No. 22-1074

IN THE

Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO,

Respondent.

On Writ of Certiorari to the California Court of Appeals Third Appellate District

BRIEF ON THE MERITS FOR *AMICUS CURIAE* BUILDING INDUSTRY ASSOCIATION OF THE GREATER VALLEY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Building Industry Association of the Greater Valley ("BIAGV") is a Stockton, California-based 501(c)(6) non-profit trade association, the mission of which is to meet community housing needs, protect stable and livable wage jobs, and advocate for responsible development, land use, and building policies. BIAGV's territory covers much of the northern San Joquin Valley and western Sierra Nevada foothills of California, coterminous with the counties of Calaveras, Mariposa, Merced, San Joaquin, Stanislaus, and Tuolumne. BIAGV is comprised of approximately thirty-five "builder" members consisting of home builders, land developers, remodelers, suppliers, and other persons engaged in the home building industry, and approximately seventy-five "associate" members including banking institutions, title companies, attorneys, and other professionals who provide support services to the residential development industry.

BIAGV regularly advocates on behalf of its members before local government bodies such as city councils and county boards of supervisors (of which there are a total of twenty-five within the organization's territory) regarding land use regulations, planning policies, zoning ordinances, and develop-

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[1] Pursuant to Rule 37.2, all parties were timely notified of the intent to file this amicus brief. Further, pursuant to Rule 37.6, no part of this brief was authored by any party or its counsel, and no person or entity other than BIAGV and its counsel funded its preparation or submission.

ment exactions such as "impact fees" like those applied to Petitioner Sheetz's property adopted via quasi-legislative processes pursuant to California's Mitigation Fee Act (Cal. Gov. Code §§66020 *et seq*.).

Those agencies, like others across California, rely on the precedent set by California courts to circumvent the Constitutional protections articulated by this Court in *Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013). For this reason, BIAGV views this case as an opportunity for this Court to clarify appropriate limitations applicable to cities, counties, and other local governments ensuring those agencies do not continue to utilize California judicial exceptions to the unconstitutional conditions doctrine to engage in an "out-and-out plan of extortion" when conditioning the approval of development projects. *Nollan*, 483 U.S. at 837.

INTRODUCTION AND SUMMARY OF ARGUMENT

State and local governments, faced with tax-dependent budgets and lists of policy and infrastructure wants and needs from a broad range of constituents are often financially challenged to provide all that is requested by the public. Thus, there is a desire to turn to private enterprise to make up for the shortfall. Perhaps nowhere is this more common than in the area of land use and development permitting—where property owners must seek permission from local government to make use of their

land and such permission is granted subject to conditions of approval. Such conditions frequently include "exactions"—dedications of property, improvements of public property, and/or the payment of "in-lieu" or "impact" fees. This Court, through the "*Nollan/Dolan*" test, holds that such exactions do not amount to an uncompensated taking of property "so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the [permittee's] proposal." *Koontz*, 570 U.S. at 605–606. This is often referred to as the "unconstitutional conditions doctrine." Unfortunately, it is common for local government agencies to impose exactions on development permits that do not satisfy the mandates of *Nollan/Dolan* and lower courts, like the California Supreme Court have created a broad loophole, exempting "legislatively" adopted exactions from any review under *Nollan/Dolan*—as did the California Court of Appeal in this case, applying a deferential "reasonable relationship" standard to El Dorado County's traffic impact fees.

But the California rule limiting *Nollan/Dolan* scrutiny to situations where the government is imposing ad-hoc conditions does substantial harm to the Takings Clause of the Fifth Amendment of the United States Constitution, and this Court's line of cases implementing that provision, for several reasons.

First, the California Rule's distinction between legislatively-adopted exactions and administratively-imposed exactions is not found anywhere in the

Constitution. This is a loophole invented by local government and adopted by the California Courts and other lower tribunals.

Second, this arbitrary distinction is wholly inconsistent with *Nollan*, *Dolan*, and *Koontz*. The conditions of approval challenged in those cases each implemented a legislatively-adopted policy or program that authorized the uncompensated taking. The public easement demanded from *Nollan* implemented a beach access program authorized by the California Public Resources Code. *Nollan*, 483 U.S. at 841–842. Likewise, the stream setback and bicycle path dedications required in *Dolan* were mandated by the City of Tigard's municipal code. *Dolan*, 512 U.S. at 379–380. The wetlands preservation easement or in-lieu monetary exaction imposed by the Water District in *Koontz* was part of an adopted State of Florida wetlands preservation program. *Koontz*, 570 U.S. at 600. That is, each of the exactions found to violate the Takings Clause by this Court, were "generally applicable to a large class of property owners through legislative action" (*California Bldg. Indus. Ass'n v. City of San Jose*, 61, Cal. 4th, 435, 459 n. 11 (2015) (hereafter, "*CBIA*") and would not have been subject to unconstitutional conditions doctrine scrutiny under the California Rule.

