LSSS Supreme Court Review and Preview

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Term Statistics

From SCOTUSblog

- Seventy-three case decided
- Sixty-six percent were unanimous (highest percent since during WWII—45% is more typical)
  - This is somewhat of an illusion
- 10 (a few less than usual) were 5-4 with Justice Kennedy always in the majority
- Reversal rate was 73%
- Court took the same number of cases from the 6th and 9th Circuits and reversed them at about the same rate
General Observations for States

Unusually high number of cases impacting the states (particularly compared to local government)

End of the term blockbusters don’t directly impact states much
  ◦ Recess appointments case
  ◦ Birth control mandate case

Preemption cases were a bit of a snooze
  ◦ Statutes of repose—not preempted
  ◦ Covenant of good faith and fair dealing—preempted

Unusual number of qualified immunity cases (and Fourth Amendment cases)
New Justice Watch

No one expected any retirements this year
- Justice Ginsburg (82)
- Justice Scalia (78)
- Justice Kennedy (77)

Justice Ginsburg
- This June is her last chance to ensure a Democrat will replace her
- Will she hold out for a Hillary presidency? Katie Couric asked this indirectly and she did not take the bait

New Democrat short lister entered the scene this year—Patricia Millett (51)
Review: Interesting Cases Relevant to States
Town of Greece v. Galloway

Legislative prayer case

Could have been a huge cases for state legislatures but wasn’t

It was all Christian prayers all the time in the Town of Greece

But in its defense, in the Town borders all places of worship were Christian and anyone could offer any prayer

In *Marsh v. Chambers* (1983) the Court held that legislative prayer is okay based mostly on its “historical foundation”
Why did the Court take this case? Theories abounded...

- To overturn the Second Circuit (that basically said any prayer at board meetings would be difficult after its decision)
- To reject the sectarian nature of the prayer in this case?
- To say legislative prayer is different in the local government v. state government context?
- To overturn *Marsh*
- To dump the endorsement test now that Justice O’Connor isn’t on the Court

No one knew

Court held the prayer practice in this case was constitutional 5-4
Rejected the argument prayers must be nonsectarian

- Minister in *Marsh* removed references to Christ to have more appeal to his audience but was not required to do so
- Governments do not want to be in the business of judging prayers
- What is generic or nonsectarian?
- Over time prayers cannot denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion
- All Christian all the time was okay “So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.”
Town of Greece v. Galloway

Rejected the argument that it is coercive to have to hear prayers at Town board meetings

- People attending Town board meetings often have business before the Board unlike those attending a state legislative session
- Prayers are for the lawmakers not the public
- Audience does not have to participate
- If you feel offended, excluded, or disrespected...you are an adult!
- Local governments cannot allocate benefits or burdens based on who participates
Town of Greece v. Galloway

No surprise...the case had a vigorous dissent

Justice Kagan writes for the ladies and Justice Breyer

Her bottom line:
  ◦ All Christian all the time isn’t okay
  ◦ When citizens encounter their government, their religion should not matter

Has you read a Town of Greece prayer from the perspective of an immigrant attending a naturalization ceremony
Town of Greece v. Galloway

Practical advice
- If you get a chaplain-of-the-month from the community to lead prayers maintain a policy of nondiscrimination and invite (at least) all congregations from your capitol city to participate
- If state legislators give the prayer maintain a policy of nondiscrimination and invite all to participate
- If someone goes overboard instruct them not to do so again

In the last 10 years the Roberts Court has heard very few cases involving religion
- Nothing really new or bold came out of this decision
- But a lot of people are still very upset
- Will this be Justice Robert’s Plessy v. Ferguson?
**Bond v. US**

Huge federalism case that wasn’t

Issue (the Court ultimately did not decide): whether the federal government can adopt a statute implementing a treaty that it would not otherwise have the authority to adopt

Why is this a federalism question: imagine anything subject the federal government does not have the authority to legislate over (but that states have authority to do)

Now imagine the US getting involved in a treaty that allows the federal government to legislate over that subject
Bond v. US

Most salacious facts ever!

