No. 12-3357

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FRANK R. O'BRIEN, JR.; O'BRIEN INDUSTRIAL HOLDINGS, LLC.,
Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; HILDA L. SOLIS, in her official capacity as the Secretary of the Department of Labor,
Defendants-Appellees.

On Appeal from the United States District Court
For the Eastern District of Missouri

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION; THE AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI; THE ANTI-DEFAMATION LEAGUE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; THE INTERFAITH ALLIANCE FOUNDATION; THE NATIONAL COUNCIL OF JEWISH WOMEN; THE RELIGIOUS COALTION FOR REPRODUCTIVE CHOICE; THE UNITARIAN UNIVERSALIST ASSOCIATION; AND THE UNITARIAN UNIVERSALIST WOMEN'S FEDERATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

No *amici* have parent corporations or are publicly held corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

STATEMENT OF *AMICI*

Amici are organizations that have a strong commitment to defending the fundamental right to religious liberty. *Amici* provide this brief to respectfully request that this Court affirm the District Court's holding that the federal contraceptive rule does not create a substantial burden on Appellants' religious exercise under the Religious Freedom Restoration Act. The District Court correctly held that requiring an employer – particularly a for-profit employer that already provides contraception coverage – to provide comprehensive health insurance to its employees does not substantially burden the company owner's religious exercise.

IDENTITY OF *AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan public interest organization of more than 500,000 members dedicated to defending the civil liberties guaranteed by the Constitution. The ACLU of Eastern Missouri, the organization's affiliate in Eastern Missouri, was founded to protect and advance civil rights and civil liberties in Eastern Missouri, and currently has over 3,000 members in the eastern part of the state. The ACLU has a long history of defending religious liberty, and believes that the right to practice one's religion, or no religion, is a core component of our civil liberties. For this reason, the

ACLU routinely brings cases designed to protect individuals' right to worship and express their religious beliefs. At the same time, the ACLU vigorously protects reproductive freedom, and has participated in almost every critical case concerning reproductive rights to reach the Supreme Court.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination and anti-Semitism. To that end, ADL works to oppose government interference, regulation and entanglement with religion, and strives to advance individual religious liberty. ADL counts among its core beliefs strict adherence to the separation of Church and State embodied in the Establishment Clause, and also believes that a zealous defense of the Free Exercise Clause is essential to the health of our religiously diverse society and to the preservation of our Republic. In striving to support a robust, religiously diverse society, ADL believes that efforts to impose one group's religious beliefs on others are antithetical to the notions of religious freedom on which the United States was founded.

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 Members, Associates and supporters nationwide. While traditionally known for its role in initiating and supporting health care and other initiatives in Israel, Hadassah has longstanding commitments to improving health care access in the United States and supporting the fundamental principle of the free exercise of religion. Hadassah strongly believes that women have the right to make family planning decisions privately, in consultation with medical advice, and in accordance with one's own religious, moral and ethical values. Consistent with those commitments, Hadassah is a strong supporter of the contraceptive rule and an advocate for the position that the rule's implementation does not violate of the Religious Freedom Restoration Act.

The Interfaith Alliance Foundation is a 501(c)(3) non-profit organization, which celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work

promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "comprehensive, confidential, accessible family planning and reproductive health services, regardless of age or ability to pay." NCJW's Principles state that "[r]eligious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society." Consistent with its Principles and Resolutions, NCJW joins this brief.

Founded in 1973, the Religious Coalition for Reproductive Choice ("RCRC") is dedicated to mobilizing the moral power of the faith community for reproductive justice through direct service, education, organizing and advocacy. For RCRC, reproductive justice means that all people and communities should have the social, spiritual, economic, and political means to experience the sacred gift of sexuality with health and wholeness.

The Unitarian Universalist Association ("UUA") comprises more than 1,000 Unitarian Universalist congregations nationwide. The UUA is dedicated to the principle of separation of church and state. The UUA participates in this *amicus curiae* brief because it believes that the decision of the United States District Court holding that the federal contraceptive rule does not create a substantial burden on religious exercise under the Religious Freedom Restoration Act should be affirmed.

The Unitarian Universalist Women's Federation has had an abiding interest in the protection of reproductive rights and access to these health services since its formation nearly 50 years ago. As an affiliate organization of the Unitarian Universalist Association of Congregations, its membership of local Unitarian Universalist women's groups, alliances and individuals has consistently lifted up the right to have children, to not have children, and to parent children in safe and healthy environments as basic human rights, with the affordable availability of birth control being essential and fundamental. The Unitarian Universalist Women's Federation has long recognized and will continue to oppose structural constraints posed when health care systems and health insurance providers limit or deny access to contraception and other reproductive health care.

AUTHORITY TO FILE *AMICUS* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* have obtained consent from all parties to file this brief.

