

**IN THE SUPREME COURT OF FLORIDA
Case Nos. SC04-2323, SC04-2324, SC04-2325**

**JOHN ELLIS “JEB” BUSH, *et al.*,
Defendants/Appellants,**

**CHARLES J. CRIST, JR. *et al.*,
Defendants/Appellants,**

**BRENDA MCSHANE, *et al.*,
Intervenors/Defendants/Appellants,**

v.

**RUTH D. HOLMES, *et al.*,
Plaintiffs-Appellees.**

On Direct Appeal from the First District Court of Appeal

**BRIEF OF BLACK ALLIANCE FOR EDUCATIONAL OPTIONS,
HISPANIC COUNCIL FOR REFORM AND EDUCATIONAL OPTIONS,
EXCELLENT EDUCATION FOR EVERYONE, CENTER FOR
EDUCATION REFORM AND REASON FOUNDATION AS
AMICI CURIAE IN SUPPORT OF APPELLANTS AND
FILED BY CONSENT OF ALL PARTIES**

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STATEMENT OF IDENTITY AND INTEREST OF AMICI

The Black Alliance for Educational Options (“BAEO”) is a non-profit, intergenerational organization of educators, parents, students, community activists, public officials, religious leaders, and business people. BAEO is committed to improving educational opportunities available to minority and low-income children throughout the United States by supporting parental choice as a means of empowering families and increasing educational options for black and other children living in depressed neighborhoods. BAEO believes that the American ideal of equal opportunity is unattainable for economically disadvantaged black children so long as they continue to lack access to educational opportunities that will allow them to close the widening gap between their academic achievement and that of white children.

The Hispanic Council for Reform and Educational Options (“Hispanic CREO”) is a non-profit organization that serves as a national voice for the right of Hispanic families to access all educational opportunities for their children, regardless of income. Hispanic CREO believes that the most effective way to improve educational outcomes for Latino children, who are statistically now the most undereducated group of children in America, is to empower parents to choose effective educational programs.

Excellent Education for Everyone (“E3”) is a coalition of New Jersey citizens from across the political spectrum, of all races, all religions, and all ethnic groups, and all regions of the State of New Jersey. E3’s goal is to ensure that all parents, regardless of income, have the power and resources to determine where and in what way their children will be educated. E3 supports programs designed to improve public schools by subjecting them to the competitive pressures of parental school choice.

The Center for Education Reform (“CER”) is a national, independent, non-profit advocacy organization that creates opportunities for and challenges obstacles to better education for America’s communities. CER advances substantive reforms that produce high standards, accountability and freedom of choice. CER is a full-service education reform engine that works with diverse constituencies to restore excellence and equity to America’s public schools.

The Reason Foundation is committed to improving the quality of education for all students by advancing parental choice and competition among schools. More specifically, the Reason Foundation supports the choices of the hundreds of families in Florida who, without Florida’s Opportunity Scholarship program, would be forced by economic necessity to have their children remain in Florida’s failing public schools.

SUMMARY OF THE ARGUMENT

This case is about educational policy, not religion. It is an irrefutable fact of this case that some children in Florida receive the “high quality education” guaranteed by the Florida Constitution, while other children do not. The ugly truth of this case is that most of the children who are deprived of a quality education in Florida are either black or Latino.

Recognizing the state’s failure to meet its constitutional obligation to many of its most disadvantaged children, the Florida Legislature established a mechanism by which the state could identify schools that were failing to provide a high quality education and a multi-faceted program to improve the schools’ performance. The centerpiece of that program, known as the A+ Plan for Education, has had a particularly beneficial impact on minority schoolchildren in Florida. Indeed, fully 57% of the children using Opportunity Scholarships are African-American, while 38% are Latino.¹ In striking down the Opportunity Scholarship program, the First District Court of Appeal took away the first real chance at a quality education many of these black and Hispanic children ever had.

¹ “Who Chooses?”: Demographic Profile of Florida’s K-12 School Choice Families, Updated December 2004,” compiled by School Choice Wisconsin from Florida DOE Choice Office’s Demographic Reports, cumulative through November 2003-04. Florida student population figures come from a Choice Office April 2003 compilation (table on file with Counsel for *Amici*, Stanford, California).

