

QUESTIONING DISCRIMINATION IN DEMOCRACY:
AN ANALYSIS OF TEXAS VOTER LAWS

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QUESTIONING DISCRIMINATION IN DEMOCRACY:
AN ANALYSIS OF TEXAS VOTER LAWS

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ABSTRACT

The discrimination in the democratic process of voting in the United States was discriminatory in its very creation. A citizen being able to have the right to vote is essential in a democracy. Although the United States passed the Voting Rights Act of 1965 to counter discrimination in voting, states such as Texas, has continued to pass laws regarding the voting process that can be seen to almost serve the same discrimination factor as the literacy and poll taxes during the Jim Crow Era. In this thesis, I focus on how Texas laws regarding the voting process of citizens leads to the disenfranchisement of minority voters and serve as catalysts of disenfranchisement from the basic democratic right to vote. I include an analysis of past voter history in Texas, as well as recent court cases to highlight Texas' discriminatory practices in voter ID laws, gerrymandering, and ballot issues. In addition, I have conducted an interview with practicing civil rights attorneys Jose Garza and Martin Golando, who are head counsel and co-counsel for the Abbott v. Perez case regarding Texas' gerrymandered districts set to make its way to the United States Supreme Court, to display the viewpoints of practicing lawyers in the field.

I- Introduction

The importance of voting in the United States can be traced back to the rule of Britain over the thirteen colonies. Many Americans during this time were displeased with the King of Britain creating the laws for the colonies without equal representation in Parliament. The need for equal representation motivated the United States to fight for its independence, and create its own Constitution. Through the Constitution, citizens were granted a voice in the affairs of the government based on their vote. However, the initial creation of the Constitution only granted the right to vote to white male landowners. The discrimination in the democratic process of voting in the United States was discriminatory in its very creation. A citizen being able to have the right to vote is essential in a democracy. According to John Locke, the right of a ruler to rule comes from the consent of the governed (Locke 2004, 330); in the United States, elected officials receive their consent to rule from the people through elections where the citizens vote for their chosen candidate. If everyone is not allowed the same rights to vote within a Democracy, then it questions if the citizens are being ruled from their consent. In this thesis, I will focus on how Texas laws regarding the voting process of citizens lead to the disenfranchisement of minorities that catalyst into them not being able to practice their basic democratic right, voting.

By the United States denying the right of certain citizens to not be able to vote challenged this ideology, and led to the passing of The Fifteenth, Nineteenth, and Twenty-Sixth Amendments that allow people who are typically oppressed in the United States the right to vote. The Fifteenth Amendment allows people to not be denied the right to vote based on their race (*"Constitution of the United States"*). This amendment

was important for the rights of African Americans after the Civil War, and the abolishment of slavery. Fifty years after the passing of the Fifteenth Amendment, the Nineteenth Amendment was passed allowing women to vote (“Constitution of the United States”). The Twenty-Sixth Amendment, although not enacted until 1971, granted citizens eighteen and older the right to vote in the United States (“Constitution of the United States”).

Texas is known as a deep south state that values the rights of its citizens. However, Texas can be seen as one of the states who has the strictest voting laws in the United States. Texas has a general population of 28.7 billion people; yet, only a little under nine million showed up to the polls to vote in the 2016 Presidential elections (New York Times, 2017). The discrepancy between the state’s population and the number of people who have showed up to vote in Texas can be attributed to many factors. However, for my study I will be analyzing how factors such as voter ID laws, ballot issues, and redistricting have prevented certain Americans from practicing their legal right to vote in Texas. In addition, these laws can be seen as a continuation of discrimination in disfranchising citizens right to vote as modern-day Jim Crow Laws.

II- Voting Rights History

With the end of the Civil War the United States passed the Fourteenth Amendment, which prevented all male United States citizens to not be denied the right to vote based on their race, color, or previous condition of servitude (“Constitution of the United States”). The amendment was passed as a way to obviate discrimination towards U.S. citizens, but created a further divide in the voting process in America.

