THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2024-001227

League of Women Voters of South Carolina.....Petitioner,

v.

Thomas Alexander, in his official capacity as President of the South Carolina Senate, Murrell Smith, in his official capacity as Speaker of the South Carolina House of Representatives, and Howard Knapp, in his official capacity as Director of the South Carolina Election Commission.....Respondents

and

Henry McMaster, in his official capacity as Governor of South Carolina.....Intervenor.

BRIEF OF RESPONDENT HOWARD KNAPP, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE SOUTH CAROLINA ELECTION COMMISSION

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Introduction

This case presents a state-law challenge to the Congressional redistricting plan that has already been the subject of extensive federal litigation over the past several years, culminating in a decision of the United States Supreme Court. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1 (2024). The State Election Commission (SEC) has no statutory role in redistricting and, thus, takes no position on the substance of the claims in this action;[1] however, the agency does have a strong interest in the orderly administration of elections, avoiding voter confusion, and not being subject to repetitive and costly lawsuits. The SEC believes that allowing this action to proceed impairs all of these important interests that it advances on behalf of the State. The League of Women Voters of South Carolina (League) was involved directly or indirectly in all aspects of the federal litigation over the same Congressional maps, yet it waited almost three years after the maps were enacted to bring this action when it was fully familiar with the importance and significance of the redistricting process and knew well that the political gerrymandering claims it now raises are not justiciable in federal court. The League's action should be dismissed for laches.

[1] The SEC is an administrative agency of the executive branch of government responsible for overseeing the election and voter registration processes in this State as set forth in Title 7 of the South Carolina Code. S.C. Code Ann. § 7-3-10(D) ("The commission shall have the powers and duties as enumerated in this title."). As a creature of statute, the SEC "can only act pursuant to powers granted." *S.C. Tax Comm'n v. S.C. Tax Bd. of Rev.*, 278 S.C. 556, 560, 299 S.E.2d 489, 491 (1983).

Statement of the Issues

Should the Court determine that laches warrants dismissal of this action because the League delayed asserting this state-law challenge to the Congressional maps drawn by the General Assembly for almost three years even though the League publicly asserted at the outset that the maps were flawed and it knew well that federal courts could not adjudicate claims of political gerrymandering?

Statement of the Case

1. History of this Original Jurisdiction action.

On July 29, 2024, the League filed its Petition for Original Jurisdiction and a Complaint against Thomas Alexander, in his official capacity as President of the South Carolina Senate (Senate), Murrell Smith, in his official capacity as Speaker of the South Carolina House of Representatives (House), and Howard Knapp, in his official capacity as executive director of the South Carolina Election Commission (SEC).[2] The Petition requested that this Court exercise its original jurisdiction and issue declaratory and injunctive relief on the basis that the Congressional redistricting plan passed by the General Assembly, Senate Bill 865, violated several provisions of the Constitution of South Carolina. On October 3, 2024, this Court issued an Order granting Governor McMaster's unopposed motion to intervene, granting Petitioner's request to hear this matter in the Court's original jurisdiction, and establishing a briefing schedule.

2. History of the federal litigation and enactment of the Congressional District maps.[3]

On October 12, 2021, the South Carolina Conference of the NAACP (SC NAACP) and Taiwan Scott, a voter, filed a federal lawsuit against public officials from the Senate, the House,

[2] S.C. Code Ann. § 7-3-10 establishes the "State Election Commission." There is no South Carolina government agency known as the "South Carolina Election Commission."

