

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
) Case No.
v.)
)
THE STATE OF GEORGIA; and)
BRIAN P. KEMP,)
SECRETARY OF STATE)
OF GEORGIA, in his official capacity,)
)
Defendants.)
)
)
_____)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
UNITED STATES' MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

I. INTRODUCTION

Plaintiff United States of America (“United States”), pursuant to Rule 65 of the Federal Rules of Civil Procedure, respectfully moves this Court for an order granting immediate injunctive relief against the State of Georgia and Brian P. Kemp, Secretary of State of the State of Georgia, in his official capacity, (“Defendants”) to remedy violations of the Uniformed and Overseas Citizens

Absentee Voting Act of 1986 (“UOCAVA”), 42 U.S.C. 1973ff *et seq.*, as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) (“MOVE Act”). Absent an order of this Court, Georgia’s military and overseas voters (“UOCAVA voters”) will be deprived of the opportunity guaranteed by UOCAVA to vote in Georgia’s Federal primary runoff election scheduled for August 21, 2012.

This action arises from Defendants’ inability to transmit timely requested absentee ballots to qualified UOCAVA voters at least 45 days prior to runoff elections for Federal office as required by UOCAVA. For the Federal primary runoff election scheduled for August 21, 2012, the deadline for transmission is July 7, 2012. Because at that time the State will not yet know if a runoff election is required and between which candidates, Georgia is unable to transmit official absentee ballots by the 45-day deadline. Georgia law requires only that runoff ballots be transmitted “as soon as possible prior to a runoff.” *See* Ga. Code Ann. § 21-2-384(a)(2). The *UOCAVA Written Plan for Federal Runoff Elections*, established by the State as required by Section 102(a)(9) of UOCAVA, 42 U.S.C. §1973ff-1(a)(9), and attached as Exhibit A (“Written Plan”), makes clear that Georgia will not send official absentee ballots to UOCAVA voters until long after the 45-day deadline, depriving UOCAVA voters of the opportunity guaranteed by

UOCAVA to receive, mark, and return their ballots. Accordingly, this Court must act.

The United States satisfies all of the requirements for preliminary relief. First, the undisputed facts establish a *per se* statutory violation and, thus, the United States is substantially likely to prevail by establishing a violation of UOCAVA. Second, without preliminary injunctive relief, Georgia's UOCAVA voters likely will suffer the irreparable harm of having their opportunity to vote in a runoff election substantially limited in violation of UOCAVA. Third, the preliminary relief sought would impose no undue burden upon the Defendants, especially when balanced against the acute harm of potential infringement of the right to vote. Finally, the public interest demands that Georgia's UOCAVA voters have a full and fair opportunity to vote as UOCAVA guarantees and have their ballots counted in the scheduled runoff election for Federal office.

Accordingly, to ensure that eligible UOCAVA voters are able to exercise fully their right to vote in Georgia's Federal primary runoff election scheduled for August 21, 2012, the United States respectfully moves this Court for an order: (1) extending Georgia's absentee ballot receipt deadline by seven days, until August 31, 2012; (2) requiring the Defendants to send by express delivery service, as soon as possible prior to the August 21 primary runoff election, if held, an official

absentee ballot for the election to any UOCAVA voter who requested to receive their ballot by mail; (3) requiring Defendants to inform UOCAVA voters no later than July 7, 2012 of their right to request a State Write-in Absentee Ballot or their official absentee ballot for any runoff election by downloading it from the internet, by email, or by fax, and to provide voters with a website address or link to the State's election information website, where unofficial results of the July 31, 2012 Federal primary election will be posted as soon as they become available; (4) requiring the Defendants to make available to UOCAVA voters the option of returning their voted ballots for the August 21 Federal primary runoff election by express delivery service, email, or fax, at no expense to the voter; (5) requiring Defendants to take such steps as are necessary to afford affected UOCAVA voters who are eligible to participate in the August 21 Federal primary runoff election a reasonable opportunity to learn of this Court's order through targeted notice and publicity efforts; and (6) requiring the Defendants to report to the United States concerning the number of UOCAVA ballots received and counted in the August 21, 2012 Federal primary runoff.¹

¹ In the event a 2012 Federal general runoff election appears likely, and absent intervening corrective action by the State, the United States would seek an Order for similar injunctive relief.

