No. 99-929

In the Supreme Court of the United States

REBECCA MCDOWELL COOK, PETITIONER

v.

DON GRALIKE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

At issue in this case are provisions of the Missouri Constitution (the Missouri Amendments) that (a) instruct Members of Congress elected from Missouri to exercise their legislative powers in favor of a proposed amendment to the United States Constitution that would limit the terms of Members of Congress, (b) require the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" to appear on the ballot next to the name of any incumbent candidate for Congress who is found by the Missouri Secretary of State to have failed to follow that instruction, and (c) require the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" to appear on the ballot next to the name of any non-incumbent candidate for Congress who declines to pledge to act in accordance with the instruction if elected.

The United States will address the following questions:

1. Whether the Missouri Amendments exceed the State's power to regulate federal elections under the Elections Clause, U.S. Const. Art. I, § 4, Cl. 1, because they are inconsistent with the fundamental constitutional structure of the national government.
2. Whether the Missouri Amendments violate the First Amendment.
3. Whether the Missouri Amendments violate the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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INTEREST OF THE UNITED STATES

This case involves an attempt by the State of Missouri to require that Members of Congress elected from that State deploy their legislative authority in accordance with instructions from the State on an issue relating to the structure and governance of the federal union. The Amendments to the Missouri Constitution under review raise serious questions about the fundamental constitutional structure of the national government. Those Amendments also raise serious questions about the authority of the States under the Elections Clause, the First Amendment, and the Speech or Debate Clause to influence the outcome of federal elections. The United States has a substantial interest in the resolution of those questions.

STATEMENT

1. This case involves a constitutional challenge to amendments to the Missouri Constitution (hereinafter Missouri Amendments or Amendments) adopted by the voters of that State in a ballot initiative in 1996. The Missouri Amendments declare the "intention" of the "people of Missouri" that a specific amendment to the United States Constitution be adopted. Mo. Const. Art. VIII, § 15. The Amendments then set forth the text of that proposed constitutional amendment, which would limit Members of the United States House of Representatives to three terms and United States Senators to two terms, and would empower the several States to adopt longer or shorter limits for their congressional delegations. *Id.* Art. VIII, § 16.

The Amendments "instruct" each Senator and Representative elected from Missouri to use "all of his or her delegated powers to pass the Congressional Term Limits Amendment set forth [in Section 16]." Mo. Const. Art. VIII, § 17(1). Pursuant to that instruction, a Member of Congress from Missouri must, if an appropriate occasion arises, perform one or more specified legislative acts in support of the proposed term-limits amendment.[1] If a Senator or

[1] In particular, a Member of Congress from Missouri must (a) vote in favor of the proposed amendment if and when it is brought to a vote, (b) second the proposed amendment if a necessary second is lacking at any congressional proceeding, (c) propose or otherwise bring the proposed amendment to a vote of the pertinent legislative body if no other legislator does so, (d) vote in favor of bringing the proposed amendment to a vote before any committee or subcommittee on which he or she serves, (e) reject any attempt to delay or table a vote on the proposed amendment, (f) vote against any proposed term-limits amendment that would establish longer term limits than Missouri's proposed amendment, (g) not sponsor any proposed amendment or law that would increase term limits beyond those in Missouri's proposed amendment, and (h) ensure that all votes on

Representative from Missouri fails to perform such a legislative act on the appropriate occasion, then the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" must be printed adjacent to that Member's name on the next primary and general election ballots. *Id.* Art. VIII, § 17(2).

Non-incumbent candidates for Congress from Missouri are "given an opportunity" to take a specific pledge indicating support for the proposed term-limits amendment. Mo. Const. Art. VIII, § 18(1). The pledge states: "I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS' will not appear adjacent to my name." *Id.* Art. VIII, § 18(3). Thus, non-incumbent candidates must undertake that, if elected, they will perform specific legislative acts in support of the term-limits amendment. If a non-incumbent candidate declines to take the pledge, then the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" must be printed next to his name on the primary and general election ballots. *Id.* Art. VIII, § 18(1). That label must be affixed even if the non-incumbent candidate supports some variant of term limits other than the one set forth in Section 16.

The Secretary of State of Missouri (Secretary) is assigned responsibility for determining whether candidates shall have the specified labels placed next to their names on the ballots. Mo. Const. Art. VIII, § 19(1). For incumbents, the Secretary must make that determination "based upon each member of Congress's action during their current term of office and any action taken in any concluded term, if such action was taken

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term limits are recorded and made publicly available. Mo. Const. Art. VIII, § 17(2)(a)-(h).

after the determination and declaration was made by the Secretary of State in a previous election." *Id.* Art. VIII, § 19(3).

The Secretary's determinations with respect to both incumbents and non-incumbents may be appealed to the Missouri Supreme Court, either by a candidate (if the Secretary determines that the candidate has not complied with the provisions and a label should therefore be placed next to the candidate's name on the ballot) or by any elector (if the Secretary determines that the candidate has complied and a label is therefore not required). Mo. Const. Art. VIII, § 19(5)-(6). If the Secretary determines that a ballot label is required for a candidate and the candidate appeals to the Missouri Supreme Court, the candidate has the burden of demonstrating by clear and convincing evidence that the label should not be placed next to his name on the ballot. *Id.* Art. VIII, § 19(6). If the Secretary determines that the ballot label is not required for a candidate and an elector appeals, the Secretary has the burden of demonstrating by clear and convincing evidence that the label should not be placed next to the candidate's name. *Id.* Art. VIII, § 19(5). In effect, therefore, a label must be placed next to a candidate's name unless there is clear and convincing evidence that the candidate has performed, on an appropriate occasion, one or more specific acts in Congress to support the term-limits amendment (in the case of an incumbent) or has promised to do so if elected (in the case of a non-incumbent).

