UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, *et al.*, Plaintiffs, v. BRIAN NEWBY, *et al.*, Defendants, KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION Defendant-Intervenors.	Civil Action No. 1:16-236 (RJL)

FEDERAL DEFENDANTS' COMBINED RESPONSE TO PLAINTIFFS' AND DEFENDANT-INTERVENORS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM

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INTRODUCTION

The U.S. Election Assistance Commission ("EAC" or "Commission") has authority under the National Voter Registration Act of 1993 ("NVRA") to incorporate into the National Mail Voter Registration Form ("Federal Form") state-law requirements as to information applicants must furnish for registration, if it determines that the required information is "necessary to enable the [State] to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1). The Department of Justice ("DOJ") cannot defend the Executive Director's decisions challenged here, which are not supported by such a finding. The standard that the Executive Director applied—"that the state-specific voter instructions should be accepted if they were duly passed state laws affecting the state's registration process," Declaration of Brian Newby (ECF No. 28-2) ("Newby Decl.") ¶ 25—is foreclosed by the Supreme Court's decision in *Arizona v. Inter Tribal Council, Inc.* ("*ITCA*"), 133 S. Ct. 2247 (2013), and would improperly strip the EAC of authority to make the appropriate determination, relegating the EAC to a ministerial role in which it gives complete deference to state determinations. The Intervenors' arguments to the contrary cannot be squared with either the NVRA or the Supreme Court's decision in *ITCA*. Therefore, summary judgment on this limited ground is appropriate, and the Court need not and should not reach plaintiffs' other claims in this case.

ARGUMENT

I. INTERVENORS' ARGUMENTS THAT THE EXECUTIVE DIRECTOR COMPLIED WITH THE NVRA MUST BE REJECTED

Under the APA, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,

43 (1983) (citation omitted). "An agency decision is arbitrary and capricious if it ' . . . entirely failed to consider an important aspect of the problem[.]'" *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 714 (D.C. Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

Here, Congress directed the EAC to make a determination whether additional information a state sought to require of voter registration applicants is "necessary" to allow states to make determinations about voter eligibility and to administer their voter registration and election process. 52 U.S.C. § 20508(b)(1). The Executive Director's decisions interpret the statute to strip the Commission of authority to make that determination, instead deferring to the requirements imposed by states. As a result, the decisions cannot be sustained under the APA and should be set aside.[1]

A. Intervenors' Statutory Arguments are Contrary to Supreme Court Precedent and Have Been Rejected by the Tenth Circuit.

Under the NVRA, the Federal Form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1). As explained in Federal Defendants' opening memorandum, the Supreme Court, the Tenth Circuit, and the Federal Election Commission ("FEC")—the EAC's predecessor—have all interpreted this statutory language to

[1] Intervenors continue to attempt to divert attention away from the challenged 2016 EAC decisions by focusing on a 2014 EAC decision that has been litigated and upheld, claiming that this 2014 decision was the result of the DOJ "commandeering" the EAC. As previously explained, while Federal Defendants will not divulge or comment on specific privileged communications regarding the 2014 EAC decision, the declaration of the then-Acting Executive Director makes clear that she made the decision in 2014 to deny the states' requests. *See* Declaration of Alice Miller ¶¶ 9-11 (ECF No. 48-1). Moreover, Kansas has conceded that this Court can resolve this case without considering the privileged communications between the DOJ and EAC, *see* Mar. 9, 2016 Hr'g Tr. at 85 (ECF No. 64), a fact further underscored by Kansas's placing virtually no reliance on the privileged, extra-record communications in the substantive arguments in support of its motion for summary judgment.

mean that the EAC (and not the states) must determine the existence or absence of such necessity. *See ITCA*, 133 S. Ct. at 2256 (rejecting a proposed reading of the NVRA that "would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form"); *see also Kobach v. U.S. EAC*, 772 F.3d 1183, 1196 (10th Cir. 2014) ("[S]tates must 'request' (rather than direct) the EAC to include the requested text, and must 'establish' (rather than merely aver) their need for it."); Statement of Basis and Purpose for Regulations on the National Voter Registration Act of 1993, 59 Fed. Reg. 32,311, 32,316 (June 23, 1994) ("Final Rules") ("The [FEC] has determined . . . to exclude the following items from the national mail voter registration form because they do not meet the 'necessary threshold' of the NVRA to assess the eligibility of the applicant or to administer voter registration or other parts of the election process.").[2]

