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 *AMICUS CURIAE* SUQUAMISH INDIAN TRIBE IN SUPPORT OF VIEJAS BAND'S, BRADLEY AVI'S, AND JEREMY FELBER'S PETITION FOR REHEARING AND REHEARING *EN BANC*

Sarah "Chloe" Thompson
(WA Bar # 43732)
PORT MADISON ENTERPRISES
15347 Suquamish Way NE
Suquamish, Washington 98392
Telephone: (360)-598-8704

ATTORNEY FOR AMICUS CURIAE
SUQUAMISH INDIAN TRIBE

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STATEMENT OF AUTHORSHIP AND FUNDING

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the Suquamish Indian Tribe declares:

1. No party's counsel authored the brief in whole or in part;
2. No party or party's counsel contributed money to fund preparing or submitting the brief; and
3. No person or entity other than the Suquamish Tribe contributed money to fund preparing or submitting the brief.

ARGUMENT

INTRODUCTION AND STATEMENT OF INTEREST

If this decision stands, it will eviscerate the protections of tribal sovereign immunity in the Ninth Circuit, where approximately 75% of all federally recognized Indian tribes are located.[1] This is inconsistent with binding precedent, and is a matter of exceptional importance.

A tribe can only act through its agents. If those agents lose the protection of sovereign immunity for actions they take in their official capacities, then every action a tribe takes through its agents carries with it the risk of suit. And under this decision, virtually anyone who wishes to circumvent a tribe's sovereign immunity can do so simply by suing a tribal official or employee in his individual capacity, even if he actually acted in an official capacity. The Suquamish Tribe, a federally recognized Indian tribe located within Washington State, submits this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-2 in order to highlight the practical consequences of this decision on a broader level. The Suquamish Tribe fully supports the Petition for Rehearing and Rehearing *En Banc* ("Petition") filed by Defendants-Appellees Viejas Fire Department, Bradley Avi, and Jeremy Felber.

[1] Approximately 435 of the 566 federally recognized tribes are located in the Ninth Circuit. *See* 77 FED. REG. 47868 (Aug. 10, 2012).

I. Lawsuits against tribal officials and employees greatly impact tribes and their treasuries; to hold otherwise is not realistic.

The crux of the decision is the Court's speculation that a lawsuit against a tribal official or employee will not impact the tribe.[2] But the reality is that such lawsuits *do* impact tribes, and the impact will be far greater if this decision stands.

A. Tribes are impacted because they indemnify their officials and employees or face other impacts.

As a practical matter, if a tribal official or employee is sued for actions he took in his official capacity, one of two things will happen. One possibility, at least theoretically, is that a tribe would turn its back on its official or employee, leaving him to navigate the legal system alone and bear alone the financial and emotional burdens of defending himself in a lawsuit that might drag on for years, meritorious or not. If he is ultimately found liable, the tribe would expect him to satisfy the judgment from his personal assets, regardless of how meager they might be, or how extreme the resultant difficulties might be for him and his family. This is the legal fiction upon which the Court based its newly-crafted "remedy-focused" analysis. The second possibility is that the tribe will indemnify, defend, and insure its official or employee. This second scenario is far more realistic, for a number of legal, ethical, and practical reasons.

[2] Op. at 11199, 11203.

In many instances, tribal law expressly immunizes tribal officials and employees and *requires* tribal governmental bodies to indemnify and defend them.[3] In most instances, tribes are also bound by ethical obligations to their communities. For example, it is not consistent with the Suquamish Tribe's values to turn its back on tribal members or their families, who comprise a significant percentage of the Tribe's workforce.[4] And that would be unthinkable in the event a tribal member's duties involved the exercise of treaty rights, which some positions with the Suquamish Tribe do.[5] Likewise, the Suquamish Tribe could not, in good conscience, allow its officials and employees (many of whom serve on a volunteer

