No. 22-822

# In The Supreme Court of the United States

AVERY DENNISON CORPORATION,

*Petitioner,*

v.

ADASA, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit**

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether the Federal Circuit correctly held a patent claim to an RFID tag claiming a specific, hardware-based RFID serial number data structure, designed to enable technological improvements to the commissioning process, patent-eligible under 35 U.S.C. § 101.

## CORPORATE DISCLOSURE STATEMENT

Respondent ADASA, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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## INTRODUCTION

This Court should deny and not hold the present Petition. Avery Dennison Corporation ("Petitioner"), a party severely sanctioned for litigation and discovery misconduct in proceedings below, seeks review of the Federal Circuit's case-specific application of this Court's precedents governing judicial exceptions to patent-eligibility under 35 U.S.C. § 101. Petitioner complains that a unanimous panel of the Federal Circuit erred when affirming the District Court's determination of eligibility. (Pet. 24, stating the "analysis contains multiple errors"). But this Court does not typically grant petitions alleging case-specific errors. Sup. Ct. R.10. As described below, the decision is a beacon of clarity and oasis of correct legal analysis, not a plea for this Court's intervention.

As discussed below, the Federal Circuit correctly applied a proper understanding of this Court's *Mayo/Alice* framework.[1] It found claim 1 of reexamined U.S. Patent Number 9,798,967 not directed to an abstract idea (Step 1 of the *Mayo/Alice* framework), thus obviating any need to evaluate "inventive concept" (*i.e.*, not reaching Step 2). No error exists, since ADASA, Inc.'s ("Respondent's") claim 1 on its face "does not merely claim a principle, but a machine embodying a principle,"[2] like all eligible machine/manufacture inventions do. And numerous vehicle problems plague this

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[1] *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collab. Svcs. v. Prometheus Lab's, Inc.*, 566 U.S. 66 (2012).

[2] *Neilson v. Harford*, 151 ER 1266, Webster's Patent Cases 295 (1841).

Petition. These include a complex claim construction dispute that Petitioner has claimed would influence the eligibility question, an alternative ground for affirmance based on waiver/abandonment, ongoing district court proceedings that could moot the eligibility issue, plus Petitioner's half-complete presentation of the issue to this Court (since no lower court reached or decided "Step 2").

Petitioner's hold request equally lacks merit. As Petitioner observes, *Interactive Wearables*[3] and *Tropp*[4] present questions on patent-eligibility. Petitioner urges the Court to hold this case in the event it grants certiorari in either of those two cases. But as the Brief for the United States as Amicus Curiae in those cases (filed April 5, 2023) makes clear (hereafter, "U.S. Br."), there is no possible way those cases could affect the outcome here. There, the Solicitor General paints a crisp dividing line between patent-ineligible examples versus patent-eligible examples (explaining "an artistic technique for painting watercolors," an "interior decorator's approach to arranging furniture" and Tropp's "method of improving airline luggage inspection" are ineligible, U.S. Br. 2, 15-16, while "Bell's telephone," "[a]n automobile," "[a] remote control," "[a] camera" and Interactive Wearable's "wearable content player with a display, controlled by a remote control that displays information about the content being played" are eligible, U.S. Br. 2-3, 14). The "RFID transponder"

[3] *Interactive Wearables, LLC v. Polar Electro Oy*, No. 21-1281.

[4] *Tropp v. Travel Sentry, Inc.*, No. 22-22.

of the present case is a clear example that the United States' analysis puts on the *eligible* side of the dividing line, even if hypothetically "it would fail today for lack of novelty" (U.S. Br. 3, characterizing Bell's telephone).[5]

The United States' proposed framework amplifies how *no* party in *either* other case urges this Court to adopt a legal standard that could possibly benefit Petitioner here. The patentees in both cases urge the Court to *broaden* eligibility, while the accused infringers urge the Court to leave the Federal Circuit's legal standard intact. No party suggests eligibility should be radically *narrowed* in a way that would affect the result here. Nor does the United States propose any shift that would favor Petitioner, instead properly assessing the "kind" or "type" of subject matter in the patent claim, but not its relation to the prior art, *i.e.*, the irrelevant happenstance of "*when* the patent is filed." (U.S. Br. 11, 17-18; *see also id.* at 3, noting a patent today that claims Bell's telephone would be *eligible*, just not novel).

The inventions in *Interactive Wearables* and *Tropp* are also completely different from the invention here, and the eligibility arguments on both sides of those cases are irrelevant to the present dispute. Nothing the Court says about the eligibility of an invention involving a wearable TV Guide (*Interactive Wearables*) or luggage locks (*Tropp*) could affect the Federal Circuit's

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[5] *Amicus* National Retail Federation "concedes" that adoption of the United States' Invitation Brief position would mean that "this case was correctly decided by the Federal Circuit." (NRF *Amicus* Br. 12 n.11).

highly fact-bound analysis about how this particular invention improves RFID technology.

Indeed, Petitioner makes literally no arguments about why a hold is appropriate. Petitioner spends the bulk of its brief explaining why this case is materially *different* from *Interactive Wearables* and *Tropp* and would purportedly serve as a good "companion" case. Having made that case, Petitioner offers a one-sentence assertion that "at a minimum," this case should be held. This does not come close to the type of showing that warrants a hold.

Holding the case would not only waste everyone's time, but would severely prejudice Respondent. If the Court holds the case, Petitioner would undoubtedly move the District Court to stay the imminent trial on anticipation. While Respondent would oppose such a motion, it should not be forced to face the risk the motion will be granted. With no reasonably likely difference in outcome after a hold, it would be unfair to make Respondent wait another year for Petitioner to satisfy monetary judgments intended to make Respondent whole for multiple years of trespass on its rights.

## STATEMENT OF THE CASE

The Petition asserts that Respondent tried to patent the "simple and familiar concept" of "subdividing one long number . . . into two shorter ones" (Pet. 21-23), arguing to this Court as if prior art invalidity should negate its infringement liability. But Petitioner will

have its chance to argue invalidity in a few weeks. As discussed below, the remanded validity trial will commence in July 2023. If prior art so clearly foreclosed the proper issuance (and confirmation after USPTO reexamination) of claim 1, Petitioner will already make that case in the coming days. This Court should not allow itself to become a replacement forum for validity issues that are about to be tried.