II. STATUTORY BASIS FOR THIS ACTION

UOCAVA guarantees military and overseas voters the right “to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office.” 42 U.S.C. §1973ff-1(a)(1). In 2009, the MOVE Act amended UOCAVA to require that states transmit absentee ballots to UOCAVA voters at least 45 days before an election for Federal office, including runoff elections, to provide voters sufficient time to receive, mark, and return absentee ballots.² 42 U.S.C. § 1973ff-1(a)(8)(A) (“Each state shall . . . transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election . . .”). Georgia is responsible for ensuring its UOCAVA compliance statewide. 42 U.S.C. §§ 1973ff-1 & 1973ff-6(6); *see United States v. Alabama*, __ F. Supp. 2d __, 2012 WL 787580, at *2 (M.D. Ala. Mar. 12, 2012) (“Alabama bears full responsibility for compliance with UOCAVA”); *United States v. New York*, No. 1:10-cv-1214, 2012 WL 254263, at *1 (N.D.N.Y. Jan. 27, 2012) (“New York is responsible for complying with UOCAVA and ensuring that validly-requested absentee ballots are sent to

² UOCAVA requires that ballots requested by the 45th day prior to a Federal election must be transmitted by the 45th day before the election. References in this memorandum to timely requested ballots refer to ballots requested by July 7, 2012, the 45th day prior to the August 21, 2012 primary runoff election. Transmission of UOCAVA ballots requested after the 45th day is governed by 42 U.S.C. §1973ff-1(a)(8)(B).

UOCAVA voters in accordance with its terms.”). The Attorney General is authorized to bring civil actions to enforce UOCAVA. 42 U.S.C. § 1973ff-4(a).

III. FACTS

Georgia law requires that a runoff election be held 21 days following a regular or special primary election in which a candidate, including those in elections for Federal offices, failed to receive a majority of the votes cast. *See* Ga. Code Ann. § 21-2-501(a). On July 31, 2012, the State will conduct a Federal primary election for its delegation to the U.S. House of Representatives. In the event that a candidate for nomination to that Federal office fails to receive a majority of the votes cast, Georgia will hold a primary runoff election 21 days thereafter, on August 21, 2012. *See* Ga. Code Ann. § 21-2-501(a). According to the list of candidates who qualified for the primary election ballot, there are three or more candidates seeking the nomination of one of the two main political parties in 6 of Georgia’s 14 Congressional districts.³ *See* Exhibit B (from website of Secretary of State Brian P. Kemp, Elections Division, Preliminary List of Candidates on the July 31, 2012 General Primary Election Ballot, <http://qual.sos.state.ga.us/QualifyingSearchResults.asp?RaceID=1>).

³ Primary runoff elections are possible in the following six Congressional Districts: District 2 (3 Republican candidates); District 3 (3 Republican candidates); District 4 (3 Democratic candidates); District 9 (3 Republican candidates); District 11 (3 Republican candidates); and District 12 (4 Republican candidates). *See* Exhibit B (<http://qual.sos.state.ga.us/QualifyingSearchResults.asp?RaceID=1>).

Section 102(a)(8) of UOCAVA requires that states transmit all validly-requested ballots to UOCAVA voters not later than 45 days before an election for Federal office when the request is received at least 45 days before the election, unless a hardship exemption is obtained pursuant to Section 102(g) of UOCAVA. *See* 42 U.S.C. §§ 1973ff-1(a)(8) & (g). The State of Georgia did not seek or obtain a hardship exemption for the August 21, 2012 Federal primary runoff election.

