UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO: 09-2144

MARYJO MILLER, individually and on behalf of her minor daughter, MARISA MILLER; JAMI DAY, individually and on behalf of her minor daughter, GRACE KELLY; JANE DOE, individually and on behalf of her minor daughter, NANCY DOE, Appellees

vs.

GEORGE SKUMANICK, Jr., in his official capacity as District Attorney of Wyoming County, Pennsylvania, Appellant

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ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED MARCH 30, 2009 IN CIVIL ACTION 3:09-CV-00540

BRIEF OF APPELLANT, GEORGE SKUMANICK, JR. AND VOLUME I OF THE APPENDIX

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I. Jurisdictional Statement:

Appellant, George Skumanick, Jr., in his official capacity as District Attorney of Wyoming County, pursuant to 28 U.S.C. 1292(a)(1), has taken an appeal from the Order of The United States District Court of the Middle District of Pennsylvania dated March 30, 2009, which granted a Preliminary Injunction to the Appellants in the above captioned case, enjoining Appellant Skumanick from initiating or continuing any prosecution of the Appellees under the Pennsylvania Juvenile Act.

The Order of the Lower Court is labeled as the granting of a Temporary Restraining Order. However, the effective time limit of the Order is indefinite in nature and the decision was based upon an evidentiary hearing in which the Lower Court decided the case after an evidentiary hearing. Under these circumstances, the Order is considered a Preliminary Injunction and an Interlocutory Appeal is permitted. *See*, Page v. Bartels, 248 F. 3d 175, 185-186 (3d Cir. 2001) and In re Arthur Treacher's Franchise Litigation, 689 F. 2d 1150, 1153-1154 (3d. Cir. 1982). The Notice of Appeal was timely filed on April 16, 2009.

The Clerk's Office required the parties to submit authorities as to why the appeal should not be submitted for dismissal on jurisdictional grounds. Both Appellant and Appellees filed responses asserting that the Order of the Lower Court was properly appealable.

II. Issues Presented For Review:

1. Did the Lower Court err in granting a Preliminary Injunction prohibiting any criminal prosecution against Appellees at a time when District Attorney Skumanick had initiated the criminal process against the sixteen (16) minors involved through an informal adjustment?

(Suggested Answer: In the Affirmative.)

2. Did the Lower Court err in holding that the District Attorney had violated Appellee's first amendment rights by requiring that Appellee, as a condition to the dismissal of criminal charges, write an essay indicating that she understood that it was wrong to pose partially naked for photographs?

(Suggested Answer: In the Affirmative.)

III. Statement of the Case:

This matter is before the Court on the appeal of George Skumanick, Jr., in his official capacity as the District Attorney of Wyoming County. The appeal is taken from the Memorandum and Order of the United States District Court for the Middle District of Pennsylvania by Judge James Munley dated March 30, 2009.

The facts of the case will be set forth in more detail in the Statement of Facts, below. The action grew out of the District Attorney's response to the practice of "sexting" at the Tunkhannock Junior and Senior High School in which female students engaged in the practice of sending or posting sexually suggestive text messages and images including nude or semi-nude photographs via cellular telephone over the internet. The practice was reported to the District Attorney after school district officials confiscated several students' cell phones and discovered photographs of "scantily clad, semi-nude and nude teenage girls". (Comp. para. 12).

District Attorney Skumanick made the prosecutorial decision to handle the matter through an "informal adjustment" under 42 Pa.C.S.A. 6323. Under the program proposed by the District Attorney, the thirteen (13) girls and three (3) boys would be required to attend a course focused on education and counseling. Letters proposing the adjustment were sent to the thirteen (13) girls, three (3) boys who were involved in the dissemination, as well as their parents. Ten (10) of the girls and the three (3) boys accepted the informal adjustment program. The remaining three (3)

girls, Appellees herein, brought suit against District Attorney Skumanick under 52 U.S.C.A. 1983 suggesting the proposal violated their constitutional rights.

