Foreword

The Patient Protection and Affordable Care Act of 2010, commonly known as Obamacare, was a unique claim of congressional power. As Chief Justice John Roberts wrote, "Congress has never attempted to . . . compel individuals not engaged in commerce to purchase an unwanted product."

From November 2009 through June 2012, I dedicated myself to the constitutional challenge to Obamacare, first as a Georgetown constitutional law professor and blogger on the popular law blog The Volokh Conspiracy, and eventually as an attorney representing the National Federation of Independent Business (NFIB). Our mission was twofold—to save our country from Obamacare and to save the Constitution for our country. Throughout the entire process, I focused on one simple idea—that the federal government cannot mandate that you purchase health insurance. Such a claim of power was not only *unprecedented,* it was also unlimited, unnecessary, and dangerous.

During that time, as a law professor, I authored dozens of law review articles, op-eds, and blog posts in which I helped develop the constitutional theory and arguments that were ultimately presented to the Supreme Court. When I first began this journey, most other academics scoffed at the very notion that this claim of power by Congress was unconstitutional. Many even deemed our objections frivolous. I and a small group of constitutional scholars and attorneys

thought differently, and we continued to develop and refine our constitutional arguments as events unfolded.

To help bring this message to the general public I gave speeches, did countless interviews on television and radio, and debated the topic across the country, all of which made me the public face of the constitutional challenges to Obamacare. In addition, I worked closely behind the scenes with some superb attorneys representing various challenging parties at the district court level to hone their arguments in response to the government's evolving defense of Obamacare. Together with lawyers from the Cato Institute, I submitted amicus briefs to all the federal circuit courts of appeals considering the case. To get a sense of how these arguments played in the courts, I was the only person to be present at all of the pivotal lower court hearings in Pensacola, Richmond, Cincinnati, Atlanta, and Washington, and eventually at the U.S. Supreme Court.

After decisions by federal district court judges in Virginia, Florida, and Pennsylvania held that Obamacare was unconstitutional, the Jones Day law firm and I became the legal team for the NFIB during the appellate phase of its lawsuit as co-plaintiff with the attorneys general of twenty-six states. Through the tireless work of my co-counsel, the attorneys general and their lawyers, and those who submitted amicus briefs, we were able to secure a victory in the Eleventh Circuit Court of Appeals in Atlanta.

The Supreme Court soon granted review of our case. But the justices didn't just accept the case: they granted six hours of oral argument time, spread over the course of three days, to flesh out all the issues. As Josh Blackman details in Chapter 5, that amount of time for oral argument is exceptional in the modern era of the Court and was an indication that those who doubted the seriousness of our challenge should have reassessed their claim that it was frivolous.

After the arguments, in which a majority of the justices seemed skeptical of the government's defense of Obamacare, I became

guardedly optimistic. The justices fearlessly engaged the issues head-on and placed the burden on the government to justify this *unprecedented* expansion of federal power beyond anything the Supreme Court had sanctioned before. They did not appear at all satisfied with the government's effort to identify some judicially enforceable limit on its claimed power to make all Americans purchase a product as part of a congressional scheme to regulate interstate commerce.

However, soon after the case was submitted to the Court, I became distressed by an extraordinary and *unprecedented* effort to try to influence the Court's private deliberations. When I was a criminal prosecutor in Chicago, after a case had been submitted to the jury, I could safely retire to my office to work on other cases knowing the jury would be insulated from further appeals from my adversaries. Not so here. After this case was submitted to the Supreme Court, many on the left—from President Obama to Patrick Leahy, the chairman of the Senate Judiciary Committee, to journalists such as Maureen Dowd, E. J. Dionne, and Jeffrey Rosen—vociferously waged what I called a "campaign of disdain" against the conservative justices in general, and Chief Justice Roberts in particular, in an effort to influence and even intimidate one or more of the justices to capitulate.

Their efforts were all the more troubling in light of the report that, at the very time when these attacks were at their peak, the chief justice began to pull back from his initial conference vote to invalidate the individual insurance mandate. Although we may never learn whether the chief justice changed his vote—and if so, why—these preemptive attacks on the Court's legitimacy should it invalidate the president's "signature" legislation left a stain on the entire case.

