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Plaintiff,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, in her official capacity as President of the University of California; and DOES 1-100,

CASE NO. RG19046222
(Consolidated with RG19046343)

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

[Unredacted Reply Memorandum lodged under sealed]

Date: August 20, 2020
Time: 3:00 p.m.
Reservation ID: R-2193299

Action Filed: December 10, 2019
Trial Date: None Set

Defendant.

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I. Introduction

The Regents of the University of California ("UC") do not deny that they have adopted a two-pathway admissions system in which an applicant's treatment depends on his or her disability status.[1] On the first pathway, students without disabilities have the advantage of access to SAT/ACT scores, which they can choose to submit to gain both a "value add" and a "second look" in UC's admissions, as well as in merit scholarship determinations worth about $99 million per year. Brick Decl. ¶ 6. Students with disabilities who require accommodations are relegated to the second pathway. These students cannot access the tests and are thus denied the advantage afforded by SAT/ACT scores to students without disabilities. UC's own experts confirm this: "[T]he odds in this Covid time of students either getting their accommodations approved or finding a suitable testing site are almost nil, especially in California." Hiss Decl. ¶ 54.

This two-pathway system, which UC admissions officials describe in their declarations and depositions,[2] is classic discrimination. The very existence of two separate pathways rather than one belies UC's claim that its admissions scheme is truly "test-optional." Such a scheme is facially discriminatory and unlawful, and it would remain so even if the SAT and ACT were validated for students with disabilities and non-discriminatory on the basis of race and wealth, which they are not. UC's four paragraphs of argument on Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* ("ADA" or "Title II")—which is incorporated and exceeded by California's disability rights statutes, Mot. 23—reveal that UC has no justification for its deliberate retention of an admissions criterion that discriminates against students with disabilities. *See* Opp'n 27–29. UC does not contest that the tests are inaccessible to many, if not most, such students. Instead, UC

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[1] Nor do they deny that the SAT and ACT are racist proxies of wealth and privilege that can be gamed by expensive test preparation. [redacted]" Lavetter Decl., Ex. A, p. 76 (Saddler Dep.) (emphasis added).

[2] *See, e.g.*, Lavetter Decl., Ex. B, p. 28 (Engelschall Dep.) "[redacted]" (emphasis added)).

blames the College Board and ACT, Inc., claiming that it is not responsible for its decision to continue utilizing the discriminatory admissions tests those companies develop and administer. That is not the law. Title II prohibits UC from outsourcing its discrimination "through contractual, licensing, or other arrangements" with the testing companies, 28 C.F.R. § 35.130(b)(1), (3), which arrangements UC admittedly has. Yoon-Wu Decl. ¶ 54.

Because UC cannot deny this facial discrimination, it pivots, arguing that even if students with disabilities are unable to access the tests, they should trust UC's assurances that they will not be disadvantaged. UC's own admissions officials belie these representations. At UC Riverside, for example, a student who can submit an SAT/ACT score has two chances for admission: his or her Academic Index Score ("AIS") as calculated with the SAT/ACT score ("AIS 1") and without ("AIS 2"). Engelschall Decl. ¶ 18. A student with a high SAT/ACT score may be admitted even with a lower GPA or lower scores on other AIS components. A student who has the same scores on the index components but cannot take the SAT/ACT because of his or her disability has fewer pathways to admission. At other campuses, SAT and ACT scores may be used during a "second look" at applicants. Przekop Decl. ¶¶ 8, 21; *see also* Hunt Decl. ¶ 9. Thus, SAT and ACT scores will necessarily "give[] students" who submit them "*more* ways to get admitted" than are available to students who, because of their disabilities, cannot submit scores. Engelschall Decl. ¶ 17.

