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SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF LAKEWOOD,

Respondent,

v.

ROBERT W. WILLIS,

Petitioner.

FILED
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WASHINGTON STATE
SUPREME COURT

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND WASHINGTON DEFENDER ASSOCIATION

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ORIGINAL

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 50,000 members and supporters, dedicated to the preservation of civil liberties. The ACLU strongly opposes laws and government action that infringe on the free exchange of ideas or that unconstitutionally restrict protected expression. It has advocated for free speech and the First Amendment directly, and as *amicus curiae*, at all levels of the state and federal court systems.

Washington Defender Association ("WDA") is a statewide organization comprised of over 1300 members dedicated to advancing and protecting the rights of indigent defendants. WDA also vigorously opposes government-imposed restrictions on expressions protected by the First Amendment, particularly when such restrictions result in the criminalization of economically marginalized persons. WDA has been granted leave to file *amicus* briefs in this Court on many prior occasions.

II. ISSUE ADDRESSED BY AMICI

Whether the City of Lakewood's anti-begging ordinance violates the First Amendment to the United States Constitution, and article 1, section 5 of the Washington State Constitution, rendering Petitioner (and Defendant below) Willis's conviction under the ordinance invalid.

III. STATEMENT OF THE CASE[1]

The Lakewood ordinance at issue prohibits "begging" at "on and off ramps leading up to and from state intersections from any City roadway or overpass." LMC 9A.4.020A (the "Ordinance"). The Ordinance also prohibits begging in other so-called "restrictive" areas, including: at intersections or islands on principal arterials; within 25 feet of an ATM or bank; within 15 feet of an occupied handicapped parking space, cab stand, bus stop, train station, or in any public parking lot or structure or walkway. *Id.* In addition, the Ordinance prohibits begging before sunrise or after sunset at any public transportation facility or on any public transportation vehicle, or while the person is under the influence of alcohol or controlled substances. *Id.*

Separately, another Lakewood ordinance, not at issue here, regulates "solicitation," defined as "any oral or written request for a contribution" and prohibits solicitation, in among other circumstances: (1) "in public streets or alleys which are open to vehicular traffic" or to solicit any person who is on such streets or alleys; (2) "within ten feet of any marked pedestrian crosswalk, within ten feet of any entrance or exit of any building then in use by the general public, or from the area of any

[1] The facts are based on the parties' briefs.

sidewalk within ten feet of its intersection with an alley or publicly used driveway"; (3) "within any office, theater, store, factory, or other premises where business is conducted or services are rendered" without approval of the person(s) in charge of the premises; and (4) "on public property or in the residential area of the city between the hours of nine p.m. and seven a.m." LMC 09A.5.050.

In August, 2011, a Lakewood police officer responding to a 911 call found Willis "standing on the shoulder of the northbound I-5 ramp, facing south toward oncoming traffic." (Op. pp. 1-2.) The off-ramp in question is located within the city limits of Lakewood. (Pet's Supp. Brief, Ex. 2) Willis had a cardboard sign indicating that he was disabled and needed help. *Id.* The investigating officers determined that Willis had been previously warned to cease begging in this particular location. *Id.*

Willis was charged with begging in a restricted area in violation of the Ordinance, and found guilty following a jury trial in municipal court. The jury's instructions contained the entire list of "restrictive" areas in the Ordinance. (*See* Pet's Supp. Brief, Ex. 3.) Willis appealed to the Pierce County Superior Court and thereafter to the Court of Appeals (Division II). The Court of Appeals found that a freeway on-ramp was a nonpublic forum, and therefore the restriction need only be reasonable and viewpoint neutral. Finding this low level of scrutiny satisfied here, the Court of

Appeals rejected Willis's constitutional free speech challenges. It also rejected his equal protection challenge, although one judge disagreed with the majority's analysis as to that issue. This Court granted discretionary review.

III. ARGUMENT

A. Summary of Argument

Amici submit this brief to provide an overview of the important constitutional issues at stake when, as here, the government makes protected speech a crime. The brief explains that, as numerous courts have recently confirmed, begging is constitutionally protected free speech, and restrictions on begging are content-based and thus must satisfy heightened scrutiny. Any overbroad criminalization of speech, like Lakewood's anti-begging ordinance, cannot survive such scrutiny, and the Court of Appeals' failure to properly analyze the type of forum at issue here further exacerbated the violation of the federal and state constitutions.