Georgia law requires that absentee ballots from UOCAVA voters must be received no later than three days after a Federal election, so long as the ballot is postmarked by the date of the election. *See* Ga. Code Ann. § 21-2-386(a)(1)(G). Thus, for the August 21, 2012 Federal primary runoff election, UOCAVA ballots must be received by August 24, 2012.

The Georgia Secretary of State's office has provided to the United States its written plan for Federal runoff elections, established as required by Section 102(a)(9) of UOCAVA, 42 U.S.C. §1973ff-1(a)(9). *See* Exhibit A (Written Plan).⁴ According to the Written Plan, when they become available, official absentee

⁴ The Written Plan essentially memorializes procedures Georgia adopted following a UOCAVA enforcement action filed by the United States in 2004 after the State failed to mail ballots to UOCAVA voters sufficiently in advance of the 2004 Federal primary election. The litigation, which pre-dated the MOVE Act's adoption of an explicit 45-day deadline for the transmission of UOCAVA ballots, resulted in this Court granting the United States's motion for a temporary restraining order and preliminary injunctive relief for the 2004 election cycle. *See United States v. Georgia*, No. 1:04-CV-2040-CAP (N.D. Ga. July 16, 2004), attached as Exhibit C. Ultimately, the matter was resolved pursuant to a Memorandum of Understanding reached by the parties and entered by the Court pursuant to a Stipulation and Order of dismissal following Georgia's adoption in 2005 of a number of new absentee ballot measures designed to bring the State into compliance with UOCAVA as it then existed. *See United States v. Georgia*, No. 1:04-CV-2040-CAP (N.D. Ga. July 25, 2005), attached as Exhibit D.

ballots for the runoff election are transmitted to UOCAVA voters by the method of transmission they requested for the primary or general election, unless they requested a different method of transmission for the runoff election. *See id* at 2. For voters who requested to receive their absentee ballot electronically without specifying an alternative means of transmission, official absentee ballots are transmitted through the Secretary of State's Electronic Ballot Delivery ("EBD") system, which is "an automated, overnight delivery process whereby each voter is notified that his/her ballot is available for download." *See id*. Although not stated in the Written Plan, the Secretary of State's office informed counsel for the United States that the list of candidates for a runoff election typically is certified one week following the initial election, since the deadline for counties to certify their results is 5:00 p.m. on the Monday following a Tuesday election, *see* Ga. Code Ann. § 21-2-493(k), with the State generally certifying a final list the next day. However, under Georgia law, the Secretary of State could wait as long as one additional week before certifying election results, *see* Ga. Code Ann. § 21-2-499(b), further delaying the availability of the information necessary for the State to prepare and transmit official absentee ballots for the runoff election. Thus, Georgia's UOCAVA voters will be sent official absentee ballots no earlier than 14 days before a Federal primary runoff election.

Prior to the transmission of the official absentee ballot for the runoff election, the State sends voters who have requested to receive their absentee ballots by mail a State Write-in Absentee Ballot (“SWAB”) for use in the event of a runoff election along with their primary or general election absentee ballot. *See* Exhibit A at 2-3 (Written Plan); Ga. Code Ann. § 21-2-381.2); Ga. Comp. R. & Regs. § 183-1-14-.05(b). For Georgia’s July 31, 2012 Federal primary election, this mailing was scheduled to occur no later than June 16, 2012, 45 days before the election.⁵ However, because it is not yet available, no list of certified candidates participating in the runoff election would have been included in these mailings.

In addition, voters who requested electronic transmission of absentee ballots can download a SWAB from the Secretary of State’s website or receive a SWAB by email or fax by the 45th day before the initial election. *See* Exhibit A at 2-3 (Written Plan). As with the SWABs sent by mail, the electronic transmission does not include confirmation that a runoff election will be held or a certified list of candidates competing in the runoff election, since no such list is available at the time of the SWAB transmission.

⁵ The United States is awaiting confirmation from Defendants that the State transmitted its UOCAVA ballots for the July 31, 2012 Federal primary election by the deadline of June 16, 2012. If Defendants fail to provide confirmation that they transmitted UOCAVA ballots on time or if a violation of UOCAVA is discovered, the United States will assess the facts and if needed, will seek further relief from this Court.

