No. 10-349

In The
Supreme Court of the United States

Shell Oil Company, and SWEPI LP (as successor-in-interest to Shell Western E & P, Inc.),
Petitioners,
v.
Nancy Fuller Hebble, et al.,
Respondents.

On Petition for Writ of Certiorari
to the Court of Civil Appeals
for the State of Oklahoma

MOTION OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, Amici Curiae International Association of Defense Counsel ("the IADC") and the National Association of Manufacturers ("the NAM") move for leave to file the accompanying brief as amici curiae in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for the respondents has refused Amici's request for consent.

The IADC is an association of insurance and corporate attorneys whose practice is concentrated on the defense of civil lawsuits. The IADC membership is comprised of the world's leading corporate and insurance lawyers. They are partners in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. Members represent the largest corporations around the world, including the majority of companies listed in the FORTUNE 500. Since 1920, the IADC has been dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable only for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. The IADC's activities benefit the approximately 2,500 invitation-only, peer-reviewed members and their clients as well as the civil justice system and the legal profession. The IADC regularly files briefs

in pending cases throughout the United States on civil justice issues of broad application.

The National Association of Manufacturers ("the NAM") represents the interests of manufacturers in court. The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial section and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM monitors legal trends and developments affecting the ability of manufacturers to be treated fairly by the legal system. The NAM is actively involved in tracking major lawsuits impacting manufacturers and in related activities to promote a fair and balanced legal system for resolving disputes. With manufacturers facing legal costs of some $865 billion annually, the efforts of the NAM have a direct effect on the competitive position of American manufacturers and complement the NAM's legal reform policy endeavors.

Amici curiae are particularly interested in this case because it demonstrates how the Court's punitive damage jurisprudence is unable to provide civil defendants with fair notice of the magnitude of their exposure to punitive damages and how the resulting unpredictability in evaluating punitive exposure produces practical problems for all parties and their counsel in settlement evaluation. This case thus presents this Court with an opportunity clarify

that punitive damage awards must bear a reasonable relationship to the damages compensating the plaintiff for the actual harm suffered—and that other types of "additional damages" should not be permitted to skew the ratio between actual damages and punitive damages.

The IADC and the NAM's motion for leave to file the accompanying brief as amici curiae should be granted.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE[1]

The interest of the amici curiae is described in the accompanying motion for leave to file this brief.

BACKGROUND AND INTRODUCTION

The two issues presented in Shell's petition raise a fundamental question in desperate need of this Court's guidance—*To what types of actual damages must a punitive damage award reasonably relate?* Because courts in different states categorize different types of damages as "compensatory" for comparison to the punitive damage award, this Court's ratio analysis is untethered to any predictable guidepost. As applied by various lower courts, this Court's ratio guideline essentially involves two open variables—if the types of additional damages that may be considered "compensatory" are changeable and uncertain, then so too is the range of constitutionally permitted punitive damages. [2]

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[1] Pursuant to this Court's Rule 37.6, amici curiae the IADC and the NAM certify that no counsel for a party to this case authored any part of this brief, nor did any party, or counsel to any party, make any monetary contribution to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2(a), amici curiae file this brief on September 29, 2010, ten days before its due date of October 13, 2010.

[2] Shell's petition also presents an opportunity for the Court to clarify its jurisprudence on what has become another source of unpredictability in punitive damage awards: the maximum constitutionally permissible ratio when compensatory damages are "substantial." The state and federal courts' inconsistent application of this Court's statement that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," has left businesses like those represented by amici curiae rudderless in evaluating punitive

This case exemplifies the necessity for a predictable starting point in actual damages for calculating the punitive damage ratio. Often, the denominator of the punitive damage ratio depends more on the particular state in which the issue happens to arise and less on the character of the award or the extent of the injury to the plaintiff. Here, because the injury occurred in Oklahoma, the Oklahoma court included a special 12% compounded pre-judgment interest in the denominator and thereby determined that a $53 million punitive damage award was reasonably related to an underpayment of $750,000 in oil and gas contractual net profit payments. Such creative manipulation of the punitive damage ratio is common and recurring.

Amici cannot overstress the importance of having a consistent rule. This case provides this Court with the opportunity to provide a rule that would:

- Provide consistent constitutional protections for defendants across the country,
- Incentivize settlement by equipping plaintiffs and defendants with consistent case valuation parameters,
- Conserve judicial resources by eliminating the case-by-case categorization of continually changing statutory damage schemes, and
- Preserve legislative flexibility to craft remedies.

