No. 08-1592

In the
Supreme Court of the United States

James M. Maloney,

*Petitioner*,

-against-

Kathleen A. Rice,

*Respondent*.

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

# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court should grant certiorari to decide whether the Second Amendment applies to the states when the answer would be irrelevant in this case because the nunchaku, the weapon at issue, is a dangerous and unusual weapon not protected by the Second Amendment.

## PARTIES TO THE PROCEEDING

The petition caption accurately identifies the parties.

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## STATEMENT OF THE CASE

This case involves a challenge to New York State's prohibition on the possession of nunchaku,[1] a Japanese martial arts weapon consisting of two pieces of wood or other rigid material (sticks) connected by a chain or cord. Nunchaku are distinguished by their ability to "deliver a powerful blow without its impact being felt by the user, since the cord cuts off the force from his hand without diminishing it." Paul Crompton, The Complete

[1] Nunchaku are also known as "nunchucks" and "chuka sticks."

Martial Arts 62 (1989). The nunchaku is an extraordinarily powerful weapon; a nunchaku strike can generate 1600 pounds of pressure – while a human bone will break under only 8 pounds of pressure. Police Conference of New York, Memorandum in Support, Bill Jacket, L. 1974, ch. 179, at 14. Quite simply, the nunchaku can be snapped hard enough to "open a hole in someone's skull." Police Fight Spread of Exotic Weapons, The Post Standard (Syracuse, NY), July 13, 1987, at A5. See also Carl Brown, The Law and Martial Arts 148 (1998) ("Nunchaku can explode coconuts like grenades, crack bones, and strangle. It is considered a deadly weapon by almost all jurisdictions.")

This action arose from an incident that took place on August 23, 2000, when a telephone employee working outside Petitioner's residence called the police, claiming that Petitioner had threatened him with a rifle. Maloney v. County of Nassau, 2007 U.S. Dist. LEXIS 71162 at *2-3 (E.D.N.Y. Sept. 24, 2007). Police arrived at the residence, but Petitioner refused to open the door or leave the house, and a twelve-hour standoff ensued. Id. Finally, at around 2 a.m., Petitioner surrendered to police, who subsequently entered the residence and seized various items. Id. They arrested Petitioner and sent him to a mental hospital, where he spent the night. Id. at *4.

Petitioner was charged with several crimes, including possession of a nunchaku in violation of New York Penal Law § 265.01, but later entered into an agreement under which he pleaded guilty to one charge of disorderly conduct. Pet. App. 36a-37a. The agreement also provided for the destruction of the nunchaku and a fine in the amount of $ 310. Id.

Petitioner commenced this action on February 18, 2003 in the Eastern District of New York, asking the court to declare unconstitutional the portions of New York Penal Law §§ 265.00 through 265.02 which criminalize the possession of nunchaku. Pet. App. 71a. The original named defendants were the New York State Attorney General and the Nassau County District Attorney. Petitioner later voluntarily discontinued the action against the District Attorney, leaving the Attorney General the only named defendant. The district court then ruled that Petitioner did not have standing to sue the Attorney General, who was not responsible for enforcing the law. Pet. App. 39a. The court granted leave to amend the complaint, and Petitioner again named as a defendant the Nassau County District Attorney, the entity responsible for enforcement of the statute, as well as the Governor and Attorney General of the State.[2] Pet. App. 45a. The complaint alleged that the Penal Law provisions violated rights guaranteed by the First and Second Amendments, as well as various unenumerated rights, including those protected by the Ninth and Fourteenth Amendments.

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[2] This amended complaint named Eliot Spitzer, in his official capacity as Attorney General of the State of New York, George Pataki, in his official capacity as Governor of the State of New York, and Denis Dillon, in his official capacity as District Attorney of the County of Nassau. Pet. App. 45a. In later proceedings, the then-current holder of each office was automatically substituted pursuant to Federal Rule of Appellate Procedure 43(c)(2) or Federal Rule of Civil Procedure 25(d). Pet. App. 1a, 19a-20a. Relevant here is the substitution of current Nassau County District Attorney Kathleen A. Rice for former District Attorney Denis Dillon.