### A. The Claimed Invention, and its Solution to the Prior Art Problem of RFID Tag Commissioning That, Until Then, Required Continuous Connection to a Serialization Database

Before the '967 Patent, global RFID tag uniqueness could only be guaranteed using a constant, uninterrupted connection to an online database. The '967 Patent improves tagging technology by guaranteeing the global uniqueness of RFID tags encoded under preexisting standards, but without the need for constant real time database connectivity. Respondent's added data field, and bitwise-allocated serial number blocks and tag memory "space" structure with its "unique correspondence," realized the longstanding goal of guaranteeing unique RFID tags worldwide where no prior art, including the SGTIN-96 standard, had before.

The '967 Patent's specification explains prior serialization techniques in the RFID industry, and that "[g]enerating a unique serial number is imperative, and is required for EPCglobal RFID tagging

implementations." (C.A. App. 81, 2:21-22). "The uniqueness of an identifier is critical to the success of almost any tracking system." (*Id.*, 2:48-49). The '967 Patent thus explained that "the state-of-the-art does not fully address the needs of . . . high-volume, reliable deployment and commissioning of RFID transponders," insofar as the state-of-the-art lacked "processes for efficient commissioning of batches of RFID transponders, without the need for realtime wireless connectivity." (C.A. App. 82, 3:21-23).

Inventor Clarke McAllister's claimed invention provided those benefits and advantages. With the claimed invention, "[t]here is no absolute need to query a database in real time; hence there is no need for continuous wireless network connectivity." (*Id.*, 3:65-67; *see also* C.A. App. 60, Abstract: "without requiring a realtime connection to a serialization database"). As the '967 Patent describes, not requiring a real time connection circumvents delays that could occur during tag commissioning processes arising from database connection lapses. (C.A. App. 82, 4:2-8). Removing the need for real time database queries reduced or outright eliminated delays, "help[ing] manual labor operate at maximum efficiency, allowing them to achieve a regular and dependable cadence in their transponder application process." (*Id.*, 4:8-12).

3. The structure by which the preferred embodiment achieved this technological solution to a technological industry practice involved re-formatting the tag serial number space to take into account what are called "blocks" of serial numbers that would become

"allocated." (C.A. App. 84, 8:4-51). "[S]erial number block sizes are sufficient to operate encoder 175 or 30 for extended periods of time without any further external authorization steps." (*Id.*, 8:37-39). The specification gives one example of a person encoding tags "for up to 1677 days or over four years without receiving future authorizations from a higher level authority." (*Id.*, 8:45-48).

This change of the serial number space would become realized when the "external number issuance authority allocates to the encoder blocks of numbers for specific object classes," with a "preferred method" being "to subdivide the entire object class serial number space into sectors that are defined by a limited number of MSBs (Most Significant Bits) of the serial number field." (*Id.*, 8:5-15). Using SGTIN-96 and its 38-bit serial number field as a starting example, the '967 Patent explained that "the upper 14 bits could be designated as the most significant bits for a particular embodiment. In that case the object class serial number space would be comprised of 16,384 sectors." (*Id.*, 8:23-26). Carrying forward this example, "the lower 24 bits [of the prior 38-bit space] represent 16,777,216 unique serial number values." (*Id.*, 8:29-31). In this way, a whole new data field in memory now exists, altering the original code format. Put differently, a new input source—the binary "allocated block" never before contemplated in the RFID arts—would now generate the particular bit-encodings of particular places in a tag's memory.

4. Petitioner does not dispute that the claims recite these concepts within an instance of an already-encoded tag having a "serial number space" (a structure in memory) deployed according to this improved code format. Claim 1 recites:

> 1. An RFID transponder comprising:
>
> a substrate;
>
> an antenna structure formed on the substrate; and
>
> an RFID integrated circuit chip which is electrically coupled to the antenna structure,
>
> wherein the RFID integrated circuit chip is encoded with a unique object number, the unique object number comprising an object class information space and a unique serial number space,
>
> wherein the unique serial number space is encoded with ***one serial number instance from an allocated block of serial numbers***, the allocated block being assigned a limited number of ***most significant bits***,
>
> wherein the unique serial number ***space*** comprises ***the limited number of most significant bits uniquely corresponding to the limited number of most significant bits of the allocated block*** and of remaining bits of lesser significance that together comprise the one serial number instance.

(C.A. App. 101, emphasis added).[6] This claim language embodies a specific instance of a new code format. In the lexicon of 35 U.S.C. § 101, claim 1 covers a "machine" or "manufacture" (the "transponder," referred to by both parties as the "tag"), and sets forth multiple physical structures. As the Federal Circuit recognized, it also embodies a "data structure," with the important characteristic (virtually ignored in the Petition) that MSBs of the serial number physical space "uniquely correspond" to the MSBs of an allocated block. (App. 12a).

5. Evidence independent of the patent document corroborated that this claimed "unique correspondence" denoted an input source for the contents of the binary memory space previously unknown in the RFID industry, and delivered magnificently useful results. Dr. Engels (who spearheaded the creation of the original SGTIN-96 standard while at MIT) described the reformatting of the tag code within Respondent's invention as a true advance, both in his summary judgment testimony and at trial. (C.A. App. 5,256-261, 14,869-878, 14,882-891). Dr. Engels explained that Mr. McAllister's improvement taught away from the conventional RFID structure at the time. It converted a

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[6] *Amicus* National Retail Federation misunderstands the '967 Patent as claiming a method to "delegate[ ] part of the process of assigning serial numbers to employees in the field." (NRF *Amicus* Br. 2-3). It also misunderstands that the patented solution allows a "serial number to be independently generated by a field employee." (*Id.* at 3). NRF also mistakenly believes that "displaying information" is part of the claimed invention. (*Id.* at 4). NRF presents positions that bear no relation to this case.

"dumb" serial number space into a "smart" one, bringing additional benefits that even the patent specification did not originally state. (C.A. App. 14,882-891).