[3] *E.g.*, Suquamish Tribal Code § 11.6.23 (stating that officials and employees of a tribal agency cannot be personally liable for their lawful acts, and requiring the agency to indemnify its directors, with certain typical exceptions for things like criminal acts). Incidentally, a finding of personal liability by a federal or state court may directly conflict with Suquamish Tribal law, a result which would have significant implications for the Tribe's sovereignty and ability to regulate its relations with its own officials and employees. *See also*, *e.g.*, Codified Laws of the Confederated Salish & Kootenai Tribes §§ 4-1-401; 4-1-501 through 4-1-507 (providing that Tribal Council members and Tribal officers, agents, and employees share sovereign immunity; and further providing for their defense and indemnification); Confederated Tribes of the Coos, Lower Umpqua & Siuslaw Indians Tribal Code §§ 2-2-41; 2-2-51 through 2-2-57 (same).

[4] For example, *all* elected officials of the Suquamish Tribal Council and appointed officials of its various governmental agencies are tribal members. In addition, the Suquamish Tribe's workforce is approximately 22% tribal members. Its workforce also includes spouses and other immediate relatives of tribal members.

[5] *See*, *e.g.*, Suquamish Tribal Code § 11.6.3 (establishing Suquamish Seafoods as a Suquamish Tribal governmental agency that exercises the Tribe's treaty fishing and shellfish harvesting rights).

basis or for quite modest wages)[6] to personally pay (both literally and figuratively) for actions they took on behalf of the Suquamish Tribe. While there may be tribes that think differently, the Suquamish Tribe believes that most tribes have similarly community-focused traditions and values.

There are also practical reasons for tribes to indemnify and defend their officials and employees. Not doing so would make it very difficult to attract and retain officials and employees, particularly if this decision stands. If serving a tribal government means that one could be sued, forced to defend oneself without assistance from the tribal government, and possibly even held personally liable, all for performing one's official duties, who would want to take that risk, particularly when there are less risky opportunities available for service with federal and state governments, and sometimes even private entities? Indeed, as discussed in the Petition, federal employees are generally immune from suit when acting within the scope of their authority.[7] The same is generally true of state officials, as discussed in the *Demery v. Kupperman* case cited by the Court itself,[8] and in the Amicus Brief of Gila River Indian Community *et al.* As the Petition further notes, sovereigns can generally control whether to subject their officials and employees to

[6] Some Suquamish Tribal officials serve on a volunteer basis, receiving only a stipend. And though the Suquamish Tribe provides very competitive wages and excellent benefits to its employees, the average wage for hourly employees is still only $15.83 per hour.
[7] Pet. at 18-19.
[8] 735 F.2d 1139, 1145-46 (9th Cir. 1984).

suit; but this decision purports to strip that ability from tribes.[9] This places tribes at a disadvantage relative to other governments, when tribes are the governments that can *least* afford to lose the protection of sovereign immunity for their officials and employees.[10]

Moreover, the reality is that tribes *do* indemnify and defend their officials and employees, and will doubtless continue to do so as long as they are able. Notably, the Viejas Band continues to defend its employees in this case, though it is no longer a defendant. Likewise, when officials and employees of the Suquamish Tribe have been sued, the Suquamish Tribe has defended the official or employee at no cost to him, without so much as a second thought. Sometimes it does so because Suquamish Tribal law requires it;[11] other times because it is otherwise obligated. The Suquamish Tribe believes this is true of other tribes as

[9] Pet. at 19-20.

[10] Tribal resources are much more limited and hard-won than those of other governments. Although tribes have the power to tax, and many tribes do collect *some* taxes, they generally lack the large tax bases that the federal and state governments enjoy, for a variety of legal and historical reasons. Tribal treasuries are heavily dependent on funds from federal contracts and grants (which generally have specific and limited uses) and/or any profits the tribe generates itself through its business operations (the uses of which are also often limited by federal and/or tribal law). Any diversion of these funds, if permissible in the first place, directly impacts the tribe's ability to provide essential governmental services for their communities, such as law enforcement, courts, education, and more.