According to Georgia’s Written Plan, voters using a SWAB are directed to a website on which the State posts a list of certified candidates “[a]s soon as practicable after an election for which a runoff election will be held” *See* Exhibit A at 2 (Written Plan). However, based on information the Secretary of State’s office communicated to counsel for the United States, the list of certified candidates is not posted on the State’s election website until at least 14 days before a primary runoff election. Thus, for Georgia’s August 21 primary runoff election, that information would not be available until August 7, 2012.

In light of these circumstances, on June 15, 2012, the United States notified Defendants that it was prepared to initiate a lawsuit to seek judicial relief for these violations if relief could not be obtained through a negotiated settlement. *See* Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Div., U.S. Dep’t of Justice, to Sam Olens, Georgia Attorney General, and Brian P. Kemp, Georgia Secretary of State (June 15, 2012), attached as Exhibit E.

IV. ARGUMENT

A. Preliminary Relief Should be Ordered Without Delay.

Four factors govern whether a temporary restraining order or a preliminary injunction should issue:

- (1) whether there is a substantial likelihood of success on the merits;

(2) whether the movant will suffer irreparable injury unless the injunction is issued;

(3) whether the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and

(4) whether granting the injunction is in the public interest.

See, e.g., Georgia v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1128 (11th Cir. 2005); *Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000); *see also United States v. Georgia*, No. 1:04-CV-2040-CAP (N.D. Ga. July 16, 2004), attached as Exhibit C. As all four factors are met here, a temporary restraining order and preliminary injunction should issue.

B. The United States Is Substantially Likely to Succeed on the Merits.

The evidence demonstrates that Defendants will be unable to transmit timely requested ballots to UOCAVA voters at least 45 days before the Federal primary runoff election scheduled for August 21, 2012, as required by UOCAVA. 42 U.S.C. § 1973ff-1; 42 U.S.C. 1973ff-1(a)(8)(A); *see* 156 CONG. REC. S4518 (daily ed. May 27, 2010) (discussing development of 45-day transmission requirement based upon evidence before Congress). Specifically, Subsection 102(a)(8)(A) of UOCAVA states:

Each State shall . . . transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election....

Georgia law requires only that ballots be transmitted “as soon as possible prior to a runoff,” *see* Ga. Code Ann. § 21-2-384(a)(2), and the State’s Written Plan makes clear that Georgia will not send official absentee ballots to UOCAVA voters until after the 45-day deadline mandated by Section 102(a)(8)(A). The State’s transmission of the SWAB is insufficient because in the absence of a certified candidate list, it fails to provide the information necessary for UOCAVA voters to cast an effective vote between the candidates that would actually compete in a runoff election. Thus, the Defendants’ failure to timely transmit absentee ballots to UOCAVA voters violates the statute. 42 U.S.C. 1973ff-1(a)(8)(A). Accordingly, the United States is highly likely to succeed on the merits.

C. Georgia’s UOCAVA Voters Will Suffer Irreparable Harm Absent Immediate Injunctive Relief.

Unless the Court takes immediate action to remedy the State’s UOCAVA violation, Georgia’s UOCAVA voters, many of whom are members of the United States Armed Forces serving the nation at home and abroad, are at serious risk of being deprived of the opportunity UOCAVA guarantees them. The right to vote is “fundamental.” *Bartlett v. Strickland*, 566 U.S. 1, 10 (2009); *see Reynolds v. Sims*,

377 U.S. 533, 561 (1964). Denial or abridgement of that right constitutes irreparable harm. *See United States v. Alabama*, __ F. Supp.2d __, 2012 WL 787580, at *2 (M.D. Ala. Mar. 12, 2012) (granting preliminary injunction to remedy UOCAVA violation following the late transmission of primary ballots by the State of Alabama, which also included relief relating to possible primary runoff elections); *see also Montano v. Suffolk Cnty. Legislature*, 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003) (“An abridgement or dilution of the right to vote constitutes irreparable harm.”). Immediate injunctive relief is necessary to ensure that Georgia’s UOCAVA voters are not denied their opportunity to participate as UOCAVA guarantees in the August 21, 2012 Federal primary runoff election.

