

Docket No. 10-56671

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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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.

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On Appeal from the United States District Court  
For The Southern District of California  
Civil Case No. 3:07-cv-02385-JAH-WMC  
The Honorable John A. Houston, Judge

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**PETITION FOR REHEARING AND REHEARING *EN BANC***

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## I.

### INTRODUCTION

The Court's decision in this case, if allowed to stand without rehearing, will create clear intra-circuit and inter-circuit conflicts, will dramatically increase the cost of emergency fire and medical services for Indian tribes, and will discourage tribes from providing much needed emergency services in cooperation with state and local governments.

Specifically, the Court in its decision here states, for the first time, that sovereign immunity does not bar state-law tort claims against tribal employees acting within the scope of their authority, so long as the plaintiff names the employees in their "individual" capacity and seeks damages from them *personally*. This ruling contradicts well-established precedent in the Ninth Circuit and in other circuits that immunity *does* extend to tribal employees acting within the scope of their authority. Moreover, the Court reaches this incorrect result *not* based upon a thorough analysis of the scope of tribal immunity or the impact on tribes and their employees, but entirely upon how plaintiffs *plead* their claims. That result is especially troubling in this case, given that plaintiffs here did not name the tribal employees as defendants until *after* the district court dismissed the tribe on the grounds of immunity.

This Court's decision contradicts well-established precedents, undermines the strong policy of the United States government to *protect* tribal sovereignty and promote tribal self-governance, and threatens tribal efforts to provide traditional, governmental services (all the more important here, since the record clearly shows that the tribal paramedics were acting in good faith pursuant to an intergovernmental agreement).

Based on the foregoing, Appellees and Defendants, BRADLEY AVI and JEREMY FELBER (the "tribal paramedics" and, along with Defendant VIEJAS BAND OF KUMEYAAY INDIANS, the "tribal defendants"), explain below that panel rehearing is *essential* as a threshold matter because the decision is based entirely on an *unbriefed issue* (the Court's "remedy-focused analysis"). The tribal defendants explain further that, if a panel rehearing is not granted, *en banc* review will be critical to resolve the conflict in authority created by this Court's decision. Finally, the tribal defendants explain that this case presents legal questions of "exceptional importance" (the decision fails to recognize unique policies and rules relating to tribal sovereign immunity; and it will have a disastrous impact on the ability of Indian tribes to provide or assist with fundamental police, fire, and medical services, both on and off their reservations).



## II.

### **BACKGROUND FACTS AND PROCEDURE**

Plaintiffs and Appellants JIM and KAY MAXWELL (the “Maxwells”) sued the Viejas Band’s fire department in connection with the death of their daughter, Kristin. They asserted state-law tort claims against the tribe, alleging that it was negligent in providing emergency services to Kristin after she was shot by her husband.

The Viejas Band then filed a successful motion to dismiss those claims, arguing that it was immune from suit according to principles of tribal sovereign immunity. Then – and only then – did the Maxwells *amend* their complaint to name the tribal paramedics. But the court ultimately dismissed the paramedics, too, based on sovereign immunity.

The Maxwells appealed, and this Court issued a published decision *affirming* the order with respect to the tribal entity based on long-standing precedent concerning sovereign immunity. However, this Court *reversed* the order with respect to the tribal paramedics, but *not* for the reasons advanced by the Maxwells or briefed by the parties. Instead, this Court reached its conclusion based on its own “remedy-focused analysis,” and on the strategic decision of the Maxwells to plead their claims against the tribal paramedics in their “individual” capacity.

