No. 24A146

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Applicant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, in his official capacity as the Secretary of the U.S. Department of Health and Human Services, JESSICA S. MARCELLA, in her official capacity as Deputy Assistant Secretary for Population Affairs; and OFFICE OF POPULATION AFFAIRS,

Respondents.

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit

Application from The United States Court of Appeals for the Tenth Circuit (No. 24-6063)

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR IN THE ALTERNATIVE FOR STAY OF AGENCY ACTION

RELIEF REQUESTED BY FRIDAY, AUGUST 30, 2024

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TO THE HONORABLE NEIL M. GORSUCH,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT

Defendants talk a big game in their response to Oklahoma's application, but their bold proclamations unravel with the slightest scrutiny. For example, Defendants claim that the Spending Clause plainly allows the imposition of abortion referrals under Title X, despite this Court's finding of ambiguity as to Title X abortion referrals in *Rust v. Sullivan*, 500 U.S. 173 (1991). Why? Because Congress said, generically, that HHS can set conditions on Title X funding. But the implications of this claim are staggering. Per Defendants, all Title X grantees are on notice, now and forevermore, that HHS may impose any conditions it wants, *even if this Court has found Title X ambiguous as to a particular condition*. No bureaucratically imposed Title X condition, in this view, could ever violate the Spending Clause, no matter how absurd, ambiguous, or unconnected from Title X. HHS has apparently been issued a blank check, not a contract. At minimum, Defendants offer no limit to their position, nor is it compatible with this Court's recent cabining of the administrative state. *E.g.*, *Loper Bright Enters. v. Raimondo,* 144 S. Ct. 2244 (2024). In the end, what is actually plain is that the Spending Clause requires *congressional* clarity, and, per *Rust*, the exact condition here is not clearly found in Title X. The correct analysis is simple.

As for the Weldon Amendment, Defendants make various attempts to explain away its plain, binding text, and none of them is remotely persuasive. Weldon is irrelevant, we are told with a straight face, because a State Health Department whose employees indisputably provide on-the-ground medical services somehow does not

qualify as an *institutional* health care entity or *any other kind* of health care organization. And Defendants' multiple 2021 promises to protect objecting grantees under Weldon? Cast aside, yet again, despite the Department being a Title X grantee. Desperate, Defendants now embrace the Tenth Circuit's novel argument that the abortion hotline is not really a referral *for* abortion at all. But as Oklahoma explained and the Tenth Circuit acknowledged, Defendants did not argue this below. Instead, Defendants repeatedly stated that they were requiring, with the hotline, Oklahoma to refer women for *abortions*. Only now, before this Court, do they insist that this hotline was an accommodation and not an abortion referral. And Defendants make no effort to explain their shift, nor do they acknowledge—much less interact with—their various contrary statements below. This gamesmanship should not be rewarded, especially not in service of trampling on protections expressly granted by Congress.

I. DEFENDANTS IGNORE CRITICAL POINTS AND MAKE KEY ADMISSIONS.

Defendants decline to respond to numerous points Oklahoma made, effectively conceding their validity. For example, they do not cite the *Arlington* case, where this Court emphasized that the Spending Clause inquiry should focus on the *statutory* text to determine whether clear notice has been given. Okla. Appl. 14 (citing *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006)). And for Weldon, they do not deny the disputed hotline's biased, "Activist" website. *Id.* at 37.

Perhaps most prominently, Defendants do not address their multiple promises in 2021 that objecting Title X "**grantees** will not be required to counsel or refer for abortions in the Title X program." Okla. Appl. 28 (quoting 86 Fed. Reg. 56,144, 56,153

(Oct. 7, 2021)). To be sure, they quote a *portion* of one promise in passing, but they conspicuously leave out the word "grantees." Resp. 10. That word matters. The Health Department ("OSDH") is a Title X grantee. App. 194 ("Grantee Name: Oklahoma State Department of Health"); Resp. 18 n.2 (including OSDH as a "state Title X grantee[]"). Defendants have promised Title X "grantees" more than they are willing to deliver, and they refuse to explain their retreat. Indeed, they do not even defend the Tenth Circuit's downplaying of their promises, an argument Oklahoma dissected at length. Okla. Appl. 28–31. This silence speaks volumes.

