No. 83-1015

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

National Association for the Advancement of Colored People, et al.,

Appellants,

vs.

Hampton County Election Commission, et al.,

Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF OF APPELLEES HAMPTON COUNTY SCHOOL DISTRICT NO. 1, STANLEY, BROOKER, HUTTO, FREEMAN AND ULMER and HAMPTON COUNTY SCHOOL DISTRICT NO. 2, DIXON, ORR, JOHNSON, GORDON AND MANIGO

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QUESTIONS PRESENTED

I. Whether or not the district court was correct in holding that the preclearance of legislation effecting a change in voting within the meaning of Section 5 of the Voting Rights Act of 1965 effectively preclears preliminary implementation done in accordance with the legislation prior to preclearance.

II. Whether or not the district court was correct in holding that the preclearance of legislation effecting a change in voting within the meaning of Section 5 of the Voting Rights Act of 1965 renders the legislation immediately enforceable.

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APPELLEES' BRIEF ON THE MERITS

STATEMENT OF THE CASE

This appeal is from the order of the three-judge district court dated September 9, 1983, holding that the provisions of Act No. 549 of the 1982 South Carolina General Assembly have not been put into effect in violation of Section 5 of the Voting Rights Act of 1965 and denying the appellants'

request for injunctive relief. J. S. App. beginning at 1a. [1]

Prior to November 1, 1964, and until the enactment of the 1982 legislation whose implementation is challenged by the appellants, the public school system of Hampton County was governed by the Hampton County Board of Education ("County Board"), the Hampton County Superintendent of Education ("Superintendent") and the boards of trustees of Hampton County School Districts Nos. 1 and 2 ("Boards of Trustees"). [2] The County Board was composed of six members and was appointed by the Hampton County members of the

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[1] This Brief is filed on behalf of the appellees Hampton County School District No. 1 and its Trustees, Philip Stanley, Lenon Brooker, Jerlyn Hutto, Miles Freeman and Gerald Ulmer and Hampton County School district No. 2 and its Trustees, T. M. Dixon, Willie J. Orr, Virgin Johnson, Jr., Rufus Gordon and Lee Manigo ("these appellees").

[2] Approximately 68% of Hampton County's public school students are black; District No. 1 students are 54% black and 46% white and District No. 2 students are 92% black and 8% white. J.A. 9a.

South Carolina Senate and the South Carolina House of Representatives. The County Board in turn appointed the six members of each of the two Boards of Trustees. The Superintendent was elected at large by the qualified voters of Hampton County and served as an advisor to the teachers and trustees of each district. Each school district operated separately under the general supervision of district superintendents. J.S. App. 2a.

Then, on February 18, 1982, the South Carolina General Assembly passed Act No. 547 of 1982, which changed the method of selection and the composition of the County Board. It provided for an elected County Board of six members elected at large from Hampton County beginning with the 1982 general election. J.S. App. 17a. The Superintendent, while continuing to be elected at large, was to serve as an ex officio County Board member with all rights and privileges of other members, including the right to vote. J.S. App. 18a. Act No. 547 did not affect the

composition or functioning of the two Boards of Trustees. The legislation was submitted by the South Carolina Attorney General to the United States Attorney General who precleared it under Section 5 of the Voting Rights Act on April 28, 1982. J.S. App. 3a.

Before Act No. 547 was approved, however, it was superseded by another piece of legislation, Act No. 549, [3/] which abolished the County Board as of June 30, 1983, and abolished the office of the Superintendent as of June 30, 1985. J.S. App. 19a. Once abolished, their respective duties were to be assumed and separately performed by the two Boards of Trustees. Beginning with the November, 1982, general election the Boards of Trustees were to be elected at large by a plurality vote of the electors within each

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[3/] The appellants' assertions in their Statement [Brief for Appellants] as to the reasons for the enactment of Act No. 549 were originally made in their complaint. J.A. 11a. They have been denied by these appellees [Id. 36a] and do not constitute facts in this appeal.

respective district. The number of members of each board was changed from six to five. Act No. 549 provided that a candidate offering for election in November, 1982, had to file with the Hampton County Election Commission during the period August 16-31, 1982. It included no language giving local election officials the authority to open a filing period other than the one specified. Id.