And to what end? UC never rebuts Plaintiffs' evidence that the tests are discriminatory and inaccessible, as its own experts and admissions officials confirm. *See, e.g.*, Hiss Decl. ¶ 36 (SAT/ACT "have very minimal predictive value," "have classist elements" that make it "easier for wealthy Marin County teenagers to prepare for the tests," and can lead to "racist outcomes"); *id.* (it can "be almost or completely impossible . . . to get accommodations, or . . . to find a test location [to] use" them—a situation that is "now made much worse by Covid"). Moreover, as UCLA's Vice Chancellor for Enrollment Management Youlanda Copeland-Morgan explained, "[s]tudents from privileged communities" are able to obtain higher scores through "test prep courses and private tutors," and retention of the tests, even in a so-called "test-optional" process, disadvantages and stigmatizes students who do not submit scores, who may "suffer bias" and "be perceived as not qualified." Lavetter Decl., Ex. C, pp. 56:2–5, 57:2–7.

To placate recalcitrant "college personnel" in whose minds the erroneously "assumed need for the SAT and ACT . . . is firmly entrenched," Syverson Decl. ¶ 16, UC falls back on arguments raised by public entities on the wrong side of history: it asserts its "legal autonomy to design" admissions policies and its incremental movement—with all deliberate speed—toward nondiscrimination. Opp'n 14, 29. But ceasing to discriminate is not "complex." Opp'n 23. Berkeley, Irvine, and Santa Cruz plan to be "test-blind" for this admissions cycle, Yoon-Wu Decl. ¶ 45, and so-called "test-optional" campuses have developed processes to evaluate students without SAT/ACT scores. To stop discriminating, these campuses need only apply those processes to all students equally (rather than the subset relegated by their disabilities to the second pathway). There is no public or institutional interest in preserving UC's facially discriminatory, two-pathway admissions process, which is irreparably harming students with disabilities, students of color, and students from low-income families even now. This Court should grant the preliminary injunction.

II. Plaintiffs are likely to succeed on the merits of their disability discrimination claims.

A. Plaintiffs' claims are justiciable.

Plaintiffs' disability discrimination claims are straightforward: UC's continued use of SAT and ACT scores denies students with disabilities equal consideration in its admissions and scholarship processes, in violation of Title II and the California antidiscrimination statutes that incorporate and exceed it. Mot. 23–25. Support for those claims is established not only by Plaintiffs' evidence but also by UC's own declarants. *See, e.g.*, *supra* p. 4:8–17.

Nevertheless, UC's opposition raises—for the first time—the defense of primary jurisdiction, a prudential doctrine that may be applied to stay a case pending referral to an administrative agency where such stay would give the court the benefit "of administrative expertise" and "help[] assure uniform application of regulatory laws." *Elder v. Pac. Bell Tel. Co.*, 205 Cal. App. 4th 841, 855 (2012). Neither circumstance is present here, where the critical issue is whether UC's continued consideration of SAT and ACT scores unlawfully discriminates against students with disabilities. "To resolve that issue," this Court must construe Title II and State antidiscrimination statutes, "an inherently judicial function." *Id.* (citation omitted). The Court, not UC, is "the ultimate arbiter[]" of whether UC's practices violate these antidiscrimination statutes,

such that the Court need not defer to UC's "erroneous administrative construction" of its liability under those statutes. *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal. App. 4th 499, 526 (1997).

Nor must the Court wait for UC to refine the contours of its disability discrimination on ripeness grounds. "[T]he ripeness requirement prevents courts from issuing purely advisory opinions, or considering a hypothetical state of facts in order to give general guidance rather than to resolve a specific legal dispute." *Hunt v. Superior Court*, 21 Cal. 4th 984, 998 (1999). The facts of this case are concrete and undisputed: UC continues to permit its campuses to use SAT and ACT scores in admissions and scholarship determinations. This pathway is inaccessible to (and the criterion is not validated for) students with disabilities who require accommodations. In moving for a preliminary injunction,[3] Plaintiffs do not seek an "advisory opinion[]" or "general guidance"; they ask this Court to resolve, on these uncontested facts, the "specific legal dispute" of whether UC's facially discriminatory, two-pathway admissions process violates Title II and the State antidiscrimination statutes that incorporate it. *Id.* The dispute is ripe for consideration.

