No. _____

In the
Supreme Court of the United States

STATE OF OHIO EX REL. THOMAS E. BRINKMAN, JR.,
Petitioner,

v.

MAUREEN O'CONNOR, PATRICK F. FISCHER,
MICHAEL P. DONNELLY, AND MELODY J. STEWART,
Respondents.

On Petition for Writ of Certiorari to the Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether it constitutes a violation of the Due Process Clause when a majority of judges on a judicial panel are also named parties in a case before the panel and, at the same time, refuse to recuse themselves from participating in the case *qua* judges on the panel so as to participate in the adjudication of the case on the merits (and ultimately rule in their own favor *qua* parties in the case)?

PARTIES TO THE PROCEEDING

Petitioner, who was Relator below, is Thomas E. Brinkman, Jr., a member of the Ohio General Assembly, who brought the action below by and on behalf of the State of Ohio for issuance of an extraordinary writ of mandamus.

Respondents, who were Respondents below, are Maureen O'Connor, Patrick F. Fischer, Michael P. Donnelly, and Melody J. Stewart, and are four of the seven justices on the Ohio Supreme Court and the target of the underlying request for issuance of a writ of mandamus.

RELATED PROCEEDINGS

This case arises from a petition for review of a final judgment (August 19, 2020) in a case initiated as an original action before the Ohio Supreme Court, assigned Case No. 2020-0389, and styled *State of Ohio ex rel. Brinkman v. O'Connor*.

TABLE OF CONTENTS

TABLE OF CONTENTS

(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page(s)

OPINION / DISPOSITION BELOW

The Ohio Supreme Court's entry disposing of the case on the merits (Pet.App.1a) is summarily reported at *08/19/2020 Case Announcements, 2020-Ohio-4053* (Pet.App.2a).

In response to a formal request for recusal, each of the four Respondents explicitly refused to recuse themselves from participating *qua* judges on the judicial panel considering the merits of the case wherein the were also parties, all pursuant to letters or memoranda directed to the clerk of the Ohio Supreme Court. (Pet.App.3a-6a.) Said refusals are part of the record in the case below but are not addressed in a reported decision of the Ohio Supreme Court.

JURISDICTION

The Ohio Supreme Court entered final judgment on August 19, 2020. (Pet.App.1a.) This petition is timely filed pursuant to the general order of this Court entered on March 19, 2020. 589 U.S. __ (2020)("the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment"). Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257.

FEDERAL CONSTITUTIONAL AND STATE CONSTITUTIONAL PROVISIONS

The pertinent constitutional provisions at issue or implicated are:

Fourteenth Amendment, Section 1, of the United States Constitution:

> … No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, Section 2(A), of the Ohio Constitution:

> The Supreme Court shall…consist of seven judges, who shall be known as the chief justice and justices. … If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the Supreme Court in the place and stead of the absent judge.

Article IV, Section 2(C), of the Ohio Constitution:

> The decisions in all cases in the Supreme Court shall be reported together with the reasons therefor.

STATEMENT OF THE CASE

When four justices of the Ohio Supreme Court failed to comply with their explicit state constitutional duty to not only report the decision in all cases but also to report "the reasons therefor", Ohio Const., art. IV, sec. 2(C), Thomas E. Brinkman, Jr., a member of the Ohio General Assembly, initiated an original action in the Ohio Supreme Court for the issuance of a writ of mandamus to compel the four justices to comply with their explicit constitutional duty.

Because the four justices were specifically named *qua* parties-respondents in the mandamus action, Mr. Brinkman raised and requested, through his legal counsel, that the four justices recuse themselves from being on the judicial panel considering the case. This basic and simple request for recusal was premised upon the well-established principle inherent in due process of *nemo judex in causa sua* (no one is judge in his own cause), as well as constitutional precedent of this Court. And recusal of the four justices would not have impacted the ability for a full panel of the Ohio Supreme Court to adjudicate the case as the Ohio Constitution specifically provides a mechanism to replace any justice who is unable to consider a case with any of the 69 judges of the intermediate courts of appeals. *See* Ohio Const., art. IV, sec. 2(A).