AUTHORSHIP AND FUNDING OF *AMICUS* BRIEF

No party's counsel authored this brief in whole or in part. With the exception of *amici*'s counsel, no one, including any party or party's counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The District Court correctly held that the federal contraceptive rule, which requires contraception to be offered in health insurance plans without cost-sharing, *see* 45 C.F.R. § 147.130(a)(1)(iv), does not substantially burden Appellants' religious exercise under the Religious Freedom Restoration Act ("RFRA"). Pursuant to RFRA, Appellants must show that the contraceptive rule placed a "substantial burden" on their free exercise of religion. 42 U.S.C. § 2000bb-1. Appellants have failed to meet that burden in two ways. First, the connection between the contraceptive rule and any impact on Appellants' religious exercise is simply too attenuated to rise to the level of a "substantial burden." The law does not require Appellants to use contraception themselves, to physically provide contraception to their

employees, or to endorse the use of contraception. The contraceptive rule creates no more infringement on Appellants' religious exercise than many other actions that Appellants readily undertake, such as paying an employee's salary, which that employee could then use to purchase contraception. Second, the employee's independent decision about whether to obtain contraception breaks the causal chain between the government action and any potential burden on Appellants' free exercise.

Furthermore, RFRA does not permit Appellants to impose their religious beliefs on their employees. As the District Court correctly held, RFRA "is a shield, not a sword." *O'Brien v. Dep't of Health & Human Servs.*, 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012), *stay granted*, No. 12-3357 (8th Cir. Nov. 28, 2012). This Court should affirm the District Court's finding that "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *Id*.

ARGUMENT

I. The Federal Contraceptive Rule Does Not Substantially Burden Appellants' Free Exercise of Religion Under the Religious Freedom Restoration Act.

As the District Court recognized, RFRA was enacted by Congress in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), to restore the strict scrutiny test for claims alleging the substantial burden of the free exercise of religion. *O'Brien*, No. 12-CV-476, 2012 WL 4481208, at *4. Specifically, RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion" unless the government demonstrates that the burden is justified by a compelling interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

Although RFRA does not define "substantial burden," this Court has held that a "rule imposes a substantial burden on the free exercise of religion if it prohibits a practice that is both sincerely held by and rooted in the religious beliefs of the party asserting the claim." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal citations and quotation marks omitted). Government action imposes a "substantial burden" when there is "no consistent and dependable way of exercising" one's faith. *Love v. Reed*, 216 F.3d 682, 689 (8th Cir. 2000). While a RFRA claim may proceed when the plaintiff alleges that she was forced by the government to act in a manner that is inconsistent with her religious beliefs, *Ali*, 682 F.3d at 710-11, "a substantial burden must place more than an inconvenience on religious

exercise," and is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[1] *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *see also, e.g., Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) ("a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise") (internal quotation marks and citations omitted); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (the word "substantial" in the "substantial burden" test cannot be rendered "meaningless," otherwise "the slightest obstacle to religious exercise, . . . however minor the burden it were to impose," could trigger a RLUIPA violation).

The party claiming a RFRA violation "must establish" that the governmental policy at issue substantially burdens his or her sincerely held

[1] Although some of the cases cited herein are Free Exercise cases decided prior to *Smith*, courts have held that those cases are instructive in the RFRA context "since RFRA does not purport to create a new substantial burden test" but rather restores the pre-*Smith* test. *Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995); *see also Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 736 (6th Cir. 2007) ("Congress has cautioned that we are to interpret 'substantial burden' in line with the Supreme Court's 'Free Exercise' jurisprudence[.]"). Moreover, Religious Land Use and Institutionalized Persons Act ("RLUIPA") cases are also instructive because that statute also prohibits government-imposed "substantial burdens" on religion. 42 U.S.C. § 2000cc(a)(1).

religious beliefs. *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997). Only after the plaintiff establishes a substantial burden does the burden shift to the government to prove that the challenged policy is the least restrictive means of furthering a compelling government interest. *Id*. Appellants here cannot meet their duty of demonstrating that their religious exercise is substantially burdened, and therefore their complaint was properly dismissed.

Appellants, and some of their *amici*, seem to argue that if they simply *allege* that the contraceptive rule substantially burdens their sincerely held religious beliefs, then the inquiry ends. Appellants' Br. at 22-25. Obviously, that is not the case. There is no doubt as to the sincerity of Appellants' religious opposition to contraception. *O'Brien*, 2012 WL 4481208, at *4. But that does not mean that the courts need not assess whether the contraceptive rule imposes a "substantial burden" on that sincerely held religious belief. To the contrary, that is the proper function of the courts. *See, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (although, on a motion to dismiss, courts assessing RFRA claims must "accept[] as true the factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," whether those beliefs are "substantially burdened" is a question of law properly left to the judgment of the courts); *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (holding in a RFRA

challenge that although the government conceded that the plaintiffs beliefs were sincerely held, "it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden"), *abrogated on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997).