After the defeat the south faced in the Civil War, most states began to instill discriminatory laws, which came to be known as the Jim Crow Laws. These laws included discriminatory practices in voting such as the poll tax and literacy tests that targeted the African American demographic. Most African American citizens during the time of the Jim Crow era had just been released from slavery, and were working on building a life away from oppression. However, when wanting to practice their democratic right to vote, they were denied this right. They were instead charged to vote, or required to take literacy tests harder for the average human to pass mostly based on their families' ties to slavery. Most African Americans during the Jim Crow Era were just beginning to rebuild their lives and finding a solid source of income. Thus, most of them did not have the money to vote. The use of literacy and poll taxes prevented United States citizens from exercising their right to participate in democracy by voting. The state of Texas passed twenty-seven Jim Crow Laws, one of which being the payment of the poll tax for all electors and the other was the "white primaries" instilled by the Democrat Political Party.

As discussed in the book, *Black Victory: The Rise and Fall of the White Primary in Texas*, in 1923 the Texas State Legislature enacted a white primary (Hine 69). The law allowed only qualified registered voters of the Texas Democratic Party to participate in its primary elections. In addition, the law stated, "under no circumstances, was an African American eligible to vote in a Democratic primary," and election judges were ordered to discard the ballot of any African Americans who attempted to vote (Hine 69). Since the Democratic Party was the head party in Texas at the time, the white primaries led to the disenfranchisement of African American voters directly. African Americans were

prevented from enacting one aspect of their right to vote, by not being able to vote in the primary elections. It was not until 1944 that the Texas white primaries were ruled unconstitutional in the *Smith v. Allright* case. The case was brought upon by Mr. Lonnie Smith, an African American Democrat, who was denied the right to vote in the Democratic primary elections by the county election official S.S. Allright. Mr. Smith argued the white primaries violated the Fourteenth Amendment and encouraged racial discrimination. The United States Supreme Court ruled unanimously on the notion that the white primaries violated the Fourteenth Amendments' statute of equal protection of the law and that a state cannot permit a private organization to practice racial discrimination ("Smith v. Allwright." Oyez).

In order to defy the Southern states racially discriminatory voter laws, the Voting Rights Act was enacted in 1965 following "sustained national pressure" to include all Americans in the liberal democratic electoral process (Guinier, 1077-1154). The Voting Rights Act of 1965 was signed by President Lyndon B. Johnson to further the Fifteenth Amendment in making sure that all citizens of the United States had an equal opportunity to vote regardless of their race. The Act provided key aspects in abolishing the use of literacy tests in the voting process through six sections. In addition, it allowed the attorney general to investigate the use of poll taxes at the state and federal level through section 5. It was not until 1964 when poll taxes were made illegal by the United States Supreme Court by passing the Twenty-Fourth Amendment to the Constitution stating that no citizen should be denied the right to vote by the United States or any State for failure to pay a poll tax or any other tax ("Constitution of the United States").

In 2013, the Voting Rights Act of 1965 faced scrutiny on its Fourth Section; which established a formula to identify the areas in the United States that are more likely to discriminate in voting practices, and provide for more stringent remedies where appropriate (“*Section 4 of the Voting Rights Act*”). The preclearance process under Section 4 of the Voting Rights Act of 1965 allowed for the federal government to review a law prior to its passage within a state that has a history of discrimination in voter laws to ensure it is not in violation of the Act. Among these states under preclearance was Texas. The concern for Section 4 of the Voting Rights Act of 1965 was brought up by the case *Shelby County v. Holder*. In the case the Supreme Court analyzed whether it was constitutional to continue to allow the federal government to review states voting laws before passage (Carter, 392). The United States Supreme Court upheld the decision that Section 4 of the Voting Rights Act of 1965 was unconstitutional because of its “coverage formula” that was no longer needed and outdated (Carter, 392). Although the United States passed the Voting Rights Act of 1965 to counter discrimination in voting, states such as Texas have continued to pass laws regarding voting processes that can be seen to almost serve the same discrimination factor as the literacy and poll taxes.

