UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Case No. 21-454 (PLF)**
ANTHONY PUMA,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO MOTION TO DISMISS COUNTS ONE, TWO, AND THREE OF THE INDICTMENT

The defendant, Anthony Puma, files this reply to the government's response filed on November 18, 2021. *See* ECF Dkt. No. 23. For the reasons discussed below, Counts 1-3 still fail to state an offense and fail to give proper notice to the defendant.

I. The Plain Language of §1515(a)(1)(B) as Interpreted by other Courts, as well as the Legislative History and Congressional Intent of §1512(c)(2), Support a Finding that the Statute Fails to State an Offense

The government argues in its response that the plain text defining "official proceeding," as a "proceeding before Congress" is sufficient to conclude that the Electoral Count on January 6 is included in this definition. The government supports this argument by choosing only one definition of "proceeding" from the Oxford English Dictionary, which defines it as "the carrying on of an action or series of actions; action, course of an action; conduct, behavior." *See* Govt. Res. at 12. However, if the courts rested on this definition alone, any event would qualify as an "official proceeding" because every event "carries on an action or series of actions." Other courts have not relied on this definition and have interpreted "official proceeding" to disqualify many types of government activities even though the activities "carried on a series of an action or series of actions." *See, e.g., United States v. Sutherland*, 921 F.3d 421, 426 (4th Cir. 2019) (FBI

investigation not an "official proceeding" because that term "implies something more formal than a mere investigation"), *cert. denied*, 140 S. Ct. 1106; *United States v. Dunn*, 434 F. Supp. 2d 1203, 1207 (M.D. Ala. 2006)) (investigation conducted by Bureau of Alcohol, Tobacco, and Firearms not an "official proceeding" because the term encompasses "events that are best thought of as hearings (or something akin to hearings").

The government further argues that the narrower Black's Law Dictionary definition of "proceeding" would still include the Electoral Count on January 6. *See* Govt. Res. at 13. That narrower definition includes, "the business conducted by a court or other official body; *a hearing*." Black's Law Dictionary, "proceeding" (11th ed. 2019). This definition of "proceeding" plainly describes the word to mean "a hearing." The government provides little support for the Joint Session on January 6 being a "hearing." The only support the government provides is that the Joint Session is a "solemn" environment where objections are permitted and a decision must be made pursuant to the procedures set form in 3 U.S.C. §15. *See* Govt. Res. at 14. However, the cases the government cite interpret "official proceeding" more narrowly by not only explaining that it must be a formal environment but that there also must be characteristics of a hearing, such as findings of fact, and having the power to issue subpoenas. *See United States v. Kelley*, 36 F.3d 1118, 1127 (1994) (explaining the Inspector General was empowered to, and did, issue subpoenas, and compel sworn testimony in conjunction with an investigation). So, it is not just that a decision must be made in a formal environment, but rather that the characteristics surrounding the event must be "akin to a hearing." *Id*. This interpretation is consistent with the congressional intent and legislative history outlined in the defendant's motion to dismiss.

Although the Electoral Count is in a "formal environment," it is not a "hearing" because it does not have the characteristics associated with a typical hearing. Simply because a decision

must be made does not place the session "comfortably within the category of an "official proceeding" as the government suggests. The government does not acknowledge the ceremonial nature of the session but instead attempts to equate it with a hearing. The government points to 3 U.S.C. §15, which technically bestows Congress with the authority to lodge objections; however these "objections" are not the same that exist in a typical proceeding for which the statute intends. As explained in detail in the defendant's motion to dismiss, the session is ceremonial and any potential legal significance to any objections is extremely rare. The session is not intended to be adversarial and that is because, by the time it takes place, the states have certified that there are no remaining disputes and therefore any objection would be to the technical procedures carried out by the individual states. Simply put, the "counting function" of Congress does not have a "judicial" aspect to it and the "electoral vote is merely ministerial."[1]

