No. 125691

IN THE SUPREME COURT OF ILLINOIS

Russell Zander, Plaintiff-Appellant v. Roy Carlson and the Illinois Fraternal Order of Police Labor Council, Defendants-Appellees	)	Petition for Leave to Appeal from the Illinois Appellate Court, First District No. 1-18-1868 There Heard on Appeal from the Circuit Court of Cook County No. 2017 L 63098

BRIEF AMICI CURIAE OF AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, ILLINOIS EDUCATION ASSOCIATION-NEA, ILLINOIS FEDERATION OF TEACHERS, AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 73

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POINTS AND AUTHORITIES

ISSUES PRESENTED FOR REVIEW

Amici adopt the statement of issues set forth in the Brief filed on behalf of Defendants-Appellees Roy Carlson and the Illinois Fraternal Order of Police Labor Council.

STATEMENT OF FACTS

Amici adopt the Statement of Facts set forth in the Brief filed on behalf of Roy Carlson and the Illinois Fraternal Order of Police Labor Council.

ARGUMENT

I. This Court should adopt the *Atkinson* immunity doctrine and find that *Atkinson* immunity bars state tort and contract claims, including claims for legal malpractice, brought against a union attorney or agent acting on behalf of the union in the collective bargaining context.

In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 247-49 (1962),[1] the United States Supreme Court held that, under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, individual union agents and members may not be held liable for damages for violation of a collective bargaining agreement for actions for which the union is liable. The Court held that individual damage actions may not be maintained against union agents or members even if such claims are brought in separate counts or actions in contract or in tort. *Atkinson*, 370 U.S. at 249. The Court in *Atkinson* relied on the legislative history of Section 301(b), which the Court found showed that such section was intended to prevent a repetition of the Danbury Hatters case[2] in which many union members lost their homes and suffered financial ruin as a result of an antitrust treble-damage action brought against union members,

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1 *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), is sometimes cited as overruling, in part, *Atkinson*. However, *Boys Markets* did not overrule *Atkinson* but rather overruled a companion case, *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962).

2 *Loewe v. Lawlor*, 208 U.S. 274 (1907); *Lawlor v. Loewe*, 235 U.S. 522 (1915); *Loewe v. Bank of Danbury*, 236 F. 444 (2d Cir. 1916).

officers, and agents individually to recover for an employer's losses in a nationwide, union-directed boycott of his hats. *Atkinson*, 370 U.S. at 248.

The Supreme Court extended the *Atkinson* rule in *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 417 (1981), where the Court held that a damage claim may not be maintained against an individual union officer even if the individual officer's conduct was unauthorized by the union and in violation of an existing collective bargaining agreement. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. at 402. Numerous courts have relied on *Atkinson* in finding that federal and state law claims against individuals acting as union representatives within the ambit of the collective bargaining process are barred. *See Boroweic v. Local No. 1570*, 889 F.2d 23, 28 (1st Cir. 1989); *Waterman v. Transport Workers' Union Local 100, 176 F.3d 150* (2d Cir. 1999); *Carino v. Stefan*, 376 F.3d 156, 159-60 (3d Cir. 2004); *Evangelista v. Inlandboatmen's Union of Pacific*, 777 F.2d 1390, 1400 (9th Cir. 1985).[3] See also *Arnold v. Air Midwest*, 100 F.3d 857, 861-62 (10th Cir. 1996) (extending the *Atkinson* immunity doctrine outside the context of claims relating to Section 301 to the context of the Railway Labor Act).

