Editor's Note:

This pleading was drafted in 2020 as a Motion to Dismiss a Petition based on a Due Process violation using the ADA and the DC Human Rights statute to clarify and give context to the nature of the violation. The attorneys chose to introduce the claim as a Due Process violation instead of a direct ADA violation because ADA challenges generally provide civil remedies. At the time, very few courts had contemplated a remedy within a criminal case for an ADA violation. Now there are more cases that at least entertain the idea, either in dicta or in the court's primary rationale, of a remedy in the criminal case. As a result, this motion might now be framed directly as a Motion to Dismiss a Petition as a remedy for an ADA and DC Human Rights Act violation, with the Due Process violation included as an alternative legal grounds.

MOTION TO DISMISS

Respondent [redacted] through undersigned counsel, respectfully moves this Honorable Court to dismiss the above captioned case as the instant prosecution violates [redacted]s rights under the Due Process Clause of the Fifth Amendment to the U.S. Constitution. In support of this motion, undersigned counsel states the following on information and belief:

1. [redacted] is fifteen years old. In the last decade, [redacted] has been enrolled in at least eight different schools. Most recently, [redacted] was placed in a special education program at [redacted] School in Virginia, which is a level five institution that caters to youth with emotional and learning disabilities.

2. In February 2019, [redacted] was administered a psychoeducational by the Child Guidance Clinic. To assess [redacted]s cognitive function ability, the *Wechsler Intelligence Scale for Children-Fifth Edition* was used. This test produced six different indexes that reported on [redacted]s intellectual ability and cognitive strengths and weaknesses. Overall, the test showed that [redacted]s cognitive ability was in the borderline range. Also, the test's administrator, [redacted], stated that the score was "mostly pulled down by his low verbal comprehension." Confidential Psychoeducational Evaluation at 9.

3. In verbal comprehension, [redacted] scored in the seventh percentile. This score came from two different tests. The first was a vocabulary test, which [redacted] scored in the low average

range. The second test was designed to measure if a child could tell whether two words were similar. In the second test, [redacted] scored in the borderline range. Overall, [redacted]s verbal comprehension index score was also in the borderline range.

4. As part of the psychoeducational evaluation, Mr. [redacted] also interviewed Ms. [redacted]s mom. During the interview, Ms. [redacted] said that her concern, among other things, was [redacted]s emotional self-control. Confidential Psychoeducational Evaluation at 12. Ms. [redacted] thought that [redacted] was "running on all cylinders at all times," that he did "not have any coping skills in order to help himself," and that he was "constantly on edge and ready to 'blow up' at any time." Confidential Psychoeducational Evaluation at 12. Given this, and the results of [redacted]s evaluation, Mr. [redacted] diagnosed [redacted] with Intermittent Explosive Disorder (IED), Attention Deficit Hyperactive Disorder ("ADHD"), Academic or Educational Problems, and he could not rule out Post Traumatic Stress Disorder ("PTSD"). To assist [redacted] with controlling the effects of these disabilities, [redacted] was prescribed Clonidine.[1] Both the defense and the Government were made aware of [redacted]s disabilities by this evaluation.

5. On October 3, 2019, Judge Seoane-Lopez ordered [redacted] to a shelter house in [redacted]. DYRS placed [redacted] at REACH, where he stayed for two weeks while awaiting a school placement and getting reconnected to a core services agency. [redacted] was soon enrolled in [redacted]k Academy, connected to [redacted], and released by the Court to his mother on October 17, 2019.

6. On January 17, 2020, [redacted] was ordered by this Court to be stepped back to a shelter house in [redacted]3. A Medical Alert was attached to that order, and it noted that

[1] Clonidine is used to treat hypertension (high blood pressure) and attention deficit hyperactivity disorder (ADHD).

