No. 14-391

In the Supreme Court of the United States

STOP THIS INSANITY, INC. EMPLOYEE LEADERSHIP FUND, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioners' challenge to provisions of the Federal Election Campaign Act of 1971, 52 U.S.C. 30116(a)(1)(C) and 30118(b)(4) (formerly 2 U.S.C. 441a(a)(1)(C) and 441b(b)(4)), that limit contributions, and solicitations for contributions, to the "separate segregated fund" of a corporation or labor union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 761 F.3d 10. The opinion of the district court (Pet. App. 15a-70a) is reported at 902 F. Supp. 2d 23.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2014. The petition for a writ of certiorari was filed on September 29, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Election Commission (FEC or Commission) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971

(FECA), 52 U.S.C. 30101 (2 U.S.C. 431) *et seq.*,[1] and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 52 U.S.C. 30106(b)(1) (2 U.S.C. 437c(b)(1)); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [FECA]," 52 U.S.C. 30107(a)(8) (2 U.S.C. 437d(a)(8)); see 52 U.S.C. 30111(a)(8) and (d) (2 U.S.C. 438(a)(8) and (d)); to issue written advisory opinions concerning the application of FECA and Commission regulations to any specific proposed transaction or activity, 52 U.S.C. 30108 (2 U.S.C. 437f); and to civilly enforce FECA, 52 U.S.C. 30109 (2 U.S.C. 437g). The Department of Justice prosecutes criminal violations of FECA. See 52 U.S.C. 30109(d) (2 U.S.C. 437g(d)).

b. This case concerns provisions of FECA that govern "separate segregated fund[s]" established by corporations and labor organizations. 52 U.S.C. 30101(4)(B), 30118(b)(2)(C) (2 U.S.C. 431(4)(B), 441b(b)(2)(C)). FECA prohibits corporations and labor organizations from directly using their treasury funds to make "contribution[s]" (*e.g.*, donations to candidates, parties, or political committees) or "expenditure[s]" (*e.g.*, other outlays of money intended to influence an election) in connection with federal elections. 52 U.S.C. 30118(a) (2 U.S.C. 441b(a)); see

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[1] After the court of appeals issued its decision in this case, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a newly-created Title 52. See U.S. H.R., Office of Law Revision Counsel, *United States Code Editorial Reclassification Table*, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_ Title_52.html (last visited Dec. 1, 2014). No text of any provision was changed. To avoid confusion, this brief will include parenthetical citations to the former Title 2 provisions.

52 U.S.C. 30101(8)(A) and (9)(A) (2 U.S.C. 431(8)(A) and (9)(A)) (definitions of "contribution" and "expenditure"). FECA "permits some participation of unions and corporations in the federal electoral process," however, "by allowing them to establish and pay the administrative expenses of 'separate segregated fund[s],' which may be 'utilized for political purposes.'" *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 201 (1982) (*NRWC*) (brackets in original) (quoting 2 U.S.C. 441b(b)(2)(C) (1982)); see 52 U.S.C. 30118(b)(2)(C) (2 U.S.C. 441b(b)(2)(c)).

FECA classifies separate segregated funds as a type of "political committee." 52 U.S.C. 30101(4)(B) (2 U.S.C. 431(4)(B)). As such, they are governed by FECA's general regulation of such entities, including a prohibition on any person contributing more than $5000 per calendar year, 52 U.S.C. 30116(a)(1)(C) (2 U.S.C. 441a(a)(1)(C)), as well as a requirement to register with the FEC and provide periodic reports on funds received and spent, 52 U.S.C. 30104(a)-(b) (2 U.S.C. 434(a)-(b)); 11 C.F.R. 114.5(e)(3). Unlike so-called "nonconnected" political committees (which are not directly tied to a particular corporation or labor organization), 11 C.F.R. 106.6(a), however, separate segregated funds "may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates contributions to the fund will be spent to assist," *NRWC*, 459 U.S. at 200 n.4. "The fund must be separate from the sponsoring union or corporation only in the sense that there must be a strict segregation of its monies from the corporation's [or union's] other assets." *Ibid.* (internal quotation marks, citation, and brackets omitted).

