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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NARUTO, a Crested Macaque, by and through his Next Friends, People for the Ethical Treatment of Animals, Inc., Plaintiff-Appellant, v. DAVID JOHN SLATER; et al., Defendants-Appellees.	No. 16-15469 D.C. No. 3:15-cv-04324-WHO Northern District of California, San Francisco ORDER

Before: BEA and N.R. SMITH, Circuit Judges, and ROBRENO,* District Judge.

On September 11, 2017, nearly two months after the court heard oral argument in this matter, the parties filed a Joint Motion to Dismiss the Appeal and Vacate the Judgment. The motions are denied.

First, the permissive language of the rule governing voluntary dismissals provides that "an appeal *may* be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court." Fed. R. App. P. 42 (emphasis added). The grant of a voluntary dismissal is not mandatory, and sometimes neither is it advisable. Our sister circuits have found a number of circumstances in

* The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

which it is appropriate for the court to deny requests for voluntary dismissal and vacatur. We believe the rationale of those cases applies here.

In *Ford v. Strickland*, 696 F.2d 804, 807 (11th Cir. 1983) (en banc), the Eleventh Circuit took a capital case en banc to resolve "several important issues that repeatedly arise in capital cases." When "a communication was received purporting to be a request by defendant Ford that all appellate proceedings cease and that the state judgment be carried out," the court denied defendant's request and published an en banc opinion. *Id.* The court invoked the motion's untimeliness as the reason for its decision: The request had been made "[a]fter a full briefing, extended oral argument, and several months of deliberation during which the judges of the Court sought to resolve and reconcile the various issues involved." *Id.* Here, as in *Ford*, a decision in this developing area of the law would help guide the lower courts. *Id.* (denying motion to dismiss to resolve "several important issues that repeatedly arise in capital cases").[1]

[1] Appellant's assertion that animals have standing to claim relief provided by federal statutes is not singular. *See Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004). *See also Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea Work Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012); *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass 1993).

The Seventh Circuit in *Albers v. Eli Lilly & Co.*, 354 F.3d 644 (7th Cir. 2004), declined to grant an appellant's motion to dismiss the appeal for reasons similar to our case. When the district court dismissed her tort action against Eli Lilly & Co. on statute of limitations grounds, Plaintiff Albers appealed. After oral argument, and after "a draft of [the] opinion had been written, Albers moved to dismiss the appeal." *Albers*, 354 F.3d at 646. The reason for the motion, the court concluded, was that "the law firm representing Albers, which has a substantial portfolio of [like] cases . . . is attempting to manipulate the formation of precedent by dismissing those proceedings that may lead to an adverse decision while pursuing others to conclusion." *Id.* Invoking its authority with respect to Rule 42 motions "to exercise discretion . . . to curtail strategic behavior," the court denied Appellant's motion and filed its already drafted opinion. *Id.* The court thought it best to foil "an attempt to make the stock of precedent [in one area] look more favorable than it really is." *Id.* As in *Albers*, this case has been fully briefed and argued by both sides, and the court has expended considerable resources to come to a resolution. Denying the motion to dismiss ensures that "the investment of public resources already devoted to this litigation will have some return." *Id.*

In *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004), the Second Circuit reviewed a BIA decision denying an Egyptian alien's application for relief from deportation. Two weeks after oral argument, the parties informed the court that they had agreed to a proposed order under which the appeal would be dismissed and the decision below vacated. *Khouzam*, 361 F.3d at 167. The court declined to comply with the request, writing in its opinion that "we are troubled by the government's tactics here." *Id.* at 168. It continued: "For the government to agree to a vacatur two weeks *after* oral argument suggests that it is trying to avoid having this Court rule on that issue." *Id.* Noting that the petition had been "fully litigated by both sides," the court "decline[d] to grant the order that the parties . . . agreed to." *Id.* Here, as in *Khouzam* and *Albers*, denying the motion to dismiss and declining to vacate the lower court judgment prevents the parties from manipulating precedent in a way that suits their institutional preferences.

As one of our colleagues once warned in a similar context, "courts must be particularly wary of abetting 'strategic behavior' on the part of institutional litigants whose continuing interest in the development in the law may transcend their immediate interest in the outcome of a particular case." *Suntharalinkam v.*

Keisler, 506 F.3d 822, 828 (9th Cir. 2007) (en banc) (Kozinski, J., dissenting from the denial of rehearing).[2]

For all of the foregoing reasons, we believe it would be improper to grant the parties' Joint Motion to Dismiss the Appeal and Vacate the Judgment.

Accordingly, the motions are hereby DENIED.

[2] We note that although PETA joins Appellants in the motions to dismiss the appeal and to vacate the district court judgment, and claims to have reached a settlement agreement with Appellees, it also points out that Naruto is not a party to the settlement agreement. It appears that the settlement agreement would not bar another attempt to file a new action.