I. Introduction

Every two years brings another general election and with it a proliferation of campaign signs in yards and other places visible to the public. This explosion of signs presents problems for city officials concerned about preserving the aesthetic beauty of their community or reducing the safety hazards caused when motorists have their attention diverted from the road. The question of what action those city officials can take to address these problems is not always clear.

Can a city simply ban all signs? Can it enact a general ban on signs with some specific exceptions? Can a city limit the number, size, and duration of signs? Does a city's ability to regulate signs extend equally to public and private property? These are some of the questions cities must address as they draft ordinances that attempt to balance legitimate concerns about aesthetics and safety with the First Amendment rights of political candidates and homeowners expressing their views on issues of public concern. These questions have been the subject of numerous rulings from the United States Supreme Court.
types of public forums for speech and set out analytical standards for each type of forum. The three categories are the traditional forum, the designated forum, and the nonforum. The significance of the Perry categorization approach is how it determines the standard of review to be applied to government regulations restricting speaker access to a particular forum. Any content-based government action restricting speaker access to a traditional or designated public forum will be subject to strict judicial scrutiny. Content-neutral regulations aimed at public forum property will be subject to heightened scrutiny. If a particular location is found to be a nonpublic forum, then the government regulation need pass only a reasonableness standard to be upheld. The Supreme Court has narrowly defined the traditional public forum and has made the existence of a nontraditional forum turn on whether the government intended the property to be open for public speech. As a result, local governments have been able to regulate or ban signs in areas that might otherwise be expected to be open to the public.

B. Narrowing the Definition of a Public Forum

The Court describes traditional forums as places "which by long tradition or by government fiat have been devoted to assembly and debate ...." Streets and parks are the most commonly cited examples of traditional public forums. In order to enforce a content-based regulation in a traditional public forum, the governmental body must show the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest. Time, place, and manner regulations that are content-neutral must be narrowly tailored to serve a significant governmental interest and must leave open ample alternative channels of communication.

The second category of public forums is public property that the state has opened to public expression. Even if the state was not required to create the forum, once it does so it is bound by the same standards used for the tra-

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8. Id. at 45-46.
9. Id.
11. Id.
12. Id. at 953-54.
13. Id. at 954.
14. Id. at 951 ("[N]o case exists in which a Court majority has extended the traditional public forum concept beyond the public streets, parks, and sidewalks of a community.").
15. Day, supra note 3, at 183.
17. See Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").
19. Id.
20. Id.
The case that some commentators believe greatly weakened the public forum doctrine, however, was the Supreme Court's plurality opinion in *United States v. Kokinda*. Marsha Kokinda and Kevin Pearl were volunteers for the National Democratic Policy Committee, who set up tables on the sidewalk near the entrance to a Maryland post office to solicit contributions and distribute literature. They were arrested by postal inspectors and convicted under a federal regulation prohibiting solicitation on postal premises.

Although public sidewalks fall squarely within the historic definition of the traditional public forum, the Kokinda Court found that the sidewalk outside of the post office entrance did not have the same characteristics as "public sidewalks traditionally open to expressive activity." The differences cited by the Court were that the sidewalk led only from the parking area to the front door of the post office and that it was "constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." In addition to the physical characteristics of the sidewalk, the Court looked at the intent of the government and found that the Postal Service had never expressly dedicated its sidewalks to expressive activity. As a result, the Court found the sidewalk to be a nonforum, and the regulation prohibiting solicitation was upheld on a reasonableness standard.

The Kokinda opinion is criticized for shifting the presumption in public forum cases from one of openness to one of closure. Allowing government intent to transform a traditional forum into a nonforum is another criticism because free speech rights may not be exercised on publicly owned property unless the government expresses an "affirmative desire to provide an open forum." If the commentators are correct in their assertion that cases like *Vincent* and *Kokinda* betray a commitment to open public debate and have effectively brought the public forum doctrine to an end, then a city wishing to restrict political signs will have virtually unlimited ability to regulate signs on property owned or controlled by the government.

