No. 20-7251

IN THE

Supreme Court of the United States

ERIC WILLIAMS,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF FOR THE LOUIS STEIN CENTER FOR LAW AND ETHICS AT FORDHAM UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE*

The Louis Stein Center for Law and Ethics based at Fordham University School of Law sponsors programs, develops publications, and supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work. The Stein Center collaborates with law students, practitioners, judges, and legal scholars to study and improve the legal profession with an emphasis on the ethical and professional values at the core of the practice of law. As part of this mission, the Stein Center regularly cultivates scholarly inquiry and scholarship on the professional conduct and regulation of lawyers. Over the past decade, the Stein Center and affiliated Fordham Law faculty have examined the ethical dimensions of the administration of criminal justice in the context of the professional obligations of prosecutors.

Conflicts of interest in criminal prosecutions implicate serious professional ethics questions important to the Stein Center. Prosecutors, in their pursuit of justice, owe a duty to the defendant and to the public to carry out each prosecution in a manner

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* Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

that upholds the guarantees of the Constitution. This duty necessarily encompasses the right to a disinterested prosecutor, free from conflict, to avoid both the actual presence of and even the appearance of improper influence that would undermine public trust in the criminal justice system. This interest is heightened when the prosecution determines to seek, and in fact obtains, a sentence of death.

SUMMARY OF ARGUMENT

The constitutional dimensions of the right to a disinterested prosecutor affect not only the individual defendants, but the criminal justice system as a whole. The justice system in the United States depends upon the fair administration of justice, which incorporates a right to a disinterested prosecutor. As a plurality of this Court observed in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), when an "interested party" acts as a prosecutor, the resulting error is "fundamental and pervasive." *Id.* at 809–10 (plurality opinion). The error undoubtedly infects the individual conviction in ways known, unknown, and unknowable. And it casts doubt on the procedures in place to ensure due process under the law. For this reason, as the same plurality determined in *Vuitton*, the involvement of a conflicted prosecutor "require[s] reversal without regard to the facts or circumstances of a particular case." *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

Such a rule is important not only to protect defendants, but to make clear the professional standards to which prosecutors must hold themselves and to encourage compliance with these

standards. Following *Vuitton*, state and federal courts have struggled to determine the appropriate standard by which to assess whether the participation of an interested prosecutor gives rise to a conflict, whether such participation qualifies as a due process violation, and what the remedy should be. Courts often attempt to examine the harm or prejudice caused in a certain prosecution. But this standard—in addition to not addressing the damage caused to the integrity of the judicial system—also leaves prosecutors unable to determine in real time whether they must recuse themselves and what the consequences of the participation will be.

The petition and the decisions below exemplify the inadequacy of the current regime and the importance of a clear and easily applied test of the due process interests at stake. Sue Korioth worked alongside both the Kaufman County District Attorney Michael McLelland, of whose murder petitioner ultimately was convicted, and First Assistant DA Mark Hasse, in whose murder petitioner was implicated during the sentencing phase that resulted in a death sentence. Pet. App. B at 13, 84. Although Korioth recognized that neither she nor anyone else in her office should prosecute the crimes that had been committed against her co-workers and McLelland's wife, Cynthia—indeed, Korioth drafted the recusal motions that the trial court granted in both instances—she nonetheless participated in both the investigation and the prosecution. *Id.* at 85–86, 88. Korioth advised, researched, discussed, drafted, and edited the materials, filings, and decisions underlying a prosecution she was statutorily disqualified from

conducting herself. *Id.* at 88. But because the evidence did not establish that her prohibited participation rose to a level of "control" that the court deemed sufficiently prejudicial, and because the court found no "actual conflict" *ex post*, despite Korioth's own decision to recuse herself *ex ante*, petitioner was denied relief. *Id.* at 110–13.

As this case illustrates, it is effectively impossible to identify all the ways that a prosecutor's conflicts can shape the course of an investigation, prosecution, and trial, and an attempt to determine whether such errors in the very underpinnings of the case were harmless achieves neither justice nor efficiency. Clarifying that the involvement of a conflicted prosecutor violates due process and results in structural error will encourage and empower prosecutors to meaningfully identify and act on their ethical obligations. It will provide courts with a workable test when evaluating allegations that prosecutors have failed to do so. And it will instill broader confidence that those tasked with carrying out the public's interest in criminal justice are doing so without disfavor or personal interest.