B. Begging is Protected Free Speech Under the Federal and State Constitutions

As numerous courts have noted, begging and other forms of solicitation for money are expressive activity entitled to the full protections of the First Amendment, whether it is undertaken by a charitable organization (*see Village of Schaumburg v. Citizens for a Better*

Environment, 444 U.S. 620, 632, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980); *see also Williams-Yulee v. Florida Bar*, __ U.S. __, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015) ("[w]e have applied exacting scrutiny to laws restricting the solicitation of contributions to charity")), or by individuals on their own behalf. In the case of the latter, referred to as either begging or panhandling, courts have long recognized that those who panhandle "may communicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability, to name a few." *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000). As one court recently noted, "a sign reading 'Sober,' or 'Two children,' conveys a message about who is deserving of charitable support, just as a sign reading 'God bless,' expresses a religious message. *McLaughlin v. City of Lowell*, 2015 U.S. Dist. LEXIS 144336, *9 (D. Mass. Oct. 23, 2015) (collecting cases). As the *McLaughlin* Court noted at **8-9, courts throughout the country and for many years have recognized that the starting point for constitutional analysis of a begging ordinance is the fact that panhandling is protected free speech:

> Panhandling is an expressive act regardless of what words, if any, a panhandler speaks. Even "the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance." *Loper v. New York City Police Dep't*, 999 F.2d 699,

> 704 (2d Cir.1993). Courts have consistently recognized the protected, expressive nature of panhandling. *See, e.g., Speet v. Schuette*, 726 F.3d 867, 875 (6th Cir. 2013) ("begging is a form of solicitation that the First Amendment protects"); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013) ("the speech and expressive conduct that comprise begging merit First Amendment protection"); *Smith v. City of Fort Lauderdale, Fla.*, 177 F.3d 954, 956 (11th Cir. 1999). Panhandling is not merely a minor, instrumental act of expression. In the words of the Massachusetts Supreme Judicial Court, at stake is "the right to engage fellow human beings with the hope of receiving aid and compassion." *Benefit v. City of Cambridge*, 424 Mass. 918, 679 N.E.2d 184, 190 (1997).

While it is clear that begging is constitutionally protected under the First Amendment, the free speech clause of the Washington Constitution protects such speech even more vigorously. For example, in a case involving free speech along the side of public streets, *Collier v. City of Tacoma*, 121 Wn.2d 737, 747-48, 854 P.2d 1046 (1993), this Court held that the City of Tacoma's duration limits on election signs in parking strips were inconsistent with article 1, section 5 of the Washington State Constitution. *Id.* In so doing, the Court explicitly noted that it diverged from the United States Supreme Court in applying the time, place, and manner test, and held that article 1, section 5 required the State to show a "compelling state interest" in this context. *Id.*

Courts interpreting article I, section 5 of the Washington State Constitution have specifically held that begging is a constitutionally protected activity. *City of Seattle v. McConahy*, 86 Wn. App. 557, 568,

937 P.2d 1133, 1140 (1997) ("begging is protected speech"); *City of Spokane v. Marr*, 129 Wn. App. 890, 894, 120 P.3d 652, 654 (2005) ("right to beg . . . is constitutionally protected"). Thus, in enacting anti-begging legislation, the City faces a high standard under the Washington State Constitution.

C. Recent U.S. Supreme Court Case Law Underscores that The Ordinance Effects an Unconstitutional Content-Based Restriction

Although courts historically have been divided about whether anti-begging ordinances were content-based restrictions on speech, following the 2015 Supreme Court ruling in *Reed v. Town of Gilbert, Ariz*, __ U.S. __, 135 S. Ct. 2218, 2230, 192 L. Ed. 2d 236 (2015), courts have consistently held that laws regulating panhandling are, in fact, content-based. *See, e.g.*, *McLaughlin*, *supra* at *11:

> The Downtown provisions are plainly content-based under current Supreme Court guidance. ... The City's definition of panhandling targets a particular form of expressive speech—the solicitation of immediate charitable donations—and applies its regulatory scheme only to that subject matter.

See also Thayer v. City of Worcester, Case No. 13-40057-TSH, 2015 U.S. Dist. LEXIS 151699, at *36 n.2 (D. Mass. Nov. 9, 2015) ("Simply put, *Reed* mandates a finding that Ordinance 9-16 is content based because it targets anyone seeking to engage in a specific type of speech, *i.e.*, solicitation of donations"); *Browne v. City of Grand Junction*, Case No.