The changes to be effected by Act No. 549 were contingent upon approval by a majority of the qualified electors voting in a county-wide referendum in May, 1982. The referendum was conducted on May 25, 1982, and a majority of the voters approved Act No. 549. [4/] According to the mandate of the voters of Hampton County, then, the County Board and the office of Superintendent were to

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[4/] Over 46% of the registered voters in Hampton County voted in the referendum, which carried by a 55% affirmative vote. Docket Sheet entry No. 1 (Compl. Exhibit 9a).

cease to exist on June 30, 1982, and June 30, 1985, respectively.

As required by Section 5 of the Voting Rights Act, Act No. 549 was submitted to the United States Attorney General for preclearance on June 16, 1982. [5/] J.S. App. 4a. As stated earlier, Act No. 547 had already been precleared by the Attorney General and Act No. 549 likewise had to receive preclearance in order to be effective. The Attorney General's failure to preclear Act No. 549 would have rendered it unenforceable and would have revived the provisions of Act No. 547. On the other hand, if the Attorney General precleared Act No. 549, it would be the controlling piece of legislation. Because

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[5/] The appellants characterize the local officials' action in submitting the referendum results as evidencing deliberate delay. Brief for Appellants 7-8. Although the Department of Justice regulations authorize consideration of a preclearance request prior to the holding of an approving referendum, there are also sound reasons as well as authority for not making a submission of referendum results until "after [the changes] become final." 28 C.F.R. §51.19.

the Attorney General is authorized to take as long as 120 days from the date of submission to perform his Section 5 review, there existed the possibility that the filing period for candidates for the two Boards of Trustees, August 16-31, 1982, might pass long before the Attorney General precleared Act No. 549. But if preclearance came after August 31, 1982, the first election for the Boards of Trustees could not be held as scheduled because no candidate would have qualified by filing during the specified filing period. J.S. App. 4a-5a.

To avoid this situation, the appellee Hampton County Election Commission ("appellee Election Commission") began accepting filings on August 16, 1982, in accordance with Act No. 549. Id. On August 23, 1982, a full 60 days after Act No. 549 was submitted, the Attorney General objected to a portion of Act No. 549. J.A. 58a. Regarding the change in the method of selection from appointed to elected boards of trustees, the

Attorney General found neither a discriminatory purpose nor effect. J.A. 59a. But the Attorney General was unable to conclude that the abolishment of the County Board was not discriminatory toward Hampton County blacks. Id. The Attorney General noted, however, in his objection letter that the "[p]rocedures for the Administration of Section 5 (28 C.F.R. 51.44) permit you to request the Attorney General to reconsider the objection."

Because the Attorney General's objection was received in the middle of the filing period and because a decision regarding whether or not to request reconsideration was pending, the appellee Election Commission continued to accept filings until the end of the statutorily prescribed period. Hampton County submitted a request for reconsideration on August 31, 1982. J.A. 63a. Nevertheless, because the possibility existed that the request for reconsideration would be denied, the appellee Election Commission also began

accepting filings for the elected County Board under Act No. 547. Any candidate who filed for one of the two Boards of Trustees was not precluded from also filing for the County Board. J.S. App. 5a. As of November 2, 1982, the Attorney General had not responded to the request for reconsideration and, accordingly, the appellee Election Commission held the County Board election on that date. Id.

Shortly thereafter, on November 19, 1982, the Attorney General withdrew his objection to the abolishment of the County Board because "a reappraisal of South Carolina law establish[ed] that the county board lacks authority to effect a consolidation and its abolition ... will not have the potentially discriminatory impact we had initially perceived." J.A. 65a. Despite the fact that the election for the County Board had already been held pursuant to Act No. 547, that legislation became a nullity when the Attorney General precleared Act No. 549.