In two significant ways, separate segregated funds are regulated differently under FECA than are nonconnected political committees. First, FECA permits the sponsoring corporation or labor organization to pay the entire costs of the "establishment, administration, and solicitation of contributions" of the separate segregated fund. 52 U.S.C. 30118(b)(2)(C) (2 U.S.C. 441b(b)(2)(C)); 11 C.F.R. 114.5(b). Such payments may be unlimited in amount and need not be reported to the FEC (as all payments to nonconnected political committees above certain threshold amounts must be). See 52 U.S.C. 30101(8)(B)(vi) and (9)(B)(v), 30104(b) (2 U.S.C. 431(8)(B)(vi) and (9)(B)(v), 434(b)); 11 C.F.R. 114.5(e)(1). Second, FECA permits a separate segregated fund to solicit contributions only from certain persons affiliated with the corporation or labor organization that established the fund (and imposes some restrictions on the frequency and form of certain such solicitations). 52 U.S.C. 30118(b)(4)(A) (2 U.S.C. 441b(b)(4)(A)); 11 C.F.R. 114.5(g)(1); see 52 U.S.C. 30118(b)(3)(B)-(C) and (4)(B) (2 U.S.C. 441b(b)(3)(B)-(C) and (4)(B)); 11 C.F.R. 114.6.

c. Although this Court has upheld the constitutionality of FECA's ban on direct corporate political contributions, see *FEC* v. *Beaumont*, 539 U.S. 146, 149 (2003), it has concluded that FECA's ban on independent expenditures by corporations and labor organizations violates the First Amendment, see *Citizens United* v. *FEC*, 558 U.S. 310, 318-319 (2010). As a result, while separate segregated funds "have the advantage of being able to directly contribute to candidates—something parent corporations still cannot do—they are no longer necessary for independent expenditures." Pet. App. 6a. The D.C. Circuit has

thus described separate segregated funds as "functionally obsolete" and "a vintage—yet still operable—relic" of a period in which Congress believed it had authority to ban all direct corporate financial participation in federal election campaigns. *Id.* at 4a, 6a.

Under current law, as interpreted and applied by the FEC and the courts, corporations and labor organizations may not only make unlimited expenditures on their own, but may also fund any amount of independent expenditures by nonconnected political committees. In *EMILY's List* v. *FEC*, 581 F.3d 1 (2009), the D.C. Circuit held that a nonconnected political committee may solicit and receive unlimited contributions for independent expenditures, so long as it separates any such independent-expenditure-only funds from funds that may be used for contributions to political candidates and political parties. *Id.* at 12; see *id.* at 8 n.7 (explaining that holding did not apply to separate segregated funds). And in *SpeechNow.org* v. *FEC*, 599 F.3d 686 (en banc), cert. denied, 131 S. Ct. 553 (2010), the D.C. Circuit held that the $5000 limit on contributions by individuals to political committees cannot constitutionally be applied in the context of a nonconnected political committee that makes only independent expenditures. *Id.* at 696. The FEC has accordingly recognized that corporations and labor organizations may contribute unlimited amounts to nonconnected political committees, so long as those funds are used only for independent expenditures. *Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations*, 79 Fed. Reg. 62,817 (Oct. 21, 2014); FEC Advisory Op. 2010-11, 2010 WL 3184269 (July 22, 2010). The FEC has also recognized that a corporation or

labor organization may establish and administer an independent-expenditure-only political committee, which may solicit the general public for funding, so long as any contribution from the sponsoring corporation or labor organization to the political committee is reported in the same manner as other funding. FEC Advisory Op. 2010-09, 2010 WL 3184267 (July 22, 2010).

2. Petitioner Stop This Insanity, Inc. (STI) is a corporation that has established a separate segregated fund, petitioner Stop This Insanity Inc. Employee Leadership Fund (STI Fund). Pet. App. 4a. Petitioners would like STI Fund to be able to operate in some ways like a nonconnected political committee and in some ways like a separate segregated fund. *Id.* at 4a-5a, 19a-20a. Under their preferred approach, STI Fund would operate like a nonconnected political committee by having separate bank accounts for its direct contributions and independent expenditures, with the ability to solicit and accept unlimited funds from any donor (not just donors affiliated with STI) to finance its independent expenditures. *Id.* at 19a-20a. At the same time, STI Fund would operate like a separate segregated fund by having the ability to receive unlimited operational funding from STI that need not be publicly disclosed. *Id.* at 20a. Petitioners sought an advisory opinion from the FEC as to whether such an arrangement would be permissible, but the Commission was unable to approve an advisory opinion by the necessary number of votes. *Id.* at 4a, 20a-21a.

STI and STI Fund—along with petitioner Glengary Inc., which wishes to donate in excess of the $5000 statutory limit to support STI Fund's independent

expenditures—filed suit in district court against the FEC, seeking declaratory relief and an injunction permitting their proposed arrangement. Pet. App. 5a, 15a-17a, 48a; see *id.* at 5a n.1 (discussing two individual plaintiffs who are not petitioners here). They alleged that the limits on donations to, and solicitations by, separate segregated funds violate the First Amendment, as applied to a distinct independent-expenditure-only account within a separate segregated fund. *Id.* at 15a-17a. The district court granted the FEC's motion to dismiss. *Id.* at 5a; see *id.* at 15a-70a.