2. On December 11, 1996, respondent Gralike, a resident and voter in Missouri's Third Congressional District and a candidate for House of Representatives in 1996 and 1998, filed this lawsuit in district court, contending that the

Missouri Amendments are unconstitutional.[2] The district court ruled the Amendments invalid on three grounds: (a) they impose qualifications for service in Congress beyond those enumerated in the Qualifications Clauses of Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3 (see Pet. App. A32, A42-A46); (b) they infringe the First Amendment rights of candidates for Congress by compelling them to take a position on a matter of public concern (see *id.* at A32, A47-A52); and (c) they coerce legislators into voting for the proposed term-limits amendment in accordance with the ballot initiative's instruction, and thereby impermissibly involve the people in the formal process of amendment of the Constitution, in violation of Article V (see *id.* at A32, A61).

The court of appeals affirmed. Pet. App. A1-A26. The court held the Missouri Amendments invalid on four grounds. Like the district court, the court of appeals concluded that the Amendments violate the First Amendment (see *id.* at A8-A14), the Qualifications Clauses (see *id.* at A15-A19), and Article V (see *id.* at A15-A19). In addition, the court ruled (*id.* at A14-A15) that the Amendments violate the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, reasoning that they "establish[] a regime in which a state officer * * * is permitted to judge and punish members of Congress for their legislative actions or positions." Pet. App. A15.

SUMMARY OF ARGUMENT

I. The Missouri Amendments exceed the States' power to operate federal elections, as defined and limited by the Elections Clause. The Elections Clause permits the States only to make nondiscriminatory and reasonable procedural

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[2] While this case was pending on appeal, respondent Mike Harman, a candidate for Congress in Missouri's Seventh District in 1998, intervened as appellee to challenge the Amendments. Resp. Br. in Opp. 5.

regulations of federal elections to ensure their orderliness and integrity, not to use their power over the ballot to influence the outcome of elections based on substantive state policy. The States also may not use their power over federal elections in a manner inconsistent with fundamental constitutional principles governing the structure of the national government. The Amendments are inconsistent with such principles, in three respects. First, the Amendments undermine principles of representative democracy inherent in the national government by manipulating the ballot, over which the State has monopoly power, to send a powerful signal to voters at the moment of choosing that a particular candidate has not accepted the people's will and does not deserve their trust and confidence. Second, by interjecting the State's position on the issue of term limits into the voting booth, the Amendments interfere with the direct connection between the people of the State and their federal representatives, a relation the Framers deemed essential to the success of the union. Finally, by seeking to require that federal legislators vote in accordance with a particular state policy, the Amendments undermine federal legislators' obligation to act in the national interest and on behalf of all the citizens of the United States, not just residents of their own State.

II. The Amendments violate the First Amendment rights of candidates for federal office. The Amendments require, as a condition of obtaining a ballot position unimpaired by a pejorative state label, that a candidate demonstrate adherence to the state policy of support for the proposed term-limits amendment. The Amendments therefore operate as an unconstitutional condition on ballot access, requiring candidates to express a particular viewpoint on a particular subject matter in order to obtain a benefit from the State. Because the condition and the ballot label are viewpoint-based, and because they significantly impair a noncompliant candidate's ability to present himself to voters

for serious consideration on an equal footing, the Amendments require strict scrutiny. The Amendments are not, however, narrowly tailored to promote a compelling state interest. Although the State argues that the labels promote voter education, the State could advance that interest without manipulating the ballot, and the labels are misleading in any event.

III. The Amendments also violate the Speech or Debate Clause. The Speech or Debate Clause prohibits the government from imposing a burden on a Member of Congress based on evidence of the Member's legislative activity. The Clause also prohibits, in litigation affecting the Member's personal interest, the introduction into evidence of the Member's votes and other legislative activity. The Amendments contravene these principles. The Amendments require the Secretary of State to examine federal legislators' voting records and other legislative activity to determine whether the Member will be assigned a pejorative ballot label. The Amendments also require that a Member demonstrate and justify his legislative record to a state official by clear and convincing evidence in order to avoid such a ballot label. The Clause does not permit state officials to require that Members of Congress give evidence of their legislative activity in order to avoid a state-imposed burden.

IV. Various historical examples of instructions to legislators and ballot notations put forward by the State do not support the constitutionality of the Amendments. None of those examples involved a state-imposed condition that a candidate adopt a particular viewpoint on a particular substantive issue in order to obtain unimpaired access to the ballot in a popular election. None of them, therefore, is apposite to analysis of the Missouri Amendments.

ARGUMENT

I. THE MISSOURI AMENDMENTS ARE INCONSISTENT WITH FUNDAMENTAL CONSTITUTIONAL PRINCIPLES DEFINING AND LIMITING THE AUTHORITY OF THE STATES UNDER THE ELECTIONS CLAUSE TO REGULATE FEDERAL ELECTIONS

1. The authority of the States to regulate congressional elections is defined and limited by the Elections Clause, U.S. Const. Art. I, § 4, Cl. 1, which authorizes the States to prescribe "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives." The Framers of the Constitution recognized benefits in permitting the States, which had experience in running elections, to operate elections for the new national government as well, but they also perceived that the States might abuse their powers over federal elections to undermine the union. See The Federalist No. 59, at 363 (Hamilton) (Clinton Rossiter ed. 1961)). The Convention therefore designed the Elections Clause as a narrow delegation of authority, not a plenary grant of power, to the States. The Framers conceived the power granted to the States in the Elections Clause as restricted to the authority "to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833-834 (1995) (*USTL*).