### III.

#### DISCUSSION

**A. Panel Rehearing Is Required to Permit the Parties to Brief the Court’s “Remedy-Focused” Analysis.**

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The panel states that it agreed with the Maxwells’ argument that the tribal paramedics are not immune from suit, but that it agreed “for a different reason” than the one asserted. Opn. at 11199. The panel then articulates its own “remedy-focused analysis,” which, it said, was “less categorical than the Maxwells’ proposed rule.” *Id.* at 11200. The proper inquiry, this Court said – different from anything the Maxwells or the tribal defendants briefed – was whether “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.” *Id.*

The Court’s opinion observes that the tribal defendants were asked at oral argument to address the Court’s analysis. Opn. at 11203. But a cursory question at oral argument was not sufficient to enable the tribal defendants to address the “remedy-focused” analysis that formed the basis of this Court’s decision, particularly given the complexity of the issues involved. Thus, a panel rehearing is required to afford an opportunity to brief that critical issue.

**B. Rehearing *En Banc* Is Necessary Because the Court’s Decision Conflicts With Precedent From This and Other Circuits.**

A rehearing *en banc* is also required here because this Court’s decision conflicts – irreconcilably – with prior decisions from this Circuit. *U.S. v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (*en banc* review is the appropriate mechanism to resolve a conflict within the circuit); *In re Exxon Valdez*, 270 F.3d 1215, 1235-36 (9th Cir. 2001). Beyond that, the decision in this case conflicts with decisions from other circuits, and that conflict provides another compelling reason for *en banc* review. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1124 (9th Cir. 2006) (*en banc* review to resolve an “inter- and infra- circuit conflict”).

Below, the tribal defendants explain: (1) that the Court’s decision in this case is inconsistent with well-established Ninth Circuit precedent; and (2) that the decision is inconsistent with precedent from two other circuits. Rehearing *en banc* is essential to resolve those conflicts.

**1. The Court’s Decision in This Case Is Inconsistent With Ninth Circuit Precedent.**

Long-standing case law from this Circuit makes clear that sovereign immunity extends to tribal employees acting in their official capacities and within the scope of their authority. Opn. at 11201, *citing*, *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (casino

employees who allegedly over-served alcohol to another employee and allowed her to drive after she was obviously intoxicated); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991) (tribal officials who allegedly denied the plaintiff use of an access road); *Linneen v. Gila River Indian Community*, 276 F.3d 492 (9th Cir. 2002) (a tribal ranger who detained the plaintiffs when they took a walk on tribal land); *Snow v. Quinault*, 709 F.2d 1319, 1322 (9th Cir. 1983) (a tribal revenue clerk who collected taxes from the plaintiff); *United States v. Oregon*, 657 F.2d 1009, 1012, n.8 (9th Cir. 1981) (tribal immunity extends to officials acting within the scope of their authority).

Those cases also confirm that plaintiffs may not “circumvent tribal immunity” through the “pleading device” of naming tribal employees as individual defendants. Opn. at 11201, *citing*, *Cook*, 548 F.3d at 727, *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 70-71 (1989); *see also*, *Snow*, 709 F.2d at 1322 (plaintiff could not “avoid the doctrine of sovereign immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity”).

Here, however, the Court (per Judges Farris, Clifton, and Ikuta) purports to announce a different rule when plaintiffs strategically sue tribal employees in their “individual,” rather than their “official,”

capacity. Opn. at 11199-11200. This Court concluded – as summarized above – that sovereign immunity does not bar claims against tribal employees as long as the plaintiffs seek money damages from them personally. *Id.* at 11200. The Court concluded further that immunity only applies when “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.” *Id.* at 11200.<sup>1</sup>

That holding is *inconsistent* with the cases discussed above and, more importantly, two other cases that specifically address immunity in “individual capacity” suits like this one. For instance, in *Hardin v. White*

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<sup>1</sup> In reaching that conclusion, this Court relied on cases which approved of claims against state employees when the plaintiffs sought only *prospective relief* to stop violations of federal law under the *Ex Parte Young* doctrine or monetary relief under the Civil Rights Act of 1871 (42 U.S.C. § 1983). *Alden v. Maine*, 527 U.S. 706, 757 (1999); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1190 (9th Cir. 2003). *See also*, *Will*, 491 U.S. 58, 71, n. 10.

