No. 20-1120

IN THE

# Supreme Court of the United States

MELISSA BELGAU, *et al.*,

*Petitioners,*

v.

JAY INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

### I. The Court should grant the Petition to resolve what standard of consent the First Amendment requires before public employers can deduct union dues or fees from their employees' wages.

#### A. The Court should grant the Petition to make clear that proof of a waiver of First Amendment rights, not a mere union membership contract, is necessary before public employers can deduct union dues or nonmember fees from their employees' wages.

The Ninth Circuit applied contract law to the dues deduction authorization cards ("cards")[1] rather than the constitutional waiver analysis *Janus* requires. Pet. App., 16a-17a. The court reasoned that Petitioners ("Employees") were not entitled to *Janus'* protections because they had become union members when they signed the cards and "*Janus* [*v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018)] does not address this financial burden of union membership." *Id*. at 18a.[2]

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[1] *See* State Response in Opposition (Appendix) ("SR App."), 78a-86a.

[2] The fact that the Ninth Circuit held that *Janus'* waiver requirement does not apply to employees who contractually agreed to union membership is not a "mischaracterization" of that opinion, as WFSE suggests in its Response in Opposition at 10, but accurately summarizes the court's conclusion that *Janus* "concluded that *nonmembers*' First Amendment right had been infringed, and in no way created a new First Amendment waiver requirement for *union members* before dues are deducted…" (emphases added). Pet. App., 20a.

Respondents, on the other hand, contend that union dues and nonmember fees deducted from Employees' wages by the State were lawful because the cards *are* the waiver *Janus* requires – something the Ninth Circuit never concluded. *See* WFSE Response in Opposition ("WR"), 15-17; State Response in Opposition ("SR"), 16, 22-23. Respondents argue that the cards can constitute a waiver because a *Janus* waiver does not require proof that Employees *knowingly and intelligently* waived their right against compelled political speech, and that simply agreeing to pay money to a union suffices as a waiver. WR, 15-17; SR, 16, 22-23 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 235 (1973) ("a knowing and intelligent waiver" is not required "in every situation where a person has failed to invoke a constitutional protection.")). Respondents' argument misses the point.

Whatever the "substance of the differing constitutional guarantees," *Bustamonte*, 412 U.S. at 246, for *any* waiver, regardless of context, someone must be *able* to exercise the right at the time she allegedly waived it. *See, e.g*., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967); *Estelle v. Williams*, 425 U.S. 501, 507-13 (1976) (SR, 23); *Bustamonte*, 412 U.S. at 234-48 (SR, 23; WR, 16); *Bauchman for Bauchman v. W. High Sch*., 132 F.3d 542, 558 (10th Cir. 1997) (SR, 16). But here, it is undisputed that at the time Employees signed the cards, Respondents *denied* Employees the very right Employees supposedly waived by signing the agreements, *i.e*., the right to choose not to financially support a union *to any degree* as a nonmember. *See* Pet., 6-7.

Employees were not "offer[ed] a true choice" because Respondents denied them this option. *See South Dakota v. Neville*, 459 U.S. 553, 563-64 (1983). (Employees

could not have "declined such deductions in the first place." SR, 26.) Thus, by simply "agreeing to pay moneys to a union" before *Janus* and in the shadow of an agency fee provision, Employees could *not* have been "waiving their right not to." SR, 16.[3]

More than a mere membership contract is necessary to prove consent to state deductions of union dues or fees, and the cards here cannot constitute the necessary waiver.

### B. The Court should grant the Petition to make clear that a *Janus* waiver must be knowing, voluntary, and intelligent.

In *Janus*, this Court cited to cases requiring proof of knowing and intelligent waivers. *See* 138 S. Ct. at 2486 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Curtis Publishing Co.*, 388 U.S. at 145). Respondents claim that the Court did so *not* to affirm a *knowing* waiver standard, as Employees contend, Pet. 12, but only a minimal standard sufficient to show that states cannot presume from employees' inaction that they wish to support a union. *See* WR, 17 n.5; SR, 21-22.