Bond is charged with possessing and using a “chemical weapon” in violation of a federal statute implementing a chemical weapons treaty.

Most crime is handled by state statute.

US government admits but for the treaty it would have no authority to pass this chemical weapons statute.

Bond asked the Court to limit or overrule the 1920 case of Missouri v. Holland, which held that if a treaty is valid then a statute implementing it is valid.
Bond v. US

Court declined

In an all-federalism-all-the-time opinion, the Court holds that Bond’s behavior did not violate statute

Concluding the use of chemicals in this case is a “chemical weapon” would “alter sensitive federal-state relationships,” “convert an astonishing amount of ‘traditionally local criminal conduct’” into “a matter for federal enforcement,” and “involve a substantial extension of federal police resources”
**Bond v. US**

If you don’t think the Chief Justice is funny you need to read *Bond*:

- “In sum, the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon”

- “That the statute *would* apply so broadly, however, is the inescapable conclusion of the Government’s position: Any parent would be guilty of a serious federal offense-possession of a chemical weapon-when, exasperated by the children's repeated failure to clean the goldfish tank, he considers poisoning the fish with a few drops of vinegar. We are reluctant to ignore the ordinary meaning of "chemical weapon" when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish.”
Riley v. California

Holding: (Generally) police must first obtain a warrant before searching an arrested person’s cellphone

Unanimous
Riley v. California

Technical legal question: is searching a cell phone a “search incident to an arrest”

Relevant case law

◦ In *Chimel v. California* (1969) the Court identified two factors that justify an officer searching an arrested person: officer safety and preventing the destruction of evidence.

◦ Four years later in *United States v. Robinson* the Court held that police could search a cigarette pack found on Robinson’s person despite the absence of these two factors. The Court noted that “[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it.”
Riley v. California

The Court declined to extend Robinson to searches of data on cell phones

Applying the Chimel factors:

- No officer safety concerns: “[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape.”
- No significant destruction of data concerns: remote wiping (third party deletion of all data) or data encryption (an unbreakable password) weren’t prevalent problems
Riley v. California

To the argument that cell phones are “materially indistinguishable” from other items on an arrestee’s person that lower courts have allowed police to search without warrants, like wallets and purses, the Court responded:

“That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together.”

Cell phones are “minicomputers” with an “immense storage capacity”
Riley v. California

Exigent circumstances exception may justify a warrantless search, for example, “to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury”

Obvious example: kidnapping suspect
Riley v. California

Case is a big blow to law enforcement which the Chief Justice acknowledges

But privacy comes at a cost and warrants are faster and easier to obtain now than ever before

The Chief writes with clarity, confidence, and humor in an opinion a lay person would understand and (might) enjoy reading
Many predicted the Court would overrule *Abood v. Detroit Board of Education* (1977) holding that public sector employees who don’t want to join the union must pay an agency fee or “fair share” to support union work related to collective bargaining.

The Court didn’t overrule *Abood*.

But is it a sign of future things to come?
**Harris v. Quinn**

Illinois declared Medicaid personal assistants public employees for the sole purpose of allowing them to unionize.

The Medicaid recipient is the employer and is responsible for almost all aspects of the employment relationship.

Predictably, a number of personal assistants did not want to join the union or pay fair share.
Harris v. Quinn

The Court held 5-4 that the First Amendment prohibits the collection of an agency fee from home health care providers who do not wish to join or support a union.

Bottom line: personal assistants aren’t “full-fledged” public employees.

What justifies an agency fee is that unions must promote the interests of members and nonmembers alike.

This justification has little force where a union cannot negotiate pay or represent nonmembers (or members) in grievances.
**Harris v. Quinn**

Majority could not have been more critical of *Abood*

Why didn’t the Court overrule it?
- Didn’t have 5 votes
- Who was the holdout(s)?