As demonstrated below, available data shows that school choice programs benefit not only the children who are able to transfer out of failing public schools, but also the public schools themselves, which, contrary to the factually baseless arguments of some opponents, do not get worse as a result of exposure to competition, but improve. Nothing in Florida's constitution prevents the state from reaching out to the underprivileged, largely minority families who are the disproportionate victims of substandard educational opportunities by providing them with publicly funded scholarships that enable them to choose among a wide variety of public and nonpublic, religious and nonreligious alternatives.

ARGUMENT

I. EMPIRICAL DATA SHOWS THAT SCHOOL VOUCHERS PROVIDE A BETTER EDUCATION FOR RECIPIENTS.

In essence, appellees' argument is that article I, section 3 of Florida's constitution prohibits policy makers from making available to Opportunity Scholarship recipients the same broad spectrum of choices that recipients of other educational aid programs in Florida have enjoyed for decades. Neither the text nor the historical interpretation and application of that provision supports appellees' argument. As set forth in this brief, adopting appellees' strained interpretation of article I, section 3 would have a particularly negative impact on minority and disadvantaged students who are not only the ones most in need of access to educational choice, but also most likely to benefit from it.

The benefits of vouchers have been more decisively established by empirical data than almost any other social policy program, owing to the fact that the social science research on this question is of a much higher quality than is usually available to policymakers. This research consistently supports the conclusion that vouchers provide children – especially minority children – with better education.

There have been eight random-assignment studies of vouchers.² Each study finds that students using vouchers had higher academic outcomes than those in the control group. In seven of the studies, the findings are statistically significant. The one study that did not find statistically significant benefits from vouchers reached that conclusion by adopting a method of racial classification that deviates from federal research guidelines.

Two random-assignment studies have been performed on Milwaukee's voucher program, the nation's largest. All the students participating in the studies were low-income and either African-American or Hispanic students who had been

² “Random assignment” is the gold standard of scientific research designs. In a random-assignment experiment, a random lottery determines whether each subject is assigned to the treatment group or the control group. The treatment group receives the intervention being studied (in this case, a voucher to attend a private school) while the control group does not. Because the assignment of subjects to each group is random, the subjects in the two groups are likely to be very similar, not only in race and income, but also in more intangible characteristics, such as the motivation and involvement of the parents. This similarity permits confidence that differences between the groups' outcomes are the result of the treatment and not by other differences between the populations in the two groups. This is particularly valuable in studying education policy, because random assignment controls for student background characteristics that heavily influence educational outcomes.

attending private schools with vouchers for four years. In the first study, the voucher students outperformed the control group by 6 percentile points on a standardized reading test and 11 percentile points in math.³ The second study, using a different set of test scores, found that voucher students did 8 percentile points better in math, and found no statistically significant difference in reading.⁴

Random-assignment studies have also measured statistically significant gains for beneficiaries of privately funded voucher programs in Charlotte, N.C.,⁵ Dayton, Ohio,⁶ and Washington, D.C.⁷ The one study that deviated from the general rule – an analysis of a privately funded voucher program in New York – was anomalous due to its authors’ abandonment of the federal government’s

³ Jay P. Greene, Paul E. Peterson, and Jiangtao Du, “School Choice in Milwaukee: A Randomized Experiment,” in *Learning from School Choice*, eds. Paul E. Peterson and Bryan C. Hassel, Brookings Institution, 1998; *see also* Jay P. Greene, Paul E. Peterson, and Jiangtao Du, “Effectiveness of School Choice: The Milwaukee Experiment,” *Education and Urban Society*, February 1999.

⁴ Cecilia Elena Rouse, “Private School Vouchers and Student Achievement,” *Quarterly Journal of Economics*, May 1998.

⁵ After having been in private schools for one year, the participating low-income students, the majority of whom were African-American, outscored the study’s control group by 6 percentile points in reading and math test scores. *See* Jay P. Greene, “Vouchers in Charlotte,” *Education Next*, Summer 2001.

⁶ Two years after entering the program, African-American students using vouchers outperformed African-American students in the control group by 6.5 percentile points in combined reading and math test scores. It did not find significant differences in test scores for non-African-American students. *See* William G. Howell and Paul E. Peterson, *The Education Gap*, Brookings Institution, 2002.