III- Voter ID Laws

Texas is no longer a part of the preclearance process by the federal government. The ability for Texas to pass laws in regard to the voting process of its citizens without the approval of the federal government poses a huge problem for the disenfranchisement of its citizens. By not being monitored by the government the Texas State Senate could pass laws that could be seen as discriminatory towards certain races, and prevent them from practicing their right to vote. On May 27, 2011, the Texas State Senate signed

Senate Bill 14 (SB-14) into law. SB-14 required registered voters to show at least one of seven forms of photo identification before being allowed to vote (“*Texas NAACP v. Steen (Consolidated with Veasey v. Abbott)*”). The law proved to be challenging, because it limited the number of acceptable photo identifications the citizens could use to vote. The newly passed bill prevented people who were homeless, or who could not obtain a driver’s license from being able to vote. In addition, the law was poorly advertised and led to less people being informed about the recently changed law when going to vote. The law passed by the Texas State Senate, in relations to the need for citizens to have a proper form of identification in order to vote, can be seen as a way for Texas to be discriminatory towards its citizens without the interference of the federal government following the decision of *Shelby County v. Holder*. The Bill was used as a way to indirectly disenfranchise minority communities, and can be seen as similar to the poll tax that was required to be paid in order to vote.

Many people argued against the passage of SB-14, and once it passed argued that it was discriminatory in not allowing certain demographics to vote. The Bill was passed in 2011, but was not enacted until after 2013 with the court’s decision that eliminated the preclearance process. Without the preclearance process Texas was able to sign a bill into law that discriminated towards it citizens. Due to its discriminatory aspects a review of the law was brought to the forefront of the Texas District Courts by the Texas National Association for the Advancement of Colored People, and the Mexican-American Legislative Caucus in the case *Texas NAACP v. Steen*. The plaintiffs argued that SB-14 violated Section 2 of the Voting Rights Act by preventing African Americans and Latinos from accessing the ballot, the Bill was passed with the intent to discriminate towards

minority voters, and provides an unconstitutional burden on the citizens right to vote (*“Texas NAACP v. Steen (Consolidated with Veasey v. Abbott)”*). According to Myrna Perez, the attorney of for the Texas N.A.A.C.P. and the Mexican-American Legislative Caucus, “Texas passed the most restrictive photo ID law in the country – a law that legislators knew would hurt minority voting rights, without any evidence justifying it (Fernandez, 2017). The case was first brought on trial in October 2014, at the District Court for the Southern District of Texas where it was decided that SB-14 did in fact did violate the Voting Rights Act. However, the case was appealed to the Texas Fifth Circuit Court of Appeals where the decision was overturned and allowed Texas’ voter ID laws to remain intact for the November 2014 elections (*“Texas NAACP v. Steen (Consolidated with Veasey v. Abbott)”*).

SB-14 brought many controversies to the State Senate, and the Texas courts. The debate between the opposing parties went back and forth on the notion of whether the Bill discriminated towards minorities. In April 2017, Judge Nelva Gonzales Ramos of the United States District Court for the Southern District of Texas ruled SB-14 to be discriminatory against minorities. The ruling by the Texas District Court displayed the intent of SB-14 solely being passed to discriminate against minority voters. After the ruling by the Texas District Court ruling against SB-14, the Texas Senate passed the Senate Bill 5 (SB-5) in June 2017 to help provide a remedy for SB-14. SB-5 related to SB-14 in that they both stated the ID requirements necessary to vote in the Texas (*“Texas NAACP v. Steen (Consolidated with Veasey v. Abbott)”*). The Texas State Senate enacted Senate Bill 5 to show that the voter ID laws could be less restrictive, and nondiscriminatory towards the minority population. SB- 5 allowed Texas citizens without

a photo ID to vote if they presented alternate forms of an ID and signed affidavits swearing a reasonable impediment kept them from obtaining the proper ID (Pollock, 2017). Although the law offered a way for citizens who did not have the proper form of identification to vote, it still proved to be restrictive by requiring a citizen to have to prove some sort of identification in order to practice their democratic right.

In August 2017, the district court heard the case of *Veasey v. Abbott*. In the case the plaintiff, Marc Veasey, argued against the constitutionality of SB-5 (“*Texas NAACP v. Steen (Consolidated with Veasey v. Abbott)*”). In addition, he argued that SB-5 encompasses the same discriminatory voter requirements as SB-14. The court ruled in favor of the plaintiff, and issued an order that prevented Texas from enforcing both laws. Due to the rulings that both Texas laws are discriminatory towards minorities, Texas once again appears to be a good candidate for the process of pre-clearance. Voter ID laws provide a way to disenfranchise minority voters, because it only allows certain citizens the right to vote. By the state of Texas passing both SB-14 and SB-5 displays the role of discrimination towards minorities when wanting to exercise their democratic right.