As Oklahoma pointed out, *id.* at 31–32, an obvious explanation for why Defendants refuse to honor promises from 2021 is that they obeyed Defendant Becerra's 2022 instruction (after the "unconscionable" *Dobbs* decision) to "double down and use every lever we have to protect access to abortion care." *Id.* at 31–32. Defendants do not address that troubling statement, nor do they defend the Tenth Circuit's weak rejoinder. The implication is clear: They have no real rebuttal. Promises are being ignored and millions in funding stripped from Oklahoma because of Defendants' opposition to a binding decision of this Court that "heed[ed] the Constitution and return[ed] the issue of abortion to the people's elected representatives." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 232 (2022).

Defendants also neglect to mount a defense of the Tenth Circuit's reliance on the Weldon Amendment's legislative history. Okla. Appl. 38–39. Apparently, Defendants believe this history does not help them here, which is highly significant because the Tenth Circuit placed "substantial weight" on that history in denying an

injunction. App. 28; *see also* App. 60 (Federico, J., dissenting) (criticizing majority for using legislative history "to muddy the meaning of the statutory text").

In addition, sprinkled throughout the response are admissions that confirm Oklahoma's case. For instance, Defendants admit that Title X involves an annual contract, *see, e.g.*, Resp. 10–11 ("A Title X grant will generally be awarded for one year ...."); *id.* at 37 (similar), which undermines their various attempts to bootstrap alleged past acceptance of the relevant conditions by Oklahoma under the Spending Clause. If the Spending Clause contracts are annually renewed, as admitted, then Oklahoma may renegotiate in any given year, especially on changed circumstances. Here, Oklahoma has objected *in advance* to the 2024 contract, so there cannot be any acceptance of the conditions therein. *Contra* Resp. 13 ("the [district] court found 'no serious argument to be made that the State of Oklahoma didn't know what the conditions were' when it *accepted Title X funding*") (emphasis added). Defendants' acknowledgement of one-year contracts cannot be squared with their apparent position that OSDH is bound forever by past acceptance of funding.

Defendants also admit that their hotline "accommodation" (a word they have *never* used in this case until now[1]) still "compl[ies] with the [2021] rule" that requires the provision of "referral information." Resp. 12. But that rule requires *abortion* referrals. *See* 42 C.F.R. § 59.5(a)(5)(i)–(ii) (requiring a "referral upon request" for "pregnancy termination"); 86 Fed. Reg. at 56,149 (indicating that the proposed rule "requires referral *for abortion* when requested"). Defendants cannot have their cake

[1] It should raise major red flags that Defendants are re-inventing their case and justifications on the fly, *at the Supreme Court*, in multiple ways such as this.

and eat it too. They are either requiring abortion referrals compliant with the 2021 Rule, as they have admitted throughout this litigation, Okla. Appl. 34–35, or they are not following the 2021 Rule.

Continuing, Defendants label this case an "unusual" and "poor vehicle" for review because of the *Ohio* litigation, but they openly admit that the cases involve different claims. *E.g.*, Resp. 20 ("Oklahoma is not advancing the primary claim the States are pursuing in the *Ohio* litigation."). The idea that this Court cannot review an as-applied challenge here just because a separate and legally distinct multistate facial challenge exists elsewhere is absurd. If anything, the opposite is true: the absence of a facial challenge makes this case *more* palatable for review. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024) ("For a *host of good reasons*, courts usually handle constitutional claims case by case, not en masse.") (emphasis added).