Against this one-sided evidence of inventiveness and eligibility, the Petition evokes ISBN book numbers, telephone numbers, car VIN numbers and credit card numbers as supposedly "conventional" ways of subdividing a number. (Pet. 22-23). Putting to one side that it never made such arguments to the District Court, and that subdividing a "number" is categorically different from subdividing a numbering "space" (*i.e.*, a binary bit positions in physical memory), the point is not germane. Conventionality is measured by what is known in a particular field or art,[7] and Petitioner never marshalled any evidence of conventionality of additional, non-standardized binary serial number subdivisions in the RFID technology arts.[8]

Petitioner tries to mask the absence of factual evidence on its side by reproducing one of Respondent's demonstrative figures from a claim construction *Markman* hearing tutorial. Petitioner notes the figure's top and bottom showing "exactly the same 1s and 0s, only

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[7] *Alice*, 573 U.S. at 221-22 (" 'well known ***in the art***") (emphasis added); *Mayo*, 566 U.S. at 82 ("well-understood, routine, conventional activity previously engaged in by scientists who work ***in the field***") (emphasis added).

[8] The remand prior-art-anticipation trial set for July 2023, discussed below, involves prior art disclosing non-unique decimal numbering system divisions for serial number allocations, not binary unique serial number subdivisions in a binary memory space.

now divided between 'Most Significant Bits' and 'Least Significant Bits.'" (Pet. 21-22). But that was simply a demonstrative figure, for teaching color-coded concepts of the EPC SGTIN-96 structure by coloring over the memory field space of several SGTIN-96 fields, where particular "0" and "1" instances were not important to what was being taught. (C.A. App. 246-259). Had Petitioner performed an electron microscope analysis of one of its actual infringing tags, it would *never* be able to show every "0" and "1" of 96 bits identical to those of a prior art SGTIN-96 programmed tag. Respondent's demonstratives do not cure Petitioner's lack of proof.

### B. Proceedings Below, Including Petitioner's Expressly "Conditional" Nature of its District Court Patent-Ineligibility Theories

1. **Infringement and Misconduct.** A federal jury found that Petitioner infringed claim 1. (C.A. App. 3). Petitioner deployed the infringed claim in billions of encoded RFID tags, without authorization from Respondent. (*Id.*). Petitioner did not appeal this infringement finding, or any claim interpretation rulings that supported the jury's determination.

After trial, Respondent learned that Petitioner had improperly withheld from discovery over two billion additional instances of its infringement. The District Court held several evidentiary hearings over this behavior. The District Court held that Petitioner's misconduct went beyond "careless negligence" and demonstrated a "significant reckless disregard for the

litigation process." (C.A. App. 14,572-573). The District Court also found that "the corporate side [of Petitioner] didn't seem to care" and asked "why [shouldn't the leadership of the company] be held accountable for this incredibly blatant disregard for providing discovery?" (C.A. App. 14,550). The District Court could not "absolve [Petitioner's] patent and continuous disregard for the seriousness of this litigation and its expected obligations." (C.A. App. 14,627). The Federal Circuit affirmed this sanction ruling, remanding only for reevaluation of the monetary amount. (App. 26a-30a).

2. **Shifting Theories.** Petitioner's adjudged and affirmed "reckless disregard for the litigation process" is relevant to the present Petition because, in this Court, Petitioner presents a ***different patent-ineligibility theory*** from the one presented to the District Court during summary judgment. Petitioner conditioned its ineligibility argument on a claim construction rejected by the trial court and not requested on appeal, or in this Court. Specifically, both sides moved for summary judgment on patent-eligibility. (C.A. App. 3,266, 4,272-276). Petitioner's motion only advanced a conditional argument: "[i]f the claim language itself does ***not*** require a limited number of most significant bits to be assigned to an allocated block of serial numbers in binary," then Petitioner would contend that the alleged abstract idea was "segmenting a numbering space." (C.A. App. 4,275, emphasis added). Petitioner also expressly conceded that, otherwise, "the claimed invention [would be] directed to a hardware-based approach accomplished by managing assignment of

serial numbers at the binary bit level," and thus not "directed to" something abstract. (*Id.*). Petitioner's Reply headed its entire relevant section with the bolded text: **"Subject matter eligibility comes down to claim scope."** (C.A. App. 5,602).

The contingent and conditional trigger for Petitioner's ineligibility defense was rational and tactical, because otherwise Petitioner's arguments risked invalidating its own large holdings of RFID patents. The trigger also did not exist. The claims ***are*** limited to "a serial number taken from an allocated block that was defined through assignment of a limited number of most significant bits." (C.A. App. 101). So now in this Court, after losing the trial, Petitioner changes theories. *See BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 826 (9th Cir. 2000) ("[I]t is a general rule that a party cannot revisit theories that it raises but abandons at summary judgment.") (citation omitted). It now argues ineligibility under a distinct claim construction from the one it made a precondition of its District Court theories. In this way, Petitioner's "patent and continuous disregard for the seriousness of this litigation and its expected obligations" continues even now.

3. **The Appeal.** Patent-eligibility was one of many issues Petitioner asked the Federal Circuit to review. The Federal Circuit rejected all of Petitioner's points of error with two exceptions: it required the District Court to recalculate the discovery misconduct sanctions amount, and vacated summary judgment of no invalidity over two prior art references so that a jury may resolve genuine issues of material fact. (App.

15a-21a, 26a-30a). The jury trial on anticipation is scheduled to begin in July 2023. Though Respondent expects to prevail, it logically follows that a final determination that claim 1 is anticipated would moot the present Petition.

On the merits, the Federal Circuit meticulously and unanimously rejected Petitioner's fact-intensive patent-ineligibility arguments. Petitioner did not seek rehearing. The Federal Circuit agreed with Respondent that claim 1 passed the *Mayo/Alice* eligibility test at the first of two steps in the *Mayo/Alice* analysis. (*Id.* at 14a-15a). The panel did not need to reach the second step.