The Lower Court conducted a hearing and determined that injunctive relief was warranted and handed down an Order enjoining District Attorney Skumanick from initiating criminal prosecution of any kind against the three (3) Plaintiffs until further Order of Court.

The Memorandum and Order of the Court was labeled a Temporary Restraining Order. However, under the holdings of this Court, In re Arthur Treachers' Franchise Litigation, 689 F. 2d. 1150, 1153-1154 (3d Cir. 1982), District Attorney Skumanick took the position that the Order was in fact a Preliminary Injunction and filed a Notice of Appeal. The Clerk's Office made a jurisdictional inquiry and both parties replied asserting the position that the Lower Court's Order granted a Preliminary Injunction from which an immediate appeal could be taken.

Two (2) of the Appellees, Marisa Miller and Grace Kelly, appeared in the photos clad in bras. After a full review of the factual circumstances of the case, District Attorney Skumanick has determined that he will bring no criminal charges against Appellees, Miller and Kelly. Those factual circumstances included the evidence which was put forward at the hearing before the Lower Court. Such evidence was in the possession of Appellees' counsel prior to the hearing and was not presented to the District Attorney. The claims of Miller and Kelly are therefore moot.

This Brief will relate only to the Preliminary Injunction granted enjoining any prosecution of Nancy Doe.

Nancy Doe was photographed wrapped in a towel with her bare breasts exposed. Nancy Doe did not appear at the hearing before the Lower Court. The evidentiary record contains no denial that Nancy Doe was involved in posing for and disseminating the photographs to her schoolmates at the Tunkhannock Junior and Senior High School.

IV. Statement of the Facts Relative to the Issues Presented:

District Attorney, Skumanick, after review of the evidence, including the provocative nude and semi-nude photographs of the thirteen (13) teenage girls, determined that there was probable cause for prosecution under Pennsylvania Statutes for possessing and distributing child pornography, 18 Pa.C.S.A. 6312 or criminal use of a communication facility 18 Pa.C.S.A. 7512.

District Attorney Skumanick sent letters to the parents of the Tunkhannock students involved, including the adult Appellees in this case. The letter, inter alia, informed the parents that their children had been identified in a police investigation involving the possession and/or dissemination of child pornography. (Comp. para. 20(a)). The letter also promised that the charges would be dropped if the child successfully completed a six (6) to nine (9) month program focused on education and counseling. The letter concluded that the course presented the children an opportunity to have the charges dropped but that "Charges will be filed against those that do not participate or those who do not successfully complete the program."

The program which was proposed was an informal adjudication in accordance with 42 Pa.C.S.A. 6323. Thirteen (13) of the sixteen (16) families agreed with the program and signed up for the course. The remaining three (3) proceeded to bring this lawsuit.

The Order of the Lower Court has the effect of interfering with the County Prosecutor's function of attempting to resolve the situation by informal adjustment or, absent that, bringing a Petition for Delinquency based on the violation of any criminal statute. It also displaces the Court of Common Pleas of Wyoming County with the Federal District Court as the judicial body to adjudicate juvenile cases in Tunkhannock, Pennsylvania.

V. Summary of Argument:

The Order of the Lower Court, granting a Preliminary Injunction, prohibiting District Attorney Skumanick from proceeding from going forward with his ongoing juvenile proceeding, represented an unwarranted and illegal intrusion into the juvenile justice system of Wyoming County. District Attorney Skumanick was faced with the situation where provocative photographs of nude and semi-nude adolescent girls were being transmitted through the internet to members of the student body at Tunkhannock Junior and Senior High School. In his prosecutorial discretion, he was attempting to address the situation with an informal adjustment under which the girls and boys who had participated in the creation and dissemination of the photographs could attend a rehabilitative class where they could be educated to understand that such actions were illegal, inappropriate and extremely dangerous.