[3] Within this brief, the SEC cites to information publicly available on federal and state government websites, including federal court trial materials available on the federal judiciary's Public Access to Court Electronic Records (PACER) system. This Court can take judicial notice of this information, the accuracy of which is indisputable. *See Matter of Harry C.*, 280 S.C. 308, 310, 313 S.E.2d 287, 288 (1984) ("The Courts will take judicial notice of subjects and facts of general knowledge, and also of facts in the field of any particular science which are capable of demonstration by resort to readily accessible sources of indisputable accuracy . . . ."); *see also United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017) (noting that federal courts "routinely take judicial notice of information contained on state and federal government websites"); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (noting that "the most frequent use of judicial notice of ascertainable facts is in noticing the content of court records") (cleaned up).

and the SEC (and, initially, the Governor) acting in their official capacities. The lawsuit as initially filed contended that the Congressional and State House districts were unconstitutionally malapportioned because no redistricting plan had been passed. *See S.C. State Conf. of the NAACP, et al. v. McMaster, et al.*, 572 F. Supp. 3d 215, 219 (D.S.C. 2021); *see also Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). On November 12, 2021, Judge Childs stayed the proceedings to allow the General Assembly time to enact new election districts. *S.C. State Conf. of the NAACP*, 572 F. Supp. 3d at 224.

On January 26, 2022, the General Assembly passed the Congressional Redistricting Plan and the Governor signed it into law.[4] On February 10, 2022, the federal plaintiffs filed a Second Amended Complaint, alleging in pertinent part that Congressional Districts 1, 2, and 5 as drawn in the Congressional Plan constituted unconstitutional racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment.[5] *See S.C. State Conf. of the NAACP*, ECF No. 154.[6] On May 6, 2022, the plaintiffs filed a Third Amended Complaint, which solely challenged Congressional Districts 1, 2, and 5 in the Congressional Plan on the same grounds as before. *See id.*, ECF No. 267.[7] The Third Amended Complaint was the operative complaint throughout the remainder of the federal litigation.

[4] *See* https://www.scstatehouse.gov/sess124_2021-2022/bills/865.htm (accessed January 13, 2025).

[5] As explained by the United States Supreme Court, "[a] racial-gerrymandering claim asks whether race predominated in the drawing of a district regardless of the motivations for the use of race." *Alexander*, 602 U.S. at 38 (cleaned up).

[6] The First Amended Complaint, filed on December 23, 2021, included a challenge the State House Plan as an unconstitutional racial gerrymander after its enactment. *See S.C. State Conf. of the NAACP*, ECF No. 84.

[7] The House and plaintiffs settled the litigation regarding the State House Plan, so the Third Amended Complaint removed the allegations regarding this plan.

On February 15, 2022, counsel for the parties in the federal litigation held a status conference with the district court regarding, *inter alia*, continuing the bench trial on the Congressional Plan, which at that point was scheduled to begin on February 28, 2022, and conclude March 8, 2022. Counsel for the SEC expressed concerns about prolonged litigation about the Congressional election districts leaving the 2022 election in limbo, as the statutorily mandated opening of the March 16, 2022 candidate filing period was fast approaching.[8] *See* ECF No. 172, Tel. Status Conf. Tr. (attached as Exhibit A) at 19:23-20:10. Judge Gergel recognized these concerns and confirmed plaintiffs were aware that continuing the trial meant that "you're not going to be using anything but the legislatively adopted plan in 2022. I mean, I just think practically, by moving the trial, I think your -- the plaintiffs are electing to pass." *See id.* at 20:11-20:21. Counsel for plaintiffs indicated that "plaintiffs underst[ood] the ramifications" of continuing the matter; i.e., that the 2022 Congressional elections would proceed under the enacted Congressional Plan. *See id.* at 21:08-11, 21:21-22:04. Thus, the matter was continued and the 2022 Congressional elections went forward under the districts as enacted by the General Assembly.

Between October 3 to October 14, 2022, an eight-day bench trial before a three-judge panel of the district court[9] was conducted regarding plaintiffs' allegations[10] On January 6, 2023, the Three-Judge Panel issued an order finding that Congressional District 1 constituted an

[8] *See* S.C. Code Ann. § 7-11-15(A) (requiring that, to qualify as a candidate for a political party primary or political party convention nomination, a person must "file a statement of intention of candidacy and party pledge and submit any filing fees between noon on March sixteenth and noon on March thirtieth . . .").