What happened on decision day in June 2012 was also *unprecedented.* Five justices (Roberts, Scalia, Kennedy, Thomas, and Alito) held that the individual mandate exceeded Congress's powers under the Constitution, just as I and others had contended since November 2009. At the same time, however, five justices upheld most of the

Affordable Care Act. Though Justices Ginsburg, Breyer, Sotomayor, and Kagan would have upheld the insurance mandate *in toto* under the commerce and tax powers of Congress, Chief Justice Roberts on his own reached the result in an *unprecedented* manner: he employed what he called a "saving construction" to revise the statute that Congress actually wrote. In other words, he chose to "save" the law by ignoring what he admitted was its most natural reading.

The statute as written by Congress included an "individual responsibility *requirement*"—better known as the "individual mandate"—that was enforced by what the statute called a monetary "penalty." In the statute as rewritten by the chief justice, the requirement and coercive penalty were replaced by an *option* either to get private insurance or pay a noncoercive *tax*.

Like the four concurring justices, some had contended that the individual mandate could be sustained under both the tax and commerce powers, notwithstanding that Congress had failed to invoke its tax power in its findings justifying the mandate. But I am unaware of any lawyer, judge, or professor who took this position ever conceding that (A) a mandate to buy insurance was unconstitutional under the Commerce and Necessary and Proper Clauses, and (B) only by construing it as an option to buy insurance could it be upheld. In adopting this reasoning, Chief Justice Roberts stood entirely alone. Although our constitutional challenge failed to stop Obamacare as we had hoped, the question of whether we ultimately won or lost the case is tougher to answer. I contend that, in at least six important respects, we were victorious in saving the Constitution for our country:

- First, we prevailed in establishing that *the federal government lacks the power to compel people to engage in economic activity.* No longer can the government claim any power to mandate that citizens buy a product or service from a private company simply

because it would solve a problem, such as lowering health insurance costs.

- Second, we were vindicated in our claim that *the government's authority to solve problems that affect the "national economy" is not a blank check for the expansion of federal power.* No longer can the government contend that it can enact any law, justified by any means that do not violate an express constitutional prohibition, so long as it can be said to address a large, collective-action problem. This was a significant victory over the vision of congressional powers favored by most constitutional law professors.
- Third, we established that *Congress may not simply invoke the Necessary and Proper Clause to do an end-run around the limits of its commerce power.* Although in the past, courts have been highly deferential—indeed too deferential—to Congress's assessment of the necessity of its restrictions of liberty, this case reaffirmed that, to be constitutional, an implied power must also be proper. It must not be a great power but one that is "incidental" to an enumerated power, and the rationale that supports such a power cannot be such as to justify an unlimited police power in Congress. This was a major victory.
- Fourth, we showed that *Congress cannot avoid the limits the Constitution places on its powers to govern by simply calling something a "tax" after a law is enacted.* Although the chief justice's "saving construction" treated the "penalty" in the statute as though it was a tax—even though both Congress and the president took great pains not to call it that—he denied that a punitive tax that had the effect of mandating activity, which is beyond its commerce power, could simply be upheld by later calling the mandate a "tax." Instead, he recognized a new, but limited, power to tax inactivity. So on this front, too, we scored a partial but significant victory.

- Fifth, to be constitutional, *any such tax must be low enough to be noncoercive and preserve the choice to conform or pay the fine.* Traffic laws do not give citizens the option of speeding or paying the fine, but the chief justice's new power to tax inactivity does. This highly limited power far better preserves liberty than does the alternative on commerce power regulation that can be enforced by punitive fines and imprisonment. Imagine, for example, if all federal drug laws were solely based on the chief justice's nonpunitive tax power rather than as commerce power regulations. We would have to open the doors of federal prisons and release drug law offenders by the tens of thousands. This was a substantial victory for liberty.
- Sixth, we succeeded in showing that Congress's power to compel states to accept federal money can be coercive and unconstitutional. Now the federal government will have to find more conciliatory means to engage the states through cooperative programs. No longer can Congress put a gun to the heads of the states and tell them, "Your money or your life." This last victory was perhaps the most unexpected, but most resounding, win.

For all these reasons, with this case, we prevailed in ensuring that our government is one of limited and enumerated powers, preserving this constraint on federal authority as a means of protecting our most fundamental individual liberties. As Chief Justice Roberts wrote in his opinion, "There can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits." On this front, our challenge was victorious both for the Constitution and for liberty.