But that analysis has no application here, because the Maxwells seek a judgment not for injunctive relief, but for money damages based upon past acts. Opn. at 11188. In addition, no allegations here support liability under section 1983. Opn. at 11201, n. 3.

*Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985) – which was published nearly 30 years ago – the plaintiff, like the Maxwells here, filed suit against various tribal entities and tribal officials in their *individual* capacities. *Hardin*, 779 F.2d at 478.

There, the Court (again per Judge Farris, joined by Judges Merrill and Beezer) held that – regardless of the form of the plaintiff’s pleading – the individual defendants were immune because they were “acting within the scope of their delegated authority.” *Hardin*, 779 F.2d at 479-480. Unlike the decision here, the deciding factor in *Hardin* was not simply whether the tribal officials would (supposedly) have to pay the judgment themselves, but whether they acted within the scope of their authority. *Id.*; *see also*, *Davis v. Littell*, 398 F.2d 83, 85 (9th Cir. 1968) (claims against a lawyer employed by a tribe and sued in his individual capacity were properly dismissed).

Since *Hardin*, this Court – in an unpublished *per curiam* opinion – *rejected* the test adopted here. *Murgia v. Reed*, 338 Fed.Appx. 614 (9th Cir. 2009). There, the plaintiff sued two tribal police officers in connection with the shooting death of another tribal member. *Id.* at 615. The tribal police officers filed a motion to dismiss the action, arguing (in part) that the claims against them were barred by sovereign immunity. *Id.*

The district court denied the motion because the officers were sued in their individual capacity.<sup>2</sup>

On appeal, this Court (per Judges Canby, Wardlaw, and Mills [District Judge sitting by designation]), held the “district court erred in concluding that tribal sovereign immunity did not apply solely because the Defendants were sued in their individual capacities.” *Murgia*, 338 Fed.Appx. at 616. Citing *Hardin*, this Court observed as follows:

“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’).” *Id.*

The *Murgia* Court thus concluded that, if “the Defendants were acting for the tribe within the scope of their authority, they [were] immune from Plaintiff’s suit regardless of whether the words ‘individual

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<sup>2</sup> According to Circuit Rule 36-3(c), unpublished decisions may be cited in a petition for rehearing *en banc* to establish a split in authority, and unpublished decisions filed after 2007 may also be cited.

capacity’ appear on the complaint.” *Murgia*, 338 Fed.Appx. at 616, citing, *Hardin*, 779 F.2d at 479-480.

In the nearly three decades since this Court published *Hardin*, state courts have consistently abided this rule. See, *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 643 (1999) (citing *Hardin* for the principle that “tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority”); *Filer v. Tohono O’Odham Nation Gaming Enterprise*, 129 P.3d 78, 85 (Ariz. Ct. App. 2006) (characterizing the rule as “well-reasoned”).

The obvious rationale for the rule that tribal employees sued in their individual capacities are immune from suit for conduct within the scope of their authority is, again, that plaintiffs cannot “circumvent” sovereign immunity by employing a pleading device. See, *Cook*, 548 F.3d at 727. Otherwise, as the District Judge concluded in *Bassett v. Mashantucket Pequot Museum and Research Center Inc.*, 221 F.Supp.2d 271, 280 (D. Conn. 2002), plaintiffs could potentially “eviscerate” tribal immunity and subject tribes to “damages actions for every violation of state or federal law.”



Nevertheless, the Court determined here – for the first time, and inconsistent with all the cases recited above – that whether the tribal paramedics acted within the scope of their authority was *irrelevant* to the immunity determination. Opn. at 11200. Rather, this Court looked *only* to whether the tribal paramedics were sued in their individual capacities, and whether the Maxwells (ostensibly) seek to collect against the individuals personally. Opn. at 11203.

It is clear, then, that the decision – which focuses on who might pay a money judgment instead of on the well-established policies supporting tribal immunity – directly and irreconcilably conflicts with long-standing precedent from this Circuit. However, this Court was required to *follow* that precedent; it was not authorized to overrule prior decisions. *U.S. v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992) (as “a general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel”), *citing*, *United States v. Mandel*, 914 F.2d 1215, 1220-21 (9th Cir. 1990).