The government additionally argues that the Court should not limit its interpretation of "proceeding before the Congress" to encompass only proceedings that are "adversarial" or "adjudicative" in nature. *See* Govt. Res. at 10. However, that is exactly what past courts have done, and as a result, they have ruled that these factors are key in determining whether something is an "official proceeding" or not. *See United States v. Perez*, 575 F.3d 164, 169 (2d Cir. 2009) (ruling that a BOP investigation qualifies as an "official proceeding" because the "review panel must determine if there has been a violation of BOP policy, must make findings, and may decide to refer the matter to senior departmental authorities); *United States v. Ramos*, 537 F.3d 463 (5th Cir. 2008) (holding that "official proceeding" is consistently used in a manner that contemplates a formal environment in which people are called to appear or produce documents").

[1] Vasan Kesavan, "*Is the Electoral Count Act Unconstitutional*?" 80 North Carolina Law Review 1653, 2002, at page 258.

Next, the government tries to interpret Congress's intentions by comparing the definition of "proceeding before congress" as outlined in §1515(a)(1)(B) to 18 U.S.C. §1505 (*See* Govt. Res. at 15) by arguing that because Congress was specific as to what agencies and committees it was referring to in §1505, then it somehow follows that they intended to broaden §1512 when it defined "official proceeding," as a "proceeding before Congress." *Id*. However, that does not cure the fact that the word "proceeding" still needs to be interpreted. Mr. Puma does not dispute that Congress convened that day and that Congress is an entity that Section 1512 covers. Instead, he argues that the Electoral Vote was not a "proceeding" (a word that exists in both statutes) as defined and interpreted by the courts over the years.

Lastly, the government cites *United States v. Ring*, 628 F. Supp. 2d 195 (D.D.C. 2009) to argue that §1512(c)(2)'s application is not limited to the destruction of documents. *See* Govt. Res. at 17. However, that case involves a defendant who made false statements to a grand jury and the court's inquiry was whether the statements qualified as "obstruction." *Id*. at 224. That case did not decide whether the grand jury hearing constituted an "official proceeding" and so has no bearing on the immediate case. Mr. Puma's argument is that the Electoral Count on January 6 is not like grand jury hearings, which are clearly "official proceedings." Mr. Puma never argued that §1512(c)(2)'s application is limited to just destruction of documents. That is just one characteristic, among many, that supports the legislative intent of §1512 to protect the integrity of evidence at an adversarial proceeding.

II. Even if the Court Determines that the Electoral Count is an "Official Proceeding," 18 U.S.C. §1512(C)(2) is Unconstitutionally Vague

The government argues that a provision is only impermissibly vague if it requires proof of an "incriminating fact" that is so indeterminate as to invite arbitrary and "wholly subjective" application. *See* Govt. Res. at 21. To support that argument, the government cites to *United*

States v. Williams, a Supreme Court decision that reversed a circuit court's finding of vagueness with regard to a pandering statute. 553 U.S. 285 (2008). *Id*. In that case, the court reasoned that:

> "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but *rather the indeterminacy of precisely what that fact is*. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent" – wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.

Id. at 306. (emphasis added). The reasoning in *Williams* is exactly what Mr. Puma argues, that the language in §1512(c)(2) would leave a juror to doubt precisely what the fact is that they would need to make a decision. The word "corruptly" creates the same problem as the words "annoying" and "indecent" that the *Williams* court acknowledged were impermissibly vague. The government also points to *United States v. Gonzalez*, No. 20-cr-40 (BAH), 2020 WL 6342948, a decision that explained vagueness arises only if the statute specifies no standard of conduct at all. *See* Govt. Res. at 21. In that case, the defendant took issue with the words "transaction" and "dealing" within a statute and argued that those words were vague. *Gonzalez* 2020 WL 6342948 at *7. The Court found that those were every day terms that were widely understood. *Id*. Here, we do not have terms that are widely understood and most importantly, there has been no identified standard of conduct to provide guidance.