Finally, the issue addressed in this case is not unique. BIAGV regularly encounters cities and counties in its territory attempting to implement this "legislative" loophole through creative ordinance-drafting by requiring new development to forego property rights without compensation in

exchange for permission to develop. This includes "inclusionary housing" restriction/fee programs like that addressed in *CBIA*, public infrastructure impact fees like that imposed by El Dorado County on Mr. Sheetz in the present case, and public land improvements/fees like that addressed in *Koontz*.

To this end, BIAGV encourages this Court to hold that the unconstitutional conditions doctrine applies to all exactions placed on development whether via ad-hoc decision or legislatively adopted scheme, and to reverse the lower court's decision with instructions to apply *Nollan/Dolan* scrutiny to the impact fees assessed on Mr. Sheetz's home construction.

ARGUMENT

I. The "Legislative" Exactions Exception Created by the Lower Courts Conflicts With The Purpose and Text of The Fifth Amendment and the Holdings of *Nollan* and *Dolan*.

As the California Court of Appeal noted in upholding the traffic impact fee assessed against Petitioner Sheetz, "[u]nder California law, only certain development fees are subject to the heightened scrutiny of the *Nollan/Dolan* test… The requirements of *Nollan* and *Dolan*… do not extend to development fees that are generally applicable to a broad class of property owners through legislative action." (A-10 to 11, *Sheetz v. County of El Dorado*, 84 Cal.App.5th 394, 406–407 (3d. App. Dist. Oct. 19, 2022), citing *CBIA*, 61 Cal.4th at 459, n.11 (2015) [holding City's "inclusionary housing" ordinance requiring new residential projects to either restrict 15% of units as

"affordable" or to pay an in lieu affordable housing fee was not subject to *Nollan/Dolan* scrutiny] and *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643, 663–671 (2002)) [holding City's Residential Hotel Unit Conversion & Demolition Ordinance which imposed a housing replacement fee as a condition of receiving a conditional use permit was not subject to *Nollan/Dolan* scrutiny.]) But this exception for "legislative" exactions adopted by the California Supreme Court and others is inconsistent with both the text of the Takings Clause and the holdings in *Nollan*, *Dolan*, and *Koontz*.

A. Applying an Exception to *Nollan/Dolan* for Legislatively Authorized Exactions Conflicts with the Takings Clause.

Our Nation's Founders and this Court declared that the "protection of property rights is 'necessary to preserve freedom' and empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Cedar Point Nursery v. Hassid* ___ U.S. ____, 141 S.Ct. 2063, 2071 (2021). As this Court recently acknowledged, the intricacies of our modern society "reinforce the importance of safeguarding the basic property rights that help preserve individual liberty." *Id*. at 2078. At the core of the Takings Clause is the promise that private property shall not be taken for public use without just compensation and this promise is enforced by "bar[ing] [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be

borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The text of the Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. There is no textual justification for the distinction between administrative and legislative exactions effectuating a taking. As previously articulated by this Court, the Takings Clause "is concerned simply with the act, and not with the governmental actor." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Protection* 560 U.S. 702, 713–714 (2010); *Cedar Point Nursery*, 141 S.Ct. at 2072 (finding that the essential question is "not whether the government action at issue comes garbed as a regulation" but "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property"). Furthermore, the Court in its decision in *Koontz* broadly references "a unit of government" rather than specifically delineating administrative actions when discussing the prohibition against conditioning approval of a land use permit on the relinquishment of property rights unless it falls within the 'nexus' and 'rough proportionality' standard articulated by this Court in *Nollan/Dolan*. *Koontz*, 570 U.S. at 599. As noted by Justice Thomas in his concurrence in denying certiorari, "I continue to doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'" *California Bldg.*

Indus. Ass'n v. City of San Jose, Calif. 577 U.S. 1179, 1179–1180 (2016).

Thus, the exceptions for legislative exactions adopted by the California courts do not logically flow from the language of the Takings Clause of the Fifth Amendment.

B. The Distinction Between Administrative and Legislative Exactions Is A Legal Fallacy Seemingly Grounded In Misreading Of This Court's Ruling in *Dolan*.

A survey of judicial history following *Dolan* indicates that lower court opinions excluding legislative exactions from *Nollan/Dolan* scrutiny springs from the fallacy that this Court's opinion in *Dolan* expressly limited its holding to ad-hoc administrative exactions. *See, e.g*., *CBIA*, 577 U.S. at 1179.