This Court should grant the petition and summarily reverse.

ARGUMENT

I. THE INVOLVEMENT OF A CONFLICTED PROSECUTOR IS A DUE PROCESS VIOLATION AND CONSTITUTES STRUCTURAL ERROR

The Court should hold that a conflicted prosecutor's involvement in a prosecution, *per se*, requires reversal because it violates a defendant's due process rights and constitutes structural error.

A. The Due Process Clause Affords A Criminal Defendant The Right To A Disinterested Prosecutor

At the heart of the analysis of the right to a trial by a disinterested prosecution lies the Constitution. As Justice Blackmun stated decades ago, "the practice—federal or state—of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." *Vuitton*, 481 U.S. at 814–15 (Blackmun, J., concurring). The Constitution "requires a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered." *Id.* at 815.

The *Vuitton* case concerned a criminal contempt prosecution undertaken by attorneys representing a party in the underlying litigation. *Id.* at 792 (majority opinion). The Court held, in a seven-vote majority opinion, that the appointment of such an interested prosecutor was error. *Id.* at 809. A four-vote plurality of the Court also concluded that this error was structural, and required automatic reversal. *Id.* at 809–14 (plurality opinion). But the

opinions of the Court—both the majority and the plurality—expressly based their conclusions on the Court's supervisory authority, and did not reach whether the conflict of interest that the Court had found intolerable also violated the defendant's due process rights. *See id.* at 809 (majority opinion). Only Justice Blackmun, in a concurring opinion, would have reached the constitutional issue and held the disinterested prosecutor's participation violated due process. *Id.* at 814–15 (Blackmun, J., concurring).

Justice Blackmun's reasoning is nonetheless in line with the Court's historical approach to identifying the process that criminal defendants are due under the Constitution. The right to a fair trial encompassed in the due process clauses affords criminal defendants a panoply of rights not specifically enumerated in the Constitution. These rights include, *inter alia*, the right to an unbiased judge, *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971), to a presumption of innocence, *Estelle v. Williams*, 425 U.S. 501, 503 (1976), to have the government prove its case beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 365 (1970), and to obtain exculpatory evidence in the government's possession, *Brady v. Maryland*, 373 U.S. 83 (1963). "A fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136 (1955), and so "[f]airness of course requires an absence of actual bias in the trial of cases," *id.* As a result, "our system of law has always endeavored to prevent even the probability of unfairness." *Id.*

In this vein, the Court previously has recognized that "[a] scheme injecting a personal interest,

financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249–50 (1980); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) ("It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

Consistent with this Court's due process jurisprudence and with Justice Blackmun's concurring opinion in *Vuitton*, numerous lower courts have recognized that the right to a disinterested prosecutor does indeed have a constitutional dimension. For example, the U.S. Court of Appeals for the Fourth Circuit has held that prosecution by a prosecutor with impermissibly conflicted interests "violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment." *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967). Other courts have identified varying degrees of due process protection against trial by a conflicted prosecutor. *See, e.g.*, *United States ex rel. SEC v. Carter*, 907 F.2d 484, 486 n.1 (5th Cir. 1990); *United States v. LaVallee*, 439 F.3d 670, 681 (10th Cir. 2006); *United States v. Heldt*, 668 F.2d 1238, 1277 (D.C. Cir. 1981); *Faulkner v. State*, 260 P.3d 430, 431 (Okla. Crim. App. 2011); *In re Goodman*, 210 S.W.3d 805, 808 (Tex. App. 2006); *Lux v. Commonwealth*, 484 S.E.2d 145, 149 (Va. App. 1997); *State v. Eldridge*, 951 S.W.2d 775, 782 (Tenn. Crim. App. 1997); *State v.*

Hunter, 313 S.C. 53, 54 (S.C. 1993); *Cantrell v. Commonwealth*, 329 S.E.2d 22, 26 (Va. 1985).

These lower court decisions, like Justice Blackmun's concurring opinion in *Vuitton*, correctly recognize that criminal prosecution by an attorney with a conflict of interest implicates a criminal defendant's right to due process. The petition provides an opportunity for this Court to do the same.