But were this true, the Court could have cited to cases involving Fourth Amendment searches, *e.g.*, *Bustamonte*, 412 U.S. at 235-48, because they do not require the government to prove knowing waivers but nonetheless demonstrate that government cannot presume from peoples' inaction that they wish to

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[3] *Brady v. United States*, 397 U.S. 742 (1970), and *Dingle v. Stevenson*, 840 F.3d 171 (4th Cir. 2016) are inapposite because the defendants in those cases did not claim they were initially denied a proper waiver. SR, 18-19. *See also Bousley v. United States*, 523 U.S. 614, 619 (1998) (distinguishing *Brady*).

consent (since proof of consent to a search is required). Moreover, it is not true that any "voluntary, affirmative, and unambiguous agreement is a waiver" if it is "outside the context of criminal suspects in custody or criminal defendants pleading guilty…" WR, 16. On the contrary, courts commonly apply a knowing and intelligent waiver standard outside these contexts. *See, e.g.*, *Curtis Publishing Co.*, 388 U.S. at 145 (First Amendment); *Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993) (First Amendment); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.3d 1390, 1394 (9th Cir.), *cert. denied*, 501 U.S. 1252 (1991) (constitutional right to run for public office); *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 223 (4th Cir. 2019) (First Amendment); *Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke Cty., N.C.*, 149 F.3d 277, 280 (4th Cir. 1998) (First Amendment).

It is a "bedrock principle" that "except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). But as demonstrated by the Petition and *amici*, *see infra* at 7-9, such subsidization is the sole purpose of the restrictions that states and unions continue to devise and enforce against employees trying to exercise the First Amendment right against compelled political speech that this Court protected and *expanded* in *Janus*.[4]

[4] States already burden public employees with "inherently compelling pressures", *Bustamonte*, 412 U.S. at 247, such as exclusive representation, "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus*, 138 S. Ct. at 2478. And this Court has already made clear that procedures used to collect money from nonmembers

A knowing waiver standard is the only mechanism individual employees have to protect themselves against the pressures of powerful state-favored unions – the right to say "no."

### C. Granting the Petition will allow the Court to resolve states', unions', and the lower courts' confusion regarding what standard of consent the First Amendment requires.

There is disagreement among the states, unions, and the lower courts regarding what standard of consent this Court affirmed in *Janus* and how it should apply to significant barriers still being applied to restrict employees' First Amendment rights. At least thirteen State Attorneys General interpret *Janus* to require a *knowing* waiver (in addition to other safeguards), rather than a mere membership contract (as in the opinion below) or a "low" waiver (as Respondents argue). *See* Brief for the States of Alaska, *et al.* as *Amici Curiae* in Support of Petitioners (filed March 18, 2021).

Even courts issuing decisions based on the opinion below have sent mixed messages with respect to whether a *Janus*' waiver applies *at all* to those who choose to become union members (requiring application of contract law),[5] or whether simply agreeing to

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"must satisfy a *high* standard." *Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S. 298, 313 (2012) (emphasis added).

[5] *See, e.g.*, *Bennett v. Council 31 of the Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO*, 991 F.3d 724, 731-732 (7th Cir. 2021) ("…*Janus* said nothing about *union members* who, like Bennett, freely chose to join a union and voluntarily authorized the deduction of union dues, and who thus consented to subsidizing a union.") (emphasis added).

pay money to a union, without more, *is* the waiver *Janus* requires.[6] Granting review will allow this Court to resolve the confusion which currently exists regarding what public employers must prove to establish that an employee consented to the deduction of union dues or nonmember fees from her wages.

## II. The Court should grant the Petition to establish that unions are not absolved of constitutional liability when they jointly arrange with states to deduct union dues or nonmember fees from public employees' wages.

Respondents contend WFSE cannot be a "joint participant" with the State because the State did not "dictate" the "terms and conditions" of the dues deduction authorizations that the State enforces pursuant to its agreement with WFSE. *See* SR, 31; WR, 19-20. But neither a union nor a state is absolved of constitutional liability simply because the state agreed to *delegate* to the union the discretion to draft the authorization that the parties would use to justify state dues and fee deductions.

On remand, the Seventh Circuit concluded in *Janus* that the union was a state actor because its receipt of employees' wages was "attributable to the State" and the union jointly participated in that transfer of wealth by collectively bargaining the arrangement. *See Janus v. AFSCME, Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) (*Janus II*). The same is true here. *See* WR, 21-22. The State delegated to WFSE the

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[6] *See, e.g.*, *Oliver v. Serv. Emps. Int'l Union Loc. 668*, 830 F. App'x 76, 79, n.3 (3d Cir. 2020) (unpublished) ("…by signing the union membership card, Oliver…effectively waiv[ed] her right not to support the Union.").

regulation of *the State's* deduction of union payments from employees' wages, including *non*members' wages, and agreed to bind itself to enforce whatever "terms and conditions" WFSE imposed. Just like the union in *Janus*, which was a "joint participant" in the "arrangement" to restrict employees' rights (agency fees), WFSE is a "joint participant" in the "arrangement" here which restricts when nonmembers can stop subsidizing union speech. *See Janus II*, 942 F.3d at 361.