Finally, Defendants repeatedly claim abortion referral requirements "have been in effect for most of the program's history." Resp. 38. But they admit such requirements only date to 1981. *Id.* They concede, that is, that abortion referrals were *not* required for the first decade of Title X, which was enacted in 1970. *See also* 53 Fed. Reg. 2922, 2923, 2934 (Feb. 2, 1988) (explaining that referrals were deemed permissible at some point in the 1970s, but not required until the 1980s). And in 1988, HHS reversed course after notice and comment, prohibiting referrals because they likely "had the effect of promoting or encouraging abortion." *Id.* at 2933. Defendants claim the 1988 Rule "was never implemented on a nationwide basis," Resp. 8 (citation omitted), but it is hard to see why that matters given *Rust*'s holding. By touting this,

Defendants are saying meritless lawsuits *then* means Oklahoma's merited claims *now* should be rejected. In sum, the history of this issue is complex, and Oklahoma's objection fits comfortably within the original meaning and application of Title X.

II. DEFENDANTS DEMAND A BLANK CHECK TO VIOLATE THE SPENDING CLAUSE.

Like the Tenth Circuit, Defendants insist that a generic delegation of rulemaking authority in 42 U.S.C. § 300a-4 ("Section 1006") is sufficient to apply the abortion referral requirement to an unwilling grantee. But as Oklahoma already explained, this statute merely states that Title X grants "shall be made in accordance with such regulations as the [HHS] Secretary may promulgate" and that Title X grants are "subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made." *Id.* § 300a-4(a) & (b). It says *nothing* about abortion referrals, much less clearly so, such that the Spending Clause would be satisfied. Okla. Appl. 15–23.

To hear Defendants, though, one would think application of this generic provision here is as plain and straightforward as can be. Which is strange, given that they did not focus on this provision in the *Ohio* litigation, nor did they emphasize this language in the 2021 Rule itself when defending the lawfulness of abortion referral requirements. *See* 86 Fed. Reg. at 56,153. Rather, in both instances, they focused on whether the 2021 Rule was a fair interpretation of Section 1008, which states that no Title X funds "shall be used in programs where abortion is a method of family planning." *Ohio v. Becerra*, 87 F.4th 759, 765 (6th Cir. 2023) (the 2021 Rule "interpreted § 1008 of Title X" which is "[a]t the heart of this case"). Moreover,

Defendants happily *touted* the ambiguity of Title X on abortion referrals in *Ohio*; and unlike here, Defendants did not try to cabin this ambiguity to Section 1008. *Compare Ohio*, 2022 WL 912088, at *11 ("Title X … is ambiguous on these issues"), *with* Resp. 7 ("the [*Rust*] Court found Section 1008's language 'ambiguous'").

Adopting Defendants' view that a generic delegation of rulemaking authority allows agencies to impose a new substantive condition on a Spending Clause legislative scheme even where this Court has found the condition ambiguous is tantamount to granting HHS bureaucrats limitless legislative power and gutting the Spending Clause in toto. Defendants conjure no real response to this, even though Oklahoma has argued it repeatedly. *E.g.*, App. 95. To the contrary, Defendants come close to *embracing* the point. Resp. 28–29 ("Congress did speak when it expressly empowered the Secretary to prescribe the 'conditions' he 'may determine to be appropriate ….'"). They certainly offer no limiting principle to their theory. But, under their view, could HHS not require actual abortions be performed as part of Title X? Defendants would probably point to Section 1008's anti-abortion restriction as a bar to such a requirement, but that is precisely Oklahoma's point. Like any statute, Section 1006 cannot be read in a vacuum; it must be read with the rest of Title X. And this Court *has already done that with Rust*. *See* 500 U.S. at 185 ("At no time did Congress directly address the issues of abortion counseling, referrals, or advocacy.").

Defendants never respond to Oklahoma's point that *Rust* was a waste of time if their Section 1006 theory is correct. Okla. Appl. 20. Instead, they claim *Oklahoma*'s theory of the Spending Clause renders *Rust* meaningless. Resp. 28. At most, then,

this point is a wash. But Defendants' assertion is not true. The Spending Clause is contractual in nature, so Oklahoma's view would *not* negate all requirements or prohibitions of abortion referrals. Presumably, Title X grantees could still accept or reject the conditions. Moreover, it is not obvious that prohibitions and requirements are equivalent "conditions" in this scenario, especially since one is a passive restriction that merely limits the program's scope.