First, after reciting principles of law that Petitioner does not contest here, the Federal Circuit excluded "conventional RFID hardware components" from its analysis, but still concluded that claim 1 is "directed to a specific, hardware-based RFID serial number data structure" that improves RFID technology. Petitioner raises no objection to this approach, since it works against Respondent in this analysis to "set aside" the hardware components—a controversial practice up for review in the *Interactive Wearables* proceeding. The panel explained:

> Considered as a whole, and in view of the specification, claim 1 is not directed to an abstract idea. Rather, it is directed to a ***specific, hardware-based RFID serial number data structure designed to enable technological improvements*** to the commissioning process. ***Setting aside the conventional***

> ***RFID hardware components***, claim 1 as a whole focuses on the data structure of the serial number space. It requires that this space include a serial number selected from an allocated block and that this serial number comprise two components: (1) a limited number of MSBs, i.e., a limited, predefined sequence of higher order bits at the leading end of the serial number, see *ADASA Inc. v. Avery Dennison Corp*., No. 6:17-CV-01685-TC, 2019 WL 281298, at *1 (D. Or. Jan. 22, 2019) (*Markman Order*), and (2) remaining bits of lesser significance. '967 patent at claim 1. Claim 1 further specifies that the claimed MSBs "uniquely correspond" to the MSBs assigned to the allocated block from which the serial number is drawn. *Id.*; *see also Markman Order*, at *3 (construing "uniquely corresponding" according to its plain and ordinary meaning). In other words, for any set of MSBs there is exactly one corresponding allocated block, and for each allocated block there is exactly one set of MSBs. In essence, the claimed MSBs function as ***an additional data field*** within the serial number space that uniquely identifies the allocated block from which it came.

(*Id.* at 12a-13a, emphasis added). The Federal Circuit particularly highlighted the "one-to-one correspondence" between the MSBs of the allocated block, and the MSBs of the serial number within the memory space, as the "central feature of the claim:"

> This one-to-one correspondence has important technological consequences. Because

> the predefined sequence of MSBs in a given serial number uniquely corresponds to an allocated block, and vice versa, serial numbers drawn from different blocks are guaranteed to be unique. It is this ***central feature of the claim*** that enables improvements in the commissioning process. As the written description details, by appropriate assignment of the allocated blocks to lower levels in the commissioning hierarchy, for example, to individual encoders, unique serial numbers can be guaranteed without the need for a continuous connection to a central database. *See* '967 patent at 8:4-51. This, in turn, reduces delays in the commissioning process relative to prior art RFID tags utilizing conventional data structures and allows tags to be commissioned on-demand, without needing to establish or reestablish a connection. Id. at 3:27-35, 3:64-4:12.

(*Id.* at 13a, emphasis added). The Federal Circuit then fulsomely rejected Petitioner's Step 1 arguments:

> We thus reject Avery Dennison's contention that claim 1 is directed to nothing more than mentally ascribing meaning to a pre-existing data field. The meaning of the MSB data field—and the improvements that flow therefrom—is the result of the unique correspondence between the data physically encoded on the claimed RFID tags with preauthorized blocks of serial numbers. That is not a mere mental process, but a hardware-based data structure focused on improvements to the technological process by which

> that data is encoded. We therefore conclude claim 1 is directed to eligible subject matter as a matter of law.

(*Id.*). Finally, the Federal Circuit noted the consistency of its result with previous holdings of that court. (*Id.* at 13a-14a).

This Petition now challenges the Federal Circuit's application of *Mayo/Alice* legal principles, but not the Federal Circuit's statement of the legal principles themselves.

## REASONS TO DENY THE PETITION

This Court should deny the Petition since the Federal Circuit was clearly correct, and its decision is in harmony with this Court's holdings. Regardless, this complex and fact-bound case is a poor vehicle for many reasons. Nor would a hold make any sense, no matter what petition-stage or merits-stage outcome ensues in the *Interactive Wearables* or *Tropp* cases.

### A. The Federal Circuit's Fact-Bound Decision Was Correct

1. No amount of alarmist rhetoric or oversimplification of what claim 1 recites can call into doubt the

Federal Circuit's correct conclusion that claim 1 of the '967 Patent is patent-eligible.[9]

At the outset, Petitioner never questions that pure application of 35 U.S.C. § 101 leads to a conclusion of eligibility. Since claim 1 covers an "RFID transponder" with a number of physical parts, it qualifies as either or both of a "machine" and a "manufacture" under statutory language. Petitioner only questions the so-called "abstract idea" judicial exception, and whether the Federal Circuit—who stated the "abstract idea" judicial exception law correctly—applied it correctly in this case. It clearly did.

2. To be sure, patent owners and supporters of innovation have raised concerns about unclarity in the *Mayo/Alice* framework, particularly as it relates to the "abstract idea" type of judicial exception to patent eligibility under 35 U.S.C. § 101, and more particularly as it relates to claims in which generic digital computers perform some high-level function (*Interactive Wearables*) or claims to non-electronic methods of organizing human activity (*Tropp*). But wherever that line blurs, it is nowhere near claim 1 of this case. The Solicitor General aptly explains that "innovations within patent

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[9] *Amicus* Impinj reflects such undue alarmism, stating a concern that cert denial in the present case will leave no "clear limits on patenting the abstract ideas at the core of" its business. (Impinj *Amicus* Br. 14). But, (1) non-novel, obvious or nonenabled subject matter will not receive such patents; and (2) where technological innovations in its field do receive patents, companies are properly incentivized either to license or to innovate to avoid infringing.

law's traditional bailiwick of the scientific, technological, and industrial arts" earn threshold eligibility for patenting under this Court's precedents, whether or not they satisfy novelty standards. (U.S. Br. 12). Exceptions exist to "preclude[ ] the patenting of [ ] fundamental building blocks of technological innovations and innovations in non-technological fields." (*Id*.). While "borderline cases exist" (U.S. Br. 14), this is not one of them.

3. This Court's decisions in *Parker v. Flook*[10] and *Diamond v. Diehr*[11] guide the analysis here. Both cases analyzed patented processes that implicated the abstract idea exception. Each process included claim limitations to a mathematical formula. The Federal Circuit's result in this case harmonizes with both.

In *Flook*, this Court concluded that the process, as claimed, fell within the scope of the judicial exception and was therefore not patent-eligible. The *Flook* claim recited (with the formula itself elided):

> 1. A method for updating the value of at least one alarm limit on at least one process variable involved in a process comprising the catalytic chemical conversion of hydrocarbons wherein [formula omitted];
>
> (3) determining an updated alarm limit which is defined as B1.+K; and thereafter

[10] 437 U.S. 584 (1978).

