Nos. 20-16759, 20-16766

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DEMOCRATIC PARTY, *et al.*,
Plaintiff-Appellees,

v.

KATIE HOBBS *et al.*,
Defendants,

STATE OF ARIZONA, *et al.*
Intervenor-Defendant-Appellants,

and

REPUBLICAN NATIONAL COMMITTEE and ARIZONA REPUBLICAN PARTY,
Intervenor-Appellants.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:20-cv-01143

INTERVENOR-APPELLANTS' BRIEF

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January 20, 2021

RULE 26.1 STATEMENT

Neither the Republican National Committee nor the Arizona Republican Party has a parent corporation or a corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF JURISDICTION

Because this case arises under federal law, the district court had jurisdiction based on 28 U.S.C. §1331. This Court has jurisdiction under 28 U.S.C. §§1291, 1292(a) to review the district court's judgment granting injunctive relief. *See TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 680 (9th Cir. 1990). The district court entered final judgment and an injunction on September 10, 2020. 1-ER-25. Intervenor-Appellants filed a timely notice of appeal on September 11, 2020. 3-ER-342.

STATEMENT OF ISSUES

I. Whether the district court erred in concluding Appellees are likely to succeed on the merits of their *Anderson-Burdick* claim.

II. Whether the district court erred in concluding Appellees are likely to succeed on the merits of their due process claim.

STATEMENT OF THE CASE

To prevent fraud, Arizona law requires early voters to provide a signed ballot affidavit with their early ballot, which election officials must receive by 7:00 PM on Election Day. *See* Ariz. Rev. Stat. §§16-548(A), 16-552(B). Under Arizona law, a ballot with a defective affidavit will not be counted. Ariz. Rev. Stat. §16-552(B). But an early voter who returns a ballot with an unsigned affidavit can cure the lack of signature until the 7:00 PM Election Day receipt deadline. For the entirety of its century-long use of absentee ballots, Arizona has required the voter's signature to validate any ballot not cast in person and has never allowed unsigned ballots to be cured after Election Day.

In the months before the 2020 general election, the Arizona Democratic Party, Democratic National Committee, and Democratic Senatorial Campaign Committee—Appellees here—challenged Arizona's Election Day signature cure deadline in the District of Arizona. Appellees claimed that law violates the Equal Protection and Due Process Clauses of the United States Constitution. 1-ER-5. The Republican National Committee and the Arizona Republican Party filed a timely joint motion to intervene, which the district court granted.[1] 1-ER-5. Despite finding the cure procedures imposed only minimal burdens on the right to vote, the district court held that they likely impermissibly burdened the right to vote. 1-ER-11-19.[2] The court also held that the procedures violated the Due Process Clause. 1-ER-20-23. In light of these findings, the district court permanently enjoined Arizona's signature cure law on September 10, 2020, less than two months before the 2020 general election. 1-ER-25.

After the district court denied their motion to stay the injunction, the State and Intervenor-Appellants separately moved this Court for a stay. This Court stayed the permanent injunction, finding Appellants were likely to succeed on the merits because

[1] Donald. J. Trump for President, Inc., was also granted intervention below as part of that joint motion, and was one of the initial Intervenor-Appellants here. *See* Doc. 118 (Sept. 11, 2020). Now that the 2020 election has ended, the Trump campaign's interest in this case has subsided. The campaign has thus filed a consented-to motion to withdraw as an intervenor and is no longer participating in this appeal as an Intervenor-Appellant.

[2] "ER" cites refer to the Excerpts of Record submitted by the State.

the district court misapplied the *Anderson-Burdick* framework, gave insufficient weight to Arizona's interest, and erroneously accepted Appellees' novel procedural due process argument. *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1085-87 (9th Cir. 2020).

SUMMARY OF THE ARGUMENT

To avoid duplicative briefing, Intervenor-Appellants incorporate by reference the Attorney General's arguments for reversing the judgment below, and focus here on two particular points. First—as the published opinion from the motions panel recognized—the district court's *Anderson-Burdick* analysis badly misses the mark. The district court correctly found that Arizona's Election Day deadline for curing unsigned ballots imposes only a "minimal" burden on voters. But the court erred as a matter of law when it held that this burden nonetheless outweighs the State's interest in enforcing its longstanding signature cure deadline. Rather than accepting the State's choice of an acceptable means to advance its several important interests, the district court imposed what it thought to be the best mechanism to advance those interests. In the face of only a de minimis burden on voting, this was error.