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35. *Id.* at 189.
37. *Id.* at 723.
38. *Id.* at 723-24; *see also* 39 C.F.R. § 232.1(h)(1) (1996).
39. *See supra* note 16 and accompanying text.
41. *Id.*
42. *Id.* at 728.
43. *Id.* at 730.
44. *Id.*
46. *Id.* at 190.
the limitations on speech are greater than necessary to accomplish the purpose of preserving aesthetics.\textsuperscript{59}

Traffic safety is also characterized as a substantial governmental interest justifying sign regulation.\textsuperscript{60} Like aesthetic regulations, regulations protecting public safety also cannot be used to abridge speech and other protected forms of expression.\textsuperscript{61} Cities can, however, impose time, place, and manner regulations designed to ensure the proper uses of the streets, so long as those regulations are not unfairly discriminatory.\textsuperscript{62} These regulations are viewed as protecting free speech and other civil liberties by preserving the social order.\textsuperscript{63}

B. The Scope of Private Property Regulation

The ability of government to regulate political signs on private property depends—to some extent—on the nature of the property involved.\textsuperscript{64} Ordinances prohibiting political signs on residential areas have uniformly been held unconstitutional.\textsuperscript{65} It is less clear, however, whether the government can enact regulations prohibiting the placing of political signs on private property in nonresidential areas.\textsuperscript{66}

1. Regulations Aimed at Residential Areas

The Supreme Court's decision in \textit{Vincent} upholding a ban on political signs on public property caused regulators and landowners to test whether that

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\textsuperscript{59} Members of the City Council v. Taxpayers for Vincent, 466 U.S. at 805.

\textsuperscript{60} Metromedia, Inc. v. City of San Diego, 453 U.S. at 507-08; see also Schneider v. New Jersey, 308 U.S. 147, 160 (1939) ("Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated.").

\textsuperscript{61} Schneider v. New Jersey, 308 U.S. at 160 ("Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.").


\textsuperscript{63} \textit{Id.} at 574.

\textsuperscript{64} The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of the public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.

\textit{Id.}


\textsuperscript{66} \textit{Id.} at 2507.

\textsuperscript{66} Compare Rappa v. New Castle County, 18 F.3d 1043, 1047 (3d Cir. 1994) (declaring as unconstitutional a Delaware law barring political signs along highways) with Wheeler v. Commissioner of Highways, 822 F.2d 586, 589-90 (6th Cir. 1987) (upholding a Kentucky Billboard Act and implementing regulations barring off-premises signs in protected areas adjacent to interstate highways).
highly effective but inexpensive and, therefore, of particular value to people of limited means.80

In striking down the Ladue ordinance, the Court pointed out that cities are by no means powerless to "address the ills that may be associated with residential signs."81 Nevertheless, the Court gave cities very little guidance on what types of remedies would be acceptable, focusing instead on the strong incentive individual residents have to maintain their property values and prevent visual clutter in their neighborhoods.82 Experts disagree on how much leeway the Gilleo decision leaves cities in trying to regulate residential signs.83 But one result that seems certain is that many municipalities and subdivisions will be reviewing their sign ordinances in light of Gilleo, and many of those ordinances will be revised.84

2. Regulations Aimed at Nonresidential Private Property

Many of the ordinances regulating signs on nonresidential private property have been aimed at stopping the proliferation of billboards and commercial and noncommercial off-premises signs.85 The seminal case for analyzing such regulations86 is the Supreme Court’s plurality decision in Metromedia, Inc. v. City of San Diego.87 This case involved a San Diego ordinance that generally prohibited “outdoor advertising display signs.”88 The ordinance provided exceptions for on-site signs and off-site signs falling

80. Gerald P. Greiman, A Good Sign in Ladue, St. Louis Post-Dispatch, June 19, 1994, at 3B.
82. Id. In dicta, the Court listed certain types of signs that need not necessarily be permitted in residential areas. Id. “Different considerations might well apply, for example, in the case of signs (whether political or otherwise) displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property. We are also not confronted here with mere regulations short of a ban.” Id. at 2047 n.17.
83. Freivogel, supra note 33, at 4B.
84. Id. Gerald P. Greiman, the attorney who represented Margaret Gilleo in her challenge to the Ladue ordinance, claimed that the Gilleo decision may have rendered unconstitutional ordinances in several communities which restricted the time during which people could post a political sign on their lawn. Id.
85. See, e.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994); Outdoor Systems, Inc. v. City of Mass., 997 F.2d 604 (9th Cir. 1993); Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992); National Advertising Co. v. Town of Niagara, 942 F.2d 145 (2d Cir. 1991); National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990); National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir. 1990); Ackerley Communications, Inc. v. City of Somerville, 878 F.2d 513 (1st Cir. 1989); National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988); Rzadkowolski v. Village of Lake Orion, 845 F.2d 653 (6th Cir. 1988); Wheeler v. Commissioner of Highways, 822 F.2d 386 (6th Cir. 1987); Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986); John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980).
86. Merriam et al., supra note 50, at 1015.
88. Id. at 493.
content-based. Meanwhile, other courts have held that cities can discriminate between on-site and off-site signs, as long as all signs that are allowed to carry commercial messages are also permitted to carry noncommercial messages. Statutes permitting on-site signs while banning off-site signs are also permitted under the theory that an appropriate relationship exists between the location and the use of the sign.

