No. 07-56722

In the United States Court of Appeals for the Ninth Circuit

REVEREND FATHER VAZKEN MOVSESIAN, *et al.*, Plaintiffs-Appellees,

vs.

VICTORIA VERSICHERUNG AG, *et al.*, Defendants,
MUNCHENER RUCHVERSICHERUNGS-GESELLSCHAFT AKTIENGESELLSCHAFT AG, Defendant-Appellant.

On Interlocutory Appeal from an Order of the United States District Court for the Central District of California

The Honorable Christina A. Snyder

District Court No. CV-03-9407

BRIEF OF AMICI CURIAE HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN OPPOSITION TO REHEARING *EN BANC*

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DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P 26.1

I certify that pursuant to Fed. R. App. P. 26.1, neither of the amici is a corporation or has any parent corporation, nor does any corporation hold stock in either of the amici curiae.

DATED: February 11, 2011

Respectfully submitted,

s/ Marco Simons
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STATEMENT OF CONSENT TO FILE

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rule 29-2(a).

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

EarthRights International (ERI) is a non-profit human rights organization which litigates and advocates on behalf of victims of abuses worldwide. ERI is counsel in several transnational lawsuits asserting state-law claims, such as *Carijano v. Occidental Petroleum Corp.*, No. 07-05068 (C.D. Cal.), No. 08-56187 (9th Cir.), which alleges that a California corporation is liable under, *inter alia*, California state law for injuries suffered in Peru. ERI therefore has an interest in ensuring that state-law claims arising out of injuries suffered abroad are not improperly dismissed for perceived interference with federal foreign affairs powers.

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR litigates many significant international human rights cases, including those asserting state law claims, such as *Saleh v. CACI Int'l Inc*., No. 08-7008; No. 08-7009, 2009 U.S. App. LEXIS 20435 (D.C. Cir. Sept. 11, 2009). The Court's disposition in this case is therefore of great interest to CCR and the people

we represent.[1]

STATEMENT OF THE ISSUE ADDRESSED BY AMICI CURIAE

The narrow questions amici address are 1) whether speeches and letters by the President and other executive branch officials can carry the authority to preempt state law under the foreign affairs conflict preemption doctrine, where the President's actions are not within any expressly delineated powers granted by the Constitution, statute, or treaty, and where they do not rise to the same level of historical acceptance and congressional acquiescence as the practice of making executive agreements to settle civil claims between Americans and foreign entities; and 2) whether a statement of policy preference by a foreign country, by itself, can be given force of law in U.S. courts with the authority to preempt state law.

SUMMARY OF ARGUMENT

The panel's decision upholding California Code of Civil Procedure § 354.4 respects the delicate balance between state and federal prerogatives struck by the Supreme Court in its foreign affairs preemption jurisprudence. Speeches and letters of the President and other executive officials lack the force of law, and therefore cannot preempt state law.

Foreign affairs conflict preemption requires, as its starting point, federal

[1] This brief was not authored in whole or in part by any party or counsel to any party, and no person contributed any money that was intended to fund

action with the force of law that is therefore "fit to preempt" state law. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 (2003). Typically such authority comes from the Constitution, statutes and treaties; the Supreme Court has recognized an exception to this rule for executive agreements negotiated by the President to settle civil claims between Americans and foreign entities. The Court made clear in *Medellin v. Texas*, 128 S. Ct. 1346, 1371 (2008), that the preemptive force of executive agreements involves a "narrow set of circumstances" that does not apply generally to executive action, including memoranda from the President.

No express authority from the Constitution suggests that the President may unilaterally control the use of the term "genocide" or prohibit states from using the phrase "Armenian genocide." Nor is there any longstanding practice equivalent to that of making executive agreements that would support such a presidential power.

No foreign affairs preemption case has ever afforded executive branch officials such unlimited power as the Appellant would create, nor has any such case ever placed so much state authority on such tenuous footing. Moreover, the amicus brief submitted by the Republic of Turkey may be considered as would be the opinion of any other amicus curiae, but its statements of policy preference may not be given the force of law by the Court. Amici therefore urge the Court do deny rehearing *en banc*.

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preparing or submitting this brief.

ARGUMENT

I. Foreign affairs field preemption is not warranted under *Garamendi*.

As this Court has recognized, "foreign affairs" preemption includes two related but distinct doctrines: "field preemption" and "conflict preemption." *Saher v. Norton Simon Museum of Art of Pasadena*, 592 F.3d 954 (9th Cir. 2010). *Amici* generally address the applicability of conflict preemption in this case, but first wish to make an observation concerning field preemption.