But as Petitioner Sheetz notes in his brief, the unconstitutional conditions applied in *Nollan*, *Dolan*, and *Koontz*, each derived from legislative mandates. (Pet. Brief at 8–9, 14–24). Thus, the artificial exception adopted by California courts is completely at odds with the law of the land as articulated by this Court.

To point a finer point on it, the lower court in this case and other California judicial opinions have held that the requirements of *Nollan/Dolan* apply only where exactions are "imposed . . . neither generally nor ministerially, but on an individual basis." A-10 to 11, *Sheetz*, 84 Cal.App.5th at 406–407. This rule is plainly inconsistent with the background of *Nollan* and *Dolan*. The easement condition imposed on

the Nollan family by the California Costal Commission was part of a "comprehensive program arising under the California Coastal Act, Cal. Pub. Resources Code Section 30212(a)." *Nollan*, 483 U.S. at 841–842. Likewise, the stream buffer and bicycle path dedications applied to Ms. Dolan's development project were mandated by the City of Tigard's municipal ordinance and not merely imposed in an ad-hoc or arbitrary manner. *Dolan*, 512 U.S. at 379–380. Finally, the in-lieu impact fee successfully challenged in Koontz implemented requirements from the Florida Dept. of Environmental Regulations' adopted wetlands preservation program standards. *Koontz*, 570 U.S. at 600. Thus, the artificial distinction between "ad-hoc" exactions and "legislatively enacted" exactions—which the California courts have used to justify exempting the latter from *Nollan/Dolan* scrutiny is an illusion. Members of this Court have repeatedly recognized this error.

For example, a year after the ruling in *Dolan*, Justice Thomas joined by Justice O'Conner in a dissenting opinion to the denial of certiorari articulated his confusion as to "why the existence of a taking should turn on the type of governmental entity responsible for the taking." *Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.*, 515 U.S. 1116, 1117–1118 (1995). Justice Thomas highlighted the absurdity of such a distinction by stating that "[a] city council can take property just as well as a planning commission can." *Id*. Justice Thomas maintained this position in his 2016 concurrence of the denial of certiorari by articulating his continued doubt that "the existence of a

taking should turn on the type of governmental entity responsible for the taking." *CBIA*, 577 U.S. at 1179.

This fundamental misapplication of the unconstitutional condition doctrine by lower courts appears to result from the courts collapsing the two distinct concepts of broad land use regulations and with development conditions applied when permits or other approvals are issued. In *Dolan*, this court expressly distinguished the exactions imposed on Ms. Dolan as a condition of her permit from legislative zoning regulations. *Dolan*, 512 U.S. at 384–385.[2] In making this distinction this Court cited to *Euclid, Pennsylvania Coal*, and *Agins*, all of which discuss land use restrictions and none of which imposed exactions. *Village of Euclid v. Ambler Realty Co*., 272 U.S. 365 (1926) (upholding a zoning ordinance prohibiting industrial uses in an area of the city where landowner's property was located); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (finding a statute which prohibited the mining of anthracite

[2] The court first distinguishes the exactions imposed on Ms. Dolan from legislative zoning regulations in the body of the opinion by stating that the land use regulation in the present case was distinguishable from *Euclid, Pennsylvania Coal Co*., and *Agins* in that they involved essentially legislative determinations classifying entire areas of the city, as opposed to an adjudicative decision to condition of an application for a building permit on an individual parcel. *Dolan*, 512 U.S. at 385. The court in footnote 8, agrees with Justice Stevens dissent that the burden rests with the party making the challenge when it is a generally applicable zoning regulation and with the city when it makes an adjudicative decision to condition an application for a building permit on an individual property.

coal that caused the subsidence of, among other things, any structure used as a human habitation unconstitutional); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (finding an ordinance imposing density restrictions constitutional). This Court referred to these generally applicable zoning regulations or "legislative determinations" as distinct from the development conditions imposed on Ms. Dolan's land use permits *not* to confine *Nollan/Dolan* scrutiny exclusively to "ad-hoc" exactions applied to development permits, but rather to distinguish development impact fees and exactions that attach when a party seeks a development permit from the government, from those broader land use regulations such as zoning, height restrictions, and building setbacks to which the Takings Clause is inapt. *Dolan*, 512 U.S. at 385.

As a result of this systemic misinterpretation of *Dolan* in California, many local agencies have converted the shield created by this Court to a sword, and convinced lower courts to use that blade to carve broad exceptions into to the unconstitutional conditions doctrine. Such recurring error should be corrected by this Court.