The district court dismissed the amended complaint on January 17, 2007, finding that the Attorney General and Governor were not proper defendants, Pet. App. 24a, and granting to the District Attorney judgment on the pleadings for all claims of constitutional violations. Relevant here is the district court's holding that "[t]he Second Amendment imposes no limitation on New York State's ability to ban the possession of certain weapons, including the nunchaku," because the Second Amendment applies only to the federal government. Pet. App. 31a. Petitioner then requested that the court reconsider its decision, but the court rejected his request on May 14, 2007. Pet. App. 13a.

On June 26, 2008, this Court issued its opinion in District of Columbia v. Heller, 128 S. Ct. 2783 (2008), holding that the Second Amendment protected an individual right to bear arms unconnected with militia service. The Court, however, made clear that the Second Amendment did not protect *all* arms; only those arms "in common use" and "typically possessed by law-abiding citizens for lawful purposes" were protected. Id. at 2816-17.

Following the Heller decision, the Second Circuit affirmed the district court judgment, explaining that it must follow the rule set forth in Presser v. Illinois, 116 U.S. 252, 265 (1866), which held that the Second Amendment limits only the federal government. The Second Circuit therefore found that New York's prohibition on nunchaku did not violate the Second Amendment. Pet. App. 2a-7a.

## THE PETITION SHOULD BE DENIED

Petitioner argues that the Court should consider this case in order to resolve an alleged split of opinion among the courts of appeals over the question of whether the Second Amendment applies to the States. There is, however, presently no circuit split. (Part I, infra.) Furthermore, even if the Court wished to address the question now, it should not use this case to do so, because the resolution of this case would remain the same regardless of whether the Second Amendment applies to the states. This is because the Second Amendment does not protect nunchaku, which are "dangerous and unusual weapons" not "in common use" or "typically possessed by law-abiding citizens for lawful purposes." Heller, 128 S. Ct. at 2816-17 (2008). (Part II, infra.)

## I. THERE IS NO CURRENT CIRCUIT SPLIT

Petitioner argues that the Court should grant certiorari because the Second Circuit's holding that the states are not bound by the Second Amendment is in conflict with the Ninth Circuit's decision in Nordyke v. King, 563 F.3d 439 (9th Cir. 2009), which found that the Second Amendment was incorporated against the states through the Due Process Clause of the Fourteenth Amendment. The Ninth Circuit, however, has ordered that Nordyke be reheard en banc, and that the three-judge panel opinion is not to be cited as precedent. Nordyke v. King, No. 07-15763 (July 29, 2009 order) (available at http://www.

ca9.uscourts.gov/datastore/opinions/2009/07/29/0715763ebo.pdf.).

The Seventh Circuit is the only other circuit court to consider this question post-Heller, and it followed the Second Circuit's decision in this case. See National Rifle Ass'n of Am., Inc. v. City of Chicago, 567 F.3d 856 (7th Cir. 2009). Petitioner attempts to cast this decision as the third prong in a "three-circuit split," Pet. 19, because the Seventh Circuit included in its opinion reasoning about why incorporation would be inappropriate even if the Court had the power to reach the question. But the Seventh Circuit's essential holding is identical to that of the Second Circuit: A circuit court must follow Supreme Court precedent holding that the Second Amendment does not apply to the states, even if the rationale underlying that precedent has been undermined by later cases. National Rife Ass'n, 567 F.3d at 857 ("We agree with Maloney"). There is therefore currently no division of opinion among the circuits.