Thereafter, the appellee Election

Commission prepared to implement Act No. 549. It sought the advice of the South Carolina Attorney General as to whether or not an election should be held for the two Boards of Trustees and, if so, the date of the election. It also sought advice as to whether or not the filing for the two Boards of Trustees should be re-opened. J.A. 74a.

The South Carolina Attorney General concluded that "the provisions of Act [No. 549] are now in effect and it requires that an election be held for the school trustees," that it should be held "[a]s soon as possible" and, finally, regarding the question as to whether the filing period should be re-opened, he concluded that "there is no reason to reopen filing as only the date of the election has changed." J.A. 67a. Acting upon this legal advice, the appellee Election Commission published a Notice of Election

setting March 15, 1983, [6/] as the date for the election. J.S. App. 7a. The five members of each of the two Boards of Trustees, namely, these appellees, were elected on that date. One of the members of the District No. 1 Board of Trustees is black and all five members of the District No. 2 Board of Trustees are black. Id. n. 2.

6/ Although the Notice began appearing in January, 1983, the appellants waited until Friday, March 11, 1983, four days before the scheduled election, to file their complaint and motion seeking to preliminarily enjoin it. Docket Sheet Entry No. 2. Notwithstanding the appellants' characterization of the single judge's "premise" for denying preliminary injunctive relief [Brief for Appellants 13], the single judge cited the appellants' eleventh-hour application as a primary reason for denying it. Record Vol. II (Transcript of March 14, 1983 hearing 2-5). Cf., Charlton County Board of Education v. United States, 459 F. Supp. 530, 533, 536 (D.D.C. 1978).

SUMMARY OF ARGUMENT

The lower court correctly held that the preclearance of Act No. 549 effectively precleared the preliminary implementation done pursuant to its provisions prior to preclearance, including the opening of the statutorily prescribed filing period and the certification of the referendum results to the South Carolina Code Commissioner.

The lower court also correctly held that the preclearance of Act No. 549 rendered the statute immediately enforceable without requiring the additional preclearance of the implementing action, namely, the holding of a special election as soon as possible after preclearance notwithstanding Act No. 549 specified the general election, when Act No. 549 was not precleared until after the general election.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE PRECLEARANCE OF ACT NO. 549 EFFECTIVELY PRECLEARED THE PRELIMINARY IMPLEMENTATION DONE PURSUANT TO ITS PROVISIONS PRIOR TO PRECLEARANCE.

A. Opening of statutorily prescribed filing period pending preclearance.

The lower court upheld the opening of the statutorily prescribed filing period, August 16-31, 1982, notwithstanding Section 5 preclearance was then pending. It first found that the action was not a "change" but merely a ministerial or administrative decision necessary to accomplish the purpose of Act No. 549. J.S. App. 8a-9a. In this respect, it is similar to running the public notices of the election or printing the ballots, both of which were necessary actions to bring about the change effected by the statute, i.e., elected rather than appointed boards of trustees, but neither of which is itself a change. The preclearance requirement of Section 5 does not apply to every task performed by local officials in order to

execute Act No. 549 for, if that were true, the notices could not have been published nor the ballots circulated unless and until precleared.

The statutorily prescribed filing period began before completion of the Attorney General's Section 5 review. The decision to accept filings was an appropriate exercise of administrative discretion aimed at complying with both the Voting Rights Act and state law. The local officials were attempting to prevent the disruption of Hampton County's educational system and to avoid the expense and confusion of a special election. Inasmuch as Act No. 549 had been submitted to the Attorney General in June, it was not unreasonable to anticipate (and prepare for) its preclearance in time for the November, 1982, general election. Opening the filing period in August as the legislation directed enabled the election to be held in November, 1982, assuming preclearance by then. This good faith attempt to comply with both federal and state law is further evidenced by

the fact that, although filings were allowed for the Boards of Trustees pursuant to Act No. 549, they were also accepted for the County Board pursuant to Act No. 547. J.S. App. 17a. Candidates were permitted to file for either or both offices [7/] with the expectation that the matter would be resolved by November and that Hampton County voters would then be able to elect candidates to fill whichever governing body was the functioning one.