Bad decision for public employees: personal assistants nationwide have been organized (California, Oregon, Washington, Massachusetts)

State law does not have to be changed

Medicaid personal assistants can still organize but cannot make nonmembers pay an agency fee
Review: Cases that Could Result in State Legislation

Add
Repeal
Amend
Hall v. Florida

In 2002 in *Atkins v. Virginia* the Supreme Court held the Eighth Amendment banned the execution of persons with intellectual disabilities.

Next obvious question is who is intellectually disabled?

General agreement in the medical community that an IQ of 70 or less renders a person intellectually disabled.

Court holds state death penalty statutes with rigid IQ cuts offs of 70 or less are unconstitutional.

Freddie Lee Hall’s lowest IQ score was 71.

5-4 opinion with Justice Kennedy writing and joined by the liberals.
Hall v. Florida

Court’s bottom line

◦ IQ isn’t final and conclusive proof of intellectual disability
◦ IQ scores are imprecise

Instead of using a rigid 70 or less IQ cutoff, states should take into account the standard error of measurement, which is generally plus or minus 5 points

So if a capital defendant’s IQ is 75 or less he or she may present additional evidence of intellectual disability
Hall v. Florida

Nine states should relook at their for death penalty statutes in light of Hall

Two other states have strict IQ cutoffs like Florida (Kentucky and Virginia)

Six other states may have bright-line cutoffs, depending on how courts interpret the statutes (Alabama, Arizona, Delaware, Kansas, North Carolina, and Washington)
Schuette v. Coalition to Defend Affirmative Action

By ballot measure, Michigan votes banned the use of race in public university admissions (and in public employment and public contracting)

We know it is constitutional for public universities to use affirmative action (in some circumstances)

But is it constitutional for them to be banned from using affirmative action?

Supreme Court says YES 6-3
Schuette v. Coalition to Defend Affirmative Action

Arguably a “political process” doctrine had evolved from Supreme Court case law

A law with a racial focus that makes it more difficult for minorities to achieve their goals should be reviewed under strict scrutiny

Minorities who wants affirmative action would have to get MI voters to pass another constitutional amendment; any other admission policy changes could be taken up at the university level
Schuette v. Coalition to Defend Affirmative Action

Court rejects a broad political process doctrine (which could foreclose voter initiatives):

- Assumes people of the same race think alike
- Hard to characterize people by race
- Hard to know what issues different races have a political interest in
- Racial minorities could say they have an interest in any issue
Schuette v. Coalition to Defend Affirmative Action

Bottom line: ballot initiatives are part of our democracy

“This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan Laws that commit this policy determination to the voters.”
Schuette v. Coalition to Defend Affirmative Action

8 states ban affirmative action by the state (New Hampshire, Washington, Oklahoma, Arizona, California, Florida, Michigan, Nebraska)

Some by referendum, others by state law, and at least one by executive order

Only Nebraska’s ban appears to apply to only public colleges and universities

All other bans apply to public contracting and public employment
Schuette v. Coalition to Defend Affirmative Action

Presumably these bans too (no matter how they came to be) are constitutional.

Justice Kennedy says as much in the plurality opinion.

One his rationales for the ruling in Schuette was not upsetting 15 year old precedent upholding CA’s ban on racial preferences in public contracting.

This issue has received surprisingly little media attention.

Is it because it isn’t common?

Has been a call to action by anti-affirmative action groups for affirmative action to be banned at all levels of government by whatever means exists in state law.
Schuette v. Coalition to Defend Affirmative Action

No Supreme Court commentator predicted the Court going any other way

BUT had the Supreme Court wanted to go the other way it had the precedent to do so
Schuette v. Coalition to Defend Affirmative Action

Justice Sotomayor’s dissent and Chief Justice’s two-page response got as much attention as the holding of the case

- Dissent is almost 60 pages—majority opinion is less than 20
- Sotomayor: To stop discrimination on the basis of race we need to talk about race
- Roberts: Maybe racial preferences do more harm than good; I am talking about it—I just don’t agree with the other side!
McCutcheon v. FEC

Campaign finance case refresher

- Expenditure and contribution limits
- In *Citizens United* the Court okayed no limit on corporate expenditures
- Federal law limited “aggregate” contributions of $123,200 per two-year election cycle to candidates (up to $48,600) and non-candidate committees (up to $74,600)

Shaun McCutcheon had no problem with the $5,200 “base” contribution limits to federal candidates—he wanted to contribute to more candidates

In *McCutcheon* the Court struck down federal aggregate campaign contribution limits
McCutcheon v. FEC

Bottom line: where is the quid pro quo corruption?