IV- Redistricting Voter Districts

In order to vote in the United States, a citizen must vote within their district or precinct. When registering to vote the citizen must provide an address to be assigned a polling station, and may not vote outside of the district where they are registered to vote. The hassle within this method can be seen in relation to college students who may go to a college outside their hometown. The student would not be able to vote unless they are registered to vote within that district, and if they are out of state they would not be able to

vote without being registered to vote within that given state. In addition, the student would have a chance to absentee vote by mailing in their ballot; however, this process is a hassle for the student and may lead to problems with the ballot not being properly casted. The process is difficult and varies state to state based on procedures and policies. Voting districts within the United States are crucial aspects of the election process, and are continuously being redrawn. The process of redistricting typically occurs after a census that shows population change to ensure that all districts have around the same population ("*7 Things to Know About Redistricting*"). Redistricting is important, because it affects political power. The redistricting of districts can be drawn in favor of a certain candidate or political party.

Redistricting is intended to allow the community to have proper representation within the United States government. When drawing districts, many states consider the community's common legislative interest by how they typically vote ("*7 Things to Know About Redistricting*"). The role of redistricting a district in favor of the community's common interest can be manipulated by the process of gerrymandering. Gerrymandering includes the redrawing of voter districts in order to protect or change a political power. According to the Brennan Center for Justice, a gerrymandered district is a deliberate and unfair attempt to draw district lines to increase the likelihood of a particular political result ("*7 Things to Know About Redistricting*"). Gerrymandered districts can lead to minority voters not being able to have a voice in local politics. The districts create a way to combine minority districts into one to prevent the success of the polarized community's favored candidate from being elected.

According to the Brennan Center for Justice, “Between 2000 and 2010, Latinos and African-Americans accounted for nearly 90 percent of Texas’ population growth, which resulted in the state receiving four additional congressional seats and required significant changes to both the state house and congressional maps” (“*7 Things to Know About Redistricting*”). It was upon the need to redraw the Texas state congressional lines that brought the court case *Abbott v. Perez* to the forefront of the Texas court systems. The lawsuit filed by Shannon Perez alongside the Mexican American Legislative Caucus filed numerous lawsuits in 2011 that challenged the legislature’s congressional and state house redistricting plans (“*Abbott v. Perez*”). The plaintiffs of the case argued that the plans of redistricting were racial gerrymandering in violation of Section 2 of the Voting Rights Acts and the Fourteenth and Fifteenth Amendment to the United States Constitution (“*Abbott v. Perez*”). In the beginning phases of the court case, Texas was still under preclearance by the Federal government, and was not released from this list until after the ruling of *Shelby County v. Holder* in 2013. After Texas being removed from preclearance, the plaintiffs argued that Texas should be required to redraw their district lines to create more electoral opportunities for Latino and African American voters. They argued that the discrimination in the district maps was intentionally meant to limit minority voters’ electoral impact, and that Texas should be placed back under preclearance by the federal government (“*7 Things to Know About Redistricting*”).

In 2012, Texas District Courts issued interim maps for the elections that were eventually adopted to be the permanent district maps in 2013. Although the maps were redrawn from the 2011 maps, they still proved to have gerrymandered districts. In March 2017, a Texas panel issued a ruling for the 2011 district maps. The panel ruled that four

districts in the 2011 map were unconstitutionally racially gerrymandered districts and have unconstitutionally and intentionally packed minority voters into a single district (“7 Things to Know About Redistricting”). Furthermore, the panel ruled on August 15, 2017 that the court issued 2013 congressional map violated the Constitution and the Voting Rights Act. Also, the panel found the 2013 maps to be created with intentional discrimination. The panel allowed Texas until August 29th to decide whether there would be a special session of the Texas Legislature to redraw the district lines (“7 Things to Know About Redistricting”). On August 25, 2017 Texas filed an appeal to the United States Supreme Court asking for a halt in the redrawing of the congressional districts. With the granting of the halt, the court then went to grant certiorari on January 12, 2018 to hear the State of Texas’ appeals of the rulings on the congressional and state house plans (Hamm).