The Second and Seventh Circuit opinions do recognize that only the Supreme Court can revisit the question of whether the Second Amendment applies to the states. Should the Court wish to resolve that question, however, it should not use this case to do so. Petitioner argues to the contrary, claiming that if one of the three circuit cases were to be selected, "this case should be the main vehicle," because the New York statute prohibits the mere possession of the nunchaku.[3] Pet. 25. Petitioner fails to note that

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[3] Petitioner appears to find some significance in the fact that he challenges only the ban on possession of nunchaku in the home,

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both the Seventh and Ninth Circuit decisions involved challenges to statutes that prohibited the mere possession of arms. Nordyke, 563 F.3d at 443 ("The Ordinance makes it a misdemeanor to bring onto *or to possess* a firearm or ammunition on County property.") (emphasis added); National Rifle Ass'n, 567 F.3d at 857 ("Two municipalities in Illinois ban the *possession* of most handguns.") (emphasis added). Moreover, the Seventh Circuit case considered laws that banned possession in any location, including in the home.

Since all the laws in question prohibit mere possession, the prohibition on possession cannot be what distinguishes these cases from each other. The true distinguishing factor is that this case involves nunchaku – a weapon which, as explained below, would not be protected by the Second Amendment. Should the Court wish to resolve the question even in the absence of a circuit split, it would be more logical to use the Seventh Circuit case as a vehicle, since that decision involved a challenge to a prohibition on the possession of handguns – the weapon specifically found by the Supreme Court to be protected by the Second Amendment as the weapon "overwhelmingly chosen by American society" for the purpose of self-defense. Heller, 128 S. Ct. at 2817. The nunchaku – a weapon barely known to many Americans and strongly associated

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while the complaints in the Seventh Circuit cases also included challenges to provisions prohibiting carrying of handguns and requiring registration of firearms. Pet. 26. The fact remains, however, that all three cases challenge statutes which prohibit the mere possession of arms.

with criminal uses, see infra p. 11 – presents a startlingly different case.[4]

## II. THE RESULT OF THIS CASE WOULD REMAIN THE SAME REGARDLESS OF WHETHER THE SECOND AMENDMENT APPLIES TO THE STATES BECAUSE THE SECOND AMENDMENT DOES NOT PROTECT NUNCHAKU, WHICH ARE DANGEROUS AND UNUSUAL WEAPONS.

This case is an inappropriate vehicle through which to address the question of whether the Second Amendment applies to the states because nunchaku are not protected by the Second Amendment.

The Court's opinion in Heller made it clear that "the Second Amendment right, whatever its nature, extends only to certain types of weapons." 128 S. Ct. at 2814. The Court read earlier precedent to stand for the proposition that the Second Amendment confers a right to bear only those arms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia." Id. (quoting

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[4] It should also be noted that Respondent joins in the arguments made by the City of Chicago and the Village of Oak Park in their brief in opposition to the petition for a writ of certiorari in National Rifle Ass'n, supra. That brief argues that the Second Amendment should not be incorporated against the States under the Due Process Clause of the Fourteenth Amendment because "[t]he right recognized in Heller to keep and bear arms in common use is not implicit in the concept of ordered liberty," Nat'l Rifle Ass'n Br. in Opp. 11, and that the Supreme Court should not revisit its repeated holdings that the Privileges or Immunities Clause of the Fourteenth Amendment does not impose the Bill of Rights against the states.

United States v. Miller, 307 U.S. 174, 178 (1939)). In colonial times, the Court explained, militia were formed by groups of men who brought with them their own weapons – the ordinary arms commonly used for lawful purposes such as self-defense. Id. at 2815.