The story of the constitutional challenge to Obamacare is *unprecedented* in every way. Never before in our nation's history has a single law received such a coordinated and concerted attack. Twenty-six states joined forces to stop Obamacare dead in its tracks. Millions of

Americans opposed the idea of the mandate, which polled—and still polls—as wildly unpopular. We saw the emergence of the Tea Party, a social movement dedicated to restoring limits on federal power and reining in the excesses of the federal leviathan, and with it the rise of a political movement for "constitutional conservatism." In the fall of 2010, Republicans gained control of the House of Representatives largely on this issue.

I first came to the challenge in November 2009, even before the Senate bill that ultimately passed had emerged from committee. At that time, though I had my doubts about the individual mandate's constitutionality, I had not deeply considered the issue. After giving a speech at the Federalist Society National Lawyers Convention at the Mayflower Hotel in Washington, D.C., I began chatting about the pending legislation with a small group of prominent conservative and libertarian attorneys and scholars in the hallway outside the ballroom. Little did I know that this casual conversation would lay the groundwork for what would become the constitutional challenge to Obamacare that rocketed through the lower courts and went all the way to the U.S. Supreme Court.

As luck would have it, joining in that initial discussion was a bright young attorney by the name of Josh Blackman. Due partly to his tenacity, and partly to fortuity, Josh was present at many of the key junctures throughout the challenge and was never far from the action. I had gotten to know Josh years earlier when he was a law student. Even then, he made a strong impression on me as someone who cares deeply about the Constitution, the Supreme Court, and our political system. As a young scholar, Josh has already distinguished himself with cutting-edge constitutional theories and an ability to address both sides of any issue fairly and dispassionately. More than any other legal observer, I believe Josh was uniquely situated to tell this story.

Over the two years we litigated this case, on his blog, JoshBlackman.com, Josh chronicled how the challenge was proceeding,

documenting each step in the evolution of the case. He even made an impact on the culture surrounding the litigation, as evidenced by the title of this book, *Unprecedented.* In the early days of this debate, even before Obamacare passed in March 2010, I took to using the word "unprecedented" more often than I realized. At one event where I used "unprecedented" several times in a single paragraph, Josh live-blogged that we should have a "Randy Barnett drinking game"—take a shot whenever I said the word "unprecedented." Josh's "joshing" spurred me to make "unprecedented" the one-word centerpiece of our strategy in the courts and in the court of public opinion, much to the chagrin of the Act's defenders.

To prepare to write this book—which began almost a year before the Supreme Court ruled—Josh conducted over one hundred interviews with nearly everyone involved in the case. He spoke with almost all of the attorneys who worked on the case, from the district court level to the Supreme Court. He read every brief filed by the government and the challengers in every case. And he was able to interview dozens of members of the media, including nearly every member of the elite Supreme Court press corps, to glean their insights into how the case evolved. Josh even interviewed high-ranking current and former administration officials to learn how the government litigated the case from the inside.

From all these sources, Josh Blackman got the scoop on the constitutional case of the century, which he now shares with all of us. Combining his inside information with his constitutional expertise and the writing skills he has honed as a scholar, he is able to explain the deep constitutional doctrines involved in this litigation in language anyone can understand. In this compelling narrative, complex arguments about the Commerce Clause, the Necessary and Proper Clause, the taxing and spending powers, and standing are all presented in plain English. Even those who have been deeply involved in the case stand to learn from his exposition. I know I have.

Part political thriller and part comprehensive history, *Unprecedented* presents the definitive account of the unprecedented constitutional challenge to Obamacare. Enjoy!

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Introduction

NFIB v. Sebelius is unlike any other case decided by the Supreme Court.

Three years before the case reached the Supreme Court, few took a constitutional challenge to the Patient Protection and Affordable Care Act of 2010 seriously. Speaker of the House Nancy Pelosi famously dismissed a reporter's question about the constitutionality of the law, chortling, "Are you serious? Are you serious?" Even fewer could have dreamed that the Supreme Court would come so close to invalidating the crowning legislative achievement of the Obama presidency. The Affordable Care Act (ACA) survived by the skin of its teeth, with the most unpredictable outcome imaginable.