The case *Abbott v. Perez*, is an important aspect in ensuring that minority communities are properly represented and have an equal say in government. By Texas creating congressional district maps that have been proven racially gerrymandered display the obstacles within the state of Texas to allow the equal representation of all citizens. Gerrymandering has proven to be another key aspect of voting practices that proves to be discriminatory against minorities used by the state of Texas. Gerrymandered districts force a set polarization and separates people from their representatives. These districts pack minority citizens who tend to vote the same into one district. Often times these districts turn out to be weird shapes that can be many miles apart in all directions. With the gerrymandered districts being manipulated to include vast and sometimes wide territory, the people in that district may be far away from their representative; and

therefore, not equally represented as stated by the equal protection clause of the Fourteenth Amendment to the United States Constitution.

VI-Ballot Issues

Under Section 4 of the Voting Right's Acts, states are required to provide a citizen who would not like to vote in English with a ballot of the language they would like to vote in. Section 4 is crucial in ensuring those with a limited amount of English proficiency the right to register and vote. According to Alexa Ura, Texas has passed a provision to its Election Code that required interpreters helping someone cast a ballot be registered to vote in the same county in which they are providing help ("Texas Voting Law on Language Interpreters Violates Voting Rights Act, Court Says."). This provision of the Texas Election Code can be seen as a way to limit the amount of resources a citizen can have when going to vote, and ultimately discriminate against how they can vote on the ballot. The law provided a barrier for citizen's ability to vote as seen in the case of Mallika Das.

Mallika Das is a U.S. citizen born in India. Ms. Das brought her son, Saurabh, to help her vote in the 2014 elections. When both Ms. Das and her son went to the vote at a Williamson County polling station, Saurabh informed the election officials that he would be translating the ballot for his mother. Unfortunately, Saurabah was told by the election officials that he would not be able to assist his mother because he was registered in a Travis county, a different county from his mother ("Appeals Court to Weigh Texas Voting Law Limiting Language Interpreters"). Ms. Das was denied her right under Section 4 of the Voting Rights Act to choose her interpreter that would help her communicate with the

election official and cast her ballot. The issue Ms. Das faced led to the Asian American Legal Defense and Education Fund, AALDEF, filing a lawsuit to bring justice to other Americans who may face the same problem as Ms. Das when going to vote in the state of Texas.

The law was placed on hold to go into effect by U.S. District Judge Robert Pitman. Justice Pitman argued that under the provision Texas arbitrarily restricted voters with limited English proficiency (“Texas Appears to Concede Voting Rights Case on Language Interpreter Law”). In August 2017, a three-judge panel of the United States 5th Circuit Court of Appeals upheld the ruling of a lower Texas court ruling that the provision of the Texas Election Code ran afoul of the federal Voting Rights Act, in that it prevented limited English speakers from receiving interpretation assistance when voting (“Texas Voting Law on Language Interpreters Violates Voting Rights Act, Court Says”). With the ruling of the 5th Circuit Court of Appeals, Texas was forced to strike down its provision to their Election Code. Allowing a citizen who is limited in speaking English is important to ensure equal representation in the democratic process. By attempting to pass the provision to its Election Code that limited the people’s access to an interpreter, the state of Texas further demonstrates its ability to disenfranchise minority voters.

VII- Civil Rights Attorney’s

In the next part of my thesis I will be discussing the perspectives of practicing voting rights attorneys Jose Garza and Martin Golando in regard to Texas being discriminatory in voter practices. Mr. Garza and Mr. Golando are co- founders of the Garza Golando Moran Law Firm in San Antonio, Texas. Mr. Garza received his Juris

Doctorate from St. Mary's University School of Law, San Antonio. He has thirty-seven years of practicing law protecting the First Amendment and Fourteenth Amendment, as well as redistricting, federal voting rights, and civil rights. Mr. Garza has argued in front of the United States Supreme Court twice in his career, and is currently the Litigation Director for the Texas Rio Grande Legal Aid. Mr. Golando received his Juris Doctorate Degree from the University of Texas School of Law. He has close to a decade of experience practicing law. Before co-founding Garza Golando Moran, PLLC, Mr. Golando was the chief of staff for a state representative who focused on bringing about change to water policy, taxation, and governmental law. Mr. Garza and Mr. Golando are head counsel for the Mexican American Legislative Caucus in the *Abbott v. Perez* case that is making its way to the United States Supreme Court in regards to Texas' redistricting. Their titles on the case are as followed, Mr. Garza "Lead Redistricting Counsel for the Mexican American Legislative Caucus" and Mr. Golando "Co Redistricting Counsel for the Mexican American Legislative Caucus."