From this history and its reading of precedent, the Heller Court drew the rule that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." Id. at 2816. The only weapons protected are those "in common use at the time."[5] Id. at 2817 (quoting Miller, 307 U.S. at 179). This limitation "is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" Id. (internal citations omitted).[6] Nunchaku

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[5] The Heller court did not specifically state whether the rule protecting weapons "in common use at the time" refers to the time of the adoption of the Second Amendment, or the current time. It appears, however, from the remainder of the Heller opinion, that the Court intended the rule to refer to the current time. The Court justified its holding that handguns were protected by the Second Amendment by noting that "handguns are the most popular weapon chosen by Americans for self-defense in the home." 128 S. Ct. at 2818. It looked to the weapon's popularity in the present time, not at the time of the Second Amendment's adoption. The Court also explicitly rejected the argument that "only those arms in existence in the 18th century are protected by the Second Amendment," stating that the argument "border[ed] on the frivolous." Id. at 2791.

[6] Several lower courts have followed the Court's clear guidance here, and found that various weapons are unprotected by the Second Amendment. See, e.g., U.S. v. Tagg, 2009 U.S. App. LEXIS 14139 (11th Cir June 30, 2009) (pipe bombs not protected by the Second Amendment); United States v. Fincher, 538 F.3d 868, 874 (8th Cir. 2008) ("Machine guns are not in common use

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are not "in common use" and are "not typically possessed by law-abiding citizens for lawful purposes." Instead, they are dangerous and unusual weapons.

### A. The nunchaku is dangerous

There is no question that the nunchaku is dangerous. "[T]he power of a nunchaku strike easily shatters bones; and in the hands of an unskilled person this weapon is about as dangerous to its wielder as it is to the opponent." Alex Levitas, Ancient Weapons for Modern Police, 9 Journal of Asian Martial Arts 35, 42 (2000). Nunchaku give "even a weak assailant enough leverage to throttle his foe. . . . With a deceptively easy motion, a nunchaku wielder can bash or strangle his victim." Memorandum in Support, Police Conference of New York, Bill Jacket, L. 1974, ch. 179 at 14. See also Peter Lewis, Martial Arts 117 (1987) ("[T]he nunchaku is an extremely dangerous weapon"); Carl Brown, The Law and Martial Arts 148 (1998) ("It seems obvious to we martial artists that the nunchaku is a deadly weapon. . . . [T]he dreaded nunchaku is a garrote from hell.")

Several states, including New York, have responded to this danger by banning or severely restricting the nunchaku.[7] This was not, as Petitioner

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by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use."); United States v. Perkins, 2008 U.S. Dist. LEXIS 72892 (D. Neb. Sept. 12, 2008) (finding that silencers and suppressors may be prohibited because they are not in common use for lawful purposes).

[7] Other states that currently ban or severely restrict the nunchaku include California, see Cal. Penal Code §§ 12020, 12029 (Deering 2009); Connecticut, see Conn. Gen. Stat. § 53-206

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claims, "an overblown reaction to a popular martial-arts fantasy film." Pet. 28. It was, instead, a reaction to the growing criminal use of the weapon – which criminal use was perhaps instigated by the film. See World Nunchaku Association, History – Bruce Lee, available at http://www.nunchaku-do.org/index.php?option=com_content&task=view&id=49&Itemid=77 (noting that, in the years following the release of Bruce Lee films, "the nunchaku was regularly used in street fights . . . The public opinion grew that the nunchaku was a criminal weapon, primarily used for strangling."); Memorandum of Louis J. Lefkowitz, Attorney General, State of New York, April 8, 1974, Bill Jacket, L. 1974, ch. 179 at 13 (the nunchaku "has apparently been widely used by muggers and street gangs and has been the cause of many serious injuries."); Letter of Michael Juliver, Association of the Bar of the City of New York, April 11, 1974, Bill Jacket, L. 1974, ch. 179 at 11 ("There is growing evidence that chuka sticks [i.e. nunchaku] are used in robberies and assaults.")