The Missouri Amendments fail to respect those limitations on the State's authority under the Elections Clause. They are designed precisely to "dictate electoral outcomes" and to "disfavor a class of candidates" by affixing a pejorative label to the name of any candidate on the ballot who disagrees

with state orthodoxy on the subject of term limits.[3] They also "evade important constitutional restraints"—indeed, they are inconsistent with fundamental constitutional principles governing the structure of the federal government.

2. The Missouri Amendments are inconsistent with the fundamental constitutional principle that Members of Congress must be chosen in free and fair elections. The importance of elections under the Constitution is manifest in its provisions for election of Representatives, U.S. Const. Art. I, § 2, Cl. 1, and Senators, Amend. XVII, § 1, and for the steady expansion of the franchise over time to eliminate qualifications of race, Amend. XV, sex, Amend. XIX, failure to pay a poll tax, Amend. XXIV, and age, Amend. XXVI. This Court has repeatedly observed that "voting is of the most fundamental significance under our constitutional structure," *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

Implicit in the idea of a fair election are the twin notions of a robust competition for votes prior to the election, and the protection of the voter from undue influence at the moment of deciding and casting a vote. Toward the latter end, this Court has emphasized that "protecting voters from confusion and undue influence," *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion), is a compelling governmental interest. Thus, the State may prohibit campaigning within 100 feet of the entrance to a polling place on election day.

The authority to operate federal elections, conferred on the States by the Elections Clause, does not include the authority to attempt to favor certain candidates and disfavor others. Indeed, the States' authority to regulate federal elections extends only to "generally applicable and even-

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[3] For much the same reason, they violate the First Amendment. See pp. 15-21, *infra*.

handed restrictions that protect the integrity and reliability of the electoral process itself," see *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 n.9 (1983), and not to efforts to influence the outcome. While government officials may undoubtedly engage in pre-election speech concerning the merits of the candidates in an election, the State may not use its power to administer elections to overbear the right of "the people [to] choose whom they please to govern them." *USTL*, 514 U.S. at 793 (internal quotation marks omitted).[4]

The State's power over the ballot, moreover, presents special dangers of undue influence in the outcome of an election. By its nature, the ballot is not a public forum in which numerous participants can engage in a debate over issues.[5] Rather, the State has a monopoly over the ballot

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[4] Several courts have invalidated attempts to favor certain candidates or parties by assigning them preferred positions on the ballot. See, *e.g.*, *McLain* v. *Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980); *Sangmeister* v. *Woodard*, 565 F.2d 460, 465-467 (7th Cir. 1977), cert. denied, 435 U.S. 939 (1978); see also *Coalition to End the Permanent Congress* v. *Runyon*, 979 F.2d 219, 225 (D.C. Cir. 1992) (separate opinion of Silberman, J.) (explaining vote to invalidate part of congressional franking statute because "the very nature of American constitutional democracy requires that voters be able to choose freely between at least two viable parties or candidates").

[5] The Court has often emphasized that ballots "serve primarily to elect candidates, not as forums for political expression." *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 363 (1997); see also *Burdick* v. *Takushi*, 504 U.S. 428, 438 (1992); *id.* at 445 (Kennedy, J., dissenting) ("the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression"). This case therefore does not require the Court to ascertain general constitutional limits on the broad category of "government speech." Cf. *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346, 1357 (2000); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-834 (1995); *Meese* v. *Keene*, 481 U.S. 465, 484 (1987). This case does not involve discussion of issues, or even elections, by government officials in a public forum. Nor does it concern the government's right to publish voter

and is in a position to deploy that power to affect the outcome of elections.

The Missouri Amendments have the purpose and effect of influencing the outcome of elections. Missouri uses the ballot labels to assert to the voters that certain candidates have not accepted the people's will and do not deserve their trust and confidence, but it permits no rebuttal to those assertions in the voting booth. At the moment of choosing among candidates, therefore, voters are left with the powerful impression created by the ballot labels.[6] Cf. *Anderson* v. *Martin*, 375 U.S. 399, 402 (1964) (invalidating State's use of ballot labels indicating the race of a candidate, and noting that a ballot "label on a candidate [appears] at the most crucial stage in the electoral process—the instant before the vote is cast"). Such use of the State's power over the ballot to influence the outcome of an election is inconsistent with a basic principle of popular sovereignty—"the right of the people to vote for whom they wish." *USTL*, 514 U.S. at 820.

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information guides about an election. Rather, this case involves only the State's exercise of its monopoly power over the ballot itself to affix a label that disfavors candidates based on their position on one particular issue.

[6] The fact that the Missouri Amendments were at the time of their adoption supported by a majority of the voters does not cure their constitutional defect. The ballot labels required by the Amendments have the potential to confuse voters or to overbear their free choice at each subsequent election. For example, even if a majority of a particular congressional district does not support term limits, the ballot labels declare that a noncompliant incumbent has "DISREGARDED [THE] VOTERS' INSTRUCTION ON TERM LIMITS," suggesting that the Member has disregarded the wishes of all the voters, not just the majority that supported the proposed term-limits amendment in the initiative. Similarly, a majority of the voters of the entire State might now or in the future no longer support the proposed term-limits amendment, and yet if the constitutional amendment requiring the ballot labels had not yet been repealed, a candidate for Congress who publicly opposed term limits could nonetheless be labeled as noncompliant with the voters' wishes.

3. In addition to introducing bias into the election, the Missouri Amendments have the defect of interjecting the State between the people of Missouri and their own federal representatives, thereby interfering with a direct relation between them that is an essential element of the constitutional structure.

