No. 18-150

In the Supreme Court of the United States

PHIL PLUMMER, *et al.*,
Petitioners,

v.

DAVID M. HOPPER, Special Administrator of the Estate of Robert Andrew Richardson, Sr.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

David E. Mills
THE MILLS LAW OFFICE LLC
1300 West Ninth St.
Ste. 636
Cleveland, OH 44113
(216) 929-4747
dm@MillsFederalAppeals.com

Nicholas DiCello
Counsel of Record
Jeremy Tor
SPANGENBERG, SHIBLEY & LIBER LLP
1001 Lakeside Ave. E.
Ste. 1700
Cleveland, OH 44114
(216) 696-3232
ndicello@spanglaw.com
jtor@spanglaw.com

Attorneys for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

It is clearly established that officers cannot put compressive force on the back of an incapacitated, face-down prone individual because this creates a high risk that the individual will asphyxiate and die. Are officers entitled to qualified immunity if they apply such force over the objection of medical personnel?

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INTRODUCTION

The Petition does not allege a circuit split, nor does it allege a misstatement of law. Instead, the Petition contends the unanimous Sixth Circuit panel below—Judges Batchelder, Griffin, and White—"erred" in assessing qualified immunity on the facts here. This Court is not one of error correction. More fundamentally, no error occurred.

It has been clearly established for years in the Sixth Circuit and in federal courts across the country that putting substantial pressure on the back of an individual who is in a face-down prone position and subdued constitutes excessive force. This manner of restraint is dangerous and excessive because it can deprive the individual of adequate oxygen, thereby precipitating a heart attack. That is precisely what Petitioners did to Robert Richardson on May 19, 2012, and precisely how he died.

Petitioners—law enforcement officers working at a jail in Dayton, Ohio—now claim they were not on notice that the manner in which they restrained Richardson was unconstitutional because medical personnel were present and "treating" Richardson but "did not intervene during the twenty-two minute period at issue to stop the officers from restraining" Richardson in an unconstitutional manner. Pet. at 16. That is false. The medical personnel, including a medic and a nurse, requested that the officers handcuff Richardson in front and roll him onto his back. The officers overrode those requests and, as is the case in any jail, completely controlled the manner of restraint.

The Petition has no basis in law or fact and should be denied.

COUNTERSTATEMENT

On May 19, 2012, Petitioners—nine officers working at the Montgomery County Jail—responded to a medical call initiated by Robert Richardson's cellmate. App. A at 4a.[1] Richardson had collapsed to the floor and appeared to be having a seizure. App. A at 4a. The officers pulled Richardson out of his cell, cuffed his hands behind his back, positioned him belly down on the concrete, all without incident, and then forcefully held him on the ground for twenty-two minutes, "applying compressive force upon a restrained Richardson's back, shoulder blades, shoulders, neck, hands, waist, thighs and lower legs for much of the twenty-two minute ordeal," until he suffocated to death. App. A at 4a–7a; App. C at 41a, 44a, 57a.

During the entire ordeal, the officers were in command of the scene and had Richardson under control. R. 86, Lewis Depo, PageID#1236; R. 87, Marshall Depo, PageID#1314; R. 89, Stumpff Depo, PageID#1379; R. 90, Wittman Depo, PageID#1429. They handcuffed Richardson "without issue" within one minute of arriving on the scene and outnumbered him nine to one. R. 84, Johnson Depo, PageID#1163; App. C at 40a, 42a. The officers "consistently testified" that "[t]hroughout the entire incident" Richardson "neither hurt anyone nor attempted to hurt anyone." App. C at 40a. Rather, a disoriented Richardson had "blood and saliva coming from his mouth," had "accelerated

[1] "App." refers to the Petition's Appendix.

breathing," and was "lethargic." App. C at 40a. Richardson was at times unable to lie completely still, but only because he was struggling to alleviate the pressure on his chest in order to breathe. App. A at 6a; App. C at 54a.