Yet, in response to the self-evident and direct conflict arising from simultaneously serving *qua* judge and *qua* party in the same case, each of the four justices explicitly and summarily refused to recuse themselves as a judge on the judicial panel considering the case. (Pet.App.3a-6a.) In refusing to recuse, the four justices offered no explanation or rationale for

why, consistent with due process, they would or could continue to function simultaneously as judges and named parties in the case.[1]

Thus, in their capacity *qua* parties in the case, each of the four justices proceeded to make filings and arguments on the merits of the case through their legal counsel (and, presumably, legal counsel consulted with their clients on the drafts of such filings). Yet, at the same time, the same four justices participated *qua* judges in the consideration and adjudication of the case, including the very arguments they themselves made *qua* parties. Ultimately, though not surprisingly, the four justices were a majority of the panel that issued a judgment in their favor and dismissed the lawsuit on the merits.

Context Giving Rise to the Lawsuit and the Refusal to Recuse

Late in the day of March 16, 2020, Ohio Governor DeWine and Ohio Secretary of State LaRose announced the postponement of the primary election beyond the date explicitly established in law by the Ohio General Assembly, *i.e.*, March 17, 2020. In response, Corey Speweik, a candidate running for public office, filed that same day a complaint in the

[1] One justice declared that he "[did] not believe any aspect of this action warrants [his] recusal" and, therefore, "[he] will continue to participate in the case." (Pet.App.4a.) Two of the justices tendered memoranda verbatim in all material aspects, each simply declaring "[u]pon due consideration of the request, I have decided not to recuse myself from the case." (Pet.App.3a & 6a.) And the final justice indicated "hav[ing] have reviewed the matter. The request is hereby: Denied." (Pet.App.5a.)

Ohio Supreme Court (the *Speweik Original Action*) wherein he sought the immediate issuance of a writ of mandamus directing the secretary of state and a local board of elections to conduct the primary election as mandated by state law, *i.e.*, on March 17, 2020.

On the morning of March 17, 2020, four of the seven justices of the Ohio Supreme Court announced that the writ of mandamus sought in *Speweik Original Action* was denied on the merits. *03/17/2020 Case Announcements, 2020-Ohio-997.* Neither at that time nor at any time since the pronouncement of the decision in the *Speweik Original Action* have the four justices provided the reasons for their decision to deny the writ of mandamus in the *Speweik Original Action*.[2]

Appreciating the mandate in the Ohio Constitution that imposes the duty upon the members of the Ohio Supreme Court not only to report the decision in all cases but also to report "the reasons therefor", Ohio Const., art. IV, sec. 2(C), Thomas Brinkman, a member of the Ohio General Assembly, commenced an original action in the Ohio Supreme Court, seeking issuance of a writ of mandamus against the four justices who participated in the *Speweik Original Action* to compel compliance with the constitutional mandate to provide the reasons for the decision therein.

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[2] With respect to the other three justices on the Ohio Supreme Court, two of the justices had recused themselves from the *Speweik Original Action* and the remaining justice did not participate in the decision or disposition of the *Speweik Original Action*. No intermediate appellate court judges were appointed pursuant to Article IV, Section 2(A), of the Ohio Constitution, to sit in the stead of the justices who recused.

As the *Speweik Original Action* concerned directly the fountainhead and legitimacy of our republic, *i.e.*, elections, and the foundational constitutional principles of separation of powers and whether statutory enactments are supreme save a constitutional provision or prohibition to the contrary, Mr. Brinkman commenced the underlying mandamus action the following day, *i.e.*, on March 18, 2020. The legal basis for the mandamus action was:

> [t]he Constitution of Ohio, as amended in 1912, wisely provided that "The decisions in all cases in the supreme court shall be reported, together with the reasons therefor." Prior to that time[,] the majority of the cases, often the big and most embarrassing ones, were decided without any opinion, or without any "reasons therefor." The people of Ohio realized that the best test of reasonable judgments was sound "reasons therefor."

State ex rel. Durbin v. Smith, 102 Ohio St. 591, 651, 133 N.E. 457 (1921)(Wannamaker, J., dissenting).

On April 10, 2020, counsel for Mr. Brinkman tendered, pursuant to Ohio S. Ct. R. Prac. 4.04(B), a sworn statement calling attention to the four justices that they were continuing to serving *qua* judges in the case, notwithstanding their status *qua* parties in the case, and, therefore, there existed the necessity that they recuse. In response, each of the four justices summarily refused to recuse themselves (Pet.App.3a-6a), without any explanation or attempted justification as to why or how they could be a party in

the case while, simultaneously, serving as a judge on the panel that would decide the merits of the case.