The government cannot ignore the vagueness of the language of 18 U.S.C. §1512(c)(2). The government cites to a series of cases to argue that "corruptly" is not vague. *See* Govt. Res. at 22-33. The government claims the defendant's reliance on *Poindexter* is misplaced, however it is the government that misunderstands the crux of *Poindexter*. *United States v. Poindexter*, 951 F.2d 369, 379 (D.C. Cir. 1991). The Court ruled *specifically* that the adverb "corruptly" should be read "transitively" and requires that the defendant "corrupt" *another* into violating

their legal duty. The reason that *Poindexter* reached a different outcome than *United States v. Morrison*, 98 F. 3d 619 (D.C. Cir. 1996) was because, in *Morrison*, the word "corruptly" was applied exactly as described in the statute, i.e., by persuading another to violate their legal duty. *Id*. at 630. So, *Morrison* and *Poindexter* are not at odds as the government suggests. Rather, the cases go hand and hand to rule that the word "corruptly" is only clear when it is applied in circumstances where one individual corrupts another to violate their legal duty. That is because the word "corruptly" is followed by another phrase that provides context and specific action that is required to violate the law. Such circumstances are absent in this case as §1512(c)(2) has no such requirement.

The government further questions *Poindexter* by citing to *Arthur Andersen v. United States*, 544 U.S. 696 (2005). *Arthur Anderson* involved a jury instruction that failed to "convey the requisite consciousness of wrongdoing." *Id*. at 698. This holding was not inconsistent with *Poindexter*, which involved an entirely different dispute. The court in *Arthur Anderson* was simply referring to the modifier, "knowingly," in §1512(b), which does not exist in §1512(c)(2). *Id*. The Court's decision in that case had no bearing on why the word "corruptly" was deemed vague in *Poindexter*. The government repeats the same misunderstanding when it cites to the 7th, 2nd, and 11th circuits. *See* Govt. Res. at 22-23. *Poindexter* remains good law and identifies one of the many problems that the word "corruptly" presents in the obstruction statute. It is impermissibly vague because it does not provide a discernable standard for what conduct is prohibited, thereby allowing for arbitrary or discriminatory enforcement as in this case. The government therefore should not be permitted to proceed with this charge against Mr. Puma.

Next, the government argues that Mr. Puma's conduct is so clearly within the statute's language because he "entered through a broken window, alongside a mob of rioters, who then

destroyed property, broke into Congressional offices, and assaulted law enforcement officers." *See* Govt. Res. at 23. Not only does this incorrectly recite what Mr. Puma's alleged conduct was, it further demonstrates the vagueness of the statute. According to video surveillance, Mr. Puma did not enter alongside people who were actively "rioting" but rather people just allegedly trespassing like he was allegedly doing. Furthermore, Mr. Puma did not destroy property, assault officers, and break into Congressional offices. One of the problems with this statute is it allows the government to arbitrarily decide who they believe was obstructing based on what other people in the crowd were doing. It does not matter that Mr. Puma may have walked in alongside someone who then walked out of his sight to go on and assault officers or destroy property. Mr. Puma should not be held responsible for other people's actions that day.

The government, in a footnote, argues that Mr. Puma's discussion regarding the First Amendment should be rejected because the obstruction statute is "related to the suppression of free expression." *See* Govt. Res. at 25. However, the government misunderstands Mr. Puma's argument. His argument is not that the entire obstruction statute should be invalidated because it violates the First Amendment. Rather, it is that the government is impermissibly using Mr. Puma's statements as a basis to theorize that he committed the act of obstruction and that Mr. Puma did not have fair notice that his protected expressions were potentially criminal. There are certain statements that could theoretically show the intent of an individual to commit a certain act if expressed close in time and with specific context. However, expressing a desire to "stopthesteal" and "storm the House of Representatives" the day before January 6, 2021 are not specific enough or close in time to show Mr. Puma's intent that afternoon. Furthermore, those statements can mean a variety of things. "Stopthesteal" was a hashtag created in support of a peaceful rally. "Storm" could also be a form a protest that does not necessarily mean physically

breaching the building to stop the vote. Lastly, people can post things on social media that they do not actually mean, which is exactly what happened in this case. Mr. Puma did not "storm" the House of Representatives and he certainly did not stop the vote as he entered the building long after the vote had been postponed.