Two eyewitnesses, Jason Haag and Keith Wayne, both detainees at the jail, testified that the "officers applied compressive force to Richardson's neck, head, shoulder and back as he continually told officers that he could not breathe." App. C at 57a. The witnesses heard Richardson cry out, "I can't breathe." R. 92, Haag Depo, PageID#1587. They heard him "gurgling" and saw foam, saliva, and snot around his nose and mouth. R. 92, Haag Depo, PageID#1592, 1601, 1605. They voiced their concerns to the officers, saying, "look, he's foaming" and "look, he can't breathe," and pleaded with the officers to let Richardson breathe: "[H]e's telling you he can't breathe, he can't breathe, let him up." R. 92, Haag Depo, PageID#1601, 1611. In response to one of the pleas ("get off of him"), one of the officers threatened the witness: "Shut up, Kenny, do you want to be next?" R. 92, Haag Depo, PageID#1592. Officers acknowledged Richardson "may have indicated to those on the scene his inability to breathe" and admitted "there was cause to be concerned about Richardson's ability to breathe." App. C at 65a–66a; R. 89, Stumpff Depo, PageID#1375; R. 90, Witmman Depo, PageID#1424.

While Richardson and the eyewitnesses were pleading with the officers, the officers were seen snickering, giggling, and laughing, "like a bunch of people standing around a water cooler in an office." R. 93, Wayne Depo, PageID#1649; R. 92, Haag Depo, PageID#1592. The

officers were at times sitting on Richardson's backside, prompting one officer to joke to another, "ride him [like] a bull," as he simulated a "bull riding motion." R. 92, Haag Depo, PageID#1587, 1592–93.

Rather than pin Richardson facedown and put pressure on his back, the officers could have handcuffed him in front, rolled him over onto his back, sat him up, or placed him in a restraint chair. R. 85, Lewis Depo, PageID#1235, 1247; R. 87, Marshall Depo, PageID#1308; R. 86 Limmer Depo, PageID#1286. For twenty-two minutes, the officers did none of this, as the video shows.

Medical personnel, including one medic and three nurses, arrived on the scene after the officers handcuffed and secured Richardson. App. C at 43a. The medical staff had no control over the manner of restraint. As one of the nurses testified, "Corrections handled restraints. Medical did not." R. 105, Miles Depo, PageID#2909. Another nurse likewise testified that "the corrections staff decides how to restrain somebody," not the medical staff. R. 107, Foster Depo, PageID#3150. The medical staff could, of course, "speak up" and make a recommendation; but "[d]oes that mean it's going to happen? No, it doesn't." R.105, Miles Depo, PageID#2909; R. 107 Foster Depo, PageID#3150.[2]

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[2] Petitioners point out that a medical doctor was at the jail. Pet. at 7–8. That is true, but the doctor was not present on the scene, did not observe what was happening, had no communication with the officers, and had no idea how Richardson was being positioned or the manner of restraint. R. 106, Ellis Depo, PageID#3048–3051. In fact, no medical doctor responded to the scene at any time before Richardson went lifeless and stopped breathing. R. 106, Ellis Depo, PageID#3076.

In fact, the medic and one of the nurses did speak up; they requested Richardson be handcuffed in front and placed on his back. But their requests were overridden by the officers. As the medic testified, "we as the medical people told corrections to cuff" Richardson in the front and position him on his back, but a sergeant "overrode" the requests. App C at 60a; R. 108, Stockhauser Depo, PageID#3266, 3267. The medic explained that anything the medical staff "would say would fall – basically fell on deaf ears." R. 108, Stockhauser Depo, PageID#3274. This frustrated the medical staff and prevented them from doing their job. R. 108, Stockhauser Depo, PageID#3275; App. A at 5a. About twenty minutes into the ordeal, the medical staff packed up their bags and left, as can be seen on the video. This left Richardson alone with the officers for roughly two minutes before they got off him, by which point Richardson had stopped breathing. During those final two minutes, one of the officers dug his knee into the back of Richardson's neck.