REASONS FOR GRANTING THE PETITION

Question Presented: Whether it constitutes a violation of the Due Process Clause when a majority of judges on a judicial panel are also named parties in a case before the panel and, at the same time, refuse to recuse themselves from participating in the case *qua* judges on the panel so as to participate in the adjudication of the case on the merits (and ultimately rule in their own favor *qua* parties in the case)?

* * *

While certiorari should not necessarily be granted in every case questioning the refusal of a justice on a state's highest court to recuse from participating in a particular case, because "the ultimate vindication of any federal right lies with this Court," *Southern Railway Co. v. Painter*, 314 U.S. 155, 159-60 (1941), certiorari should be granted when: (i) the due process rights of a litigant and the general public to a fair and impartial judicial panel are clearly implicated; (ii) there is no meaningful opportunity to otherwise rectify the refusal of a justice to recuse; and (iii) it readily appears that the refusal of a justice to recuse likely rises to the level of a violation of the Due Process Clause. Based upon well-established precedent of this Court, this standard has clearly been met in the present case such that a writ of certiorari should issue.

This Court has regularly granted certiorari to address and to remedy the refusal of a state supreme court justice to recuse in a particular case. In *Aetna*

Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986), *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), and *Williams v. Pennsylvania*, 579 U.S. __, 136 S.Ct. 1899 (2016), this Court granted certiorari wherein the issue was whether the refusal of a single state supreme court justice to recuse in a particular case violated the Due Process Clause. *See Aetna Life*, 475 U.S. at 815 ("[t]he question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when a justice of the Alabama Supreme Court declined to recuse himself from participation in that court's consideration of this case"); *Caperton*, 556 U.S. at 872 ("[t]he question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion"); *Williams*, 579 U.S. __, 136 S.Ct. at 1903 ("[t]he question presented is whether the justice's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment"). As developed below, after granting certiorari in each of those cases, this Court concluded the Due Process Clause was violated in each of those instances.

Now, the issue in the present certiorari petition is whether the refusal of four state supreme court justices to recuse from a case violates the Due Process Clause when those four justices are also named parties in a case before their own court – a scenario causing even more affront to the Due Process Clause than that in *Aetna Life, Caperton*, and *Williams*. *See Lide v. Fidelity and Deposit Co. of Md.*, 179 S.C. 161, 183 S.E. 771, 774 (1936)("it would be a monstrosity to permit a judge to sit in judgment in one's own case, or in one in which he is interested in the outcome");

Farmer v. Christian, 154 Va. 48, 57, 152 S.E. 382, 385 (1930)("[t]here is nothing more obnoxious to lovers of justice than that any man should be a judge in his own case").

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), this Court reiterated the well-established principle that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Id.* at 14. Thus, "[t]he federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930). Stated otherwise, state judicial officials and their actions are subject to the same Fourteenth Amendment strictures as legislative and executive actors.

'The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *accord Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997)("the Due Process Clause clearly requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case" (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). And, this "requirement of neutrality has been jealously guarded by this Court." *Marshall*, 446 U.S. at 242.

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton*, 556 U.S. at 876 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). And while "the disqualifying criteria [for

judges] 'cannot be defined with precision'," *id.* at 880 (quoting *Murchison*, 349 U.S. at 136), one event has been universally recognized as creating a self-evident violation of the impartiality and fairness mandated by the Due Process Clause, *i.e.*, a person serving a judge in his or her own case. *See Singletary v. Carter*, 1 Bail. 467, 468, 17 S.C.L. 467, 468 (S.C. 1830)("there is no proposition, which would be more universally concurred in, than that no officer should be permitted to act in his own case").

In explaining this standard, Justice Black, speaking for the Court, declared:

> [N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge … not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."

Murchison, 349 U.S. at 136 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), and *Offutt v. United States*, 348 U.S. 11, 14 (1954), respectively).

"Within the courtroom, … litigants press their cases … and judges act with the utmost care to ensure that justice is done." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991). This is the foundational basis of our adversarial judicial system. Yet, when the position of litigant and judge merge into the same person, the essence of fundamental fairness inherent in due process is indisputably lost. The affront to due process arising when a litigant and a judge are one-and-the-same has been recognized repeatedly by this Court; this principle is fundamental. *See Pierce v. City of Huntsville*, 185 Ala. 490, 64 So. 301, 305 (1913)("[i]t is fundamental that no man shall be judge in his own case, and due process requires an impartial tribunal").

