No. 09-161

In The
Supreme Court of the United States

ANDREW J. MILLER,

Petitioner,

v.

MIGUEL VILLEGAS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Indiana Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were respondents properly awarded attorneys' fees pursuant to 42 U.S.C. § 1988 in a state court action in which: (a) they raised both federal and state law claims; (b) the federal and state law claims arose from a common nucleus of operative fact; (c) respondents prevailed on the state law claim, making it unnecessary to reach the federal law claims; (d) the lower court found, and petitioners do not dispute, that the federal law claims were substantial and fee-generating; and (e) the relief respondents obtained under the state law claim was the same relief that they sought under the federal claims?

PARTIES TO THE PROCEEDINGS

Petitioner is Andrew J. Miller, in his official capacity as Commissioner of the Indiana Bureau of Motor Vehicles.

Respondents are Miguel Villegas, Betty Doe (a judicially sanctioned anonymous name), and Mary Smith (a judicially sanctioned anonymous name), who represent both themselves and a class of those similarly situated. The class is defined as:

> all current and future persons in Indiana who are, or who will be, required by defendant to produce information concerning their citizenship or immigration status in order to obtain an Indiana driver's license or permit or a state identification card, but who are, or will be, unable to produce the identification mandated by the Indiana Bureau of Motor Vehicle's non-promulgated identification requirements.

(App. 52A).

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STATEMENT OF THE CASE

In 2002, the petitioner ("BMV," for Indiana Bureau of Motor Vehicles) instituted, without prior notice or rule-making, a new rule that radically altered the then-existing identification requirements necessary for the issuance of a driver's license, learner's permit, or state identification card. (App. 44A-50A). The effect of the new requirements was to cause many persons, including both persons without lawful immigration status and some persons in the United States with protected immigration status, to be no longer able to receive licenses, permits, or identification cards.

Prior to the challenged 2002 rules, the BMV's identification requirements allowed applicants to present a variety of documents, all of which were assigned a point value. (App. 44A n.4). The applicant had to amass a total of six points. (*Id.*). For example, if the applicant had a license already, he or she would be awarded six points. Three points were earned by, among other things, a birth certificate, passport or certain immigration documents. A credit card with a photograph earned two points, as did, among other documents, a photo-id from school or work, a social security card, or a certified marriage license. There were numerous documents earning one point, including an Indiana voter registration card, a credit card without a photograph, or a Medicare or Medicaid card. There was no requirement that any particular document or category of document be produced.

After the rule change in 2002, applicants were restricted to producing a limited number of documents from specific categories: a primary document such as a certified birth certificate or other similar documents; documents proving Indiana residence; and, under certain situations, enumerated secondary documents. (App. 45A-50A). Under the new rules those who sought licenses, but not identification cards, had to also produce proof of their social security number. (App. 45A n.5).

The named plaintiffs in this case had been entitled to licenses or identification cards prior the change in 2002. Both Mr. Villegas and Ms. Smith desired to obtain a license or identification card and were now precluded from doing so. (App. 58A-59A). Ms. Doe had a license under the former rules, but after it was stolen could not get it replaced because of the new rules. (App. 51A, 76A, 91A).

Contrary to the BMV's claims (Petition at 5), neither before the change nor immediately after were applicants required to have a social security number. First, there was no requirement in Indiana law or BMV procedure that any applicant present information concerning a social security number before obtaining an identification card from the BMV. (App. 58A). Second, although Indiana law required that those who had social security numbers present the number when applying for a license, those who had never been issued a social security number were allowed to complete an affidavit attesting to the fact that they did not have a social security number. (App.

55A-56A). In its original opinion mandating that judgment be entered for the respondents ("the class"), the Indiana Court of Appeals stated that "[t]o this day, the BMV's website provides, 'If the applicant does not have a Social Security Number, the applicant must complete the BMV Social Security Affidavit.'" (App. 55A-56A & n.10).

Respondents filed this class action in Indiana state court claiming that the new rule violated rule-making and other requirements imposed by Indiana law, IND. CODE § 4-22-2-13, *et seq.*, and also violated the Indiana and United States Constitutions. The relief sought on all claims was identical; an injunction barring enforcement of the new rules. (App. 94A). The trial court entered judgment for the BMV and dismissed all claims. (App. 80A). The Indiana Court of Appeals, however, reversed, and granted to the class the precise relief they requested – the voiding of the new rules. (App. 68A). The Court of Appeals only found it necessary to reach the state law rule-making claim, holding that the new requirements were unlawful under Indiana law and remanding "the case with instructions for the trial court to enter summary judgment in favor of the plaintiffs." (App. 68A). The trial court entered the appropriate order. (App. 38A-39A).