The lower court further found that, even assuming the opening of the August filing period was a Section 5 "change", it was precleared when the Attorney General withdrew his outstanding objection to Act No.549 in late November, 1982. Relying on Berry v. Doles, 438 U.S. 190 (1978), the lower court

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[7/] The appellee Election Commission so advised prospective candidates publicly through notices in the local newspaper and personally when candidates filed at the Commission office. Motion to Dismiss or Affirm (appellee Election Commission) App. 4a - 5a, 7a - 9a.

concluded that the "fact that the eventual preclearance of Act No. 549 followed the filing period for the Trustees' position is not a bar under Section 5." J.S. App. 9a. Act No. 549 has now been precleared by the Attorney General and thus has been found not to have a discriminatory purpose or effect. "[T]he matter [is] at an end." Berry v. Doles, 438 U.S. at 193. Assuming arguendo that the opening of the August filing period before preclearance was technically a violation of Section 5, no Section 5 claim exists now. An injunction against implementation of an unprecleared change is the only remedy for a violation of Section 5 and that remedy is no longer available because the alleged change has been precleared. The appellants' complaint regarding the local officials' decision to complete the filing period after receipt of the Attorney General's objection on August 26, 1982, is likewise moot

because that objection was subsequently withdrawn. 8/

The Solicitor General asserts that the Justice Department has uniformly treated candidate qualifying periods as covered by the preclearance requirement of Section 5. Brief for the United States as Amicus Curiae 15, n. 9. While these appellees have no quarrel with that assertion, it does not go far enough because it does not also disclose that the Justice Department, at the same time that it has viewed a new candidate qualifying period as a covered change, has allowed the new candidate qualifying period to proceed as statutorily provided pending preclearance. As the appellee Election Commission more fully explains [Brief for Appellees (Election Commission) 20-24], the Justice Department had

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8/ Moreover, as the record manifests, the appellee Election Commission, which is the public body authorized to allow or disallow filing, most probably did not learn of the objection until after the statutory filing period had expired. Motion to Dismiss or Affirm (appellee Election Commission) App. 9a - 10a.

allowed a special filing period to go into effect pending preclearance [J.A. 50a - 51a, 53a - 57a] only six months before the appellee Election Commission was advised by the South Carolina Attorney General that he "assume[d] that pursuant to the Act's provisions, ...notice was given of the filing period and candidates did file within the time specified by statute." J.A. 68a. Accordingly, the appellee Election Commission was entirely justified in relying on legal advice based, as it was, on the Justice Department's pattern and practice with respect to the implementation of new candidate qualifying periods pending preclearance.

B. Certification of referendum results to South Carolina Code Commissioner.

The appellants originally asserted [J.A. 17a] that the appellees had failed to certify the May, 1982, referendum results to the South Carolina Code Commissioner in accordance with Section 3 of Act No. 549. J.S. App. 21a. They

have abandoned their argument concerning this alleged "change" because they now agree that the certification was in fact made. Brief for Appellants 12 n. 2. Accordingly, their argument regarding the lower court's declaration that an allegation of discriminatory intent or effect is necessary to a Section 5 action need not be reached by this Court because that declaration was made with reference to the certification "change". J.S. App. 8a. These appellees would note, however, that the lower court correctly declared the law in this regard. Cf., Dougherty County Board of Education v. White, 439 U.S. 32, 42 (1978); Georgia v. United States, 411 U.S. 526, 534 (1973) (§5 changes are those "which have the potential for diluting the value of the Negro vote and are within the definitional terms of §5"); United States v. Georgia, Civil Action No. C76-1531A, slip op. at 7 (N.D. Ga. September 30, 1977), aff'd 436 U.S. 941 (1978). The appellants' reliance on, inter alia, Allen v.

