

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CENTER FOR INDIVIDUAL FREEDOM,)

Plaintiff,)

v.)

Case No. 10 CV 4383

LISA M. MADIGAN, Attorney General of the State of)
Illinois; BRYAN SCHNEIDER, Chairman and Member)
of the the Illinois State Board of Elections; WANDA L.)
REDNOUR, Vice Chair and Member of the Illinois State)
Board of Elections; ALBERT PORTER, Member of the)
Illinois State Board of Elections; JESSE R. SMART,)
Member of the Illinois State Board of Elections;)
ROBERT J. WALTERS, Member of the Illinois State)
Board of Elections; PATRICK A. BRADY, Member of)
the Illinois State Board of Elections; WILLIAM M.)
McGUFFAGE, Member of the Illinois State Board of)
Elections; and JOHN R. KEITH, Member of the Illinois)
State Board of Elections,)
Defendants.)

Judge William T. Hart

Magistrate Judge Michael T. Mason

NOTICE OF QUESTION OF CONSTITUTIONALITY OF STATE STATUTES

Pursuant to Rule 5.1(a)(2) of the Federal Rules of Civil Procedure, we hereby serve notice on the Attorney General of the State of Illinois that the attached Complaint challenges the constitutionality of Illinois state statutes. The Complaint alleges that 10 ILCS 5/9-7.5 discriminates in violation of the Equal Protection Clause of the Fourteenth Amendment and 10 ILCS 5/9-1.5, 1.7, 1.8, 1.9 are unconstitutionally vague and require compliance with 10 ILCS 5/9-3, 10 in violation of the First Amendment.

Dated: July 14, 2010

Respectfully submitted,

CENTER FOR INDIVIDUAL FREEDOM

By: /s/ Steven F. Pflaum
One of Its Attorneys

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CERTIFICATE OF SERVICE

Steven F. Pflaum, an attorney, hereby certifies that he caused a copy of the foregoing **Notice of Question of Constitutionality of State Statutes** to be served by hand-delivery on July 15, 2010, upon:

Lisa M. Madigan
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/s/ Steven F. Pflaum

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FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

CENTER FOR INDIVIDUAL FREEDOM,)
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Plaintiff,)

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Case No.)

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Board of Elections; PATRICK A. BRADY, Member of)
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McGUFFAGE, Member of the Illinois State Board of)
Elections; and JOHN R. KEITH, Member of the Illinois)
State Board of Elections,)
Defendants.)

COMPLAINT

Nature of the Action

1. The Center for Individual Freedom (“Center”) brings this action to vindicate its constitutional right to associate without burdensome discrimination or needless chill and to speak out in Illinois about how we are governed and about those who seek to govern us. Illinois campaign finance law heavily burdens and discriminates against such association and speech by most corporations and other organizations, including “[e]ach nonprofit organization except for a labor union.” 10 ILCS 5/9-7.5 (emphasis added). This express statutory discrimination in favor of labor unions and their views and against the Center with respect to association and speech violates both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. It is yet another statute in the long line of Illinois legislation favoring labor union

speech that the Supreme Court of the United States repeatedly has held unconstitutional. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Carey v. Brown*, 447 U.S. 455 (1980). The discrimination is compounded by the unconstitutional vagueness of Illinois law, which is forcing the Center to remain silent for fear of exposing itself to potential criminal and civil penalties and temporary and permanent injunctions if the Center does not subject itself to regulation by the State.

2. Proceeding under the Civil Rights Act, 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Constitution itself, the Center seeks injunctive, declaratory, and any other appropriate relief that will protect its rights to speak and to be free of discrimination. Because irreparable injury is being inflicted on the Center, its supporters, and its would-be listeners at this very moment, the Center seeks emergency preliminary as well as permanent injunctive relief.

Jurisdiction and Venue

3. This action is brought pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution of the United States of America. Because this action arises under the Constitution and laws of the United States, this Court has federal question jurisdiction under 28 U.S.C. § 1331. Because this action seeks to redress the deprivation of civil rights, this Court has jurisdiction under 28 U.S.C. § 1343(a)(3). Because a defendant resides in this District and a substantial part of the events or omissions underlying the claim occurred here, venue is proper under 28 U.S.C. § 1391(b).