⁷ African-American students using vouchers had combined reading and math test scores 9.2 percentile points higher than those of the control group, after having been in the program for two years. Howell and Peterson, *Education Gap*.

research guidelines for classifying students by race.⁸ A previous study of the New York program, which used the same data and used the proper standard for classification, found that African-American students who spent three years in the voucher program scored 9.2 percentile points higher in math and reading scores than the control group.⁹ Analyzing only results from the first year, another study found that voucher students in the New York program who left low-achieving public schools benefited by 4.7 percentile points in math.¹⁰

This body of high-quality research, which unwaveringly supports the existence of benefits from vouchers,¹¹ dwarfs the quality of research that supports most social policy initiatives. The findings of social science are clear and consistent: vouchers provide a better education to those who use them, particularly minority students.

⁸ See Alan B. Krueger and Pei Zhu, “Another Look at the New York City School Voucher Experiment,” Working Paper, March 2003 (available at <http://abs.sagepub.com/cgi/content/refs/47/5/658>); see also Paul E. Peterson and William G. Howell, “The Latest Results from the New York City Voucher Experiment,” *Education Next*, Spring 2004.

⁹ Howell and Peterson, *Education Gap*.

¹⁰ John Barnard, Constantine E. Frangakis, Jennifer L. Hill, and Donald B. Rubin, “Principal Stratification Approach to Broken Randomized Experiments: A Case Study of School Choice Vouchers in New York City,” *Journal of the American Statistical Association*, June 2003.

¹¹ This research consistently finds that vouchers benefit minority students, but does not consistently find that vouchers make a significant difference for non-minority students. The research also consistently finds that vouchers produce either higher math scores or higher combined math and reading scores, but does not consistently find that vouchers produce higher reading scores.

II. VOUCHER PROGRAMS IMPROVE PUBLIC SCHOOLS.

Perhaps even more important than the effect vouchers have on the students who use them is the effect that they have on students who remain in the public school system. For a variety of reasons, many students who become eligible for Opportunity Scholarships choose to remain in their current public schools. Furthermore, since Opportunity Scholarships are limited to students in chronically failing schools, the vast majority of Florida's students are never offered a voucher. If Opportunity Scholarships had a harmful effect on public schools, they might be a bad policy even though they help the students who use them. But the evidence indicates that – far from *harming* public schools – Opportunity Scholarships have actually *improved* the performance of the worst public schools, even where all other efforts to do so have demonstrably failed.

Opponents of voucher programs frequently claim that vouchers drain needed financial resources from public schools because as students leave for private schools they take state funding with them. Even though the public school will also have fewer students to generate expenses, the critics argue that it is harder to educate fewer students on a smaller budget than to educate more students on a larger budget. They also claim that vouchers will reduce public schools' performance by taking the best students and the most active parents, leaving behind the worst students and least supportive parents in the public schools. Thus,

it is argued, vouchers doom public schools by depriving them of the financial and human elements necessary for improvement.

While that makes for a plausible theory in some circles, proponents of vouchers respond that vouchers will improve public schools precisely *because* they put schools' resources in jeopardy by allowing students and parents to leave.

Vouchers force public schools to compete for funding and students by improving the education they provide, rather than being able to rest secure in the knowledge that they will get the same budget and the same students regardless of how poorly they perform, as is most often the case now.

Before the advent of Opportunity Scholarships, Florida's failing schools could take their students for granted because the students, and the funding that comes with them, had nowhere else to go. The failing urban schools targeted by Opportunity Scholarships are attended mostly by low-income and minority students, whose parents are disproportionately unlikely to have the resources to send their children to private school or to move to a neighborhood with better schools if their local public school fails to provide an adequate education. By contrast, schools in comfortable white suburbs have to worry that parents will move to a higher performing school district or put their children in private schools if the public schools fail to perform. Because suburban parents are more likely to have the wherewithal to leave, suburban schools have a strong incentive to provide

the best education possible. Vouchers create the same incentive in urban schools, where it is ordinarily much weaker due to the lower level of resources available to parents.¹²