The Framers saw the "great and radical vice" of the Articles of Confederation as "the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." The Federalist No. 15, at 108 (Hamilton). The Framers therefore discarded the confederal structure of the Articles for a national government that "extend[ed] the authority of the Union to the persons of the citizens." *Id.* at 109. But the Framers perceived that the States might attempt to subvert the connection between the people and the union, and so the question arose how to ensure that "[t]he people of America [remain] warmly attached to the government of the Union, at times when the particular rulers of particular States * * * may be in a very opposite temper." The Federalist No. 59, at 365-366 (Hamilton).

To the Framers, the solution lay in the republican character of the union. As Madison observed at the Convention, the union could be "stable and durable" only if the legislature "should rest on the solid foundation of the people themselves," rather than an intervening body. 1 *The Records of the Federal Convention of 1787*, at 50 (Max Farrand ed., rev. ed. 1966). The Framers therefore required biennial elections to the House of Representatives to ensure that the federal Congress would retain "an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52, at 327 (Madison). The Framers also prohibited the States from adding qualifications for service in the Congress beyond those established in the Constitu-

tion, which might undermine popular support for the new national legislature. See *USTL*, 514 U.S. at 806-808. As the Court explained in *USTL*, the Constitution established that "the right to choose representatives belongs not to the States, but to the people." *Id.* at 820-821.[7]

The Missouri Amendments' manipulation of the ballot for federal elections impermissibly interferes with the connection between the people of Missouri and the union. In assigning a pejorative ballot label to a candidate for federal office who does not accept the State's orthodoxy of support for a particular measure, the State announces its judgment that the candidate does not deserve the trust and confidence of the people of Missouri. It does so, moreover, in the voting booth and at the moment of voting—the very point on which, the Framers understood, the success of the union depends. By interposing its own judgment about the preferable outcome of a federal election, the State intrudes on "the most basic relation between the National Government and its citizens, the selection of legislative representatives." *USTL*, 514 U.S. at 842 (Kennedy, J., concurring).[8]

4. The Missouri Amendments are also inconsistent with the constitutional structure of the union because they seek to constrain by law the legislative activity of federal officials. The Amendments attempt to inhibit the election or reelec-

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[7] With the adoption of the Seventeenth Amendment in 1913, this principle became applicable to the Senate as well. *USTL*, 514 U.S. at 821.

[8] This interference is not minimized by the fact that the measure directing the ballot labels to be assigned to noncompliant candidates was adopted by popular initiative rather than legislation. The ballot labels are the policy of the State no less than they would be if they had been adopted by legislation—just as the ballot exclusions struck down in *USTL*, which were also adopted by popular initiative, were the official policy of the State. See *USTL*, 514 U.S. at 809 n.19. Moreover, the determination whether to apply the labels to any particular candidate is made by the Secretary, an elected state official.

tion of a candidate who has not acted or will not promise to act in accordance with the instructions of the State of Missouri. Federal legislators, however, are charged with acting on behalf of all of the nation's citizens, regardless of their State of residence. See *USTL*, 514 U.S. at 837-838 ("Members of Congress * * * become, when elected, servants of the people of the United States[;] * * * they occupy offices that are integral and essential components of a single National Government."). The Amendments undermine the national character of the union, which depends on a connection between Members of Congress and the people of *all* the States of the union.[9] Because, under the Constitution, Members of Congress legislate in the national interest, not merely the interest of the State from which they are elected, a State may not seek to confine a federal legislator's authority to consider the national interest by handicapping him on the ballot if the Member (or would-be Member) will not act in accordance with the official policy of the State.

Indeed, the Missouri Amendments may well be more disruptive of the national character of the union than were the Arkansas term limits invalidated in *USTL*. The provision at issue in *USTL* did not seek to constrain Members of Congress elected from Arkansas to vote in any particular way. Every Member elected from Arkansas still remained free to consider the national interest on every issue, and to vote in accordance with that Member's judgment of the national interest. The Missouri Amendments, by contrast, endeavor to ensure that federal legislators vote in accordance with a particular policy of that State, even if a

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[9] See *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 43 (1868) ("The people of these United States constitute one nation * * * [and] have a government in which all of them are deeply interested."); *Saenz* v. *Roe*, 526 U.S. 489, 504 n.17 (1999) ("our citizens have two political capacities, one state and one federal, each protected from incursion by the other").

legislator believes that the policy is contrary to the interest of the nation as a whole.[10]

II. THE MISSOURI AMENDMENTS VIOLATE THE FIRST AMENDMENT

1. The Missouri Amendments are also unconstitutional because they operate as an unreasonable and discriminatory condition on access to the ballot. To obtain a spot on the ballot unblemished by a pejorative state label, a candidate for office must demonstrate to the satisfaction of a state official that he has supported, or has pledged to support, a particular state policy, adoption of the proposed term-limits amendment. The appeal process, moreover, is biased to impose the burden of proof, by clear and convincing evidence, on the party arguing that the ballot label is not warranted,

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[10] Although we do not address herein at length the Qualifications Clauses of Article I or the constitutional-amendment requirements of Article V, the points made in the text support the court of appeals' conclusion that the Amendments violate those provisions as well. As the Court observed in *USTL*, by prohibiting Congress and the States from imposing any qualifications for service in Congress beyond those set forth in the Qualifications Clauses, the Framers intended to ensure that the people would be able to choose for Congress any "citizen whose merit may recommend him to the esteem and confidence of his country." 514 U.S. at 819 (quoting The Federalist No. 57, at 351 (Madison)). The Missouri Amendments undermine that free choice by "handicapping a class of candidates," *id.* at 831, with the purpose of preventing the election of candidates who decline to support the proposed term-limits amendment. In addition, by constraining Members elected from Missouri to vote on a proposed constitutional amendment on the governance of the national union in conformity with direction from the State of Missouri and not the Member's judgment of the national interest, the Amendments are inconsistent with the Constitution's presumption that Members of Congress, when exercising their authority under Article V to propose an amendment to the Constitution of the national government, will act on behalf of "the whole people who created it." *Id.* at 839 (Kennedy, J., concurring).