On the basis of the second clause of § 20508(b)(1), Kansas now suggests that the NVRA authorizes the EAC to add state requirements to the Federal Form without regard to whether the information the state seeks to require of applicants is necessary to assess voter eligibility because, according to Kansas, such information may meet the NVRA's "necessity" standard "*either* if it helps assess the eligibility of the applicant *or* if [it] enables the State election official to 'administer [the] voter registration and . . . election process.'" Mem. in Supp. of Intervenor Def. Kobach's Cross-Mot. for Summ. J. ("Kan. Mem."), at 13-14, ECF No. 107. But this argument is irrelevant to the challenged decisions here for two reasons. First, in its request for revisions to the Federal Form's state-specific instructions for Kansas, Kansas did not claim or

[2] *See also id.* (excluding "place of birth," even though 33 states required it on their own forms); *id.* at 32,316-17 (excluding "the date of restoration of voting rights" for applicants who have been convicted of a disenfranchising crime, even though some states require such information; finding that "the date of restoration of voting rights is not itself essential to determining the eligibility of applicants, provided that applicants affirm in writing and under penalty of perjury that . . . their voting rights have been restored"); *id.* at 32,317 (excluding "maiden name" even though at least one state constitution requires it for registration).

demonstrate that documentary proof-of-citizenship was necessary to "enable the appropriate State election official . . . to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1). Rather, Kansas asserted that "a documentary proof-of-citizenship instruction on the Kansas State Specific Instructions of the [Federal Form] is necessary to enable Kansas county election officials to assess the eligibility of an applicant." AR0073, ECF No. 69-2. Second, the record is clear that the Executive Director did not make any determination that the requested documentary proof-of-citizenship requirement is necessary either for eligibility or for administrability. *See* AR0004-05; Fed. Defs.' Mot. for Summ. J. ("Fed. Defs. Mem.") 15-16, ECF No. 101. Moreover, the example Kansas offers of a change to the state-specific instructions of the Federal Form that allegedly falls under § 20508(b)(1) and "can only be understood as necessary" under the administrability clause—that "several States' instructions have been modified to include a link to the website of the States' election offices," Kan. Mem. 14—does not implicate § 20508(b)(1) at all. By its terms, § 20508(b)(1) concerns only what "identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant)" the Federal Form may *require* of applicants; it does not address the EAC's authority with regard to information states wish to *provide* to applicants in the state-specific instructions.

Kansas additionally argues that it is for state officials—not the EAC—to determine what is necessary to demonstrate compliance with a state's voter registration laws. Further, Kansas contends that the Supreme Court in *ITCA* "made clear that the determination of necessity resides with the States, not the EAC." Kan. Mem. 15. But none of Kansas's arguments can be squared with the Supreme Court's rejection in *ITCA* of a "reading [of the NVRA that] would permit a State to demand of Federal Form applicants every additional piece of information the State

requires on its state-specific form," *ITCA*, 133 S. Ct. at 2256, nor its acknowledgement of the EAC's "validly conferred discretionary executive authority." *See id.* at 2259; *see also Kobach*, 772 F.3d at 1194-96 (explaining that the *ITCA* decision "would make no sense if the EAC's duty was nondiscretionary"). Indeed, if every state law regarding voter registration procedures were reproduced on the Federal Form, the NVRA would serve little purpose.[3] *Accord* Final Rules, 59 Fed. Reg. at 32,316 (FEC excluding certain items from Federal Form even though some states require them "because they do not meet the 'necessary threshold' of the NVRA to assess the eligibility of the applicant or to administer voter registration or other parts of the election process"). It certainly could not counteract "discriminatory and unfair registration laws and procedures [that] can have a direct and damaging effect on voter participation in elections for Federal office," as the statute aims to do. 52 U.S.C. § 20501(a)(3).

By the same reasoning, Intervenor Public Interest Legal Foundation's ("PILF's") contention that Plaintiffs' and the Federal Defendants' arguments "amount to nothing more than disagreement with Executive Director Newby's determination that Kansas, Alabama and Georgia have demonstrated that a proof-of-citizenship requirement is necessary in those states," Intervenor-Def. PILF Mot. for Summ. J. ("PILF Mem.") 32, ECF No. 104, also fails. First, the record is clear that the Executive Director did not make any determination that the requested documentary proof-of-citizenship requirement is necessary to determine voter eligibility, as the NVRA requires. *See* AR0004-05; Fed. Defs.' Mem. 15-16. Second, in support of this argument, PILF argues that in *ITCA*, the Supreme Court "was clear" that if a State determined that "'a mere oath will not suffice to effectuate [the state's] citizenship requirement,'" PILF Mem. 32 (quoting

[3] For the same reason, Kansas's proposed "objective" definition of "necessary" cannot be reconciled with the NVRA. Kan. Mem. 17-18. Although Federal Defendants explained in their memorandum (Fed. Defs. Mem. 20-21) why this definition must be rejected under *ITCA*, Kansas offers no rebuttal and its argument should accordingly be rejected.