Parties

4. Plaintiff Center is a nonpartisan, nonprofit organization whose mission is to protect and defend individual freedoms and rights guaranteed by the U.S. Constitution. Its goals, principles, and activities are more fully described at its Internet website www.cfif.org.

(a) The Center is a corporation organized under the laws of the Commonwealth of Virginia and operates under § 501(c)(4) of the Internal Revenue Code. Its headquarters address is 917-B King Street, Alexandria, Virginia 22314.

(b) The Center has a history of speaking out on justice and other public policy issues and vigorously defending its right to do so in federal courts and elsewhere. *See, e.g., Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 658 (5th Cir. 2006); *Ctr. for Individual Freedom v. Corbett*, No. 07-2792, 2008 WL 2190957, at *1 (E.D. Pa. May 5, 2008); *Ctr. for Individual Freedom v. Ireland*, No. 1:08-00190, 2008 WL 1837324, at *7 (S.D. W.Va. Apr. 22, 2008). The rights the Center seeks to vindicate here are similar to rights it has vindicated in those cases.

(c) Voluntary contributions support the work of the Center. Consistent with its philosophical commitment to individual freedom, the Center zealously guards the privacy of its contributors. Similarly, many of its contributors require assurances of anonymity.

(d) The Center wishes to speak about judicial matters, legal reform, and other justice-related public policy issues in Illinois during the period prior to the upcoming November 2, 2010, general election when the public is most attentive to such issues and candidates provide useful illustrations of the Center's concerns. The Center also wishes to speak about these matters during similar periods in the future.

(e) The Center's planned speech would refer to candidates in upcoming elections and to issues of public importance related to those candidates, but would not use explicit words such as "vote for" or "defeat" to expressly advocate the election or defeat of any candidate.

5. Defendants are legally responsible for enforcing the laws of Illinois that are challenged in this action. They are sued in their official capacities pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and are proper persons to defend the interest of the State in this action.

(a) Defendant Bryan Schneider is the Chairman and a Member of the Illinois State Board of Elections (“Board”). The Board receives complaints of campaign finance violations. 10 ILCS 5/9-20. The Board holds preliminary hearings to determine whether complaints have “justifiable grounds.” 10 ILCS 5/9-21. The Board holds full public hearings, may impose fines, may report violations to the Attorney General or the appropriate State’s Attorney, and may seek injunctions and enforce civil penalties in the Illinois state circuit courts. 10 ILCS 5/9-3, 21, 23, 26. The Board has one of its two principal offices in Chicago, Illinois. Accordingly, Defendant Bryan Schneider has an official residence in Cook County, Illinois.

(b) Defendant Wanda L. Rednour is the Vice Chairman and a Member of the Board. She has an official residence in Cook County, Illinois.

(c) Defendant Albert Porter is a Member of the Board. He has an official residence in Cook County, Illinois.

(d) Defendant Jesse R. Smart is a Member of the Board. He has an official residence in Cook County, Illinois.

(e) Defendant Robert J. Walters is a Member of the Board. He has an official residence in Cook County, Illinois.

(f) Defendant Patrick A. Brady is a Member of the Board. He has an official residence in Cook County, Illinois.

(g) Defendant William M. McGuffage is a Member of the Board. He has an official residence in Cook County, Illinois.

(h) Defendant John R. Keith is a Member of the Board. He has an official residence in Cook County, Illinois.

(i) Lisa Madigan is the Attorney General of the State of Illinois. She has the power, along with State's Attorneys, to prosecute violations of the challenged laws.

10 ILCS 5/9-26. The Attorney General's Office has one of its "main offices" in Chicago, Illinois. Accordingly, Defendant Lisa Madigan has an official residence in Cook County, Illinois.