A recent study directly examined the effect that Opportunity Scholarships have had on public schools in Florida by comparing the performance of Florida public schools facing different levels of competitive pressure from the Opportunity Scholarship Program.¹³ The study found that the academic performance of Florida public schools was directly related to the level of competition each school faced from the Opportunity Scholarship Program. Public schools that had received two

¹² Previous research indicates that the increased difficulty of leaving failed public school systems in large school districts leads to lower educational outcomes. Florida's low-income students face an additional burden in this regard because of the state's unusually large school districts. Florida's school districts are drawn on county lines; each Florida county is a single school district. Geographically large school districts such as Florida's make it more difficult for low-income parents to leave a school system that does not satisfy their needs. For example, leaving the Miami-Dade school district – the district with the most failing public schools in the state – requires parents to move not only out of their local neighborhoods, but out of the entire Miami metropolitan area, likely abandoning their jobs, families, and friends in the process. See Caroline Hoxby, "Analyzing School Choice Reforms that Use America's Traditional Forms of Parental Choice," in Paul E. Peterson and Bryan C. Hassel, eds., *Learning from School Choice*, Brookings Institution, 1998; Clive R. Belfield and Henry M. Levin, "The Effects of Competition on Educational Outcomes: A Review of US Evidence," National Center for the Study of Privatization in Education, March 2002 (at <http://www.ncspe.org/readrel.php?set=pub&cat=37>); Jay P. Greene, "2001 Education Freedom Index," Manhattan Institute, January 2002 (at http://www.manhattan-institute.org/html/cr_24.htm).

¹³ Jay P. Greene and Marcus A. Winters, "Competition Passes the Test," *Education Next*, Summer 2004.

failing grades from the state within a four-year period, and thus had vouchers offered to their students, made the largest improvements. These voucher-eligible schools saw their FCAT math scores rise 15.1 scale points over and above the improvement made by Florida public schools as a whole. They also saw additional gains of about 5.9 percentile points on the math portion of the Stanford-9, another standardized test administered to Florida students. Public schools facing competition from vouchers also made substantial improvements over other public schools in reading – about 5.2 scale points on the FCAT. The next-largest gains were made by public schools that had received one failing grade within a three-year period: these schools did not yet face competition from Opportunity Scholarships but would if they received one more failing grade. They improved more than Florida schools as a whole on the FCAT by 9.2 scale points in math and 6.1 scale points in reading, and on the Stanford-9 by 3.5 percentile points in math and 1.7 percentile points in reading.

While schools either facing or threatened by competition from Opportunity Scholarships made substantial gains compared to Florida schools as a whole, other schools with similarly low test scores – that were not immediately facing a threat from voucher competition because they had never received a failing grade from the state – did not make similar gains. Schools that had received nothing but D grades from the state and schools that had received at least one D grade from the state did

not make substantial improvements on the FCAT or Stanford-9 compared to other Florida public schools. These schools were highly similar to the voucher-eligible and voucher-threatened schools in their test scores, demographics, and funding; the only major difference was the absence of the voucher threat. What's more, schools that had received a single failing grade more than three years ago, and thus had once faced a threat from vouchers, but no longer faced that threat because the four-year window to receive another failing grade had closed, actually saw their test scores decline compared to other Florida public schools.

That the study found similar results on the high-stakes FCAT, the results of which determine a school's grade, and the Stanford-9, to which no financial strings are attached, indicates that the improvements made by failing public schools reflect real increases in student proficiency and not simply manipulations of the testing system.¹⁴ Many have argued that high-stakes tests like the FCAT force schools to cheat or "teach to the test," defined as teaching students how to increase their score on a particular test without actually increasing their academic proficiency. If such manipulations were driving the results in Florida, schools would be improving on the FCAT but not on the Stanford-9, which schools have no incentive to

¹⁴ Previous research on the FCAT has also found that that the results of Florida's high-stakes testing system are reliable because they correlate highly with those of the low-stakes Stanford-9. See Jay P. Greene, Marcus A. Winters, and Greg Forster, "Testing High-Stakes Tests: Can We Believe the Results of Accountability Tests?" *Teachers College Record*, June 2004.

manipulate or “teach to.” Instead, the schools are showing real, quantifiable improvement.