Second, the district court erred by applying the *Mathews v. Eldridge* procedural due process framework in the election context. Again, as the motions panel recognized, *Anderson-Burdick*—not *Mathews*—is the appropriate standard for challenges to election laws. So for the same reasons Appellees' *Anderson-Burdick* challenges fail, their due process challenges also must fail. Accordingly, this Court should reverse the district court's permanent injunction.

ARGUMENT

Because "[a] district court's decision to grant a permanent injunction involves factual, legal, and discretionary components," this Court reviews underlying "legal conclusions de novo," factual findings for clear error, and "the scope of injunctive relief for abuse of discretion." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). But "mixed questions of law and fact implicating constitutional rights are reviewed de novo." *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1066-67 (9th Cir. 1995). A court "by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

I. The district court erred in concluding that Appellees are likely to succeed on the merits of their *Anderson-Burdick* claim.

The district court recognized that Arizona's Election Day deadline for curing unsigned ballots imposes only a "minimal" burden on voters, 1-ER-12-14, but it erred as a matter of law when it held that this de minimis burden nonetheless outweighed the State's interest in enforcing a longstanding election procedure. As this Court already has held, "[a]ll ballots must have *some* deadline, and it is reasonable that Arizona has chosen to make that deadline Election Day itself so as to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion." *Ariz. Democractic Party*, 976 F.3d at 1085. That is sufficient to uphold Arizona's deadline for the curing of unsigned ballots.

When evaluating a challenge to a state election law under the *Anderson-Burdick* framework, courts "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). When, as here, the burden imposed by the law is minimal, "the State need not narrowly tailor the means it chooses to promote ballot integrity." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365 (1997). *See also Ariz. Democratic Party*, 976 F.3d at 1085. Rather, the State must show only that the law "reasonably further[s] Arizona's important regulatory interests." *Ariz. Libertarian Party v. Hobbs*, 925 F.3d 1085, 1094 (9th Cir. 2019). Arizona has done so here.

The State offered "four interests" behind "the challenged deadline: (1) fraud prevention; (2) reducing administrative burdens on poll workers; (3) orderly administration of elections; and (4) promoting voter participation and turnout." 1-ER-14. The district court held that the Election Day deadline violated Appellees' equal protection rights because, in its view, the State could achieve some of its interests through less restrictive measures and did not provide sufficient evidence that the Election Day deadline would serve its other asserted interests. The district court acknowledged that voting deadlines deter fraud, for example, but it nevertheless held

that the Election Day deadline was unreasonable because a post-election deadline would deter fraud just as effectively. 1-ER-14-15. But that is not the law.

For laws that impose burdens as slight as this one—requiring only that voters sign their name on their official voting documents—the State is not required to provide "proof that [the deadline is] the only or the best way to further [its] proffered interests." *Ariz. Libertarian Party*, 925 F.3d at 1094. On the contrary, because the cure deadline imposes only the slightest burden on voting, the State needs to demonstrate only that the deadline reasonably furthers an important state interest. Under this standard, the district court's acknowledgement that the "State's interest in preventing voter and election fraud is important" and that "the State's fraud prevention interest is served by imposing a deadline by which voters must sign their ballots" by itself justifies the deadline. 1-ER-14.

Indeed, the district court's own previous opinions further undermine its ruling here. *Compare* 1-ER-14 ("Because there is no evidence that the challenged deadline reasonably prevents fraud, the Court finds that fraud prevention does not justify the minimal burdens imposed.") (Rayes, J.), *with Feldman v. Ariz. Secr'y of State's Office*, 208 F. Supp. 3d 1074, 1091 (D. Ariz. 2016) ("[Plaintiffs] argue that [the law] is unjustified because there is no evidence of verified absentee voter fraud perpetrated by ballot collectors ... [But] Arizona 'need not show specific local evidence of fraud in order to justify preventative measures.'") (Rayes, J.) ("*Feldman I*"); *see also Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 390 (9th Cir. 2016) ("The district court did not err in crediting

Arizona's important interest in preventing fraud even in the absence of evidence that voter fraud had been a significant problem in the past. ... [States] need not restrict themselves to a reactive role: [they] are 'permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.'") ("*Feldman II*") (upholding *Feldman I*).

The district court also held that the State did not provide enough evidence that the Election Day deadline would reduce administrative burdens to a sufficiently "meaningful" extent. 1-ER-15-17. In the process, it once again inverted the constitutional standard for voting laws that impose de minimis burdens. In short, the district court "require[d] a particularized" evidentiary "showing" that the State's deadline would achieve its stated interests—something this Court has repeatedly said States are not required to do. *Ariz. Libertarian Party*, 925 F.3d at 1094 (quotation marks omitted). By parsing the State's evidence to evaluate the magnitude of the costs saved by the State's chosen deadline, the district court implicitly acknowledged that the State's chosen deadline *does* further its stated goal of reducing administrative burdens—but then substituted its own policy judgment for the State's, even though that "cost-benefit analysis [was] the kind of judgment that the [State] was entitled to make." *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 733 (9th Cir. 2015).