[redacted] was prescribed Clonidine. The next day, [redacted] was placed at the Sasha Bruce Residential Empowerment Adolescent Community Home ("REACH"). REACH touts itself as "a community based residential facility for committed and detained youths" that "provides... a highly structured, service-enriched, homelike environment as an alternative to institutionalization." https://www.sashabruce.org/programs/safehomes/reach/.

7. On its face, REACH seemed like a good fit for [redacted] has emotional and learning disabilities, and REACH was designed to provide children with a "service enriched" environment. Moreover, staff at REACH were familiar with the Child and Adolescent Mobile Psychiatric Service ("CHAMPS"). CHAMPS is often used in D.C. for "children experiencing an emotional or mental health crisis" and it "[p]rovides in-home assistance when appropriate," or it can "arrange temporary placement in a respite home or other emergency setting as needed." https://washington.dc.networkofcare.org. So, when a child at REACH is in crisis, REACH staff know that they can contact CHAMPS to help deescalate the situation.

8. On January 19, 2020, around 1:55 in the morning, three officers responded to REACH. Ms. [redacted], a REACH employee, had called them. She had originally called them, because [redacted] told her that he wanted to go back to YSC after she refused to let him get a drink of water. When the officers arrived, Ms. [redacted] greeted them at the door, told them that [redacted] had mental health issues, and that he had threatened her. No one called CHAMPS, even though [redacted], another REACH employee on duty at the time, had thought CHAMPS might have been a viable option and recommended CHAMPS to the police officers who arrived at the scene.

9. The officers arrested [redacted] for misdemeanor threats. The next day, Martin Luther King Day, the Government charged [redacted] with misdemeanor threats.

10. When the Government arrested and charged [redacted] the Government knew, or should have known, of [redacted]s borderline cognitive functioning, his borderline verbal comprehension, and his disabilities related to his behavioral health diagnosis.

11. Additionally, the Government knew, or should have known, that the alleged offense was a manifestation of [redacted]s emotional and learning disabilities.

12. The Government also failed to accommodate [redacted]s emotional and learning disabilities in any way when it arrested and charged [redacted] with misdemeanor threats.

13. Finally, there were no exigent circumstances relating to public safety that support the Government's failure to accommodate [redacted]s emotional and learning disabilities.

14. As a result, the Government violated [redacted]s Due Process rights by charging him with misdemeanor threats.

WHEREFORE, for the reasons contained herein and any others that may appear to the Court, respondent [redacted] respectfully requests that the Court grant this Motion to Dismiss.

Respectfully submitted,

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FAMILY COURT OF THE DISTRICT OF COLUMBIA
JUVENILE BRANCH

IN THE MATTER OF : [redacted]
:

[redacted] , : **Judge** [redacted]
: **Trial Date: Feb. 20, 2020**
RESPONDENT :
:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF [redacted] 'S MOTION TO DISMISS

The Supreme Court has held, that Congress has "broad power" to enforce the "substantive guarantees" of the Due Process and Equal Protection Clauses, by enacting "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Tennessee v. Lane*, 541 U.S. 509, 519 (2004) (quoting *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 727–28 (2003). This power extends to "legislation proscribing practices that are discriminatory in effect." *Id*. at 520. One such piece of legislation is Title II of the Americans with Disabilities Act ("Title II"). 42 U.S.C.A. § 12132 (West); *id*. at 533–534; *see also* DC Human Rights Act, D.C. Code Ann. § 2-1401.01 *et. seq.* (West) (prohibiting discrimination against individuals with disabilities and recognizing that "every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life...").

