No. _____

In The
Supreme Court of the United States

STEVEN SUSSEX AND VIRGINIA SUSSEX,
Petitioners,

V.

CITY OF TEMPE,
Respondent.

On Petition for a Writ of Certiorari
to the Arizona Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a quiet title proceeding, can the trial court apply state law to bar a defense that the plaintiff's title is "null and void" under the federal Arizona-New Mexico Enabling Act?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in Maricopa County Superior Court:

1. Plaintiff/Respondent City of Tempe

2. Defendants/Petitioners Steve and Virginia Sussex

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PETITION FOR WRIT OF CERTIORARI

Steven Sussex and Virginia Sussex ("Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the Arizona Court of Appeals.

OPINIONS BELOW

The opinion of the Arizona Court of Appeals is *City of Tempe v. Sussex*, (June 13, 2019) and included in the Appendix at Attachment "A". The order of the Arizona Supreme Court denying review is included in the Appendix at Attachment "B" (January 8, 2019).

STATEMENT OF JURISDICTION

The opinion and judgment of the Arizona Court of Appeals in this matter is dated June 13, 2019. The Arizona Supreme Court denied a petition for review on January 8, 2019. Jurisdiction of this Court is invoked under 28 U.S.C.A.§ 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 28 of the federal Enabling Act for the State of Arizona, which reads in relevant part:

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided…

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered…

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void, any provisions of the constitution or laws of the said state to the contrary notwithstanding.

STATEMENT OF THE CASE

On May 24, 2016, Plaintiff City of Tempe ("City") filed a claim for ejectment against the Defendants. Defendants' family has occupied the property in question and the home on it for over one hundred years. Since statehood, the real property in question has been designed as "school trust" land (as a result of which the Defendants have been unable to acquire it through adverse possession, or homesteading laws). In response to the City's lawsuit for ejectment, Defendants argued that the City did not have valid title to the Property, because the State deeded it away (first to the Union Pacific Railroad on December 18, 2002, which deeded it to the City days later) without conducting a public auction as required by the Enabling Act and Arizona Constitution. As the strict result of the Enabling Act and Constitution, the City's title was therefore void. Appellant argued that the lower court could not award ejectment without finding that the City had valid title. *See* A.R.S. § 12-1252(A); *see also Genardini v. Kline*, 19 Ariz. 558, 562, 173 P. 882, 884 (1918) ("Without any question, such is the nature of this action, the statutory action in the nature of an action in ejectment. Such being the clear nature of the action, the plaintiff's right to recover depends

upon the strength of his own title (paragraph 1629, C. C. A. 1913), and not upon the weakness of the title of his adversary.") The City moved for summary judgment on its claim for ejectment, and Appellants cross-moved for summary judgment in their favor on the City's claims.[1] In ruling on the motions, the lower court at first overlooked the issue of whether the City had valid title, and awarded the City summary judgment based upon a finding that Defendants' defense was somehow barred by the statute of limitations for filing "actions" against a municipality, A.R.S. § 12-821 (which the lower court mistakenly cited as "A.R.S. § 12-851"). Defendants filed a Motion for Reconsideration in which they pointed out that their *defense* could not be barred by a statute of limitations (for filing an "action" against the municipality), and further that issues of void title can be raised at any time. After ordering a response to the Motion for Reconsideration, the Court then ruled alternatively that the City was not required to prove up its title in order to eject the Defendants, and/or that merely presenting the Court with a quitclaim deed was sufficient. At no point did the Court actually review or rule on the Defendants' critical defense—which they have been "shouting out" since the beginning of this case—which is that the Enabling Act and Arizona Constitution render the City's title void (and the Defendants, by virtue of occupying the property for over a century, have the better claim to title). Because 1)

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[1] Defendants also sought summary judgment on their alternative claims for reimbursement for the value of their home and improvements, under theories of inverse eminent domain and/or conversion.

the plaintiff in an ejectment action must prove up his own title ("recover on the strength of his own title") as an element of the claim, and 2) the City lacks title to the property as a matter of law pursuant to the Enabling Act and Arizona Constitution, the lower court erred by granting the City summary judgment on its claims and entering a judgment for ejectment against Defendants.

The Court of Appeals affirmed the lower Court's decision, finding that the Defendants' defense was barred by the statute of limitations for filing "actions" against a municipality, A.R.S. § 12-821,[2] because the Defendants did not file a lawsuit of their own asking the Court to declare the transfer from the State invalid, within one year of learning about the transfer. In other words, the lower courts ruled that the Defendants should have raised their defense to an element of the City's claim before the City's claim was ever filed, and applied a statute of limitations for filing "actions" *against* a public entity in order to bar the *defense* to an action *by* one. Further, it decided that any defense based on the fact that the City's title was void under the federal Enabling Act was barred by the Arizona statute of limitations.