According to Respondent's medical experts, the cause of death was a "fatal cardiac arrhythmia" caused by the "manner of restraint," which impaired Richardson's ability to breathe. App. A at 7a. The inability to breathe resulted "'from the compression of Mr. Richardson's torso, including his upper back and neck[,] while he was subdued in a prone position with his hands cuffed behind his back.'" App. A at 7a. If "an individual's arms and legs are restrained like Richardson's were, that individual cannot use them to alleviate the compressive pressure, [he] will fatigue

'[o]ver time,' and his '[r]espiratory movements will ultimately stop.'" App A. at 7a.[3]

The district court denied the officers' motion for summary judgment, concluding they were not entitled to qualified immunity and that the case should go to trial. The Sixth Circuit unanimously affirmed. The officers' motion for rehearing was denied.

REASONS FOR DENYING THE PETITION

I. This Case Presents None of the "Compelling Reasons" Necessary to Grant the Petition.

This case does not present any of the "compelling reasons" that might warrant this Court's exercise of discretion to grant a petition for a writ of certiorari. Rule 10. Petitioners do not allege a circuit split and do not claim the Sixth Circuit "decided an important federal question in a way that conflicts with relevant

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[3] Petitioners claim acute marijuana intoxication was a contributing factor to Richardson's death. Pet. at 5. This is both inaccurate and irrelevant. As Respondent's medical experts explained, from a medical standpoint, marijuana does not cause death or serious illness. R. 102, Leff Depo, PageID#2528–31; R. 99. "Marijuana does not kill people." R. 99, Spitz Depo, PageID#2408–09. Anyway, whether marijuana contributed to Richardson's death is not relevant to the question whether the use of force by the officers was reasonable or whether they displayed deliberate indifference to Richardson's serious medical needs. *See, e.g., Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 905 (6th Cir. 2004) (rejecting the officers' argument that Champion may have died from a preexisting medical condition unrelated to his treatment by the police because "the Officers' argument sidesteps the point: even if Champion had not died, but had only been injured, his clearly established rights were no less violated").

decisions of this Court." Rule 10(a), (c). Instead, they claim the Sixth Circuit "misunderstood the 'clearly established' analysis" by "fail[ing] to identify a case where an officer acting under similar circumstances as petitioners was held to have" violated a constitutional right to be free from excessive force. Pet. at 20. Petitioners are wrong.

The conduct at issue in this case involves "compressive restraint of Richardson (including to his torso) for much of the twenty-two minute period of time, including during the five minutes before Richardson's death. Jurors viewing the jail video of the incident could reasonably conclude that officers applied compressive force upon a restrained Richardson's back, shoulder blades, shoulders, neck, hands, waist, thighs and lower legs throughout much of the twenty-two minute ordeal." App. C at 57a. Petitioners claim they lacked fair notice their conduct was unconstitutional, but the Sixth Circuit identified cases in which this exact manner of restraint was held unconstitutional: "Creating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force." App. A at 16a (citing *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004)). More than that, the Sixth Circuit identified a specific case in which medical and non-medical personnel worked hand in hand to subdue an individual: *Lanman v. Hinson*, 529 F.3d 673 (6th Cir. 2008). In *Lanman*, the individual was having obvious difficulty breathing (as Richardson was) and cried out for help to breathe (as Richardson did), and yet the defendants placed substantial pressure on his back, resulting in

asphyxiation—and then death. This, the Sixth Circuit held, was "objectively unreasonable given the fact that plaintiff's eyewitness testified that defendants continued to restrain Lanman in this dangerous position five minutes after he wasn't resisting at all." *Id.* at 689.