even if that party is not the one taking the appeal. See Mo. Const. Art. VIII, § 19(5) and (6). Thus, the Amendments effectively require that a candidate demonstrate support for state orthodoxy as a condition of obtaining a clear ballot spot. Such a condition on unimpaired ballot access violates the First Amendment.[11]

The Court has, of course, recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer* v. *Brown*, 415 U.S. 724, 730 (1974). Moreover, every provision of an election code that channels the process of selection invariably affects, at least to some degree, the right of candidates to gain access to the ballot (and the rights of voters who support them). See *Burdick*, 504 U.S. at 433; *Anderson* v. *Celebrezze*, 460 U.S. at 788. Thus, when a State imposes "reasonable, nondiscriminatory restrictions" on ballot access, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Ibid.*

The Missouri Amendments, however, cannot be characterized as "reasonable, nondiscriminatory" regulations of the

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[11] This Court has generally reviewed discriminatory conditions on ballot access under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. See *Anderson* v. *Celebrezze*, 460 U.S. at 786 n.7. Because this case involves state regulation of the ballot for elections to federal office, the question also arises whether the regulations exceed the State's authority under the Elections Clause. The Court has made clear that the limitations on the State's authority to regulate the ballot for federal elections imposed by the Elections Clause are at least as strict as the restrictions imposed by the First and Fourteenth Amendments. See *USTL*, 514 U.S. at 834; see also *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 217 (1986). Because, as we explain in the text, the Missouri Amendments contravene the First Amendment, they necessarily exceed the State's authority under the Elections Clause as well.

ballot similar to those previously upheld by this Court. Most importantly, the requirements imposed by the State as a condition of avoiding a pejorative ballot label are neither content-neutral nor viewpoint-neutral. The conditions, rather, require candidates to express support for a particular position in a particular way if they wish to avoid unfavorable treatment on the official ballot. Even if a candidate would prefer to take no position at all on the issue of term limits, or would prefer to take a position only slightly at variance with the state orthodoxy, the candidate will be assigned a denigrating label on the ballot informing the voters that the candidate has declined to support the official state position on term limits. The Amendments therefore operate as an unconstitutional condition; they require something the State plainly could not directly compel—that the candidate express a particular point of view on a particular issue[12]—as a condition of obtaining a benefit from the State, an unimpaired ballot position. Cf. *Board of Comm'rs* v. *Umbehr*, 518 U.S. 668, 675-676 (1996).

2. Petitioner argues that the Missouri Amendments do not implicate candidates' First Amendment rights because they do not flatly exclude from the ballot incumbents who have failed to vote as instructed or non-incumbent candidates who have declined to pledge to do so if elected. A realistic evaluation of the ballot labels and of the conditions imposed by the Missouri Amendments confirms, however, that the Amendments must be subject to strict scrutiny.

First, both the conditions and the ballot labels are viewpoint-based, a factor that almost invariably requires the application of strict scrutiny. See *Rosenberger* v. *Rector &*

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[12] See *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 575 (1995) ("[T]he choice of a speaker not to propound a particular point of view * * * is presumed to lie beyond the government's power to control.").

Visitors of Univ. of Va., 515 U.S. 819, 828-830 (1995). We are unaware of any case in which this Court has upheld a viewpoint-based regulation of the ballot, and it is difficult to imagine a situation in which such a regulation could be justified.[13] Indeed, a discriminatory viewpoint-based condition on unimpaired access to the ballot presents a serious concern that the State is attempting "to drive certain ideas or viewpoints from the marketplace" (*NEA* v. *Finley*, 524 U.S. 569, 587 (1998))—namely, that the State is attempting to discourage candidates who oppose term limits, or at least the specific proposed term-limits amendment set forth in the Missouri Amendments.

Second, the ballot labels send an official signal to the electorate that, because the candidate has declined to accept the term-limits instruction as binding, that candidate does not deserve public confidence. The ballot label significantly

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[13] Thus, although the State may regulate access to the ballot in pursuit of legitimate, non-discriminatory objectives, that does not permit it to impose viewpoint-based conditions on access to the ballot—just as a State may not condition access to public employment on adherence to a certain political party, even though the State may plainly impose numerous regulations on public employment. Cf. *Board of Comm'rs* v. *Umbehr*, *supra*. And although this Court has on numerous occasions upheld regulations that restrict access to the ballot to those candidates who have demonstrated that they have a nontrivial level of support in the community, see *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 194-195 (1986); *Anderson* v. *Celebrezze*, 460 U.S. at 788-789 n.9; *American Party of Tex.* v. *White*, 415 U.S. 767 (1974); *Jenness* v. *Fortson*, 403 U.S. 431 (1971), the Court has never suggested that a State may use that power to insist that candidates show that they have substantial popular support for a particular position, or (as here) that they have adopted a particular position that has substantial support in the community. A State could not, for example, require candidates seeking access to the ballot to show that a certain percentage of the electorate supported their positions on tax relief and gun control. Such a regulation would skew the election to the topics that the State, rather than the candidate, deemed sufficiently important to present to the electorate.