*En banc* review is therefore critical to resolve the conflict created by this Court’s decision.

## **2. The Court's Decision Conflicts With Precedent From Other Circuits.**

In addition to this conflict in Ninth Circuit authority, this Court's decision also conflicts with published decisions from two other circuits. Specifically, the Tenth Circuit addressed the applicability of sovereign immunity to individual tribal defendants in *Burrell v. Armijo*, 603 F.3d 825 (10th Cir. 2010). There, the plaintiffs sued two individual tribal officials and the tribal entity itself. *Id.* at 830. After the tribal entity was dismissed from the lawsuit, the plaintiffs pursued their monetary claims only against the individual tribal officers personally. *Id.* at 830-831. Ultimately, the District Court entered JMOL in favor of the individuals on the grounds of sovereign immunity which the Tenth Circuit affirmed.

The Tenth Circuit thus concluded that "sovereign immunity generally extends to tribal officials acting within the scope of their official authority" but does not apply "when the official is acting as an individual or outside the scope of those powers that have been delegated to him." *Burrell*, 603 F.3d at 832. Accordingly, consistent with *Hardin* and *Murgia* – but inconsistent with the decision in this case – the Tenth Circuit concluded that the immunity question "hinges on the breadth of official power the official enjoys . . . ." *Id.* at 832.

Likewise, the Second Circuit determined that plaintiffs may not circumvent tribal immunity by naming tribal officials or employees as individual defendants, as long as the complaint relates to their representative actions, and “does not allege [the individual defendants] acted outside the scope of their authority.” *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); see also *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 307-310 (N.D.N.Y. 2003) (dismissing individual capacity claims because allegations that they violated state law failed to establish they acted outside the scope of their authority); *Romanella v. Hayward*, 933 F.Supp. 163, 167-168 (D.Conn. 1996) (same); *Bassett*, 221 F.Supp.2d at 280 (individual capacity claims against tribal officials lie only when “the complaint pleads – and it is shown – that tribal officials acted beyond the scope of his authority,” and the official is “‘stripped’ of tribal immunity [only] when he acts ‘manifestly or palpably beyond his authority’”).<sup>3</sup>

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<sup>3</sup> At oral argument, counsel for the tribal defendants specifically referred to the standard adopted by the Second Circuit – that a tribal employee is immune unless he acts “manifestly and palpably beyond his authority.” Thus, this Court was aware of the conflicting authority, but did not reference it in the decision.

In sum, the decision here obviously conflicts with well-established and long-standing precedent from this and other circuits. For that reason, too, *en banc* review is essential.

**C. Rehearing *En Banc* Is Necessary Because the Court’s Decision Concerns Issues of “Exceptional Importance.”**

*En banc* review is critical for the additional reason that the issues posed in this case are of “exceptional importance.” That is: (1) this Court’s decision fails to recognize unique policies setting tribal immunity apart from immunities applicable to other entities; and (2) the decision will have a disastrous impact on the ability of Indian tribes to provide essential government services, both on *and* off their reservations.

**1. The Decision Fails to Recognize the Unique Policies Setting Tribal Immunity Apart From Immunities of Other Entities.**

The panel stated that it declined to “give tribal officers broader sovereign immunity protections than state or federal officers” based on its conclusion that “tribal sovereign immunity is coextensive with other common law immunity principles.” Opn. at 11203.

Respectfully, however, that observation is simply incorrect. The United States Supreme Court has repeatedly recognized the unique history and federal policies supporting tribal immunity, separating it from

immunities of other entities. *See, Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986) (tribal immunity is not congruent with state and federal immunity); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) (Indian tribes did not participate in the Constitutional Convention and were not parties to the “Mutuality of Concession” that makes the states’ surrender of immunity plausible, and questions concerning the scope of tribal immunity are best left to Congress). The Supreme Court has also specifically acknowledged that many tribes have limited resources, and immunity is therefore necessary to preserve tribal autonomy and assets. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64-65, n.19 (1978) (the cost of a private right of action is particularly burdensome for an Indian tribe).

