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COMMUNITY COALITION
15

16 UNITED STATES DISTRICT COURT
17 FOR THE EASTERN DISTRICT OF CALIFORNIA
18

19 DARRELL ISSA, JAMES B. OERDING,
20 JERRY GRIFFIN, MICHELLE BOLOTIN,
and MICHAEL SIENKIEWICZ

21 Plaintiffs,

22 vs.

23 GAVIN NEWSOM, in his official capacity
as Governor of the State of California; and
24 ALEX PADILLA, in his official capacity as
Secretary of State of California,
25

26 Defendants.
27
28

Case No. 2:20-cv-01044-MCE-CKD

**AMICUS BRIEF IN SUPPORT OF
DEFENDANTS' AND
INTERVENOR-DEFENDANTS'
OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

Date: July 16, 2020

Time: 2:00 pm

Courtroom: 7, 14th Floor

Judge: Hon. Morrison C. England, Jr.

1 **I. INTRODUCTION**

2 Pursuant to the Court’s Order of June 22, 2020 (Dkt. 56), Amici California Common
3 Cause, the League of Women Voters of California, and Community Coalition (collectively,
4 “Amici”) submit the following amicus brief in support of Defendants’ and Intervenor-
5 Defendants’ opposition to the Motion of Plaintiffs Darrell Issa, James B. Oerding, Jerry Griffin,
6 Michelle Bolotin, and Michael Sienkiewicz (“Plaintiffs”) for a preliminary injunction. As a
7 preliminary matter, Amici submit that, as Defendants and Intervenor-Defendants have shown in
8 their opposition brief, the preliminary injunction motion and the entire action have been mooted
9 by the enactment of superseding legislation. The motion should be denied on that basis alone.

10 **II. ARGUMENT**

11 **A. Plaintiffs Lack Standing to Pursue Their Claims**

12 The Supreme Court’s decision in *Lance v. Coffman*, 549 U.S. 437 (2007), forecloses
13 plaintiffs’ standing here to bring claims under the Elections Clause and the Electors Clause
14 because their alleged injury is, at most, the kind of generalized grievance about the conduct of
15 government that the Supreme Court has held is insufficient to confer standing under either of
16 those clauses.

17 Plaintiffs in this case and its related case are components of a political party, a single
18 congressional candidate, and four voters, and none of them comes close to establishing the
19 required level of injury necessary to proceed with their Elections Clause and Electors Clause
20 claims. Their motions for preliminary injunction allege only generalized harm to voters or that
21 harm will result from Governor Newsom’s alleged violation of law. (Case 2:20-cv-01055, Dkt.
22 24-1 at 15:20-21 and 16:1-2; Case 2:20-cv-01044, Dkt. 38-1 at 14:11-13.) The Supreme Court
23 rejected exactly this position in a *per curiam* opinion focusing solely on standing to bring an
24 Elections Clause claim in *Lance*, 549 U.S. at 442 (“The only injury plaintiffs allege is that the
25 law—specifically the Elections Clause—has not been followed. This injury is precisely the kind
26 of undifferentiated, generalized grievance about the conduct of government that we have refused
27 to countenance in the past.”).

1 The only cases in which the Supreme Court has found standing to bring Elections Clause
 2 and Electors Clause claims are those brought by or on behalf of a state, a state legislature or a
 3 working majority of a state legislature. *See Ariz. State Legislature v. Ariz. Indep. Redistricting*
 4 *Comm’n*, 135 S. Ct. 2652, 2663-65 (2015) (Plaintiff Arizona Legislature had standing because a
 5 voter initiative to establish an independent redistricting commission eliminated its ability to
 6 implement a redistricting plan, thus causing a “concrete and particularized” institutional injury).
 7 In *Ariz. State Legislature*, the Court distinguished *Rainey v. Byrd*, 521 U.S. 811 (1997) (six
 8 individual members of Congress lacked standing to challenge the line-item veto), from *Coleman*
 9 *v. Miller*, 307 U.S. 433 (1939) (working majority of Kansas State Legislature had standing to
 10 challenge lieutenant-governor’s tie-breaking vote in favor of a federal constitutional amendment).