A. The Connection Between the Contraceptive Rule and the Impact on Appellants' Religious Beliefs Is Too Attenuated to Rise to the Level of "Substantial Burden."

As the District Court properly held, the connection between the contraceptive rule and Appellants' religious beliefs is simply too attenuated to rise to the level of a substantial burden. *O'Brien*, 2012 WL 4481208, at *5. Indeed, the contraceptive rule neither requires employers to physically provide contraception to their employees, nor endorse the use of contraception, and does not "prohibit" any religious practice or otherwise substantially burden Appellants' religious beliefs. *See Ali*, 682 F.3d at 710-11. As the District Court correctly found, the rule only requires Appellants to provide a comprehensive health insurance plan "that might eventually be used by a third party" to obtain health care that is "inconsistent with [Appellants'] religious values." *O'Brien*, 2012 WL 4481208, at *7. But this "indirect financial support of a practice" from which Appellants wish to abstain "according to religious principles" does not constitute a substantial

burden on Appellants' religious exercise. *Id*. at *6; *see also Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir. Dec. 20, 2012) (denying motion for an injunction pending appeal in challenge to contraceptive rule, agreeing with the district court's holding that the plaintiffs were unlikely to succeed on the merits of the RFRA claim because the relationship between the contraceptive rule and the plaintiffs' religious beliefs was "indirect and attenuated"), *application for injunction pending appeal denied*, No.12A644, 2012 WL 669888 (Sotomayor, Circuit Justice Dec. 26, 2012).

In *Goehring v. Brophy*, the Ninth Circuit rejected a RFRA claim strikingly similar to Appellants' claim here. 94 F.3d 1294. In that case, public university students objected to paying a registration fee on the ground that the fee was used to subsidize the school's health insurance program, which covered abortion care. *Id*. at 1297. The court rejected the plaintiffs' RFRA and free exercise claims, reasoning that the payments did not impose a substantial burden on the plaintiffs' religious beliefs, but at most placed a "minimal limitation" on their free exercise rights. *Id*. at 1300. The court noted that the plaintiffs are not "required [themselves] to accept, participate in, or advocate in any manner for the provision of abortion services." *Id*.

The District Court's decision that the contraceptive rule imposes a *de minimis* burden on Appellants' religious practice, *O'Brien*, 2012 WL 4481208, at *7, is also consistent with several cases analyzing similar governmental policies. For example, the D.C. Circuit upheld the Affordable Care Act's requirement that individuals have health insurance coverage in the face of a claim that the requirement violated RFRA because it required the plaintiffs to purchase health insurance in contravention of their belief that God would provide for their health. The appellate court affirmed a district court holding that the requirement imposed only a *de minimis* burden on the plaintiffs' religious beliefs. *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2001), *affirming Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). The district court held that inconsequential burdens on religious practice, like the requirement to have health insurance, "do[] not rise to the level of a substantial burden." *Mead*, 766 F. Supp. 2d at 42.

Similarly, the Fourth Circuit in *Dole v. Shenandoah Baptist Church* held that a religiously affiliated school's religious practice was not substantially burdened by compliance with the Fair Labor Standards Act ("FLSA"). 899 F.2d 1389 (4th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990). The school paid married male, but not married female, teachers a

"salary supplement" based on the school's religious belief that the husband is the head of the household. *Id*. at 1392. This "head of the household" supplement resulted in a wage disparity between male and female teachers, and accordingly, a violation of the FLSA. The Fourth Circuit rejected the school's claim that compliance with FLSA burdened its religious beliefs, holding that compliance with the FLSA imposed, "at most, a limited burden" on the school's free exercise rights. *Id*. at 1398. "The fact that [the school] must incur increased payroll expense to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim." *Id*.; *see also Donovan v. Tony & Susan Alamo Found.*, 722 F.2d 397, 403 (8th Cir. 1983) (rejecting Free Exercise Clause challenge to FLSA because compliance with those laws cannot "possibly have any direct impact on appellants' freedom to worship and evangelize as they please. The only effect at all on appellants is that they will derive less revenue from their business enterprises if they are required to pay the standard living wage to the workers."), *aff'd*, 471 U.S. 290, 303 (1985).

There are strong parallels to the cases cited above and the instant action. Just as the plaintiffs in *Goehring* failed to state a claim under RFRA because the burden on religion was too attenuated, the same is true here. The fact that someone might have used the student health insurance in

Goehring to obtain an abortion, or the fact that Appellants' employees might use their health insurance to obtain contraception, does not impose a "substantial" burden on religious practice. Moreover, just as in *Shenandoah*, a requirement that employers provide comprehensive, equal benefits to their female employees does not substantially burden religious exercise. As the District Court properly held, Appellants "remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives."[2] *O'Brien*, 2012 WL 4481208, at *6.

