No. _____

In the
Supreme Court of the United States

DR. JILL L. STEIN; JILL STEIN FOR PRESIDENT,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Presidential Primary Matching Payment Account Act establishes a scheme that provides public financing for the presidential primary campaigns of qualified candidates. Candidates may use the funds received for any qualified campaign expense incurred during the matching payment period, which ends no later than the last day of the last major party nominating convention. *See* 26 U.S.C. § 9032(6). But while major party candidates are entitled to appear on state general election ballots automatically once they are nominated, minor party candidates must petition to qualify – a process the Federal Election Commission recognizes as "the equivalent" of their primary election campaigns. Minor party candidates' ballot access expenditures are therefore qualified campaign expenses, but only if incurred during the matching payment period. Because many state ballot access deadlines fall after the major parties hold their nominating conventions, minor candidates are ineligible to use matching funds to pay for petition drives in those states. The question presented is:

Whether 26 U.S.C. § 9032(6) violates the equal protection of law by guaranteeing that major party candidates are eligible to receive public financing for the entirety of their presidential primary campaigns while arbitrarily terminating minor party candidates' eligibility in the midst of theirs?

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings related to this case.

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The repayment order entered by Respondent Federal Election Commission on October 29, 2021 is reported as LRA 1021.

The opinion of the Court of Appeals reviewing the agency order is reported at *Stein v. Federal Election Com'n*, 77 F.4th 868 (D.C. Cir. 2023).

STATEMENT OF JURISDICTION

The Court of Appeals had jurisdiction over this case pursuant to 26 U.S.C. § 9041. It entered its Opinion and Judgment on July 21, 2023. App. 1, 12. The Court of Appeals denied rehearing and rehearing *en banc* on August 31, 2023. App. 41, 43.

On November 28, 2023, Chief Justice Roberts entered an order extending the time to file a petition for certiorari until January 12, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides, in relevant part, that:

> No person shall … be deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. V.

Section 9032(6) of the Presidential Primary Matching Payment Account Act states:

> The term "matching payment period" means the period beginning with the beginning of the calendar year in which a general election for the office of President of the United States will be held and ending on the date on which the national convention of the party whose nomination a candidate seeks nominates its candidate for the office of President of the United States, or, in the case of a party which does not make such nomination by national convention, ending on the earlier of (A) the date such party nominates its candidate for the office of President of the United States, or (B) the last day of the last national convention held by a major party during such calendar year.

26 U.S.C. § 9032(6).

STATEMENT OF THE CASE

Congress enacted the Presidential Primary Matching Payment Account Act ("the Act") in 1974 "as a means of eliminating the improper influence of large private contributions" in presidential elections. *Buckley v. Valeo*, 424 U.S. 1, 96 (1976); *see* 26 U.S.C. §§ 9031-9042. The object of the Act is "to enhance the ability of candidates to present their positions and themselves to voters in presidential primaries." *LaRouche v. Federal Election Com'n*, 996 F.2d 1263, 1267 (D.C. Cir. 1993). The Act achieves its purpose by providing "partial federal financing for the campaigns of qualifying presidential primary candidates." *Simon v. Federal*

Election Com'n., 53 F.3d 356, 357 (D.C. Cir. 1995). As applied to qualifying minor party candidates, however, the Act contains a poison pill, *see* 26 U.S.C. § 9032(6), which frustrates the Act's purpose, serves no legitimate governmental interest, and "unfairly or unnecessarily burden[s]" such candidates' "important interest in the continued availability of political opportunity." *Buckley*, 424 U.S. at 1 (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974)).

Section 9032(6) provides that all candidates who qualify for funding under the Act – whether they seek the nomination of a major party or a minor party – become ineligible to receive funding on the date they are nominated or the last day of the last major party nominating convention, whichever is earlier. *See* 26 U.S.C. § 9032(6). Because major party candidates are entitled to automatic ballot access in all 50 states and the District of Columbia once they are nominated at their party's convention, § 9032(6) ensures that they remain eligible to receive funding under the Act for the entirety of their primary election campaigns. Minor party candidates, by contrast, generally must petition for placement on state general election ballots after they win their party's nomination, *see Buckley*, 424 U.S. at 106, and the deadline for doing so in many states often falls after the major parties hold their nominating conventions. App. 3-4.