This broad application of the immunity set forth in *Atkinson* in the context of federal

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3 Zander notes that the Central District of Illinois declined to apply the *Atkinson* immunity doctrine in *Bagley v. Blagojevich*, 685 F. Supp. 2d 904, 910 (C.D. Ill. 2010). Zander Brief at 20. *Bagley* involved a claim under 42 U.S.C. Section 1983 that state and union officials had conspired to deprive individuals of their rights under the United States Constitution. The Seventh Circuit Court of Appeals, in affirming the District Court's decision granting the union officials' motion for summary judgment, declined to decide whether *Atkinson* immunity should be applied in the context of a Section 1983 claim ("Because we find that the AFSCME officials' conduct did not constitute state action, we do not address the AFSCME officials' arguments that they are immune under the *Atkinson* doctrine ..."). *Bagley v. Blagojeich*, 646 F. 3d 378, 400, fn. 2 (7th Cir. 2011).

labor law is rooted in the national policy favoring collective bargaining as a way to resolve disputes between employees, acting through their unions, and employers. Under federal labor law, union officials have a duty to represent their members.[4] Illinois public sector unions also have a duty to represent their members. See Section 6(d) of the Illinois Public Labor Relations Act (IPLRA), 5 ILCS 315/6(d) ("Labor organizations recognized by a public employer as the exclusive representative or so designated in accordance with the provisions of this Act are responsible for representing the interests of all public employees in the unit...."); *Jones v. Illinois Educational Labor Relations Board*, 272 Ill. App. 3d 612, 619 (1st Dist. 1995) (finding that a union's duty of fair representation stems from its statutory role as exclusive bargaining representative). Union agents cannot carry out such duty effectively if they must consider potential damage liability to individuals who are affected by the legitimate collective bargaining activities of unions. Moreover, the threat of potential personal damage liability would discourage many qualified people from taking on the responsibilities of union positions and would undermine the effectiveness of union leaders and the collective bargaining process. This would frustrate the public policy, established by the Illinois Public Labor Relations Act (IPLRA), 5 ILCS 315/2, and the Illinois Educational Labor Relations Act (IELRA), 115 ILCS 5/1, favoring the collective bargaining process in the public sector in Illinois.

The policy favoring the collective bargaining process has led other courts to find that *Atkinson* immunity precludes state tort claims against individual union agents, including

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4 *Vaca v. Sipes*, 386 U.S. 171 (1967) (unions have a duty to represent their members both in collective bargaining and in the administration of collective bargaining agreements).

claims for legal malpractice, *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986); intentional interference with economic advantage and inducing breach of contract, *Evangelista v. Inlandboatmen's Union of Pacific*, 777 F.2d 1390; tortious interference with contractual relations, *Wolfson v. American Airlines, Inc.*, 170 F. Supp. 2d 87 (D.Mass 2001); fraud, *Sackett v. Wyatt*, 32 Cal. App. 3d 592 (Cal. App. 4th Dist. 1973); and civil conspiracy, *Williams v. Pacific Maritime Assoc.*, 421 F.2d 1287 (9th Cir. 1970).

Atkinson immunity has also been extended outside the federal private sector labor law context and found to apply to suits against public sector union agents and officials. Thus, in *Montplaisir v. Leighton*, 875 F.2d 1 (1st Cir. 1989), *Atkinson* immunity was applied in the context of federal public sector labor law to a suit for legal malpractice brought by former air traffic controllers. *Atkinson* immunity has also been found to apply in the context of state public sector labor laws. *See Best v. Rome*, 858 F. Supp. 271 (D.Mass. 1994), *affirmed*, 47 F.3d 1156 (1st Cir. 1995) (union attorney and law firm immune from suit brought by police department employee for breach of fiduciary duty, intentional infliction of emotional distress, and legal malpractice); *Brown v. Maine State Employees Association,* 690 A.2d 956, 960 (Maine Sup. Jud. Ct. 1997) (attorney for state employees' union immune from suit for legal malpractice in connection with representation of employee in grievance procedure); *Weiner v. Beatty*, 116 P.3d 829 (Nevada Sup. Ct. 2005) (school district employee's claim for legal malpractice against union attorney barred by *Atkinson* immunity); *Gagliardi v. East Hartford Housing Authority*, 2005 U.S. Dist. LEXIS 33559 (D. Conn. 2005) (public sector union official immune from liability in state law claim for breach of duty of fair representation