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damage exposure. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003). Although this brief does not focus on the havoc caused by the lower courts' inconsistent rulings on this issue, the same kind of damaging unpredictability described in this brief accompanies both issues raised in Shell's petition, and both are of real and ongoing concern to amici curiae.

By granting certiorari, the Court can answer the broad question of what effect—if any—damages that have both compensatory and punitive qualities should have on the constitutional ratio between the actual harm suffered by the plaintiff and punitive damages awarded based on the reprehensibility of a defendant's conduct.

ARGUMENT

I. Amici agree with Shell that the absence of clear guidance on how to calculate the punitive damage ratio frustrates due process.

Amici agree with Shell that the lack of clear guidance on how to calculate the punitive damage ratio requires clarification from this Court. Although the Court has weighed in on the constitutionality of various punitive damage ratios, the Court has not squarely confronted the issue here. The issue here illustrates that the calculation of the ratio itself, by including additional variable damage components, threatens the due process rights of defendants.

A. The current jurisprudence regarding how the punitive damage ratio is calculated frustrates due process because it leads to unpredictable punitive damage awards.

This case illustrates the unpredictability of punitive damage awards in the absence of clear guidance on how the punitive damage ratio should be calculated. The plaintiffs suffered actual harm of approximately $750,000 from the underpayment of oil and gas contractual net profit payments. Based on this Court's guidance on the permissible punitive damage ratio in *Exxon* and *State Farm*, Shell would have been on notice that it could likely face exposure

to punitive damages in a 1:1 ratio, or $750,000. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008); *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003). Some courts, also relying on *State Farm*, have issued decisions suggesting possible notice that punitive damages could reach a 4:1 ratio, or $3 million. *See State Farm*, 538 U.S. at 425. Shell had no notice, however, that an award of $53 million in punitive damages would be upheld as constitutional. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

The Oklahoma court's justification for upholding that $53 million punitive damage award illustrates the jurisprudential gap. The Oklahoma court relied on a special interest rate—12% compound pre-judgment interest—to increase the amount of "compensatory" damages even though the Oklahoma legislature candidly described it as a "penalty" in previous iterations of the statute. The dramatic increase in the amount of purported "compensatory" damages moved the ratio to punitive damages from a clearly unconstitutional 70:1 to 4:1. Thus, the ad hoc modification of the punitive damage calculation dramatically altered Shell's punitive damage exposure without regard to procedural due process concerns regarding adequate notice.

If the Oklahoma court's ad hoc modification of the punitive damage ratio was an outlier, this case would not warrant special attention. Unfortunately, the lack of guidance from this Court on how to determine whether additional recoveries beyond the actual harm inflicted should be included as part of the "harm to the plaintiff" has produced conflicts in a variety of contexts, for example:

- Emotional distress with a partially punitive aspect. *Compare Roby v. McKesson Corp.*, 101 Cal. Rptr. 773, 797-99 (Cal. Ct. App. 2010); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 308-10 (Tex. 2006); *Daka, Inc. v. McCrae*, 839 A.2d 682, 697-701 (D.C. Ct. App. 2003); *with Boyd v. Goffoli*, 608 S.E.2d 169, 182-84 (W. Va. 2004).
- Lost profits. *Compare Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007), *with Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335 (Fed. Cir. 2001).
- Attorneys' fees. *Compare Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 235 (3d Cir. 2005); *Jurinko v. Med. Protective Co.*, 305 F. App'x 13, 28 n.16 (3d Cir. 2008), *with Wallace v. DTG Operations, Inc.*, 563 F.3d 357 (8th Cir. 2009). The inconsistent use of attorneys' fees to dilute the punitive damage ratio is currently before this Court in *Stroud v. Blount*, No. 09-1572, on petition for writ of certiorari from *Blount v. Stroud*, 914 N.E.2d 925 (Ill. App. Ct. 2009).
- Capped or reduced awards. *Compare Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 447-48 (Kan. 2006); *USA Truck, Inc. v. West*, 189 S.W.3d 904, 906, 911 (Tex. Ct. App. 2006), *with Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 54 (Ky. 2003). *See also Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006) (splintering on how to calculate the ratio); *Groth v. Hyundai Precision & Indus. Co.*, 149 P.3d 333, 340-41 (Or. Ct. App. 2006) (discussing complexity of computing ratio when award was limited by statute).

Clear guidance from the Court on how the punitive damage ratio should properly be calculated would provide defendants with the constitutionally required notice and greatly enhance the ability to accurately predict the maximum size of a punitive damage award.