Respondents cannot distinguish the deductions here from the deductions in *Janus* by noting that the "terms and conditions" of the deductions here are "union dues" deducted pursuant to an agreement between "private" parties, SR, 28-29; WR, 19-21, because the State is a party to the authorizations the State enforces. *See NLRB v. U.S. Postal Service*, 827 F.2d 548, 554 (9th Cir. 1987). Regardless, even enforcement of "self-imposed", Pet. App., 16a, restrictions on First Amendment rights based on "private" agreements involve state action. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) (holding a promissory estoppel action to enforce a private confidentiality contract involved a "state action."). *See also* Brief of *Amici* Cara O'Callaghan, *et al.* in Support of Petitioners ("O'Callaghan Brief"), 14-16 (filed March 17, 2021).

States and unions need to be stopped from doing an end run around the First Amendment using the Ninth Circuit's ruling on state action. Indeed, courts throughout the Ninth Circuit are already dismissing for lack of state action lawsuits filed to stop unauthorized union fee deductions based on agreements *forged* by unions. *See* Brief of Goldwater Inst. and Nat'l Taxpayers Union as *Amici Curiae* Supporting Petitioners, 5-8, 12 (filed March 18, 2021). These courts

claim the opinion below requires dismissal because, as Respondents argue here, employees are "really" challenging the validity of a "particular private agreement", Pet. App., 10a – the terms of which the State did not "dictate or… influence", SR 31, and must by law enforce "without inquiry into [its] merits." Pet. App., 12a.

### III. This case is of the utmost importance.

This case concerns the propriety of significant barriers states and unions are devising to restrict when public employees can exercise their *Janus* rights, which is certainly not an issue of "fleeting significance." SR, 33-34.[7] What was true pre-*Janus* remains true now: "[i]t is hard to estimate" how much money has "been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment", *Janus*, 138 S. Ct. at 2486, given the "impediments to *Janus*' implementation" instituted by states and unions. Brief of *Amicus Curiae* Mackinac Ctr. for Pub. Policy in Support of Petitioners, 7 (filed March 18, 2021).

The real-world ramifications of these "impediments" are already being felt because restrictions to employees' First Amendment rights can be included in CBAs and statutes "devoid of any constitutional standards at all." Brief of *Amici Curiae* Washington State Legislators in Support of Petitioners ("Legislators' Brief"), 10, 13-15 (filed March 18, 2021). Indeed, we have already seen states and unions requiring objecting nonmembers such as Cara O'Callaghan to continue paying fees for up to *four years*. *See* O'Callaghan Brief, 4-6. The

[7] The State's presumption that all employees who became union members in the shadow of an agency fee regime have by now exercised their *Janus* rights is spurious given that Respondents have never notified them of any such rights.

opinion below also poses particular challenges to state legislators trying to protect state employees' First Amendment rights, including "give-it-a-try litigation" challenging increasingly restrictive payment commitment periods and other restrictive policies, *see* Legislators' Brief, 11-12, statutory imposition of difficult processes imposed on employees to resign union membership (which Washington already imposed), *id*. at 14-15, and "all-or-nothing" ratification of CBAs containing restrictions on employees' First Amendment rights. *Id*. at 15-16.

Certainly, this Court did not expect that the "adjustments" unions would have to make post-*Janus* "to attract and retain members" would be onerous *restrictions* on employees' First Amendment rights and deceptive schemes to trap employees into subsidizing opinions which they "disbelieve[] and abhor[]." *Janus*, 138 S. Ct. at 2464. But as Employees and *amici* demonstrate, without this Court's further guidance, unions and states are already well on their way to the *Abood*-type[8] "practical problems", "abuse", and "unworkab[ility]" this Court hoped to end by overruling *Abood*. *See Janus*, 138 S. Ct. at 2460, 2486; *see also* Pet., 10, 25-30. The importance of these federal questions, and their square implications in this case, are reason to grant the Petition.