brought by housing authority employee); *Sellers v. Doe*, 650 N.E. 2d 485 (Ohio App. 10th Dist. 1994), *appeal denied*, 647 N.E.2d 1388 (Ohio Sup. Ct. 1995) (attorney employed by state teachers' union immune from liability in legal malpractice action brought by teacher); *Mamorella v. Derkasch*, 276 A.D. 2d 152, 155 (N.Y. Sup.Ct., App. Div. 2000) (attorney employed by state school district supervisors and administrators' union immune from liability for legal malpractice in action brought by school principal in connection with union attorney's handling of discharge arbitration); *Stafford v. Meek*, 762 So. 2d 925 (Fla. App. Ct., 3rd Dist. 2000) (union attorney immune from liability in legal malpractice suit brought by school board employee); *Ramos v. Tacoma Community College*, 2006 U.S. Dist. LEXIS 49216 (W.D. Wash. 2006) (applying *Atkinson* immunity in the context of a suit brought by a community college art instructor against a teachers' union president alleging that a settlement agreement negotiated by the union president deprived her of due process rights).

In this case, IFOP Labor Council attorney Carlson, as a union agent, represented Zander in a discharge arbitration proceeding provided for in a collective bargaining agreement between the IFOP Labor Council and the Village of Fox Lake. A discharge arbitration proceeding involves an interpretation and construction of the "just cause" provision of a collective bargaining agreement. In addition to the determination of whether an employee engaged in the misconduct alleged by an employer, the determination of "just cause" may involve an analysis of many provisions of the collective bargaining agreement, including provisions for fair and timely notice, adequate investigation, reasonableness of employer rules, equitable application of employer rules, and that discipline be proportionate to the nature of the conduct involved.

As the Ninth Circuit found in *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985):

> In handling Peterson's labor grievance, [union attorney] Berthelsen assumed a function that often is performed by a union's business agents or representatives. Labor grievances and arbitrations frequently are handled by union employees or representatives who have not received any professional legal training at all. A union may, on the other hand, choose to have its interests in any part of the collective bargaining process represented by a professionally trained attorney. ... [W]here the union is providing the services, the attorney is hired and paid by the union to act for it in the collective bargaining process.

771 F. 2d at 1258. The Court in *Peterson* recognized that in some arbitration cases an individual union member may have "a very real interest in the manner in which the grievance is processed," but found that "when the union is providing the services, it is the union, rather than the individual business agent or attorney, that represents and is ultimately responsible to the member." 771 F.2d at 1258. The Court in *Peterson* found that: "We do not believe that an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an "attorney-client" relationship in the ordinary sense with the particular union member who is asserting the underlying grievance." *Id.*

Other courts have similarly recognized that a union's decision to use an attorney rather than another union agent to handle a grievance, arbitration or other proceeding provided for in a collective bargaining agreement does not alter the fact that it is the union that is the party to the dispute and represents its bargaining unit members. See *Montplaisir v. Leighton*, 875 F.2d at 6, quoting *Peterson v. Kennedy*, 771 F.2d at 1258-9 ("Where counsel has been delegated 'a function that often is performed by a union's business agents or representatives,' ... disregarding the *Atkinson* rule 'is not warranted or permissible merely because a union chooses to employ an attorney.'"); *Best v. Rome*, 858 F. Supp at 276 (union

attorney handling discharge arbitration proceeding acts on behalf of the union and it is the union which carries on the dispute); *Brown v. Maine State Employees Association,* 690 A.2d at 960 ("Brown did not enter into an attorney-client relationship with that lawyer. The choice to use a lawyer as opposed to another union worker to process Brown's grievance was the union's decision."); *Carino v. Stefan*, 376 F.3d at 160 ("The only courts of appeals to have considered the specific question presented here, whether attorneys acted on behalf of the union, have uniformly concluded that *Atkinson* prohibits claims made by a union member against attorneys employed by or retained by the union to represent the member in a labor dispute.).