B. The absence of clear guidance from this Court invites state legislatures and courts to skew the ratio.

Absent clear guidance from this Court, state legislatures and state courts are able to perform ad hoc calculations of the ratio that dramatically alter defendants' potential punitive damage liability. As the law now stands, a state legislature's characterization of a monetary award as compensation or as a penalty—whether the impact on the punitive damage ratio is intentional or not—can dramatically change a defendant's punitive damage exposure from state-to-state and from year-to-year. Here, the Oklahoma legislature's 1985 deletion of the descriptive term "penalty" from the interest statute was all that the Oklahoma court needed to dramatically alter the result of this case, even though:

1) The legislature did not substantively change the pre-judgment interest calculation from the pre-1985 punitive statute.
2) The pre-judgment interest does not bear any relation to the actual harm suffered by the defendant, even when the time value of money is taken into account. In terms of 2010 dollars, the 1973 underpayments would still only be $3.3 million.
3) The statute singled out a particular class of disfavored oil and gas defendants for

especially high pre-judgment interest. Rather than 12% compound interest, other defendants are only subject to 6% simple interest.

The ability of state legislatures and courts to skew the punitive damage ratio and sidestep this Court's punitive damage jurisprudence is demonstrated by the fact that when faced with the same situation—deletion of the word "penalty" from an oil and gas payment statute—the Alabama Supreme Court reached the opposite conclusion. *See Ala. Dep't of Conservation & Natural Res. v. Exxon Mobil Corp.*, 11 So. 3d 194, 200-01 (Ala. 2008). Leaving the issue to state law makes the federal Constitution not merely disuniform but also infinitely manipulable.

Unfortunately, the creative minds of attorneys, and the state legislatures and courts in which they ply their trade, will never run dry trying to find such ways to manipulate this Court's punitive damage ratio. Currently on writ of certiorari to this Court are examples of that creativity—*Stroud v. Blount*, No. 09-1572, where the Illinois court used attorneys' fees to push the punitive damage ratio from 10:1 down to 2:1, and *Lawnwood Medical Center, Inc. v. Sadow*, No. 10-371,where the Florida court permitted an infinite ratio of $5 million in punitive damages to zero compensatory damages. *See Blount*, 914 N.E.2d at 943; *Lawnwood Med. Ctr., Inc. v. Sadow*, ___ So.3d ___, No. 4D08-1968, 2010 WL 1066833, at *13 (Fla. Ct. App. Mar. 24, 2010) . The financial stakes are too high, the pot of gold at the end of the punitive damage lottery too big, for the creative juices not to flow toward finding new ways to characterize legislatively and judicially created additional damages as "compensatory" damages to

dilute the punitive damage ratio. Without clear guidance from this Court, state-by-state determinations will continue to threaten the due process notice rights of companies represented by Amici.

C. The absence of clear guidance on how to consistently calculate the punitive damage ratio leads to a result that violates procedural due process.

Amici do not suggest that *all* remedies should be consistent across all states—doing so would intrude upon the state's rights. Amici merely suggest that this Court provide guidance on how the punitive damage ratio governed by the Fourteenth Amendment should be calculated. U.S. CONST. amend. XIV, § 1.

Inconsistency in calculations defeats the purpose of the punitive damage ratio—providing notice and predictability for what constitutes a constitutionally impermissible punitive damage award. Amici acknowledge the difficulty of crafting a ratio that can apply to every situation—whether 4:1, 1:1, or some form of sliding scale based on the nature of the harm or conduct. However, flexibility regarding the ratio cannot be compounded by vagueness regarding the definition of compensatory damages. Providing guidelines in the form of a numeric ratio, without any guidance on how to calculate that ratio in practical application, is no guidance at all. Given the inclusion of the clearly penal pre-judgment interest in the compensatory side of the punitive damage ratio, this case provides the perfect opportunity for the Court to provide additional guidance.

II. The absence of clear guidance on how to consistently calculate the punitive damage ratio and the resulting absence of procedural due process notice is of particular concern to Amici.

The Court has long recognized that excessive punitive damages bearing no reasonable relationship to the actual harm suffered threaten constitutional protections. Amici, its members, and clients of its members must rely on these protections. Therefore, Amici focus on the procedural due process problem inherent with the current jurisprudence—unpredictability. In the absence of clear guidance on the calculation of the punitive damage ratio, clients and their counsel, such as Amici, cannot accurately assess the true magnitude of a defendant's punitive damage exposure.