The results of the preceding study are confirmed by another study that also examined the effect of Opportunity Scholarships on Florida’s public schools and produced similar results, finding that failing schools threatened with vouchers made improvements above those of other low-performing schools not threatened with vouchers.¹⁵ Each study’s results indicate that Florida’s Opportunity Scholarship Program has led to substantial improvements in the academic outcomes of the state’s lowest-performing public schools. Rather than performing worse because of a loss of funding and students, failing public schools in Florida have responded to the increased competition from vouchers by providing students with a better education.

Some argue that the improvements made by failing schools in Florida are the result of a “stigma” placed on the schools by declaring them failures and not of the vouchers themselves.¹⁶ But the second study cited above shows this criticism to be false. Prior to Opportunity Scholarships, Florida public schools were assigned a rating of 1 to 4 on the basis of their performance. Schools that received the lowest rating under this system should have experienced the same stigma as schools that

¹⁵ Rajashri Chakrabarti, “Closing the Gap,” *Education Next*, Summer 2004.

¹⁶ Helen Ladd, “Debating Florida’s Voucher Effect,” *Education Week*, March 14, 2001.

receive an F under the current program. However, the study finds that this previous system, which graded schools but did not contain the threat of vouchers, did not produce gains similar to those produced by the Opportunity Scholarship Program.

These findings in Florida are consistent with research on school choice programs in other parts of the country. Researchers at Columbia University's Teachers College performed a meta-analysis¹⁷ on studies examining the effect of competition on public school outcomes.¹⁸ The meta-analysis identified 41 studies on the effect of competition on a variety of public-school outcomes. It announces that the cumulative research suggests that more competitive markets for education produce modest but statistically significant improvements in test scores and graduation rates. They also find that competition produces more generous teacher salaries and lower student-teacher ratios.

Though the meta-analysis reports only modest positive effects from increasing school choice, it finds remarkably few studies purporting to show evidence that school choice could harm public-school performance. In fact, only 2

¹⁷ A meta-analysis is a study of studies, using the results of many studies on a certain topic to produce a single combined finding.

¹⁸ Belfield and Levin, "The Effects of Competition on Educational Outcomes: A Review of the US Evidence," National Center for the Study of Privatization in Education, March 2002 (at <http://www.ncspe.org/readrel.php?set=pub&cat=37>).

of the 41 studies evaluated claimed to have found *any* negative effects caused by increased competition.

Those who claim that vouchers will harm public schools may be able to present a reasonable-sounding theory, but empirical evidence demonstrates that the theory is false. According to the current research, there is simply no verifiable reason to believe that vouchers harm public schools. On the contrary, the evidence suggests that vouchers – and Florida’s Opportunity Scholarships Program in particular – lead to significant improvements in the performance of failing public schools.

III. VOUCHERS IMPROVE RACIAL INTEGRATION AND TOLERANCE.

Vouchers are frequently portrayed as leading to greater racial segregation and the teaching of intolerance in private schools, but studies show that the opposite is the case. Vouchers tend to increase the racial mixing of students, and students who attend private schools with vouchers tend to be more tolerant of groups they dislike than students in public schools.

There have been two empirical studies of the effects of vouchers on racial segregation. Both studies find that students using vouchers attend private schools that are more racially integrated than the public schools they otherwise would have attended. A study of the Milwaukee voucher program found that 54.4% of students in Milwaukee’s public schools attended racially segregated schools,

defined as schools that were either more than 90% white or more than 90% non-white. Only 49.8% of students at private schools that accepted Milwaukee's vouchers attended schools that were segregated. Religious schools were even more integrated than private schools generally; only 41.8% of students at religious schools accepting vouchers were in segregated schools.¹⁹ Another study examined a voucher program in Cleveland using two different measures of segregation. It found that a full 19% of voucher recipients, compared to only 5.2% of public school students in the Cleveland metropolitan area, attended schools where the percentage of white students was within 10% of the average proportion of white students in the Cleveland metropolitan area. Also, using the same definition of "segregated school" adopted in the Milwaukee study, the Cleveland study found that 60.7% of public school students and 50% of voucher students attended a segregated school.²⁰

Private schools transcend residential barriers in ways that public schools do not. The public school to which a child is assigned is generally determined by the neighborhood in which the child lives. As a result, the racial composition of public

¹⁹ Howard L. Fuller and Deborah Greiveldinger, "The Impact of School Choice on Racial Integration In Milwaukee Private Schools," American Education Reform Council manuscript, August 2002 (at www.schoolchoiceinfo.org/data/research/integ0802.pdf).