11 **B. California’s Legislature May, Consistent With the Elections Clause and**
 12 **Electors Clause, Delegate Lawmaking Authority to the Governor**

13 Relying on an unsupportable construction of the Elections Clause and Electors Clause, the
 14 RNC Plaintiffs¹ assert that “the Legislature cannot delegate to the Governor the power to amend,
 15 repeal, or suspend validly enacted election-integrity laws.” (RNC Memo at 11.) The Plaintiffs in
 16 this action, while never asserting directly that the legislature may not delegate lawmaking
 17 authority, imply as much, stating that “[e]ven if the California Legislature could grant Governor
 18 Newsom authority to prescribe legislative enactments, EO N-64-20 is ultra vires under state law.”
 19 (Issa Memo at 12.) Both sets of plaintiffs are wrong. Indeed, acceptance of these plaintiffs’
 20 position would subject virtually every state’s election processes to attack as unconstitutional, a
 21 result never intended by the Elections Clause and Electors Clause.

22 Plaintiffs’ position is squarely foreclosed by the Supreme Court’s decision in *Ariz. State*
 23 *Legislature, supra*, 135 S. Ct. 2652. There, the Court held that “legislature” as used in the
 24 Elections Clause means the “power that makes laws” consistent with a state’s constitution and
 25 encompasses the people of Arizona’s exercise of the initiative process authorized by the Arizona
 26 Constitution. *Id.* at 2671; *see also Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018)

27 ¹ The “RNC Plaintiffs” are Republican National Committee, National Republican Congressional
 28 Committee and California Republican Party - the plaintiffs in related case No. 2:20-CV-01055-
 MCE-CKD.

1 (“The Supreme Court interprets the words ‘the Legislature thereof’ as used in [the Elections
2 Clause], to mean the lawmaking processes of a State.”). Having equated the people’s lawmaking
3 through initiative with the exercise of legislative authority, the Court held that “the people may
4 delegate their legislative authority over redistricting to an independent commission just as the
5 representative body may do.” *Id.* Thus, any argument that the California Legislature may not
6 delegate its lawmaking function with respect to federal elections fails under controlling Supreme
7 Court authority. *See Corman*, 287 F. Supp. 3d at 573 (“The Elections Clause ... affirmatively
8 grants rights to state legislatures, and under Supreme Court precedent, to other entities to which a
9 state may, consistent with the Constitution, delegate lawmaking authority.”)

10 Any suggestion that a state’s governor, in particular, may not participate in the lawmaking
11 function under the Elections Clause and Electors Clause is similarly meritless. In *Ariz. State*
12 *Legislature*, the Court reiterated its holding in *Smiley v. Holm*, 285 U.S. 355 (1932), that “the
13 Elections Clause ... respect[s] the State’s choice to include the Governor in [the lawmaking]
14 process” 135 S. Ct. at 2667 (*citing Smiley*, 285 U.S. at 368); *see also Paher v. Cegavske*, No.
15 3:20-cv-00243-MMD-WGC (D. Nev. Apr. 30, 2020), 2020 WL 2089813, *8 (finding that the
16 Nevada Legislature delegated its authority under the Elections Clause to the secretary of state).

17 A state’s discretion to delegate lawmaking authority to entities and officials other than the
18 “legislature” itself is consistent with “[t]he dominant purpose of the Elections Clause,” which is
19 “to empower Congress to override state election rules, not to restrict the way States enact
20 legislation.” *Ariz. State Legislature*, 135 S. Ct. at 2672. Respecting the authority of the
21 California Legislature to delegate its lawmaking authority to others, including the governor, is
22 consistent with the Supreme Court’s admonition that “it is characteristic of our federal system
23 that States retain autonomy to establish their own governmental processes.” *Id.* at 2673; *see also*
24 *id.* at 2677 (“[T]he Clause surely was not adopted to diminish a State’s authority to determine its
25 own lawmaking processes.”).