The Challenged Provisions

6. Illinois has adopted complex, vague, and burdensome statutes that (1) discriminate in favor of labor unions and their views and against nonprofit speakers that are not labor unions and (2) restrict the rights of Americans to discuss issues of public importance unless they register and report as political committees. These statutes are found at 10 ILCS 5/9-1 *et seq.* The specific provisions challenged in this Complaint are (1) the nonprofit organization registration and disclosure requirements at 10 ILCS 5/9-7.5 and (2) the expenditure and political committee definitions at 10 ILCS 5/9-1.5, 1.7, 1.8, 1.9 which trigger the political committee registration and disclosure obligations at 10 ILCS 5/9-3, 10.

The Discriminatory and Burdensome Nonprofit Organization Registration and Disclosure Requirements

7. A nonprofit organization, "except for a labor union, that accepts contributions, makes contributions, or makes expenditures during any 12-month period in an aggregate exceeding \$5,000 ... on behalf of or in opposition to ... candidates for public office" is subject to detailed, intrusive, and burdensome reporting and registration requirements. 10 ILCS 5/9-7.5

(emphasis added); *see also* 26 Ill. Admin. Code § 100.130. These reporting requirements impose financial and administrative burdens and require disclosure of, among other things, an organization's contributors. *Id.*

**The Vague and Burdensome
Political Committee Registration and Disclosure Requirements**

8. A "political committee" is defined to include any "individual, trust, partnership, committee, association, corporation, or any other organization or group of persons" that "accepts contributions or makes expenditures during any 12-month period in an aggregate amount exceeding \$3,000 on behalf of or in opposition to a candidate or candidates for public office."

10 ILCS 5/9-1.7, 1.8, 1.9.

9. An "expenditure" is defined as "a payment, distribution, purchase, loan, advance, deposit, or gift of money, or anything of value, in connection with the nomination for election, or election, of any person to public office." 10 ILCS 5/9-1.5. The phrase "in connection with [an] election" is not defined and is unconstitutionally vague.

10. The registration and reporting requirements that apply to political committees impose financial and administrative burdens and require disclosure of, among other things, an organization's contributors. 10 ILCS 5/9-3, 10.

Penalties and Enforcement

11. The Board may penalize a political committee for failing to file a statement of organization within ten business days of the creation of the committee (or within two business days if created within 30 days of an election) with a civil penalty of not more than \$5,000. 10 ILCS 5/9-3. The Board as well as any other political committee may petition a court for a temporary restraining order or a preliminary or permanent injunction against the political

committee ordering it to cease operations and cease the expenditure of funds until the statement of organization is filed. 10 ILCS 5/9-3.

12. The failure of political committees or nonprofit organizations to file timely reports disclosing donations and expenditures may lead to civil penalties of up to \$5,000. 10 ILCS 5/9-10; 26 Ill. Admin. Code § 100.130.

13. Any person believing a campaign finance violation has been committed may file a complaint with the State Board of Elections. 10 ILCS 5/9-20. The Board may impose a fine in addition to or in lieu of reporting the violation to the Attorney General or State's Attorney. 10 ILCS 5/9-21, 23. The Board may petition a state circuit court for an order compelling compliance with a Board order as well as to restrain or prohibit a person from engaging in actions violating campaign finance laws. 10 ILCS 5/9-24.

14. The willful failure to file required information or the filing of false or incomplete required information is a business offense subject to a fine of \$5,000. 10 ILCS 5/9-26. A business offense is a criminal offense in Illinois. 730 ILCS 5/5-1-2. The appropriate State's Attorney or the Attorney General may bring an action for a violation. 10 ILCS 5/9-26.

15. The Board has entertained complaints alleging that nonprofit organizations must register and report as political committees because they sponsored public communications that referred to candidates notwithstanding the fact that the communications did not expressly advocate the candidates' election or defeat. *See Lavelle v. Law Enforcement Alliance of Am. (LEAA)*, 02 CD 65, Report of Hearing Examiner (Oct. 31, 2002) (attached); *Ill. Campaign for Political Reform v. Ill. State Bd. of Elections*, 382 Ill. App. 3d 51, 886 N.E.2d 1220 (2008).