The Federal Courts, including our Supreme Court, who had faced this issue, have universally held that Federal Court should be extremely hesitant and deferential in intervening in prosecutorial discretion in the criminal courts of the states. This is particularly the case when the target of the injunctive action is an ongoing criminal investigation. Under those circumstances, the Courts have held that the Federal Court should not interfere by the issuance of injunction "unless bad faith enforcement or other special circumstances are demonstrated".

The Lower Court disregards this standard in its entirety, erroneously holding that no criminal proceeding had been initiated at the time the Injunction was issued. In fact, the record shows that a criminal proceeding had been initiated under 42 Pa.C.S.A. 6323 in the form of an informal adjustment. That is a proceeding aimed at the rehabilitation of juveniles prior to the filing of any Petition for Delinquency. The record shows that the proceeding had been initiated and, at least with regard to thirteen (13) of the sixteen (16) potential Defendants, was on the verge of being finalized. Based on the standards of federalism, judicial restraint and comity, the Lower Court should not have interfered with the ongoing juvenile proceedings in Wyoming County Court.

Assuming for the purpose of argument that the standards relating to an ongoing juvenile proceeding did not apply, the Lower Court should not have intervened with a Preliminary Injunction because the Appellee was not subject to irreparable injury. Assuming that District Attorney Skumanick would have gone forward with a Petition for Delinquency, Ms. Doe would have had the right to counsel, would have had the right to require the District Attorney's Office to meet the burden of proof that she was delinquent and, would have had the benefit of review by the Wyoming County Court of Common Pleas and the Appellate Courts of Pennsylvania. The proceedings would have been closed and would not have injured her reputation with adverse publicity.

Her constitutional rights would have been protected and vindicated by the process. There was simply no basis for injunctive relief.

Finally, the basis of the Lower Court's opinion is that District Attorney Skumanick violated Ms. Doe's rights to be free from compelled speech because she would have been required to write an essay stating that she understood that disseminating pictures of herself bare-breasted through the internet was wrong. The requirement was part of a Pre-Petition diversionary process designed to avoid criminal charges from ever being filed. She was not compelled to write any essay. She could have refused to attend the class or write any essay and merely defended herself against the Juvenile Petition which may or may not have been forthcoming.

VI. Argument:

1. The Lower Court erred in granting a Preliminary Injunction prohibiting any criminal prosecution against Appellees at a time when District Attorney Skumanick had initiated the criminal process against the sixteen (16) minors involved through an informal adjustment.

A. **Standard of Review** - In 28 U.S.C. §1292(a)(1) provides the Third Circuit Court of Appeals with appellate jurisdiction to entertain Interlocutory Appeals that grant, deny, or modify injunctions. The Court reviews the grant or denial of a Preliminary Injunction for abuse of discretion. Questions of law are reviewed de novo, while questions of fact are reviewed for clear error. Adams v. Freedom Forge Corp., 204 D. 3d 475, 484 (3d Cir. 2000) (*citing* Frank Russell Co. v. Wellington Mgmt. Co., 154 F.3d 97, 101 (3d Cir. 1998)).

B. GENERAL PROVISIONS TO PRELIMINARY INJUNCTIONS:

Preliminary Injunctive relief is extraordinary in nature and should issue in only limited circumstances. *See*, American Tel. and Tel. Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1426-27 (3d Cir. 1994), cert. denied, 514 U.S. 1103, 115 S.Ct. 1838, 131 L. Ed. 2d 757 (1995). A District Court may permissibly grant the "extraordinary remedy" of a temporary restraining order only if: (1) the Plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the Plaintiff; (3) granting the injunction will not result in irreparable harm to the

Defendant; and (4) granting the injunction is in the public interest. P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC., 428 F.3d 504, 508 (3d Cir. 2005). The moving party must produce evidence sufficient to convince the Court that all four (4) factors favor injunctive relief, and the Court must endeavor to balance all four (4) factors. United States v. Bell, 238 F. Supp. 2d 696, 699 (M.D.Pa. 2003).