B. The Involvement Of A Conflicted Prosecutor Is Structural Error

The plurality in *Vuitton* observed that when an "interested party" acts as a prosecutor, the resulting error is "so fundamental and pervasive that [it] require[s] reversal without regard to the facts or circumstances of a particular case." 481 U.S. at 809–10 (plurality opinion) (quoting *Van Arsdall*, 475 U.S. at 681). The plurality's conclusion that the error was not subject to harmless error review but instead required reversal in every instance is of a piece with the Court's subsequent structural error jurisprudence.

In *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), the Court identified "at least three broad rationales" for exempting an error from harmless error review: (1) "when the error's effects are simply too hard to measure," (2) when "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," and (3) when "the error always results in fundamental unfairness." *Id.* at 1908. All three considerations militate in favor of a structural-error treatment of prosecutorial conflicts.

Difficulty of measurement. There is no reliable method of measuring how the interests and biases that a conflicted prosecutor brings to a prosecution affect subsequent decision-making, either by that prosecutor individually or by a broader team. Prosecutorial communication and decision-making happen off the record, outside the view of the court. Accordingly, it is effectively entirely obscured from later judicial review. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("[T]he decision to prosecute is particularly ill-suited to judicial review."); Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 491 (2017) (noting that "actual prejudice" in the case of a conflicted prosecutor is "nearly impossible to show, given that there is no discovery of prosecutors' internal decision-making and, in any event, prosecutors themselves may be unaware of the cognitive impact of a conflict").

In *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), a case involving an analogously difficult-to-measure potential for bias, the Court held that the mere participation of one conflicted judge on a three-judge panel constituted structural error requiring reversal in every instance. *Id.* at 1909–10. The Court reasoned that, "while the influence of any single participant in [the judicial] process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." *Id.* at 1909 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Brennan, J., concurring)). So too may the involvement of a conflicted prosecutor "shape" the course of a criminal prosecution by influencing

the decision to indict, whether to offer a plea, how to conduct the trial, and what penalties to seek. *See* Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 Dick. L. Rev. 589, 595–601 (2019) (discussing the enormous impact that prosecutors' exercise of discretion has on a prosecution). As a result, a "[h]armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). Because a conflicted prosecution can create harm yet evade a harmless error review, it is properly treated as a structural error.

Interests beyond a reliable outcome. The public has an interest in appointed or elected prosecutors doing the public's work without improper consideration of personal interests. The presence of a conflict does not just call into doubt the standing of one prosecutor in a single case, but can work to undermine public faith in the criminal justice system, much like the participation of a biased judge. *See Williams*, 136 S. Ct. at 1909 ("[T]he appearance of bias demeans the reputation and integrity not just of one jurist, but of the large institution of which her or she is a part."). As the *Vuitton* plurality recognized, the participation of a conflicted prosecutor raises doubts that "undermine[] confidence in the integrity of the criminal proceeding," and "'calls into question the objectivity of those charged with bringing a defendant to judgment.'" 481 U.S. at 810 (plurality opinion) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986)). A prosecution involving an interested

prosecutor undermines the public's trust in the judicial system and the public's interest in a just outcome.

Fundamental unfairness. Finally, it is fundamentally unfair to a defendant to have to contend with the awesome power of the state's prosecuting authority if that office is dedicated not only to doing justice but to achieving a particular outcome with respect to that particular defendant, even if the interests of justice would dictate a different outcome. Trial by a conflicted judge is fundamentally unfair and not amenable to harmless error analysis, *see Tumey v. Ohio*, 273 U.S. 510, 535 (1927), as are other "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards," *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Like those errors in the basic architecture by which a defendant is charged, tried, and convicted, and unlike errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented," *id.* at 307–08, the involvement of a conflicted prosecutor calls the entire proceeding into question and does not lend itself to an appellate determination of how a prosecution by an unbiased prosecutor would have differed, as is necessary to deem a constitutional violation harmless.

Each of the bases for finding structural error are present in this case, as in other cases in which prosecutors have conflicts of interest. A criminal prosecutor "is not disinterested if he has . . . an axe to grind against the defendant, as distinguished from the appropriate interest that members of

society have in bringing a defendant to justice with respect to the crime with which he is charged." *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (Friendly, J.). By recusing herself and her office from prosecuting petitioner but nonetheless playing an extensive behind-the-scenes role in petitioner's arrest, conviction, and death sentence, Korioth applied that principle in word, but not in deed. The extent of Korioth's influence on the innumerable discretionary and strategic choices that occur in a prosecution for capital murder are unknown and unknowable, and the lower courts' attempt to re-weigh the animus she had recognized merited disqualification and to measure the extent she brought that conflict to bear on such decisions was unsurprisingly fruitless. Korioth's bias and the resulting impact on petitioner's conviction and sentence were difficult to measure, at odds with the public's interest in the neutral application of justice, and fundamentally unfair.