B. The pathway that considers and values SAT/ACT scores is denied to Plaintiffs.

UC's experts "fully acknowledge and endorse the numerous concerns over the lack of value, appropriateness, and accessibility of the SAT/ACT for LD [learning disabled] students." Syverson Decl. ¶ 26; *see* Hiss Decl. ¶ 36. They also agree that any required submission of SAT/ACT scores to attain scholarships is discriminatory. *See* Syverson Decl. ¶ 35; Hiss Decl. ¶ 51. They do not meaningfully contest that applicants who require accommodations that are unavailable do not have the "option" to submit SAT/ACT scores, and that others can exercise it only at time and resource costs significantly beyond those which applicants without disabilities must endure. UC's admissions directors are utterly indifferent to these concerns.[4] These

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[3] Contrary to UC's characterization, the requested preliminary injunction is prohibitory because it "seeks to restrain a party from a course of conduct or to halt a particular condition"—here, UC's consideration of discriminatory SAT and ACT scores. *People v. Mobile Magic Sales, Inc.*, 96 Cal. App. 3d 1, 13 (1979). Thus, even though "the act of removal" of the discriminatory criterion may be "affirmative . . . , it is incidental to the injunction's prohibitive objective to restrain further violation" of State antidiscrimination statutes. *Id.*

[4] *See, e.g.*, Lavetter Decl., Ex. D, p. 10 (Przekop Dep.) ("[redacted]

undisputed facts give rise to UC's liability.

UC wrongly argues that Plaintiffs must show that considering SAT/ACT scores results in the admission of fewer students with disabilities. Opp'n 26–27. As Plaintiffs explained, they need only show that giving extra credit in the admissions process to students who are able to submit high scores, when Plaintiffs cannot test due to their disabilities, denies them equal consideration. Pls.' Opp'n Dem. 17–18; *see also Smith v. City of Oakland*, No. 19-CV-05398-JST, 2020 WL 2517857, at *5 (N.D. Cal. Apr. 2, 2020) (plaintiffs' injury "focuses on discriminatory access to a government program, not the underlying [benefit] itself"); *Davis v. Astrue*, 874 F. Supp. 2d 856, 863–64 (N.D. Cal. 2012) ("discrimination in the process" gives rise to plaintiffs' injury).

Students with disabilities cannot be considered fairly when, because of their disabilities, they have no access to the "value add" of an SAT/ACT score. UC admits that it gives students with SAT/ACT scores "*more*" pathways to admission than students who cannot present a score. Opp'n 27; *see* Hunt Decl. ¶ 9; Engelschall Decl. ¶ 18.[5] That some students without disabilities are also unable to test because of COVID-19 is irrelevant. Opp'n 28.[6] UC's reliance on the disparate impact framework in *Darensburg v. Metropolitan Transportation Commission*, 611 F. Supp. 2d 994 (N.D. Cal 2009), is misplaced. Opp'n 25. Section 11135 disability discrimination claims, unlike racial discrimination claims, incorporate the ADA. Under Title II, Plaintiffs need not prove "uneven treatment of similarly situated individuals" or a "comparison class, i.e., . . . similarly situated individuals given preferential treatment. . . . Congress had a more comprehensive view of the concept of discrimination advanced in the ADA." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S.

[redacted]" (emphasis added)); *id.* Ex. E, p. 77 (Lewis Dep.) ("[redacted]") (emphasis added).

[5] Plaintiffs are also completely excluded from several of UC's pathways for admission, including admission by exam, Yoon-Wu Decl. ¶ 8, and eligibility in the statewide context, *id.* ¶ 9a. The only way students with disabilities can be considered for admission by exception is if they disclose their "disadvantage" to admissions officers. *Id.* ¶ 10.