This Court has similarly recognized those policy considerations. *See, U.S. v. Oregon*, 657 F.2d at 1013 (“Indian tribes enjoy immunity because they are sovereigns pre-dating the constitution, and immunity is thought necessary to preserve autonomous tribal existence”); *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985) (“[tribal] immunity is necessary to preserve the autonomous political existence of the tribes . . . and to preserve tribal assets”).

Given those unique policy considerations, the regulation of tribal affairs has always been left to Congress, rather than the Courts. In fact, the federal Constitution gave Congress the exclusive authority to “regulate Commerce” with Indian tribes. U.S. Const., Art. I, § 8, cl. 3. While Congress has always been free to limit – or even abrogate – tribal sovereign immunity, it has “consistently reiterated its approval of the immunity doctrine.” *Oklahoma Tax Com’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991). That approval reflects the desire of Congress to promote the “goal of Indian self-government, including its ‘overriding goal’ of encouraging tribal self-sufficiency and economic development.” *Id.*, citing, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

Thus, federal policy considerations that are exclusive to Indian tribes support the unique jurisprudence of tribal sovereign immunity. And, given those policy considerations, civil claims may be brought against Indian tribes, their officials, and their employees only in very limited circumstances. For example, in *Santa Clara Pueblo*, the Supreme Court addressed whether a plaintiff may assert a private right of action against an individual tribal officer based on an alleged violation of the Indian Civil Rights Act. The Supreme Court observed that “a proper respect both for tribal sovereignty itself and for

the plenary authority of Congress in this area” required it to “tread lightly” in the absence of clear Congressional intent. *Santa Clara Pueblo*, 436 U.S. at 60. The Supreme Court ultimately concluded that – unlike civil rights statutes applicable to state officers – Congress declined to expose tribal officials to actions for damages, because such lawsuits would “undermine the authority of tribal forums,” and would impose a financial burden that Indian tribes typically cannot afford. *Id.* at 64, 70.

Here, similarly, Congress has never passed a statute permitting individuals to pursue state-law tort claims against tribal employees, particularly when the tribal officers were acting within the scope of their authority, like here. This Court should therefore follow the lead of the Supreme Court, and should “tread lightly” in assessing whether the Maxwells may seek a money judgment against individual tribal employees (which, as this Court acknowledged, might ultimately be paid by the tribe according to indemnity agreements [Opn. at 11203]).

In the end, the rules and policies regarding tribal immunity are simply *different* from those relating to immunities of other sovereigns (like the federal government). But even if the immunity of tribal employees was “coextensive” with immunities of federal officials, the tribal paramedics here should *still* be immune from suit because they acted within the scope of their

authority. In *U.S. v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986), *cert denied*, 481 U.S. 1069 (1987), this Court held the plaintiff could not seek money damages against a federal employee for actions in the scope of his employment, reiterating the long-standing rule that federal employees are immune from suit as long as they act within the scope of their authority. *Id.* at 859. The Court explained as follows:

“If an employee of the United States acts completely outside his governmental authority, he has no immunity. An obvious example would be if a dispute occurs pertaining to the sale of an employee’s personal house, his government employment provides him with no shield to liability. [Citation omitted.]” *Id.*

This Court confirmed that official “action is still action of the sovereign, even if it is wrong,” as long the action does “not conflict with the terms of [the officer’s] valid statutory authority . . . .” *Id.*, 806 F.2d at 860. Likewise, here, the actions of the tribal paramedics were all clearly within their authority. Therefore, they are immune from suit under the doctrine of sovereign immunity, regardless of whether that immunity derives from jurisprudence relating to Indian tribes or the federal government.