II. The Practical Implications of California's Artificial Distinction.

BIAGV and its members on a daily basis are "in the trenches" working with local government officials on issues ranging from broad legislative policy documents, such as general plan and zoning ordinances, to more discrete site specific land use

permitting such as conditional use permits, subdivision maps, and building permits. As a practical matter, California's application of the "legislative" exactions exemption provides an unworkable framework which grants unfettered discretion to local government by allowing agencies to garble the presentation of an exaction such that it places upon the individual the burden of the community cutting against the core of the Takings Clause. *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 881(1996) (finding that the *Nollan* and *Dolan* standard does not apply to cases in which the exaction takes the form of a generally applicable development fee or assessment); *San Remo Hotel L.P.*, 27 Cal.4th at 668 (finding that individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*, while generally applicable development fees warrant a more deferential type of review).

By way of example, municipal "inclusionary zoning" ordinance-based development conditions like that upheld by the California Supreme Court in *CBIA* are increasing in number around the state. *CBIA*, 577 U.S. at 1179. In fact, BIAGV has seen several such proposed ordinances make their way from the San Francisco Bay Area into the neighboring San Joaquin Valley. Such ordinances typically compel developers to reserve a minimum percentage of units for "low income" purchasers or, instead, to pay an *in lieu* affordable housing impact fee. Such reservations or fees are not subjected to *Nollan/Dolan* scrutiny—either at the time they are adopted by

ordinance or when they are applied as conditions of development upon the issuance of land use approvals or building permits. Relying on the precedent set in *CBIA*, cities typically declare such exactions exempt from any *Nollan/Dolan* analysis. Of course, if a *Nollan/Dolan* scrutiny were applied, such an exaction would fail to meet fundamental nexus and rough proportionality requirements.

Any student enrolled in an introductory economics course learns that under the law of supply and demand, the price of a commodity, such as housing, will rise when supply is low and demand is high and will fall when supply increases and demand subsides. The idea that those adding housing supply to the market (thereby, in theory, reducing housing prices) should also be harnessed to bear the costs of providing additional affordable housing via the government prohibiting their ability to sell their product at market value or charging *in lieu* fees, contradicts *Nollan's* "essential nexus" standard. Thus, local governments place the burden of fixing the very public problem of housing affordability on a group (home builders) whose activities have absolutely no nexus to that problem (and likely provide some self-executing relief to the issue).[3]

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[3] Further reviewing legislatively-adopted local government exactions from the scrutiny of *Nollan/Dolan*, the California Supreme Court held that the ordinance at issue in *CBIA* was a merely a land use regulation that was not subject to *Nollan/Dolan* scrutiny because it did not amount to a taking of property nor did it take money. *CBIA,* 61 Cal. 4th at 461 ("the San Jose inclusionary housing ordinance does not violate the unconstitutional

The assumption that the electorate will sufficiently protect the Constitutional integrity of state and local exactions established by statute or ordinance as championed by the majority opinions in *CBIA*, 61 Cal.4th at 435 and *San Remo Hotel L.P.*, 27 Cal.4th at 671, is misguided. If a city adopts an

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conditions doctrine because there is not exaction—the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process."). The court reasoned that for an exaction to occur under the Takings Clause the government must "demand[ ] the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval." *Id.* at 460. But this creative analysis ignores the fact that the ordinance does demand the developer, as a condition of receiving permission to build a residential project, give a material interest in real property to the City— the ability to freely convey that property at market value secured by deed restriction. As taught in first year property law classes, property is a "bundle of sticks." Requiring developers to give up one "stick" (their right to freely convey property at market value secured via deed restriction) is indistinguishable from the "stick" demanded of the Nollans by the California Coastal Commission (public easement across property) or the "stick" the City of Tigard required of Ms. Dolan to convey (property dedication for public drainage and bike path) in exchange for permission to develop. More pointedly, to the extent the water district's obligation that Mr. Koontz preserve portions of his land or pay in lieu fees for wetlands preservation did not satisfy the unconstitutional conditions doctrine, because the payment of a "monetary exaction" or "impact fee" may be classified as a "stick" of property interest, nor do inclusionary housing ordinances like that endorsed by the California Supreme Court in *CBIA* or the $23,400 traffic impact fee challenged in the present case. For, as this Court held "so-called 'monetary exactions' must satisfy the essential nexus and rough proportionality requirements of *Nollan* and *Dolan*." [*Koontz,* 570 U.S. at 613.]