26 In *Ariz. State Legislature*, the Supreme Court emphasized that the strict, legislature-only
27 interpretation of the Elections Clause advanced by the Arizona Legislature would cast doubt on
28 “a host of regulations governing the ‘Times, Places and Manner’ of holding federal elections.”

1 *Id.* at 2676. As that Court has stated, the “manner” of holding elections “encompasses matters
2 like ‘notices, registration, supervision of voting, protection of voters, prevention of fraud and
3 corrupt practices, counting of votes, duties of inspectors and canvassers, and making and
4 publication of election returns.” *Cook v. Gralike*, 531 U.S. 510, 523-524 (2001) (quoting *Smiley*,
5 285 U.S. at 366). Were state legislatures prohibited by the Elections Clause from delegating their
6 authority to make laws concerning these matters, a host of state regulations governing the “time,
7 place, and manner” of federal elections would be invalidated. To cite just a few examples, *see*,
8 *e.g.*, Cal. Gov. Code § 12172.5(d) (Delegating to the Secretary of State authority to “adopt
9 regulations to assure the uniform application and administration of state election laws”); Ga. Elec.
10 Code §§ 21-2-31 (delegating to State Election Board authority to “promulgate rules and
11 regulations so as to obtain uniformity in the practices and procedures of [election officials]”; to
12 “formulate, adopt, and promulgate rules and regulations ... as will be conducive to the fair, legal,
13 and orderly conduct of primaries and elections”; and to “promulgate rules and regulations to
14 define uniform and nondiscriminatory standards concerning what constitutes a vote and what will
15 be counted as a vote”), 21-2-50 (delegating to secretary of state authority to “determine the
16 forms of nomination petitions, ballots, and other [required] forms”), 21-2-50.1 (delegating to
17 governor the authority to “postpone the date of any primary, special primary, election, or special
18 election” during a state of emergency), 21-2-70 (delegating to county superintendents authority to
19 select polling places and to “make and issue such rules, regulations, and instructions ... as he or
20 she may deem necessary for the guidance of poll officers, custodians, and electors”); Fla. Stat. §§
21 97.012 (delegating to secretary of state authority to “provide uniform standards for the proper and
22 equitable administration of the registration laws”), 101.001 (delegating to county commissioners
23 authority to “alter or create precincts for voting”), 101.015 (delegating to Department of State
24 authority to “adopt rules which establish minimum standards for hardware and software for
25 [voting systems]”); N.Y. Elec. Law §§ 3-102 (delegating to state board of elections authority to
26 “promulgate rules and regulations relating to the administration of the election process”), 4-100
27 (delegating to board of elections authority to create, consolidate, divide or alter election districts);
28 Ill. Elec. Code § 1A-8 (delegating to state board of elections authority to “prescribe and require

1 the use of ... uniform forms, notices, and other supplies” and to “[a]dopt, amend, or rescind rules
2 and regulations”).

3 In short, Plaintiffs’ assertion that the California Legislature is prohibited by the Elections
4 Clause or Electors Clause from delegating to the governor, under state law, lawmaking authority
5 with respect to federal elections is meritless.

6 **C. The Balance of Harms and the Public Interest Favor Denial of the Motion for**
7 **a Preliminary Injunction**

8 The balance of harms and the public interest weighs heavily in favor of denial of
9 Plaintiffs’ motion for a preliminary injunction. The importance of ensuring that all registered
10 voters have the opportunity to safely vote during the current COVID-19 pandemic, and the need
11 to protect poll workers and voters from undue exposure to the virus and reduce its spread, far
12 outweigh Plaintiffs’ speculative, anecdotal, and unproven allegations that general distribution of
13 vote-by-mail ballots will result in widespread voter fraud.