ITCA, 133 S. Ct. at 2260), the State need only provide some evidence of noncitizen registration in its borders, triggering in the EAC "a nondiscretionary duty" to include that state's proof-of-citizenship requirement in the state-specific instructions on the Federal Form, *id.* (citing *ITCA*, 133 S. Ct. at 2260). PILF's argument is incompatible with the Supreme Court's suggestion in *ITCA* that "a State may request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility, and may challenge the EAC's rejection of that request in a suit under the [APA]," which makes clear that the Supreme Court understands the EAC to have authority to reject a State's request. *Id.* at 4; *see also Kobach*, 772 F.3d at 1194-96 (noting that the *ITCA* decision "would make no sense if the EAC's duty was nondiscretionary"); *id.* at 1196 ("Were a state's mere averments truly sufficient to obligate the EAC to grant its requests, there would be no need for states to advance and substantiate an argument that their requests had been arbitrarily refused.").

B. Kansas's Constitutional Arguments Cannot Be Squared with the Elections Clause's Reservation to Congress of Authority Over Voter Registration.

Kansas's suggestion that Plaintiffs' and Federal Defendants' reading of the NVRA is unconstitutional must also be rejected. Kan. Mem. 14 ("it would violate Article I, Section 2 of the Constitution if the *requirements* for voting in federal elections differed from the *requirements* for voting in state elections" (emphasis added)). The Constitution states that "the electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const., Art. I, Sec. 2, cl. 1. But the Supreme Court expressly acknowledged that it is permissible for state-developed voter registration forms to "require information the Federal Form does not." *ITCA*, 133 S. Ct. at 2255 ("States retain the flexibility to design and use their own registration forms, but the Federal Form provides a backstop: No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a

simple means of registering to vote in federal elections will be available.").

Moreover, as the Supreme Court explained in *ITCA*, the Constitution makes a clear distinction between *eligibility requirements*—which the Qualifications Clause leaves to states—and *registration procedures*—which Congress can preempt under the Elections Clause. *See ITCA*, 133 S. Ct. at 2257 ("[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them."); *id.* at 2257 (explaining that Elections Clause legislation "necessarily displaces some element of a pre-existing legal regime erected by the States"). *See also Kobach*, 772 F.3d at 1195 ("Even as the *ITCA* Court reaffirmed that the United States has authority under the Elections Clause to set *procedural* requirements for registering to vote in federal elections (i.e., that documentary evidence of citizenship may not be required), it noted that individual states retain the power to set *substantive* voter qualifications (i.e., that voters be citizens)."). It is Kansas's assertion that "registration is itself a qualification" that raises constitutional doubts; a state cannot intrude on Congress's "authority under the Elections Clause to set *procedural* requirements for registering to vote in federal elections (i.e., that documentary evidence of citizenship may not be required)" by simply recasting registration as a "voter qualification." *See id.* However Kansas attempts to cast this argument, it cannot get around the fact that "eligibility requirements" and "registration procedures" must be understood to be distinct. Kan. Mem. 22.

II. THE COURT SHOULD NOT REACH PLAINTIFFS' OTHER CLAIMS

The Court should not reach Plaintiffs' other claims because Plaintiffs are entitled to summary judgment on the limited grounds discussed above, and any further challenges would be more appropriately addressed, if necessary, following any EAC decision under the appropriate statutory standard. Moreover, as the parties' briefs demonstrate, Plaintiffs' assertions in Counts I, II and III of their complaint raise questions concerning EAC authority and procedures that the

agency should have the opportunity to decide in the first instance.

A. The Scope of the Executive Director's Delegated Authority Need Not and Should Not Be Resolved at This Time.

Counts I and II concern whether the Executive Director had authority to issue the decisions he did, under the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 ("HAVA"), (Count I) or under an internal EAC subdelegation (Count II). Although both Plaintiffs and Intervenors argue that the Court should resolve these claims at this time, review of their opposing arguments—*see* Pls. Cross-Mot. for Summ. J. ("Pls. Mem.") 23-30, ECF No. 102, Kan. Mem. 28-29,[4] and PILF Mem. 18-24—which reflect the lengthy and complicated history of this issue, *see* Fed. Defs. Mem. 5-10, highlight why the Court should not weigh in on these questions and should instead allow the agency the opportunity to decide the bounds of the Executive Director's authority in the first instance. To the extent the Court finds it necessary to reach these claims, it should narrowly rule that the Executive Director's authority did not extend to the action he actually took—adopting a statutory interpretation not previously adopted by the Commission that is contrary to the plain text of the NVRA and the Supreme Court's *ITCA* decision. Whatever authority the Commission delegated, it could not reasonably be construed to include reinterpretation of the EAC's organic statute in a manner inconsistent with Supreme Court authority.