[9] *See* 28 U.S.C.A. § 2284 (a) ("A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.").

[10] The bench trial concluded with closing arguments on November 29, 2022. *S.C. State Conf. of the NAACP*, ECF No. 492.

unconstitutional racial gerrymander but that Congressional Districts 2 and 5 did not. *S.C. State Conf. of the NAACP v. Alexander*, 649 F. Supp. 3d 177, 197 (D.S.C. 2023) (three-judge panel), *modified* 2024 WL 1327340 (D.S.C. Mar. 28, 2024), *rev'd in part sub nom. Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1 (2024). The court ordered, *inter alia,* that elections in Congressional District 1 be enjoined until approval of the constitutionally valid reapportionment plan by that court. *Id.* at 199-200. On February 4, 2023, the court issued an order noting that defendants had indicated their intention to appeal to the United States Supreme Court and deferred the deadline for submission of a remedial plan until 30 days after a final decision of the Supreme Court. *S.C. State Conf. of the NAACP*, ECF No. 501 at 3.

On October 11, 2023, the United States Supreme Court heard oral argument in *Alexander*. However, by the beginning of March 2024, the Court had not yet issued an Opinion. Compounding the uncertainty, the beginning of the 2024 election cycle was imminent, with candidate filing for the 2024 election cycle opening on March 16 and closing on April 1. *See* S.C. Code Ann. § 7-11-15(A). Thus, there was considerable uncertainty about the legal impact of the district court's January 6, 2023 Order enjoining future elections in Congressional District 1 until a remedial plan was in place, *see* 649 F. Supp. 3d at 199-200, especially in view of the February 4, 2023 Order setting a deadline for defendants to submit a remedial plan of 30 days after a final decision of the Supreme Court. *S.C. State Conf. of the NAACP*, ECF No. 501 at 3.

Because of this uncertainty, on March 7, 2024, defendants moved for a partial stay of the district court's January 6, 2023 Order to allow the 2024 elections to proceed under the Enacted Plan. *Id.*, ECF No. 519. The candidate filing period began on March 16 without a ruling on the motion. After a few days passed, on March 18, 2024, defendants filed an Emergency Application

for Stay of Panel's Injunction for the 2024 Elections with the United States Supreme Court.[11] On March 28, 2024, the district court granted defendants' motion for a partial stay and modified its injunction to allow the Enacted Plan to be used for the 2024 election cycle already underway. *Id.*, ECF No. 523, 2024 WL 1327340 (D.S.C. Mar. 28, 2024).

On June 24, 2024, the Supreme Court issued its opinion reversing the district court decision that Congressional District 1 was an unconstitutional gerrymander and remanding the vote dilution claim for further proceedings. *Alexander*, 602 U.S. at 6-7. On July 25, 2024, the parties filed a Joint Stipulation Voluntarily Dismissing Third Amended Complaint with Prejudice effectively ending the case. *S.C. State Conf. of the NAACP*, ECF No. 527. This case was filed four days later, on July 29, 2024, with many of the same attorneys who appeared in the federal litigation also appearing in this state-law challenge to the Enacted Plan. Three days later, on August 1, 2024, the district court issued an order that formally accepted the joint stipulation and ended the federal litigation. *S.C. State Conf. of the NAACP*, ECF No. 528.

Standard of Review

Although this case involves a constitutional challenge to a redistricting plan, that plan becomes law just like any other statute. In reviewing a constitutional challenge to a statute,

> [t]his Court has a very limited scope of review . . . . All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution. The party challenging the constitutionality of a statute bears the burden of establishing unconstitutionality.

[11] *See* Appellants' Emergency Application for Stay of Panel's Injunction for the 2024 Elections at https://www.supremecourt.gov/DocketPDF/22/22-807/303334/20240318175102126_SC%20SCOTUS%20Application%20for%20Partial%20Stay.pdf (accessed January 13, 2025).