The court of appeals affirmed. Pet. App. 1a-14a. The court observed that STI itself can use its own treasury funds for "unlimited" independent expenditures, *id.* at 2a, 5a, and is "capable of sweeping solicitation," including solicitation from the public at large for donations, *id.* at 13a. "And yet," the court continued, "it wants a vehicle capable of soliciting without transparency." *Id.* at 13a-14a. "Simply put," the court explained, "Stop This Insanity would like to use its segregated fund to solicit the entire public while concealing its expenses for such solicitation," by taking advantage of the special disclosure exemption that separate segregated funds enjoy with respect to operating expenses provided by their parent organization. *Id.* at 5a. Recognizing that this Court "has endorsed disclosure as 'a particularly effective means of arming the voting public with information,'" the court of appeals concluded that the First Amendment "does not compel" the result advocated by petitioners. *Id.* at 14a (quoting *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1460 (2014) (plurality opinion)).

The court of appeals rejected petitioners' argument that their position followed directly from this Court's

decision in *Citizens United*. Pet. App. 7a-10a. The court of appeals noted that *Citizens United* had acknowledged the existence of separate segregated funds without questioning the constitutionality of the statutory provisions by which those funds are regulated. *Id.* at 7a (citing *Citizens United*, 558 U.S. at 337-339). The court also observed that, unlike the plaintiff in *Citizens United*, which had challenged FECA's "outright ban" on political speech by corporations, *ibid.* (quoting *Citizens United*, 558 U.S. at 337), STI was challenging "a snare it ha[d] fashioned for itself" by seeking to make independent expenditures through a separate segregated fund rather than directly. *Id.* at 8a; see *id.* at 9a ("By clothing itself in the letter of *Citizens United*, [STI] claims there is a constitutional right to do things the hard way. We cannot sanction such an illogical conclusion."). The court also disagreed with petitioners' contention that *Citizens United* "eliminated distinctions between various organizational forms" so as to require that separate segregated funds have the same ability to solicit and accept contributions as nonconnected political committees. *Id.* at 9a (internal quotation marks omitted). Noting that nonconnected political committees are subject to the "disclosure requirements" that petitioners "are endeavoring to avoid," the court reasoned that "no political action committee has" the mix of advantages that petitioners "are looking for," and that it would thus "be disingenuous to say [STI] is simply seeking equalization across different types of organizations." *Id.* at 9a-10a.

The court of appeals also held that FECA's treatment of separate segregated funds does not violate any separate First Amendment rights that STI Fund

may possess. Pet. App. 10a-14a. The court initially questioned whether its "analysis should be so formalistic" as to "treat the Fund as if it existed in isolation." *Id.* at 11a. Even assuming *arguendo* that complete analytical separation of the two entities was proper, however, the court held that the challenged restrictions were constitutional because the government had "demonstrated 'a sufficiently important interest' and 'employ[ed] means closely drawn to avoid unnecessary abridgement of associational freedoms.'" *Ibid.* (brackets in original) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

The court of appeals perceived it to be undisputed that if disclosure of funding sources in this context is an important governmental interest, Congress can validly require entities to choose between classification as a nonconnected political committee (which has fewer solicitation and contribution restrictions, but more disclosure requirements) and classification as a separate segregated fund (which has more solicitation and contribution restrictions, but fewer disclosure requirements). Pet. App. 10a-14a. The court disagreed with petitioners' assertion that the government can *never* have a substantial interest in requiring disclosure in this context. *Id.* at 11a. The court of appeals observed that, under this Court's decisions, nondisclosure can at least sometimes be "appropriately included within the anticorruption rationale" that generally justifies campaign-finance regulation. *Id.* at 12a-13a (citing, *inter alia*, *McCutcheon*, 134 S. Ct. at 1459 (plurality opinion), and *Citizens United*, 558 U.S. at 367).

Judge Sentelle concurred in the judgment without a separate opinion. Pet. App. 2a.

ARGUMENT

The court of appeals correctly rejected petitioners' contention that the First Amendment entitles STI Fund to simultaneously enjoy both the advantages of a nonconnected political committee (which may solicit and accept funds from the general public for independent expenditures) and the advantages of a separate segregated fund (which may receive unlimited operational funding from its parent without disclosing that funding).[2] The decision below does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners do not meaningfully challenge the court of appeals' conclusion that STI's own First Amendment rights are not violated by FECA's restrictions on separate segregated funds' solicitation and acceptance of donations. See Pet. App. 6a-10a. Under this Court's decision in *Citizens United* v. *FEC*, 558 U.S. 310 (2010), STI itself may solicit unlimited donations for independent expenditures and fund unlimited independent expenditures from its general treasury funds, regardless of any limitations imposed on separate segregated funds. *Id.* at 318-319; see Pet.