[4] In its argument as to the scope of the Executive Director's delegated authority, Kansas improperly relies on extra-record material covered by the deliberative process privilege, *see* Kan. Mem. 28-29, but offers neither explanation nor justification as to why the Court should consider this material. In a record review case, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C.Cir.2012) (review is "limited to assessing the record that was actually before the agency"). A party seeking supplementation with extra-record evidence carries the burden to establish that inclusion is necessary. *See Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 55 (D.C. Cir. 2015). Even if Kansas had purported to carry that burden here, this Court should not consider the material proffered because it is well-established that "[a]gency deliberations not part of the record are deemed immaterial" in a record review case. *In re Subpoena Duces Tecum*, 156 F.3d 1279 (D.C. Cir. 1998).

B. The Challenged Decisions Are Informal Adjudications for Which Notice-and-Comment Rulemaking Was Not Necessary.

For similar reasons, the Court should decline to reach Plaintiffs' claim that the EAC was required to undertake notice-and-comment rulemaking. But should the Court reach the issue, Federal Defendants are entitled to summary judgment on this claim. Fed. Defs. Mem. 24-25. In support of their claim, Plaintiffs assert that the Executive Director's decisions were "legislative rule[s]." Pls. Mem. 34. As the Tenth Circuit previously found, however, the Executive Director's decisions on states' requests are "informal adjudication[s,]" *Kobach*, 772 F.3d at 1197; and "neither notice-and-comment nor an on-the-record hearing is required" for such adjudications, *New Life Evangelistic Ctr. Inc. v. Sebelius*, 753 F. Supp. 2d 103, 116 (D.D.C. 2010). To the extent Plaintiffs contend that the action of the Executive Director warranting notice and comment was his determination that "no showing of 'necessity' was required to grant the States' requests," thus "effect[ing] a substantive regulatory change to the statutory regime," Pls. Mem. 36 (citation omitted), the Executive Director's conclusion was contrary to the NVRA and Supreme Court precedent, as explained above. Therefore, this determination was *ultra vires* irrespective of whether notice and comment procedures would be required.

III. THE COURT SHOULD SET ASIDE THE CHALLENGED DECISIONS AND ALLOW THE AGENCY THE OPPORTUNITY TO TAKE FURTHER ACTION CONSISTENT WITH THE CORRECT STATUTORY STANDARD

The Court has before it the Executive Director's contemporaneous memorandum regarding his decisions. *See* Feb. 1, 2016 Mem., ECF No. 28-1. For the reasons set out in prior filings, *see* Fed. Defs. Mem. 15-16, Defs.' Mar. 6, 2016 Suppl. Br. 3-4, 6-7, ECF No. 48, that memorandum sets forth "the determinative reason for the final action," and accordingly the action's validity "must . . . stand or fall on the propriety of that finding." *Camp*, 411 U.S. at 143. On the basis of this record, it is clear that "the agency made an error of law" and therefore "the

court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *Nebraska Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 331 (D.C. Cir. 2006) (citation omitted). That is not to say that the EAC cannot reconsider the states' requests under the statutory standard, as Federal Defendants have explained previously. Defs.' Mar. 6, 2016 Suppl. Br. 12. However, based on the contemporaneous memorandum, there can be no doubt that the decision under review did not apply the statutory standard. *See* Feb. 1, 2016 Mem. 4. In these circumstances, the decisions should be set aside and the EAC should be given the opportunity to take action consistent with the proper statutory standard. *See SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943).