## IV. This case poses no problematic jurisdictional issues.

The Ninth Circuit correctly held that Employees' prospective claims against the State are "inherently transitory." *See* Pet. App., 15a-16a. Respondents argue Employees had "ample time" to obtain a ruling on class

[8] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

certification before their prospective claims became moot, WR, 23-25; SR, 13-15, but in *Gerstein v. Pugh*, this Court focused not on a particular time period, but on the fact that "[t]he length of pretrial custody cannot be ascertained at the outset." *See* 420 U.S. 103, 111 n.11 (1975); *see also Wilson v. Gordon*, 822 F.3d 934, 946 (6th Cir. 2016) ("…the essence of the exception is uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class" and whether the named plaintiff knew "when his claim would become moot because the duration of his claim was at the [defendant's] discretion.") (internal citations and quotations omitted)). Here, WFSE had sole discretion to determine when Employees' prospective claims would become moot, because WFSE could have instructed the State to stop the deductions *at any time*. *See* Pet., 4.[9] Employees "did not know when [their] claim[s] would become moot." *Wilson*, 822 F.3d at 946. As in *Wilson*, WFSE was "on notice" that Employees wished to proceed as a class and WFSE "might strategically seek to avoid that possibility" by mooting their case. *Wilson*, 822 F.3d at 947.

Respondents *stipulated* with Employees to defer the class certification issue until after the ruling on the merits. *See* App., *infra*, 1a-7a & Pet. App. 85a-92a. Civil Rule 23(c)(1)'s requirement that class certifica-

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[9] Additionally, the State stopped deducting fees from petitioners Melissa Belgau, Donna Bybee, and Richard Ostrander (on WFSE's instructions) *three months* after Employees filed this lawsuit (November 2018). *See* State App. 81a, 85a-86a. Thus, the "inherently transitory" exception would still apply even if it required a particular length of time because three to six months "does not give a court enough time to consider and decide a motion for class certification." *Salazar v. King*, 822 F.3d 61, 74 (2d Cir. 2016).

tion occur as soon as "practicable" allows for "wiggle room" and class certification is "not always" proper before addressing the merits. *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941 (7th Cir. 1995) (noting that "[c]lass actions are expensive" and parties may choose to seek a ruling on the merits before class certification). *See also Schweizer v. Trans Union Corp.*, 136 F.3d 233, 238 (2d Cir.1998). Such was true here.

The court below did not err when it held Employees' prospective claims to be "inherently transitory."[10]

Finally, Employees claims are grounded in the facts. Employees challenge the "ten-day escape period policy" to the extent it requires the State to deduct dues or fees from the wages of employees who have not knowingly, voluntarily, and intelligently waived their *Janus* rights. *See* SR, 32-33. Employees challenge neither the narrowness of a subsequent opt-out window nor claim a right to stop paying dues or fees at any time, so long as employees against whom the State enforces those restrictions knowingly, voluntarily, and intelligently waived their *Janus* rights when they agreed to them. *See* SR, 26-27. Additionally, Employees challenge the policy of charging dues or fees to employees who have not waived their *Janus* rights, whether that policy is established by law and CBA (as applied to Employees) or by law (as it continues to apply to putative class members and many others). *See* SR, 33; Pet., 2-4.

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[10] Additionally, nothing about the "inherently transitory" exception required plaintiffs to file a class certification motion to establish the inherently transitory nature of their claims. Further, "showing" the inherently transitory nature of prospective claims only requires that the facts demonstrate that the defendant can moot the case *at any time*. *See* WR, 23; SR, 13.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 28, 2021

# APPENDIX

# APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

[Filed 11/13/18]

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Case No. 3:18-cv-05620-RJB

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BELGAU, *et al.*,

*Plaintiffs*,

v.

INSLEE, *et al.*,

*Defendants*.

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The Honorable Robert J. Bryan

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JOINT STATUS REPORT and DISCOVERY PLAN

Plaintiffs and Defendants jointly submit this Joint Status Report and Discovery Plan, pursuant to the Court's Order Regarding Initial Disclosures, Joint Status Report, and Early Settlement, dated August 14, 2018 (Dkt. 20), Fed. R. Civ. P. 26, and Local Civil Rule 26.

1. Nature and Complexity of the Case.

A. Plaintiffs' Brief Statement of the Case:

This class action case seeks to enforce the United States Supreme Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), which acknowl-

edged the "abuse" public employees have suffered under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) at the hands of union executives and public employers who for

* * *

3. Consent to Assignment of Case to Magistrate Judge.

   No.