Unprecedented is the story of the ACA's journey to the brink of oblivion and back, in the blink of an eye, and what it means for the future of our government and our Constitution.

The story of the challenge to Obamacare is the story of President Barack Obama's first term. After his historic election in 2008, Obama considered the ACA his "legacy." This law was intended to ensure that all Americans have access to affordable health care and cannot be denied coverage based on preexisting conditions. Obama was willing to stake his presidency on a law that is now popularly nicknamed after him.

The story of the challenge to Obamacare is also the story of a bitterly divided Congress. Following the president's landslide victory in 2008, Democrats won wide majorities in both houses, large enough to overcome any Republican opposition to the ACA. However, with the bill's rising unpopularity, steeped by the brewing Tea Party, the administration had to dig deep to ram the law through on a party-line vote before it was too late.

The story of the challenge to Obamacare is also the story of the courts. With the passage of the law, the president's legacy seemed to be secured, as constitutional challenges seemed futile. Yet several federal judges rebuffed the government's argument that the ACA, with its individual mandate, was justified by what the Supreme Court had sanctioned before. This law was unprecedented. Ultimately, it would be up to the Supreme Court to pass final judgment on whether Congress could compel people to purchase health insurance.

And most importantly, the story of the challenge to Obamacare is the story of our Constitution, the thread that holds together these three competing branches.

It was the Constitution that gave social movements such as the Tea Party the steam needed to oppose this law and nearly stop it in its tracks. Supported by leading libertarian constitutional theorists, the Tea Party said, no, the Constitution does not give Congress the power to regulate inactivity and make us buy broccoli.

It was the Constitution's enumerated powers and its promise of equality for all that inspired progressives to pass the ACA and build another bedrock foundation in society's pursuit of social justice. To President Obama, our fundamental charter enshrines "the core principle that everybody should have some basic security when it comes to their health care."

It was the Constitution's separation of powers that presented the Supreme Court with the opportunity to judge this monumental law.

And in the end, it was the Constitution that gave Chief Justice John Roberts the deciding vote and allowed the ACA to survive.

The challenge to the ACA bolted together our three governmental tracks into a riveting and unpredictable roller-coaster ride that spanned two decades, beginning in the White House, rocketing through Congress, careening throughout the heartland of America, and finally colliding with the Supreme Court. This wild ride created the most powerful and concerted constitutional challenge to any federal law in a generation—and its dramatic resolution provided a fitting conclusion to this chapter of our constitutional history.

With all three branches of our government uniting, and dividing, over the meaning of our Constitution, the challenge to the ACA tested our mettle and revolutionized the legal and political landscape for years to come.

This is the story of how the nine justices of the Supreme Court decided the fate of the ACA. Fittingly, this drama is told in nine parts.

Part I (October 2, 1989–January 20, 2009)

The story of the individual mandate crisscrosses two decades of inside-the-beltway politics at its finest as Democrats, Republicans, and everyone in between shifted and evolved in their positions on whether the government should force people to buy insurance, who otherwise would choose to free-ride on the system. To understand the constitutional challenge to Obamacare from 2009 to 2012, we must start with the conservative origins of the individual mandate, championed for over two decades by leading Republicans from Newt Gingrich to Mitt Romney.

Part II (January 21, 2009–March 23, 2010)

During his first term, President Obama made his primary focus the ACA. The cornerstone of the ACA was the individual mandate, which

the president adopted directly from Hillary Clinton's plan—the same plan he had opposed during the Democratic primary.

At the time, most scholars laughed at the idea of any legal challenge to Obamacare. Yet a handful of constitutional scholars and attorneys, led by Georgetown law professor Randy Barnett, was undeterred. They argued that it was unconstitutional for the federal government to force people to purchase insurance. Soon, this argument would gain constitutional steam as it was adopted by the surging popularity of the Tea Party. But this opposition was not enough to "kill the bill." When, at the eleventh hour, Senate Republicans lodged constitutional objections against the ACA, it was to no avail. Shortly thereafter, the ACA cleared the Senate and House on straight party-line votes and seemed unstoppable.

Part III (March 24, 2010–January 31, 2011)

With the Congress and the president accepting the law, only one branch's approval was still needed—the courts. Before the ink of the president's signature was even dry, lawsuits were filed in courts across the country. The leading case, filed in Florida, was a coordinated constitutional challenge that eventually united twenty-six states to oppose the ACA.