Both Judge Thompson's dissent and the Petition suggest that the majority's field preemption analysis is inconsistent with *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) [hereinafter "*Garamendi*"], because that case struck down a similar California law under foreign affairs preemption. The dissent properly recognizes that field preemption is only available where a state fails to address "an area of 'traditional state responsibility.'" *Movsesian v. Victoria Versicherung AG*, 2010 U.S. App. LEXIS 25225, at *23 (9th Cir. Dec. 10, 2010) (Thompson, J., dissenting) [hereinafter "*Movsesian II*"]. The dissent then charges that *Garamendi* "specifically rejected Justice Ginsburg's position that California in that case had broad authority to regulate the insurance industry," suggesting that section 354.4 is therefore subject to field preemption. *Id.* at *23-24.

Amici submit that this critique is flawed because it fails to recognize that *Garamendi* expressly declined to conduct a field preemption analysis. *See Garamendi* at 539 U.S. at 419-20. Its observation of the strength of California's interests in the statute at issue was done in the context of weighing this against a *conflict with federal acts*, not for the purpose of determining whether the statute was subject to field preemption. *Id.* at 420. Thus the majority's field preemption analysis does not conflict with *Garamendi*.[2]

II. Conflict preemption is inapplicable here because, even if the federal government objected to state use of the term "Armenian Genocide," there is no federal act that is "fit to preempt" state law.

Conflict preemption considers whether state law interferes with an affirmative federal foreign policy act. *Garamendi*, 539 U.S. at 418–19. The majority here found that there was no federal foreign policy prohibiting the recognition of the "Armenian Genocide." Even if such a policy could be identified, however, it could not preempt state law in the absence of a federal act with preemptive power.

[2] Amici submit that field preemption would not apply here, largely for the reasons discussed in *Cruz v. United States*, 387 F. Supp. 2d 1057, 1075–77 (N.D. Cal. 2005). As in *Cruz*, it is significant here that "the United States . . . has not filed a statement of interest representing that the California statute threatens its relations" with Turkey. *Id.* at 1077. Field preemption generally only displaces state laws where the state "establish[es] its own foreign policy." *Deutsch v.*

A. Conflict preemption requires an act "fit to preempt" state law.

Conflict preemption requires, as its starting point, a federal act that has the power to preempt, or is "fit to preempt," state law. *Garamendi*, 539 U.S. at 416. Under the Supremacy Clause, certain sources — the "Constitution," the "laws of the United States," and "treaties" — are the "supreme law of the land," and can preempt state law. U.S. Const., art. VI, § 2. Conflict preemption, therefore, only applies to actions of the political branches carrying the force of law; federal acts lacking legal force cannot preempt state law. *See, e.g. S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 812 n.5 (9th Cir. 1993); *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) ("We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication."); *see also Garamendi*, 539 U.S. at 442 (Ginsburg, J., dissenting) (no authority grants executive branch officials "the power to invalidate state law simply by conveying the Executive's views on matters of federal policy").[3]

The requirement that conflict preemption be based on acts with the force of law holds true even in the foreign policy arena. The Supreme Court's decision in *Medellin v. Texas*, 128 S. Ct. 1346 (2008), makes clear that despite the fact that the

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Turner, 324 F.3d 692, 709 (9th Cir. 2005).

[3] Nothing in the majority opinion in *Garamendi*, which relied on executive agreements rather than mere statements by the executive as the source of

President has the lead foreign policy role, "[s]uch considerations . . . do not allow us to set aside first principles. The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" 128 S. Ct. at 1368 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). Thus *Medellin* was primarily focused on searching for a possible basis — either a ratified treaty, *see* 128 S. Ct. at 1368–71, or some independent power of the President, *id.* at 1371–72 — that would give the President the authority to displace state law.

Medellin made clear that Presidential memoranda do not generally carry the force of law, even where they implicate important foreign affairs interests. Aside from powers derived from statutes and treaties, or powers expressly granted by the Constitution, the only other "narrow set of circumstances" in which the *Medellin* Court recognized preemptive authority involves "the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Id.* at 1371. The President's power to make such agreements has "been exercised since the early years of the Republic," and the practice "has received congressional acquiescence throughout its history." *Garamendi*, 539 U.S. at 415. Such agreements are "legally binding," *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994), and have long been held

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preemptive power, conflicts with this point from Justice Ginsburg's dissent.

to have "the full force of law." *United States v. Walczak*, 783 F.2d 852, 856 (9th Cir. 1986) (citing *United States v. Pink*, 315 U.S. 203 (1942)).