infringes on the candidate's ability to present himself to the voters for serious consideration. A State could hardly require that the names of candidates who had declined to support a particular state policy be printed in tiny type, or be marked by the Secretary of State as "state-disapproved" candidates. While the burden imposed on candidates by the Missouri Amendments may not be quite so drastic as those in the hypothetical examples just given, the vice of the Missouri Amendments is the same: the State uses its control of the ballot to insist that candidates adopt a particular position on a particular issue if they wish to gain access to the voters on an equal footing.[14]

Petitioner further contends (Pet. Br. 36-37) that the Amendments leave candidates free publicly to oppose term limits, as long as they state publicly that they will agree to adhere to the State's instructions to exercise legislative power in support of the term-limits amendments (and do so once elected). Even if that were true, it could not justify the Amendments' burden on candidates' rights of freedom of expression—just as an impermissible patronage practice re-

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[14] Petitioner also argues (Pet. Br. 32-34) that the Amendments are not subject to First Amendment scrutiny at all because the ballot labels supposedly comment only on a candidate's behavior, not speech. That contention is without merit. With respect to non-incumbent candidates, the assignment of a ballot label turns on whether the candidates takes a "pledge" of specific words, see Mo. Const. Art. VIII, § 18(3), which is unquestionably speech. With respect to incumbent candidates, the assignment of a ballot label turns on whether the Member of Congress has used his or her legislative authority in certain ways, including making proposals in Congress, see *id.* § 17(2)(c), sponsoring amendments, § 17(2)(g), and voting for the proposed term-limits amendment, § 17(2)(a). Whether or not the act of voting in Congress is itself protected by the First Amendment, see *Spallone* v. *United States*, 493 U.S. 265, 302 n.12 (1990) (Brennan, J., dissenting), the Missouri Amendments touch on other legislative activity that is plainly speech, such as sponsoring amendments and proposing legislation.

quiring public employees to join the Democratic Party (cf. *Board of Comm'rs* v. *Umbehr*, *supra*) could not be justified on the ground that the employees remained free to criticize that party's policies.

In any event, the State's reading of the Amendments is implausible. An incumbent candidate could scarcely make speeches in Congress against the term-limits amendment and escape the ballot label, since the Amendments instruct Members to use *all* of their delegated powers to pass the amendment. See Mo. Const. Art. VIII, § 17(1). At a minimum the Secretary of State would be required to determine whether the Member had acted in accordance with the instructions, with the burden tilted heavily in favor of finding that the Member had not complied. And if a non-incumbent candidate signed the pledge to vote in favor of the term-limits amendment but then proceeded to denounce the same amendment as ill-considered, that candidate would also likely find himself before the Secretary of State to face the contention that his pledge was not genuine. The prospect of a candidate's being required to justify his campaign literature and speeches to the satisfaction of a state official is incompatible with the First Amendment's guarantee of free speech.

3. Because the Missouri Amendments require strict scrutiny, they may be upheld only if the ballot conditions and labels are narrowly tailored to advance a compelling state interest. See *Norman* v. *Reed*, 502 U.S. 279, 289 (1992). Petitioner argues (Pet. Br. 40-42) that the Missouri Amendments advance the state interest of informing voters about candidates' willingness to act in accordance with the instructions. We may assume the State has a substantial interest in educating the voting public about candidates' positions on issues of public concern. But there is no apparent reason why the State could not provide the public with information about the candidates' positions on term limits—including

their positions on the proposed term-limits amendment—without intruding into the ballot itself or requiring candidates to speak or act in specified ways as a condition of unimpaired ballot access. For example, the State could prepare voter information guides in which candidates are afforded the opportunity to explain their positions on the term-limits amendment and address their opponents' records on the same subject.

Moreover, the ballot labels required by the Amendments do not substantially promote voter education. The labels are misleading in important respects. If, for example, a non-incumbent candidate supports term limits generally but believes that the state-approved term-limits amendment is too draconian and therefore declines to pledge to support that amendment, the candidate will be labeled on the ballot as having "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS"—with no opportunity to explain on the ballot that he does, in fact, support term limits but in a different form. Similarly, an incumbent who supports term limits (including the proposed term-limits amendment) but who has found it inadvisable for tactical considerations to press for a vote on the amendment at a particular time will nonetheless be labeled in the voting booth as having "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS," again without any opportunity to explain the circumstances to the voters. Thus, even if the State might be able in another context to justify ballot labels identifying candidates' positions on particular issues, it has not demonstrated that these labels promote the interest of voter education.

III. THE MISSOURI AMENDMENTS VIOLATE THE SPEECH OR DEBATE CLAUSE

1. The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S.

Const. Art. I, § 6, Cl. 1. The Clause was "designed to preserve legislative independence." *United States* v. *Brewster*, 408 U.S. 501, 508 (1972); see *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) ("The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently."); *United States* v. *Helstoski*, 442 U.S. 477, 491 (1979) (the purpose of the Clause "was to preserve the constitutional structure of separate, coequal, and independent branches of government").

Although the Clause was born of concern specifically with shielding legislators from vindictive criminal prosecutions brought by the Executive Branch as punishment for legislative criticism, *Helstoski*, 442 U.S. at 491-492, it has been applied broadly to prevent federal legislators from being subjected to scrutiny by governmental officials for their legislative acts "in *any* other Place," as the Clause states.[15] Furthermore, the Clause shields Members "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967). In addition, the Clause, although expressly reaching only "Speech or Debate," has long been interpreted to protect anything "generally done in a session

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[15] The Clause thus protects federal legislators from being "[q]uestioned" about their legislative activity by state officials as well as federal officials. Plainly, the imposition of criminal or civil liability against a Member of Congress under state law for the Member's legislative acts could seriously impair that Member's independence. Thus, in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), a state-law tort action brought in federal court against a United States Senator, the Court nowhere suggested that the Clause was not applicable merely because the case arose under state law. Cf. *Doe* v. *McMillan*, 412 U.S. 306 (1973) (Clause held applicable to bar tort action brought against Members of House of Representatives under District of Columbia law); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881) (same).

of the [Congress] by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881). Voting by Members is plainly covered by the Clause, as is all action taken by Members at legislative committee hearings. See *Helstoski*, 442 U.S. at 487-488; *Doe* v. *McMillan*, 412 U.S. 306, 311 (1973); *Brewster*, 408 U.S. at 509. The Clause thus prohibits the introduction into evidence of a Member's vote in litigation pertaining to the Member's personal interest. See *Helstoski*, 442 U.S. at 487-488.