[11] 450 U.S. 175 (1981).

> (4) adjusting said alarm limit to said updated alarm limit value.

*Flook*, 437 U.S. at 596-97.

This was merely a claim to the formula itself—a "thinking only" claim that did not even express one single limiting structural aspect, much less any computer structures. This Court first analyzed the question by noting that "a process is not unpatentable simply because it contains a law of nature or a mathematical algorithm." *Id.* at 590. Rather, the Court invoked its earlier holding in *Mackay Radio and Telegraph Co. v. Radio Corporation of America*, 306 U.S. 86, 94 (1939) that "a novel and useful structure created with the aid of knowledge of a scientific truth [or the mathematical expression of it] may be [a patentable invention]." *Id.* at 590-91. But the *Flook* claim failed on its facts because, as a "process" containing a mathematical formula (and not any structure), the patentee had not written in any "inventive concept in its application." *Id.* at 594-95. This was, in part, because "the notion that alarm limits must be recomputed and readjusted" in the catalytic conversion of hydrocarbon arts was "well known," as was every other aspect of the claim outside the formula itself. *Id.*

In *Diehr*, a different claim that included a mathematical formula (and numerous structural aspects) received this Court's approval as patent-eligible. The *Diehr* claim recited (formula elided):

> 1. A method of operating a rubber-molding press for precision molded compounds with the aid of a digital computer, comprising:
>
> providing said computer with a database for said press, including at least, [certain variables],
>
> initiating an interval timer in said computer upon the closure of the press for monitoring the elapsed time of said closure,
>
> constantly determining the temperature (Z) of the mold at a location closely adjacent to the mold cavity in the press during molding,
>
> constantly providing the computer with the temperature (Z),
>
> repetitively calculating in the computer, at frequent intervals during each cure, the Arrhenius equation [reciting formula],
>
> repetitively comparing in the computer at said frequent intervals during the cure each said calculation of the total required cure time calculated with the Arrhenius equation and said elapsed time, and
>
> opening the press automatically when a said comparison indicates equivalence.

*Diehr*, 450 U.S. at 180 n.5.

This Court had no trouble concluding that the patentee did "not seek to patent a mathematical formula," but instead "seek[s] patent protection for a process of curing synthetic rubber." *Id.* at 187. This

Court summarized: "Arrhenius' equation is not patentable in isolation, but when a process for curing rubber is devised which incorporates in it a more efficient solution of the equation, that process is, at the very least, not barred at the threshold by § 101." *Id.* at 188. The Court also observed that the same statement from *Mackay* as quoted in *Flook* "takes us a long way toward the correct answer in this case," *i.e.*, that "a novel and useful ***structure*** created with the aid of knowledge of a scientific truth [or the mathematical expression of it] may be [a patentable invention]." *Id.* (emphasis added). And this Court further emphasized that "claims must be considered as a whole," because it is "***inappropriate*** to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis." *Id*. (emphasis added).

*Flook* and *Diehr* support the Federal Circuit's holding here. They together support a straightforward rule. A patent purporting to cover a mathematical formula *itself* is patent-ineligible. But a patent covering a technology improvement is patent-eligible—even if the improvement is driven by the inventive use of a mathematical formula. Thus, in *Flook*, a patent on "a method for updating the value of at least one alarm limit"—essentially, a patent on math—was ineligible. But in *Diehr*, a patent on a "method of operating a rubber-molding press"—classic patentable subject matter—was eligible, even though the method incorporated the use of mathematics.

This case easily falls on the *Diehr* side of the line. The patent is on an "RFID transponder"—clearly a

technological structure, not a mathematical formula, and certainly not a non-structural "particular technological environment." The patent's improvement is in the structure of the "RFID integrated circuit chip," and in particular, its instance of an encoded memory space object number. Petitioner claims that a patent on an *encoded object number itself* would be unpatentable. Whether or not that is true, Respondent did not obtain a patent on an encoded object number. Instead, Respondent obtained a patent on an improved RFID transponder that incorporates an inventive new way of encoding object numbers. The improvement solves technology problems in the prior art. Such a patent is eligible, just as *Diehr*'s method of operating a rubber-molded press that incorporated a mathematical equation was eligible.

4. Later "abstract idea" decisions of this Court (*Bilski*[12] and *Alice*) developed the legal concepts earlier fleshed out through the opposing *Flook* and *Diehr* outcomes, giving rise to today's two-part test. Each supports eligibility here, and the correctness of the Federal Circuit's decision.

*Bilski* and *Alice* could not be more different from this case. Both cases involved broad patents on fundamental economic concepts, and this Court deemed the claims patent-ineligible because of a concern that they would preempt the use of those concepts across the board. In *Bilski*, 561 U.S. at 611, the patent application covered the general concept of hedging—*i.e.*,

[12] *Bilski v. Kappos*, 561 U.S. 593 (2010).

"protecting against risk." This Court explained the appropriateness of looking to the "guideposts" of *Flook* and *Diehr* (plus a third case, *Gottschalk v. Benson*[13]) to decide whether the "abstract idea" exception renders the claims patent-ineligible. *Id.* at 612. Doing so, the Court explained: "Hedging is a fundamental economic practice long prevalent in our system of commerce and taught in any introductory finance class." *Id.* at 611. It refused the patent based on its concern that "[a]llowing petitioners to patent risk hedging would pre-empt use of this approach in all fields." *Id.* at 611-12.

In *Alice*, 573 U.S. at 219, the patent was drawn to "the use of a third party to mitigate settlement risk." This Court held up *Diehr* as a sharp contrast, since the claim there had an "equation in a process designed to solve a technological problem in 'conventional industry practice.'" *Id.* at 223 (*quoting Diehr*, 450 U.S. at 177-78). No such design to solve a "technological problem" in "industry" was apparent to save the *Alice* claims, since those claims were economics-focused. The Court held the idea patent-ineligible because it is a "building block of the modern economy." *Id.* at 220. The Court emphasized that the patent's main problem was its breadth, and expressed "concern" about the potential for "pre-emption" of "the basic tools of scientific and technological work." *Id.* at 216.