**2. The Decision Will Have a Disastrous Impact  
On the Ability of Indian Tribes to Provide  
Essential Government Services.**

Finally, if this Court's decision stands, then Indian tribes – unlike other sovereigns – may have no control over when they and their officers are subject to civil liability for actions taken on the sovereign's behalf. The federal government has chosen to immunize its employees for acts undertaken in the scope of their duties and to instead force plaintiffs to proceed against the federal government in federal court under the limits of its tort claims act. 28 U.S.C. § 2679. California, however, has chosen to make its public employees subject to liability to the same extent as private persons, although they are immune for “discretionary” acts. Cal. Gov. Code §§ 820(a), 820.2. California itself has chosen to accept liability only as “provided by statute.” Cal. Gov. Code § 815.

According to this Court's decision, however, Indian tribes and their officers may be subject to liability for money damages under state tort law in *any* case where the plaintiff simply alleges claims against a tribal employee in his or her “individual” capacity. (The officer would be subject to direct liability, while the tribe would be required to indemnify or insure against the loss.) Thus, the decision has the potential of stripping Indian tribes of the fundamental protection of tribal immunity –

the ability to determine when they and their officers may be sued in civil courts for actions taken on the sovereign's behalf.

Moreover, this Court's decision ignores the fact that this lawsuit relates to *voluntary* emergency services provided by the tribal entity, and that the entity here *explicitly* retained its sovereign immunity in the written contracts where it offered those services. Opn. at 11199, CR 123. If this Court abrogates those contracts (which were carefully negotiated by local governments and the tribal entity), Indian tribes may no longer have control over when they may be sued. Thus, it may become financially impossible for them to provide emergency services – or police, fire, or other related services – both on and off their reservations.

The tribal defendants submit that those issues – along with all of the issues presented here – constitute matters of exceptional importance that justify *en banc* review.

#### IV.

#### **CONCLUSION**

For all the reasons explained above, the tribal defendants request that this Court grant, as a threshold matter, a panel rehearing to afford them an opportunity to brief the “remedy-focused” analysis that formed the basis of this Court's decision.

In addition, the tribal defendants request a rehearing *en banc*, so that this Court may issue a new decision confirming the rule that tribal officials and employees are immune from suit as long as they act within the scope of their authority, and affirming the district court's order dismissing the Maxwells' claims against the tribal paramedics.

Dated: October 29, 2012

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**CERTIFICATE OF COMPLIANCE**

I certify that this Petition contains 4,141 words in compliance with the length limits set forth at Ninth Circuit Rule 40-1(a), and that the Petition's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: October 29, 2012

HIGGS, FLETCHER & MACK LLP

By: s/ Phillip C. Samouris  
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Attorneys for Appellees,  
VIEJAS BAND OF  
KUMEYAAY INDIANS,  
BRADLEY AVI and  
JEREMY FELBER

Docket No. 10-56671

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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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.

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On Appeal from the United States District Court  
For The Southern District of California  
Civil Case No. 3:07-cv-02385-JAH-WMC  
The Honorable John A. Houston, Judge

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**CERTIFICATE OF SERVICE**

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Phillip C. Samouris, Esq.  
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INDIANS, BRADLEY AVI and  
JEREMY FELBER

I, CELESTE L. REISING, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within-entitled action; my business address is 401 West "A" Street, Suite 2600, San Diego, California 92101-7913.

On October 29, 2012, I served the within documents, with all exhibits (if any):

**PETITION FOR REHEARING AND REHEARING *EN BANC***

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmission report issued by the transmitting facsimile machine is attached hereto.

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.

by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery Service agent for delivery. A true and correct copy of the airbill is attached hereto.

by having personally delivered the documents listed above to the persons at the addresses set forth below.

by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

√

I am familiar with the UNITED STATES COURT OF APPEAL, NINTH CIRCUIT's practice for collecting and processing electronic filings. Under that practice, documents are electronically filed with the Court. The Court's ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered uses in the case. The NEF will constitute service of the document. Registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. Under said practice, registered ECF users were served.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 29, 2012, at San Diego, California.

s/ Celeste L. Reising