The Irreparable Injury to Plaintiff

16. The Center has been planning and desires to speak to the public in the Northern District of Illinois on matters of vital public interest including, among others, criminal law

enforcement and sentencing, legal reform, judicial decision-making, and other justice-related public policy issues. These are important issues for the people of Illinois to consider as a general matter, whether or not an election is occurring.

17. The Center plans to use various media, including broadcast, print, and telephone banks. The speech would occur during the time period leading up to the November 2, 2010 general election because citizens are attuned to public policy issues in that time period. The Center plans to spend more than \$3,000 or \$5,000 – the monetary thresholds for registration and reporting requirements for political committees and nonprofit organizations, respectively – to disseminate its communications, and the necessary funds are available.

18. The Center has identified vendors and initiated work to create and disseminate the communications. Substantial resources have already been invested although the precise content and format of the Center's speech will depend on an assessment of the circumstances at the moment the speech is to be disseminated.

19. Citizens of Illinois are particularly interested in and attuned to discussion of such issues of public importance at this time because of the impending election. Candidates for political office have responsibility for the issues the Center plans to address. Those issues can be framed clearly, and the views of the Center can be communicated and illustrated most effectively, by reference to the role of government officials and views of candidates in that election.

20. The Center is gravely and reasonably concerned that money spent for its contemplated speech will be considered by Illinois regulators to constitute an "expenditure" within the meaning of Illinois's campaign finance laws. Such expenditures over \$3,000 or \$5,000 (truly a pittance for television, radio, or similar speech) could expose the Center to civil

and criminal penalties as well as the burdens of litigation unless it registers and files regular reports required of nonprofit organizations or political committees.

21. As explained above, the Center is committed to individual freedom and to fighting government requirements that burden those freedoms. When government imposes administrative and financial burdens on the Center, its ability to devote its energy and resources to advancing its mission is weakened. Similarly, disclosure burdens significantly impair the Center's ability to speak because many of its contributors insist on anonymity and refuse to be disclosed so that the Center must hedge and trim, or even stand silent, to avoid risk.

22. The Supreme Court has held that, in some circumstances, disclosure burdens may be imposed on those speaking near the time of elections. *Citizens United v. FEC*, 130 S.Ct. 876, 914 (2010). The Court never has held, however, that such burdens may be imposed in a way that discriminates in favor of some speakers or are too vague for speakers to know whether they apply. This Complaint challenges such discrimination and vagueness.

23. The imposition of these burdens on the Center's speech, but not on labor union speech, discriminatorily disfavors the Center's speech and association. Similarly, the vagueness of the Illinois law forces the Center to avoid speech that the Illinois legislature has not clearly subjected to the burdens of disclosure and reporting.

24. The existing and threatened irreparable injuries to the rights of the Center, similar entities, and their willing listeners will become greater and more acute as the election approaches. Thus, prompt judicial relief is essential.

Violations of Law

25. The nonprofit organization registration and disclosure requirements at 10 ILCS 5/9-7.5 violate the First Amendment, as incorporated into the Fourteenth Amendment's Due Process Clause, as well as the Fourteenth Amendment's Equal Protection Clause.

(a) The Equal Protection Clause forbids the government from discriminating in favor of some speakers and against others.

(b) The challenged nonprofit organization registration and disclosure requirements discriminate between speakers by requiring nonprofit organizations to commit to burdensome registration and reporting requirements unless the speaker is a labor union.

(c) No justification exists for this unequal burden on First Amendment activity by these similar types of speakers.

(d) Application of 10 ILCS 5/9-7.5 to the Center and its planned speech would be unconstitutionally discriminatory.

26. The political committee disclosure requirements at 10 ILCS 5/9-3, 10 violate the First Amendment.

(a) The First Amendment demands that disclosure requirements related to political speech be exceedingly precise, clear, and narrowly tailored to ensure that lawful speech is not suppressed as speakers seek to steer clear of the regulated zone.