To provide officers fair notice that their conduct is clearly unconstitutional, there need not be a case "directly on point." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). Rather, existing precedent must place the constitutional question beyond debate by showing "the violative nature of particular conduct." *Id.*; *see also Saucier v. Katz*, 533 U.S. 194, 202–03 (2001) ("Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard."). But to the extent Petitioners needed a case directly on point—that is, a case involving the use of compressive force on the back of a subdued individual in the presence of medical personnel—*Lanman* was it. *Lanman* even involved (like this case) the injection of the anti-anxiety drug Ativan by a nurse. *Id.* at 678. This is simply not a case where the Sixth Circuit defined "clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam). And this case is particularly unworthy of certiorari review because the officers here *overrode* medical personnel when imposing this unconstitutional and deadly compressive restraint.

II. The Sixth Circuit Faithfully Applied Clearly Established Law.

The unanimous decision below is correct and reflects the straightforward application of clearly established law. Indeed, it has been clearly established for years that the use of substantial compressive force on the back, shoulders, torso, or neck of a suspect who is bound and subdued while lying face down is unconstitutional. It is unconstitutional because of the serious risk of asphyxiation. This conduct has been held unconstitutional in the context of arrests, in jails, in psychiatric hospitals, and in prisons. And it has been the law regardless of whether the compressive force is applied by law enforcement officers, by medical staff, or by officers in the presence of medical staff.

In *Champion v. Outlook*, 380 F.3d 893 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 1837 (2005), several officers wrestled Champion, a severely autistic man, to the ground at the entrance to a retail store, cuffed him behind his back, and put pressure on his back while he was prone, causing him to asphyxiate and die. His estate brought a Fourth Amendment excessive-force claim against the officers. The Sixth Circuit denied the officers qualified immunity because it was "clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force." *Id.* at 903; *see also Martin v. City of Broadview Heights*, 712 F.3d 951, 961 (6th Cir. 2013) ("The prohibition against placing weight on Martin's body after he was handcuffed was clearly established in the Sixth Circuit as of August 2007. In *Champion*, we held that applying

pressure to the back of a prone suspect who no longer resists arrest and poses no flight risk is an objectively unreasonable use of force.").

Lanman, 529 F.3d 673 (6th Cr. 2008), arose in a psychiatric hospital. Several aides and nurses held Lanman, a mental-health patient, "face down even after he had stopped struggling and told them he could not breathe, resulting in positional asphyxiation." *Id.* at 684. The patient's family brought a claim against the hospital staff under the Fourteenth Amendment. The Sixth Circuit, relying on *Champion*, denied qualified immunity because the "defendants continued to restrain Lanman in this dangerous position five minutes after he wasn't resisting at all." *Id.* at 689; *see also Kulpa v. Cantea*, 708 F. App'x 846 (6th Cir. 2017) (relying on *Champion* to deny qualified immunity to jail officers who knelt on the back of a detainee while he lay prone and handcuffed, causing the detainee to die of asphyxiation); *McKinney v. Lexington–Fayette Urban Cnty. Gov't*, 651 F. App'x 449 (6th Cir. 2016) (affirming the denial of qualified immunity against prison officials who held a prisoner face down in a prone position with hands cuffed behind his back and pressed their hands and knees into his back until he died from asphyxia).

Far from there being a circuit split, the Sixth Circuit case law reflects a robust consensus among federal courts, which places law-enforcement officers on notice of the clearly established rights at issue in this case:

- *Weigel v. Broad*, 544 F.3d 1143, 1152 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2387 (2009): "[A] reasonable officer would have known that the

pressure placed on Mr. Weigel's upper back as he lay on his stomach created a significant risk of asphyxiation and death. His apparent intoxication, bizarre behavior, and vigorous struggle made him a strong candidate for positional asphyxiation."