[11] *Supra* n.3.

well, virtually throughout Indian country.[12] The reality is that lawsuits against tribal officials and employees do affect tribes, and will continue to do so.

B. This decision will *increase* the impact on tribes of lawsuits against tribal officials and employees.

In fact, this decision will increase the impact of these lawsuits on tribes. The cost of indemnifying and defending tribal officials and employees will rise significantly, potentially to the point of leaving tribes insolvent. Lawsuits against tribal officials and employees will increase as plaintiffs recognize a new and expedient way to circumvent tribal sovereign immunity. Plaintiffs may also use such lawsuits as leverage to obtain a settlement or other concession from the tribe itself that they would not otherwise be able to obtain. The lawsuits will drag on longer because they will no longer be dismissed on sovereign immunity grounds. This will increase the expense of defending the officials and employees. And the lawsuits will be at least somewhat more likely to be successful without the protection of sovereign immunity, which may require the tribe to satisfy judgments in some cases.

To protect themselves from this increased liability risk, tribes will also have to purchase additional insurance coverage and/or self-insure at higher levels. Tribal agencies may have no choice in this matter, as tribal law may *require* them to carry

[12] *Id.*

sufficient insurance coverage.[13] Tribes who do not carry sufficient coverage or who do not self-insure at high enough levels (which may not be reasonably possible to predict in advance) could potentially be rendered insolvent by even one large judgment.

Other increased impacts will include lost productivity and interference with the public administration. For example, an official or employee who is sued could be tied up in litigation for years. He will have to miss work to attend meetings with attorneys, depositions, court appearances, and more. And the inherently stressful and time consuming nature of litigation and of dealing with any judgment that may ultimately be entered against him will cause him to be distracted at work and prevent him from working at full capacity. In many cases, the parties to the litigation will seek documents and other information belonging to the tribe. This will cost the tribe time and resources either to produce or to resist producing. In some cases, the official or employee himself might be unable to obtain pertinent documents and information from the tribe, to his detriment. This was not previously a problem, because officials and employees were protected by the tribe's sovereign immunity. But the effect of this decision will be to drive a wedge between tribes and their officials/employees in this and other ways. Thus, in

[13] *See, e.g.*, Suquamish Tribal Code §11.6.25 (requiring a tribal agency to carry insurance covering all its operations, with policy limits and types of coverage set by the Suquamish Tribal Council, the Suquamish Tribe's elected governing body).

reality, lawsuits against tribal officials and employees *do* affect tribes and their treasuries significantly, and will affect them even more significantly if this decision stands. To speculate otherwise is not realistic.

II. The Court's casual disregard of the real impacts of such lawsuits for tribes is inconsistent with binding precedent.

The Court noted some of the realities discussed above, but summarily dismissed them, choosing to base its decision entirely on the legal fiction that tribes will not be impacted by lawsuits against their officials and employees. Its casual disregard of the actual impacts of such lawsuits on tribes is inconsistent with binding U.S. Supreme Court and Ninth Circuit precedent in several ways.

First, the Court considered only financial impacts. Yet as the Court itself recognized, under Ninth Circuit precedent, other impacts such as interference with the public administration, may justify a finding that tribal officers are protected by sovereign immunity.[14] And cases like the present case do impact tribes in more ways than financially, as the foregoing discussion illustrates.