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[2] The petition expresses (Pet. 24 & n.15) uncertainty as to whether, if petitioners' position were accepted, STI's payments for STI Fund's solicitation costs would in fact be exempt from disclosure under FECA. The court of appeals, however, understood petitioners to be seeking such an exemption. See, *e.g.*, Pet. App. 13a-14a (explaining that petitioners "want[] a vehicle capable of soliciting without transparency"). And such an exemption would be the unavoidable consequence of petitioners' position, because FECA explicitly excludes from the definition of contribution "the establishment, administration, and *solicitation* of contributions to a separate segregated fund." 52 U.S.C. 30118(b)(2)(C) (2 U.S.C. 441b((b)(2)(C)) (emphasis added).

App. 2a, 5a, 8a, 13a-14a. Petitioners identify no authority for the proposition that establishment of a separate segregated fund is necessary to effectuate STI's own First Amendment right to make independent expenditures. Nor do they argue that limitations on solicitations and expenditures by a separate segregated fund—a type of entity created by Congress to provide an *alternative* to then-banned direct corporate expenditures, *id.* at 6a—function as limitations on the sponsoring organization's own political speech. Petitioners also do not argue that any limitations on solicitations and contributions by separate segregated funds infringe the First Amendment rights of Glengary, which can make unlimited independent expenditures from its own treasury.

Petitioners instead contend that such limitations violate the First Amendment rights of STI Fund. They frame the primary question presented in this case as whether a "political committee * * * has a First Amendment right to engage in unrestricted [independent-expenditure] activities" if it avoids intermingling independent-expenditure funds with funds it may use for direct political contributions. Pet. i. Neither the court below nor the FEC, however, prohibits political committees from engaging in such activities in that circumstance. So long as a political committee operates as a nonconnected political committee—as STI Fund is free to do—it may solicit and accept donations into an independent-expenditure-only account without limitation.[3] See *EMILY's List* v.

[3] Petitioners are therefore incorrect in asserting (Pet. 3) that "[e]ven if" STI Fund "was to eschew the narrow disclosure exemption it receives, and announce every penny its connected organiza-

FEC, 581 F.3d 1, 9 (D.C. Cir. 2009); 79 Fed. Reg. at 62,817; FEC Advisory Op. 2010-11; FEC Advisory Op. 2010-09; pp. 5-6, *supra*; see also *SpeechNow.org* v. *FEC*, 599 F.3d 686, 696 (D.C. Cir.) (en banc), cert. denied, 131 S. Ct. 553 (2010) (concluding that individuals may make unlimited donations to political committees for independent expenditures).

Petitioners correctly note (Pet. 20-25) that if STI Fund registered as a nonconnected political committee, it would be required to publicly disclose any operational funding it receives from STI, because it would no longer be eligible for the disclosure exemption that FECA grants in the context of a parent organization's subsidization of a separate segregated fund. But petitioners fail to establish that STI Fund has a First Amendment right to that disclosure exemption. The court of appeals understood petitioners' sole argument on that issue to be that the government has no valid interest in requiring disclosures when the only political activities at issue are independent expenditures. Pet. App. 10a-14a. The court correctly rejected that contention. *Ibid.*

This Court has recognized that a disclosure requirement "'impose[s] no ceiling on campaign-related activities,'" "'do[es] not prevent anyone from speaking,'" and is constitutional so long as there is a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-367 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 64, 66 (1976) (per curiam), and *McConnell* v. *FEC*, 540 U.S. 93, 201 (2003)). The Court has also explained that a disclosure require-

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tion, [STI], gives it," it "still could not form [a] separate account" for independent expenditures.

ment can "be justified based on a governmental interest in 'providing the electorate with information' about the sources of election-related spending." *Id.* at 367 (quoting *Buckley*, 424 U.S. at 66) (brackets omitted); see *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1459 (2014) (plurality opinion) (same). And in *Citizens United*, the Court upheld the application of FECA's disclosure requirements in a context involving independent expenditures. 558 U.S. at 367-371 (rejecting First Amendment challenge to disclosure requirements as applied in the context of a political movie).