“If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime.”
What is the impact on states?

◦ About a dozen states provide aggregate limits on campaign contributions to state candidates

◦ The constitutionality of these state laws seems doubtful in the wake of *McCutcheon*

◦ The impact of these state laws no longer applying will vary. In New York, for example, the aggregate limit to contribute to a state candidate is $150,000, so not much likely will change in that state.
**McCullen v. Coakley**

Court unanimously struck down Massachusetts 35 foot buffer zone surrounding abortion clinics as a violation of the First Amendment

Protesters routinely violated a previous “floating bubble zone” statute

“Sidewalk counselors” were prevented from having personal interactions with those entering the clinics
McCullen v. Coakley

Restricting speech at abortion clinics (rather than at any place where a protest might occur) is content-neutral.

This is important because if the statute wasn’t content-neutral strict scrutiny would apply (and MA agreed it would lose).

Great nod to state legislatures: “The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics.”

The fact that employees could enter the buffer zone didn’t make it content-based—this did not amount to giving one side an advantage in the abortion debate.
McCullen v. Coakley

MA still loses because too much speech was burdened by the buffer zone

MA had lots of options to deal with problems at abortion clinics

- Generic criminal statutes forbidding assault, breach on the peace, trespass, vandalism, etc.
- State laws like the federal Freedom of Access to Clinic Entrances Act which prevents injury, intimidation, or interference toward someone seeking an abortion
- Criminalize following and harassing people entering a clinic
- Obstructing clinic entrances can be dealt with by statute

Some states might see some legislation on this issue
McCullen v. Coakley

To the argument that nothing else worked the Court said: prove it

- No prosecutions for 17 years
- No injunctions since the 1990s
- Of course enforcing a buffer zone is easier than proving intent under a harassment or obstruction statute: too bad
So many interesting things about this case:
- Came down at the end of June
- Unanimous
- The liberals joined the Chief Justice’s opinion (because he wrote an opinion they could live with)
- The conservatives are unhappy with the opinion but agree with the outcome; Justice Scalia calls it a Something for Everyone opinion
- Chief Justice gives practical advice

Is *Hill v. Colorado* dead?

SLLC filed an *amicus* brief
McCullen v. Coakley

Are buffer zones dead?
- Are their other options that restrict speech less?
- Have you tried them? Really?
CTS Corp v. Waldburger

One of two preemption case of the term

State law wasn’t preempted

The SLLC didn’t file an amicus brief in this case because we thought the preemption of state law might be the better overall outcome

Who else didn’t take the law school class that covered statutes of repose?
CTS Corp v. Waldburger

In 2009 NC homeowners sue CTS under state law for polluting their water

NC has a 10 year statute of repose that prevent anyone from being sued for a tort 10 years after the defendants last culpable act

CTS hasn’t owned the property since 1987

CERCLA, the Superfund statute, explicitly preempts state statute of limitations related to certain state tort claims

But does it apply to statutes of repose?
CTS Corp v. Waldburger

Court says no

CERCLA uses the term “statutes of limitations” four times, it never uses the term “statutes of repose”

“Other features of the statutory text further support the exclusion of statutes of repose” including Section 9658 describes the covered period in the singular, assumes a claim exists (statutes of repose can prohibit a cause of action from coming into existence), and allows for equitable tolling (pausing) (only available under statutes of limitations)
CTS Corp v. Waldburger

Five states have relevant statutes of repose (Alabama, Connecticut, Kansas, Oregon, and North Carolina)