Respondent Federal Election Commission ("the Commission") has long recognized that "the petition process required of the presidential candidates of the minor parties [is] the equivalent of the primary elections and convention process of the major party

candidates." Advisory Opinion ("AO") 1975-44, 2 (Socialist Workers 1976 National Campaign Committee); *see also* AO 1995-45 (Dr. John Hagelin for President, 1996 Committee). The Commission's regulations promulgated pursuant to the Federal Election Campaign Act, *see* 52 U.S.C. § 30101 *et seq*., likewise recognize that minor party candidates' primary election date may be defined as "the last day to qualify for a position on the general election ballot" of any state. 11 CFR § 100.2(c)(4). Accordingly, Minor party candidates' expenditures for ballot access petition drives are "qualified campaign expenses" for purposes of the Act – that is, the funds such candidates receive under the Act may be used to pay for their petition drives. *See* 26 U.S.C. § 9032(9).

But § 9032(6) imposes a catch. It terminates minor party candidates' eligibility to receive funds under the Act – even if they are engaged in the petition drives the Commission recognizes as "the equivalent" of their primary election campaigns – whenever the major parties happen to conclude their nominating conventions. Thus, while § 9032(6) guarantees that major party candidates remain eligible for the entirety of their primary election campaigns, the provision terminates minor party candidates' eligibility in the midst of theirs based on sheer happenstance. Minor party candidates may be eligible to receive the funding for which they qualify under the Act for the duration of their primary election campaigns, or not, based on nothing more than the date on which the major party nominating conventions conclude. Section 9032(6) therefore produces arbitrary and disparate results as applied to minor party candidates that bear no rational

relation to any legitimate governmental interest. It terminates their eligibility regardless of their qualification and irrespective of the level of voter support they demonstrate, simply because the major party primary elections have concluded.

A. The Presidential Primary Matching Payment Account Act

The Act provides partial federal financing for the campaigns of qualifying presidential primary candidates. *See* 26 U.S.C. §§ 9031-9042. A candidate who is determined to be eligible under the Act is entitled to receive payments from the Presidential Primary Matching Payment Account to match individual contributions up to $250. *See* 26 U.S.C. §§ 9034(a), 9037. Candidates may only use these funds to defray "qualified campaign expenses," which are defined as expenses incurred in connection with the candidate's campaign for nomination that do not violate federal or state law. *See* 26 U.S.C. § 9032(9).

The Commission has long recognized that expenses incurred by a minor party presidential candidate for the purpose of qualifying for placement on state ballots are qualified campaign expenses under the Act. App. 28. Such expenses, however, must be incurred during the "matching payment period." *See* 26 U.S.C. § 9032(6). The matching payment period begins on the first day of the calendar year in which the presidential election will occur. *See id*. As applied to a candidate who seeks the nomination of a party that nominates by national convention and of parties that do not – *i.e.*, minor parties – the matching payment period ends on the earlier of the date on which the national party

nominates its candidate for President, or the last day of the last national convention held by a major party during that year. *See id*. The end of the matching payment period is the candidate's Date of Ineligibility. *See* 11 C.F.R. § 9033.5(c). After a candidate's Date of Ineligibility, expenses incurred by the candidate's committee are not qualified campaign expenses under the Act, with limited exceptions. *See* 11 C.F.R. § 9032.9(a)(1).

The Act requires the Commission to conduct an examination and audit of the qualified campaign expenses of every publicly funded candidate after the campaign for the nomination ends. *See* 26 U.S.C. § 9038(a); 11 C.F.R. § 9038.1. The audit includes an examination of the candidate's Net Outstanding Campaign Obligations, which is the difference between the "total of all outstanding obligations for qualified campaign expenses as of the candidate's date of ineligibility" and the total value of all cash, assets and amounts owed to the candidate's committee as of that date. 11 C.F.R. § 9034.5(a)(1), (2). If the Commission determines that "any portion of the payments made to a candidate from the matching payment account was in excess of the aggregate amount of payments to which [the] candidate was entitled," the candidate must repay "an amount equal to the amount of excess payments." 26 U.S.C. § 9038(b)(1). Likewise, if the Commission determines that any portion of the payments was used for a purpose other than to defray qualified campaign expenses, the candidate must repay "an amount equal to such amount." 26 U.S.C. § 9038(b)(2).