II. A STRUCTURAL-ERROR RULE WOULD PROVIDE PROSECUTORS WITH THE MEANS TO AVOID A DUE PROCESS VIOLATION

A clear statement that the involvement of a conflicted prosecutor amounts to a due process violation and qualifies as structural error not only would protect the integrity of the judicial system and the rights of individual defendants, but it also would be likely to lessen the occurrence of prosecutions tainted by conflict. Lower courts have frequently conflated the analyses for judging a conflict, due process violation, and appropriate remedy when faced with a prosecution involving a conflicted

prosecutors. Prosecutors are left with an amorphous test for assessing their own conduct and the consequences of it.

The articulation of a bright-line rule holding that an improperly conflicted prosecutor's involvement requires reversal in every instance would resolve a lack of uniformity in this area of law, and thereby encourage and empower prosecutors to avoid the participation of a conflicted prosecutor.

A. The Different Standards For Assessing The Nature Of And Remedy For A Prosecutor Conflict Fail To Provide Prosecutors With Clear Guidance Necessary To Comply With Their Ethical Obligations

As discussed, *supra* Part I.B, the plurality opinion in *Vuitton* "establish[ed] a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment." 481 U.S. at 814 (plurality opinion). However, given the lack of a majority opinion or subsequent guidance from the Court on this point, few lower courts have similarly concluded that "reversal is automatic if conflict is found." *United States v. Lanier*, 879 F.3d 141, 151 (5th Cir. 2018); *see, e.g.*, *Faulkner*, 260 P.3d at 433 (rejecting argument that defendant had to show actual harm from involvement of conflicted prosecutor); *Commonwealth v. Eskridge*, 604 A.2d 700, 702 (Pa. 1992) ("We hold that a prosecution is barred when an actual conflict of interest affecting the prosecutor exists in the case; under such circumstances a defendant need not prove actual prejudice in order to

require that the conflict be removed."); *see also Sinclair v. State*, 363 A.2d 468, 475 (Md. 1976) (pre-*Vuitton* decision requiring automatic reversal of conviction based on impermissible prosecutorial conflict).

Other courts have disregarded the plurality's rule in *Vuitton* and instead have required defendants who challenge the disinterestedness of their prosecutors to "prove actual prejudice" on appeal. *Heldt*, 668 F.2d at 1277; *see, e.g.*, *United States v. Wallach*, 935 F.2d 445, 460 (2d Cir. 1991) (defendants must "establish[] that they were prejudiced by any conflict of interest" to obtain relief); *United States v. Kahre*, 737 F.3d 554, 574 (9th Cir. 2013) ("[D]efendants must demonstrate prejudice from the prosecutor's potential conflict of interest."); *Webber v. Scott*, 390 F.3d 1169, 1176–77 (10th Cir. 2004) (applying harmless error analysis); *United States v. Spiker*, 649 F. App'x 770, 771 (11th Cir. 2016) (requiring prejudice); *Pabst v. State*, 192 P.3d 630, 639–40 (Kan. 2008) (requiring prejudice under state law); *People v. Vasquez*, 137 P.3d 199, 213 (Cal. 2006) (requiring prejudice to reverse conviction obtained by prosecutor who should have recused under state law).

Nor do lower courts all agree on the allocation of the burden, even when they otherwise agree that prosecution by a conflicted prosecutor can potentially be excused as harmless. The Fourth Circuit, in a frequently cited decision, applied harmless error analysis but placed the burden on the government to prove the due process violation was harmless beyond a reasonable doubt. *Ganger*, 379 F.2d at 714–15. Similarly, but not identically, the Court of Appeals of

New York has reasoned that "the practical impossibility of establishing that the conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice." *People v. Zimmer*, 414 N.E.2d 705, 707 (N.Y. 1980); *see also Spiker*, 649 F. App'x at 774 (finding plain error and reversing conviction obtained by interested prosecutor due to "the far-reaching effect" of the prosecutor's choices and because the conflict "seriously affected the fairness, integrity, or public reputation of a judicial proceeding").

