Case No. 16-15469

IN THE
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, WILDLIFE PERSONALITIES, LTD., AND BLURB, INC.,

DEFENDANTS-APPELLEES,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA IN CASE NO. 3:15-CV-04324,
U.S. DISTRICT JUDGE WILLIAM H. ORRICK III

RESPONSE TO *SUA SPONTE EN BANC* ORDER BY DEFENDANTS-APPELLEES DAVID JOHN SLATER AND WILDLIFE PERSONALITIES, LTD.

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15 June 2018

INTRODUCTION

Defendants-Appellees David John Slater and Wildlife Personalities, Ltd. (henceforth, "Slater") submit this brief in response to the Court's *sua sponte, en banc* order (D.E. 55). Slater respectfully suggests that the Court rehear this case *en banc* and affirm the district court's judgment that Plaintiff Naruto lacks statutory standing under the Copyright Act – the same result the panel majority reached. *Naruto v. Slater*, 888 F.3d 418, 426 (2018).

Slater wholeheartedly agrees with the result the panel reached, but with respect, he disagrees with the position all three panel judges took that animals cannot have standing under Article III of the United States Constitution. Slater believes that this Court correctly held in *Cetacean Community v. Bush* that Article III does not preclude animals from having standing to sue in federal court: "[W]e see no reason why Article III prevents Congress from authorizing a suit in the name of an animal . . . ." 386 F.3d 1169, 1176 (9th Cir. 2004). The *Cetacean* panel thus properly reserved for the political branches the answer to the important question of animal standing in federal court, rather than allowing the judiciary to have the first and last words on the matter.

To be sure, all three judges of the panel in this case rightly observed a serious flaw of omission in *Cetacean*: whether the self-appointed lawyer in that case was a suitable "next friend" to represent the animal "community" plaintiff. In the *Cetacean* appellate panel's and district judge's defense, the government defendants in that case never questioned that the plaintiff's attorney was an adequate advocate for the cetaceans' interests. Nor did the government argue that this lawyer's connection to the plaintiff was so remote as to deprive the federal courts of Article III jurisdiction to decide the case.

Regardless of which positions litigants in previous cases like *Cetacean* might have asserted, and regardless of which issues judges in this circuit could have examined, *sua sponte*, the question now before the full Court is whether to sit *en banc* to clear the air in what is now a foggy jurisdictional landscape.[1] It should.

On rehearing *en banc*, Slater respectfully suggests that the Court should embrace four straightforward standing rules: 1) Article III does not preclude animal standing; 2) If an Act of Congress plainly states that animals can have standing, they can; absent such a plain statement, they cannot have standing; 3) A "person" under Federal Rule of Civil Procedure

[1] For brevity, Slater uses "full Court" herein to mean the limited *en banc* Court under Ninth Circuit Rule 35-3.

17(c) *could* be an animal – thus permitting "next friend" representation – but *only* if the Act of Congress authorizing the action or cause of action at issue plainly states that animals can have statutory standing; and 4) The requirements for "next friend" standing this Court set forth in *Coalition of Clergy v. Bush*, 310 F.3d 1153, 1159-60 (9th Cir. 2002) are mandatory to invoke federal court jurisdiction.

Slater, a nature photographer based in Wales, did not choose to embark on a legal adventure in California regarding a photograph taken in an Indonesian jungle. But he dearly hopes that what will be the most exhaustive federal legal precedent on animal rights to date – a case that will forever bear his name – is one that holds open the idea of animal standing in United States federal courts.

THE NEED FOR *EN BANC* REHEARING

Intracircuit conflict. As discussed in the concurring opinion, there is a conflict among this Court's precedential decisions concerning whether failure to establish eligibility for "next friend" standing is jurisdictional. 888 F.3d at 434-36 (N.R. Smith, J., concurring). The earliest of the cases involved, *Coalition*, held that the ineligibility of a group of clergy members to serve as "next friends" of Guantanamo detainees was a jurisdictional

problem that required vacatur of the district court's decision adjudicating the habeas rights of individual detainees. 310 F.3d at 1162-65.