The class then sought attorneys' fees pursuant to 42 U.S.C. § 1988 and the trial court granted the request. (App. 35A-37A). The BMV appealed this decision to the Indiana Court of Appeals, which affirmed the fee award. (App. 3A-34A).

In its fee decision, the Court of Appeals noted that the BMV had, following its earlier decision, promulgated new identification requirements. (App. 8A). These new requirements were more expansive than those that had been voided, allowing some previously disqualified class members to obtain licenses or identification cards.[1] In response to the BMV's argument that respondents did not qualify as prevailing parties the Court of Appeals concluded that their undecided constitutional claims were substantial and arose out of a common nucleus of operative fact with the successful state law claim. (App. 21A-25A). The Court further held that the

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[1] A comparison of the former identification requirements, (App. 45A-50A), with the promulgated regulations, IND. ADMIN. CODE tit. 140, r. 7-4-3, discloses that persons with additional immigration documents may now obtain licenses, permits, or identification cards. These include non-citizens with:

> – authorization for parole of an alien into the United States (form I-512 issued by United States Citizenship and Immigration Services). IND. ADMIN. CODE tit. 140, r. 7-4-3(c)(3).
>
> – a travel document (form I-131). IND. ADMIN. CODE tit. 140, r. 7-4-3(c)(11).
>
> – a "Notice of Action" (form I-797) that indicates an applicant's approval may be used to extend the validity of an original primary document. IND. ADMIN. CODE tit. 140, r. 7-4-3(c)(12).

Further, under the promulgated identification requirements additional documentation is now allowed to satisfy social security number requirements – Social Security cards that indicate that the numbers are not valid for employment or valid for work only with authorization of the Department of Homeland Security. IND. ADMIN. CODE tit. 140, r. 7-4-3(f)(2),(3).

respondents were prevailing parties in that the earlier appellate decision had given them "all the relief they had asked for: the identification rule was declared void and without effect." (App. 29A).

ARGUMENT

Reasons for denying the writ

Plenary review in this case is inappropriate for three reasons. First, the trial court and the Indiana Court of Appeals properly applied the well-established test, adopted by this Court, for awarding fees where fee-generating claims in litigation are not resolved but plaintiffs are successful on a pendent non-fee generating claim. The BMV does not argue that it was inappropriate to apply this test, nor does it dispute the lower courts' application of this test. Nor, for that matter, does it claim that plenary review is necessary to resolve any conflict in the lower courts concerning the test's application.

Second, in its efforts to contort this well-recognized test, the BMV suggests that a new test for prevailing party status should be established that would make attorney fee awards dependent not on whether the plaintiffs prevailed and obtained exactly what they sought in the litigation • as they most certainly did in this litigation • but rather on the results of an analysis that looks beyond the litigation to determine if the plaintiffs achieved what the trial court concludes was their aspirational goal. The

Indiana Court of Appeals properly rejected this unique argument for which there is no support and which violates this Court's established definition of "prevailing party." Moreover, even if a court can look beyond the relief granted in the case to determine prevailing party, the BMV's argument ignores the fact that the regulations promulgated following the decision on the merits in this case expanded the documents acceptable for identification, thus allowing some class members to obtain their licenses, permits, or identification cards.

Third, the BMV also suggests that the established test for prevailing party status in this circumstance should be ignored where the result of the litigation does not foreclose the plaintiffs from raising the unresolved federal claims in separate future litigation. This argument was not raised in the courts below and is waived. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). In any event, it is nothing more than an invitation for this Court, in the face of its clear precedent and in the absence of any conflict in the lower courts, to reconsider the well-accepted analysis under 42 U.S.C. § 1988, and the BMV has presented no compelling reason for doing so.

A. This case presents no conflict with any precedent but instead represents appropriate application of well-established jurisprudence

The purpose of the Civil Rights Attorneys' Fee Awards Act of 1976 (42 U.S.C. § 1988) "is to ensure

'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citing H.R. REP. No. 94-1558, p. 1 (1976)). Recognizing the reality that constitutional claims and non-fee generating statutory claims may be raised together, and that "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible," *United States v. Lovett*, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring), this Court noted shortly after the enactment of § 1988 that it is "clear that Congress intended fees to be awarded when a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act." *Maher v. Gagne*, 448 U.S. 122, 133 n.15 (1980). In *Maher* the Court cited directly from relevant legislative history, noting that in a bill substantially identical to that which became 42 U.S.C. § 1988 the House Report stated:

> [t]o the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claims for the purpose of awarding counsel fees ... In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 ... (1974). In such

> cases, if the claim for which fees may be awarded meets the "substantiality" test, see *Hagans v. Lavine*, *supra; United Mine Workers v. Gibbs*, 383 U.S. 715 . . . (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." *United Mine Workers v. Gibbs*.