B. This Lawsuit

Petitioners are a minor party presidential candidate, Dr. Jill Stein, and her political committee. Petitioners qualified for funding under the Act in both the 2012 and 2016 presidential election cycles. App. 3-4, 38 n.23. The repayment order at issue here, which requires petitioners to repay $175,272, arises from the 2016 presidential cycle. App. 3-4. The facts relating to petitioners' 2012 presidential campaign are relevant, however, because they demonstrate the arbitrary and disparate results that flow from the application of § 9032(6) to minor party candidates.

In 2012, petitioners received $372,130 in matching funds under the Act. *See* Final Audit Report of the Commission on Jill Stein for President (October 11, 2011 – August 31, 2014), 4 n.9, available at https://www.fec.gov/resources/legal-resources/enforcement/audits/2012/Jill_Stein_for_President/FinalAuditReportoftheCommission1323020.pdf (accessed January 5, 2024). Dr. Stein's party nominated her on July 14, 2012, but she was obliged to petition for ballot access in several states after that date. App. 38 n.23. Coincidentally, the last state ballot access deadline Dr. Stein had to meet in 2012 was September 6, which was also the last day of the last major party nominating convention that year. App. 38 n.23. As a result, the Commission determined that Dr. Stein remained eligible for funding under the Act until that date – *i.e.*, for the entirety of her primary election campaign – and all her ballot access expenses in 2012 were deemed qualified campaign expenses. App. 38 n.23. Therefore, no repayment order issued.

In 2016, petitioners received approximately $590,000 in matching funds. App. 4. Dr. Stein's party nominated her on August 6, 2016, and once again she was obliged to petition for ballot access in several states after that date. App. 28, 32. Unlike 2012, however, the major parties concluded their nominating conventions on July 28, 2016 – several weeks earlier than the last state ballot access deadline Dr. Stein had to meet. App. 32. The Commission therefore determined that Dr. Stein became ineligible under the Act on August 6, the date on which her party nominated her, even though her primary election campaign was ongoing. App. 31. It concluded that petitioners "could not receive the benefit of any … ballot access date after July 28, 2016," because that was "the last date of the last major party nominating convention." App. 31-32. Consequently, all ballot access expenditures petitioners made after August 6, 2016 – which otherwise constitute "qualified campaign expenses" under the Act – were not in fact qualified campaign expenses and petitioners could not use matching funds to pay for them. App. 32. Based on this determination, the Commission ordered petitioners to repay $175,272 of the matching funds they had received. App. 18.

Section 9032(6), as applied, rendered Dr. Stein eligible for funding under the Act for the entirety of her 2012 primary election campaign and no repayment order issued. In 2016, however, Section 9032(6) terminated Dr. Stein's eligibility in the midst of her primary election campaign, leading to the $175,272 repayment order at issue here. The sole basis for this

disparate result is that the major parties held later nominating conventions in 2012 than in 2016.

Petitioners timely requested administrative review of the Commission's repayment order on June 17, 2019. App. 22. In a Statement of Reasons entered on October 29, 2021, the Commission upheld its order and directed petitioners to repay $175,272 to the United States Treasury. App. 16, 40. Petitioners timely petitioned for review to the Court of Appeals pursuant to 26 U.S.C. § 9041. App. 2.

C. The Decision Below

In the proceedings below, petitioners asserted a narrow challenge to the constitutionality of § 9032(6) as applied. App. 2. Petitioners claim that § 9032(6) is unconstitutional under *Buckley* insofar as it rendered them ineligible to expend matching funds on ballot access petition drives because it frustrates the purpose of the Act, serves no legitimate governmental purpose, and unfairly and unnecessarily burdens minor party candidates. *See Buckley*, 424 U.S. at 94-97. The Court of Appeals rejected petitioners' petition but failed to address their constitutional claim on the merits. App. 2, 6-8.