Unpredictability also hinders settlement. The absence of clear guidance on the method of calculating the punitive damage ratio prevents plaintiffs and their counsel from accurately (and reasonably) assessing possible verdict value. Thus, the absence of this clear guidance prevents plaintiffs and defendants from collectively assessing settlement value and frustrates the agreed resolution of disputes. This uncertainty is compounded by the possible exposure for uninsured punitive damages coercing settlements with plaintiffs and defendants' own insurers.

A. The absence of clear guidance on how to calculate the punitive damage ratio frustrates the ability of counsel and the clients they advise to make informed settlement recommendations and decisions.

In the absence of a state statutory cap on punitive damage awards, the ratio guidance provided by this Court is the only vehicle available to attorneys and clients for predicting the eventual amount of a potential punitive damage award. For example, a defendant would expect that if it is facing actual harm exposure of $1 million, the Constitution and this Court's jurisprudence would suggest that the punitive damage exposure would also be $1 million, a 1:1 ratio.

However, absent further clarification from this Court, the defendant cannot accurately estimate the effect of statutory and common-law "add-ons." The possibility that state legislatures or state courts might arbitrarily define add-ons as "compensatory damages" leads to unpredictable dilution of the punitive damage ratio. Who could have predicted that an underpayment of $750,000 in oil and gas contractual net profit payments would produce a purportedly constitutional $53 million punitive damage award?

For a defense attorney, evaluating a defendant's punitive damage exposure is a key part of evaluating the potential verdict and settlement ranges confronting the client. For our system of justice to work in practice, the client's decision regarding whether to try or settle a case must be based on a more predictable accounting for maximum

punitive damage exposure than is currently permitted.

For a plaintiff's attorney, the absence of clear guidance in calculating the ratio turns punitive damage claims into a lottery where the rewards are uncertain but possibly immense. The uncertainty encourages gaming the system by forum-shopping in an attempt to avoid states that faithfully adhere to the Constitution. Absent clear guidance, that behavior will only continue.

B. The absence of clear guidance on how to calculate the punitive damage ratio is especially troublesome because the insurability of punitive damages is constantly questioned by insurers.

The unpredictability in evaluating the maximum range of punitive damages exposure takes on even greater importance because insurers usually take the position that punitive damages potentially are not covered by their insurance policy. The prospect of a massive amount of potentially uninsured punitive damages creates a financial nightmare for any business. How many businesses could survive a $53 million uninsured punitive damage award as a result of losing a lawsuit worth $750,000 in actual damages?

This is not a Chicken Little scenario. In practice:

- Insurers routinely reserve their rights to later deny coverage in a case presenting the potential for an award of punitive damages.
- Insurers who have previously negotiated an express exclusion of coverage for punitive damages in their policy will deny coverage outright.

- Even when their insurance policies do not expressly exclude coverage for punitive damages, insurers frequently invoke their insurance policies' exclusions for intentional acts in order to reserve their right to ultimately deny insurance coverage for punitive damages.

Faced with providing coverage for a substantial punitive damage award, insurers predictably try to shift the risk of the punitive damages onto the insured. Some form of this scenario plays out in almost all cases involving punitive damages and compounds the many practical problems that Amici face because of the current uncertainty inherent in calculating the punitive damage ratio.

III. Shell's petition provides this Court with the opportunity to clarify that the relevant ratio is the relationship between only the amount of punitive damages and the amount of actual damages.

Shell's petition exemplifies the need for guidance that provides clear notice of the proper method of calculating the punitive damage ratio. For example, Amici believe that it would be possible (and appropriate) to articulate a bright line rule that establishes which types of damages should be included in which side of the ratio. Consistent with this Court's punitive damages jurisprudence, the damages that represent the actual or potential "harm inflicted" on the plaintiff should be compared to the punitive damage award. *See Gore*, 517 U.S. at 575. Amici would suggest that other types of damages, whether created by state statute or by state common law, should be excluded from calculation of the ratio. Adopting this rule would provide invaluable

clarification on how the components of the ratio should be calculated, resolve current confusion and disagreement among the lower courts, and substantially advance the Court's punitive damages jurisprudence.

A. This Court's punitive damage jurisprudence has long and correctly focused on the relationship between the damages awarded to compensate a plaintiff for the "actual harm inflicted" relative to the punitive damage award.