Although the moving party must prove all four (4) factors, Courts have indicated that the most important prerequisites for the issuance of a Preliminary Injunction is likelihood of success n the merits and irreparable injury. *See*, Am. Tel and Tel. Co. v. Winback and Conserve Program, Inc. ,42 F.3d 1421, 1427 & n. 8 (3d Cir. 1994); Matthews v. Villella, 2009 U.S. Dist. LEXIS 8858 (M.D. Pa. Feb. 6, 2009). A failure to show a likelihood of success or a failure to demonstrate irreparable injury must necessarily result in the denial of a Preliminary Injunction. In re Arthur Treacher's Franchise Litigation, 689 F.2d 1137, 1143 (3d Cir. 1982).

During his testimony, District Attorney Skumanick indicated that in his opinion, the criminal statute most directly implicated is the child pornography statute. However, he also indicated that there may be other appropriate charges including open lewdness, 18 Pa.C.S.A. §5901 and public indecency.

Irreparable injury is "potential harm which cannot be redressed by a legal or equitable remedy following a trial." Instant Air Freight Co. v. C.F. Air Freight, Inc.,

882 F.2d 797, 801 (3d Cir. 1989). A Court may not grant Preliminary Injunctive relief unless the Preliminary Injunction is "the only way of protecting the Plaintiff from harm". Id. The relevant inquiry is whether the party moving for the Injunctive Relief is in danger of suffering the irreparable harm at the time the Preliminary Injunctive relief is to be issued. Id. Speculative injury does not constitute a showing of irreparable harm. Id. The Court in Instant Air Freight noted that "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Id., 882 F.2d at 801 (quoting Sampson v. Murray, 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed. 2d 166 (1964). Assuming that a Petition for Delinquency would have been filed, that would not have caused irreparable harm to Appellee. Juvenile proceedings are closed, and rehabilitative in nature. The decisions of District Attorney Skumanick, if wrong, would have been reviewed by the Court of Common Pleas of Wyoming County and the Appellate Courts of Pennsylvania, where the Appellee's constitutional rights would have been respected.

C. SPECIFIC STANDARDS FOR AN INJUNCTION PROHIBITING THE CONTINUATION OF AN ONGOING CRIMINAL MATTER:

As a general matter, Federal Law establishes that a Federal Court "may not grant an Injunction to stay proceedings in a State Court, except as expressly

authorized by Act of Congress or where necessary in aid of jurisdiction or to protect or effectuate Judgments, 28 U.S.C. 2283. The United States Supreme Court examined the criteria established in the Court's previous decisions construing the circumstances when a Federal Court can enjoin a state prosecution. Mitchum v. Foster, 407 U.S. 225, 242-43 (1972). Although Federal Courts have the jurisdictional power to enjoin state criminal prosecutions "the principles of equity, comity and federalism must restrain a Federal Court when asked to enjoin a State Court proceeding."

In the Supreme Court case of Steffell v. Thompson, et al, 415 U.S. 452, 454 (1974), the Court concluded "when a State Criminal proceeding ... is pending against a Federal Plaintiff at the time his Federal Complaint is filed, ... unless bad faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude the issuance of a Federal Injunction restraining enforcement of the criminal statute and, in all but unusual circumstances, a Declaratory Judgment on the constitutionality of the Statute. Steffell v. Thompson, et al, 415 U.S. 452, 454 (1974).

If the Standard of Review set forth in Steffell and Mitchum apply, the Preliminary Injunction should not have been granted prohibiting all juvenile prosecution of Appellee. Under the Pennsylvania Child Pornography Statute 18 Pa.C.S.A. 6312.1, "prohibited sexual art" is defined as "...nudity if such nudity is

depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction".

Surely, the act of the District Attorney in going forward with informal adjustment, or juvenile prosecution of Ms. Doe and her ten (10) Co-Defendants, can not be construed as "bad faith enforcement". The photographs depicted nude or semi-nude girls. The photographs were not disseminated to their Tunkhannock school mates for any reason other than sexual gratification. Ms. Doe did not appear at the hearing before the Lower Court to deny that she was involved in posing for the photographs and assisting in their dissemination.