Neither *Medellin* nor *Garamendi* suggested that, aside from powers granted by statute, treaty, or the Constitution, as well as executive agreements to settle international disputes, there is any other relevant authority that would allow the President to preempt state law. Although *Garamendi* relied on executive branch statements to illuminate the policy animating the executive agreements, *see* 539 U.S. at 411 & 422, it does not suggest that such a statement alone has preemptive force, or that the state statute at issue would have been preempted in the absence of an executive agreement. Indeed, *Medellin* noted that, with respect to executive agreements, "the limitations on this source of executive power are clearly set forth," 128 S. Ct. at 1372, and emphasized that the "authority to settle international claims disputes pursuant to an executive agreement" is "narrow and strictly limited." *Id.* "[T]he Court has been careful to note that '[p]ast practice does not, by itself, create power.'" *Id.* (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

The Supreme Court's decision in *Barclays Bank* is also instructive. There, in the analogous foreign commerce clause context, the Court rejected the contention that amicus briefs or letters from the administration to a state governor had the power to preempt, finding they "lack the force of law." 512 U.S. at 328–

30 & n.30. Indeed, the Supreme Court considered this point so indisputable that it used it in another context as an example of a "broken circle" of logic: "[T]hat Executive agreements may displace state law . . . and that unilateral presidential action (renunciation) may displace Executive agreements, does not produce the 'logical' conclusion that unilateral presidential action may displace state law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) (citation omitted).

Neither the dissent nor the Petition identify any federal act with preemptive power regarding the use of the phrase "Armenian genocide." The original panel opinion, *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1059-60 (9th Cir. 2009) [hereinafter "*Movsesian I*"], however, suggested that such authority derives directly from the Constitution or, in the alternative, from a longstanding practice to which Congress has acquiesced. *Amici* address each of these bases in turn.

B. The Constitution does not grant the President exclusive authority over the term "Armenian genocide."

The original panel opinion suggested that the Constitution itself provided authority for presidential control over the phrase "Armenian genocide": "The President acts well within his constitutionally delegated powers by developing and enforcing the policy refusing to provide official recognition to an 'Armenian Genocide.'" *Movsesian I*, 578 F.3d at 1060.

Medellin rejected the notion that the President has general preemptive

powers over matters relating to foreign policy. Instead, a specific grant of authority is necessary. The original opinion here identified three potentially relevant clauses of the Constitution. *Movesisian I*, 578 F.3d at 1059. Article II, section 2, clause 1 provides that the President is the Commander-in-Chief; article II, section 2, clause 2 grants powers to make treaties and appoint ambassadors; and article II, section 3 grants powers to receive ambassadors and to execute the laws. None of these remotely touches on the power to control recognition of "genocide."

The President generally has the power to execute, not unilaterally create, federal law. *Youngstown*, 343 U.S. at 587 ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *accord Hamdan v. Rumsfeld*, 548 U.S. 557, 591–92 (2006). Indeed, both *Youngstown* and *Hamdan* rejected executive assertions of the authority to make law regarding matters related to an ongoing war. *Youngstown*, 343 U.S. at 583, 590 (rejecting President Truman's claim of authority to seize steel mills to support national defense, including prosecution of the Korean War); *Hamdan*, 548 U.S. at 567 (rejecting procedures President established to try prisoner captured during war). These cases both involved "a war in progress," *Movsesian I*, 578 F.3d at 1059, and the presidential action was far more overt than the implied policy at issue here.

C. There is no longstanding practice that would give the President's letters and speeches the force of law in prohibiting the use of the term "genocide."

The original panel opinion also suggested that, in the absence of any express constitutional authority to act, the President has exclusive authority of the use of the term "genocide" because, like executive agreements, this presidential monopoly is a longstanding practice to which Congress has acquiesced. *Movsesian I*, 578 F.3d at 1060. But there is no such longstanding practice, however it might be characterized.