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2 The trial court mistakenly cited it as A.R.S. § 12-851.

REASONS FOR GRANTING THE PETITION

The injustice to the Sussex family is of national magnitude. Further, by deciding that the Sussexes' defense under the federal Enabling Act was barred by a statute of limitations, the Arizona Court of Appeals applied state law to override the express provisions of the Arizona-New Mexico Enabling Act, and therefore decided an important federal question in a way that conflicts with relevant decisions of this Court.

I. Factual background

Five generations of Defendants' family have lived in and occupied the home at 302 W. First Street for over one hundred years, since at least 1892 (hereinafter referred to as the "Home" or "Property"). They settled on the land before the State of Arizona even existed.

In 1910, Congress passed the New Mexico-Arizona Enabling Act, which paved the way for the establishment of the States of Arizona and New Mexico. *See generally, Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 462 (1967); A.R.S., Enab. Act, Sec. 28. In lieu of giving the new states money to fund themselves, Congress instead gave them land, which was earmarked for various pur-

poses such as supporting the public schools.[3] In selecting the land, Congress used the federal survey, a "rigid checkerboard pattern"[4] that was placed over the State map. Congress provided in the Enabling Act that every "Section 16" on the federal survey (i.e., every sixteenth "checker" on the "checkerboard")[5] would be State land dedicated to "the support of the common [public] schools" (a.k.a. "school trust land")—regardless of whether some-

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[3] From *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 460 (1967): "The Federal Government since the Northwest Ordinance of 1787 has made such grants to States newly admitted to the Union." "Between 1803 and 1962, the United States granted a total of some 330,000,000 acres to the States for all purposes. Of these, some 78,000,000 acres were given in support of common schools." In Arizona, "some 10,790,000 acres" were granted by the United States to Arizona "in trust for the use and benefit of designated public activities within the State." "[S]ome 9,180,000 acres were earmarked for various educational purposes, of which some 8,000,000 acres were given for the support of common schools."

[4] *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. at 463. Arizona and New Mexico were granted four times as much land as other states, "because the unappropriated lands in Arizona and New Mexico were largely of so little value."

[5] *See* A.R.S., Enab. Act, Sec. 24: "…sections sixteen and thirty-six [in addition to sections] two and thirty-two …are hereby granted to the said state for the support of common schools…"

body had already been living there and had built a home, or had otherwise cultivated or improved the land.[6] The Sussex family's home happened to fall on a "Section 16" on the federal survey; and so when the State was founded in 1912, the Sussexes effectively became trespassers in their own home, overnight.[7]

The Sussexes were not alone. In fact, the problem of "good citizens" who had already settled on what suddenly became State land was so common when the State was founded, that it was debated at the Arizona Constitutional Convention, and it resulted in the only letter that the Convention ever sent to

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6 "It was not supposed that Arizona would retain all the lands given it for actual use by the beneficiaries; the lands were obviously too extensive and too often inappropriate for the selected purposes. Congress could scarcely have expected, for example, that many of the 8,000,000 acres of its grant 'for the support of the common schools,' all chosen without regard to topography or school needs, would be employed as building sites. It intended instead that Arizona would use the general powers of sale and lease given it by the Act to accumulate funds with which it could support its schools…"

7 The federal government actually held on to (reserved) the Sussexes' particular section until the 1960's (for purposes of the Salt River Project), before formally transferring it over to the State of Arizona—a nuance that has little to no bearing on the instant case.

Congress (called "Memorial No. 1").[8] In that letter—which the Convention voted overwhelmingly to send (41 to 7)—it asked Congress for more leeway to compensate the occupants of state lands for their improvements. Congress never responded.

Further, Congress was *extremely* restrictive in the Enabling Act about how the State could or could not dispose of public land.[9] This was mainly due to an

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8 Discussing the letter, Convention delegate W.T. Webb said: "[It] will protect the interest of the poor. Many good citizens have taken up school lands and have cultivated, improved and built homes thereon and are good honest industrious people, and they should be protected in these homes and in this land…" Convention Delegate A.C. Baker (and later, second Chief Justice of the Arizona Supreme Court) also remarked that "[f]or the benefit of many people, who are the best class of citizens and who have established themselves upon this land and spent much labor and means to cultivate and improve it, they should have protection…There are provisions for these school lands, but they are not acceptable to all and do not [protect] the people who have spent their time, means and best efforts upon them. It is but right that they should have this protection." *The Records of the Arizona Constitutional Convention of 1910* at 716-717 (John S. Goff, ed., 1991).