Rather than addressing petitioners' narrow as-applied challenge to the constitutionality of § 9032(6), the Court of Appeals misconstrued their claim as a broad facial challenge to the "funding limits" imposed by the Act. App. 6-8. In its brief discussion of petitioners' constitutional claim, the Court of Appeals did not address § 9032(6) at all. App. 6-8. The Court of Appeals simply concluded that "the public funding

limits at issue here are indistinguishable from those upheld in *Buckley*," and rejected petitioners' equal protection claim on that basis. App. 8.

Petitioners timely petitioned for rehearing and rehearing *en banc* on the ground that they do not challenge the "funding limits" upheld in *Buckley*, but rather assert an as-applied challenge to § 9032(6). The Court of Appeals denied rehearing and rehearing *en banc* on August 31, 2023. App. 41, 43.

REASONS FOR GRANTING THE WRIT

I. SECTION 9032(6) FRUSTRATES THE PURPOSE OF THE ACT, SERVES NO LEGITIMATE GOVERNMENTAL INTEREST AND UNFAIRLY AND UNNECESSARILY BURDENS MINOR PARTY CANDIDATES.

When this Court rejected a facial challenge to the constitutionality of the Act nearly 50 years ago in *Buckley*, it acknowledged that a public financing scheme would violate the Fifth Amendment's guarantee of equal protection of law if it "unfairly or unnecessarily burdened the political opportunity of any party or candidate." *Buckley*, 424 at 96. The undisputed facts of this case demonstrate that the Act does so as applied here due to the operation of § 9032(6) – a provision that was not at issue in *Buckley*. *See id*. at 90-97, 105-108. Further, neither the Commission nor the Court of Appeals identified any legitimate governmental interest that the provision might further by tying minor party candidates' eligibility under the Act to the date of the major parties' nominating conventions. The undisputed facts also demonstrate

that § 9032(6) unfairly and unnecessarily burdens minor party candidates, including petitioners. Section 9032(6) is therefore unconstitutional under *Buckley*.

Crucially, however, the Court of Appeals made clear in the proceedings below that it detects no infirmity in § 9032(6), App. at 6-8, 41, 43, and that Court has exclusive jurisdiction over constitutional challenges to the provision. *See* 26 U.S.C. § 9041(a). Review by this Court is therefore warranted now, because the decision below conflicts with *Buckley* and no conflict among the lower courts can or will emerge on this issue. Further, the material facts are genuinely undisputed and the question presented was squarely raised and thoroughly briefed in the proceedings below. This Court should grant certiorari to correct the Court of Appeals' error and ensure the continued viability of the Act as applied to minor party candidates.

A. SECTION 9032(6) FRUSTRATES THE PURPOSE OF THE ACT BY TERMINATING QUALIFIED MINOR PARTY CANDIDATES' ELIGIBILITY IN THE MIDST OF THEIR PRIMARY ELECTION CAMPAIGNS.

The Court of Appeals has repeatedly recognized that the purpose of the Act is "to provide partial federal financing for the campaigns of qualifying presidential primary candidates." *Simon*, 53 F.3d at 357; *see LaRouche*, 996 F.2d at 1267 ("The object of the statute is to enhance the ability of candidates to present their positions and themselves to voters in presidential primaries.") This is not a guarantee of full funding for a presidential candidate's primary campaign, but that is only because the statute establishes a *matching*

program: once candidates are deemed eligible, they are "entitled to receive payments … to match individual contributions up to $250." *Simon*, 53 F.3d at 357. This funding is intended "to defray 'qualified campaign expenses,'" which are defined as "expenses incurred in connection with the campaign for the presidential nomination that do not violate federal or state law." *Id.* (citing 26 U.S.C. § 9032(9); 11 C.F.R. § 9034.4(a) (1995)).