The Lower Court held that the strict standards set forth in Steffell did not apply to this case because there was no criminal action pending. The Court is clearly wrong. The uncontradicted testimony was that criminal proceedings had been initiated involving all thirteen (13) Tunkhannock students who had their photographs appear on the internet. Indeed, the letter concerning the February 28, 2009 meeting attached to Appellees' Complaint states, "The meeting is to finalize the paperwork for the informal adjustment."

The statute for informal adjustments under which the District Attorney was proceeding is 42 Pa.C.S.A. 6323 which states:

A. General Rule

(1) Before a Petition is filed, the Probation Officer or other Officer of the Court designated by it, subject to its direction, shall, in the case of a dependent child where the jurisdiction of the Court is premised upon the provisions of paragraph (1), (2), (3), (4), (5) or (7) of the definition of "dependent child" in section 6302 (relating to definitions) and if otherwise appropriate, refer the child and his parents to any public or private agency available for assisting in the matter.

B. Counsel and advice. -Such social agencies and the Probation Officer or other Officer of the Court may give counsel and advice to the parties with a view to an informal adjustment if it appears:

(1) counsel and advice without an adjudication would be in the best interests of the public and the child;

(2) the child and his parents, guardian, or other custodian consent thereto with knowledge that consent is not obligatory; and

(3) in the case of the Probation Officer or other Officer of the Court, the admitted facts bring the case within the jurisdiction of the Court.

The Lower Court concluded that there was no criminal proceeding in force because no Petition for Delinquency had been filed. However, the Superior Court of Pennsylvania stated in Commonwealth v. J.H.B., 760 A.2d 27 (Pa. Super. 2000) (*quoting* In the Interest of BPY, 712 A.d 769,770 (Pa. Super. 1998)) that "Under the Juvenile Act, Petitions may be disposed of in three (3) ways: (1) by informal adjustment, 42 Pa.C.S.A. §6323; (2) by Consent Decree, 42 Pa.C.S.A. §6340, or by

hearing, 42 Pa.C.S.A. §§ 6336, 6341". The Court made clear that it is not necessary that a Petition for Delinquency be filed in order for a criminal proceeding to be commenced. Indeed, a criminal proceeding in the form of an informal adjustment can only be pursued prior to the filing of a Petition.

In this case, assuming for the purpose of argument that no informal adjustment could be reached and assuming that District Attorney Skumanick ultimately decided to bring a Petition for Delinquency, Appellee had ordinary corrective relief if she was prosecuted for the content of the photograph. District Attorney Skumanick testified that any prosecution would be reviewed by the Wyoming County Court of Common Pleas under the Pennsylvania Juvenile Code as previously stated. Juvenile proceedings are closed and rehabilitative not punitive in nature. This allows County Court Judges to dismiss Petitions which are not well founded. Because no Petition had as yet been filed, the interference by the Federal Court stifles prosecutorial discretion, which in this case should be applauded and encouraged rather than enjoined.

In this case, Appellees have thus far been successful in convincing the Lower Court to act as a super child advocate dictating to the Wyoming County District Attorney what prosecutions could be brought in taking the decision as to the adequacy and propriety of the charges away from the Court of Common Pleas of

Wyoming County. Assuming that a Petition for Delinquency would be filed, Appellee would not face irreparable harm since she has all the constitutional safeguards guaranteed to Juvenile Defendants. Adjudication before the County and Appellate Judges of Pennsylvania, to determine that the Juvenile's rights had not been violated would be fully available to her.