Of course, *Rust* turned on *Chevron* deference, so there remains a question of how much weight it should carry moving forward. Okla. Appl. 19 n.2. Defendants brush off Oklahoma's suggestion of a remand on this point, but: (1) they are wrong to claim that it only matters to a facial challenge, since *Rust* is binding facially *or* as applied; and (2) they ignore Oklahoma's observation that this Court was retaining only the "holdings of those [*Chevron*] cases that *specific agency actions* are lawful." *Loper Bright*, 144 S. Ct. at 2273 (emphasis added). The specific agency action in *Rust* (*prohibiting* referrals) is not the same as the specific agency action here (*requiring* referrals). To be clear, *Rust*'s ambiguity finding plainly counsels for an injunction. But *Loper Bright* says what it says, and it does not appear that the Tenth Circuit evaluated its effect on *Rust* appropriately.

Defendants rely on two main cases to argue the Spending Clause. But the first, *Biden v. Missouri*, 595 U.S. 87 (2022), is not a Spending Clause case. To be sure, one set of *Missouri* plaintiffs cited *Pennhurst* once, but neither this Court nor the dissents mentioned the Spending Clause or *Pennhurst* a single time. Moreover, *Missouri* arose during the COVID-19 pandemic, which created unique regulatory challenges. *See id.*

at 97. It is thus difficult to imagine how *Missouri* could resolve a Spending Clause argument, especially when this Court found the government's actions there were clearly allowed *by statute*. *See id.* at 93 ("The rule thus fits neatly within the language of the statute."). Such is not the case here, where *Rust* mandates an ambiguity finding. Presumably for this reason, the Tenth Circuit did not cite *Missouri*.

Defendants also cite *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), but they ignore Oklahoma's observation that the "requisite clarity in *Bennett* was *statutory*," which is foreclosed here by *Rust*. Okla. Appl. 17. Nor do they deny that *Bennett* rejected the government's argument that "any reasonable interpretation" of statutory requirements could determine "grant conditions." *Bennett*, 470 U.S. at 670. That is to say, Oklahoma refuted reliance on *Bennett*, and Defendants declined to interact with that refutation. The refutation thus stands.

Defendants also attempt, in vain, to downplay the split with *West Virginia ex rel. Morrisey v. U.S. Dep't of Treasury*, 59 F.4th 1124 (11th Cir. 2023). Defendants' argument boils down to the claim that *Morrisey* dealt with a "different statutory scheme." Resp. 19. But *Morrisey* and the present case are remarkably similar. Both involved a state Spending Clause challenge to a controversial regulatory condition that the government defended based on a statute's generic implementation language. The Eleventh Circuit rejected this defense, whereas the Tenth Circuit approved. It is impossible to read the two cases together and not see a stark split on the question of whether specific regulations combined with generic statutory language suffice for the Spending Clause. *Compare Morrisey*, 59 F.4th at 1148 ("[T]he condition itself must

still be ascertainable on the face of the statute."), *with* App. 16 ("Oklahoma could make an informed decision based on the combination of Title X's language and HHS's conditions."). Defendants retort that Title X says "subject to such *conditions*," Resp. 20, but there is no material difference between this and an authorization "to issue such regulations as may be necessary or appropriate," *id.* at 19 (citation omitted).

Defendants insist that a ruling in Oklahoma's favor will open the floodgates for invalidation of numerous regulations. *Id.* at 25–26 n.3. This is difficult to square with their argument that this case has no "nationwide significance." Resp. 4–5. It is also a strawman; Oklahoma is not arguing that all HHS regulations are invalid. Far from it. Here, Oklahoma is making the limited point that a substantive condition *this Court has found ambiguous* cannot, for that very reason, be required by an agency under the Spending Clause. As far as Oklahoma is aware, there are not many *Rust*-like cases out there. In any event, *Loper Bright* indicates that even longstanding intrusions into the separation of powers should not be countenanced.