- *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2871 (2004): Officers' act of continuing to press their weight onto detainee's neck and torso as he lay on the ground and begged for air constituted excessive force. "[I]n what has come to be known as 'compression asphyxia,' prone and handcuffed individuals in an agitated state have suffocated under the weight of restraining officers." *Id.* at 1056–57; *see also Krecham v. Cnty. of Riverside*, 723 F.3d 1104 (9th Cir. 2013) (denying qualified immunity to officers who restrained a delusional man in prone position by using their knees to hold his shoulder blades down); *Abston v. City of Merced*, 506 F. App'x 650, 653 (9th Cir. 2013) (clearly established that the "use of body compression as a means of restraint was unreasonable and unjustified by any threat of harm or escape when Abston was handcuffed and shackled, in a prone position, and surrounded by numerous officers"); *Tucker v. Las Vegas Metro. Police Dep't*, 470 F. App'x 627, 629 (9th Cir. 2012) ("[E]xisting law recognized a Fourth Amendment violation where two officers use their body pressure to restrain a delirious, prone, and handcuffed individual who poses no serious safety threat.").

- *Richman v. Sheahan*, 512 F.3d 876 (7th Cir. 2008): Reasonably trained officers would know that compressing the lungs of a morbidly obese person can kill the person, as the "shortage of oxygen can and did precipitate a heart attack in this case." *Id.* at 880.

- *McCue v. City of Bangor*, 838 F.3d 55 (1st Cir. 2016): The arrestee had a clearly established right not to be placed face-down in a prone position while two officers exerted weight on his back and shoulders.

Applying pressure to the back of an individual who is restrained in a prone position is so dangerous that even doing so for a minute can be fatal—and hence unconstitutional. *Kulpa*, 708 F. App'x at 849 (denying qualified immunity where officers handcuffed Kulpa behind his back, placed him face down, and put their knees and feet onto his back for less than one minute, suffocating him to death). As the Seventh Circuit noted ten years ago, "police are warned not to sit on the back of a person they are trying to restrain, especially if he is obese" because doing so can compress the person's lungs, thereby causing fatal asphyxiation. *Richman*, 512 F.3d at 880.

Indeed, in 2009, the State of Ohio banned prone restraint (*i.e.*, restraining a person while he is face down) across all state agencies, including the Ohio Department of Rehabilitation and Correction—the agency responsible for Ohio's prisons and that issues minimum standards for Ohio jails. App. C at 45a. R. 96-2, Executive Order, PageID#2109–12. The Executive Order pointed out that "[a]ccepted research has shown that there is a risk of death when

restraining an individual in a prone position.... This research has led other states to prohibit this restraint technique." App. C at 45a. *See Hope v. Pelzer*, 536 U.S. 730, 744–45 (2002) (looking to state regulations as evidence that the conduct at issue was clearly proscribed.) Likewise, the Montgomery County Jail's official written policy categorically prohibits "placing prisoners who are in restraints in [a] prone … position[]." R. 96-4, PageID#2131. That is, the very jail where Petitioners were working prohibited the very manner in which they restrained Richardson. The captain with the Montgomery County Sheriff's Office who conducted an investigation into the incident and who is responsible for the jail policy testified that the video shows the officers violating that policy. R. 81, Crosby Depo, PageID#1033, 1042, 1048–50, 1055–56.

In short, the Sixth Circuit faithfully applied the robust body of case law addressing the exact force at issue in this case, law that is reinforced by an Ohio Executive Order and the Montgomery County Jail's own policy.[4] Petitioners had fair notice their conduct was unconstitutional, and the Sixth Circuit committed no error.

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[4] Petitioners' own use-of-force expert agreed that law enforcement standards and training require officers to get suspects off their bellies once they are handcuffed. R. 96, Faulkner Depo, PageID#2010–11.