(b) The challenged political committee disclosure requirements fail to give sufficient advance notice as to what is subject to regulation and punishment in violation of the First Amendment because they are impermissibly vague and untailed. The definition of “political committee” at 10 ILCS 5/9-1.7, 1.8, 1.9 turns on whether an entity has made an “expenditure ... on behalf of or in opposition to a candidate.” “Expenditure” is defined at 10 ILCS 5/9-1.5 to include all spending “in connection with [an] election.” These phrases have no clear and definite meaning that can be ascertained with confidence before speaking, generally or with respect to the type of speech planned by the Center.

27. The nonprofit organization registration and disclosure requirements also violate the First Amendment in precisely the same way because the nonprofit organization registration and disclosure requirements also apply to “expenditures ... on behalf of or in opposition to ... candidates.” 10 ILCS 5/9-7.5.

28. The challenged laws are facially invalid for these reasons. Moreover, they are invalid as applied to the Center and to other similarly situated organizations.

Claims

29. The injury to the Center, other entities, and their Illinois audience is irreparable. Monetary relief is not realistically available and, in any event, could not fully and fairly compensate for the loss of core First Amendment and Fourteenth Amendment rights.

30. The challenged laws were enacted and are maintained, and Defendants’ enforcement responsibilities were established and are exercised, under color of law of the State of Illinois. The violations of First and Fourteenth Amendment rights caused by those laws, the threat that Defendants will participate in the enforcement of those laws, and the resulting existing and threatened injuries violate 42 U.S.C. § 1983 and entitle the Center to all appropriate relief.

31. An actual controversy exists between the Center, on the one hand, and the Defendants, on the other hand, concerning the validity of the challenged laws, thus entitling the Center to a declaratory judgment under 28 U.S.C. § 2201 and appropriate supplemental relief under section 2202.

32. In 2009, Illinois passed a new law revising its Election Code. *See* Public Act 96-832. The amended Election Code does not affect the Center’s claims because, among other reasons, the material changes to the challenged provisions are not effective until January 1, 2011, and the Center would like to speak now.

Relief

The Center seeks all remedies that will effectively protect it and others who wish to speak freely in Illinois in the time period before the Illinois elections. Among the remedies requested are:

- A. A preliminary and permanent injunction against the enforcement of the nonprofit organization registration and disclosure requirements and a declaratory judgment that they are invalid and unenforceable.
- B. A preliminary and permanent injunction against the enforcement of the political committee registration and disclosure requirements and a declaratory judgment that they are invalid and unenforceable.
- C. In the alternative, a declaratory judgment that the definition of “expenditure” in the nonprofit organization and/or political committee registration and reporting contexts has a tailored and objective bright line meaning that conforms to the First Amendment and a preliminary and permanent injunction against enforcement beyond that meaning.
- D. An award of attorney’s fees pursuant to 42 U.S.C. § 1988(b), together with costs of suit.

Dated: July 14, 2010

Respectfully submitted,

CENTER FOR INDIVIDUAL FREEDOM

By: /s/ Steven F. Pflaum
One of Its Attorneys

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**STATE OF ILLINOIS
COUNTY OF COOK**

**BEFORE THE STATE BOARD OF ELECTIONS
OF THE STATE OF ILLINOIS**

Michael E. Lavelle
Complainant

vs.

02 CD 65

Respondents
Law Enforcement Alliance of America, (LEAA)

REPORT OF HEARING EXAMINER

Procedural History

This closed preliminary hearing was held as a result of a complaint filed pursuant to An Act to Regulate Campaign Financing (Illinois Compiled Statutes, Chapter 10, Article 5, Section 9-1 et seq., hereafter referred to as the Act) alleging that the Respondents violated Sections 5/9-1.5, 5/9-1.8 and 5/9-3. Specifically, the complaint alleged that the Respondents failed to register with the State Board of Elections as a Political Committee after it made an expenditure in excess of \$3,000 on behalf of a candidate on the ballot at the upcoming November General Election.