As a passing glance at the claim language in this case makes clear, the patent here is not even close to a patent on the general idea of hedging risk or using

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[13] 409 U.S. 63 (1972).

third-party intermediaries. No "fundamental economic practice" is in danger of lock-out. It is a focused and narrow improvement to one particular set of structures—RFID transponders—with a cleverly-devised new characteristic and new data field. It is simply absurd to suggest that permitting this invention to be patented will preempt "basic tools of scientific and technological work." Respondent never attempted to patent or monopolize (according to Petitioner's caricature) "subdividing one long number . . . into two shorter portions" in all arts, by all means, and for all purposes. (Pet. 21).

This Court faced down true preemption concerns in *Benson*, which contrasts from this case as presenting an actual threat to scientific tools. There, a claim recited a binary coded decimal (BCD) conversion algorithm and other hardware-level computer limitations. *Benson*, 409 U.S. at 73-74. But that claim failed the eligibility test because the only conceivable environment of use for such an invention was the basic digital computer itself. *Id.* at 71-72. Permitting that monopoly would have amounted to preemption of a certain mathematical algorithm in its only possible application in a then-nascent but ground-shifting field—computers themselves. In contrast, Respondent's claim does not preempt any formula or foundational algorithm in any field. The multitude of Petitioner's examples of "conventional" number subdivisions proves this point (*e.g.*, ISBN numbers, VIN numbers, *etc.*). So does the existence of noninfringing tags, about which Petitioner bragged to the jury, to obtain leniency in the damages

award. (C.A. App. 14,796, 15,200, 15,450-451, 15,672-673).

In summary, the Federal Circuit was correct that Respondent's claim 1 is directed not to any "abstract idea," but to "a specific, hardware-based RFID serial number data structure designed to enable technological improvements to the commissioning process." (App. 12a). In the United States' explanatory framework, the RFID transponder subject matter here is like a phone, an automobile, a remote control or a camera: an "innovation[] within patent law's traditional bailiwick of the scientific, technological, and industrial arts" and thus patent-eligible under this Court's precedents. (U.S. Br. 12, 14).

### B. This Case is Not a Good Vehicle, and Petitioner Complains Only of the Application of Properly-Stated Law

This case is also an inappropriate vehicle for reconsideration of this Court's "judicial exception" standards, or review of the Federal Circuit's application of them.

First, this case is a poor vehicle because Petitioner itself has taken the position that eligibility turns on the highly fact-bound question of what, precisely, the claims mean. In the District Court, Petitioner went out of its way to argue that the claims were not *necessarily* abstract; rather, whether they were abstract turned on a delicate and disputed question of claim construction. Petitioner's Summary Judgment Reply headed its

entire relevant section with the bolded text: **"Subject matter eligibility comes down to claim scope."** (C.A. App. 5,602). Petitioner was explicit, stating that it had raised its ineligibility defense within a "contingent motion" requiring a claim construction that the claims were *not* limited to, and were *broader* than, "a serial number taken from an allocated block that was defined through assignment of a limited number of most significant bits." (C.A. App. 4,275).

Respondent disagreed, and continues to disagree, with Petitioner's position and argued that all claims were patent-eligible no matter how construed. But, taking Petitioner at its word, Petitioner evidently believes that eligibility turns on a predicate question of claim construction that the Court will have to resolve in order to even *reach* the eligibility questions in this case—a classic vehicle problem that will impede resolution of the question presented.

Making matters even more confusing, after losing the trial, Petitioner switched gears, renewing via appeal its purportedly "contingent motion" despite not receiving the claim construction on which its motion was "contingent" and instead raising a *different* construction. This led to complicated briefing in the Federal Circuit on whether or to what extent Petitioner had abandoned its eligibility argument. Ultimately, the Federal Circuit held that Petitioner had preserved some kind of eligibility argument, and rejected that argument on the merits. (App. 12a n.2). Respondent disagrees with that conclusion and would renew its abandonment argument as an alternative ground for

affirmance. But, even setting aside the abandonment question, the Petition leaves clear as mud whether Petitioner will advance the claim construction it supported in the District Court, the claim construction it advanced in the Federal Circuit (under which the Federal Circuit ruled against it), or some third claim construction. The Court should not grant certiorari in a case where it might have to resolve a complex question having nothing to do with eligibility in order to reach the question presented.

Second, ongoing district court proceedings could moot the eligibility issue. As multiple members of this Court have recently emphasized, the Court's ordinary practice is to deny certiorari in interlocutory cases. *See*, *e.g.*, *City of Ocala v. Rojas*, 143 S. Ct. 764, 765 (2023) (Gorsuch, J., respecting the denial of certiorari) ("I see no need for the Court's intervention at this juncture. This case remains in an interlocutory posture . . . I would allow that process to unfold."); *National Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 56-57 (2020) (Kavanaugh, J., respecting the denial of certiorari) ("[T]he case comes to us at the motion-to-dismiss stage, and the interlocutory posture is a factor counseling against this Court's review at this time."); *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari) (noting that case was "in an interlocutory posture" and "issues will be better suited for certiorari review" after final judgment).

As in any interlocutory case, review here is unwarranted because it may never be necessary. While Respondent does not believe Petitioner will win the July

2023 trial, it hypothetically might. All effort by this Court might be wasted, whereas cases come around frequently where petitioners ask this Court to review § 101 decisions following final judgments.

But this interlocutory case is particularly unsuited for certiorari because the incomplete record will seriously hinder this Court's review. The bulk of the Petition presses the argument that the claims are ineligible because the invention's central innovation has long been known. According to Petitioner, "[t]reating a long number as the combination of shorter numbers is a simple and familiar concept," and is no different from the use of area codes in telephone numbers. (Pet. 22). Respondent, of course, disagrees that the claim merely boils down to "treating a long number as the combination of shorter numbers." Crucially, however, *this is wrapped up in the issue the parties are about to try.* In a few months, there will be a trial on whether the patent merely covers a "simple and familiar concept" or is novel. Indeed, Petitioner emphasizes that "the subdivision concept is recounted in a book entitled *RFID for Dummies*." (Pet. 24). Yet, *that is the exact question at issue at trial*—whether the patents-in-suit are anticipated in view of *RFID for Dummies*.