Finally, even if a generic delegation of rulemaking authority could allow an agency to impose a new substantive condition in the face of definitive ambiguity, Defendants wrongly brush past the limiting language in the statute. Again, Section 1006 says HHS may only impose conditions "*appropriate* to assure that such grants will be effectively utilized *for the purposes for which made*." 42 U.S.C. § 300a-4(b) (emphases added). That language means Defendants do not have *carte blanche* to make substantive policy choices where congressional intent is ambiguous. Rather, HHS must tailor regulations to the unambiguous "purposes" of Title X. Defendants

offer no response on this point, even though their view would render nugatory both "appropriate" and "purposes for which made."

III. DEFENDANTS WARP THE PLAIN TEXT OF THE WELDON AMENDMENT.

On the Weldon Amendment, Defendants offer a smorgasbord of arguments, several of which they inappropriately embrace for the very first time before this Court, but none of which undermines the protections promised in the plain text. To begin, Defendants find it significant that "Oklahoma … did not raise the Weldon Amendment in its discussions with HHS before HHS terminated its grant." Resp. 22. But cited or not, Weldon prohibits Defendants from discriminating against objectors who decline to perform abortion referrals. The law does not cease to bind HHS because OSDH objected without immediately detailing all the possible bases for its objection. Moreover, OSDH *did* raise Weldon with HHS well before this lawsuit, giving Defendants plenty of time to comply. Specifically, OSDH relied on Weldon in its initial July 2023 administrative appeal, App. 326–28, which came five months *before* this action was filed. The insinuation that Oklahoma did not object in time is groundless.

Procedure aside, Defendants admit the Weldon Amendment protects "any institutional … health care entity" from discrimination by "a Federal agency or program" because the entity declines to "refer for abortions." Resp. 29–30. And they admit that "health care entity" is defined as "any other kind of health care … organization." *Id.* Again, the plain language could hardly be broader. Okla. Appl. 26.

Nevertheless, Defendants make three basic responses. First, despite their failure to deny that "state employees provided some of the services funded under the

grant," Resp. 22, Defendants continue to insist that the Health Department is not a healthcare entity or organization. Specifically, they claim that this is so because the definition "does not include government administrative agencies within its listed terms." *Id.* at 30. But Oklahoma's Health Department is *indisputably* a healthcare organization, thus it *is* included within Weldon's broad terms. *See* App. 52–54 (Federico, J., dissenting). And the fact that States are also prohibited from subjecting other entities to discrimination based on their refusal to provide abortion referrals, Resp. 31, does not change that calculus. If anything, it proves Oklahoma's point. After all, what sense would it make to say that a State cannot discriminate, but its health care arms and employees can be discriminated against? Defendants are grasping at straws, rather than submitting to congressional authority.

Defendants also repeatedly point to the states' (citation-free) claim in *Ohio* that federal conscience statutes like Weldon do not apply to States. Resp. 4, 21–22. Indeed, in Defendants' summary of the case, *id.* at 4, that is the *only* specific Weldon argument they mention. Apparently, their Weldon Amendment case rises or falls with this point. But again, in the proceedings below Oklahoma disavowed that preliminary *Ohio* argument as plainly atextual and unsupported by authority, and neither the district court nor the Tenth Circuit deemed it worthy of discussion. Okla. Appl. 26–27 n.3. Defendants make no effort to explain why, then, the argument is significant or binding here. Nor do they explain why OSDH should be stripped of Weldon's protections after

it helped convince the Oklahoma Attorney General's Office of its Weldon views.[2]

Second, Defendants now argue that the hotline requirement does not count as a referral for abortions under Weldon. Resp. 4, 32–34. True, this is where the Tenth Circuit (crash-)landed. But Defendants do not deny—because they cannot—that *they never made this argument below*. Okla. Appl. 24–25, 33–39; *see also OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015) ("Absent unusual circumstances—none of which is present here—we will not entertain arguments not made below."). Nor do Defendants show any awareness of Oklahoma's or Judge Federico's pushback against that argument. But that pushback is devastating. The record shows that from the beginning Defendants have repeatedly labeled the hotline requirement an abortion referral requirement. Okla. Appl. at 34–35. Again, Defendants do not deny this, which should end the matter.