This Court has recognized that it is a union and not an individual union member that is a party to an arbitration proceeding under a public sector collective bargaining agreement. In *Stahulak v. City of Chicago*, 184 Ill. 2d 176 (1998), this Court held that an individual employee does not have standing to seek judicial review of an arbitration award where the employee has not shown that his union breached its duty of fair representation. 184 Ill. 2d at 184.[5] This Court in *Stahulak* noted that Section 6(b) of the IPLRA, 5 ILCS 315/6(b), allows an employee to present a grievance to an employer at the initial stage of the grievance process, but found that "nothing in section 6(b) ... allows the employee to pursue a grievance through the entire dispute resolution procedure, including arbitration and the filing of a suit to challenge an arbitration award, when an employee's union has chosen not to do so." 184

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5 The determination of whether an Illinois public sector union breaches its duty of fair representation is to be made by the Illinois Labor Relations Board, which has exclusive jurisdiction over duty of fair representation claims. *Knox v. Chicago Transit Authority*, 2018 IL App (1st) 162265, ¶31.

Ill. 2d at 182.[6]

The collective bargaining agreement between the IFOP Labor Council and the Village of Fox Lake, as allowed by statute (see 65 ILCS 5/10-2.1-17), provides that a discharge may be contested through an arbitration proceeding as an alternative to a hearing before the Police Commission. See *City of Decatur v. AFSCME Local 268*, 122 Ill. 2d 353 (1988), in which this Court, finding that the legislature in Section 8 of the IPLRA, 5 ILCS 315/8, expressed a preference for arbitration as a means for resolving labor disputes, held that an employer had a duty to bargain over a union proposal to allow employee discipline to be challenged through arbitration as an alternative to challenging it through a municipal civil service system. That the arbitration proceeding in this case was an alternative to a hearing before the Police Commission does not alter the fact that it is the union, and not the individual union member, that was a party to the arbitration proceeding.

Moreover, Zander does not claim that he had a retainer agreement with Carlson, nor does he allege that he was misled by Carlson as to whether his discharge would be challenged through a grievance in an arbitration proceeding under the collective bargaining agreement rather than before the Police Commission. Thus, Carlson, as the union's attorney, was representing the union in the arbitration proceeding with respect to Zander's termination and it was the union that was representing Zander. Since Carlson, the union's attorney, was acting as a union representative with respect to the administration of a collective bargaining agreement, there is no logical or policy reason to limit the scope of the immunity set forth

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6 Section 3(b) of the IELRA, 115 ILCS 5/3(b), similarly allows an employee to present a grievance at the initial stage of the grievance process.

in *Atkinson* and its progeny.

In representing its bargaining unit members in the collective bargaining context, a union must consider the interests of the bargaining unit as a whole. In some cases, that will lead to a union deciding to settle a grievance or arbitration over the objection of an individual grievant or other bargaining unit member. A union retains wide discretion to decide whether to litigate or settle disputes so long as it does not breach its duty of fair representation. "[P]ermitting malpractice suits whenever a union's legal strategies fail would inevitably impede the speedy processing and determination of industrial disputes." *Montplaisir v. Leighton*, 875 F.2d at 6. The Court in *Montplaisir v. Leighton* noted that state statutes of limitation for malpractice are typically significantly longer than that for duty of fair representation claims, and that "the negligence test employed in state-law malpractice actions differs materially from the federal-law test for unfair representation." Id.