Next, the Court rejected the possibility that a tribe might indemnify its officials and employees, and therefore be the real party in interest. Citing *Demery v. Kupperman*,[15] the Court trivialized indemnification obligations as merely

[14] Op. at 11200, *citing* Shermoen v. United States, 982 F.2d 1312, 1320 (9th Cir. 1992).
[15] 735 F.2d 1139 (9th Cir. 1984).

intramural agreements between a sovereign and its officers.[16] Yet as discussed above, a tribe's indemnification obligations may be imposed by law, and in any case, they have a very real impact on the tribe.[17] Moreover, *Demery* is inapposite.[18] The *Demery* court rejected the proposition "that a state may *extend* sovereign immunity to state officials merely by enacting a law assuming those officials' debts" only *after* it had already concluded that the defendants were not entitled to the protection of sovereign immunity in the first place.[19] In reaching its conclusion, the *Demery* court relied on *Ronwin v. Shapiro*.[20] Similarly in *Ronwin*, the court concluded, unsurprisingly, that student law review members were *not* protected by state sovereign immunity.[21] The court noted that the possibility that the State of Arizona might indemnify the students should not constitute "an *extension* of

[16] Op. at 11203.
[17] *Supra* n.3 and accompanying text.
[18] *Demery* and most of the other cases the Court relies upon in the Opinion are inapposite for other important reasons as well. They involve claims against *state* officials, not tribal officials; yet state sovereign immunity is not coextensive with tribal sovereign immunity. Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 756 (1998). There is also a federal statutory basis for the claims (such as Section 1983), and the claims involve allegations that the defendants acted unconstitutionally or otherwise outside the scope of their authority. Neither of these crucial points is alleged in the present case, and both the District Court and this Court recognized that the defendants acted in their official capacities. Op. at 11200 n.3; D. Ct. Doc. #53 at 10.
[19] *Demery*, 735 F.2d at 1147 (emphasis added).
[20] 657 F.2d 1071 (9th Cir. 1981).
[21] *Id*. at 1075.

sovereign immunity."[22] These decisions merely stand for the unremarkable proposition that an individual who is not entitled to sovereign immunity in the first place does not become entitled to sovereign immunity just because a state might indemnify the individual. They do not justify the Court's casual disregard of the proposition that the very real impacts on tribes of their indemnification obligations make them the real party in interest in lawsuits against tribal officials and employees.

Finally, the Court perfunctorily dismissed the Defendants' concerns about hiring, speculating that there would be minimal, if any, effect on the tribe's hiring ability because the case involves (1) allegedly grossly negligent acts, (2) committed outside tribal land, (3) pursuant to an agreement with a non-tribal entity.[23] But under U.S. Supreme Court and Ninth Circuit precedent, none of these factors is an appropriate basis for determining whether a tribe is the real party in interest. While the nature of the acts in question may be relevant to determining whether an official or employee acted in his official or individual capacity for purposes of a sovereign immunity analysis,[24] both the District Court and this Court already determined that the defendants here acted *in their official capacities*.[25] Likewise, the off-reservation location of the acts is not a permissible factor. The

[22] *Id*. at 1074 (emphasis added).
[23] Op. at 11203-11204.
[24] *E.g.*, Cook v. AVI Casino Enter., Inc., 548 F.3d 718 (9th Cir. 2008).
[25] Op. at 11200 n.3; D. Ct. Doc. #53 at 10.

U.S. Supreme Court has held that the protection of sovereign immunity does not stop at reservation boundaries.[26] Therefore, the fact that the activities in question occurred off the reservation cannot be a factor. Nor is it relevant, without more, that the acts in question were committed pursuant to an agreement with a non-tribal entity. Tribes have *innumerable* agreements with non-tribal entities, including, without limitation, treaties, 638 contracts with the federal government, other contracts with the federal government, inter-governmental agreements with state and local governments and their respective governmental agencies, contracts with vendors, contracts with customers, and more. It is true that a tribe can waive sovereign immunity for itself and/or its agents via a contract. However, it is axiomatic that any such waiver cannot be implied but must be unequivocally expressed.[27] In this case, there was no such waiver. To the contrary, the tribe expressly *retained* its sovereign immunity, as both the District Court and this Court concluded.[28] And the fact that there is a somewhat related state statute[29] (which, incidentally, is susceptible to more than one interpretation) that happens to use the word "immunity" and the phrase "federally recognized Indian tribe" in the same