Other pro-business states may want to pass similar statutes of repose

Issue cuts both ways for the state because they could be the alleged contaminator or the aggrieved party
Preview: Granted Cases of Interest
Three Tax Cases—SLLC briefs filed or forthcoming
Alabama Department of Revenue v. CSX

Facts: Railroads in Alabama pay 4 percent sales tax on diesel fuel. Trucks pay 19 cents a gallon and no sales tax. For the relevant time period, railroads paid $2.08 a gallon and trucks paid $2.19

Issue: Railroads claim they have been discriminated against in violation of the Railroad Revitalization and Regulation Reform Act (4-R)

What!? They paid LESS in total state taxes

Eleventh Circuit said it was too hard to compare RR sales tax with truck excise tax and concluded RR are discriminated against because trucks pay no sales tax
Alabama Department of Revenue v. CSX

Alright the case is a little more complicated...but not much!

Two issues

◦ What is the correct class for determining discrimination
  ◦ Competitors or other commercial and industrial taxpayers
  ◦ If it is the latter Alabama wins because all other commercial and industrial taxpayers pay a sales tax

◦ Should a court look at a state’s tax structure in total when determining if railroads are discriminated against

Complicating factor

◦ Water carriers don’t pay any tax on diesel fuel (possibly because of concerns about the constitutionality of taxing vessels in navigable waters)
Alabama Department of Revenue v. CSX

All sorts of interesting things about this case

This case is an ongoing saga
- Thomas and Ginsburg said in a dissenting opinion on another issue that the correct comparison class is other commercial and industrial consumers
- No one knows the other Justices’ views on this issue

Court asked for briefing on the second question

Alabama stands to lose millions of dollars (meanwhile CSX makes billions...)

Up to 42 states may be affected by this case

Every industry wants their own 4-R Act
Comptroller v. Wynne

Issue: Whether a state must provide a credit to residents for all income taxes paid to another jurisdiction.

Background: In Maryland, taxpayers who pay income taxes out of state get a credit against their Maryland state taxes but not their Maryland county taxes.

Lower court ruling: Maryland’s highest court ruled this tax scheme violates the dormant Commerce Clause (states cannot unjustifiably burden interstate commerce).

Reasoning: The Wynne’s pay much more in taxes than a neighbor who earns the same amount of money in-state making; this may discourage the Wynne’s from earning money out of state (thus burdening interstate commerce).
Comptroller v. Wynne

SLLC’s brief makes all the expected arguments

- State and local governments have the power to tax the income of its residents, wherever earned
- The scope of the dormant Commerce Clause regarding non-resident income taxes has not been clearly defined should not be construed to mandate credits
- Taxation is a legislative matter that should not usurped by the judiciary
Comptroller v. Wynne

To counter the argument that the Wynne’s neighbor with the same income will pay more in taxes our brief points out:

◦ Both neighbors use local services—one should not pay less (or even nothing) for them!
◦ And to counterbalance a tax credit, a county would need to raise some other tax, which will fall disproportionately on some other neighbor and often be more regressive
◦ It is odd to argue Maryland’s tax system is unconstitutional because of other states’ tax system

A number of other state and local governments don’t provide tax credits for income taxes paid in other jurisdictions
Direct Marketing v. Brohl

Really a jurisdictional case in the context of a state tax

Context is collecting state sales tax on online purchases from purchaser

Quill Corp. v. North Dakota prohibits states from forcing retailers with no in-state physical presence to collect and remit state sales taxes

Which we all know deprives state and local governments of significant revenue because consumers don’t self report
Direct Marketing v. Brohl

Facts: Colorado makes online retailers who don’t to collect sales tax comply with notice and reporting requirements designed to make it easier for purchasers to pay taxes (and for the Department of Revenue to know who owes taxes)

Issue: Whether the Tax Injunction Act (TIA) bars the federal court from hearing this case even though DMA isn’t a taxpayer and Colorado “neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration.”