Soon, judges in Florida and Virginia would find the individual mandate unconstitutional. These courts would hold that Congress's power to regulate commerce did not include the power to regulate inactivity—that is, a person's decision not to buy health insurance. With these rulings, this challenge could be considered frivolous no longer.

Part IV (February 1–November 13, 2011)

Following some victories and defeats in the federal trial courts, the case progressed to the courts of appeals, where the challengers and the government would clash in several rounds. First, the Sixth Circuit Court of Appeals in Cincinnati found that the ACA was constitutional

in its entirety. Second, the Fourth Circuit Court of Appeals in Richmond rejected the challenge to the ACA; it also found that it could not even consider the suit brought by Virginia Attorney General Ken Cuccinelli because he lacked "standing" to challenge the law.

The third, and most significant, ruling was from the Eleventh Circuit Court of Appeals in Atlanta. In a blow to the administration, that court found that the individual mandate was unconstitutional—Congress could not compel individuals to purchase health insurance. With a court of appeals having invalidated the law, review by the Supreme Court was inevitable.

Part V (November 14, 2011–March 25, 2012)

On November 14, 2011, at long last, the Supreme Court accepted review of what would become known as "the Health Care Cases." The Court scheduled an unprecedented six hours of argument time, spread over three days, for this seminal case.

For the government, Donald Verrilli assumed power as the new solicitor general. With that change came a shift in strategy and a revised argument: that the Court should read the ACA as placing a tax on those who choose not to purchase health insurance, rather than as a mandate to buy health insurance. This subtle difference would ultimately save the law. After many waited in the freezing cold for up to ninety-two hours for a ticket to oral arguments, the stage was set for the main event.

Part VI (March 26–28, 2012)

The three days of oral arguments inside the Supreme Court were a wild ride. On day one, hewing closely to the administration's revised strategy, the solicitor general had the unenviable task of convincing the justices that the individual mandate was at the same time a tax and not a tax. On day two, the solicitor general choked, quite literally, and struggled to explain why the mandate was constitutional.

By the end of the third day, things were looking good for the challengers. However, the outcome of this case would remain "in flux."

Part VII (March 29–June 27, 2012)

Although the battle inside the Supreme Court concluded on March 28, 2012, this constitutional storm would soon thunder into the streets of Washington. Prominent liberals, from President Obama to Senator Patrick Leahy, urged the Supreme Court to uphold the ACA and stressed that the Court should not step into the political fray of striking it down. Prominent conservatives, from Senator Mitch McConnell to conservative columnist George Will, returned fire at what they perceived as liberal preemptive attacks and urged the chief justice to show some resolve.

We would later learn that the chief justice's vote was in play and that, at some point, he changed his mind in favor of finding that the ACA was constitutional. However, many in Washington knew this fact much earlier and acted accordingly. After two years of arguments before the courts, it would be the arguments made outside the Court that defined the legacy of *NFIB v. Sebelius.*

Part VIII (June 28, 2012)

The ACA's day of reckoning came on June 28, 2012. It was a day that will live in legal infamy, as Hollywood could not have scripted a more dramatic conclusion to this perfect constitutional storm. At 10:06 AM, Chief Justice Roberts announced that he had written the opinion in *NFIB v. Sebelius.* Years earlier, Roberts had likened the role of a judge to that of an umpire—just calling balls and strikes. In this case, the chief justice hurled a wicked constitutional curveball. Reporters outside the Court scrambled to report on the opinion. CNN and Fox News would initially report that the Court struck down the individual mandate. President Obama, watching these reports in the White House, was "crestfallen." But CNN and Fox were wrong.

In a shocking surprise, the chief justice had voted to uphold the ACA by characterizing the penalty enforcing the individual mandate as a tax. Justices Scalia, Kennedy, Thomas, and Alito jointly dissented and would have jettisoned the entire ACA. This decision stunned almost everyone who anticipated that Justice Kennedy would be the pivotal swing vote—but not the solicitor general, who had realized that "the Chief Justice could be the fifth, and not the sixth, vote." The ACA, in the words of Justice Ginsburg, survived "largely unscathed." Within minutes of the conclusion of the session, Gov. Mitt Romney and other prominent Republicans elevated the Court's decision into an issue for the 2012 election. At the White House, the president celebrated, as his "legacy" had been secured.