Applied Bldg. Scis., Inc. v. S.C. Dep't of Com., Div. of Pub. Railways, 442 S.C. 421, 426, 900 S.E.2d 241, 243-44 (2024), *reh'g denied* (May 7, 2024) (cleaned up).

In South Carolina, "laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" *State v. Policao*, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) (*quoting Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007)). This Court has broad discretion in determining whether laches applies. *Chambers of S.C., Inc. v. Cnty. Council for Lee Cnty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993) ("The court is vested with wide discretion in determining what is an unreasonable delay."); *Ramantanin v. Poulos*, 240 S.C. 13, 23, 124 S.E.2d 611, 615 (1962) ("It is impossible to adopt a general rule by which the application of the rule of laches may be determined. The determination of the question [of laches] rests largely within the discretion of the Court and proceeds in the light of the circumstances of each case . . . .").

Argument

The Court should hold that this challenge to the Congressional redistricting map is barred by laches because the League unnecessarily and unreasonably delayed this assertion of its claimed rights and thereby prejudiced the important interests of the SEC and the State of South Carolina in, *inter alia*, maintaining the integrity of elections and avoiding voter confusion.

Laches applies here because the League should not be permitted to maintain this action after it sat on its rights and delayed bringing a claim that it knew well was ripe for adjudication as soon as the new legislative maps were enacted into law almost three years ago. *Hemingway v. Mention*, 228 S.C. 211, 217, 89 S.E.2d 369, 371–72 (1955) ("Equity aids the vigilant, not those who slumber on their rights.") (cleaned up). The League was well aware of the importance and significance of the redistricting process and the enactment of the newly-drawn maps into law, yet it did nothing but dawdle while federal litigation proceeded regarding entirely different claims than the state-law claims the League has asserted here. And as outlined above, that federal litigation

was comprehensive and continued for more than two years, yet the League did nothing about the claims it now asserts here. The Court should exercise its discretion to dismiss this action because of laches.

1. The redistricting process.

The United States Constitution requires that there be an "Enumeration" for the House of Representatives every ten years and that "Representatives . . . shall be apportioned among the several States . . . according to their respective numbers." U.S. Const., art. 1, § 2, cl.3. Because members of the House are chosen "by the People," *id*., cl. 1, "one [person]'s vote in a congressional election is to be worth as much as another's. *Wesberry*, 376 U.S. at 8. Thus, South Carolina must enact redistricting plans on an equipopulous basis every ten years. *See Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 623 (D.S.C. 2002), opinion clarified (Apr. 18, 2002).[12] Redistricting thus is a vital legislative function that 'involves lawmaking in its essential features and most important aspect." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 788, 807 (2015) (cleaned up). In South Carolina, the redistricting responsibility and authority always rest with the South Carolina General Assembly. *Colleton Cnty. Council*, 201 F. Supp. 2d at 626.

2. The League knew well the importance of the redistricting process but chose to do nothing.

It is indisputable that the League was intimately familiar with and had an abiding interest in the redistricting process. The League actively participated in the public input process provided

[12] While the redistricting for State House and State Senate seats proceeded around the same time and on parallel tracks, only Congressional redistricting is at issue here.

by the General Assembly.[13] Its representatives testified at public hearings, presented specific map designs, and otherwise worked at influencing the Legislature to enact what it considered to be fair redistricting maps.[14] These activities were largely conducted through Lynn Teague, the League's Vice President for Issues and Action, who testified as follows in pertinent part during the federal trial proceedings:[15]

- Ms. Teague was in charge of "assembling [the] team, working with [the] team, and then representing the League at the State House and presenting [its] position and [its] maps." Ex. B, Trial Tr. 675:10-20.

- "The League was set up to do this. We had made [redistricting] a priority for several years. And we did have people who were experienced and had done map drawing and so forth. We had mathematicians who could help us evaluate." *Id.* at. 678:11-14.

- The League "submitted testimony at every stage" of the public input process. *Id.* at 677:7-9.