The proper standard of judicial restraint when considering a Petition to a Federal Court to interfere with a State Court criminal proceeding was set forth by our Supreme Court in the case of Douglas v. City of Jeannette, 319 U.S. 157 at 163-164, 63 S.Ct. 877, 87 L.Ed. 1324, wherein the Court stated at pages 163-169:

> Courts of equity in the exercise of their discretionary powers should conform to this policy (of leaving generally to the state courts the investigation and trial of criminal cases arising under state laws) by refusing to interfere with or embarrass threatened proceedings in State Courts save in those exceptional cases which call for the interposition of a Court of Equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states - though they might otherwise be given - should be withheld if sought on slight or inconsequential grounds.
>
> It is a familiar rule that Courts of Equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. Where the threatened prosecution is by state officers for alleged violations of a state law, the State Courts are the final arbiters of its meaning and application, subject

> only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the Federal Courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by Federal Court of Equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate.
>
> The holding of the Supreme Court should be applied in this case.

2. **The Lower Court erred in holding that the District Attorney had violated Appellee's first amendment rights by requiring that Appellee, as a condition to the dismissal of criminal charges, write an essay indicating that she understood that it was wrong to pose partially naked for photographs.**

The Lower Court concluded that the requirement that the girls write an essay for the class reflecting an understanding that their actions in transmitting nude or partially nude pictures were wrong, violated their rights to be free from compelled speech and to be from government retaliation for protected speech.

The Court's conclusion is simply wrong. The required statement in that essay, as a condition for not filing charges, was a central part of the informal adjustment. Section 2(b)(3) of the Act permitting informal adjustment states that informal adjustment is proper where it appears that admitted facts bring the case within the jurisdiction of the Court.

In order to avoid the filing of charges, the recalcitrant juvenile was simply required to admit that her actions that could lead to the charges were wrong.

Indeed, the purpose of the Juvenile Act, as stated in 42 Pa.C.S.A. 301 states:

> (2) consistent with the protection of the public interest, to provide for children committing delinquent acts, programs of supervision, care and rehabilitation which provide balanced attention to the protection of the Community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the Community.

In all cases in which Pre-Trial Diversion is permitted, such as the Juvenile Act and the Accelerated Rehabilitative Disposition Act under Pa. Rule of Criminal Procedure 310, a condition of the dismissal is an admission that the Defendant understood that he had committed the act charged.

This is not a form of compelled speech or a violation of her first amendment rights. If the Defendant is not willing to make the admission, the juvenile can proceed into Juvenile Court and challenge the adequacy of any Petition for Delinquency which would be filed.

All of the cases cited by the Lower Court relating to rights against compelled speech and retaliation for protected speech, have nothing to do with admissions required for Pre-Trial Diversion for the dismissal of criminal charges. If County Prosecutors are now enjoined from requiring admissions of fault from criminal Defendants seeking Pre-Trial Diversion, the informal adjustment provision of the Juvenile Act is effectively destroyed.

VII. Conclusion:

It is respectfully submitted that this Honorable Court should reverse the Order of the United States District Court for the Middle District of Pennsylvania and deny the Motion for Injunctive Relief in favor of Appellees, Jane Doe and Nancy Doe, and that the Court dismiss the Complaint of Appellees, Jane Doe and Nancy Doe also.

Respectfully submitted,

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as District Attorney of Wyoming County

CERTIFICATIONS

1. Michael J. Donohue is a member in good standing of the Bar of the United States for the Third Circuit Court of Appeals.

2. This Brief contains 4,532 words, excluding Tables, Certifications and any Addenda and is within the typed volume limitation provided by Federal Rule of Appellate Procedure 28(1).

3. On June 29, 2009, an original and ten (10) hard copies of this Brief and four (4) copies of the Appendix were filed with the Office of the Clerk.

4. On June 29, 2009, this Brief was checked for viruses using McAfee software and then e-mailed in portable document format (pdf) to the Clerk of Courts at electronic briefs at ca3.uscourts.gov.

5. The hard copies and electronic versions of the Brief are identical.

6. On June 29, 2009, two (2) hard copies of the Brief and one (1) copy of the Appendix were served by e-mail and First Class Mail upon the following:

Witold J. Walczak, Esquire, American Civil Liberties Union of PA, 313 Atwood Street, Pittsburgh, PA 15213 and vwalczak@aclupgh.org .

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By /s/ Michael J. Donohue
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