Medellin makes clear that, in granting preemptive force to executive agreements, *Garamendi* relied on the President's "narrow and strictly limited authority to settle international claims," 128 S. Ct. at 1372, not some generalized executive power in the foreign affairs realm. By contrast, the practice at issue in *Medellin* — that of issuing directives to state courts — was "not supported by a 'particularly longstanding practice' of congressional acquiescence." *Id*. However the issue here is characterized, it similarly fails this test.

The dissent suggests that there is a federal practice forbidding "legislative recognition of the 'Armenian Genocide.'" *Movsesian II*, 2010 U.S. App. LEXIS 25225 at *26 (Thompson, J., dissenting). Unlike the practice of legally binding executive agreements, which dates back centuries, this purported practice could date back no earlier than 1984. In 1981, President Reagan referred to "the

genocide of the Armenians."[4] In 1984, with no apparent objection from the executive, the House of Representatives passed a resolution recognizing "victims of genocide, especially those of Armenian ancestry." H.R.J. Res. 247, 98th Cong. (1984) (passed by House).

Nor is there a general presidential monopoly on recognition of genocide. Indeed, Congress has used the word to describe a contemporary situation prior to the executive branch doing so and has called upon the executive to do likewise. *See, e.g.*, H.R. Con. Res. 467, 108th Cong. (2004) (passed by House); S. Con. Res. 133, 108th Cong. (2004) (passed by Senate).

With respect to forbidding *states* from recognizing the Armenian genocide, the evidence of such a practice is thinner still. As in *Medellin*, no one has "identified a single instance in which the President has attempted (or Congress has acquiesced in)" an attempt to prohibit the states from using the phrase "Armenian genocide." *Medellin*, 128 S.Ct. at1372. Indeed, the majority notes that "while some forty states recognize the Armenian Genocide, the federal government has never expressed any opposition to any such recognition," *Movsesian II*, 2010 U.S. App. LEXIS 25225 at *12 — it has not even opposed section 354.4.

In *Barclays Bank*, the Supreme Court considered whether a state tax law was preempted by the foreign commerce clause because it allegedly interfered with the

[4] Proclamation 4838 (Apr. 22, 1981), *available at*

federal government's ability to speak with one voice in international trade. 512 U.S. at 320. The state law had engendered considerable diplomatic protest from other nations. *Id.* at 324, n.22. The Court, however, held that only Congress, not the President or the judiciary, has the authority "to evaluate whether the national interest is best served by [] uniformity, or state autonomy." *Id.* at 328–29, 331. Indeed, the Court disavowed any competence to determine whether a state law interfered with Congress' ability to speak with the voice of the nation in foreign affairs, or whether conversely Congress had decided to allow the state to act. 512 U.S. at 324–31. Noting that "[t]he judiciary is not vested with the power" to decide how to balance the competing concerns involved, *id.* at 328, the Court presumed that a lack of "specific indications of congressional intent to bar" state law affecting foreign commerce indicates "Congress' willingness to tolerate" such law. *Id.* at 324, 327; *accord id.* at 332 (Scalia, J., concurring) (noting that the Court's decision "requires no more than legislative inaction to establish that 'Congress implicitly has *permitted*'" state's law) (quoting *id. at* 326) (emphasis in original).

To be sure, *Barclays Bank* was based in part on the fact that "the Constitution grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Id.* at 329 (quoting U.S. Const. art. I, § 8, cl. 3). But

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http://www.presidency.ucsb.edu/ws/index.php?pid=43727.

Barclays Bank also implicitly recognizes that, in areas other than foreign commerce, the President's preemptive foreign affairs powers are derived either from the Constitution or from a congressional grant of authority, or exercised pursuant to an executive agreement. Although the situation was not presented in *Barclays Bank*, the Supreme Court there noted that, in another case, Congress might delegate preemptive authority to the President "by a statute or a ratified treaty." *Id.* at 329. In the absence of such a delegation, the Court only contemplated that the President might preempt state law "pursuant to a legally binding executive agreement." *Id*. The Court specifically declined to consider when such unilateral executive action might preempt state law precisely because the only Executive Branch communications at issue in *Barclays Bank* were those "that express federal policy but lack the force of law." *Id.* at 330. Federal policy, therefore, is insufficient to preempt without the force of law. As in *Medellin*, the only mechanism even contemplated by *Barclays Bank* through which the Executive might preempt traditional state authority without congressional action is an executive agreement. *Barclays Bank* would be nullified if the Executive could preempt state law based on some general foreign affairs authority.[5]

[5] Indeed, since international trade policy is a facet of U.S. foreign policy, affording the President general foreign affairs preemptive power would allow the President unilaterally to regulate international commerce through preemption of state rules, in violation of the foreign commerce clause, by simply declaring that such action was taken pursuant to his authority to "manage foreign affairs."