Even on its own terms, the district court's weighing of the State's interests in enforcing the cure deadline fails. For example, as evidence that the State's interest in reducing administrative burdens and conducting an orderly election is not served by the

cure deadline, the court points only to Arizona's provision of a post-Election Day cure period for mismatched signatures and for in-person voters without identification. 1-ER-15-18. The district court identified only one reason for this disparate treatment that the State failed to proffer—that the "shorter deadline for curing unsigned envelopes is intended to penalize voters for their errors." 1-ER-18. But—as the motions panel recognized—Arizona offered an eminently reasonable justification for this disparity that the court below ignored: the State agreed to assume additional administrative costs for remedying ballots that may have been invalidated due to its own mistake but declined to assume additional costs for remedying ballots invalidated due to the mistake of the voter. *See Ariz. Democratic Party*, 976 F.3d at 1086 ("[T]he State may still reasonably decline to assume such burdens simply to give voters who completely failed to sign their ballots additional time after Election Day to come back and fix the problem."); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020).

The district court similarly ignored the State's fraud rationale by making flawed analogies to mismatched signatures and in-person provisional ballots. The court erroneously found that "the State has not explained how its fraud prevention interest would be harmed if voters could cure missing signatures in the same post-election timeframe applicable to these other identification issues." 1-ER-15. But this ignores Arizona's explanation for the disparity, the higher risk of fraud inherent with unsigned rather than mismatched ballots: "[T]he potential risk of fraud is greater with non-signatures. Many would-be cheaters may hesitate before signing hundreds of fraudulent

ballots because doing so would both provide extensive handwriting samples that could be traced back to the fraudster. ... But submission of unsigned ballots runs much less risk of being traced back to the perpetrator, given the absence of evidence for investigators." Doc. 85-1, at 20-21 (citing Atkeson Report ¶70; Napolitano Decl. Exs. P-U). As with the administrative-burden explanations, the district court never grapples with the State's reasonable justifications for its treatment of unsigned ballots.

The district court's decision also ignores precedent. The court simply declares that the State's "asserted interests is illegitimate," without citing "any cases directly on point" to justify that assertion. *Disability Law Ctr. of Alaska v. Meyer*, 2020 WL 5351595, at *7 (D. Alaska Sept. 3, 2020). Indeed, despite the proliferation of voting-rights cases spurred by the COVID-19 pandemic, no court in this circuit has ever vacated an election law for imposing a "minimal" burden on citizens' right to vote.

On the contrary, Ninth Circuit courts have uniformly upheld voting laws that impose de minimis burdens on voters while advancing legitimate governmental interests. *See, e.g.*, *Feldman*, 843 F.3d at 391 ("By asserting its interest in preventing election fraud and promoting public confidence in elections, ... Arizona bore its burden of establishing 'important regulatory interests' sufficient to justify the minimal burden imposed by [state law]."); *Ariz. Libertarian Party*, 925 F.3d at 1094 (State's "signature requirements reasonably further Arizona's important regulatory interests and therefore justify" a small burden on party's right to ballot access); *Fight for Nevada v. Cegavaske*, 2020 WL 2614624, at *5 (D. Nev. May 15, 2020) (upholding

minimal burden imposed by signature deadline under rational-basis review); *Paralyzed Veterans of Am. v. McPherson*, 2008 WL 4183981, at *15 (N.D. Cal. Sept. 9, 2008) (rejecting motion for preliminary injunction because "plaintiffs have failed to provide evidence of anything other than minimal burdens on their right to vote"); *Disability Law Ctr. of Alaska*, 2020 WL 5351595, at *7 (similar); *cf. Mi Familia Vota v. Hobbs*, 977 F.3d 948, 952 (9th Cir. 2020) (staying injunction of voter registration deadline because, inter alia, "the statutory deadline does not impose a 'severe burden'").

Federal courts across the country routinely uphold election laws imposing minimal burdens, as well. Such laws are invalidated only when a state has either asserted a governmental interest that conflicts with Supreme Court precedent or failed to assert *any* governmental interest. *See, e.g.*, *Common Cause/N.Y. v. Brehm*, 432 F. Supp. 3d 285, 314 (S.D.N.Y. 2020) (vacating election law because, "when pressed at trial to provide a legitimate interest, the State was repeatedly unable to do so"); *Nation v. San Juan Cty.*, 150 F. Supp. 3d 1253, 1268-69 (D. Utah 2015) (invalidating county school board districts because county's justification conflicted with Supreme Court precedent). This case fits neither situation.