- The League "prepared a congressional map" to present to lawmakers. *Id.* at 679:18-679:23. In creating this map, the League "develop[ed] its own criteria" which "took off from the National League criteria, with a few slight modifications." *Id.* at 680:9-684:24.

[13] On August 12, 2021, the United States Census Bureau released to the Legislature the redistricting data it needed to start the redistricting process. *See* U.S. Census Bureau website, 2020 Census Timeline of Important Milestones at https://www.census.gov/programs-surveys/decennial-census/decade/2020/planning-management/release/timeline.html (accessed January 13, 2025). In the 2021 redistricting process, both the House and the Senate provided opportunities for public participation in the redistricting process, including the ability for stakeholders to testify at public hearings, submit testimony or other information, and present their own maps for consideration. *See* Senate 2021 Redistricting website at https://redistricting.scsenate.gov (accessed January 13, 2025); House 2021 Redistricting website at https://redistricting.schouse.gov (accessed January 13, 2025).

[14] The League in fact has a webpage cataloguing many of its redistricting activities. *See* https://my.lwv.org/south-carolina-state/electoral-democracy-issues/redistricting-sc-continues-people-powered-fair-maps-south-carolina (accessed January 13, 2025).

[15] *See S.C. State Conf. of the NAACP*, ECF No. 505, Trial Tr. vol. III. Pertinent parts of Ms. Teague's testimony in the federal proceeding are attached as Exhibit B.

The League also worked closely with the federal plaintiffs. At trial, Ms. Teague testified that the League has partnered with the SC NAACP over the years and the two organizations were "in close communication throughout most of the redistricting process." *Id.* at 676:4-7. On December 9, 2021, Ms. Teague sent an email to other League representatives regarding their availability for "a Zoom with John Cusick and others from [the NAACP] LDF," on the subject of "potential litigation." *Id.* at 736:9-17. Mr. Cusick was one of the LDF's lead attorneys and by the time this email was sent on December 9, 2021, he had already appeared in the federal litigation on behalf of the plaintiffs.[16] In her trial testimony, Ms. Teague confirmed this email was on the subject matter of "potential litigation," and explained the context: "The question was very basic. It was, were we planning to litigate[?]" *Id.* at 736:18-19. Ms. Teague confirmed in her testimony that she was "personally disinclined to engage in litigation," stating that she had "to take into account that the League is an all-volunteer -- except for one part-time clerk -- organization without attorneys, without the capacity to take on a lot of litigation." *Id.* at 736:20–737:01.

On December 28, 2021, Ms. Teague emailed John Ruoff (the League's map-drawer), discussing an alternative Congressional map prepared by House staff. Testifying about this email and the League's objectives in redistricting process, Ms. Teague confirmed that the League was "basically just laying out a position to build a record for our friends at LDF and ACLU at this point. . . . . The House has no intention of listening to anyone." *Id.* at 733:6-24. When further questioned about this email, Ms. Teague explained:

> [W]e recognized by this time that we were unlikely to be litigants in this because it requires more bandwidth than the League has, to be blunt. And so, we knew that it

[16] *See S.C. State Conf. of the NAACP*, ECF No. 1 (Mr. Cusick's name on Complaint, filed Oct. 12, 2021); ECF No. 34 (PHV application, Oct. 26, 2021); ECF No. 41 (Order granting PHV application, Oct. 26, 2021).

was likely that it would be litigated and we wanted our presentations on the record for consideration.

Id. at 734:4-9.

Although it elected not to be a party in the federal matter, the League certainly participated in and supported that litigation. In addition, the League on August 18, 2023, filed an amicus brief with the United States Supreme Court in *Alexander* asking the Court to affirm the lower court decision based on the Congressional Plan being an unlawful racial gerrymander.[17]

3. The Court should exercise its discretion to find laches because of the League's dawdling in bringing this state-law action while the federal action proceeded.