State Board of Elections, 393 U.S. 544 (1969), and Perkins v. Matthews, 400 U.S. 379 (1971), is misplaced because those decisions hold only that a local district court cannot determine whether or not a change in voting is in fact discriminatory in intent or effect. But the lower court's declaration does not reach that issue and the appellants have simply misread it.

The one significant point that remains notwithstanding the appellants' abandonment of their challenge to this alleged change is that their original assertion is totally inconsistent with their position regarding the opening of the statutorily prescribed filing period pending preclearance. On the one hand, they assert that the appellees violated the preclearance requirements of Section 5 when they allowed filing in accordance with the statute before obtaining preclearance. On the other hand, they complained that the failure of the appellees to certify the referendum results to the South Carolina Code Commissioner in accordance with the statute

irrespective of preclearance also violated Section 5. J.A. 12a, 17a. This basic inconsistency in approach, these appellees submit, highlights the fallacy of all of the appellants' Section 5 claims.

C. Abolishment of the office of Hampton County Superintendent of Education and devolution of his duties on elected boards of trustees.

The third allegedly unprecleared change is the abolishment of the elective office of county superintendent of education and the devolution of his duties on the elected boards of trustees. This change is precisely one of the changes effected by Act No. 549 [J.S. App. 19a], which has now been precleared in its entirety. The appellants also assert that the local officials have devolved the duties prematurely. J.S. 12. This assertion is vigorously denied by these appellees; moreover, even if it were true, the remedy is, as the lower court observed [Record Vol. III (Transcript of July 21, 1983 hearing 45)], an action in state court to enjoin a violation of

state law, not a Justice Department review of the unauthorized "change."

II. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE PRECLEARANCE OF ACT NO. 549 RENDERED THE STATUTE IMMEDIATELY ENFORCEABLE WITHOUT REQUIRING THE ADDITIONAL PRECLEARANCE OF IMPLEMENTING ACTION TAKEN SOLELY BECAUSE OF THE TIMING OF THE PRECLEARANCE.

The final allegedly unprecleared changes concern the holding of the election as soon as practicable after preclearance but on a date different from the one prescribed in the statute and without re-opening the filing for candidates. These appellees submit, however, that when the statutorily prescribed date cannot be met only because of an outstanding objection from the Attorney General which is ultimately withdrawn and literal compliance with the statute is thus impossible, the mere change in the date does not constitute a change which requires Section 5 preclearance. There are legal and practical reasons for this conclusion. First, the Attorney General, who administers the Voting Rights Act and whose interpretation is entitled to great weight

[cf., United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978)], manifestly did not consider the statutory date of the first election of the boards of trustees to be a change subject to preclearance because he precleared the statute seventeen days after the statutory date and did not caution, as he has often done, [9/] that any further submission was required. The holding of the initial election for the boards of trustees in March, 1983, rather than during the general election on November 2,1982, due solely to the outstanding Justice Department objection at the time of the general election, merely implemented the statute which had, in the meantime, been precleared. Cf., Berry v. Doles, supra. Factually, it is a de minimis change and legally it is no change. Moreover, the decision to hold the initial election as soon as practicable after preclearance, made,

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[9/] See, e.g. United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. at 115.

as it was, on the advice of the South Carolina Attorney General, represents a good faith effort to implement a statute whose preclearance reflects that it is more racially equitable and furthers the purpose of the Voting Rights Act to a greater extent than the former appointment process.

Finally, there are practical reasons underlying the decision to elect the boards of trustees as soon as possible without amending the precleared statute. There was the real possibility that an amendment expressly authorizing a later election date would not have been precleared in a timely fashion thereby necessitating another amendment. 10/ The amendment process could have gone on indefinitely. Furthermore, the March, 1983,

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10/ The Solicitor General argues that preclearance could have been timely obtained had the appellees submitted the March, 1983 election date for preclearance in January, 1983. Brief for the United States as Amicus Curiae 17-18 n. 11. He overlooks the fact that, under his view of the absolute prohibition against any degree of implementation pending preclearance, the

initial election represents merely a one-time special election held in order to implement the statute and will not recur inasmuch as successive elections will be held on the general election schedule in accordance with the statute.