2. The Missouri Amendments contravene these principles. Under the Amendments, a Missouri state official (and, on judicial review, the Missouri Supreme Court) must examine the legislative acts of Members of Congress who are running for reelection to determine whether they have complied with the terms of the Amendments' instruction to undertake specific actions in Congress. The outcome of that examination leads to an official determination whether the State will impose a burden on or grant a benefit to the Member—namely, whether the Member will have a pejorative label affixed to his name on the election ballot, or whether his spot on the ballot will not be so burdened. The Clause prohibits the State from attaching legally significant consequences to the legislative acts of Members of Congress in this fashion.

The State's determination requires the introduction of evidence about the Member's votes and other legislative acts in Congress. See Mo. Const. Art. VIII, § 19(2). The Secretary must ascertain whether the Member has taken or failed to take a litany of specified legislative acts, including introducing, proposing, bringing to a vote, and seconding the proposed term-limits amendment, voting in favor of that amendment and against any other amendment that would establish longer terms, and opposing any effort to table or delay legislative consideration of the favored amendment.

Id. Art. VIII, § 17(2). Moreover, this examination of the Member's legislative record may be wide-ranging and intrusive. For example, the Secretary must affix the ballot label if she determines that the Member has "fail[ed] to propose" the amendment for a vote in Congress (should the amendment otherwise lack such a proponent) or has "fail[ed] to reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body of the proposed" term-limits amendment. *Id.* Art. VIII, § 17(2)(c) and (e). In making such determinations, the Secretary could be required to consider, not just votes recorded in the *Congressional Record* and other information readily available to the public, but also information submitted from interested groups concerning communications between a Member and the leadership of the Member's chamber about legislative priorities. See *id.* Art. VIII, § 19(2) (providing that Secretary may consider public comments in making her determinations). If a member of the public contended that a Senator had "fail[ed] to reject any attempt to delay" a vote on the term-limits amendment, the Senator could likely meet that contention only by providing an explanation of his understanding of the matters pending on the legislative calendar and his evaluation of the relative priorities of those matters. And because the Secretary of State's determination not to affix a ballot label may be sustained on judicial review only if clear and convincing evidence supports it, see *id.* Art. VIII, § 19(5), the Member's submission will likely have to be quite detailed to be effective.

The Speech or Debate Clause does not permit state officials to require federal legislators to justify their legislative actions in such a fashion. The intrusive inquiry into a legislator's record mandated by the Amendments threatens to undermine the independence of federal legislators by effectively compelling them to present a detailed explanation of their legislative actions and strategy to the satisfaction of

a state official, at pain of official state disapproval in the form of a pejorative ballot label if they fail to persuade state officials (and judges) by clear and convincing evidence that their legislative activity comports with the official state policy favoring the term-limits amendment. The inquiry also threatens to distract Members of Congress from their legislative activity by requiring them to spend time preparing their justifications for a state official proceeding.

3. Of course, nothing in the Speech or Debate Clause prevents state officials (or members of the public) from calling on Members of Congress to explain their actions with respect to legislation, asking questions of Members about such actions in debates, or criticizing a Member's legislative record. The Clause does not insulate Members from political accountability for their legislative actions. In those situations, however, no official governmental benefit or burden turns directly on the Member's response. A Member may choose whether and how to respond to the question or criticism and retains the freedom to take the political consequences of responding, not responding, or framing the response in a particular way. The Member's accountability to the voters is preserved, as is his independence from official coercion and oversight.

It is quite a different matter to place in the hands of a state official the power to determine how an incumbent candidate shall be treated on the ballot based on that Member's legislative record. While a pejorative ballot label is not a criminal punishment or civil penalty, it nevertheless is an official action imposing a burden on the candidate. There may be close cases in which it is unclear that unpleasant consequences visited upon an incumbent candidate by state officials because of that Member's legislative record constitute

impermissible "question[ing]" of the Member in violation of the Speech or Debate Clause, but this is not one.[16]

IV. THE STATE'S HISTORICAL EXAMPLES OF INSTRUCTIONS TO LEGISLATORS AND BALLOT NOTATIONS DO NOT SALVAGE THE MISSOURI AMENDMENTS

The State maintains that instructions to legislators and ballot notations have a historical pedigree that establishes the constitutionality of the Missouri Amendments. The State maintains, for example (Pet. Br. 10-14), that the colonial legislatures and, after independence, the States issued instructions to their delegates to the Continental Congress, the Confederation Congress, and the Constitutional Convention. The State also points out that state legislatures occasionally issued instructions to Senators elected by those legislatures before the adoption of the Seventeenth Amendment.