This Court has found it appropriate, in light of the close parallel between the IPLRA and the National Labor Relations Act (NLRA), "to examine Federal interpretations of the NLRA where those decisions are consistent with the purpose of our Act." *City of Burbank v. Illinois State Labor Relations Board*, 128 Ill. 2d 335, 345 (1989). Under both the IPLRA and the IELRA, it is an unfair labor practice for a union to breach its duty of fair representation. However, both statutes provide that a union breaches its duty of fair representation only if it engages in "intentional misconduct in representing employees." 5 ILCS 315/10(b)(1) (IPLRA); 115 ILCS 5/14(b)(1) (IELRA). Permitting a malpractice suit against a union attorney in connection with the attorney's handling of an arbitration or other proceeding on behalf of a union under a collective bargaining agreement would impede the

speedy processing and resolution of public sector labor disputes. Holding an attorney acting as a union agent in the collective bargaining context to a negligence standard rather than the intentional misconduct standard applicable to Illinois public sector unions would discourage unions from using attorneys in such cases and would discourage attorneys handling such cases from exploring settlement and other avenues to speedy resolution of disputes. The result would be protracted labor conflicts, contrary to the public policy favoring expeditious resolution of labor disputes.

Accordingly, this Court should adopt the *Atkinson* immunity doctrine, and find that *Atkinson* immunity bars state tort and contract claims, including claims for legal malpractice, brought against a union attorney or agent acting on behalf of the union in the collective bargaining context.

II. The Appellate Court correctly found that Zander's claim against the Illinois Fraternal Order of Police Labor Council is a claim for breach of the duty of fair representation which falls within the exclusive jurisdiction of the Illinois Labor Relations Board.

Section 6(d) of the IPLRA provides that: "Labor organizations recognized by a public employer as the exclusive representative or so designated in accordance with the provisions of this Act are responsible for representing the interests of all public employees in the unit. Nothing herein shall be construed to limit an exclusive representative's right to exercise its discretion to refuse to process grievances of employees that are unmeritorious." 5 ILCS 315/6(d). Section 10(b)(1) of the IPLRA provides that it is an unfair labor practice for a labor organization "to restrain or coerce public employees in the exercise of the rights guaranteed in this Act, provided ... (ii) that a labor organization or its agents shall commit

an unfair labor practice under this paragraph in duty of fair representation cases only by intentional misconduct in representing employees under this Act." 5 ILCS 315/10(b)(1). Section 14(b)(1) of the IELRA provides that employee organizations are prohibited from "[r]estraining or coercing employees in the exercise of the rights guaranteed under this Act, provided that a labor organization or its agents shall commit an unfair labor practice under this paragraph in duty of fair representation cases only by intentional misconduct in representing employees under this Act." 115 ILCS 5/14(b)(1).

A union's duty of fair representation stems from its statutory role as exclusive bargaining agent. *Jones v. Illinois Educational Labor Relations Board*, 272 Ill. App. 3d 612, 619 (1st Dist. 1995); *Cessna v. City of Danville*, 296 Ill. App. 3d 156, 163 (4th Dist. 1998). A union that is an exclusive bargaining representative commits an unfair labor practice pursuant to Section 10(b)(1) of the IPLRA, 5 ILCS 315/10(b)(1), when it fails to fairly represent the interests of all members of a bargaining unit as required by Section 6(d) of the Act, 5 ILCS 315/6(d). *Foley v. AFSCME*, 199 Ill. App. 3d 6, 9 (1st Dist. 1990).

A claim by a public employee that a labor union breached its duty of fair representation is an unfair labor practice within the exclusive jurisdiction of the Illinois Labor Relations Board. *Foley v. AFSCME*, 199 Ill. App. 3d at 10, 12; *Cessna v. City of Danville*, 296 Ill. App. 3d at 163. Accordingly, the circuit courts are without subject matter jurisdiction over such claims. *Knox v. Chicago Transit Authority,* 2018 IL App (1st) 162265 ¶¶ 25, 31, 34; *Foley v. AFSCME*, 199 Ill. App. 3d at 10, 12; *Cessna v. City of Danville*, 296 Ill. App. 3d at 163.

In *Foley v. AFSCME*, the First District of the Appellate Court found that:

> [A] union's breach of duty of fair representation is an unfair labor practice under the Act. As such, it is subject to the Act's comprehensive scheme of remedies and administrative procedures. . . . No provision exists in the Act which authorizes public employees to file suit in the circuit court, alleging a union's breach of duty of fair representation.