Title II prohibits discrimination of individuals with disabilities by protecting a "variety of... basic constitutional guarantees." *Lane,* 541 U.S. at 522. These guarantees include those "protected by the Due Process Clause." *Id*. at 523, 533–34 (holding Title II "applies to the class of cases implicating the fundamental [Due Process Clause guarantee] of access to the courts). Thus, in certain circumstances, when a state violates Title II, it violates a disabled individual's fundamental guarantee of due process. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*,

489 U.S. 189, 195 (1989) (finding Due Process Clause is "phrased as a limitation on the State's power to act").

By charging [redacted] with an offense that is a manifestation of his emotional and learning disabilities—disabilities protected by Title II and the DC Human Rights Act—the Government violated [redacted]s right to Due Process under the Fifth Amendment of the Constitution. *See generally DeShaney*, 489 U.S. at 196 (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)) (finding substantive due process guaranteed by the Fifth Amendment is "intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression'"). Accordingly, this case should be dismissed.

A. The Government's decision to charge [redacted] with misdemeanor threats violates his Due Process rights.

It has long been established "in Biblical, Greek, Roman, Continental and Anglo-American law," that an "injury can amount to a crime only when inflicted by intention." *Morissette v. U.S.*, 342 U.S. 246, 250 n.4 (1952); *cf*. *Rhode Island v. Innis*, 446 U.S. 291, 297–301 (1980) (finding the Fifth Amendment recognizes a lack of intent where the government acts in a coercive way that overbears an individual's free will); *see also* Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 Yale L.J. 2746, 2788 (2015) (quoting Timothy Cunningham, *A New and Complete Law-Dictionary, Or General Abridgment of the Law, On a more Extensive Plan than any Law-Dictionary Hitherto Published*, 2 vols. (2d ed. 1771; 3d ed. 1783)) (stating "[i]t is laid down as a general rule, that ideots..., being by reason of their natural disabilities incapable of judging between good and evil, are punishable by no

criminal prosecution whatsoever").[2] This principle is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.* at 251 n.8. (noting "[a]bsence of intent also involves such considerations as lack of understanding because of... subnormal mentality... infancy, [or] lack of volition due to some actual compulsion"). Consequently, the Government violates the Due Process Clause of the Constitution when it prosecutes an individual for an alleged offense that it knows or should have known was the result of a disability that compelled the underlying offense, and where the Government itself failed to reasonably accommodate that disability. *Cf. Gorbey v. U.S.*, 54 A.3d 668, 678 (D.C. App. 2012) (quoting *Medina v. California*, 505 U.S. 437, 439 (1992)) (reaffirming "[d]ue process 'prohibits the criminal prosecution of a defendant who is not competent to stand trial'"). Indeed, finding otherwise would put the Government above the law.

For instance, recognizing that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion...overprotective rules and policies... [and] segregation," Congress adopted Title II. 42 U.S.C.A. § 12101(a)(5) (West); *Lane*, 541 U.S. at 510 (finding Title II enacted against a "backdrop of pervasive unequal treatment of persons with disabilities in the administration of state services and programs, including systematic deprivations of fundamental rights"). Under Title II, "no qualified individual with a disability shall... be subjected to discrimination by any [public] entity," due to such disability. 42 U.S.C.A. § 12132 (West); *see also* D.C. Code Ann. § 2-1402.31 (West).

[2] Justice Scalia recommended Timothy Cunningham's 1771 law-dictionary in *A Note on the Use of Dictionaries,* 16 Green Bag 2D 419, 424 (2013) and cited it in his opinion *D.C. v. Heller*, 554 U.S. 570 (2008). Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 Marq. L. Rev. 77, 114 (2010).

Importantly, the public entity does not have to receive federal funds to fall under Title II's broad reach. 42 U.S.C.A. § 12131(1)(A)(B) (West) (stating "public entity" means "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government"). Thus, all three branches of D.C.'s government—executive, judicial, and legislative—are covered by the Title II, along with all their activities, "even if [those activities] are carried out by contractors." 28 C.F.R. § Pt. 35, App. B; *see also United States v. Georgia*, 546 U.S. 151, 159 (2006) (holding Title II creates a private cause of action for damages against the States under the Fourteenth Amendment).