9 *See also Gladden Farms, Inc. v. State*, 129 Ariz. 516, 518, 633 P.2d 325, 327 (1981): "The practice of granting newly admitted states title to federal lands in trust for certain designated public purposes has been in existence since the Northwest Ordinance of 1787. The new states have not always treated the

earlier experience with land grants to New Mexico, where New Mexican state officials had allegedly sold the land privately and at "unreasonably low prices" for "private advantage."[10] In order to prevent

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trust lands in the manner in which Congress intended, and certain abuses and fraud have occurred. Because of past abuses, Arizona and New Mexico, as the last of the 48 contiguous states to enter the Union, were provided with an Enabling Act somewhat stricter than those under which previous states had entered the Union."

10 From *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 463–64 (1967): "The central problem which confronted the [Arizona-New Mexico Enabling] Act's draftsmen was…to devise constraints which would assure that the trust received in full fair compensation for trust lands.…This is confirmed by the legislative history of the Enabling Act. All the restrictions on the use and disposition of the trust lands, including those on the powers of sale and lease, were first inserted by the Senate Committee on the Territories. Senator Beveridge, the committee's chairman, made clear on the floor of the Senate that the committee's determination to require the restrictions sprang from its fear that the trust would be exploited for private advantage. He emphasized that the committee was influenced chiefly by the repeated violations of a similar grant made to New Mexico in 1898. The violations had there allegedly consisted of private sales at unreasonably low prices, and the committee evidently hoped to prevent such depredations here by requiring public notice and sale. The restrictions were thus intended to guarantee, by preventing particular abuses through the

this, Congress included very strict provisions in the Arizona Enabling Act—which supersedes even the Arizona Constitution—which plainly prohibit the State from transferring away public land except via a public auction, and with proper notice. "The Enabling Act is itself quite clear: 'Said lands shall not be sold, except to the highest and best bidder at the public auction.' The only exception to the plain clear language of this Act is in the granting of an easement or right of way and then only because no fee interest is involved, and because there is nothing in the Enabling Act limiting the power of the legislature to grant right of way easements for public highways." *Gladden Farms, Inc. v. State*, 129 Ariz. 516, 521, 633 P.2d 325, 330 (1981)(internal quotation marks omitted).

The full provision requiring auctions for "school trust" land is contained in Section 28 of the New Mexico-Arizona Enabling Act (quoted above). Article 10 of the Arizona Constitution, entitled "State and School Lands," also incorporates those provisions of the Enabling Act verbatim. *Gladden Farms, Inc. v. State*, 129 Ariz. at 518, 633 P.2d at 327.

II. History of the Sussexes

Defendant Steven Sussex's great-grandfather, Jesus Martinez, purchased the home at issue from another settler named Ramon Gonzales in 1892. The house itself was built in 1882, making it one of the three oldest homes left standing in the Valley of the Sun. At that time, it was common for settlers to buy and

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prohibition of specific practices, that the trust received appropriate compensation for trust lands."

sell land amongst themselves without recording a deed, and so no deed was ever recorded.

Jesus Martinez's daughter, Belen Martinez, married a settler named Alfred Sussex, who was Steve Sussex's grandfather. The Sussexes' address at the home was listed in the City Directory in 1892; and the marriage (and honeymoon) of Belen and Alfred were announced publicly in the predecessor to The Arizona Republic, The Arizona Republican, in articles dated July 18, 1913 and July 26, 1913.

On April 10, 1959, the State of Arizona sent "Ms. A[lfred] E. Sussex," i.e. Belen Sussex, a check for $1,510.00 as compensation because a contractor for the State had accidentally demolished some of the Sussexes' improvements on the property.

When Belen died in 1967, she transferred her rights in the property to Defendant Steven Sussex. From 1972 to 1986, Steven Sussex openly operated a painting business out of the Home. Various members of the Sussex family have lived in the Home, or otherwise continuously occupied the property with Mr. Sussex's permission, ever since 1967. The Sussexes have maintained a gate around the property for decades, lock the Home to prevent burglary, and they have reported trespassers on the property (vagrants, etc.) to the police. Since at least the 1980's, Mr. Sussex has continuously and openly stored items and vehicles on the Property, and completed work on the Property. The Home is one of the three oldest homes in the entire Valley of the Sun.