Part IX (June 29, 2012–January 21, 2013)

With the chief justice's stunning opinion, the battle of Obamacare entered its final phase—the 2012 presidential election. Governor Mitt Romney proved to be the worst conceivable candidate to challenge President Obama on the issue of health care reform, because Romney had imposed an individual mandate in his own state. With Obama referring to Romneycare as the "godfather" of Obamacare, the Republican had little credibility in opposing the law. President Obama was elected to a second term of office, securing his "legacy" of Obamacare. However, though this confrontation with the Supreme Court turned out to be in Obama's favor, the Roberts Court remains poised to confront Obama's administration, and those of future presidents, on the most fundamental constitutional issues of our time.

* * *

The Affordable Care Act is now the supreme law of the land. However, the battle over Obamacare, health care reform in America, and competing visions of our Constitution is far from over.

Author's Note

Like most people, when I first heard about the arguments against the constitutionality of the Affordable Care Act, I was highly skeptical. Even though I was present at the birth of the challenge to the mandate in November 2009, I doubted it could work. On December 31, 2009, I predicted on my blog that the Supreme Court would not even consider this case: "The Justices are not touching this with a ten-foot pole." I could not have been more wrong.

Over the next two years, I watched in awe as this case rapidly evolved and developed in real time. I marveled at how quickly the constitutional arguments formed. I was stunned at how rapidly the Tea Party, and later the Republican Party, coalesced around this constitutional movement. I was also impressed with how the Obama administration vigorously rallied to defend this law. Though many did not initially take the challenge seriously, Justice Department lawyers dedicated themselves to the case from day one.

With each victory by the challengers in the lower courts, I reassessed my own prediction and became confident that the Supreme Court would have to take the case. Yet I remained conflicted. On the one hand, I was very sympathetic to constitutional arguments advanced by Georgetown law professor Randy Barnett and others that comported with my broader view of constitutional law and our system of government. On the other hand, I was cognizant of the political landscape in which the justices would rule on the issue. I worried about the possible repercussions during the 2012 election if the Court struck down this landmark piece of legislation. Because of the political dynamics involved, this case was unlike any before.

One episode in April 2012, days after oral arguments concluded, deepened my concern. In the span of a few days, all three branches of our government clashed. President Obama called on the Court to uphold the law, Senate Republicans criticized the president for

intimidating the Court, and in response, a federal judge demanded that the attorney general state his opinion whether courts retain the power of judicial review. In my mind, this was a preview of the bitterness to come if the Court struck down the ACA. I can only speculate that Chief Justice John Roberts would have viewed the event similarly. At the time, I blogged about this internecine conflict: "I am getting really antsy about this case. Everyone—Congress, the President, and the Courts—are playing with fire. And I have little faith that any of them know what they're doing." That lingering doubt remained my sentiment until decision day. When others asked me what I wanted to happen, I was still undecided.

It is perhaps fitting that, when the case was finally decided on June 28, 2012, I was at 35,000 feet on a transatlantic flight to London. Moments before my flight took off, I received the message from a friend: "Chief Justice Roberts' vote saved the ACA." I managed to reply, "OMG," before my phone lost reception and I was in total radio silence for eight hours, with no idea of what happened. In hindsight, I realize that the time apart from the case was cathartic. The pandemonium playing out in Washington, D.C., was beneath me, quite literally. The time above it all gave me a chance to gain a new perspective on the case and reformulate how this book would conclude. (Perhaps one day I will release the alternative ending in a collector's edition of *Unprecedented*.)

In the blink of the eye, the ACA went to the brink of unconstitutionality and back. Along that rapid journey, lawyers and scholars from across the philosophical spectrum were so focused on developing, refining, and advancing constitutional arguments at breakneck speeds that they were often unable to pause and appreciate the monumental importance of what was happening.

The drama is now behind us. My aim in writing this book has been to tell the story of what occurred and provide an opportunity to reflect on what it means for our government, our laws, and our Constitution.

The legacy of the Affordable Care Act is yet to be written, but its history has already begun.

Josh Blackman
HOUSTON, TEXAS
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