There is no question that the League was aware of the redistricting process and concerned about its alleged impacts. By the testimony of its own official, "[t]he League was set up to do this" and had made redistricting "a priority for several years." *Id.* at 678:11-12. Above and beyond its participation in the public comment process and in a Zoom meeting with the LDF December 2021 regarding "potential litigation," the League knew well what enactment of the newly drawn Congressional maps meant. Nevertheless, as Ms. Teague testified, the League at least by December 2021 decided to say "no" to challenging the Congressional Plan. And even if the League was not a party to any litigation, it remained in the redistricting fight throughout the public comment process, the drawing of the maps, and the pendency of the federal litigation. It did so—at a minimum—by "laying out a position to build a record for our friends at LDF and ACLU," by having Ms. Teague available to testify at trial for plaintiffs, and by filing an amicus brief before the U.S. Supreme Court.

[17] The League did not argue in that filing that the Plan was a political gerrymander. *See* https://www.supremecourt.gov/DocketPDF/22/22-807/275717/20230818162306055_22-807%20Brief.pdf (accessed January 13, 2025).

This record warrants a finding of laches. No one can question the League's good faith in advocating for what it believes. But it should not be permitted to turn around four days after a stipulation of dismissal was filed in the federal litigation and initiate a state-law claim about the same maps that it had been directly and indirectly challenging for years. Thus, as is necessary for a finding of laches, the League has unreasonably delayed in bringing this action. Two Congressional elections have come and gone using the Enacted Plan, and almost five years have lapsed since the 2020 Census. This is a wholly unreasonable delay. *Chambers of S.C., Inc.*, at 421, 434 S.E.2d 279 at 280 ("Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner.").

Second, the interests of the SEC and the State of South Carolina are prejudiced by the League's unreasonable delay. "States have important interests in protecting the integrity of their political processes . . . , in ensuring that their election processes are efficient, [and] in avoiding voter confusion . . . ." *Clements v. Fashing*, 457 U.S. 957, 965 (1982). "[T]he state is charged with ensuring the uniformity, fairness, accuracy, and integrity of elections." *Perry v. Judd*, 471 F. App'x. 219, 227 (4th Cir. 2012). While the League has been sitting on its rights, the SEC and South Carolina voters have been left with uncertainty about election boundaries from October 2021 when the federal litigation began until July 2024 when it ended. Implementing new maps at this point—almost three years after the maps were first enacted and after their use in two federal elections—would create substantial confusion and uncertainty among voters. As shown in the federal proceedings, the concern about uncertainty is not an abstract issue because the SEC and the State have needed judicial intervention to clear up uncertainty about what election maps to use in both 2022 and 2024.

At some point, "there should be an end to litigation." *Evans v. Creech*, 187 S.C. 371, 197 S.E. 365, 368 (1938). The League could have initiated this action at least two years ago because it knew well that, as of 2019, political gerrymandering claims are nonjusticiable in federal court. *Rucho v. Common Cause*, 588 U.S. 684, 721 (2019); League Br. at 10-11 (noting that, in 2019, the United States Supreme Court "concluded that partisan gerrymandering claims are nonjusticiable under the federal Constitution"); *see also Alexander*, 602 U.S. at 9-10. But the League did nothing for almost three years and now extends the lingering uncertainty by instituting this matter only a few days after the parties stipulated to dismissal of the federal litigation over Congressional District 1. That uncertainty is further manifested by the fact that the redistricting process is supposed to be a once a decade event; allowing the League to proceed with this action not only subsidizes the League's strategic dawdling but also risks encouraging redistricting litigation to continue for almost an entire decade. *See Reynolds v. Sims*, 377 U.S. 533, 583 (1964) ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system."); *White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990) (rejecting redistricting challenge on the ground of laches and holding that "two reapportionments within a short period of two years would greatly prejudice the County and its citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens").

Conclusion

The SEC respectfully contends that the Complaint and this matter should be dismissed because the League unreasonably delayed in bringing this challenge.

Respectfully submitted,

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