The failure to re-open filing for candidates for the March, 1983, initial election is not a change at all because the filing had already occurred pursuant to the statute on August 16-31, 1982. Indeed, the re-opening of filing would have constituted a change, arguably requiring preclearance before implementation because no authority existed for a second filing. But the decision not to re-open the filing period conformed with rather than changed the authorized

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10/ (cont.) special election could not have been held in March, 1983, assuming preclearance by March, 1983, because candidates would not have been able to qualify pending preclearance and other preliminary steps such as noticing the election sixty days in advance as required by statute could not have been taken.

procedure. Furthermore, the appellants' theory for this alleged change is based on the erroneous assumption that a Section 5 change occurred in state law by virtue of the Attorney General's outstanding objection. They contend in effect that the opening of the filing period in August, 1982, instead of after November 19, 1982, constituted a covered change by reason of the outstanding objection. The outstanding objection, however, was not a change in state law. South Carolina law did not require that a filing period be opened subsequent to the Attorney General's preclearance of Act No. 549. Whether or not that enactment receives Section 5 preclearance is relevant only under federal law; it is not relevant in determining whether a change in state law has occurred because it is not a matter of state law. Therefore, the failure to re-open a filing period after preclearance cannot constitute a change in South Carolina law with respect to voting.

THe appellants have erroneously characterized the appellees' action in immediately implementing Act No. 549 once it was finally precleared as contrary to this Court's decisions that any change in voting is a covered change. See, e.g., Allen v. State Board of Elections, 343 U.S. 544, 566 (1969). None of the appellees, including these appellees, disputes that a change in an election date effected by legislation is a covered change; instead, they argue that a substitute election date made necessary solely by the timing of the preclearance, which timing makes literal compliance with the precleared statute impossible, and used only to effect the initial implementation of the precleared statute is not required to be additionally precleared. If this were so, then the purpose of the administrative preclearance alternative under Section 5, that is, "to provide a speedy alternative method of compliance to covered States" [Morris v. Gressette, 432 U.S. 491, 503 (1977)(emphasis

added)], might never be achieved. When the tremendous number of submissions which the Attorney General must review is considered, preclearances coming too late for literal compliance are to be expected. Indeed, this Court early on recognized that problems of administration would occur. Cf., Allen v. State Board of Elections, 393 U.S. at 169. While these appellees recognize that the burden of complying with Section 5 is primarily that of the covered jurisdictions, they have an equal responsibility to ensure the integrity of their state laws by enforcing them once preclearance is obtained. In the implementation of Act No. 549, the appellees have consistently and legitimately attempted to comply with Section 5, a law whose "potential severity" and "extraordinary remedy of postponing the implementation of validly enacted state legislation" this Court has repeatedly recognized. Morris v. Gressette, 532 U.S. at 504 [emphasis added].

The appellants apparently disagree with the Attorney General's preclearance of the provisions of Act No. 549. But they cannot seek judicial review of that official's failure to object even though it "may have been erroneous" because judicial review of the Attorney General's preclearance action is foreclosed. Morris v. Gressette, 432 U.S. at 5107, n. 24. They may now challenge the legislation only in a traditional action questioning its constitutionality [Allen v. State Board of Elections, 393 U.S. at 549-50], an action which is currently pending here. J.S. 6, n.3.

CONCLUSION

These appellees respectfully submit that the judgment entered in the cause by the three-judge District Court for the District of South Carolina should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, KAREN LeCRAFT HENDERSON, counsel of record for these Appellees and a member of the Bar of this Court, do hereby certify that, in accordance with Rule 28, three (3) copies of the foregoing Motion to Dismiss or Affirm were served on all parties required to be served on this date by depositing same in the United States mail, first-class postage prepaid, and addressed as follows:

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This 14th day of September, 1984.

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