Petitioner is essentially asking the Court to invalidate the patent based on its own untested factual representations *before* a fact-finder has the opportunity to determine whether those factual representations are true, or assess Petitioner's improper conflation of digital versus binary numbering spaces. The Court does not currently have a factual record on this issue. The

Court should never rely only on a Petitioner's one-sided, vigorously contested, yet so-far-untested, factual assertions.

Third, the patent system's greatest need now is for review of decisions finding claims *in*eligible, not *eligible*. The destabilizing impact of uncertainty in this area cited at length in the Petition (Pet. 28-31) falls squarely on patent owners, not accused infringers. It is patent owners who need review of errant Federal Circuit decisions that (unlike the present one) overexpand the judicial exceptions to eligibility, and use it to swallow all of patent law. Accused infringers already benefit from this uncertainty, by obtaining questionable dismissals in case after case. This case falls on the wrong side of that divide for review to be appropriate.

Petitioner ironically tries to use this posture to its advantage, suggesting that this Court may achieve some sort of balance by handling a correctly-decided Federal Circuit decision favoring a patentee, simultaneously with a different Federal Circuit decision adverse to a patentee. (Pet. 3, 33). This viewpoint is facile and wrong. The Court should not review fact-bound, correct decisions in cases beset by vehicle problems out of a vague desire to create balance. And the Solicitor General in the other cases has already explained how balance can emerge: review both *Interactive Wearables* and *Tropp* at the same time, as potential foils against one another for eligible versus ineligible patents. (U.S. Br. 11).

Fourth, this case would be a defective vehicle for reviewing the *Mayo/Alice* framework itself (if that is this Court's interest), because the lower courts did not reach *Alice* Step 2—the step that has caused the most confusion among lower courts. This Court's decision in *Alice* set forth a two-step process: At Step 1, the Court determines whether the claim is directed to an abstract idea. If the answer is "yes," then at Step 2, the Court assesses whether there is an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept itself. Under *Alice*'s framework, eligibility at Step 1 meant "pencils down" for Step 2. As the Federal Circuit has explained, the two steps involve different types of analysis—"Step 1" is typically an issue of law, while "Step 2" may involve subsidiary fact-finding over the inventiveness of the additional elements. *See generally, Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018).

Here, the Federal Circuit correctly stopped at Step 1, finding the claim was not directed to an abstract idea. It therefore had no need to, and did not, proceed to Step 2. A better vehicle for reviewing a decision finding eligibility (if there is one) would be a determination by a district court or the Federal Circuit that includes analysis of *both* Step 1 ("directed to an abstract idea") *and* Step 2 ("inventive concept"). This is so because Step 2 has given the Federal Circuit far more difficulty than Step 1. Judges have debated whether or to what extent Step 2 involves fact-finding, depends on claim construction, is resolved by the jury, and have simply

disagreed on what "inventiveness" means. *E.g.*, *Berkheimer v. HP Inc.*, 890 F.3d 1369 (2018) (multiple opinions respecting *en banc* denial). If the Court grants certiorari in this case, which addresses only Step 1, it will say precisely nothing on the very issues on which the Federal Circuit needs the most guidance.

Fifth, the Court would not even be *capable* of determining whether Respondent's patent is eligible. All this Court could do on the eligibility questions of this case is, at most, grant half-relief to Petitioner. It would not completely decide the eligibility issue, but instead would likely remand for consideration by the lower courts (all the way down to the District Court) of Step 2, even if Petitioner "sweeps the table." It is extremely unlikely the Court would decide the Step 2 issue on its own without the benefit of lower-court decisions, especially in an interlocutory posture in which related issues of anticipation are about to go to trial. At that point, after such a remand, an overwhelming factual record awaits favoring Respondent, but no factual record exists on Step 2 favoring Petitioner. Petitioner presented no expert testimony supporting Step 2 at summary judgment, whereas Respondent presented expert testimony countering Step 2. (C.A. App. 5,256-261, 14,869-878, 14,882-891). Hence a remand outcome would amount to years of further delay, with a nearly inevitable identical outcome.

For all of these reasons, far better vehicles exist than this case, even if this Court were interested in taking up patent subject matter eligibility in the near future.

### C. No Hold is Warranted, Since Other Pending Petitions Leave No Reasonable Possibility of a Different Outcome

Petitioner's suggestion to hold this case while this Court reviews another also lacks merit. Petitioner points to *Interactive Wearables* and *Tropp*. (Pet. 3, 33). Even if the Court grants certiorari in either or both of those cases, it should deny certiorari here.

To begin, the Court should deny a hold because Petitioner presents literally no arguments in favor of a hold. A GVR requires "a reasonable probability" petitioner might later prevail. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). True, this case is about § 101 and *Interactive Wearables* and *Tropp* are about § 101, but the mere fact that the cases involve the same statute is not enough to justify a hold. Indeed, even after the Court called for the views of the Solicitor General in *Interactive Wearable* and *Tropp*, this Court denied certiorari outright in another 35 U.S.C. § 101 case. *See Janke v. Vidal*, No. 22-604, denial of certiorari (Feb. 21, 2023).

Rather, the proponent of the hold has to explain *why* the case might be affected by the decision in a granted case. Petitioner makes no argument on this issue. Instead, it argues the exact opposite. It places all of its eggs into the basket of the argument that this case is *different* from *Interactive Wearables* and *Tropp*, thus warranting a cert grant in this case too. *E.g.*, Pet. 13 ("If this Court were to take up the weighty question of construing Section 101, it would benefit from having before it cases that challenge the Federal Circuit's jurisprudence from both directions.").

Petitioner's argument for a hold, in its entirety, is the following:

> At a minimum, if the Court grants one of those other petitions, it should hold this one and then dispose of it as appropriate in light of the ensuing decision.