Lastly, the government glosses over why the "residual clause" of §1512 somehow passes the vagueness challenge. *See* Govt. Res. at 24. It explains that because the Electoral Count qualifies as an "official proceeding," then that phrase is not vague, but it does not explain why the "catch all" phrase "otherwise obstructs" is not vague or otherwise provides sufficient notice of conduct that is prohibited. Catch-all provisions have been scrutinized carefully by the Supreme Court and have been deemed unconstitutionally vague because of the open-ended and imprecise language of the type in §1512(c). *See e.g., United States v. Johnson*, 576 U.S. 591 (2015); *Sessions v. Dimaya*, 138 S. Ct, 1204 (2018). So too here should this Court deem §1512(c)(2) catchall void for vagueness.

III. 18 U.S.C. §1752 is Not "Unambiguous" and the Legislative History Suggests the United States Secret Service is the Only Entity Designated to Restrict Areas Under the Statute

The government argues that the plain reading of the text of 18 U.S.C. §1752 does not specify who must do the restricting and so there is no need to consider the legislative history. *See* Gov. Res. at pgs. 26-28. However, the language of §1752 is not clear as it reads: "restricted building or grounds" means any posted, cordoned off, or otherwise restricted area" and thereby implies that "someone" must decide what area can be restricted. If the language was unambiguous, it would mean that *any entity* could restrict the Capitol grounds. That cannot possibly be what Congress intended as it would create no guidance to law enforcement or to the public. Given this ambiguity, we must look to the legislative history to determine what Congress

intended. *See U.S. v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) (citing *Staples v. United States*, 511 U.S. 600, 605 (1994).

The government is incorrect that the legislative history supports broad authority for any entity to restrict Congressional grounds. *See* Govt. Res. at 29. The government offers *United States v. Bursey*, 416 F.3d 301 (4th Cir. 2015) in support of this assertion, however that case involves in *what manner* the area is deemed restricted. In *Bursey*, the Court held that the presence of law enforcement was sufficient to restrict the area and that §1752 did not require a physical demarcation. *Id*. at 308. The 4th Circuit's decision actually provides further support for Mr. Puma's position because, in *Bursey*, the Secret Service is the entity that designated an area at the Columbia airport as restricted. *Id*. at 304.

The Senate Judicial Committee report unambiguously vests the Secret Service with the power to set federal restricted areas. S. Rep. No. 91-1252 (1970) at 7. If Congress did not intend to vest that authority with the Secret Service, it would not have named that agency specifically. Moreover, Congress did not remove that authority when it amended §1752 to its current version. The government reasons that because the current version of the statute does not specifically reference the Secret Service, then that means Congress purposefully removed it to broaden the authority to other entities. This assumption is unfounded and would create more uncertainty if the statute is silent on what agency has the authority to restrict areas. It could not have been Congress's intention to remove that language without specifying exactly who could restrict areas the President or Vice President is "temporarily visiting." The Court should not interpret §1752 to provide authority for any entity to restrict the grounds other than the entity that is charged with protecting the President or Vice President and has historically retained such authority.

IV. Former Vice President Mike Pence was not "temporarily visiting" the U.S.

Capitol on January 6, 2021

As an initial matter, the government cannot amend the Grand Jury's indictment through a pleading. The indictment in this case charges Mr. Puma with conduct "*where the Vice President and Vice President-elect were temporarily visiting.*" *See* ECF No. 11 (emphasis added). The indictment does not charge that "Vice President Mike Pence and his family were present" in the U.S. Capitol building when Mr. Puma is alleged to have violated 18 U.S.C. § 1752. *See* Govt. Res. at 31. Nor does the indictment charge that Vice President-Elect Harris "'[would] be temporarily visiting.'" *Id*. at 32. Therefore, the indictment does not charge what the government now apparently wishes it did and cannot stand on that basis.