excessive fee on new development that either does not have a nexus to such developments impacts, or where a nexus exists but the condition is not roughly proportional to the project's impacts, it is illogical to assume that the residents who would likely welcome the demanded improvements to public infrastructure without any increase in their own tax liability would understand, let alone consider, this issue when deciding to cast their vote in the next city council election such that *Nollan/Dolan* protections are extraneous. Indeed, an electorate consisting of existing residents may see the shifting of such burdens to developers and new residents as a benefit. By analogy, this Court did not decide to sit-out school desegregation efforts in *Brown v. Board of Education*, 347 U.S. 483 (1954) and its progeny, on the theory that if the majority of voters in Arkansas and other southern states opposed segregation they could vote out members of state and local legislative bodies implementing such policies. Rather, it recognized that the electorate will not always support *what is required of the Constitution*. Where a Constitutional right is at issue—be it a property right, a right to equal protection under the law, a right to be free from unreasonable searches, or the right to bear arms—it is the role of this Court, as an apolitical body, to cut through the political rhetoric and protect those rights guaranteed by the Supreme Law of the Land (Art. IV). For this exact reason, the Constitution prohibits forcing some people alone to bear public burdens. *Armstrong*, 364 U.S. at 49.

Endorsing the California Rule allows the government to do exactly what this Court warned against in *Koontz*; evade the limitations of *Nollan* and *Dolan* simply by its phrasing. *Koontz*, 570 U.S. at 606 (warning against allowing the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval); *Cedar Point Nursery*, 141 S.Ct. at 2067 (finding that the Constitution prevents property rights from being so easily manipulated); *Nollan*, 483 U.S. at 841 (holding that the Takings Clause is more than a pleading requirement and that compliance with it is more than just "an exercise in cleverness and imagination").

This Court recently recognized the vulnerability of the landowner to "the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Koontz*, 570 U.S. at 604–605 (noting that land use permit applicants are particularly vulnerable to extortionate demands for money). This Court further acknowledged that the landowner is likely to "accede to the government's demand, no matter how unreasonable." *Id*. Although there is a public desire to improve our communities that *amicus* does not contest, this does not permit the agency to achieve "the desire by a shorter cut than the constitutional way of paying for the change." *Dolan*, 512 U.S. at 396 (quoting *Pennsylvania Coal*, 260 U.S., at 416, 43 S.Ct. at 160).

California's municipal finance paradigm has resulted in a dependence upon development impact fees and other development exactions such that development related fees comprise of up to one third of some California cities' budgets. *Residential Impact Fees in California*, TENER CENTER FOR HOUSING INNOVATION AT UC BERKELEY, at 14 (August 2019). A recent study surveying a fragment of California cities revealed that average impact fees were $23,455 for a single-family home and $19,558 for a multi-family home, nearly three times the national average. *Residential Impact Fees in California*, TENER CENTER FOR HOUSING INNOVATION AT UC BERKELEY, at 42–45 (August 2019). In the Central Valley the weighted average fees and costs for home is approximately $50,000 per house. *Residential Development Impact Fee Comparison Study*, NORTH STATE BUILDING INDUSTRY ASSOCIATION, at 6 (May 2021). This issue is exacerbated in areas such as Sacramento County wherein the weighted average of fees and costs for homes is approximately $97,000 per unit with the highest range fees and costs for the county set at $105,000, amounting to one-fifth of the price for the home. *Id.* at 6–7.

BIAGV is always vigilant in reviewing local government attempts to adopt new legislative exactions or to raise existing impact fee amounts. Occasionally, BIAGV is forced to challenge such legislation in court where the ordinance bears no relationship to the impact. (*See, e.g., Bldg. Indus. Ass'n of the Greater Valley v. City of Hughson et. al.*, Case No. CV-21-000815, Superior Court of California, County

of Stanislaus (2021).) This is all the more reason why this Court should eliminate the California Rule.

CONCLUSION

The *Nollan/Dolan* test does not eliminate the government's ability to execute legitimate land use controls, rather it ensures there are predictable boundaries by requiring the government to show its work to withstand scrutiny. The core of this Court's holding in *Nollan* and *Dolan* was to strike the balance between the interest of the city in improving the community and the property rights of the landowner by permitting the "government [ ] [to] choose whether and how a permit applicant is required to mitigate the impacts of a proposed development" but preventing it from "leverage[ing] its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Koontz*, 570 U.S. at 606. California's carve-out for any dedication, fee, or other exaction that is authorized by a legislative process is a textbook example of the exception swallowing the rule. This Court should vacate the state court's judgment and remand with instructions to apply *Nollan*, *Dolan*, and *Koontz* to the traffic impact fees demanded of Mr. Sheetz.

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Respectfully submitted,

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