**B. The nunchaku is not "in common use" and is therefore not protected by the Second Amendment.**

The key to the constitutional analysis is whether the arms in question are "in common use" and are "typically possessed by law-abiding citizens for lawful purposes." Heller, 128 S. Ct. at 2816, 2817. The nunchaku is an unusual weapon; it is not the type of weapon in common use or typically possessed for lawful purposes. Martial arts books directed to ordi-

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(2008); Arizona, see Ariz. Rev. Stat. § 13-3101 (LexisNexis 2008); and Massachusetts, see Mass. Ann. Laws ch. 269, § 10(b) (LexisNexis 2009).

nary United States citizens describe the nunchaku as "unusual, to say the least,"[8] and news articles about the weapon often explain or describe the nunchaku, operating on the assumption that many ordinary readers will not be familiar with it.[9] This makes nunchaku quite different from the handguns protected by the Second Amendment – it is hard to imagine a news article about handguns that begins by explaining what a handgun is. Petitioner even appears to assume that the members of this Court will not be familiar with nunchaku, as he begins his statement of the case with a description of the weapon. Pet. 6.[10]

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[8] Jennifer Lawler, Martial Arts for Dummies 16 (2003) (stating that "Japanese martial arts weapons are unusual, to say the least," and giving nunchaku as the first example of such an unusual weapon).

[9] See, e.g., Tracy Wilkinson, 29 Anti-Abortion Protestors Sue Police for Alleged Brutality: Demonstrators Say They Were Injured by 'Pain Compliance' Techniques when Officers Broke up Blockades at Family Planning Clinics, Los Angeles Times, Feb. 10, 1990 at 3 ("The most serious injuries, the suit alleges, came from the so-called nunchaku, a martial arts device consisting of two sticks connected by a rope."); William LaRue, Police Fight Spread of Exotic Weapons, The Post Standard (Syracuse, NY), July 13, 1987 at A5 ("Chuka sticks are two long pieces of wood linked by rope or chain, and they inflict injury by striking or choking.").

[10] Petitioner's "Questions Presented" section – the very beginning of the Petition – begins by stating that "[a] New York statute makes the possession of a type of weapon known as a nunchaku a criminal misdemeanor." The substitution of the word "handgun" makes the sentence sound a bit ridiculous: "A New York statute makes the possession of *a type of weapon known as a handgun* a criminal misdemeanor." This demonstrates the vast difference between nunchaku and handguns – clearly,

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The fact that some individuals use the nunchaku in a nonviolent manner in marital arts classes does not transform this unusual weapon into one "typically possessed by law-abiding citizens." Heller, 128 S. Ct. at 2816. Only those weapons "in common use" fall within the Second Amendment's protection, and the nunchaku simply cannot come near that threshold. Many people do not even know what a nunchaku *is* – and many of those familiar with the weapon associate it with criminal contexts rather than lawful purposes. See supra p. 11.

In response, Petitioner might point to his statement that the nunchaku is "currently used by over two hundred police forces across the country." Pet. 7. But the fact that a weapon is authorized for police use[11] does not mean that it is "in common use" by law-abiding citizens or is typically possessed by ordi-

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handguns are a weapon "in common use," while nunchaku are not.

[11] New York Penal Law § 265.20 (a)(1) contains several exceptions to the prohibition on possession of the various weapons listed in Penal Law § 265.01, including an exception for possession by police officers. In discussing whether police use of the weapon is legal in New York, Petitioner claims that "none of the defined exemptions apply to 'chuka sticks.'" Pet. 6. This is inaccurate; the exemptions in New York Penal Law § 265.20(a)(1) apply to "[p]ossession of *any* of the weapons . . specified in sections 265.01," (emphasis added), which, of course, would include chuka sticks. The statute therefore explicitly permits possession by police officers. Petitioner correctly notes that the New York State Attorney General has opined that police officers may possess the weapons prohibited by section 265.01, but the Attorney General's opinion merely applied the clear statute. It did not create a new interpretation. See 1980 N.Y. Op. (Inf.) Att'y Gen. 247.

nary individuals in their homes for self-defense. In addition, there are 17,000 police departments in the United States, so if two hundred of these are using nunchaku, only about *one percent* of United States police departments are using this unusual weapon.[12] The nunchaku is therefore not even "in common use" for police departments.[13]

Petitioner further claims that nunchaku fall within the protection of the Second Amendment[14] be-

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[12] See Tony Perry, Police Use of Martial Arts Weapon Debated, Los Angeles Times, May 8, 2000 at 3. ("Of about 17,000 police departments in the United States, about 200 small and medium-size departments continue to use nunchakus . . .")