14 **1. The Executive Order Will Enable Voters to Cast Ballots Safely and**
15 **Prevent Further Spread of COVID-19**

16 The COVID-19 pandemic is an ongoing public health emergency that has hit California
17 especially hard and has caused widespread disruptions in civic life. As of June 29, 2020, there
18 were a total of 222,917 positive cases and 5,980 deaths in California.² Elderly people and people
19 of any age who have certain underlying conditions, including high blood pressure, diabetes,
20 chronic lung disease, and severe obesity, are especially likely to have prolonged serious illness or
21 to die from the disease. Declaration of Dr. Ranit Mishori (Dkt. 33-5) (“Mishori Decl.”) ¶¶ 10-12.
22 People of color have faced especially high rates of infection, complications, and death resulting
23 from this coronavirus.³ *Id.* ¶¶ 15-22. Latinos are disproportionately likely to contract the virus—
24 in California, Latinos are 39% of the population but make up 54% of the state’s coronavirus

25 ² *COVID-19 Updates*, CAL. DEP’T PUB. HEALTH (June 29, 2020),
26 <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx>.

27 ³ *COVID-19 in Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL AND
28 PREVENTION (June 4, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (“[C]urrent data suggest a disproportionate burden of illness and death among racial and ethnic minority groups.”).

1 cases. *Id.* ¶ 21. Black Americans are similarly affected disproportionately—they represent only
2 5% of California’s population but 10% of the state’s COVID-19 deaths. *Id.* Nationwide, black
3 Americans are dying at a rate almost two-and-a-half times higher than the corresponding rate for
4 white Americans.⁴ Low-income communities have been especially hard-hit.⁵

5 Doctors and public-health experts have identified several reasons why this coronavirus has
6 caused such devastation in communities of color and low-income communities. Mishori Decl. ¶
7 15. The “social determinants of health” are conditions in a person’s life that shape every aspect
8 of their health, including their susceptibility to the severest effects of COVID-19 infection. *Id.* ¶¶
9 16-17. In communities of color and low-income communities, the social determinants of health
10 include reduced access to quality health care, higher prevalence of underlying chronic medical
11 conditions, and housing challenges. *Id.* ¶¶ 15-19. Already predisposed to medical conditions and
12 poor health, people of color and low-income people are also more likely to be employed in
13 essential jobs that expose them to COVID-19, and they are less likely to have access to testing for
14 coronavirus infection. *Id.* These factors subject people of color and low-income people to greater
15 exposure to the coronavirus, greater severity of disease, and substandard or inaccessible medical
16 care. This confluence of long-standing disparities and injustice is killing people.

17 While the world waits for a vaccine that is certainly many months or years away, public
18 health experts and government officials have stressed that physical distancing is necessary to
19 prevent the spread of the virus. Mishori Decl. ¶¶ 9, 14. Just last week, in response to a recent
20 spike in cases throughout the state, Governor Newsom ordered partial re-closures in 19 California
21 counties.⁶ To keep voters safe, states run by both Republican and Democratic election officials
22 have expanded vote-by-mail options or have conducted elections entirely by mail. Experts agree
23

24 _____
25 ⁴ *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM
RESEARCH LAB (May 27, 2020), <https://www.apmresearchlab.org/covid/deaths-by-race>.

26 ⁵ See Wyatt Koma et al., *Low-Income and Communities of Color at Higher Risk of Serious Illness*
if Infected with Coronavirus, KAISER FAMILY FOUND. (May 7, 2020),
27 <https://www.kff.org/coronavirus-covid-19/issue-brief/low-income-and-communities-of-color-at-higher-risk-of-serious-illness-if-infected-with-coronavirus/>.

28 ⁶ <https://covid19.ca.gov/roadmap-counties/>.

1 that this advance planning is necessary because “we can expect that coronavirus will continue to
2 affect, sicken and kill large numbers of Americans moving forward and into the fall.” *Id.* ¶ 32.

3 Primary elections this year in Florida, Illinois, and Wisconsin have proved that in-person
4 voting causes transmission of COVID-19.⁷ The risks of in-person voting are clear to doctors and
5 public health experts. Hundreds of voters can cycle through a polling place on Election Day,
6 exposing poll workers and other voters to their respiratory droplets in confined, poorly ventilated
7 spaces that facilitate transmission. *Id.* ¶¶ 34-39. Poll workers themselves are likely to be older—
8 studies have reported that most are over 60—and therefore more likely to have high-risk
9 conditions. *Id.* ¶ 38. Voting machines and materials exchanged among voters and poll workers
10 are potential sites of surface transmission. *Id.* ¶¶ 40-41. Any precautionary measures, such as
11 disinfection of machines and surfaces between each voter, are likely to slow the voting process,
12 which will subject voters to exposure in long lines. *Id.* ¶¶ 41-44. Even if all voters and poll
13 workers followed best practices, they would still face a risk of exposure. *Id.* ¶ 45. Asymptomatic
14 individuals could spread the disease, and those with mild symptoms could decide to vote despite
15 the risk of transmission. *Id.*