Moreover, in recognizing Title II's extensive scope, several circuit courts have held that Title II also applies to the arrest stage of the criminal legal system. *See generally Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211 (9th Cir. 2014); *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999); *Waller ex rel. Estate of Hunt v. Danville, VA*, 556 F.3d 171 (4th Cir. 2009). Furthermore, under Exec. Order No. 13217(c), Title II stands for the principle that "[u]njustified isolation or segregation of qualified individuals with disabilities through institutionalization is a form of disability-based discrimination prohibited by Title II." 66 FR 33155, Exec. Order No. 13217(c), 2001 WL 34773715. As such, Due Process Clause protections apply prophylactically to disabled persons as defined by Title II to prosecutions. *Cf. Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

To determine whether the prosecution of a child with disabilities violates due process and requires dismissal,[3] the Court should examine the following four elements: (1) the government knows that the child has a disability; (2) the alleged offense is a manifestation of the disability; (3) the government failed to provide the child with reasonable accommodations relating to the

[3] As a matter of first impression, no test exists to guide the Court's analysis in this matter.

disability short of arrest and prosecution; and (4) no exigent circumstances pertaining to public safety exist. Because these factors are satisfied in this case, [redacted]s charge should be dismissed. *Cf. Lewis v. Truitt*, 960 F. Supp. 175, 178 (S.D. Ind. 1997) (finding "[c]ourts have held that a plaintiff may recover under the ADA where he can show that (1) he was disabled, (2) the defendants knew, or should have known, he was disabled, and (3) the defendants arrested him because of legal conduct related to his disability").

1. The Government knows that [redacted] has emotional and learning disabilities that substantially limit a major life activity.

To ensure inclusivity, Title II provides "[b]road coverage" to those suffering from a disability. 28 C.F.R. § 35.101 (stating disability under Title II "shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA"). An individual qualifies as disabled, if that individual's disability "substantially limits... one or more major life activities." *See, e.g.*, *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521–22 (1999); *see also* DC Human Rights Act, D.C. Code Ann. § 2-1401.02(5A) (defining disability as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual having a record of such an impairment or being regarded as having such an impairment").

[redacted] has officially been diagnosed with Intermittent Explosive Disorder and Attention Deficit Hyperactive Disorder. Additionally, Post-Traumatic Stress Disorder could not be ruled out. Compounding the problem is [redacted]s poor verbal comprehension index score. *Cf. E.E.O.C. v. Dollar Gen. Corp.*, 252 F. Supp. 2d 277, 284 (M.D.N.C. 2003) (finding plaintiff had a disability and was "substantially limited in major life activities, including [among other things] communicating and thinking"). Because of these conditions, [redacted] has been transfered from one school to another, eight in all, to find a program that will allow him to excel. *Olson v. Dubuque*

Cmty. Sch. Dist., 137 F.3d 609, 612 (8th Cir. 1998) (noting a disability substantially limits major life activities if it causes "consistently high levels of hostility, social withdrawal, or failure to communicate when necessary"); *Karlik v. Colvin*, 15 F. Supp. 3d 700, 708 (E.D. Mich. 2014) (finding "extreme dyslexia and ADHD" had "substantially limit[ed] the major life activities of reading, learning, and concentrating"). It is clear, therefore, that [redacted]s disabilities significantly impact his ability to, *inter alia*, attend school, which is a major life activity, particularly in the life of a 15-year-old boy.

Critically, the government was aware, or should have been aware, of [redacted]s disabilities before they brought a charge of misdemeanor threats against him. First, [redacted]s disabilities are documented in the February 2019, psychoeducational report administered by the Child Guidance Clinic, that, upon information and belief, is in the Government's possession. And second, since October of 2019, defense counsel has repeatedly made oral representations in court documenting [redacted]s need for medication and rehabilitative services. Moreover, when [redacted] pleaded guilty in 19-[redacted]1173, he agreed not to challenge commitment to DYRS, in large part, because of the Government's position that he needed intensive services. Thus, the Government knew, before charging [redacted] in the instant case, that he had emotional and learning disabilities.