[6] To the extent UC argues that students are not excluded from the SAT and ACT "solely" on the basis of their disabilities, Opp'n 27, that is not the standard under Title II. *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1204 n.5 (9th Cir. 2016).

581, 598 (1999) (plurality op.). It is enough that some Plaintiffs and their members are, because of their disabilities, excluded from equal consideration.[7] In any case, Plaintiffs have shown that they are disparately impacted by UC's continued use of SAT/ACT scores, because they must shoulder "burdens . . . in a manner different and greater than . . . others" if they want to maximize their chance of admission. *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). UC does not dispute that those students with disabilities who can take advantage of the "option" to submit an SAT/ACT score do so at far greater expense in time, effort, and resources than students without disabilities. Mot. 26–27. UC has also not rebutted that students with disabilities experience greater stigma when universities continue to tout the SAT and ACT as useful measures. Mot. 29. These stigmatic harms are also cognizable under Title II. *See Olmstead*, 527 U.S. at 600–01.

UC argues only that it is not "vicariously liab[le]" for discrimination by the College Board and ACT, Inc. Opp'n 28–29. But UC is responsible for its own decision to use an admissions criterion to which people with disabilities are denied effective—or any—access, 28 C.F.R. § 35.130(b)(1)(i)–(iii), when the discrimination is accomplished, in part, "through contractual, licensing, or other arrangements" with third parties, *id.* § 35.130(b)(1); *see also id.* § 35.130(b)(3). (The word "agency" does not appear in the Title II regulation, and there is no reason to import such a requirement. *See* Opp'n 28.) UC admits that it has contractual relationships with the College Board and ACT, Inc. Yoon-Wu Decl. ¶ 54.[8] Moreover, UC's decision to delegate part of its admissions process to the testing companies fits comfortably into the "other arrangements" contemplated by Title II, especially because the law forbids universities to use discriminatory admissions tests, regardless of who owns or administers the tests. 34 C.F.R. § 104.42(b).[9]

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[7] UC's current anti-bias training, an hour-long online module, [redacted], Lavetter Decl., Ex. E, p. 35 (Lewis Dep.), and appears largely ineffectual, *id.* p. 27 ("[redacted]"). UC cites no data to suggest that this or hypothetical future trainings will overcome the biases identified by Dr. Blanck and UC's own declarant, Ms. Copeland-Morgan. Blanck Decl. ¶¶ 34–46; *supra* p. 4:23–28.

[8] Ms. Yoon-Wu withholds information about the full scope of those contracts, including, for example, whether the testing companies make any commitments or representations with regard to accommodating students with disabilities.

[9] This analysis does not hold UC responsible for discrimination "by every school district, high

Defendants have offered no *substantive* legitimate justification for their continued use of SAT/ACT scores. *See* Opp'n 25. Their own experts will not defend the tests.[10] The mere assertion that "some disadvantaged students" benefit from the tests, without evidence and without any attempt to quantify how many are benefitted versus harmed, Opp'n 27, does not carry UC's burden. *See* Rothstein Supp. Decl. ¶ 13 (Although some disadvantaged students may have "unusually strong SAT scores, . . . there are also students in the opposite category, who would be admitted under test-blind rules but not under test-optional rules. Given . . . socioeconomic gaps in SAT scores, among underrepresented applicants the latter group is certain to be much larger than the former."). Moreover, those who might benefit from the test are currently prevented from doing so. "Test-optional," when that pathway is closed to students with disabilities, does not offer those students an equal chance to compete in UC's admissions process. It therefore must be enjoined.