16 2. The “Harms” Alleged by Plaintiffs Are Speculative, Anecdotal, and 17 Unproven

18 Plaintiffs’ allegations echo long-debunked claims that associate mail-in ballots with voter
19 fraud.⁸ Their motions are replete with vivid anecdotal images of hundreds of mail-in ballots

20 ⁷ Kent Justice & Steve Patrick, *Duval County Poll Worker Tests Positive for Coronavirus*, NEWS
21 4 JAX (Mar. 30, 2020), <https://www.news4jax.com/news/local/2020/03/30/duval-county-poll-worker-tests-positive-for-coronavirus/>; David Smiley & Bianca Padró Ocasio, *Florida Held Its Primary Despite Coronavirus. Two Broward Poll Workers Tested Positive*, MIAMI HERALD
22 (Mar. 26, 2020), <https://www.miamiherald.com/news/politics-government/article241539451.html>; Mary Ann Ahern, *Poll Worker at Chicago Voting Site Dies of Coronavirus, Election Officials Say*, 5 CHI. (Apr. 13, 2020),
23 <https://www.nbcchicago.com/news/local/chicago-politics/poll-worker-at-chicago-voting-site-dies-of-coronavirus-election-officials-say/2255072/>; Chad D. Cotti et al., *The Relationship Between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary* (Nat’l Bureau of Econ. Research, Working Paper No. 27187, 2020), <https://www.nber.org/papers/w27187.pdf>.

24 ⁸ *See, e.g.*, Wendy R. Weiser & Harold Ekeh, *The False Narrative of Vote-by-Mail Fraud*, BRENNAN CTR. FOR JUSTICE (Apr. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>; Matt Barretto et al., *Debunking the Myth of Voter Fraud in Mail Ballots*, UCLA LPPI VOTING RIGHTS PROJECT, UNIV. N. M. CTR. FOR SOC. POLICY, UNION OF CONCERNED SCIENTISTS (Apr. 14, 2020), <https://latino.ucla.edu/wp-content/uploads/2020/04/LPPI-VRP-Voter-Fraud-res.pdf>.

1 overflowing in apartment building hallways and of voters being unduly influenced by others
2 while voting away from polling places. (Case 2:20-cv-01055-MCE-CKD, Dkt. 24-1 at 6:9-7:3;
3 Case 2:20-cv-01044-MCE-CKD, Dkt. 38-1 at 9:6-15).

4 In reality, vote-by-mail fraud is virtually nonexistent.⁹ Millions of Americans vote by
5 mail—one in four voters did so in the last two federal elections.¹⁰ Yet an exhaustive investigation
6 found only 491 instances of vote-by-mail fraud committed between 2000 and 2012, a period in
7 which billions of votes were cast.¹¹ A database maintained by the Heritage Foundation, a
8 conservative think tank, reflects the incredibly low rate of voter fraud in connection with voting
9 by mail in particular—only 16% of the small number of fraud cases were in connection with
10 voting by mail.¹² The experience of Oregon—which was the first to move to all vote-by-mail
11 elections, in 1998—is illustrative. The same Heritage Foundation database reflects only two
12 cases of absentee voter fraud in Oregon.¹³ In addition, during the 2016 presidential election, the
13 Oregon attorney general prosecuted just 10 cases of voter fraud out of over 2 million votes cast.¹⁴

14 In addition, universal vote by mail is not—or should not be—a partisan issue. There is no
15 evidence that the wider availability of vote by mail benefits one party over the other.¹⁵ This is
16 confirmed by the fact that, despite the deep partisan divide perceived in the country, a recent poll
17 found that nearly three-quarters of Americans, including large majorities of both Democrats and
18 Republicans, want mail-in ballots to be sent to all active registered voters, instead of being
19 available only upon request, for the November election.¹⁶

20 _____
⁹ Weiser & Ekeh, *supra* note 7; Barretto, *supra* note 7.