When conducting my interview, I asked Mr. Garza and Mr. Golando a series of seven questions with follow-up questions in between some of the questions. The interview was conducted on March 12, 2018 over the phone between both attorneys at the same time. The questions I chose to ask were general in relation to voting practices within Texas. These questions pertain to certain aspects of my essay that I have researched in order to receive the perspective of practicing Texas attorneys. Some of the responses to the questions will not be given word for word, and will not give the exact lawyer who answered it due to the interview being an open discussion between Mr. Garza and Mr. Golando.

VIII-Interview Questions with Responses

Question 1: What are the most common cases that you have presided over that deal with discriminatory voter laws and practices in Texas?

Response: Cases regarding Section 2 and 5 of the Voting Rights Act, and jurisdiction cases in relation to the Fourteenth Amendment.

Question 1 Follow Up: Why do you think it is the most common?

Response: Most cases in Texas come into question are a large challenge. They are seen to abridge the minority vote. If there is a new election practice the laws can be seen as a intended dilutive of minority votes.

Question 2: How are cases that are brought upon by the discriminatory voter laws and practices usually resolved?

Response: In the early sixties, cases were typically thrown out. The Voting Rights Act of 1965 allowed minority communities to challenge discriminatory practices. In 1975, the United States Congress expanded Section 5 of the Act. In the 1980s, in order to challenge a law under Section 2 of the Voting Rights Act, the person would have to prove intent; which was very hard to do with government figures. The United States amended the Voting Rights Act requirement to show intent in 1982. Most cases are resolved through settlement, and result in the elimination of the laws deemed discriminatory.

Question 3: How would you say new voter laws such as SB-14 and SB-5 (Voter ID laws) relate to those of the Jim Crow Era?

Response: Mr. Garza- Continued pattern of the discrimination in Texas.

Question 3 Follow Up: What are the negative effects of these laws?

Response: Mr. Garza- Nothing new in strategy to prevent the discrimination.

Question 4: In your opinion, what role does gerrymandering play in discriminatory voting practices, and how do they effect certain minority communities?

Response: Mr. Golando- Limit the different amount of voices that are represented. We do not get to hear the problems of the minorities and they are left off. Mr. Garza- Texas packs the districts so that the minorities are spread out and their effectiveness is spread out.

Question 4 Follow Up: Does Texas have a problem with gerrymandering:

Response: Strong and constant problem within Texas with gerrymandering.

Question 5: Should there be a remedy in allowing convicted felons the right to vote?

Response: Mr. Golando- In order for a felon to be able to vote again they must seek reinstatement or pardon. The process is very hard, and in Texas a felon generally will not be able to vote again.

Question 6: What would you say us the correlation between the U.S. prison system demographic population and the disenfranchisement of African Americans?

Response: Mr. Garza- The laws have been enforced more harshly through the African American Community.

Question 7: Do you think Texas will or should return back to preclearance in the passage of voter laws by the Federal government?

Response: Texas should return back to preclearance. Congress should enact an amendment for the coverage formula.

IX- Conclusion

The interview with Mr. Garza and Mr. Golando emphasized the continuous struggle Americans face when trying to practice their democratic right. Texas has a problem in making discriminatory voter laws that disenfranchise minority communities. The Voting Rights Act of 1965 was passed as a way to ensure that all Americans were given the equal right to vote, however citizens are still denied some parts of the Voting Rights Act. The creation of new laws, such as the voter ID law, add to the requirements a citizen needs to vote; thus, making voting a burden for United States citizens instead of the process owed to them by law as citizens.

The right to vote is a key democratic aspect that every citizen should have a right to possess. When a citizen is denied this basic right the proper functioning of a democracy is put in question. The passage of laws that intentionally disenfranchise minorities in Texas, as well as gerrymandered districts, makes the state of Texas a red flag. To ensure that all citizens are represented in Texas, the United States Supreme Court should consider amending Section 4 of the Voting Rights Act. By doing so, Texas will be able to be monitored before passing discriminatory laws.

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