2. The offense here is a direct manifestation of [redacted]s emotional and learning disabilities.

Courts have held that if a plaintiff is unjustly arrested because of his disability, he can recover damages under Title II. *See, e.g.*, *Jackson v. Inhabitants of Town of Sanford*, No. CIV. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (finding "[t]he legislative history of the ADA demonstrates that Congress was concerned with unjustified arrests of disabled persons"). Consequently, plaintiffs can recover under Title II when an arresting officer knows, or should know, that the offense is a manifestation of an individual's disability. *See Sacchetti v.*

Gallaudet Univ., 344 F. Supp. 3d 233, 270 ([redacted]C. 2018) (finding "[t]o establish a claim for wrongful arrest under the ADA, the plaintiffs must show that the MPD officers [arrested them] because of legal conduct related to his disability"); *Lewis v. Truitt*, 960 F. Supp. 175, 178–79 (S.D. Ind. 1997) (holding officers unjustly arrested the plaintiff when they knew he was "deaf but refused to take steps to communicate with him and then arrested him because he did not respond to them appropriately"); *cf.* 20 U.S.C.A. § 1415(k)(1)(F)(iii) (West) (stating procedural safeguards under Individuals with Disabilities Educational Act ("IDEA"), if a child is removed from a placement because of certain conduct, and that conduct was a manifestation of his disability, then schools are required to "return [a] child to the placement from which the child was removed," unless special circumstances exist).[4] Collectively, these statutes and cases stand for the proposition that individuals with disabilities can be protected from state action when the offense is a manifestation of their disability.

When this Court stepped [redacted] back to a shelter house, it recognized that shelter houses, in theory, have staff who are trained to constructively communicate with juveniles, and who are given tools, like training and CHAMPS, to help deescalate situations when necessary. As [redacted]s mother noted in the 2019 psychoeducational: [redacted] "does not have any coping skills in order to help himself." Common sense, then, suggests that [redacted]s inability to cope with stressors, combined with his poor verbal comprehension, and immaturity, can create a situation that leaves [redacted] exasperated and unable to find the right words to use to express himself when he is in crisis. Thus, the offense [redacted] is accused of—misdemeanor threats—is a direct manifestation of his disabilities.

[4] Special circumstances include the child possessing a weapon in school, selling or possessing narcotics, or the child "inflicting serious bodily injury upon another person." 20 U.S.C.A. § 1415(k)(1)(G)(i-iii) (West).

3. The Government failed in its duties to provide reasonable rehabilitative services for [redacted]s known emotional and learning disabilities.

Under § 16-2301.02 (7), a purpose of the juvenile system is to "hold the government accountable for providing reasonable rehabilitative services." In establishing this purpose, D.C. has taken a progressive stance toward youth rehabilitation, by setting an affirmative duty upon its Government to take part in the "goal of creating productive citizens" out of D.C.'s youths. § 16-2301.02(2). Thus, D.C. has gone beyond the floor mandated by the Fifth Amendment's Due Process Clause in taking care of its detained youths, and has placed upon itself the responsibility of ensuring that youth in its care have reasonable rehabilitate services. *See DeShaney*, 489 U.S. at 200 (holding when a state "restrains an individual's liberty that it renders him unable to care for himself... [and] fails to provide for his basic human needs... it transgresses the substantive limits on state action set by... the Due Process Clause").