[13] Furthermore, the limited police use of the weapon has been plagued by controversy and claims of police brutality. See, e.g., Perry, supra note 12, at 3 (Los Angeles Police Department abandoned use of nunchaku as a result of controversy and a lawsuit prompted by "[n]ews pictures of pain-wracked protesters being led away by Los Angeles police"). Police use generally involves twisting the cord around the limb of an individual being arrested, which results in excruciating pain. See Michael D. Mitchell, Note, Forrester v. City Of San Diego: Is Pain Compliance an Appropriate Police Practice under the Fourth Amendment?, 40 Vill. L. Rev. 1177, 1178 n.9 (1995). In one lawsuit claiming unconstitutional excessive force due to the use of nunchaku on nonviolent protesters, a video showed images of "small, middle aged women scream[ing] in agony as the nonchakus [sic] were twisted around their wrists." Forrester v. City of San Diego, 25 F.3d 804, 813-815 (9th Cir. 1994) (Kleinfeld, J., dissenting) (also noting that "[t]he pain caused lasting damage, from tendon injuries to breaking a surgeon's wrist."). Those subject to police use of the nunchaku have described the excruciating pain as "street torture." Richard Serrano, A Question of Restraint – Amid Brutality Allegations, Police in San Diego are Using an Ancient Asian Tool as Weapon in Subduing Suspects, Los Angeles Times, Jan. 8, 1990 at 1.

[14] Petitioner argues that the fact that this case concerns nun-

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cause they meet the definition of arms as stated by this Court. Pet. 27. Insofar as Petitioner's argument is that any weapon that meets the definition of "arms" is protected by the Second Amendment, he ignores the Heller Court's clear statement that the Second Amendment does not protect all arms; the right extends only to "arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia.'" 128 S. Ct. at 2814 (quoting United States v. Miller, 307 U.S. 174, 178 (1939)). As noted above, the Court ruled that the only arms with this relationship to the militia are those "in common use."

Petitioner further claims that nunchaku are protected by the Second Amendment because "the destructive power of all forms of blunt club-like weapons [like the nunchaku] is far less than that of the handguns . . . held protected in Heller." Pet. 27. But the test clearly articulated by the Heller Court did not take into account the "destructive power" of the weapon in question. The test for Second Amendment protection instead asks whether a weapon is

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chaku is "legally irrelevant" because "none of the circuits . . . reached the question of whether the underlying arms were protected." Pet. 27. This is specious reasoning. The Second and Seventh Circuits did not reach this issue because they dismissed the case on the threshold question of whether the Second Amendment applied to the states at all. Had they gone beyond this threshold question, they would of course have had to confront the question of whether the underlying arms were protected. Furthermore, the Ninth Circuit panel in Nordyke, after holding that the Second Amendment was applicable to the states, *did* necessarily reach the question of whether the underlying arms were protected in the context there – i.e., in "sensitive places" such as County property.

"in common use" and is "typically possessed by law-abiding citizens for lawful purposes." Heller, 128 S. Ct. at 2816. The nunchaku, a highly dangerous and unusual weapon, cannot meet this requirement.

Because nunchaku are not protected by the Second Amendment, it is irrelevant to the determination of this case whether that Amendment applies to the States. The result of the case would be the same, and the judgment below would stand, no matter how this Court were to decide on the incorporation question. New York State would still have the power to ban nunchaku. This case is therefore not an appropriate vehicle through which to decide whether the Second Amendment applies to the states.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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