Beyond that, the district court's application of *Anderson-Burdick* ignores state practice and has the potential to disrupt the longstanding practices of several other states. Fifteen states do not allow voters to cure unsigned ballots under any circumstance. *See* Doc. 85-1, at 25, 35-36 (Table 1). The district court agreed that Arizona's proffered interests were significant but disagreed with its chosen means to

accomplish these interests. 1-ER-15-17. Under the district court's reasoning, at least these fifteen states' longstanding unsigned ballot laws would be per se unconstitutional. But "there is no requirement that" states' cure deadline laws are "the only or the best way to further" their interests in orderly elections. *Dudum v. Arntz*, 640 F.3d 1098, 1114 (9th Cir. 2011). Under *Anderson-Burdick*, courts cannot impose their view of the ideal means to accomplish an objective upon the states when the challenged law imposes only a minimal burden. *Id.* Instead, as the prevailing disparity of approaches to unsigned ballots demonstrates, unless a measure imposes a severe burden, states are entitled to choose from various means to advance their interests. *See Ariz. Libertarian Party*, 925 F.3d at 1094.

Finally, this wide disparity of state approaches highlights the policy-driven nature of the district court's opinion. States have a vast menu of absentee-ballot policies to choose from, all of which further the same fundamental interest of safeguarding the integrity of American elections. In crediting the Secretary's interests, the court ignores the State's proffered interests, bolstered by extensive evidentiary submissions. *See* Doc. 85-1, at 26-29; *see also Ariz. Democratic Party*, 976 F.3d at 1085 ("[T]here can be no doubt (and the record contains evidence to show) that allowing a five-day grace period beyond Election Day to supply missing signatures would indeed increase the administrative burdens on the State to some extent."). Instead of asking whether Arizona's unsigned-ballot rules fell within this universe of reasonable approaches—which it clearly does—the district court sided with the Arizona Secretary of State's policy preferences over

those of the State's legislature. 1-ER-17 ("[T]he Secretary believes that a uniform cure period for all three of these identification issues would promote the orderly administration of elections by reducing voter confusion ... The Court gives great weight to the Secretary's judgment."). That, it cannot do.

II. The district court erred in concluding Appellees are likely to succeed on the merits of their due process claim.

As an initial matter, the district court applied the wrong framework to Appellees' procedural due process claims. This Court has unambiguously held that *Anderson-Burdick* applies to *all* election claims brought under the First and Fourteenth Amendments, including procedural due process claims. *See Dudum*, 640 F.3d at 1106 n.15; *Lemons v. Bradbury*, 538 F.3d 1098, 1103 (9th Cir. 2008) (noting that "'a more flexible standard applies' for analyzing election laws that burden the right to vote" under *Anderson-Burdick* and affirming denial of procedural due process claim); *see also Ariz. Democratic Party*, 976 F.3d at 1086 n.1 ("The State is also likely to succeed in showing that the district court 'erred in accepting the plaintiffs' novel procedural due process argument,' because laws that burden voting rights are to be evaluated under the *Anderson/Burdick* framework instead."); *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) ("In *Burdick v. Takushi*, the Court emphasized that [the *Anderson-Burdick*] test applies to *all* First and Fourteenth Amendment challenges to state election laws." (emphasis in original)); *Obama for Am. v. Husted*, 697 F.3d 423, 430

(6th Cir. 2012) (*Anderson-Burdick* is the "single standard for evaluating challenges to voting restrictions").

Rather than applying the *Anderson-Burdick* framework to Appellees' procedural due process claims, the district court erroneously applied the standard announced in *Mathews v. Eldridge*, 424 U.S. 319 (1976).[3] *Mathews* applies to the vast majority of procedural due process challenges, but, as the above-cited precedent confirms, it is not the appropriate standard in the election law context. *See id.*; *see also New Ga. Project*, 976 F.3d at 1282 ("[T]he district court also erred in accepting the plaintiffs' novel procedural due process argument. The standard is clear: '[W]e must evaluate laws that burden voting rights using the approach of *Anderson* and *Burdick*.'").