To fulfill its statutorily required duty to place youth in the least restrictive setting necessary to achieve the purposes of the juvenile legal system, the Government will request and the court will order that a youth be detained in a shelter house. By law, the shelter house should be equipped to provide a child with reasonable rehabilitative services, and must also accommodate the child's disabilities under Title II and the D.C. Human Rights Act. *See Murphy*, 527 U.S. at 521–220; D.C. Code Ann. § 2-1402.73 (stating "it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived: race, color, religion, national origin, sex, age, 28 marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or

business"). For example, when the Government knows a child has a disability recognized by Title II and/or the D.C. Human Rights Act, the shelter house should be notified about it. Furthermore, the shelter house should provide the child with his prescribed medication. Finally, the shelter house should use services like CHAMPS when a child is in crisis. Unfortunately, these reasonable rehabilitative services and accommodations were not used here, and despite this, Government chose to charge [redacted] with misdemeanor threats.

Both Ms. [redacted] and Ms. [redacted] were aware that [redacted] had "mental issues," and knew, or should have known, about [redacted]s particular emotional and learning disabilities. Likewise, [redacted] was not given his required medication at the proscribed intervals, by either YSC or REACH. Finally, instead of listening to Ms. [redacted], and calling CHAMPS, the officers never having heard of the program, instead arrested [redacted]

Hence, with full knowledge of [redacted]s emotional and learning disabilities, the Government knew, or should have known, that [redacted] had not received reasonable rehabilitative services or accommodations at REACH before they decided to charge him with an offense that was a direct manifestation of his disabilities. Thus, to allow this criminal prosecution to proceed would signal to the Government that it will not be held accountable for failing to provide a child in its care reasonable rehabilitative services or accommodations, which would undercut the purpose of D.C.'s juvenile legal system, Title II, and its own Human Rights Act.

4. No exigent circumstances pertaining to public safety required the Government to arrest and prosecute [redacted]

The government cannot show that exigent circumstances existed that required it to charge [redacted] with misdemeanor threats. *Cf. Sheehan*, 743 F.3d at 1222–23; *Graham v. Connor*, 490 U.S. 386, 396 (1989) (noting under the Fourth Amendment, whether the force required to seize an individual is reasonable depends on whether there was an "immediate threat to the safety of

the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"). First, [redacted] was already detained, so there was no reason to charge him with an offense that would ensure he was removed from the community. Second, [redacted] had already plead guilty in a previous case and had agreed not to challenge commitment to DYRS at disposition. Third, while not bearing directly on the decision to charge [redacted] it is important to note that when officers arrived at REACH [redacted] did not pose a threat to public safety. Instead, he was calm and in his room. Likewise, when officers told [redacted] that he was under arrest, he did not resist. Instead, he calmly put his hands behind his back and did as the officers ordered. Thus, exigent circumstances were not present, and the exception for charging [redacted] despite his emotional and learning disabilities does not apply.

Conclusion

Thus, Government's decision to charge [redacted] for committing this offense violated his constitutionally protected due process rights because the Government was aware of [redacted] s emotional and learning disabilities, the offense was a direct manifestation of [redacted] s disabilities, the Government failed to provide [redacted] with reasonable rehabilitation services, and no exigent circumstances exist that would allow the Government to prosecute [redacted] despite his emotional and learning disabilities. Thus, this case should be dismissed.

WHEREFORE, for the reasons contained herein and any others that may appear to the Court, respondent [redacted] respectfully requests that the Court grant this Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of this Motion to Dismiss was electronically filed to the Office of the Attorney General, Attn. Julia Rupert, Assistant Attorney General, 441 4th Street, N.W., Fourth Floor, Washington, D.C. 20001 on the 10th day of February 2020.

Michael Bongiorno

FAMILY COURT OF THE DISTRICT OF COLUMBIA
JUVENILE BRANCH

IN THE MATTER OF	:	[redacted]
[redacted] ,	:	**Judge** [redacted]
	:	**Trial Date: Feb. 20, 2020**
RESPONDENT	:	
	:	

ORDER

Upon consideration of the Respondent [redacted] 's Motion to Dismiss, it is this _____ day of _____, 2020, hereby:

ORDERED that Respondent's Motion is **GRANTED**;

IT IS SO ORDERED.

_____
Honorable Peter A. [redacted]

Copy to:

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