In *Cetacean*, neither the district court nor this Court considered the eligibility of the self-appointed lawyer to serve as the "next friend" of a "community" of whales, porpoises, and dolphins. With no consideration of the requirements of Rule 17(c) and no citation to *Coalition*, the *Cetacean* courts decided the question of whether these animals had *statutory* standing under four Acts of Congress. *See* 386 F.3d at 1176-79; 249 F. Supp. 2d 1206, 1209-11 (D. Haw. 2003). In fairness to the *Cetacean* courts, the government never questioned whether the cetaceans' self-appointed lawyer met the "next friend" standing requirements set forth in *Coalition*.[2]

Judge N.R. Smith rightly observes that the *Cetacean* panel did not have the power to overrule *Coalition* regarding the jurisdictional requirements for "next friend" standing. 888 F.3d at 434. Without establishing the eligibility of the *sub silentio* "next friend" to act on behalf of the named plaintiff, the *Cetacean* courts arguably lacked jurisdiction under *Coalition*, and thus lacked the power to decide whether the named plaintiff had statutory standing to sue under four Acts of Congress.

[2] The government's appellate brief in *Cetacean* is available at 2003 U.S. 9th Cir. Briefs LEXIS 154.

The procedural confusion resulting from this conflict between *Coalition* and *Cetacean* is apparent in the disagreement between the majority and concurring opinions in this case. It will likely occur in future cases – including those that do not involve animals. If a defendant does not object when a representative is ineligible to serve as a "next friend", is the court nonetheless free to reach a decision that binds the named plaintiff? *Cetacean* and *Coalition* offer conflicting answers to that question.

Exceptional importance of the question of Article III standing for animals. All three panel judges opine that animals can never have Article III standing to sue in federal court. 888 F.3d at 425, n. 7; *Id.* at 434, n. 10. Just as the *Cetacean* panel observed that it would be an "extraordinary step" if Congress were to grant statutory standing to animals, 386 F.3d at 1179, it would also be extraordinary for the judiciary to rule out animal standing as a constitutional matter. That would deny the political branches the option of granting animals standing (through suitable "next friend" representatives) to enforce laws enacted for their protection and very survival. The gravity of permanently closing the courtroom doors to animals is a matter of exceptional importance, warranting *en banc* consideration with full merits briefing and an opportunity for *amicus curiae* participation.

ISSUES THAT SHOULD BE DECIDED ON REHEARING *EN BANC*

1. **Animal standing under Article III.** The full Court should reaffirm the holding in *Cetacean* that Article III does not rule out standing for animals, and that Congress is free to grant animals standing to sue in federal court. 386 F.3d at 1175-76.

2. **Statutory interpretation regarding animal standing.** The full Court should reaffirm the clear rule of statutory interpretation set forth in *Cetacean*: if an Act of Congress plainly states that animals can have standing, they can; in the absence of such a plain statement, animals cannot have standing. 386 F.3d at 1179.

3. **Whether a "person" represented by a "next friend" via Rule 17(c) could be an animal.** An animal could be a "person" under Rule 17(c), but only if the underlying Act of Congress plainly states that animals can have statutory standing. Rule 17(c) cannot be read to diminish any substantive right Congress may choose to grant animals. *See* 28 U.S.C. § 2072(b) (Federal rules of procedure "shall not abridge, enlarge or modify any substantive right.").

4. **Whether the requirements for "next friend" standing in *Coalition* are jurisdictional.** The dual requirements for "next friend" standing in *Coalition*, 310 F.3d at 1159-60, are mandatory to *invoke* federal court

jurisdiction, but they are not necessarily jurisdictional at all stages of the case. Should a deficiency in "next friend" representation develop at later stages of litigation, the court should determine whether the named real party in interest was adequately represented prior to the deficiency before entering judgment on the merits or deciding an appeal.

PROPOSED DECISION ON REHEARING *EN BANC*

Applying the above suggested resolution of the issues on rehearing, the full Court should reach the same result as the panel majority: affirmance of the district court's judgment of dismissal for lack of statutory standing. Please note that the settlement agreement in this case resolved all claims and issues between and among the parties to the agreement. The panel correctly noted that Plaintiff Naruto was not party to that agreement. 888 F.3d at 421, n. 3.

Respectfully submitted,

/s/ ANDREW J. DHUEY
Attorney for Defendants-Appellees,
DAVID JOHN SLATER and
WILDLIFE PERSONALITIES, LTD.

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Signature of Attorney or Unrepresented Litigant: s/ Andrew J. Dhuey

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