Complainant's Exhibits

1. Form D-4, Complaint for Violation of the Campaign Disclosure Act and a written elaboration of the nature of the complaint.
2. Copy of a response from the LEAA to an inquiry from the State Board of Elections regarding the purchase of television advertisements supporting Joe Birkett and criticizing Lisa Madigan, both candidates for Illinois Attorney General.
3. Chart obtained from Buying Time, LLC showing the purchase and value of television air time in various markets by the LEAA.
4. Article appearing on October 7 in the Chicago Sun Times attributing quotes from Attorney General candidate Joe Birkett.
5. Videotape copy of the advertisement at issue

Respondent's Exhibits

1. Attorney Thomas Kirby appeared on behalf of the Respondent.
2. Pre-hearing Brief of the LEAA

PARTYS' CASE-IN-CHIEF

This Closed Preliminary Hearing was conducted on October 30, 2002 in the Chicago Office of the State Board of Elections. The Complainant Michael E. Lavelle appeared in person and represented himself. He was assisted by attorney Michael Kasper. Also appearing were two witnesses, Ms. Ann Spillane and Mr. Adam Ollendorff, employees of the Citizens for Lisa Madigan Campaign.

Complainant's Case-in-Chief

Mr. Lavelle contended that the LEAA violated the Campaign Disclosure Act when, after producing and financing a television advertisement valued in excess of \$3,000 supporting Joe Birkett and criticizing Lisa Madigan, both candidates for Illinois Attorney General, they failed to file a D-1 Statement of Organization and a Pre-Election Report with the State Board of Elections.

Respondent's Case-in-Chief

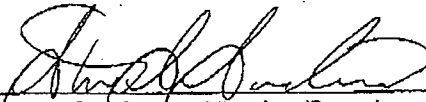
Mr. Kirby did not dispute the facts of the Complaint. His contention was that the LEAA was engaged in independent issue advocacy, speech protected by the First Amendment to the US Constitution. His position was that the US Supreme Court in Buckley vs. Valeo declared that only political speech directly advocating the election of an identified candidate (using words such as "vote for" or "elect") were subject to regulation. All other "issue advocacy speech" such as that used in the ads in question was not subject to governmental regulation. Mr. Kirby then contended that the advertisement in question was not directly advocating the election of Joe Birkett or directly advocating the defeat of Lisa Madigan since the key words identified in Buckley were absent, and was therefore not subject to regulation by the Campaign Disclosure Act. Mr. Kirby also cited FEC vs. Massachusetts Citizens for Life to support his contention.

Mr. Kirby also applied Buckley for the proposition that the advertisements were not made "in connection with" the election. Again, only speech explicitly advocating a certain candidate is considered made "in connection with" an election. Since the speech in question did not so advocate, regulating it in any way is unconstitutional.

FINDINGS AND RECOMMENDATION

I recommend that the Complaint be found to have been filed upon justifiable grounds. As an employee of the State Board of Elections, I am obligated to base my recommendation on the application of the Campaign Disclosure Act and its accompanying rules. Section 5/9-1.8 defines "State Political Committee" as any "organization...which...makes expenditures during any 12

month period exceeding \$3,000 on behalf of or in opposition to a candidate for public office". Section 5/9-1.5 defines "expenditure" as a "payment...or gift of money or anything of value, in connection with the election of any person for public office." Applying what the LEAA did in purchasing the advertisement to the two Sections above compels me to agree with the Complainant. The advertisement clearly supports Joe Birkett by touting his qualifications and the ad clearly casts Lisa Madigan in a negative light by highlighting her lack of experience. These ads ran during a two week period within a month of the highly contested election for Illinois Attorney General. I therefore believe that they satisfy the statutory requirements of "support of a candidate" and "in connection with" an election. I do feel however that the Constitutional arguments presented by the Respondent are worthy of being addressed more thoroughly; specifically, whether the Illinois Campaign Disclosure Act is the same type of regulation of speech as the Federal Election Campaign Act that was restricted by the Supreme Court in its decision in Buckley vs. Valeo. I therefore recommend that a public hearing be held to address this issue.


Steve Sandvoss - Hearing Examiner
October 31, 2002

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