III. The balance of harms weighs heavily in Plaintiffs' favor.

A. Plaintiffs will suffer irreparable harm absent the injunction.

Plaintiffs have shown that the irreparable harm they will suffer "if an injunction is denied is greater than the interim harm [UC] is likely to suffer if the injunction is issued."[11] *Integrated*

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school athletic association, and extracurricular implicated in any applicant's materials." Opp'n 28. UC does not limit extra credit to students who attend only specific, UC-designated high schools. And whereas students attend high school and participate in extracurriculars for reasons other than college admissions and scholarships, those are the only reasons students take the SAT/ACT. By considering these tests, UC funnels students to the testing companies, which discriminate. In addition to the violations discussed *supra*, this contravenes the ADA's prohibition on "providing significant assistance to an . . . organization . . . that discriminates on the basis of disability." 28 C.F.R. § 35.130(b)(1)(v).

[10] Dr. Syverson supports test-optional policies only as a stepping stone to soothe community opposition to test-blind admissions. Syverson Decl. ¶ 33, but such opposition cannot support continuing a discriminatory policy, *cf. Intervention911 v. City of Palm Springs*, No. CV1301117MMMOPX, 2014 WL 12853165, at *18 (C.D. Cal. July 7, 2014) (discriminatory community attitudes are circumstantial evidence of city's discriminatory intent).

[11] Contrary to UC's assertion, irreparable harm is not a separate preliminary injunction factor, but rather is assessed by courts under the interim harm analysis. *See, e.g.*, *Butt v. State*, 4 Cal. 4th 668, 692–94 (1992) (discussing irreparable injury as part of interim harm analysis); *see also Cohen v. Bd. of Supervisors*, 40 Cal. 3d 277, 286 n.5 (1985) (rejecting respondents' proposed five-factor test for preliminary injunction, which included "the degree of irreparable injury the denial of the injunction will cause," and opining that "[s]everal of these purported requirements are simply different ways of describing the 'interim harm' factor").

Dynamic Sols., Inc. v. VitaVet Labs, Inc., 6 Cal. App. 5th 1178, 1183 (2016) (citation and alterations omitted). As a threshold matter, UC does not contest—and its experts affirm—that the discriminatory denial of accommodations and lack of accessible test sites harm students with disabilities like Plaintiffs and their members.[12] UC's characterization of Plaintiffs' "theory of harm" ignores the fundamental harm underlying its false "test-optional" process: submitting a score is simply not an option for significant numbers of students with disabilities.

Instead of addressing the harm that results from this categorical denial of access, UC attacks as "conjectural" what it characterizes as Plaintiffs' "core factual premise": that students who cannot take the SAT/ACT "will be at a competitive disadvantage relative to those" who submit scores. Opp'n 8. But as UC's own declarants demonstrate, at every campus that considers test scores, students with disabilities who are foreclosed from obtaining them will be deprived of

particularly susceptible to serious illness from coronavirus, obtaining a test score—even forgoing accommodations—requires risking their lives. Mishori Decl. ¶¶ 26–30, 33. And for students of color and students from low-income families, who are more likely to have family members vulnerable to COVID-19, securing a test score requires exposing their loved ones to heightened risk. *Id.* ¶¶ 29–32. Although UC dismisses the experiences of these students as irrelevant, they are not: the students with disabilities harmed by UC's false "test-optional" policy include students of color and students from low-income families, and these students and other members of Plaintiff organizations are irreparably injured by UC's insistence on retaining tests that the Regents and UC's own experts admit are discriminatory. *Infra* n.13; Mot. 30–32. UC has no answer to the immense psychological and stigmatic harm inflicted upon students of color and students from low-income families by the Regents' deliberate decision to preserve the test scores' advantage for affluent white students. *Compare* Mot. 30–32 *with* Opp'n 17–19, 29–32 (silent).