Id. (quoting H.R. REP. NO. 94-1558, p. 4 n.7 (1976)).

The BMV does not dispute that *Maher* sets out the relevant test where a decision is entered on a non-fee claim and the pendent fee claims are left undecided. Nor does it dispute that the state law claim on which the class prevailed in this case arose out of a common nucleus of operative fact with the federal claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Nor does it argue that the federal law claims, not decided below, are not "substantial" as that term is defined in *Hagans v. Lavine*, 415 U.S. 528, 536-38 (1974). Rather, the BMV's contention is that the lower courts misapplied these well-established standards in this case. Even if true, this does not establish grounds for granting plenary review. SUP. CT. R. 10. Moreover, the courts below reached the correct result in awarding the class attorneys' fees.

The BMV argues that *Smith v. Robinson*, 468 U.S. 992 (1984), where this Court refused to allow an award of fees where non-fee claims were decided and

an unaddressed constitutional claim was not, compels a conclusion that the Indiana courts erred below. However, *Smith* is nothing more than an application of the formula articulated in legislative history and approved in *Maher*. Indeed, this Court in *Smith* reiterated the *Maher* standard. *Id.* at 1006-07. This Court emphasized in *Smith* that the unresolved federal claim and the non-fee claims not only involved entirely separate theories, but "more important, would have warranted entirely different relief." *Id.* at 1015. It is clear from that decision that the claims did not arise from a common nucleus of operative fact. The non-fee claims addressed the question of which agency was required to pay for the child's education and the federal constitutional claims sought only a declaratory judgment that state special education hearing regulations did not comply with due process and federal law and an injunction, not on behalf of the petitioners, to protect others in future administrative hearings. *Id.*

The contrast here is clear. The relief sought by the class on both the state law and federal claims was identical • invalidation of the challenged regulations. And, all claims arose from the exact same circumstance • the BMV's creation of the new identification procedures. This is a common nucleus of operative fact, and the BMV does not argue to the contrary. As the First Circuit noted in responding to a claim that the case before it was analogous to the situation in *Smith*, thus precluding a fee award, "[t]his case does not present that situation; the facts arise from a

common nucleus of operative fact, and the theories are but different statutory avenues to the same goal." *Paris v. United States Dep't of Hous. and Urban Dev.*, 988 F.2d 236, 240 (1st Cir. 1993).

B. The BMV's Petition asks this Court to abandon accepted law in favor of an uncertain and unsupported test for prevailing party status that depends not on whether the plaintiffs obtained the relief they requested but on a subjective assessment based on a review of facts occurring after the conclusion of the litigation

This Court, in synthesizing its cases concerning 42 U.S.C. § 1988, has noted that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). This material alteration is established by "enforceable judgments on the merits and court-ordered consent decrees." *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001). "Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Farrar*, 506 U.S. at 111. Here, the class obtained a judicial order from the Indiana Court of Appeals striking down the BMV identification requirements. Therefore, the lower courts held,

entirely consistent with this Court's jurisprudence, that the class prevailed.

In urging this Court to review this case, the BMV asks this Court to abandon its jurisprudence and allow courts to deny fees, not because the plaintiffs have not prevailed and benefitted in the sense of obtaining a judgment granting them all the relief requested, but on the ground that the relief obtained does not satisfy what the trial court subjectively concludes is the "real" or aspirational goal of the litigation, which can occur only after the litigation is over and the trial court in some way assesses its effect. Thus, the BMV argues that it is irrelevant that the class obtained through a final judgment exactly what it asked for in the litigation because what the class really wanted was the ability to obtain licenses, permits, and identification cards, which is again foreclosed to some of the class under the new rules promulgated after the Indiana Court of Appeals voided the former requirements. The BMV claims that a court should wait until after the litigation is over, see what effect it has, and then look into the minds of plaintiffs and deny fees if it concludes that the plaintiffs did not obtain what they really desired in the litigation.