2. Petitioners assert (Pet. 13-20) that the ruling below conflicts with decisions of the Fifth and Tenth Circuits. No such conflict exists. Neither of those decisions addressed the constitutionality of FECA's regulation of separate segregated funds, and neither suggests that another circuit would have decided this case differently.[4]

In *Catholic Leadership Coalition* v. *Reisman*, 764 F.3d 409 (2014), the Fifth Circuit addressed a Texas statute that regulated "general-purpose political committees," a type of nonconnected political committee recognized under state law. *Id.* at 413-414. The court found that the State's regulatory scheme was unconstitutional insofar as it prohibited a committee from making more than $500 in contributions or expenditures until (1) 60 days had passed following the appointment of a treasurer and (2) the committee had received donations from at least ten different contrib-

[4] The same is true of other circuit-court decisions cited by petitioners' amicus, which the amicus recognizes to be in accord with the D.C. Circuit's own precedents concerning independent expenditures by nonconnected political committees. See Coolidge-Reagan Found. Amicus Br. 8-10 & n.5.

utors. *Id.* at 416-417, 426-437. Both the type of committee and the campaign-finance restrictions involved in *Catholic Leadership Coalition* were different from those at issue here. Indeed, the Fifth Circuit distinguished the D.C. Circuit's decision in this case by explaining that "there are fundamental differences between federal law's regulation of separate segregated funds and Texas's regulation of general-purpose committees." *Id.* at 431 n.28.

In *Republican Party* v. *King*, 741 F.3d 1089 (2013) (*RPNM*), the Tenth Circuit affirmed a preliminary injunction against the enforcement of a New Mexico law that prohibited political committees (as defined under state law) from soliciting and accepting unlimited donations for the purpose of making independent expenditures. *Id.* at 1090-1103. The Tenth Circuit found the D.C. Circuit's decision in *EMILY's List*—which had similarly held that a political committee under federal law could solicit and accept unlimited donations for independent expenditures so long as it maintained a separate independent-expenditure-only account, 581 F.3d at 12—to be "instructive." *RPNM*, 741 F.3d at 1097; see *ibid.* (noting that the committees at issue in *RPNM* were "similarly situated" to the ones at issue in *EMILY's List*). The Tenth Circuit did express some disagreement with the district court's reasoning in this case. *Id.* at 1100-1101. That disagreement was premised, however, on the erroneous belief that the district court's decision in this case was applicable to all political committees (and thus was inconsistent with the D.C. Circuit's own decision in *EMILY's List*), rather than just separate segregated funds. *Ibid.* The Tenth Circuit had no occasion to consider the D.C. Circuit's own later decision in this

case, which reaffirmed *EMILY's List* and clarified that the issue in this case is specific to separate segregated funds. See Pet. App. 9a-10a.[5]

3. Contrary to petitioners' contention (Pet. 32-34), this case does not present a question of exceptional importance that would warrant this Court's review. With respect to independent expenditures, separate segregated funds are "a vintage—yet still operable—relic" of the pre-*Citizens United* legal regime. Pet. App. 6a; see *Catholic Leadership Coal.*, 764 F.3d at 431 n.28 (describing separate segregated funds as "a vestigial surplusage no longer necessary and/or needed for corporations to engage in independent expenditures"). Although a number of separate segregated funds still exist, limitations on their activities do not pose any practical impediments to independent ex-

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[5] The other two circuit-court decisions cited by petitioners (one of which is unpublished) likewise do not conflict with the court of appeals' decision here. Those decisions did not address separate segregated funds under FECA; the cases involved constitutional challenges to state laws rather than to any FECA provision; and the courts *declined* to find the challenged laws unconstitutional as applied. See *Vermont Right to Life Comm., Inc.* v. *Sorrell*, 758 F.3d 118, 122, 141, 143-144 & n.23 (2d Cir. 2014) (recognizing that the existence of a separate bank account for independent expenditures "may be relevant" to the constitutionality of limits on donations to a political committee, but upholding the application of such limits where a "'fluidity of funds'" between two assertedly separate accounts showed that they "were not kept sufficiently separate"), petition for cert. pending, No. 14-380 (filed Sept. 29, 2014); *Alabama Democratic Conference* v. *Broussard*, 541 Fed. Appx. 931, 932, 936-937 (11th Cir. 2013) (per curiam) (finding that the existence of material disputes of fact precluded judgment as a matter of law for the plaintiffs in an as-applied First Amendment challenge to a state law barring transfers from one political committee to another).

penditures. Any person (or entity) that wishes to make independent expenditures is free to do so in his (or its) own name. Any person (or entity) is also free to establish a nonconnected political committee that may solicit and accept unlimited amounts, from any donor, for independent expenditures. And any existing separate segregated fund may convert itself to a nonconnected political committee, which will effectively remove the limitations on soliciting and accepting donations for independent-expenditure activities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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