TIA says: “district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”

Holding: Tenth Circuit says no
Direct Marketing v. Brohl

Tenth Circuit’s reasoning

◦ DMA isn’t a taxpayer, no problem: “Nothing in the language of the TIA indicat[es] that our jurisdiction to hear challenges to state taxes can be turned like a spigot, off when brought by taxpayers challenging their own liabilities and on when brought by third parties challenging the liabilities of others.”

◦ Notice and comment requirements aren’t taxes, no problem: DMA’s lawsuit seeks to retrain state tax collection
Alabama Legislative Black Caucus v. Alabama

Issue: Does Alabama’s redistricting plan violate Section 2 of the Voting Rights Act by intentionally packing black voters into districts already containing a majority of black voters?

Redistricters say majority-black districts were underpopulated

Black voters say black voters were packed into super-majority districts to limit their potential influence in other jurisdictions

Can you set a quote of what percent of voters should be black in each state? Dissent says no. But this is a common practice?
Alabama Legislative Black Caucus v. Alabama

Fundamental disagreement about what happened in this case:

Majority: Race wasn’t the predominate motivating factor in redistricting, instead the legislature “maintained the cores of existing districts, made districts more compact where possible, kept almost all of the incumbents within their districts, and respected communities of interest where possible.”

Dissent: Drafters set a quota that they would not decrease the percent of black voters in any district. To achieve these quotas, the legislature “eliminated existing districts, created conflicts between incumbents, ignored legislators’ preferences, and split of huge volume of precincts.”
Arizona State Legislature v. Arizona Independent Redistricting Commission

The Arizona voters remove congressional redistricting authority from the Arizona State Legislature and place it in an unelected commission.

Does this violate the U.S. Constitution’s Elections Clause which requires that the time, place, and manner of congressional elections be prescribed in each state by the “Legislature thereof”?

Federal district court says no—Supreme Court precedent says other bodies can redistrict.

Dissent agrees to a point—but says other bodies can’t do 100% of the redistricting.

While the use of redistricting commissions is popular for drawing state legislative district lines, only Arizona, California, and Montana have mandated them for congressional redistricting.
Armstrong v. Exceptional Child Center

In 2012 in *Douglas v. Independent Living Center of Southern California* the Court was supposed to decide whether the Supremacy Clause allows private parties to sue states to enforce a Medicaid reimbursement statute and if it does whether a state’s reimbursement rate is preempted by Medicaid.

The Court ultimately did not decide the issue.

The majority of the Court seemed skeptical that the Supremacy Clause provides a cause of action; dissenting Justices Roberts, Alito, Scalia, and Thomas concluded it does not.

It is all about Justice Kennedy?
Why is this case important?

- Medicaid = money
- State’s rights--Congress was perfectly capable of creating a private right of action under Medicaid but it didn’t—so why should one be found under the constitution?
- If the Supremacy Clause can provide a cause of action under this section of the Medicaid Act, where else might it provide a cause of action to sue a state
Texas Department of Housing and Community Affairs v. Inclusive Communities Project

For the third time the Court has taken up the issue of whether disparate-impact claims can be brought under the Fair Housing Act.

Will this case settle like its predecessors, *Mt. Holly v. Mt. Holly Citizens in Action* and *Magner v. Gallagher*?

Eleven federal circuits have decided this issue; all have held that claims are possible.

The Supreme Court is expected to reach the opposite conclusion.
Preview: Likely Grants Interest
Same-Sex Marriage Bans

Seven petitions = cert denied
What will happen next?
Only time will tell...
ACA Subsidy Case

On the same day in late July the DC Circuit and the 4th Circuit reached opposite conclusions regarding whether ACA exchange enrollees can receive a subsidy if they buy insurance in a state that has not established an exchange.

Petition for cert has been filed in the Fourth Circuit case (where the federal government won).

Entire DC Circuit is rehearing its panel decision (where the government lost).

Key language “established by the state”

The Fourth Circuit (and many others) predict the ACA will “crumble” if tax credits are unavailable on federal exchanges.

Only 14 states and the District of Columbia have established exchanges.
SLLC Supreme Court Preview Webinar

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