IV. REGULATING SIGNS BY ENACTING A TOTAL BAN OR A PARTIAL BAN: MIXED SIGNALS FROM THE COURTS TO THE CITIES

In addition to regulating signs according to their location, many cities have also enacted ordinances that distinguish between various types of signs. Many ordinances exempt certain categories of signs from their general ban.

96. Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 611 (9th Cir. 1993); Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992); Rzadkowolski v. Village of Lake Orion, 845 F.2d 653, 655 (6th Cir. 1988); Wheeler v. Commissioner of Highways, 822 F.2d 586, 591 (6th Cir. 1987).
97. Rappa v. New Castle County, 18 F.3d 1043, 1067 (3d Cir. 1994); see also Bond, supra note 64, at 2504.
98. See, e.g., National Advertising Co. v. City & County of Denver, 912 F.2d 405, 408 (10th Cir. 1990) (prohibiting off-site commercial signs within 660 feet of freeway, while permitting on-site commercial and noncommercial signs); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1270 (4th Cir. 1986) (allowing on-premise signs and permitted off-premise signs and special category signs, including political signs, in certain areas of the city).
99. The ordinance adopted by Ladue contained exceptions for:
   - municipal signs
   - [subdivision and residence identification] signs
   - [load signs and driveway signs for danger, direction, or identification] signs
   - [health inspection signs] signs for churches, religious institutions, and schools
   - Identification signs for other non-profit organizations
   - Signs identifying the location of public transportation stops
   - signs advertising the sale or rental or real property
   - [commercial signs in commercially zoned or industrial zoned districts] signs
   - signs identifying [safety hazards]

City of Ladue v. Gilleo, 114 S. Ct. 2038, 2041 n.6 (1994) (citations omitted).

The San Diego ordinance contained exemptions for the following types of signs:
1. Any sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation.
2. Bench signs located at designated public transit bus stops.
3. Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture and storage.
4. Commemorative plaques of recognized historical societies and organizations.
5. Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies.
content of the sign and may include such things as temporary political signs, time and temperature signs, and signs for religious and civic organizations. The Supreme Court's decisions on whether such exemptions are permissible are filled with ambiguities, and leave many city officials confused as to what type of ordinance is constitutional.

As is the case with ordinances that distinguish between on- and off-site signs, the key to whether a regulation will be upheld that imposes either a total or partial ban is whether the court views the restriction as content-based or content-neutral. As noted in Part III of this Note, regulations that seek to restrict speech based on its content will rarely be upheld. Content-neutral regulations that restrict the time, place, and manner of otherwise protected speech are, on the other hand, permitted. Time, place, and manner regulations must be "justified without reference to the content of the regulated speech, . . . serve a significant governmental interest, and . . . leave open alternative channels for communication of the information."
of a particular expressive forum could pose constitutional problems. However, the Court reached a different conclusion just a few years later in Vincent. The majority opinion in Vincent was written by Justice Stevens, who first signaled his support for the idea of a total ban in his dissenting opinion in Metromedia. In deciding whether a total ban could withstand constitutional scrutiny, Justice Stevens identified two questions that needed to be addressed. The first was whether there was any reason to believe that the regulation was biased toward a particular point of view, or whether it was a subtle method for regulating controversial subjects of public debate. The second question was whether there remained an ample market for the

119. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 n.20 (1981) (citing Schad v. Mount Ephraim, 452 U.S. 61 (1981) (finding that an ordinance prohibiting all live entertainment violates the First Amendment guarantee of free expression)); see also Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 87 (1977) (striking down an ordinance prohibiting the posting of "For Sale" or "Sold" signs on residential property). The Court in Linmark did not decide the question of whether a total ban on signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression. Id. at 94 n.7. The Court did, however, seem to indicate that a total ban could run into problems by failing to leave open ample and alternative channels of communication. Id. at 93. The Court adopted a restrictive view of what would constitute ample and alternative means of communication by stating that those alternative means could not be more costly, less effective, and less likely to reach the intended audience than the form of communication being restricted. Id. Linmark puts the burden of proof on the party seeking to restrict speech to show that any possible alternative means of communication is feasible. Liuzzi, supra note 118, at 403.