14-cv-00809-CMA-KLM, 2015 U.S. Dist. LEXIS 132835, *28 (D. Colo. Sept. 30, 2015) (noting that *Reed* confirms the court's earlier conclusion that a panhandling ordinance was a content-based restriction); *Norton v. City of Springfield*, 806 F.3d 411, 612 (7th Cir. 2015) ("The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation.").

The Supreme Court in *Reed* explained why it is constitutionally significant that anti-begging ordinances are content based: "a government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed*, 135 S. Ct. at 2226 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). *Reed* further noted that a content-based restriction is presumptively unconstitutional and subject to strict scrutiny, that a facially content-based law must pass strict scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the idea contained' in the regulated speech," and that "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed*, 135 S. Ct. at 2226-28.

In its brief, the City glosses over the effect of *Reed*, implying that *Reed* did not materially affect the content-neutrality analysis. *See* Resp.

Supp. Brief at p. 16 ("[t]he post-*Reed* cases reach the same result"). The City cites two cases in support of its proposition: *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015) and *Thayer, supra.* Both are inapposite. Although *Cutting* held that an ordinance aimed at panhandling was content-neutral, it did so because the ordinance did not on its face cover only panhandling; it prohibited *all* use of median strips for *any* purpose, except by pedestrians. *See Cutting*, 802 F.3d at 82. The other case, *Thayer*, engaged in an extensive discussion of *Reed*, analyzed ordinances which, like Lakewood's, prohibited solicitation in certain places, and ultimately concluded that *Reed* required a finding that the ordinance was content-based "because it targets anyone seeking to engage in a specific type of speech, i.e., solicitation of donations." *Thayer*, 2015 U.S. Dist LEXIS 151699, at *36 n.2. Thus, the City's contention that "[t]he Code is content-neutral" (Resp. Supp. Brief, pp. 13-14) is contrary to the weight of authority.

The City's argument does highlight a content-neutral way to address panhandling if it poses a safety risk in certain parts of on- or off-ramps: regulate the traffic-obstructing conduct of individuals for any purpose in those areas where safety concerns are present. *Cf. Browne*, at * 39 (noting, with respect to asserted concerns over aggressive panhandling that "the correct solution is not to outlaw panhandling . . . the focus must

be on the threatening behavior"). And here, the City's municipal code already prohibits pedestrian interference with traffic regardless of location. *See* LMC 10.16.050 - Pedestrian Obstruction of Traffic ("[i]t shall be unlawful for any pedestrian to walk or be on a public roadway in a manner which unnecessarily or unreasonably interferes with, delays, obstructs or halts the travel of vehicles over and/or across the public roadway"). The obstruction of traffic law does not single out constitutionally protected speech or make such speech a crime. Instead, it is aimed at *behavior* instead of speech, as this Court found was constitutionally acceptable in *City of Seattle v. Webster*, 115 Wn.2d 635, 802 P.2d 1333 (1990). The obstruction of traffic law does not criminalize begging while allowing other messages; the record here reflects that the intersection in question permitted "[p]olitical signs, signs for employment, signs for church, real estate sales, advertising for community and charitable functions." (Pet's Supp. Brief, Ex. 5.) The City's asserted interest in public safety is best served simply by enforcing a constitutionally valid provision of its existing code rather than doing that which the First Amendment clearly prohibits: targeting disfavored speech.[2]

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[2] Of course, broad location-based bans can also run afoul of the First Amendment, particularly when they are used to target the poor. Amici do not suggest that the City use a location-based restriction to target

D. The Ordinance is Unconstitutional Because it is Facially Overbroad

The overbreadth doctrine is aimed at preventing government proscriptions that have a chilling effect on constitutionally protected speech.[3] *State v. Immelt*, 173 Wn.2d 1, 8, 267 P.3d 305, 308 (2011) (citing *Virginia v. Hicks*, 539 U.S. 113, 115-16, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003)). *See also State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). It reflects courts' judgment that the First Amendment's interest in preventing a chilling effect outweighs "the possible harm to society in permitting some unprotected speech to go unpunished." *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). An overbreadth challenge allows "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Immelt*, 173 Wn.2d at 7 (internal citations and quotations omitted). A law "that is substantially overbroad may be invalidated on its face." *City of Houston v. Hill*, 482 U.S. 451, 458, 107 S.