The district court cited a few opinions from the small minority of district courts that have continued to use *Mathews* to evaluate election laws, but the only opinion it cited from a court within the Ninth Circuit predates *Burdick* by two years and this Court's dispositive cases by at least eighteen years. *See* 1-ER-21 (citing *Raetzel v.*

[3] Intervenor-Appellants agree with the State that there is no need for this Court to conduct a procedural due process inquiry at all, because Appellees are attempting to recategorize a substantive due process claim as a procedural due process claim. *See* Br. of State of Ariz., No. 20-16759, Doc. 32, at 64-65 (Jan. 20, 2021). Appellees are not requesting a new *procedure* for voters to cure unsigned ballots; they are clearly happy with the current method for doing so. Rather, Appellees seek a *substantive* change to the *date on which such procedures are no longer available*. State law provides voters with a process for curing unsigned mail ballots—it merely requires voters to take advantage of that process before the polls are closed to in-person voting and ballot counting begins. This elementary restriction is no different from a statute of limitations or any other temporal restriction the law routinely applies to legal processes of all sorts. Appellees' complaint is with the substance of the law on its face, not the procedures used to enforce it.

Parks/Bellemont Absentee Election Bd., 762 F. Supp 1354, 1355-58 (D. Ariz. 1990)). In *Lemons*, this Court reviewed a procedural due process challenge to Oregon's voting laws and applied *Burdick* to affirm the district court's denial of a preliminary injunction. *Lemons*, 538 F.3d at 1105. The opinion never mentioned *Mathews*. In *Dudum v. Arntz*, this Court stated in no uncertain terms that "First Amendment, Due Process, [and] Equal Protection claims" implicating state voting laws are "addressed under [the] single analytic framework" outlined in *Anderson* and *Burdick*. 640 F.3d at 1106 n.15. And in *Soltysik v. Padilla*, this Court reaffirmed once again that First and Fourteenth Amendment claims are all "folded into the *Anderson/Burdick* inquiry" in the election law context. 910 F.3d 438, 449 n.7 (9th Cir. 2018).

The district court never acknowledged that *Lemons* involved a procedural due process claim, and it attempted to distinguish *Dudum* and *Soltysik* by noting that they involved Fourteenth Amendment claims other than procedural due process claims. 1-ER-20-21. But there is no reason to believe that this Court included an unstated exception for procedural due process claims when it stated that First and Fourteenth Amendment challenges to voting laws are "folded into the *Anderson/Burdick* inquiry" and addressed under a single framework. 1-ER-20; *cf. New Ga. Project*, 976 F.3d at 1282 (noting absence of "binding cases from any court that apply the *Mathews* test to a State's election procedures"). That assertion is all the more suspect given that this Court has *already* applied *Anderson-Burdick* to procedural due process challenges to voting laws. *See Lemons*, 538 F.3d at 1105.

Furthermore, *Anderson-Burdick* would apply to Appellees' claim even if this issue had not already been decided by circuit precedent (which it has). Because *Anderson* and *Burdick* were decided after *Mathews*, the most logical interpretation of those cases is that the Court carved out an exception to the usual *Mathews* inquiry when it announced a separate framework for First and Fourteenth Amendment challenges to voting laws. And the *Anderson-Burdick* framework already accounts for procedural due process concerns, including (1) the right at stake; (2) potential burdens to that right; and (3) the public interests and the extent to which election laws are serving those interests. *Compare Burdick*, 504 U.S. at 433-34, *with Mathews*, 424 U.S. at 335 (outlining procedural due process factors). *Anderson-Burdick* inherently recognizes the procedural reality "that government must play an active role in structuring elections … if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433; *see also New Ga. Project*, 976 F.3d at 1282 ("The generalized due process argument that the plaintiffs argued for and the district court applied would stretch concepts of due process to their breaking point. And even looking at that approach in the most charitable light possible, it is conceptually duplicative of the specific test we have been instructed to apply under *Anderson* and *Burdick*.").

Before analyzing Appellees' claims under the *Mathews* framework, the district court held in the alternative that, if *Anderson-Burdick* did apply, its analysis of Appellees' procedural due process claim would mirror its analysis of their equal protection claim.

1-ER-21. Because Appellees' *Anderson-Burdick* claims fail, *supra* section I, so too do their procedural due process claims.[4]

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's injunction.

Respectfully Submitted,

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[4] Even if the *Mathews* framework applied, Appellees' procedural due process claim still fails. A state law requiring voters to cure unsigned ballots after the Election Day deadline does not violate any freestanding right—voters simply do not have a constitutional or statutory right to correct ballot infirmities after Election Day that were caused by the inaction of those same voters. *See Burdick*, 504 U.S. at 433 ("It does not follow, however, that the right to vote in any manner . . . [is] absolute."). If that were the case, then the laws of the fifteen states that do not allow ballot curing at any point during the voting period must necessarily be unconstitutional as well.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2021, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

/s/ Patrick Strawbridge
Counsel for Intervenor-Appellant

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9th Cir. Case Number(s) 20-16759, 20-16766

I am the attorney or self-represented party.

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