Professor Stone believes the Court generally recognizes that substantial or total bans on particular means of expression pose significant dangers, and generally tests such restrictions under an intermediate standard of review. Stone, supra note 93, at 65-66. Some of the considerations that Professor Stone cites in support of his conclusion are that while speakers often can shift to alternative means of communication, the fact that the speaker prefers the prohibited means of communication means something is lost in the transition. Id. at 65. Second, to the extent that certain means of expression are used disproportionately by certain types of speakers (such as yard signs by political candidates) the potential distorting effect of laws limiting that means of expression is more serious. Id. at 65-66. Third, despite the advent of radio, television, and cable as means of communication, "it remains important to preserve the more traditional and less expensive means of communication, which are most often the subject of prohibition." Id. at 66. "Finally, although the elimination of any one of those means of communication may not significantly reduce the total quantity of public debate...a deferential standard of review" could cumulatively lead to a serious reduction or elimination of certain means of expression. Id.

Professor Lee notes that while alternative modes of communication are always available in theory, some modes will be inadequate for poorly financed communicators. Lee, supra note 6, at 806. He contends that the adequacy of alternatives cannot be assumed. Id. Rather, he states courts need to engage in a detailed analysis of factors such as cost and the ability to reach the intended audience. Id. Professor Lee is critical of the Supreme Court for frequently ignoring those considerations. Id.

121. Metromedia, Inc. v. City of San Diego, 453 U.S. at 553 (Stevens, J., dissenting).
122. Id. at 552.
123. Id.
could be found unconstitutional because of content-based exemptions, Justice Stevens also found support in Metromedia for the proposition that a sign ordinance could prohibit too much protected speech. Justice Stevens used Metromedia and Vincent to "identify two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs." The first is that the ordinance in effect restricts too little speech because the exemptions discriminate based on the signs' message. Justice Stevens found an exemption from an otherwise permissible regulation of speech could fit that definition if it represents a governmental attempt to give an advantage to one side of an issue of public debate, or to select the topics for public debate. That language mirrors the traditional definition of content-based discrimination, but Justice Stevens stated that simply removing the exemptions would not necessarily cure the defects in the regulation.

The reasoning behind that conclusion relates to the second analytical basis identified in the opinion: that an ordinance could restrict too much protected speech. Justice Stevens found that even if the exemptions in the Ladue ordinance were free of viewpoint discrimination, the ordinance still restricted too much speech by almost completely banning signs from residential property. The broad sign prohibition struck down in Gilleo was distinguished from the broad sign prohibition approved in Vincent on the basis that residential signs, unlike signs placed on public property, are a unique and important means of communication.

134. Id. at 2043 (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 525-34 (1981)).
135. Id. at 2043.
136. Id.
137. Id.
138. Id. at 2043-44.
139. Id. at 2043.
140. Id. at 2045.
141. Id. at 2045; see also supra notes 70-80 and accompanying text. The view of residential signs as a unique and important means of communication affected the way Justice Stevens evaluated the availability of alternative means of communication. See Freivogel, supra note 33, at 4B. In Vincent, when signs placed on utility poles were not found to be unique or valuable, Justice Stevens concluded that ample, alternative means existed. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984). In contrast, Justice Stevens noted in Gilleo that the mere existence of an equally affordable and legible means of communication (such as flags) did not alter the fact that the Ladue ordinance "banned a distinct and traditionally important means of expression." City of Ladue v. Gilleo, 114 S. Ct. 2038, 2046 n.16 (1994).

Professor Fiss is critical of the way Justice Stevens evaluated alternative means in Vincent. Fiss, supra note 47, at 11. "Rather than asking whether posting signs on utility poles is a sensible and effective method of communicating with the public . . . Stevens seems to place the burden on the speaker to demonstrate that the means of communication is 'uniquely valuable.'" Id. Professor Fiss contends it will be very difficult for any single mode of communication to meet the "uniquely valuable" requirement, and implies that restrictive regulations will more easily withstand scrutiny on the basis that alternative means are available. Id.
have generally been upheld—so long as the regulations are applied without regard to the content of the signs.\footnote{153}

Regulations aimed at limiting the number or duration of political signs prior to an election are more likely to be declared unconstitutional.\footnote{154}