This inconsistent review for prejudice obscures more than it illuminates. Courts routinely fail to distinguish clearly between their analyses of whether a particular prosecutor had an impermissible conflict of interest, whether an impermissibly conflicted prosecutor was sufficiently involved in a prosecution to call it into question, and whether a defendant was ultimately prejudiced. *Compare, e.g.*, *In re Jackson*, 51 A.3d 529, 539 n.13 (D.C. 2012) ("The prosecutor is not disinterested if he or she 'has a special motivation to favor the victim or satisfy a victim's private agenda if that agenda is inconsistent with the prosecutor's public duty to serve all the people neutrally, i.e., equally and fairly.'") (quoting Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 Lewis & Clark L. Rev. 559, 563 (2005)), *with, e.g.*, *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988) (finding no reversible error where undisputedly interested party's attorney participated in prosecution because "[t]here [was] no suggestion that the United States Attorney . . . did

not exercise an independent prosecutorial judgment").

The decision below recognized and indeed exemplifies the lack of clarity in the relevant law. The trial court's Amended Findings of Fact and Conclusions of Law relied on secondary authority for the proposition that *Vuitton* "did not settle the issue of whether a prosecutor's lack of disinterestedness can constitute a per se violation of due process or whether disinterestedness is subject to harmless error analysis." Pet. App. B at 111 (quoting Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 Baylor L. Rev. 171, 187 (2002)). And the ensuing analysis conflated prosecutor Korioth's conflict of interest, Korioth's involvement in petitioner's prosecution, and whether petitioner was prejudiced. In assessing whether Korioth was a "decision maker," the court observed that "the evidence of [petitioner's] guilt is strong," which is relevant to prejudice. *Id.* at 94. In assessing whether Korioth had an actual conflict of interest due to her friendship with a victim, the court observed that petitioner "fail[ed] to prove Korioth committed misconduct towards [petitioner's] prosecution based on her friendship," which is relevant to her involvement. *Id.* at 104. And in assessing whether petitioner was prejudiced, the court observed that he "was tried by an impartial judge and jury, he was represented by counsel, and he had a full opportunity to present his case," none of which addresses the role of the prosecutor. *Id.* at 113.

B. Barring Participation By Conflicted Prosecutors Gives Prosecutors Clear Tools To Analyze And Comply With Their Ethical Obligations

Given these muddled and divergent standards for evaluating impermissible prosecutorial conflicts, prosecutors are left to engage in a guessing game as to their ethical obligations in any given case. Unlike private attorneys, prosecutors cannot defer to a client to assess or waive conflicts of interest. Green & Roiphe, *supra*, at 505. Prosecutors themselves are often the only and final arbiters of whether or not to recuse, and may fail to consider the effect that their involvement or presence may have on discretionary decisions in the case. *Id.* at 505–06. The importance of self-regulation among prosecutors is only heightened by their historical hostility and resistance to professional regulation by external bodies such as bar associations. *See* Bruce A. Green, *Prosecutors and Professional Regulation*, 25 Geo. J. Legal Ethics 873, 875–82 (2012).

A standard that looks uniquely to the existence of a conflict gives prosecutors a clear, bright-line rule at the outset of a prosecution to determine whether they may be involved. Not only does it take a much needed zero-tolerance policy regarding the potential for impermissible influence, but it also operates to ensure public confidence in the system by focusing on the knowable potential for impropriety, rather than the unknowable, case-by-case inquiry of actual prejudice. Green & Roiphe, *supra*, at 491.

Conversely, an involvement- or prejudice-based standard lacks clarity and requires a prosecutor to

reevaluate the sliding scale of the seriousness of the conflict and the degree of their involvement throughout the litigation. It also requires prosecutors to account for biases and influence that they themselves may not even be aware of. *See id.* Moreover, because prosecutors' offices do not typically record their deliberative processes in detail, requiring a defendant to demonstrate actual prejudice imposes a near-impossible task unless the degree of the conflict is so significant that there can be no doubt as to its effect. If such a standard were applied, it would discourage prosecutors with serious but less blatant conflicts from recusing themselves, knowing that a defendant will be unable to satisfy the ultimate burden of demonstrating harm.

CONCLUSION

This Court should grant the petition for certiorari and summarily reverse the decision of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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