The response Defendants do give is underdeveloped and hard to follow. It is also meritless. The definitions of "referral" that Defendants cite plainly apply to the hotline. *E.g.*, Resp. 32 ("A 'referral' is '[t]he act or an instance of sending or directing to another *for information* ....") (emphasis added). Like the Tenth Circuit, Defendants fixate on "for," arguing that this preposition is not triggered unless a woman is directed straight to a "medical provider[]." *Id.* But as Judge Federico observed, "[i]f the patient desires information about options that are not abortion, there would be no need for a referral to a national hotline." App. 54–55. OSDH is not required to

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[2] Defendants downplay the HHS regulation that said the Weldon Amendment protects state "components." Resp. 31 n.5. They do not deny, though, that they rescinded this regulation *after* Oklahoma filed the present lawsuit. Okla. Appl. 27. And they offer no explanation for the rescission.

ignore reality: "[I]f a patient requests a referral, an Oklahoma provider would reasonably assume it is solely to explore the option of pregnancy termination …." *Id.* at 55 (Federico, J., dissenting). Indeed, Defendants even admit *in their response* that the patients are referred to the hotline "to obtain information *about abortion* and *any subsequent referral to a specific provider*." Resp. 33 (emphases added). Weldon does not set some impossibly high standard for abortion referrals. It clearly applies here.[3]

Third, perhaps sensing how tenuous their position is, Defendants add yet *another* brand-new argument. Namely, they now spend two pages claiming that, if Weldon applies, it still "would not allow OSDH to prevent any other providers funded by the grant from providing referrals." *Id.* at 34. This is mistaken. Per Defendants' own 2021 promises, a grantee is a grantee and may abstain from referral involvement, period. Regardless, Defendants' conclusion on this point—that the total denial of funds was still justified—does not follow from the argument. Even if accepted, the argument would simply mean that this Court should order a partial injunction. That Defendants are now willing to contemplate such an injunction, even if implicitly, is quite telling.

IV. DEFENDANTS HAVE PROVIDED ZERO EVIDENCE OF INJUNCTIVE HARM.

Defendants claim the harm to Oklahoma is "outweighed by the harm the public would suffer" if OSDH were allowed to object to abortion referrals. Resp. 36. This is unsupported by the record. Defendants admit that $4.5 million dollars are at stake, *id.*, an amount that led the district court to hold that "Oklahoma's made a sufficient showing here of irreparable injury." App. 132. "[F]rankly," the court stated, "I'm

[3] Nor is it significant that only the Tenth Circuit has ruled on Weldon since 2004. Is Oklahoma supposed to wait another 20 years to rely on plain, binding language?

reluctant to accept the federal government's invitation to say that $4.5 million isn't substantial enough to worry about." *Id.* And Defendants' comparison of $4.5 million to Oklahoma's broader budget breaks down once one makes the same comparison to the multi-trillion-dollar federal budget. If that comparison is the measure of harm, the harm befalling Oklahoma is far greater than that facing Defendants.

Defendants also argue that "enjoining the grant termination in this case would cause irreparable harm to the government and patients served by Title X projects." Resp. 38. Despite ample opportunity, however, *Defendants failed to introduce any evidence of this*. Oklahoma's witness described in detail the harms to the State, App. 182–189, whereas Defendants provided no such affidavit. In a similar vein, Defendants claim that Oklahoma does not "deny that other entities in the State … can step in to provide family-planning services if OSDH chooses not to." Resp. 36–37. But Oklahoma *has* denied this. *E.g.*, Reply, 2024 WL 2750406, at *27.

Finally, Defendants' argument that this Court should not bother with an emergency motion regarding a "single discretionary grant to a single state agency" over a piddling $4.5 million dollars, Resp. 5, cuts firmly in *Oklahoma's* favor. If the amount is as "modest" and the relief as limited as Defendants repeatedly insist, then it should not be any problem for them to hold onto the money while this Court decides whether to grant certiorari. And surely emergency docket relief is not automatically withheld from parties facing clear as-applied violations. *Contra id.* at 4.

CONCLUSION

This Court should enjoin or stay Defendants' effort to subvert the rule of law.

Respectfully submitted,

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