In any event, even if the indictment did charge that "Vice President Mike Pence and his family were present" in the U.S. Capitol building and/or that Vice President-Elect Harris "[would] be temporarily visiting" the U.S. Capitol building, the indictment would still fail to state any offense under § 1752, because none of those individuals were or would be "temporarily visiting" the U.S. Capitol on January 6, 2021 within the ordinary meaning of that term in the context of the criminal statute at issue.[2]

Notably, the government makes a passing attempt to justify the application of the statute "with respect to" Vice President-Elect Harris (Gov't Res. at 32) however has now filed superseding indictments in numerous cases removing her from January 6 charges altogether because they learned she was not present at the joint session. *See, e.g. U.S. v. Sean McHugh*, 21-CR-453(JDB) ECF No. 39; *U.S. v. Isaac Sturgeon*, 21-CR-091 (RCL) ECF No. 53. Therefore, the government has essentially conceded that Counts Two and Three in this case each fail to state

[2] Nor was the U.S. Capitol building and grounds "posted, cordoned off, or otherwise restricted" because of any Secret Service protectee's presence (or planned presence) there on January 6.

an offense "with respect to" Vice President-Elect Harris.

Similarly, the government acknowledges that Vice President Pence lived and worked in the District of Columbia and maintained "a permanent U.S. Capitol office." *See* Govt. Res. at 31. The government acknowledges that he was at the U.S. Capitol on January 6 "oversee the Joint Session of Congress." *Id*. Contrary to the government's assertion, it is hardly "irrelevant" that Vice President Pence lived and worked in the District of Columbia and had a permanent U.S. Capitol office. *Id*. These undisputed facts, and the totality of the undisputed circumstances here, demonstrate that the statute does not apply as a matter of law as the government attempts to apply it. Nor did Congress intend the statute to apply here. The "temporarily visiting" part of the statute was promulgated specifically to address the difficulties of protecting the President "when he is outside the White House complex traveling or residing temporarily *in some other section of the country.*" Auth. Of Sec'y Treasury to Ord. Closing of Certain Sts. Located Along the Perimeter of the White House, 19 Op. O.L.C. 109 (1995) ("*Authority of the Secretary*") (emphasis added).[3] In the floor debate on the bill, legislators discussed "the problems confronting the Secret Service when protecting the President *outside of Washington*." *Id*. (emphasis added). Nonetheless, Mr. Puma does not suggest that the statute may apply "only to locations outside the District of Columbia." *Id*. at 4. Mr. Puma simply highlights the obvious: that a person generally cannot be said to be "temporarily visiting" his own office building located approximately four miles from his residence.

Still, the government claims that Vice President Pence was "temporarily visiting" the Capitol because he was "physically present . . . for a particular purpose" and "intended to leave at the close of the session." *Id*. at 32. According to the government, then, every person

[3] Available at https://www.justice.gov/file/20226/download.

"physically present" at the Capitol that day—every Congressperson, every staffer, every U.S. Capitol Police officer—was "temporarily visiting." By that logic, only a person meandering aimlessly through the Capitol for no purpose, or a person who lived within and never left the Capitol (i.e., no one), would fall outside the scope of "temporarily visiting." The Court should reject the government's invitation to read all meaning out of an express limitation in a criminal statute. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself" and "is founded on the tenderness of the law for the rights of individuals . . . .").

To the extent that unidentified family members of Vice President Pence (Govt. Res. at 31) are now alleged to constitute a basis to impose federal criminal liability on thousands of people for trespassing on January 6, the government's argument fares no better. Members of Vice President Pence's family were, in the government's own words, allegedly "present" to "attend" and "to observe" a Congressional meeting in a federal building where the Vice President maintains a *permanent* office and *presides*. The Vice President's family members were not on vacation or at a speaking event. That a family member may not work independently or have an independent office at the U.S. Capitol does not transform the U.S. Capitol into a "temporary visit," as expressly required by the criminal statute at issue. After almost one year of charging January 6 defendants, the government now tries to interject new protectees without providing a basis for why they were "temporarily visiting" as intended by Congress.