4. Discovery Plan.

   The parties believe they may be able to avoid the need for discovery by agreeing to stipulated facts to serve as the basis for cross-motions for summary judgment or partial summary judgment. The parties are currently negotiating regarding those stipulated facts. If the parties reach agreement on stipulated facts by November 30, 2018, they intend to inform the Court and propose a briefing schedule for cross-motions for summary judgment or partial summary judgment. The Discovery Plan below reflects the parties' agreements regarding discovery if they do not reach agreement on stipulated facts by November 30, 2018.

   A. Rule 26(a) Initial Disclosures: The parties agree that, if discovery is necessary, the deadline for Rule 26(a) Initial Disclosures should be December 14, 2018. The Court has already extended this deadline to December 14, 2018 to provide time for the parties to negotiate a set of stipulated facts for cross-motions for summary judgment or partial summary judgment. (Dkt. 39.) If the parties do not reach agreement on stipulated facts, the parties agree that December 14, 2018 should remain the deadline

for Rule 26(a) Initial Disclosures. If the parties do reach agreement on stipulated facts, they will inform the Court and request that the Initial Disclosures deadline be vacated.

B. Discovery Subjects, Timing, and Potential Phasing: The principal topics for discovery, if necessary, include evidence related to Plaintiffs' allegations, claims, request for class certification, and the nature and amount of damages to which plaintiffs allege they and putative class members, if a class is certified, will be entitled if they are able to establish liability.

If the parties reach agreement on stipulated facts for cross-motions for summary judgment or partial summary judgment, discovery will not be necessary until after those cross-motions are resolved. If Defendants' anticipated motion for summary judgment is granted, the case will be resolved.[1] If Plaintiffs' anticipated motion for partial summary judgment is granted, discovery necessary for the resolution of the remaining issues in the action including, but not limited to, class certification, and the remaining, if any, merits issues such as damages, will be necessary.[2] The parties will meet and confer if such discovery becomes necessary after the Court resolves the cross-motions for summary

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[1] The parties reserve all rights of appeal. Plaintiffs specifically reserve the right to an appeal of any such decision and the right to seek class certification if an appeal is successful.

[2] Plaintiffs reserve the right to file an early class certification motion prior to the close of such discovery if and after their motion for summary judgment or motion for partial summary judgment is granted.

judgment or partial summary judgment, and will propose relevant deadlines at that time.

If the parties do not reach agreement on stipulated facts by November 30, 2018, they will proceed with discovery on all issues, without phasing, and agree that the deadline for the close of discovery should be set as April 30, 2019. The parties reserve the right to request an extension of that deadline should the circumstances warrant it.

C. Electronically Stored Information: If discovery becomes necessary either because the parties do not reach agreement on stipulated facts or after the Court resolves the cross-motions for summary judgment or partial summary judgment, the parties will

* * *

E. Anticipated Discovery Sought: See the discussion of the subjects, timing, and potential phasing of discovery in section 4.B above.

F. Phasing Motions:

Cross-motions for summary judgment or partial summary judgment: As discussed above, the parties are currently negotiating regarding stipulated facts that would serve as the basis for cross-motions for summary judgment or partial summary judgment. If the parties reach agreement on stipulated facts by November 30, 2018, they intend to inform the Court and propose a briefing schedule for those cross-motions.

Class certification motions. If Defendants' anticipated motion for summary judgment is

granted, the case will be resolved. If Plaintiffs' anticipated motion for partial summary judgment is granted, discovery necessary for the resolution of the remaining issues in the action including, but not limited to, class certification, and the remaining, if any, merits issues such as alleged damages, will occur, followed by resolution of class certification motions and then any remaining motions for summary judgment.

The Court's resolution of the legal issues that the parties expect would be presented in cross-motions for summary judgment or partial summary judgment could have a significant impact on plaintiffs' request for a class action. If the parties reach an agreement on stipulated facts on which to base cross-motions for summary judgment or partial summary judgment, the parties will request that the Court extend the current deadline for class certification motions set forth in Local Civil Rule 23(i)(3) to one hundred (100) days following the ruling on the parties' cross-motions, if any class certification motions are necessary following that ruling. If the parties do not reach an agreement on stipulated facts by November 30, 2018, the parties will request that the Court extend the current deadline for class certification motions to thirty (30) days after the close of discovery.

Dispositive motions deadline. If the parties cannot agree to stipulated facts, the parties believe the deadline for dispositive motions should be the later of either thirty (30) days after the close of discovery or thirty (30) days after any class certification motions are resolved.

* * *

DATED this 13th day of November, 2018.

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