The undisputed facts of this case clearly implicate "[t]he due process guarantee that 'no man can be a judge in his own case'," *Williams*, 579 U.S. at __, 136 S.Ct. at 1906, which was indisputably violated when four justices of the Ohio Supreme Court participated on the judicial panel *qua* judges while, at the same time, were parties in this case before the Court.[3] And as this case began as an original action in the Ohio Supreme Court, no opportunity existed for a superior appellate court, save this Court, to rectify the refusal of the four state supreme court justices to recuse so as to ensure compliance with the Due Process Clause.

* * *

[3] The four justices who were named parties in this case would have also engaged in *ex parte* communications with the other justices on the panel during the conference at which the entire panel was considering and deciding the merits of the case.

As noted above, this Court has appropriately and on multiple occasions granted certiorari to review the refusal of a state supreme court justice to recuse in particular cases when the Due Process Clause was clearly implicated.

In *Aetna Life*, this Court granted certiorari to address "[t]he question [of] whether the Due Process Clause of the Fourteenth Amendment was violated when a justice of the Alabama Supreme Court declined to recuse himself from participation in that court's consideration of this case." *Aetna Life*, 475 U.S. at 815. While the state supreme court justice in *Aetna Life* was not a party in that particular case which involved a bad-faith refusal-to-pay claim, because that justice was also a litigant in another bad-faith refusal-to-pay case, this Court held a violation of the Due Process Clause occurred when the justice refused to recuse because, "when [the state supreme court justice] made that judgment [in the *Aetna Life* case], he acted as 'a judge in his own case.'" *Id.* at 824 (quoting *Murchison*, 349 U.S. at 136).

This Court similarly granted certiorari in *Caperton* when "[t]he question presented [was] whether the Due Process Clause of the Fourteenth Amendment was violated when one of the [state supreme court] justices in the majority denied a recusal motion." *Caperton*, 556 U.S. at 872. While *Caperton* directly involved "an extraordinary situation … involving judicial campaign contributions that present[ed] a potential for bias…," *id.* at 887, this Court also reiterated the fundamental principle applicable in this case. Specifically, in *Caperton,* this Court recognized again "that the Due Process Clause incorporated the common-law rule

that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case" and that "[t]is rule reflects the maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'" *Id.* at 876 (quoting (quoting *Tumey*, 273 U.S. at 523 and THE FEDERALIST No. 10, p. 59 (J. Cooke ed. 1961)(J. Madison)).

Finally, in *Williams*, this Court once again granted certiorari to consider "[t]he question presented [of] whether [a] [state supreme court] justice's denial of [a] recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment." *Williams*, 579 U.S. __, 136 S.Ct. at 1903. Drawing again upon "the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome,'" *id.* at __, 136 S.Ct. at 1905-06 (quoting *Murchison*, 349 U.S., at 136-37), this Court recognized "that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Id.* at __, 136 S.Ct. at 1905. Thus, this Court concluded that due process precluded "a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision." *Id.* at __, 136 S.Ct. at 1906. And this Court further explained that a person serving as a judge in his or her own case constitutes such an affront to due process that "it does not matter whether the disqualified judge's vote was necessary to the disposition of the case." *Id.* at __, 136 S.Ct. at 1909. Holding "that an unconstitutional failure to recuse constitutes structural error," this Court aptly described the participation by a single justice who

should have recused as impermissibly affecting the "whole adjudicatory framework" of the state supreme court below. *Id.* at __, 136 S.Ct. at 1909-10.

* * *

Additionally, Justices of this Court have repeatedly confirmed, by their own example, of the necessity for recusal when a judge is also a party in a case before the court on which the judge sits. In apparent recognition and respect of the proposition inherent in due process that a person may not be a judge in his or her own case, justices of this Court have not participated in consideration of certiorari petitions when they are also named parties. *See, e.g., Sidley v. Breyer*, 552 U.S. 987 (2007)(mem.)(named as parties, seven Justices took no part in the consideration of or decision on the petition); *Jaffe v. Roberts*, 581 U.S. __, 137 S.Ct. 2191 (2017)(mem.)(named as parties, eight Justices took no part in the consideration of or decision on the petition); *Shao v. Roberts*, 592 U.S. __, __ S.Ct. ___ (mem.)(Dec. 14, 2020)(named as parties, six Justices took no part in the consideration of or decision on the petition).