In addition to being contrary to the explicit holdings of this Court noted above, and unsupported by any jurisprudence whatsoever, the BMV's argument is factually incorrect. Although persons without any lawful status are again unable to obtain licenses, permits, or identification cards under the

promulgated regulations, the promulgated regulations did substantially expand the identification that had been acceptable under the voided rules. *See supra* note 1. These changes provided the opportunity for those members of the class with this now-allowed documentation to obtain licenses, permits, and identification cards. Accordingly, this case is an inappropriate vehicle for this Court to reexamine its unquestioned and well-accepted precedent. Even under the BMV's argument this, in and of itself, is sufficient to establish that the class prevailed. "[T]he prevailing party inquiry does not turn on the magnitude of the relief obtained." *Farrar*, 500 U.S. at 114.[2]

Furthermore, the test that the BMV proposes is impractical and illogical. While it is true that the ultimate regulations promulgated by the BMV did not allow the named plaintiffs and undoubtedly some members of the class to obtain licenses, permits or identification cards, there was no way for any court to know this when the Court of Appeals invalidated the challenged regulations and thereby gave the class all the relief it sought. It was entirely possible for the BMV, in response to the Court of Appeals' decision, to have determined that even persons without status

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[2] The BMV does not argue to this Court, and did not argue to the Indiana courts, that the amount of fees awarded to the class is erroneous. It has argued only that the lower courts erred in finding that the class is a prevailing party in this litigation for purposes of the receipt of fees under 42 U.S.C. § 1988.

could obtain licenses, permits, or identification cards. *See, e.g.*, *League of United Latin American Citizens (LULAC) v. Bredesen*, No. 3:04-0613, 2004 WL 3048724 (M.D. Tenn. Sept. 28, 2004) (refusing to grant a preliminary injunction against Tennessee rule that allowed persons without lawful status to be issued a license inscribed with "FOR DRIVING PURPOSES ONLY • NOT FOR VALID IDENTIFICATION"). If the BMV had chosen to take this action, would the BMV now concede that the class prevailed, despite the fact that the exact same appellate decision was made and the exact same judgment was entered? Such a concession, mandated by the BMV's argument, would appear to violate the principles of *Buckhannon*, which require the focus to be on the judicially sanctioned relief awarded in the litigation and not on whether the plaintiffs can be deemed to be a catalyst to the defendants' change. 532 U.S. at 601-08. The award of attorneys' fees does not, and cannot, require a court to wait to evaluate the post-judgment effect of litigation to determine if the plaintiffs ultimately obtained what they actually desired in the litigation, regardless of the fact that the plaintiffs received all the relief that they requested in their complaint. This Court's clear mandate is to avoid such a metaphysical inquiry and instead focus on whether the plaintiff "obtain[ed] at least some relief on the merits of his claim." *Farrar*, 506 U.S. at 111. The class here obtained the precise relief it requested • invalidation of the challenged regulations • and therefore the Court of Appeals' decision "materially alter[ed] the legal relationship between" the BMV

and the class "by modifying the [BMV's] . . . behavior in a way that directly benefit[ed]" the class. *Id.* at 111-12. The BMV advances no reason why this Court should abandon this settled jurisprudence.[3]

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[3] In its Petition, at pp. 13-14, the BMV cites a series of cases for the proposition that there are "debates" among lower courts over the meaning of "directly benefit" as used in *Farrar*. There is no such debate and the cases cited by the BMV all conform, as does this case, to the basic requirement that in order to receive attorneys' fees the relief granted the plaintiff must "materially alter[ ] the legal relationship between the parties by modifying defendant's behavior in a way that directly benefit[ ] the plaintiff." *Id.* at 111-12. Thus, fees were denied in *Barnes v. Broward County Sheriff's Office*, 190 F.3d 1274 (11th Cir. 1999) where the plaintiff prevailed only on a claim concerning the use of pre-employment psychological testing that was unrelated to his claim of discrimination and therefore, the injunction of such testing did not directly benefit him in any way at the time of the decision. *Id.* at 1278. In *Martinez v. Wilson*, 32 F.3d 1415 (9th Cir. 1994), the court refused to allow fees to plaintiffs who did nothing but vindicate the general interest in having government obey the law, thereby not obtaining any direct benefit in a case that had become moot through changes in federal law. *Id.* at 1422. In *Roark & Hardee LP v. City of Austin*, 522 F.3d 533 (5th Cir. 2008), fees were not allowed after a favorable constitutional decision on the merits challenging the constitutionality of an ordinance was reversed by the appellate court leaving only a holding, not appealed on the merits, that due process required expeditious judicial review when the ordinance was applied. *Id.* at 556. And, in *Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726 (7th Cir. 1995), the court, applying the now rejected "catalyst theory" found that the defendant had altered its actions as a result of the lawsuit and therefore, under *Farrar*, there had been a material alteration of the legal relationship between the parties. *Id.* at 730-31. These cases illustrate various factual scenarios where courts have applied the rule of *Farrar* and other cases from this Court's attorney fee jurisprudence,