Under Georgia’s existing election calendar, the State is unable to transmit official absentee ballots 45 days before a runoff election, as UOCAVA requires. The evidence establishes that these ballots for the Federal primary runoff election scheduled for August 21, 2012 will not be transmitted to Georgia’s UOCAVA voters until 14 days before the election, at the earliest. *See Exhibit A (Written Plan)*. Moreover, voters cannot know the unofficial results from the initial election until after the July 31, 2012 primary election has been completed. Thus, even voters choosing to use a SWAB the day after the initial election would have the

information necessary to cast an effective ballot no more than 20 days before the date of the August 21 Federal primary runoff election.

D. Any Burden on Defendants is Minimal, and Is Far Outweighed by the Risk of Harm to Georgia's UOCAVA Voters.

The relief that the United States seeks in this motion is appropriately tailored to remedy Defendants' violation of UOCAVA in the next primary runoff election for Federal office, scheduled for August 21, 2012. While a change in Georgia's election calendar or other permanent structural changes will be necessary to ensure long term relief in future Federal runoff elections, by this motion the United States seeks the imposition of tailored, temporary relief that would address only Georgia's imminent violation for the potential 2012 primary runoff. As interim relief for the State's inability to transmit its UOCAVA ballots by the 45-day deadline -- and to ensure immediately that the rights of UOCAVA voters are protected -- the United States seeks a remedy that includes extending Georgia's ballot receipt deadline in any primary runoff election by an additional 7 days. *See United States v. Cunningham*, No. 08-cv-709, 2009 WL 3350028, at *10 n.3 (E.D.V.A. Oct. 15, 2009) (citing many United States District Court cases where an extension of the ballot receipt deadline had been entered as a remedy for a UOCAVA violation); *United States v. Wisconsin*, No. 10-CV-518 (W.D. Wis. Sept. 14, 2010; entered Sept. 15, 2010) (ordering 17-day extension of deadline),

attached as Exhibit F. To further tailor and minimize the burden on Georgia of an extension of the ballot receipt deadline, the United States' proposed order would permit Georgia to formally certify election results if the number of outstanding ballots from UOCAVA voters could not mathematically alter the outcome of the election, subject to amendment or re-certification to add any votes from any valid ballots returned by the extended receipt deadline. *See, e.g., United States v. Wisconsin*, No. 12-CV-197 (W.D. Wis. Mar. 23, 2012), attached as Exhibit G.

In addition, the State should be required to send by express delivery service official absentee ballots for any primary runoff election to voters who requested their ballots by mail immediately after the ballots become available. As further relief, voters in any primary runoff election should be offered the option of returning their ballots by email, fax, or express delivery service at no cost to the voter. Offering UOCAVA voters these remedial options should maximize to the greatest extent possible the window of time a voter would have to receive, mark, and return a ballot so that the time period more closely approximates the 45-day standard guaranteed to voters by UOCAVA.

Further, the State should be ordered to undertake additional remedial efforts, including generalized and targeted publicity efforts, to alert to the greatest extent possible all UOCAVA voters of the new alternatives for electronic and express

delivery service transmission of voted ballots in any Federal primary runoff elections, as well as the extended ballot receipt deadline. Courts have routinely ordered this kind of relief to remedy UOCAVA violations in other cases. *See United States v. Georgia*, No. 1:04-CV-2040-CAP (N.D. Ga. July 25, 2005), attached as Exhibit D; *United States v. Alabama*, ___ F. Supp.2d ___, 2012 WL 787580 at *6 (discussing the necessity of notifying voters regarding the remedies imposed by the court in response to the State's UOCAVA violations) (M.D. Ala. Mar. 12, 2012); *United States v. New York*, No. 10-CV-1214 (N.D.N.Y. Feb. 14, 2012) (requiring the state to report detailed information about its UOCAVA activities to the United States and the court), attached as Exhibit H; *see* Consent Decree, *United States v. California*, No. 12-CV-1427 WBS (E.D. Cal. May 30, 2012) (requiring, among other things, extensive publicity efforts to notify affected UOCAVA voters of remedial efforts), attached as Exhibit I.