21 ¹⁰ Weiser & Ekeh, *supra* note 7; see also *EAVS Deep Dive: Early, Absentee and Mail Voting*,
22 U.S. ELECTION ASSISTANCE COMM'N (Oct. 17, 2017),
[https://www.eac.gov/documents/2017/10/17/eavs-deep-dive-early-absentee-and-mail-voting-data-
23 statutory-overview](https://www.eac.gov/documents/2017/10/17/eavs-deep-dive-early-absentee-and-mail-voting-data-statutory-overview).

24 ¹¹ Corbin Carson, *Election Fraud in America*, NEWS21 (Aug. 12, 2012),
<https://votingrights.news21.com/interactive/election-fraud-database/>.

25 ¹² Barretto, *supra* note 7 at 6-7.

26 ¹³ Barretto, *supra* note 7 at 9.

27 ¹⁴ Barretto, *supra* note 7 at 9.

28 ¹⁵ Barretto, *supra* note 7 at 7.

¹⁶ Chris Kahn, *Most Americans, Unlike Trump, Want Mail-in Ballots for November if
Coronavirus Threatens: Reuters/Ipsos Poll*, REUTERS (Apr. 7, 2020),

1 Plaintiffs’ arguments are especially misguided and dangerous because they are based on a
2 complete misrepresentation of right-to-vote jurisprudence. No court has ever ruled that the
3 expansion of the ability to vote for all voters violates the right to vote of one of these voters based
4 solely on the unsupportable speculation that the expansion of the vote could lead to increased
5 voter fraud, thereby purportedly “diluting” the complaining voter’s vote. But that is the whole of
6 Plaintiffs’ case. Under Plaintiffs’ theory, the laws of 33 states that allow “no excuse” absentee
7 voting would be unconstitutional because they lead to more absentee voting. Indeed, under
8 Plaintiffs’ theory, any increased accessibility to voting by mail would be constitutionally suspect.
9 Plaintiffs’ claims, if successful, would have the effect of endangering poll workers and voters and
10 disenfranchising California’s most vulnerable voters, including black Americans, Latinos, and
11 medically vulnerable individuals. The implications could resonate long after this election if
12 Plaintiffs prevail on their theory that voting by mail is per se unconstitutional. For some of the
13 Plaintiffs, this disenfranchisement may be precisely the point.¹⁷

14 **3. The Public Interest Clearly Favors Denial of the Motion**

15 The public interest in ensuring that all registered voters have the right to exercise their
16 right to vote and in preventing the spread of COVID-19 under the current pandemic conditions is
17 clear, for the same reasons set forth above.

18 **III. CONCLUSION**

19 Based on the foregoing, the Court should deny the Motion.
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26 <https://www.reuters.com/article/us-usa-election-poll/most-americans-unlike-trump-want-mail-in-ballots-for-november-if-coronavirus-threatens-reuters-ipsos-poll-idUSKBN21P3G0>.

27 ¹⁷ Plaintiff Darrell Issa alleges that he “has already had to reevaluate his electoral strategy in order
28 to campaign in the 50th Congressional District as a result of EO N-64-20.” Issa Compl. ¶ 53.

1 Dated: July 7, 2020

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Other Documents[2:20-cv-01044-MCE-CKD Issa et al v. Newsom et al](#)

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The following transaction was entered by Libby, John on 7/7/2020 at 4:33 PM PDT and filed on 7/7/2020

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Filer: California Common Cause
Community Coalition
League of Women Voters of California

Document Number: [62](#)

Docket Text:

BRIEF -- Amicus Brief in Support of Defendants' and Intervenor-Defendants' Opposition to Plaintiffs' [38] Motion for Preliminary Injunction filed by California Common Cause, Community Coalition, League of Women Voters of California. (Libby, John)

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