III. Tempe's Purported Acquisition of Title

In 2002, the State of Arizona, the Union Pacific Railroad Company ("UPRC") and the City negotiated a sale of the Home and adjoining parcels along the railroad from the State to the UPRC on December 18, 2002, and then another sale from the UPRC to the City days later, on December 24, 2002. The land was *not* auctioned off, as required by the Arizona Constitution and the Enabling Act. This is of course critical to the Sussex family, because if the land had been put up for auction, then the Sussexes (or sympathetic parties) could have bid on the home. Instead, the land was privately sold to the City, which has, ever since then, claimed that it has absolute sovereign immunity from the Sussexes' claims.

The State and UPRC were clearly aware that the sale was in violation of the Enabling Act, as discussed below. In a transparent effort to try to avoid the Enabling Act, the State and UPRC structured their deal as a "settlement" of a lawsuit by the UPRC against the State, in which the UPRC claimed title to the Property. The UPRC paid the State one million, fifty thousand dollars ($1,050,000.00) to "settle" its own suit for title, in return for which the State quitclaimed various property, including the Property at issue, to the UPRC. Days later, the UPRC then quitclaimed that property (including the Property at issue) to the City, for which the City agreed to pay it $550,000.

The six-paragraph "Settlement Agreement" between the State and the UPRC states the $1,050,000.00 purchase price, and it contains a description of the UPRC's questionable claim to title, which was

allegedly based on a (wild) deed from a third party (Charles Appleton Hoover) dated 1887, and a purported right-of-way granted by the United States in 1875. Tellingly, the sixth and final paragraph of the "Settlement Agreement" read as follows:

> 6. Notwithstanding any other recital or provision of this Settlement Agreement to the contrary, the Parties agree that this Settlement Agreement will, at the option of either Party, be null and void *ab initio* with the Parties having no liability to one another under this Settlement Agreement if any Arizona State Court of Federal District Court, including, without limitation, any appellate court, shall have declared all or any portion of this Settlement Agreement or the Quit Claim Deed **unconstitutional or otherwise unlawful pursuant to [the] Enabling Act**, or shall have restrained or enjoined the performance of any portion of this Settlement Agreement.

(Emphasis added).

Finally, neither the UPRC nor the City (nor the State) has ever used, possessed, or occupied the Sussexes' property or Home.

IV. Conflict with the Enabling Act

The federal Arizona Enabling Act strictly provides that the State may not dispose of public lands except at a public auction conducted with notice; and that any transfer in violation of the Act "shall be null and void, any provisions of the constitution

or laws of the said state to the contrary notwithstanding." The land at issue was indisputably located on "Section 16" land, which was subject to this provision of the Enabling Act. Allowing school trust land to be transferred without an auction and via private agreement – no matter how that agreement is characterized, whether it be as a "settlement agreement" or as a "purchase agreement"—is a patent violation of the Enabling Act, making the agreement null and void, along with any subsequent claim to title made upon it. The Enabling Act is clear that any transfer of public land without an auction is null and void. "The Enabling Act is one of the fundamental laws of the State of Arizona and is superior to the Constitution of the State of Arizona, in that neither the Arizona Constitution nor laws enacted pursuant thereto may be in conflict." *Gladden Farms*, 129 Ariz. at 518, 633 P.2d at 327. "The Enabling Act is the fundamental and paramount law in Arizona," and "[i]n dealing with trust lands in particular, all doubts must be resolved in favor of protecting and preserving trust purposes." *United States v. New Mexico*, 536 F.2d 1324, 1326–27 (10th Cir. 1976). "[T]he general intent of Congress [in the New Mexico-Arizona Enabling Act] is clear. It intended the Enabling Act to severely circumscribe the power of state government to deal with the assets of the common school trust. The duties imposed upon the state were the duties of a trustee and not simply the duties of a good business manager. The grant in trust was intended to curb the power of the state to deal with the trust lands…Thus, to comply with congressional intent, we must strictly apply the Enabling Act's restrictions regarding disposal of school trust assets."

Kadish v. Arizona State Land Dep't, 155 Ariz. 484, 487–88, 747 P.2d 1183, 1186–87 (1987), *aff'd sub nom. ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989)(internal citations omitted). "We have no right to delete terms from the plain language of [Arizona Constitution's] text. The Arizona Constitution clearly describes public auction as the proper method of disposal of our school trust land. We cannot permit disposals that do not fit within the scope of the enumerated methods." *Deer Valley Unified Sch. Dist. No. 97 of Maricopa Cty. v. Superior Court In & For Maricopa Cty.*, 157 Ariz. 537, 540–41, 760 P.2d 537, 540–41 (1988).