Granting a temporary restraining order and preliminary injunction in this case will impose minimal hardship on the Defendants. To the extent the Defendants argue otherwise, such burdens pale in comparison to the denying Georgia's UOCAVA voters the opportunity to vote UOCAVA guarantees.

E. The Public Interest Favors Immediate Relief.

UOCAVA reflects Congress's determination that military and overseas voter participation in Federal elections is a vital national interest. *See United States v. New York*, No. 1:10-cv-1214, 2012 WL 254263, at *1 (Jan. 27, 2012) ("Nothing is more critical to a vibrant democratic society than citizen participation in government through the act of voting. It is unconscionable to send men and women overseas to preserve our democracy while simultaneously disenfranchising them while they are gone."); *Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307 (N.D. Fla. 2000) ("Voting is . . . a sacred element of the democratic process. For our citizens overseas, voting by absentee ballot may be the only practical means to exercise that right. For the members of our military, the absentee ballot is a cherished mechanism to voice their political opinion. . . . [The vote] should be provided no matter what their location."). The MOVE Act reaffirmed this core determination. The relief requested herein will advance the public interest by ensuring that Georgia's UOCAVA voters, many of whom are members of the U.S. Armed Forces deployed abroad, can cast votes as guaranteed by UOCAVA.⁶

⁶ Moreover, the public has a clear interest in the enforcement of Federal statutes that protect constitutional rights, including voting rights. *United States v. Raines*, 362 U.S. 17, 27 (1960) (reversing denial of preliminary injunction in voting rights case and holding that "there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights"); *United States v. E. Baton*

V. CONCLUSION

For the forgoing reasons, the Plaintiff respectfully requests that the Court grant the United States' motion for a Temporary Restraining Order and Preliminary Injunction and enter the attached proposed Order granting immediate relief for the violations of UOCAVA described in this Memorandum.

Rouge Parish Sch. Bd., 594 F.2d 56, 58 (5th Cir. 1979) (“[T]he United States has an interest in enforcing Federal law that is independent of any claims of private citizens. In the [voting rights] context the Supreme Court has characterized this as ‘the highest public interest in the due observance of all constitutional guarantees.’” (quoting *Raines*, 362 U.S. at 27)); see *Herman v. S.C. Nat’l Bank*, 140 F.3d 1413, 1425 (11th Cir. 1998) (discussing *E. Baton Rouge Parish Sch. Bd.*, 594 F.2d at 58). Both irreparable harm and the public’s interest in an injunction are presumed where the United States—rather than a private party—seeks injunctive relief pursuant to statute. See, e.g., *United States v. Alabama*, No. 06-cv-392, 2006 WL 1598839, at *2 (M.D. Ala. 2006) (“[N]o showing of irreparable harm is necessary in an action for a statutory injunction. . . because where Congress has seen fit to act in a given area by enacting a statute, irreparable injury must be presumed in a statutory enforcement action. Further, an examination of whether an injunction pursuant to a statute is in the public interest is unnecessary because Congress acts in the public’s interest.” (citations and internal quotation marks omitted)).

Respectfully submitted,

Date: June 27, 2012

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies, pursuant to LR 7.1.D, N.D. Ga., that the foregoing Memorandum of Points and Authorities in Support of United States' Motion for Temporary Restraining Order and Preliminary Injunction was prepared in Times New Roman 14 point font.

/s/ Christopher J. Huber
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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2012, a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of United States' Motion for Temporary Restraining Order and Preliminary Injunction was served, via electronic correspondence, to the following counsel of record:

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