Foley v. AFSCME, 199 Ill. App. 3d at 10.

Zander asserts that his claim against the IFOP Labor Council should be allowed to proceed in the circuit court because his claim against the union was for "vicarious liability ... i.e. legal malpractice under a breach of contract theory." Zander Brief at 26.

In *Cessna*, the Fourth District of the Appellate Court found:

> Plaintiff attempts to circumvent this [finding of exclusive jurisdiction in the Labor Board] by asserting that she is alleging a breach of the *common law* duty of fair representation, whereas, in *Foley*, the plaintiffs were alleging a breach of the duty of fair representation under the [Illinois Public Labor Relations] Act. However, there simply is no common law duty of fair representation. The duty of fair representation stems from a union's statutory role as exclusive bargaining agent. *Jones v. Illinois Educational Labor Relations Board,* 272 Ill. App. 3d 612, 619, 650 N.E.2d 1092, 1097 (1995). When the legislature enacts a comprehensive statutory scheme, creating rights and duties that have no counterpart in common law, the legislature may limit or preclude the jurisdiction of the circuit courts. *Board of Education of Warren Township High School District 121 v. Warren Township High School Federation of Teachers, Local 504*, 128 Ill.2d 155, 165, 538 N.E.2d 524, 529 (1989).

296 Ill. App. 3d at 163-4.

Here, similarly, Zander's claim against the IFOP Labor Council is based solely on the union's representation of Zander in connection with his termination from employment and the discharge arbitration held pursuant to the terms of the union's collective bargaining agreement. Such a claim is a claim for breach of the duty of fair representation and is encompassed within the statutory framework of the IPLRA. Section 11(e) of the IPLRA

provides that:

> A charging party or any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may apply for and obtain judicial review of an order of the Board entered under this Act, in accordance with the provisions of the Administrative Review Law, as now or hereafter amended, except that such judicial review shall be afforded directly in the appellate court for the district in which the aggrieved party resides or transacts business.

5 ILCS 315/11(e). Thus, a public employee who files an unfair labor practice charge with the Illinois Labor Relations Board alleging a breach of a union's duty of fair representation may seek administrative review of the Labor Board's final administrative decision in the unfair labor practice proceeding directly in the Appellate Court.

Section 16 of the IPLRA provides that:

> After the exhaustion of any arbitration mandated by this Act or any procedures mandated by a collective bargaining agreement, suits for violation of agreements ... between a public employer and a labor organization representing public employees may be brought by the parties to such agreement in the circuit court in the county in which the public employer transacts business or has its principal office.

5 ILCS 315/16. No provision of the IPLRA allows an individual public employee to file an action in the circuit court. *Stahulak v. City of Chicago*, 184 Ill. 2d at 180. Since Zander's claim against the union, regardless of what Zander calls it, is a claim for breach of the union's statutory duty of fair representation, the circuit court lacks subject matter jurisdiction over such claim. *Knox v. Chicago Transit Authority,* 2018 IL App (1st) 162265 ¶¶ 25, 31, 34; *Foley v. AFSCME*, 199 Ill. App. 3d at 10, 12; *Cessna v. City of Danville*, 296 Ill. App. 3d at 163.

Accordingly, the Appellate Court correctly found that Zander's claim against the

Illinois Fraternal Order of Police Labor Council is a claim for breach of the duty of fair representation which falls within the exclusive jurisdiction of the Illinois Labor Relations Board.

CONCLUSION

For the foregoing reasons, this Court should adopt the *Atkinson* immunity doctrine, and find that *Atkinson* immunity bars state tort and contract claims, including claims for legal malpractice, brought against a union attorney or agent acting on behalf of the union in the collective bargaining context. Also for the foregoing reasons, this Court should find that Zander's claim against the Illinois Fraternal Order of Police Labor Council is a claim for breach of the duty of fair representation which falls within the exclusive jurisdiction of the Illinois Labor Relations Board.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 14 pages.

/s/Melissa J.Auerbach
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