²⁰ Jay P. Greene, "The Racial, Economic, and Religious Context of Parental Choice in Cleveland," presented at the November 1999 meeting of the Association for Public Policy Analysis and Management (at www.schoolchoiceinfo.org/data/research/Clevint.pdf).

schools is frequently limited by geographic boundary lines. Wherever a high level of residential segregation by race exists, it follows that public schools will have great difficulty achieving racial integration. Making matters worse, the boundary lines that determine who goes to what school are politically drawn and may reflect the desire of white neighborhoods to exclude minority students from their schools.

With respect to tolerance of others, the body of research on this subject shows that private school students are more tolerant than public school students and are better in other civic outcomes as well. Social scientists have developed a method for measuring tolerance that is used in most studies of the issue.²¹ A meta-analysis found that of 18 separate analyses done in 12 studies comparing tolerance levels of students in private schools with those of students in public schools, ten found private schools were significantly more tolerant, seven were inconclusive, and one found public schools significantly more tolerant.²² The meta-analysis also

²¹ Students identify the group that they dislike most, sometimes from a list that is given to them. They are then asked whether that group should be allowed to engage in certain activities, like holding a public march or having a book reflecting their views in a public library.

²² A random-assignment study confirms that vouchers produce greater tolerance, finding that one-year of attending private schools using vouchers improved tolerance by 33%. This not only confirms that the greater tolerance taught by private schools extends to voucher students, but it also helps confirm that the civic benefits of private schooling are real and not simply a result of people who happen to already be more tolerant choosing to attend private schools. *See* David E. Campbell, “The Civic Side of School Reform: How Do School Vouchers Affect Civic Education?” Program in American Democracy Working Paper 4, Notre Dame University, May 24, 2002 (www.nd.edu/~amdemoc/Campbell_civiced.pdf).

found 12 analyses in eight studies of volunteerism. Eight of the analyses found that private school students volunteer more than public school students, three were inconclusive, and one found that public school students volunteer more.

Additionally, the meta-analysis found private schools did better than public schools in other civic outcomes, such as political participation.²³

Far from being harmful to America's civic values, vouchers improve both racial integration and attitudes of tolerance. These are both well-established goals that government seeks to promote in its education policies. Vouchers have shown themselves to serve these ends in addition to the more traditional academic purposes of education.

Florida has not always encouraged these ideals of racial integration and tolerance. The same constitutional convention that adopted the anti-Catholic Blaine Amendment also included provisions that prohibited interracial marriage,²⁴ required a discriminatory poll tax,²⁵ and required the segregation of school children

²³ Patrick J. Wolf, "School Choice and Civic Values in the U.S.: An Evidentiary Review," presented at the 2002 meeting of the American Political Science Association (copy on file with Counsel for *Amici*, Stanford, California).

²⁴ Fla. Const. of 1885, art. XVI, § 24 – "All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited."

²⁵ Fla. Const. of 1885, art. VI, § 8 – "The Legislature shall have power to make the payment of the capitation tax a prerequisite for voting, and all such taxes received shall go into the school fund."

based on race.²⁶ Today we urge this court not to return to Florida's discriminatory past, but rather to move toward an egalitarian future by upholding the constitutionality of an educational program that gives all of Florida's children a better opportunity to succeed.

CONCLUSION

For the foregoing reasons, the decision of the First District Court of Appeal should be reversed.

Respectfully submitted,

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²⁶ Fla. Const. of 1885, art. XII, § 12 – “White and colored children shall not be taught in the same school, but impartial provision shall be made for both.”

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief of *amici* BAE0, et al. was served this 24th day of January, 2005, via first-class mail, postage pre-paid to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), the attached brief of *amici* BAEO, et al., is submitted in Times New Roman 14-point font and complies with the font requirements of this rule.

By: _____
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