Indeed, the burden on Appellants' religious exercise is just as remote as other activities that they subsidize that are also at odds with their religious beliefs. For example, as the District Court found, Appellants "pay salaries to their employees – money the employees may use to purchase contraceptives." *Id*. And just as the court recognized in *Mead*, Appellants "routinely contribute to other forms of insurance" via their taxes that include contraception coverage such as Medicaid, and they contribute to federally funded family planning programs. 766 F. Supp. 2d at 42. These federal programs "present the same conflict with their [religious] beliefs." *Id*. But

[2] Moreover, the same would be true if a company owned by a Jehovah's Witness insisted on excluding blood transfusions from its employees' health plan because of her religious beliefs, or if a Christian Scientist business owner refused, in violation of the ACA, to provide health insurance coverage based on his religious beliefs.

like the federal contraceptive rule, the connection between these programs and Appellants' religious beliefs is too attenuated. Indeed, this Court has held that a religious objection to the use of taxes for medical care funded by the government does not even create a cognizable injury. *Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000) (holding that plaintiffs lacked standing to challenge under the Free Exercise Clause the expenditure of state funds on abortion care for indigent women).

Furthermore, the fact that Appellants have been providing contraception coverage for years, Appellants' Br. at 6-7, also demonstrates that the burden to Appellants' religious exercise is minimal. There is no dispute that Appellants are sincere in their religious objection to contraception. But courts have looked to compliance with objected-to laws to ascertain the *substantiality* of the burden involved. In *Shenandoah*, for example, the fact that the school had come into compliance with the FLSA was one relevant factor in the court's determination that compliance with the FLSA would not substantially burden the school's religious exercise. 899 F.2d at 1397-98. Here, prior to the passage of the ACA and the contraceptive rule, the health insurance Appellants provided to their employees included coverage for contraception. The fact that Appellants have been providing contraceptive coverage for years further demonstrates

that any burden on Appellants' religious beliefs that is imposed by the rule is minimal.

B. An Employee's Independent Decision to Use Her Health Insurance to Obtain Contraception Breaks the Causal Chain Between the Government's Action and Any Potential Impact on Appellants' Religious Beliefs.

It is a long road from Appellants' own religious opposition to contraception use, to an independent decision by an employee to use her health insurance coverage for contraceptives. *O'Brien*, 2012 WL 4481208, at *6-7. That is, the independent action of an employee breaks the causal chain for any violation of RFRA. In this respect, the Supreme Court's decision in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), is instructive. In *Zelman*, the Court held that a school voucher program did not violate the Establishment Clause because parents' "genuine and independent private choice" to use the voucher to send their children to religious schools broke "the circuit between government and religion." *Id*. at 652. Here, as the District Court found, "the health care plan will offend plaintiffs' religious beliefs only if an OIH employee (or covered family member) makes the independent decision to use the plan to cover counseling related to or the purchase of contraception." *O'Brien*, 2012 WL 4481208, at *7. Therefore, as in *Zelman*, this scenario involves an employee's independent and private choice, which breaks the causal chain between government mandate and free

exercise of religion. Any slight burden on Appellants' religious exercise is far too remote to warrant a finding of a RFRA violation.

II. RFRA Does Not Grant Appellants a Right to Impose Their Religious Beliefs on Their Employees.

RFRA "is a shield, not a sword." *Id*. at *6. It cannot be used to "force one's religious practices upon others" and to deny them rights and benefits. *Id*. This case, and most of the cases discussed above, implicate the rights of third parties, such as providing employees with fair pay, *see Shenandoah*, or ensuring that health insurance benefits of others are not diminished, *see Goehring*. Unlike the seminal cases of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, where only the plaintiffs' rights were at issue, Appellants here are attempting to invoke RFRA to deny their female employees, who may have different beliefs about contraception use from their employer, equal health benefits. As the District Court held, "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *O'Brien*, 2012 WL 4481208, at *6.

CONCLUSION

Accordingly, this Court should affirm the District Court's holding that "requiring indirect financial support of a practice, from which plaintiff himself abstains according to his religious principles" does not "constitute[] a substantial burden on plaintiff's religious exercise," *id*. at *6, and should affirm the dismissal of the case.

January 3, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B) and Fed. R. App. P. 29(d) because:

   This brief contains 3,985 words, excluding the parts of the brief exempted by Fed. R. App. P. (a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Office 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

DATED: January 3, 2013

/s/Anthony E. Rothert
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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2013, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. In addition, a copy will be delivered by mail upon notification of approval by the Clerk.

DATED: January 3, 2013

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