The government reads the words "temporarily visiting" out of the statute completely. Under the government's limitless interpretation, the words "temporarily visiting" are meaningless and superfluous. "The Government's reading is thus at odds with one of the most basic interpretive canons, that 'a statute should be construed so that effect is given to all its

provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see also Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (discussing "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative") (citing *United States v. Menasche*, 348 U.S. 528, 538–539 (1955)).

If Congress wanted to define "restricted building or grounds" to encompass anywhere a Secret Service protectee "is or will be physically present" at any given time, Congress easily could have, and would have, omitted the words "temporarily visiting" or used the words "physically present" instead in § 1752(c)(1)(B). *See Burgess v. United States*, 553 U.S. 124, 130 (2008) ("As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated.") (alteration and ellipsis in original) (quoting *Colautti*, 439 U.S. at 392-393 n. 10). "Congress did not write the statute that way." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Naftalin*, 441 U.S. 768, 773–774 (1979)). Consequently, the statute simply does not restrict any government building in which a Secret Services protectee is or will be "physically present." *Id*. Also, "[r]eading the statute to proscribe a wider range of offensive conduct," as the government urges, "would raise the due process concerns underlying the vagueness doctrine." *Skilling v. United States*, 561 U.S. 358, 408 (2010).

Contrary to the government's assertion (Govt. Res. at 32), it is entirely rational that section 1752(c)(1)(B) would not apply at the President and Vice President's "permanent residences in Delaware or California" because state criminal and property law protects all individuals on their private property and in their private residences. Congress does not have the power to federally prosecute and punish any and all criminal conduct anywhere in the United States:

> Under our federal system, the "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)); *see also Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States"). When Congress criminalizes conduct already denounced as criminal by the States, it effects a "'change in the sensitive relation between federal and state criminal jurisdiction.'" *United States v. Enmons*, 410 U.S. 396, 411–412 (1973) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

United States v. Lopez, 514 U.S. 549, 561 n. 3 (1995). It is entirely rational and reasonable for Congress to legislate so as not to exceed the scope of its Constitutional authority.

Lastly, the government's contention that the appropriate construction "would neuter the government's ability to deter and punish those individuals who seek unauthorized access to the President's or Vice President's location" (Govt. Res. at 32) is wholly unsupported. Section 1752 expressly delineates three definitions of the term "restricted building or grounds" pursuant to which individuals may be criminally punished. "When 'a statute includes an explicit definition' of a term, 'we must follow that definition . . . .'" *Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021) (quoting *Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020)). In addition, section 3056(d) criminalizes obstruction and interference with a Secret Service officer's performance of his or her "protective functions." *See also Authority of the Secretary*, 19 Op. O.L.C. at 109 (opining that § 3506 "grants the Secretary broad authority to take actions that are necessary and proper to protect the President").

The government's argument should be directed to Congress to amend the statute, not to request this Court to interpret it contrary to Congress's language. The Supreme Court has recently rejected the government's attempts to stretch and broaden the interpretation and application of federal criminal statutes. *See Kelly v. United States*, 140 S.Ct. 1565, 1574 (2020)

(finding the government using federal fraud statutes to criminalize regulatory actions of government officials an impermissible and overbroad application of the statute); *Van Buren*, 141 S.Ct. at 1661 (finding the government's broad construction of the computer fraud and abuse statute would implicate a large amount of commonplace activity not meant to be covered by the statute). This Court should do the same here.

CONCLUSION

For all of the reasons discussed above, the defendant Anthony Puma, respectfully requests that the Court dismiss counts 1-3 of the Indictment because they fail to state an offense and are unconstitutionally vague.

Respectfully submitted,

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