None of those examples, however, involved ballot labels imposed by the State or state-imposed conditions on a candidate's access to the ballot for a popular election. None of them, therefore, is helpful to analyze the Missouri Amendments, under which a state official makes a formal determination whether a candidate has spoken or acted on an issue of public concern in a particular way, and then determines how the State shall present that candidate to the electorate. Indeed, almost all the State's examples involved

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[16] It would seem clear, for example, that the Speech or Debate Clause would prohibit a State from requiring Members of Congress who had voted in a particular way to go through especially onerous steps to qualify for the ballot, such as collecting an inordinately large number of signatures or paying an exorbitant filing fee. The Missouri Amendments may differ from those examples in a matter of degree, but the Amendments are similar to those examples in that a central purpose of the Amendments is to make it more difficult for a Member of Congress to secure reelection if that Member has voted or failed to vote in a particular way in Congress.

situations where the instruction was issued to a delegate by a body with complete control over the process of determining whether and how that delegate should be considered for reelection—for example, the States' delegates to the Confederation Congress, and Senators elected by state legislatures before the Seventeenth Amendment. In those situations, it is difficult to speak meaningfully of any impairment of a right of ballot access, as there was no popular election.

The electorate does, of course, have authority to reject any candidate for Congress based on his articulated or unarticulated position on term limits. But unlike the election of Senators before the Seventeenth Amendment, popular election of Members of Congress depends on a ballot mechanism. And no example put forward by petitioner suggests that the State could officially hobble a candidate in a popular election campaign because of that candidate's unwillingness to abide by state instructions.[17]

The State also points out (Pet. Br. 15-17) that, before the Seventeenth Amendment provided for popular election of Senators, several States adopted by initiative provisions

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[17] More generally, the State's examples fail to demonstrate that the Framers would have accepted instructions that were binding, in the sense that a government official could impose any sanction of substantial consequence for the failure of a legislator to follow, or a candidate to accept, a state legislature's instructions. Indeed, with respect to candidates for federal office, it is indisputable that the Constitution would forbid a State from imposing at least some sanctions of that nature. A State could not exclude from the ballot any candidate for Congress who refused to accept state instructions on any subject, for such a rule would impermissibly impose qualifications for the federal office beyond those permitted by the Qualifications Clauses of Article I. See generally *USTL*, 514 U.S. at 798-802, 829-831. And the Speech or Debate Clause would plainly forbid a State from imposing civil or criminal sanctions on a Member of Congress based on that Member's failure to follow state instructions. See pp. 22-26, *supra*.

that informed voters on the ballot whether candidates for state legislature had pledged to vote for United States Senator in conformity with results of an unofficial poll that indicated the popular choice for Senator. In most of those cases, however, the provisions were permissive; they merely allowed candidates to declare to the voters on the ballot that they had agreed (or had not agreed) to accept the voters' expressed preference for Senator. The State did not itself assign a disapproving ballot label to candidates who had declined to promise to act in accordance with that preference. See 1 George H. Haynes, *The Senate of the United States: Its History and Practice* 101-103 (1938).[18] Thus, those ballot laws did not condition a clean position on the ballot on the candidate's adoption of any particular position.

Nor does *Ray* v. *Blair*, 343 U.S. 214 (1952), support the State's position. In that case, the Court upheld a state law that allowed political parties to require that candidates for the position of presidential elector in a party primary pledge, if elected, to support the national party's nominees for President and Vice President. (The party would not certify a candidate for a place on the primary ballot unless he made such a pledge.) The Court rejected the contention that the law violated the Twelfth Amendment in that it constrained electors' discretion to vote for President according to their own judgment. The Court stressed, however, that the purpose of the state law was to strengthen the political party system, see *id.* at 221-222, 226 n.14, which the Court has long recognized as a legitimate objective of state regulation over

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[18] North Dakota's law, which did require candidates for state legislature to pledge to vote for United States Senator in accordance with the expression of popular will at the party primary or general election, was struck down under the state constitution on the ground that it added to the qualifications for state legislator beyond those prescribed in the state constitution. See *State ex rel. McCue* v. *Blaisdell*, 118 N.W. 141, 144 (N.D. 1908).

elections.[19] Moreover, the law upheld in *Ray* was neutral as to content and viewpoint; it did not require presidential electors to express support for any *particular* position or candidate as a condition of ballot access, but merely allowed parties to require would-be electors to support whatever candidate the party nominated.[20] Accordingly, petitioner has not pointed to any historical evidence suggesting that a State may place a pejorative label on the ballot next to the name of a candidate who has failed to satsify a state official that he has accepted or complied with state instructions on a particular substantive issue.

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[19] The law under review in *Ray* was similar to laws protecting political parties against raiding, which the Court has upheld on several occasions. See *Burdick*, 504 U.S. at 439; *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973).

[20] Petitioner and amici note (Pet. Br 21-22; Mo. Term Limits Br. 11-14) that States frequently recognize the important role played by political parties in our electoral system by indicating candidates' party affiliation on the ballot label. The placement of a party label on the ballot, however, is not a viewpoint-based regulation. While voters may perceive that a particular political party has a particular viewpoint, the placement of *all* candidates' partisan affiliations (if they have one) on the ballot does not send any particular message to the electorate. Thus, even-handed disclosure of candidates' partisan affiliation on the ballot presents no threat to candidates' and voters' First Amendment rights.

It is conceivable, of course, that a State might abuse its policy of placing candidates' party affiliation on the ballot to suggest to the voters that a candidate who is not affiliated with a major political party deserves the voters' disapproval. The Court has never suggested, however, that such a practice would be constitutional. See p. 10 & note 4, *supra* (discussing appellate decisions invalidating preferential ballot treatment for incumbents); cf. *Anderson* v. *Celebrezze*, 460 U.S. at 793-794 (close scrutiny required for "[a] burden that falls unequally on new or small political parties or on independent candidates" because "such restrictions threaten to reduce diversity and competition in the marketplace of ideas").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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