"The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree." *Gore*, 517 U.S at 581. However, for purposes of evaluating this relationship, the Court has recognized that it is not the label used to describe the damages designed to compensate a plaintiff for the actual harm suffered that matters, but rather the substance of those damages. *See Gore*, 517 U.S. at 581 n.32 (citing *Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) ("[E]xemplary damages allowed should bear some proportion to the *real damage sustained*") (emphasis added); *Saunders v. Mullen*, 66 Iowa 728, 729, 24 N.W. 529 (1885) ("When the *actual damages* are so small, the amount allowed as exemplary damages should not be so large") (emphasis added); *Flannery v. Baltimore & Ohio R.R. Co.*, 15 D.C. 111, 125 (1885) (when punitive damage award "is out of all proportion to the *injuries received*, we feel it our duty to interfere") (emphasis added); *Houston & McCarthy v. Niskern*, 22 Minn. 90, 91-92 (1875) (punitive damages "enormously in excess of what may justly be regarded as *compensation" for the*

injury must be set aside "to prevent injustice") (emphasis added)).

In distinguishing the purposes served by compensatory and punitive damages, the Court has characterized compensatory damages as "'intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'" *State Farm*, 538 U.S. at 416 (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)). This is in contrast to punitive damages, which are "aimed at deterrence and retribution." *State Farm*, 538 U.S. at 416. Although the Court has at times used different terminology to describe what type of damages should be compared to a punitive damage award for constitutional purposes, the Court's meaning—in part demonstrated by its interchangeable use of the terms "actual damages" and "compensatory damages"—has remained focused on the harm inflicted on or suffered by the plaintiff.

B. The lower courts' inconsistent inclusion of additional types of compensatory damages as part of the punitive damage ratio reveals that those types of damages differ from the "actual harm inflicted" on the plaintiff.

The types of compensatory damages that the lower courts sometimes include in their calculation of the punitive damage ratio run the gamut. Courts across the nation vary widely in their treatment of "add-on" damages like pre-judgment interest, special interest, post-judgment interest, attorney's fees, costs, and penalty interest for purposes of calculating the punitive damage ratio. This is not surprising, given that the schemes of different states depend on

the imponderable vagaries and development of the law by state supreme courts as well as by state legislatures. Nevertheless, the differences in those state schemes should not become an unconstitutional obstacle to what should be a uniform calculation for deciding whether a punitive damage award complies with constitutional requirements. The differences in those schemes should instead become the impetus to adopting a uniform calculation of that ratio that provides the notice needed for defendants to evaluate their maximum potential punitive exposure and then to modify their conduct accordingly.

C. A ratio comparing punitive damages only to damages that compensate a plaintiff for the "actual harm inflicted" would provide much-needed guidance to the lower courts and is consistent with this Court's jurisprudence.

Amici suggest that this Court clarify that the ratio should compare only the harm suffered by plaintiff against the punitive damage award. This rule would provide both the clear direction needed by the lower courts and the adequate notice to defendants required under procedural due process. Further, the rule flows directly from this Court's original formulation of the ratio. Instead of determining what additional types of damages should be included in the ratio on a case-by-case basis or state-by-state basis, the Court can resolve the question with a simple calculation that is consistent with the Court's historic description of the relevant inquiry.

By limiting the punitive damage ratio to the harm suffered by the plaintiff, and stripping away the varying and continually changing legislative

enhancements to "compensatory damages," this Court would adopt a more easily administered rule. That rule would allow parties, counsel, and the lower courts real predictability in applying this Court's jurisprudence under the punitive damage ratio guidepost. It would eliminate the problem presented by this case and so many others encountered by Amici across the country where different state courts interpret the add-on as compensatory damages in order to dilute the ratio. It would make unnecessary this Court adjudicating, on a case-by-case basis, all of the state legislative intent issues and state supreme court rulings that might justify the classification of a particular type of "compensatory" damage as "actual damages" under this Court's punitive damage ratio.

Although this Court has "'consistently rejected the notion that . . . a simple mathematical formula'" can determine a bright line between a constitutional punitive damage award and an unconstitutional one, the Court's jurisprudence does not preclude the creation of a bright line to determine what types of damages should be considered when evaluating whether the measure of punishment is "reasonable and proportionate" to the harm suffered by the plaintiff. *State Farm*, 538 U.S. at 424-25, 426 (quoting *Gore*, 517 U.S. at 582). Adopting a bright-line rule here would provide a predictable foundation for evaluating punitive damage award, and therefore make meaningful the flexibility built into the Court's punitive damage jurisprudence.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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