C. Neither UC nor the public has an interest in UC's continued discrimination.

UC's own actions belie its claim that requiring all campuses to cease considering admittedly discriminatory SAT/ACT scores will result in any meaningful injury. If that were the case, the Regents would not have voted to permanently eliminate consideration of SAT and ACT scores for California applicants in future admissions cycles, and individual campuses would not have chosen to go "test-blind" now. Opp'n 1, 10. Because neither UC nor its campuses will be harmed if ordered to stop discriminating, UC—like universities during the desegregation era—falls back on academic deference arguments. UC asserts that one of its "essential freedoms" is to determine, "*on academic grounds* . . . who may be admitted to study." Opp'n 29 (emphasis added) (citing *Ass'n of Christian Schs. Int'l v. Stearns*, 362 F. App'x 640, 643 (9th Cir. 2010)). But as UC's own experts recognize, there *are* no "academic grounds" for using discriminatory SAT and ACT scores.[13] Whereas the court in *Stearns* deferred to UC's review of "high school courses to

[13] Syverson Decl. ¶ 30 ("Our research and earlier research" belies "the perspective that reasonable admissions decisions are so dependent upon . . . an SAT/ ACT score, that in their absence, we will need another datapoint to have the information necessary to make good decisions."); Steven T. Syverson, Valerie W. Franks, & William C. Hiss, *Defining Access: How Test-Optional Works* 6, 38 (2018) (test scores "routinely fail to pass standard tests of statistical significance when included

ensure that they adequately prepare incoming students for the rigors of academic study at UC," 362 F. App'x at 643, here, UC's leaders have affirmed that—in addition to being "racist" and "correlated to wealth and privilege," Mot. 8—"[t]he ACT and SAT tests are not clearly linked" "to the curriculum that shapes student readiness." Lavetter Decl., Ex. G, p. 8.

Why, then, has UC chosen to retain the tests? Its experts again provide the answer: "In spite of the evidence disputing their value and equitable use, the assumed need for the SAT and ACT in the admission process is firmly entrenched in the minds . . . of many college personnel," such that efforts to eliminate them "meet with substantial resistance." Syverson Decl. ¶ 16. But the "firmly ingrained" and incorrect "assumptions" of "various college constituencies" are not grounds for deference. *Id.* ¶¶ 16, 29 (emphasis in original). If they were, UC could justify ever more protracted timelines for redressing discrimination in direct relation to the virulence of its constituencies' discriminatory beliefs, and thereby deny yet two more cohorts of students equal treatment of the laws. But faculty recalcitrance is not superior to the rights of tens of thousands of students to nondiscrimination in the admissions processes upon which their futures depend. Such deference is neither in UC's interest nor that of the public,[14] *see* Opp'n 30, particularly given UC's admission that the tests discriminate, because it undermines the State's "compelling interest in making sure that people from all backgrounds perceive that access to the University is possible for talented students, staff, and faculty from all groups." Shaw Decl., Ex. H (Regents Policy 4400).

IV. Conclusion

For the foregoing reasons, Plaintiffs request that this Court grant the preliminary injunction.

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with high school GPA in regressions predicting graduation rates" and "calcify differences based on class, race/ethnicity, and parental educational attainment") (citations omitted).

[14] UC's unsupported assertion that a preliminary injunction would harm current applicants ignores that—contrary to its expert's recommendation that UC "immediately launch[] an aggressive campaign to outline their new policy to the public," Syverson Decl. ¶ 36 (emphasis in original)—UC's Opposition and supporting declarations are presently the clearest articulation of how so-called "test-optional" will be implemented this admissions cycle. Most UC campuses have not finalized their admissions and scholarship policies; some will not even finalize them until at least November 2020. Engelschall Decl. ¶ 20; Brumfield Decl. ¶ 10. Requiring all UC campuses to stop using discriminatory SAT and ACT scores will thus provide much-needed assurance and clarity.

DATED: August 13, 2020

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PROOF OF SERVICE

Smith v. The Regents of the University of California
Case No. RG19046222

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 800 West Sixth Street, 18th Floor, Los Angeles, CA 90017-2701.

On August 13, 2020, I served true copies of the following document(s) described as **PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address lwahjudi@scheperkim.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 13, 2020, at Los Angeles, California.

/s/ Lue Wahjudi
Lue Wahjudi

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Case No. RG19046222

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