* * *

Finally, it should be noted that the present case does not implicate the Rule of Necessity. Well established under the common law, the Rule of Necessity has been applied as early as 1430, "when it was held that the Chancellor of Oxford could act as judge of a case in which he was a party when there was no provision for appointment of another judge." *United States v. Will*, 449 U.S. 200, 213 (1980).

Simply stated, the Rule of Necessity "means that a judge is not disqualified to try a case because of his

personal interest in the matter at issue *if there is no other judge available to hear and decide the case*." *Atkins v. United States*, 556 F.2d 1028, 1056 (Ct. Cl. 1977)(emphasis added); *accord Philadelphia v. Fox*, 64 Pa. 169, 185 (1870)("[t]he true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest – where no provision is made for calling another in, or where no one else can take his place – it is his duty to hear and decide, however disagreeable it may be").

With respect to the refusal of the four justices of the Ohio Supreme Court to recuse themselves in the present case, the Rule of Necessity was not implicated. Under the Ohio Constitution, express provision is made for another jurist or jurists to sit on a panel of the Court if one or more justices are disqualified in a particular case:

> If any member of the [Supreme Court] shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the Supreme Court in the place and stead of the absent judge.

Ohio Const., art. IV, sec. 2(A).

In Ohio, there are 69 judges on the intermediate appellate court who were available to sit in the place and stead of the four justices who are also named parties in the case. Thus, provision is expressly made by state law to avoid the Rule of Necessity. *See Brinkley v. Hassig*, 83 F.2d 351, 357 (10th Cir. 1936) ("[i]f the law provides for a substitution of personnel

on a board or court,… a disqualified member may not act").

Yet, this stopgap provision was ignored in the present case [4] to the detriment of Relator Thomas Brinkman and the people of the State of Ohio, as well as, most significantly, to the most basic concept of due process. *See Schroder v. Ehlers*, 31 N.J.L. 44 (N.J. 1864)("[t]hat a person cannot be a judge in his own case has ever been regarded as one of the fundamental maxims of the law of nature").

CONCLUSION

"Due process entitles [a litigant or party] to 'a proceeding in which he may present his case with assurance' that no member of the court is 'predisposed to find against him.'" *Williams*, 579 U.S. at __, 136 S.Ct. at 1910 (quoting *Marshall*, 446 U.S. at 242). Consistent with this fundamental principle, this Court "has acknowledged that '[a]llowing a decisionmaker to review and evaluate his own prior decisions raises problems,' perhaps because of the risk that a judge might 'be so psychologically wedded to his or her previous position' that he or she will 'consciously or unconsciously avoid the appearance of having erred or changed position.'" *Isom v. Arkansas*,

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[4] A review of other cases before the Ohio Supreme Court identified at least another instance when a justice was a named party in a case (Respondent O'Connor) and she continued to sit on the panel, ultimately participating in the adjudication of the case on the merits. *State ex rel. Evans v. Supreme Court of Ohio and Maureen O'Connor*, *06/25/2014 Case Announcements*, 2014-Ohio-2725 (Pet.App.7a & 8a).

589 U.S. __, 140 S.Ct. 342, 344 (2019)(mem.) (statement of Sotomayor, J.)(quoting, respectively, *Withrow*, 421 U.S. at 58 n.25, and *Williams*, 579 U.S. at ___, 136 S.Ct. at 1906 (quoting *Withrow*, 421 U.S. at 57)).

Consistent with this Court jealously guarding the requirement of neutrality in judicial tribunals and granting certiorari in *Aetna Life, Caperton,* and *Williams,* as well as its role as the ultimate vindicator of federal constitutional rights, the Court should grant certiorari in the present case as (i) the due process rights of Relator Thomas Brinkman and the people of the State of Ohio to a fair and impartial judicial panel are clearly implicated; (ii) there was no meaningful opportunity to otherwise rectify the refusal of the four justices to recuse; and (iii) it readily appears that the refusal of those four justices to recuse likely rises to the level of a violation of the Due Process Clause.

Respectfully submitted,

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