Here, it is undisputed that petitioners' ballot access expenditures all would be "qualified campaign expenses" under the Act but for one factor: petitioners incurred some of these expenses outside the matching payment period, as defined by § 9032(6). App. 28, 29-30. Section 9032(6) thus rendered petitioners ineligible to receive funding for qualified campaign expenses based solely on the fact that they incurred the expenses after the major party conventions. App. 30-32. But as the Commission acknowledges, minor party candidates' ballot access petition drives are the equivalent of major party candidates' primary elections. Further, Congress expressly intended that "the funds be issued [under the Act] on a nondiscriminatory basis," *LaRouche*, 996 F.2d at 1267, which does not "give an unfair advantage to established parties…." *Buckley*, 424 U.S. at 96-97. By arbitrarily terminating minor party candidates' eligibility to receive funds in election cycles when the major parties happen to hold early nomination conventions, § 9032(6) frustrates the purpose of the Act and the congressional intent behind it.

The Court of Appeals failed to address this argument. Instead, the Court of Appeals reasoned that because "Congress could permissibly deny all public funding" to petitioners "based on [their] lack of widespread support…," it follows that Congress could take "the less restrictive step" of providing petitioners with funding that is "less generous than the funding provided to primary candidates of major parties." App. at 7. But this misconstrues petitioners' claim. Petitioners accept that Congress can constitutionally provide minor party candidates with less funding than major party candidates under *Buckley*. *See Buckley*, 424 U.S. at 96, 99. Section 9032(6) nonetheless frustrates the purpose of the Act because it guarantees that major party candidates remain eligible to receive the greater funding to which they are entitled for the entirety of their primary election campaigns, but arbitrarily terminates minor party candidates' eligibility to receive the lesser funding to which they are entitled in the midst of their primary election campaigns whenever the major parties hold early nomination conventions. Petitioners' challenge is not to the Act's "funding limits," as the Court of Appeals incorrectly averred, App. at 7, but to § 9032(6)'s arbitrary and premature termination of their eligibility to receive the lesser funding to which they are entitled.

B. SECTION 9032(6) DOES NOT FURTHER ANY LEGITIMATE GOVERNMENTAL INTEREST.

The Court of Appeals conceded that restrictions on public funding must "further an important governmental interest" to withstand constitutional scrutiny. App. at 6 (citing *Buckley*, 424 U.S. at 95-96). Section 9032(6) fails this test because no governmental interest is served by a provision that makes minor party candidates eligible for funding under the Act for the entirety of their primary election campaigns in one election cycle, as Section 9032(6) did for petitioners in 2012, while terminating their eligibility in the midst of their primary election campaign in the next election cycle, as Section 9032(6) did for petitioners in 2016, based on nothing more than the happenstance of when the major parties decide to hold their nomination conventions. The Court of Appeals did not address this argument.

The Court of Appeals conspicuously failed to identify *any* governmental interest that § 9032(6) furthers. App. at 7-8. Instead, the Court of Appeals averred that the Act's "funding limits" – which petitioners do not challenge – "implicate the important government interests in limiting public funding for candidates with slim support." App. at 7. But if the Court of Appeals intended to suggest that § 9032(6) also furthers these interests, it is in error. The record demonstrates that the provision is woefully inadequate to the task.

Petitioners were entitled to funding for the entire duration of their primary election campaign in 2012 because the major parties held their nomination conventions on September 6, 2012, and petitioners had completed their ballot access petition drives on that date. In 2016, however, petitioners' eligibility for funding was terminated on August 6, 2016 – even though they were still engaged in multiple ballot access petition drives, the cost of which qualifies for funding under the Act – only because the major parties held earlier nomination conventions that year. The discrepancy between these disparate outcomes – full eligibility in 2012 and partial eligibility in 2016 – is attributable to only one factor: the date on which the major parties held their nomination conventions.

Contrary to the Court of Appeals' implication, § 9032(6) does not further the "government interests in limiting public funding for candidates with slim support." App. at 7. Because the provision terminates qualified candidates' eligibility to receive funding based solely on the date on which the major parties' nomination conventions end, irrespective of the candidates' level of public support, § 9032(6) is not even rationally related to that interest. Under § 9032(6), a candidate with less support who runs in an election when the major parties hold later nomination conventions will be entitled to a longer period of eligibility than a candidate with more support who runs in an election when the major parties hold earlier nomination conventions. That does not further the governmental interest the Court of Appeals cited, but eviscerates it.