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panhandling, but rather that it focus on the danger sought to be averted—in the case of subsection (1) of the Ordinance, actions compromising highway safety.

[3] There are several reasons the Court should reach the overbreadth argument. First, Willis clearly challenged the Ordinance in its entirety. Second, the jury was instructed on the entire Ordinance rather than on a constitutionally valid subset of it.

Ct. 2502, 96 L. Ed. 2d 398 (1987).

A statute targeting speech is overbroad if it "sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct." *Immelt*, 173 Wn.2d at 6 (citing *City of Tacoma v. Luvene*, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992)). When determining whether a statute is overbroad, courts give criminal statutes "particular scrutiny," and will invalidate these statutes if they criminalize substantial amounts of protected speech even though the law may address a legitimate state interest. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). A statute that criminalizes a form of pure speech, as does the Ordinance, "must be interpreted with the commands of the First Amendment clearly in mind." *State v. Strong*, 167 Wn. App. 206, 216, 272 P.3d 281, 287 (2012). To defeat an overbreadth challenge, the government (in this case the City) must show that a compelling interest exists and that the law is narrowly tailored to avoid criminalizing substantial amounts of protected speech. *Id.* Absent such a showing, the law will not withstand scrutiny under the First Amendment and article I, section 5 of the Washington State Constitution. *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989); *Immelt*, 173 Wn.2d at 15.

In addition to freeway on- and off-ramps, the Ordinance treats a number of other locations as "restrictive," including in relevant part:

(1) intersections or islands on principal arterials; (2) within 25 feet of any ATM or bank; and (3) within 15 feet of any occupied handicapped parking space, cab stand, bus stop, train station or public parking lot. In the wake of *Reed*, courts evaluating similar location-based restrictions on panhandling have found them in violation of the First Amendment.

For example, in *McLaughlin*, *supra*, the federal district court struck down as insufficiently narrowly tailored an ordinance with some similarities to the Lakewood Ordinance here; the ordinance in *McLaughlin* prohibited "aggressive" panhandling from someone who is waiting in line; panhandling within a 20-foot buffer zone around a bank, ATM, check-cashing business, mass transportation facility, public restroom, pay telephone, theater or outdoor seating area, or around the parking lot of any of these facilities. *McLaughlin* at 2015 U.S. Dist. LEXIS 144336, at *43 (citing Lowell Code sec. 220-15).

Likewise, in *Browne, supra,* the federal district court struck down a similar ordinance of the City of Grand Junction that contained both location- and conduct-based restrictions. The location-based restrictions prohibited panhandling within 100 feet of an ATM or a bus-stop, on a public bus, in a parking garage, parking lot or other parking facility, or where the person solicited was in the patio or sidewalk area of a restaurant or cafe or waiting in line to enter an event, retail business or theater. As in

McLaughlin, the court in *Browne* found that the City of Grand Junction's asserted interest of public safety was insufficient to justify the location-specific bans. *Browne*, *37-38 ("Grand Junction has not shown—and the Court does not believe—that a request for money, simply because it occurs within 20 feet of a bus stop, threatens public safety"); *Browne*, *38-39 ("a solicitation for money . . . [is not] a threat to public safety simply because it takes place in a public parking garage, parking lot, or other parking facility"). The court did acknowledge that threatening behavior might accompany panhandling, but noted that the correct solution is not to outlaw panhandling, and further noted that to comply with the First Amendment, "[t]he focus must be on the threatening behavior." *Browne*, *39-40.

The Ordinance here is similarly overbroad and would criminalize requests for funds or support from members of the fire department, the Salvation Army, the Girl or Boy Scouts, or even representatives of local businesses to the extent such requests are made within 25 feet of an ATM or bank, 15 feet of any handicapped parking space, cab stand, bus stop, train station or parking lot. The Ordinance prohibits such speech even if it takes a purely passive form that does not in any way interfere with or impede the listener. It is difficult to see how such a sweeping restriction could pass scrutiny under the First Amendment or article 1, section 5 of

Washington's constitution.