III. Medical Personnel *Did* Object to the Manner of Restraint But Were Overridden by the Officers.

Still, Petitioners argue that the analysis changes—that somehow the existing body of law, the Executive Order, and the Montgomery County Jail's policy no longer matter—"where on-the-scene medical personnel did not intervene during the twenty-two minute period at issue to stop officers from restraining the individual in the manner deemed to constitute objectively unreasonable excessive force." Pet. at 16. But the central premise of the argument is erroneous: Even assuming medical personnel could ever somehow authorize unconstitutional force (and there is no authority that they can), the medical personnel *did* try to intervene here. Both the medic and a nurse asked the officers to handcuff Richardson in front of his body and lay him on his back. As the medic testified, a restrained person should not be left on his belly because of the risk of asphyxia and death. R. 108, Stockhauser Depo, PageID#3257. Unfortunately, medical personnel's requests were overridden by the officers; indeed, anything the medical staff said "fell on deaf ears." R. 108, Stockhauser Depo, PageID#3274. As the Sixth Circuit observed, there were specific facts in the record showing the officers "refused a medic's and nurse's request to reposition Richardson." App. A at 23a. The officers controlled the manner of restraint, as is their responsibility and constitutional duty, and deferred to no one—not to the medical staff who objected, not to the nearby detainees who pleaded with the officers to get off Richardson, and not to Richardson himself, who "continually told officers that he could not breathe." R. 108, Stockhauser Depo, PageID#3275;

App. A at 5a; R. 105, Miles Depo, PageID#2909; R. 107, Foster Depo, PageID#3150; App. C at 57a.

The Sixth Circuit considered and rejected the factual argument Petitioners press in this Court—that they were "relying on or deferring to medical staff expertise." The Sixth Circuit rejected the argument because the facts in the record told a different story. Petitioners refused to accept the facts in the lower court and continue to do so now. On that basis alone the Petition should be denied. *Johnson v. Jones*, 515 U.S. 304, 307, 317, 319 (1995) (holding that defendant-officers are not permitted to seek interlocutory appeal challenging a denial of qualified immunity that depends on "fact-related district court determination[s]" but must accept "the facts that the district court assumed when it denied summary judgment"; rather, such appeals are limited to "neat abstract issues of law").

In any event, the presence of medical staff has no bearing on the constitutionality of the officers' conduct, just as the officers' "motive is irrelevant," because the "qualified immunity doctrine is an objective one." *Champion*, 380 F.3d at 904; *Harlow v. Fitzgerald*, 457 U.S. 800, 818–819 (1982); App. A at 17a–19a. If anything, the officers' conduct in this case is more egregious because they actually overrode the medical personnel's requests that Richardson be repositioned. It would be absurd to think an officer, who has an independent obligation to protect citizens' constitutional rights, could enjoy immunity from otherwise unconstitutional force just because a medic is present—or even where the medic directs the officer to apply unconstitutional force. *Cf. Richman*, 512 F.3d

at 879 ("The judge did not order [the deputy sheriffs] to commit a tort, and, even if he had done so, to clothe them with judicial immunity would be as absurd as ruling that the judge would have been immune from liability had he brained the plaintiff's son with his gavel."). The presence (or absence) of medical staff does not alter the basic fact that compressive force on the back of a restrained individual can kill the person, and it does not alter the clearly established right to be free from such lethal force where, as here, the restrained individual poses no threat. *See McKinney*, 651 F. App'x at 449 n.6 (rejecting the officers' defense that they should enjoy immunity because they were relying on medical staff who were present and observing during the incident as the officers held a prisoner face down with hands cuffed behind his back and pressed their hands and knees into his back until he died).

Petitioners similarly assert this rejected factual premise (that the officers were relying on medical staff) to argue they are entitled to qualified immunity regarding the claim of their deliberate indifference to Richardson's serious medical needs. Pet. at 21–23. They contend that this same factual premise is what makes this case "at least one step removed" from cases that clearly establish the right to be free from such deliberate indifference. Pet. at 23. But they have the facts wrong: the officers overrode the medical staff. The right at issue is not "one step removed"; it is directly defined by clearly established law.

There is no basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Nicholas DiCello
Counsel of Record
Jeremy Tor
SPANGENBERG, SHIBLEY & LIBER LLP
1001 Lakeside Ave. E., Ste. 1700
Cleveland, OH 44114
(216) 696-3232
ndicello@spanglaw.com
jtor@spanglaw.com

David E. Mills
THE MILLS LAW OFFICE LLC
1300 West Ninth St., Ste. 636
Cleveland, OH 44113
(216) 929-4747
dm@MillsFederalAppeals.com

Attorneys for Respondent

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