[26] Kiowa Tribe v. Mfg. Techs, 523 U.S. 751, 760 (1998).
[27] *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).
[28] Op. at 11199; D. Ct. Doc. #53 at 7.
[29] CAL. HEALTH & SAFETY CODE § 13863.

sentence is not relevant, because states cannot modify or limit tribal sovereignty.[30] Without a clear contractual waiver of sovereign immunity, the existence of an agreement with a non-tribal entity is not relevant to a determination of whether a tribal official or employee is entitled to the protection of tribal sovereign immunity. Thus, the Court's refusal to consider that a tribe's indemnification obligations, impacts on a tribe's hiring ability, or other impacts on the tribe make the tribe the real party in interest, was inconsistent with U.S. Supreme Court and Ninth Circuit precedent.

CONCLUSION

A plaintiff bears the burden of proving jurisdiction.[31] In order to establish jurisdiction here, the Maxwells needed to allege a viable claim that the tribal paramedics acted outside their authority.[32] Yet the Maxwells did not even make the bare allegation that the tribal paramedics acted outside their authority, much less make allegations sufficient to support a viable claim that they did.[33] And though the Maxwells' claims are nominally labeled individual capacity claims, they are, in reality, official capacity claims. Both the District Court and this Court recognized

[30] Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998) ("So tribal immunity is a matter of federal law and is not subject to diminution by the States.").
[31] D. Ct. Doc #53 at 4, *citing* Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).
[32] *E.g.*, Cook v. AVI Casino Enter., Inc., 548 F.3d 718 (9th Cir. 2008).
[33] *See* First Am. Compl., D. Ct. Doc # 56.

that fact.[34] Indeed, the Maxwells' true target is the tribe, as evidenced by the fact that they amended their Complaint to name the paramedics only *after* the District Court had dismissed their claims against the tribe,[35] and the fact that the claims they assert against the paramedics are the *exact same claims* they asserted against the tribe.[36]

This decision takes the drastic step of allowing third party state law tort claims against tribal officials and employees acting in their official capacities, without any federal statutory basis for jurisdiction or Congressional abrogation or tribal waiver of sovereign immunity. It does so based entirely on the legal fiction that any remedy will operate against the officials and employees, not the tribe. This is not consistent with reality, binding U.S. Supreme Court and Ninth Circuit precedent, or similar precedent from other Circuits. The reality is that it will have serious financial and collateral impacts on federally recognized tribes in the Ninth Circuit, which comprise approximately 75% of all federally recognized tribes. The

[34] Op. at 11200 n.3; D. Ct. Doc. #53 at 10. Ironically, the Court easily identified an official capacity claim in disguise when it wished to distinguish *Hardin v. White Mountain Apache Tribe*, even while acknowledging that the *Hardin* decision wasn't clear on several points, and making several assumptions in order to reach its conclusion. Op. at 11202.

[35] The District Court dismissed the Viejas Fire Department as a defendant on June 13, 2008, and the Maxwells filed their First Amended Complaint on November 7, 2008.

[36] *Compare* Compl., D. Ct. Doc. #1, *with* First Am. Compl., D. Ct. Doc. # 56.

Suquamish Tribe is deeply disturbed by the decision, and respectfully requests that the Court grant the Petition for Rehearing and Rehearing *En Banc*.

Respectfully submitted,

November 8, 2012 **SUQUAMISH INDIAN TRIBE**

By: */s/ Sarah "Chloe" Thompson*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Ninth Circuit Rule 29-2(c), the typeface requirement of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6); because it is 4180 words (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)), and is double-spaced in 14-point proportionally spaced Times New Roman typeface with serifs.

DATED this 8th day of November, 2012.

SUQUAMISH INDIAN TRIBE

By: */s/ Sarah "Chloe" Thompson*

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2012, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth circuit through the appellate CM/ECF system.

SUQUAMISH INDIAN TRIBE

By: */s/ Sarah "Chloe" Thompson*