D. Affording preemptive force to an alleged policy expressed only in speeches and letters raises serious federalism concerns.

The Petition locates a policy against recognition of the Armenian genocide in various speeches, letters, and press briefings from several Presidents and other executive officials. Petition for Rehearing *En Banc* of Defendant-Appellant Munich Re, *Movsesian v. Victoria Versicherung AG*, No. 07-56722, at 13-16 (9th Cir. Jan. 3, 2011) ("Petition"). But affording preemptive force to such materials would give insufficient attention to concerns for state sovereignty. Under *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550–51 (1985), states are usually protected against federal intrusion by their representation in the federal political process. Allowing federal courts to override state powers without explicit congressional direction "'would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1990) (quoting Laurence H. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)). These concerns counsel strongly against allowing preemption based solely on policy preferences, for two reasons.

First, the requirement that the President must take the public, high-profile step of negotiating an executive agreement — or equivalent action with the force of law — affords a measure of political protection to states. "Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution — vesting that decision in the political branches,

subject to checks and balances." *Medellin*, 128 S. Ct. at 1362. Allowing the President to circumvent these procedures, and preempt state law simply by expressing a policy preference in speeches and letters to Congress, would eviscerate the states' protections. Indeed, because such preferences are created, expressed, and modified so easily, the panel's doctrine would create a prescription for chaos. Even the Petition acknowledges that there would be no conflict problem if California had chosen to use, for example, the Armenian term "*Meds Yeghern*" instead of the English phrase "Armenian genocide." Petition at 14. And there can be no dispute that California's choice of words would have posed no problem if it were enacted in, say, 1982, after President Reagan recognized the Armenian genocide. Surely the states cannot be required to keep track of the presidential terminology of the day, which can be changed at a whim, in order to avoid federal preemption.

The second reason to require a more formalized lawmaking process before preempting state law is that, while "the hurdles to political branch correction of untoward state foreign relations activity are relatively insignificant. . . the erroneous federalization of [state] law . . . will not trigger the political branches' special means to monitor and control adverse foreign relations activity." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1693–94 (1997). Thus, if a state goes too far in intruding upon foreign relations,

the political branches can protect themselves; if the courts go too far in preempting state law, states are largely helpless.

These concerns have special weight here, where the only identified problem with section 354.4 is the *label* chosen by the legislature. Before determining that federal law requires the unprecedented conclusion that states are prohibited from using certain *words* in their statutes,[6] this Court should require action that has traditionally been held to have the force of law.

III. Turkey cannot create foreign policy conflicts.

While Turkey's arguments regarding the foreign policy of the United States may be considered by this Court just like those of any other *amicus*, they are irrelevant in the absence of a federal act that is fit to preempt state law.

Turkey's submission of its *own* policy positions must be disregarded. "Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they . . . tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001) *aff'd in part on other grounds*, 538 U.S. 468

[6] Although it is admittedly an open question whether states have First Amendment rights, basic principles of federalism suggest limits on the federal government's restriction of speech by states and local governments. *See e.g.*, Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1, 33–35 (1999) (collecting cases); *but see, e.g.*, *Ceballos v. Garcetti*, 361 F.3d 1168, 1190 (9th Cir. 2004) (O'Scannlain, J., specially concurring).

(2003). Instead, federal judges "are bound to decide cases before them according to the rule of law." *Id.* Courts therefore must ignore statements such as Turkey's. *Id.* If a foreign government finds the litigation offensive, it may lodge a protest with our government; our political branches can then respond in whatever way they deem appropriate -- up to and including passing legislation." *Id.*

CONCLUSION

For the foregoing reasons, amici urge this Court to deny the petition for rehearing *en banc*.

DATED: February 11, 2011

Respectfully submitted,

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[*]In the interests of full disclosure, counsel Marco Simons was a law clerk for the Hon. Dorothy Wright Nelson during 2002–2003.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Case No. 07-56722

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 4200 words or less, according to Microsoft Word, the word-processor used to create the brief.

DATED: February 11, 2011

Respectfully submitted,

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