(Continued on following page)

C. The BMV's argument, raised for the first time in this Court, that fee awards should be denied if the fee-generating claims are not precluded in future litigation has no support in case law and is nothing more than a request that this Court revise its current and well-accepted jurisprudence

Existing jurisprudence, without conflict, therefore supports the lower courts' decision in this case. The BMV nevertheless argues that this case presents a new question • whether fees under 42 U.S.C. § 1988 should be available where a decision on the non-fee claim does not shield against a future case raising the federal claims even though the plaintiff prevailed in the original litigation on a non-fee ground. This question does not justify plenary review: it was not raised in the lower courts, it has not been addressed by any other court, and it is not meritorious. It is, fairly understood, merely a continued expression by the BMV of dissatisfaction with the applicable rules and standards that lower courts routinely and consistently apply when deciding whether to award fees.

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thus demonstrating that the BMV's real concern is only how this jurisprudence was applied in this case. The case at bar is another such illustration in which, unlike the cases cited above where fees were denied, the plaintiffs obtained the precise relief they requested through the final judgment mandated by the Court of Appeals.

The BMV's brief to the Court of Appeals on the attorneys' fee issue argued only that the class did not prevail on its federal constitutional claims because: 1) the trial court originally found against the class on all claims and this decision was not overturned by the original Court of Appeals decision reversing the trial court and mandating judgment for the class; 2) the undecided federal claims did not meet the "common nucleus" and "substantiality" requirements of *United Mine Workers*, 383 U.S. at 725, and *Hagans*, 415 U.S. at 536-38; and 3) an award of fees is inappropriate because the class had failed to obtain the objectives of their federal claims. (Respondents' Appendix, App. 1-App. 3). Having failed previously to raise its argument concerning "shielded" and "unshielded" claims, the BMV may not raise this claim now for the first time. *Taylor*, 503 U.S. at 645-46. This alone suffices as a reason for this Court to deny plenary review.

Moreover, the BMV is raising an issue that is hardly uncommon, that has generated no judicial commentary, and on which there is no conflict in the case law. When a court strikes down a statute, rule, or other governmental action on state law grounds, rendering it unnecessary to rule upon the pendent federal claims, it is frequently the case that the federal law claims may be renewed in subsequent litigation depending on how the defendants respond to the judgment based on state law. There is no reason to create new law to address that situation for the simple reason that, when it arises, courts routinely

and properly resolve it by application of the well-established principles summarized in *Maher*.

For example, in *Southwestern Bell Telephone Co. v. City of El Paso*, 346 F.3d 541 (5th Cir. 2003), the telephone company challenged actions of a governmental water improvement district as violating both state law and federal law. The company prevailed on a state law claim and the federal claim was therefore not resolved. In the BMV's parlance the federal claim was "not shielded" because a change in state law would allow the identical federal claims to be made. Nevertheless, fees under 42 U.S.C. § 1988 were awarded based on an application of the above cited principles in *Maher*. *Id.* at 510-11. In *California State Outdoor Advertising Ass'n, Inc. v. California*, No. S-05-0599, 2006 WL 662747 (E.D. Cal. Mar. 16, 2006), the plaintiffs claimed that a permit fee for outdoor advertising was not properly promulgated as required by California law and that it violated the First Amendment. The court ruled in favor of the plaintiff on the procedural state law claim only, *id.* at *3-4, thereby leaving the federal claim "not shielded" in that the exact same federal issue could be raised if the defendant properly followed the procedural requirements of California law. The case therefore presented the identical posture as the case at bar. In awarding fees the court relied on *Maher*. *Id.* at *8-10. Similarly, in *Bangs v. Town of Wells*, 834 A.2d 955, 957 (Me. 2003), the plaintiff prevailed on a state law claim that an ordinance barring mobile home expansion had not been enacted in compliance with

state law procedural requirements, while not deciding plaintiff's substantive federal constitutional claim. The federal law claims were "not shielded" • the town was free to impose the same challenged substantive requirements after following the proper statutory procedure. Nevertheless, fees were allowed following application of the principles set forth in *Maher*. *Id.* at 958-59.

The BMV's argument is nothing more than an argument, unsupported in the case law, against *Maher*. To adopt the BMV's solution • preventing the award of fees where the federal claims are not precluded from being raised in future litigation • would be to run directly counter to this Court's pronouncement that it is "clear that Congress intended fees to be awarded when a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act." *Maher*, 448 U.S. at 133 n.15. No court has doubted the ability to award fees in this situation and there are no grounds for grant of plenary review.

CONCLUSION

For the reasons stated above, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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