This is not a situation, as Intervenors suggest, in which "this Court . . . 'cannot evaluate the challenged agency action on the basis of the record before it," PILF Mem. 33-38, or in which "the Executive Director erred by not sufficiently explaining his decision," Kan. Mem. 40. The Executive Director made clear that he was deferring to state law, a position that cannot be reconciled with the governing statute and controlling precedent. There is therefore no need for this Court to seek "additional clarification." *Id.* at 40-41. D.C. Circuit precedent holds that a supplemental declaration may not be relied upon insofar as it contradicts the agency's contemporaneous explanation. *See Olivares v. TSA*, 819 F.3d 454, 463-64 (D.C. Cir. 2016), *petition for cert. filed*, No. 16-88, 16 U.S.L.W. 142 (July 14, 2016) (holding *post hoc* declaration only "admissible for [the court's] consideration" if it "contains 'no new rationalizations'; it is 'merely explanatory of the original record'" (citation omitted)); *AT&T Info. Sys. Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) ("[N]ew material should be merely explanatory . . . and should contain no new rationalizations." (citation omitted)). Here, a second

supplemental declaration cannot establish that the January 29, 2016 decisions were made on the basis of the NVRA's "necessary" standard where the Executive Director's contemporaneous explanation for his decisions expressly stated that he considered "need" to be "irrelevant" and "not the issue I am evaluating." Feb. 1, 2016 Mem. 4.

Moreover, as Federal Defendants have previously explained, the case cited by Kansas—*Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319 (D.C. Cir. 2011)—does not support its proposal. In that case, the court upheld consideration of a declaration that had been prepared after the court determined that the agency's reasons were unclear and that "further articulation of its reasoning" would enable the court to evaluate the decision. *See Menkes*, 637 F.3d at 337 (quoting *Local 814, Int'l Bhd. of Teamsters v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976) (per curiam)). The agency decision at issue in *Menkes* made clear that plaintiff's status as a registered independent pilot would expire at the end of the 2003 navigation season but the administrative record did not address important underlying considerations, including what "changed conditions" made his registration appropriate in 2003 but not in 2004. *See Menkes v. U.S. Dep't of Homeland Security*, 486 F.3d 1307, 1314-15 (D.C. Cir. 2007). Accordingly, the D.C. Circuit vacated the agency's decision and stated that "on remand [the agency] will be obliged to" explain the changed conditions. *Id.* at 1314. Here, by contrast, the Executive Director expressly stated his rejection of the statutory standard, and no supplementation can change that fact. *See* Defs.' Mar. 6, 2016 Suppl. Br. 3-4.

IV. INTERVENORS PROVIDE NO BASIS FOR THE COURT TO DEPART FROM ITS PRIOR HOLDING THAT PLAINTIFFS HAVE ADEQUATELY ESTABLISHED STANDING

This Court previously held that the League of Women Voters of Alabama ("Alabama League"), the League of Women Voters of Georgia ("Georgia League"), League of Women Voters of Kansas ("Kansas League"), and Project Vote ("the State Leagues") "met their burden

to demonstrate organizational standing." Mem. Op. 15, ECF No. 92. Kansas does not challenge the organizational plaintiffs' standing. Kan. Mem. 12-13. PILF offers two main arguments for why the State Leagues lack standing. PILF Mem. 11-17. But neither argument appears to provide a basis for reconsidering this Court's prior decision.

First, PILF asserts that the Kansas League's president testified in a different federal action that the group does not conduct voter registration drives. *Id.* at 12. The Court found that "the Kansas League will now have to help individuals understand and comply with the documentation of citizenship requirement to the extent it uses the Federal Form in its voter registration endeavors." Mem. Op. 17. Because the Court's finding was not limited to voter registration drives, PILF's reliance on a deposition statement about voter drives (but not about voter registration endeavors more broadly) cannot logically affect the standing analysis.

Second, PILF asserts that the other State Leagues lack standing because Alabama and Georgia are not enforcing their documentary proof-of-citizenship requirements. PILF Mem. 14-15. But this Court found that Alabama and Georgia's non-enforcement of their respective documentary proof-of-citizenship requirements as to Federal Form applicants was not dispositive because the Alabama and Georgia Leagues, like the Kansas League, "ha[ve] a mission of educating the public about voting laws . . . [and i]f the state-specific instructions remain on the Federal Form, [they] will have to expend some resources to clarify the effects of the requirements to their members and volunteers and to potential voters they encounter in order to minimize confusion the instructions may cause." Mem. Op. 17-18. "[T]hey will be expending resources 'in response to, and to counteract, the effects of the defendants' allegedly unlawful conduct." *Id.* at 18 (quoting *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011)). PILF does not offer any new arguments, beyond those this Court has already

rejected.

CONCLUSION

For the reasons stated herein and in Federal Defendants' Memorandum, because the challenged decisions did not apply the statutory standard, they cannot be sustained. The proper remedy under the APA is to set aside the challenged decisions, giving the EAC the opportunity to consider the states' requests under the proper statutory standard.

Dated: August 26, 2016

Respectfully submitted,

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