E. A Constitutionally Appropriate Forum Analysis Should be Applied in this Case

Even if the Court disagrees that the Ordinance is inappropriately content-based and facially overbroad, it should conduct a full inquiry into the nature of the forum in which Mr. Willis panhandled. As this Court has noted, "an analysis of the 'character of the property at issue' is necessary to determine the constitutional validity of a regulation that attempts to limit expressive activity." *Sanders v. City of Seattle*, 160 Wn. 2d 198, 208, 156 P.3d 874, 879 (2007) (internal citations omitted). Content-based speech restrictions in a public forum must satisfy heightened judicial scrutiny. *See Reed, supra*; *Collier, supra*, 121 at 747-48 (requiring compelling state interest). On the other hand, speech restrictions in a nonpublic forum need only be reasonable and viewpoint neutral. *Herbert v. Wash. State Pub. Disclosure Comm'n*, 136 Wn. App. 249, 263, 148 P. 3d 1102 (2006).

The Court of Appeals, while expressing caution as to some aspects of the record (*see* fn. 1), held that Mr. Willis's speech took place in a nonpublic forum. (Op. at p. 5.) It noted that Mr. Willis "was convicted of begging on a freeway on ramp," that there was nothing in the record as to the City's intent to open freeways to public discourse, and that freeways

have not been historically open to public discourse. *Id.* This Court should take a closer look at the forum in question: when a "sufficiency of the evidence inquiry implicates core First Amendment protection," an appellate court must be exceedingly cautious in determining whether a violation of the precious right to free speech has occurred; "It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings. The First Amendment demands more." *State v. Kilburn*, 151 Wn.2d 36, 48-49, 52, 84 P.3d 1215, 1224 (2004) (applying "the rule of independent review because the sufficiency of the evidence question raised involves the essential First Amendment question"). In the First Amendment context, "the burden shifts to the State to justify a restriction on speech." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 183, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999).

Although some on- and off-ramps may be nonpublic forums, the particular off-ramp in question has a sidewalk, crosswalk and traffic signal. (Pet. for Discret. Review, p. 7.) Sidewalks, of course, are "the hallmarks of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) ("time out of mind public streets and sidewalks have been used for public assembly and debate"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103

S. Ct. 948, 74 L. Ed. 2d 794 (1983) ("[a]t one end of the spectrum are streets and parks . . . . quintessential public forums"). Similarly, courts have held that median strips and islands can also be public forums. *See Warren v. Fairfax Cnty.*, 196 F.3d 186, 196-7 (4th Cir. 1999) (*en banc*); *Collier*, 121 Wn.2d at 747-48 (1993) ("parking strips . . . are part of the 'traditional public forum'").

Here, the Ordinance does not offer any precise definition for on- and off-ramps, beyond that they are "areas commonly used to enter and exit public highways from any City roadway or overpass." LMC 09A.4.020(J). But on- and off-ramps often transition into city streets with sidewalks that are traditionally used by pedestrians and individuals exercising their First Amendment rights, including those holding signs. *Cf. Cutting, supra,* 802 F.3d at 88 ("The ordinance restricts speech in all median strips in the entire City of Portland. And the actual 'strips' range widely in terms of their size and character."). It is common to see signs on or near freeway ramps informing drivers of places to buy food, gas and lodging, as well as "human billboards" advertising local businesses. It is also common, during election season, to see political campaign signs posted or held at such intersections. Indeed, the police report written by the officer who issued the citation in this case refers to a "sidewalk" behind Mr. Willis. (Pet's Supp. Brief, Ex. 2, p.3.) The Court of Appeals

intimated that Mr. Willis's expression occurred on the freeway itself ("there was nothing in the record as to the City's intent to open freeways to public discourse"), when in fact the begging did not occur on the freeway, and the freeway in this instance is quite distinct from the off-ramp at issue—which terminates at a normal arterial intersection with sidewalks, crosswalks and traffic signals.

Because "an analysis of the 'character of the property at issue' is necessary to determine the constitutional validity of a regulation that attempts to limit expressive activity" (*see Sanders, supra*), the Court of Appeals erred by not making a more careful examination of the forum question.

IV. CONCLUSION

The Ordinance is not content neutral and is overbroad in its scope, and is similar to those that several courts have found in violation of constitutional standards. For the reasons set forth above, the Amici respectfully submit that the Court should reverse Mr. Willis's conviction.

Respectfully submitted, this 30th day of December, 2015.

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DECLARATION OF SERVICE
SUPREME COURT FOR THE STATE OF WASHINGTON
No. NO. 91827-9
City of Lakewood v. Robert W. Willis

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below, I caused to be served a copy of the **Brief of Amici Curiae** via email to the Clerk of the Court. I also caused the same to be served to all parties of record via email (by consent):

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Signed this 30th day of December 2015, at Seattle, King County, Washington.

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