Pet. 14; *see also* Pet. 33 (similar "at a minimum" language). That is not good enough. The words "at a minimum" are not a legal argument. Holding a petition, and delaying resolution for a year or more, is not a consolation prize that the Court owes to a litigant "at a minimum" if the litigant cannot persuade the Court that certiorari should be granted. Instead, Petitioner must present an affirmative case that there is a realistic possibility that the case will be influenced by the already-granted cases.

No such possibility exists. While Respondent of course disagrees with Petitioner's argument that the Court should grant certiorari, Respondent fully agrees with Petitioner that this case is dramatically different from *Interactive Wearables* and *Tropp*. First, since both of the other proceedings involve patentees seeking to overturn an *in*eligibility determination, *neither* party is proposing a legal standard that could possibly affect this case. Respondents in those cases ask this Court to affirm the Federal Circuit, but do not seek any alteration of the Federal Circuit's current legal standards. Instead, respondents in both cases ask the Court to stick to the status quo. (*See Tropp* BIO 2 ("The Federal Circuit decision here does not conflict in any way with

this Court's decisions in *Alice*, *Mayo* or any of their progeny. Like petitioners before him, Tropp tosses this case up as a hopeful jump ball, but without any concrete suggestion for altering the *Alice/Mayo* framework."); *Interactive Wearables* BIO 2 ("The Petition seeks nothing more than for this Court to reassess an alleged misapplication of a properly stated rule of law.")). If this Court affirms the Federal Circuit in *Tropp* and/or *Interactive Wearables* and leaves the status quo intact, its ruling would not change the result in this case and could only result in cert denial here, albeit long delayed, and therefore this eventuality does not merit further delay of this case for at least another year.

Alternatively, the Court might reverse the Federal Circuit in *Interactive Wearables*, *Tropp*, or both. In that scenario, the Court would hold that current Federal Circuit law defines the scope of patent-eligible inventions *too narrowly* and would *broaden* the scope of patent-eligible inventions. That outcome could not possibly affect the result in this case, in which the claims *were* held eligible.

A closer look at the argument by the patent owners in *Tropp* and *Interactive Wearables* makes clear that those arguments, if accepted by the Court, could not possibly benefit Petitioner here. More specifically, in *Interactive Wearables*, the petitioner seeks to end the disregard of old claim elements in an unconventional arrangement during the eligibility analysis. (*Interactive Wearables* Pet. 4). This outcome would only strengthen Respondent's claim of patent eligibility

here, since (as discussed) the Federal Circuit here "set aside" allegedly "old" RFID tag structural limitations to commence its Step 1 analysis (in conflict with *Diehr*), and did not consider the totality of the unconventional arrangement. Meanwhile, in *Tropp*, the petitioner and its *amici* ask for wholesale elimination of judicial exceptions entirely—a compelling request in view of presented arguments against judicial exceptions to Congressionally-enacted statutory law. (*Tropp* BIO at 28-29; US Inventor *Amicus* Br. in *Tropp* 5-10). This, too, would work only in Respondent's favor here.

Likewise, the United States' legal standard would provide no assistance to Petitioners in this case. The United States contends that the Federal Circuit takes an overly *narrow* approach to eligibility. The United States faulted the Federal Circuit for having "repeatedly invoked the abstract-idea exception by describing technological inventions at a high level of generality." U.S. Br. 20. Correcting the Federal Circuit's error on that score would *weaken* Petitioner's position. While the United States acknowledged that "[s]trategies for achieving non-technological aims . . . are largely unpatentable," U.S. Br. 13, the patents in this case clearly are not directed to strategies for "achieving non-technological aims." Thus, neither the parties nor the Government advocate a legal position that could possibly benefit Petitioner.

What is more, both the technology and the disputed legal issues in *Interactive Wearables* and *Tropp* are completely different from the technology and the disputed legal issues in this case. *Interactive Wearables*

involves a consumer product patent—a claim on a particular kind of remote control with a display, used in a certain way with a media player. The dispute in *Interactive Wearables* is whether the level of detail in the specification should be relevant to eligibility. The patentee summarized its position in the introduction to the petition for certiorari, complaining of a "misplaced analysis of the level of detail recited in the specification regarding the components of the device recited in the claims, rather than the claim limitations themselves." (*Interactive Wearables* Pet. 3). According to the patentee, "the proper analysis of what a claim is directed to at step one must remain focused on the claim language itself, and ultimately consider whether the claim as a whole, not statements in the specification, poses a risk of pre-empting an abstract idea." (*Id.* at 4). Whatever the merits of this argument, it is irrelevant to this case, which has nothing to do with the relative importance of the claim versus the specification in determining eligibility.

Meanwhile, in *Tropp*, the issue was whether a patent regarding luggage inspection involved a "fundamental economic practice of baggage inspection at airports," as the accused infringer claimed and the lower courts concluded (*Tropp* Pet. 9, 26a), or a technological improvement, as the patent owner claimed. According to the *Tropp* petitioner, the claims are eligible because they "require specific equipment—a dual-access lock with an improved master key and structure indicating that it is compatible with the luggage screening entity—alongside a specific process for the

screening entities to use that new, specific equipment." (*Tropp* Pet. 20). Again, regardless of who is right about that specific dispute, it cannot affect this case. There is no possible argument that the patent here is directed to a "fundamental economic practice," and no possible argument that eligibility may turn on whether the patent requires "specific equipment" to implement that fundamental economic practice. Notably, a person who invents improved computer technology may receive a patent "even if the main utility of that technological improvement lies in the conduct of business." (U.S. Br. 13-14).

Given no reasonable possibility that any statement or holding of this Court will favor Petitioners in an outcome-shifting way, in any foreseeable granted case on § 101 judicial exceptions, this Court should not hold this case. It should simply deny certiorari. It is telling that Petitioner makes no prediction of any specific alteration to § 101 legal standards that it believes might arise out of either of the two other proceedings. Instead, Petitioner as a judgment debtor seeks delay for delay's sake.

Unnecessarily holding this case creates a risk of severe prejudice to Respondent. If the Court holds the Petition, Petitioner would undoubtedly seek a stay of the trial. Respondent would oppose such a stay, but if it is granted, the trial could be delayed for a year or more. This would vindicate aims of a Petitioner already

held to be a contumacious party, severely sanctioned for not taking its litigation obligations seriously.

## CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

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