The Court of Appeals did not identify any other governmental interest that § 9032(6) might conceivably protect. App. at 7-8. The Commission also failed to identify any legitimate governmental interest that the provision furthers. The Commission asserted just one interest: that § 9032(6) furthers Congress's intent to ensure that major and non-major party candidates are eligible to receive funding under the Act for the same "length of time," App. 37, but the Commission failed to cite any authority for that assertion. Moreover, it cannot be reconciled with the Court of Appeals' conclusion that "it was Congress's explicit intention that the funds be issued on a nondiscriminatory basis." *LaRouche*, 996 F.2d at 1267 (citation omitted).

Section 9032(6) is plainly discriminatory. It guarantees that major party candidates are eligible to receive funding under the Act for the entirety of their primary election campaigns but terminates minor party candidates' eligibility in the midst of theirs whenever the major parties hold early nomination conventions. Neither the Court of Appeals nor the Commission identified any governmental interest that such discrimination might serve. Section 9032(6) is therefore unconstitutional under *Buckley* because nothing in the record supports the conclusion that it furthers "an important governmental interest." *Buckley*, 424 U.S. at 95-96. Certiorari is warranted to correct the Court of Appeals' error in upholding the provision.

C. SECTION 9032(6) UNFAIRLY AND UNNECESSARILY BURDENS THE POLITICAL OPPORTUNITY OF MINOR PARTY CANDIDATES, INCLUDING PETITIONERS.

The Act "has an important impact on the exercise of First Amendment rights, inasmuch as campaign funds are often essential if 'advocacy' [of beliefs and ideas] is to be truly or optimally 'effective.'" *Com. to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 844 (D.C. Cir. 1979) (quoting *Buckley*, 424 U.S. at 65-66). That is especially true as applied to "a candidate [who] either lacks national prominence or belongs to a minor party outside the mainstream of American politics." *Id*. It is therefore "particularly important to ensure that the Commission is applying the eligibility criteria for primary matching funds in an even-handed manner." *Id*. (noting "our national commitment to open and robust discussion of all political viewpoints") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).) Section 9032(6) prevents the Commission from doing so.

When major party nominees win their party's nomination, they are guaranteed placement on every state's general election ballot. By ending the matching funds period on the date of a major party candidate's nomination, therefore, Section 9032(6) ensures that such candidates are eligible to receive matching funds during the entire period of their primary election campaign. By ending minor party candidates' matching funds period on that same date, however, Section 9032(6) cuts off their eligibility irrespective of whether

they continue to incur ballot access expenses that otherwise qualify as "qualified campaign expenses" under the Act. App. at 28.

Here, petitioners reasonably anticipated that their 2016 ballot access expenses would be deemed qualified campaign expenses under the Act, as they were in 2012. App. at 28 n.23. That did not occur, for no reason other than a change in the date of the major party conventions. App. at 32. The consequence is dramatic: petitioners now face a $175,272 repayment order they would not owe if a major party held its convention in September, as it did in 2012, instead of in June, as it did in 2016. App. at 28 n.23. As applied here, therefore, Section 9032(6) "unfairly or unnecessarily burden[s] the political opportunity" of a minor party candidate like Dr. Stein. *Buckley*, 424 U.S. at 96. It rendered Dr. Stein ineligible to receive matching funds for ballot access expenses that otherwise would be deemed qualified campaign expenses under the Act based solely upon the fact that the major parties changed their convention dates. App. at 28.

This Court has long recognized that a statute may be invidiously discriminatory precisely because it treats differently situated candidates alike. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971). "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike," the Court explained. *Id.* (citation omitted). Section 9032(6) is the statutory embodiment of such invidious discrimination. The Court should grant certiorari to rectify this discrimination and ensure the Act's

continued viability as applied to minor party candidates.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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