A "no harm, no foul" test does not apply—in other words, even if a property is sold for what the parties claim (or could even prove) was a reasonable market value, then the sale is still null and void if it did not occur at a public auction with notice. *Gladden Farms*, 129 Ariz. at 520–21, 633 P.2d at 329–30. The reason for this is not only because of the plain language of the Constitution and Enabling Act, but also because "the price received for public sale might still be higher than the appraised value…[I]ndeed most sales of state land at auction are, in fact, for a price higher than the appraised value." *Id.* The Arizona Supreme Court has made clear that "we do not believe that [a] sale without auction and bid assures the 'highest and best' price that the Enabling Act requires." *Id.*, 129 Ariz. at 521, 633 P.2d at 330. In *Kadish v. Arizona State Land Dept.*, the Arizona Supreme Court rejected the theory that the disposition of state land is in substantial conformity with the Enabling Act so long as it has an "overall beneficial effect," where it did not strictly comply

with the Enabling Act's requirements (in that case, the requirement that the value of the lease be appraised, and not be auctioned off for less than its market value). 155 Ariz. at 497. The caselaw—both in Arizona and New Mexico—is replete with numerous other examples of leases or sales (or even statutory schemes) which the court found to be null and void because of a failure to comply with the Enabling Act's strict requirements, including the most basic requirement for a public auction with notice; *see e.g. Farmers Inv. Co. v. Pima Mining Co.*, 111 Ariz. 56, 523 P.2d 487 (1974)(finding sale of timber derived from state land to be null and void, where it was not sold at a public auction); *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 593, 790 P.2d 242, 248 (1990)(finding that statute which allowed for exchange of private land for public land without an auction was null and void under Enabling Act); *State ex rel. King v. Lyons*, 149 N.M. 330 (2011)(same, finding that New Mexico statute allowing exchanges of private property for public property without an auction was in violation of New Mexico-Arizona Enabling Act).

Because the State of Arizona clearly did not conduct an auction of the property of issue here—*at all*—then the transfer of school land from the State of Arizona to the UPRC under the Settlement Agreement was clearly not in "substantial conformity" with the Enabling Act. Therefore, the Settlement Agreement, and the associated quitclaim deeds from the State of Arizona to the UPRC and then from the UPRC to the City of Tempe, are null and void.

The lower court found that the Sussexes' defense under the Enabling Act was barred by the state-law statute of limitations for claims against a "public entity" in A.R.S. § 12-821. Even setting aside the fact that applying a statute of limitations to bar a *defense* to a claim makes no sense, a statute of limitations like A.R.S. § 12-821 is inapplicable because the Enabling Act operates "automatically" to render a transfer of title "null and void," and the Act expressly provides that transfers in violation of the Act are null and void notwithstanding "any provision of the contitution or laws of [Arizona] to the contrary." Sec. 28 of the Arizona-New Mexico Enabling Act. The Enabling Act took effect without the Defendants needing to raise it by filing a suit or counterclaim in order to give its terms effect. *See e.g. Princess Plaza Partners v. State*, 187 Ariz. 214, 219, 928 P.2d 638, 643 (App. 1995)("[a]s a sanction, the Enabling Act provides that any disposition of the trust land not in substantial conformity with its provisions is null and void, *despite any provisions of Arizona's constitution and laws to the contrary*")(emphasis added, internal quotation marks omitted). The lower courts essentially ruled that a transfer is void only if the Sussex family brings it to court within one year of learning about it, which is directly contrary to the text of the Enabling Act and the decisions of this Court interpreting its plain language. *See e.g. ASARCO Inc. v. Kadish*, 490 U.S. 605, 626, 109 S. Ct. 2037, 2050, 104 L. Ed. 2d 696 (1989)("Under the conditions [of the Act], the granted lands could not be sold or leased except to the highest bidder at a public auction following notice by advertisements in two newspapers weekly for 10 weeks… Disposition of any of said lands, or of any

money or thing of value directly or indirectly derived therefrom, in any manner contrary to the provisions of [the] Act, shall be deemed a breach of trust. Any such disposition is expressly stated to be null and void unless made in substantial conformity with the provisions of [the] Act.")(Internal ellipses and quotation marks omitted.)

By applying a state statute of limitations to "overrule" the Enabling Act, the Arizona Court of Appeals has violated the Enabling Act and decided an important federal question in a way that conflicts with relevant decisions of this Court. "The Court's concern for the integrity of the conditions imposed by the [Enabling Act] has long been evident." *ASARCO*, 490 U.S. at 633. The Court should therefore grant review.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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