\footnote{153. Swenson, supra note 91, at 660; Merriam et al., supra note 50, at 1034; see also Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 615 (9th Cir. 1993) (finding regulation of signs by size and location equally burden both commercial and noncommercial speech); Chicago Observer, Inc. v. City of Chicago, 929 F.2d 325, 328 (7th Cir. 1991) (finding size limits on newsracks are neutral with respect to content and viewpoint); Ackerley Communications, Inc. v. City of Somerville, 878 F.2d 513, 522 (1st Cir. 1989) (noting that a city can correct content discrimination in a sign ordinance by basing exemptions solely on height requirements); National Advertising Co. v. City of Orange, 861 F.2d 246, 249 (9th Cir. 1988) (reasoning that a city can redraft an ordinance to avoid content-based distinctions by regulating noncommunicative aspects such as size, spacing, and design); Rzadkowolski v. Village of Lake Orion, 845 F.2d 653, 654 (6th Cir. 1988) (finding ordinance limiting number of billboards carrying commercial or noncommercial messages does not regulate content); cf. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429-31 (1993) (asserting city's aesthetic and safety interests in limiting the total number of newsracks is not served by ordinance banning all commercial newsracks, but not placing any limits on the number of noncommercial newsracks).}

\footnote{154. Alison E. Gerenser, Removal of Billboards: Some Alternatives for Local Government, 21 STETSON L. REV. 899, 905 n.28 (1992) ("Temporary political signs offer special advantages to a candidate or ideology, for means of political communication are not entirely fungible."); see also Whitton v. City of Gladstone, 821 F. Supp. 1342, 1344 (D.N.J. 1994). The court found an ordinance prohibiting commercial or residential property owners from placing political signs on their property more than 30 days before an election amounted to an impermissible content-based distinction. \textit{Id.} The court noted that in some residentially-zoned areas, a permanent year-round ground sign expressing support for a particular sports team would not be subject to the durational limits, while the limits would apply to a political campaign sign made of the same material, with the same dimensions and colors, and erected on the same spot. \textit{Id.} The Fourth Circuit found that an ordinance limiting the number of temporary signs that could be placed on residential property to two infringed on residents' free speech rights by preventing them from expressing support for more than two candidates in an election with numerous contested races, and by significantly restricting the ability of two voters living within the same household to use sign posting to express their support for opposing candidates. Arlington County Republican Comm. v. Arlington County, 983 F.2d 582, 594 (4th Cir. 1993). A New Jersey community's ordinance which limited signs advertising political events or viewpoints to 10 days before the event was also found to be content-based. McCormack v. Township of Clinton, 872 F. Supp. 1320, 1323 (D.N.J. 1994). The court noted that signs advertising yard sales, town festivities, or athletic events could presumably be posted at any time within 30 days before the actual event. \textit{Id. at 1323-24.} A Tacoma, Washington, ordinance that prohibited the posting of political signs more than 60 days before an election was also struck down on the basis that it failed to adequately provide for free speech rights. Collier v. City of Tacoma, 854 F.2d 1046, 1057 (Wash. 1993). \textit{But see} Messer v. City of Douglasville, 975 F.2d 1505, 1513 (11th Cir. 1992). The \textit{Messer} decision upheld an ordinance requiring permits for temporary signs as a content-neutral regulation. The ordinance required that applicants for a temporary permit for political signs also post a $500 bond to ensure the signs are removed within 10 days following the election. \textit{Id.} The Eleventh Circuit rejected the argument that the ordinance limited political speech by placing a financial requirement on political candidates that did not apply to others. \textit{Id.} The court noted the bond requirement burdened all signs of a temporary nature, not just political signs. \textit{Id.} An ordinance
almost always be upheld, while restrictions of signs on residential property will almost always be struck down. Cities should also be able to draft ordinances that distinguish between on-site and off-site signs, so long as commercial speech is not favored over noncommercial speech.

A total ban on signs on nonresidential property would probably be permitted. The question of whether exceptions can be made for certain types of noncommercial signs is less clear. Exemptions for temporary political signs will probably be allowed, but an ordinance that bans political signs while allowing types of noncommercial signs will likely face greater challenges. Although there are some indications a city may constitutionally prohibit political signs by limiting exemptions to those signs bearing a relationship to the property on which they are displayed, that theory has not been widely tested in the lower courts.

Finally, cities should be able to limit the size and shape of signs. The number of temporary political campaign signs can probably be regulated on nonresidential property, but any restrictions aimed at residential property face a good chance of being struck down. Cities probably cannot limit the duration of campaign signs before an election, but should be able to impose removal requirements on the signs after the election.

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