

CASE NOTES

Cook v. Gates: Don't Ask, Don't Tell Remains a Legal Option for the Military, But the End May Be in Sight

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I. INTRODUCTION

Twelve members of the United States Armed Forces were separated from service under the Don't Ask, Don't Tell (DADT) statute of the United States Code.¹ The former service members brought suit against Secretary of Defense Robert M. Gates and Secretary of Homeland Security Michael Chertoff, alleging that DADT violated the plaintiffs' right to due process on its face and as-applied.² Additionally, their complaint alleged that DADT denied equal protection on the basis of sexual orientation, and that the portion of DADT that triggered separation proceedings based on a member's statement that he or she was homosexual violated the right to freedom of speech.³

The United States District Court for the District of Massachusetts affirmed the lower court's decision, ruling that all of the claims failed as a matter of law, and dismissed the complaint with prejudice and entered a final judgment.⁴ The First Circuit Court of Appeals for the United States *held* that the DADT statute (1) did not violate substantive due process, (2) did not violate equal protection principles, and (3) did not violate members' rights under the First Amendment. *Cook v. Gates*, 528 F.3d 42, 47 (1st Cir. 2008).

II. BACKGROUND

After being elected President in 1992, Bill Clinton revisited the Department of Defense policy that separated homosexual individuals from military service.⁵ In response to review of the policy by the

1. *Cook v. Gates*, 528 F.3d 42, 47 (1st Cir. 2008).

2. *Id.*

3. *Id.*

4. *Id.* at 48.

5. *Id.* at 45.

Executive branch, Congress conducted its own study.⁶ After extensive review, Congress passed 10 U.S.C. § 654, known as the Don't Ask, Don't Tell Act.⁷ The DADT Act provided for the dismissal of members of the military when one of three findings is made: (1) a member has engaged or attempted to engage in a homosexual act; (2) a member has expressed that he or she is a homosexual; or (3) a member has married or attempted to marry a person of the same sex.⁸ In the event such a finding is made a member may avoid separation by establishing that:

- (a) the conduct was a departure from customary behavior, (b) the conduct is unlikely to recur, (c) the conduct did not involve force, coercion, or intimidation, (d) the member's continued presence in the military is consistent with the interest of the military, and (e) the member does not have a propensity or intent to engage in future homosexual acts.⁹

Additionally, the Act allows a member who has stated that he or she is a homosexual to avoid separation of service by demonstrating that he or she is not likely to engage in homosexual activity.¹⁰

Challenges to DADT occurred regularly throughout the 1990s, though none succeeded.¹¹ The Act withstood all challenges under the rational basis standard of review. Rational basis review appeared to be the Supreme Court of the United States' accepted standard when assessing challenges to laws that discriminated based on sexual orientation.¹² In 2001, however, the Supreme Court decided a case involving the rights of homosexuals that appeared to create an opening to challenge DADT under a standard of review higher than rational basis.¹³

Challenges to DADT appeared to be a dead issue until the Supreme Court appeared to alter its accepted standard of review in regard to at least some laws pertaining to homosexual intimacy in *Lawrence v. Texas*.¹⁴ Striking down a Texas statute that made it a crime for two

6. *Id.*

7. *Id.* at 46.

8. 10 U.S.C. § 654(b) (1993).

9. *Id.* § 654(b)(1)(A)-(E).

10. *Id.* § 654(b)(2).

11. See *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (finding DADT constitutional under a rational basis standard of review); *Selland v. Perry*, 100 F.3d 950 (4th Cir. 1996) (holding DADT constitutional); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1997) (holding that DADT survived rational basis review as the policy reasonably related to legitimate government interests); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997) (holding that discharge of a service member did not violate equal protection or First Amendment rights).

12. See *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (holding that a Colorado constitutional amendment prohibiting legislative, executive, or judicial action designed to protect homosexuals from discrimination was unconstitutional under a rational basis standard of review).

13. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

14. See *id.*

persons of the same sex to engage in certain intimate conduct, the Court appeared to utilize a standard of review that fell between rational basis and strict scrutiny.¹⁵ After *Lawrence*, challenges to DADT under equal protection were brought by plaintiffs seeking to have courts assess DADT under a new intermediate standard of review.¹⁶

III. COURT'S DECISION

In the noted case, the First Circuit examined the appellants' allegations by first analyzing the statutory and regulatory schemes of the DADT statute.¹⁷ The court reviewed the district court's dismissal of the complaint de novo.¹⁸ The court held that the appellants' due process claim failed both facially and as-applied.¹⁹ Additionally, the court found that the plaintiffs' claim that the DADT statute was a violation of the principles of equal protection failed under rational basis review.²⁰ Finally, the court held that the DADT section that subjects a member to possible separation for making a statement identifying himself or herself as a homosexual did not establish a content-based restriction of speech.²¹

The court began with the plaintiffs' claim that DADT violated their right to substantive due process.²² The court believed that the proper first step in evaluating a due process claim in the context of sexual orientation was to determine how *Lawrence* affected the basis of review.²³ The court noted that the Supreme Court in *Lawrence* overruled *Bowers v. Hardwick*, which had reviewed challenges to laws criminalizing homosexual intimacy under a rational basis standard.²⁴ The court's inquiry began with a review of the basic principles of substantive due process.²⁵ The court looked at the principles of due process set forth in *Washington v. Glucksberg*.²⁶ *Glucksberg* held that when dealing with fundamental rights and liberties, the substantive component of due process required a heightened protection against government

15. *Id.*

16. *See* United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004).

17. Cook v. Gates, 528 F.3d 42, 45-47 (1st Cir. 2008).

18. *Id.* at 48.

19. *Id.* at 60.

20. *Id.* at 62.

21. *Id.* at 65.

22. *Id.* at 48.

23. *Id.*

24. *Id.* at 48-49.

25. *Id.* at 49.

26. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (holding that the right to assisted suicide is not protected by the Due Process Clause)).

interference.²⁷ The question before the court in the noted case was whether the holding in *Lawrence* added to the list of liberty interests enumerated in *Glucksberg*.²⁸ In particular, the court sought to determine if *Lawrence* added the right of an adult “to engage in consensual sexual intimacy in the home”²⁹ to the *Glucksberg* list of protected liberty interests. The court began its inquiry by reviewing how the *Lawrence* Court approached the question of “due process rights that protect the formation and perpetuation of intimate relationships.”³⁰ The court concluded that the *Lawrence* decision relied on Supreme Court substantive due process precedent that established protections for certain sexual conduct outside of the marital relationship.³¹ The court noted that the *Lawrence* Court, in overruling *Bowers*, recognized that there was a broader right to engage in private, consensual sexual intimacy.³²

The court also noted that in response to the ruling of *Lawrence*, there existed a split among courts and commentators in their interpretations of the proper standard of review.³³ One reading argued that the holding of *Lawrence* only required a rational basis review.³⁴ Another felt that the case, and all subsequent cases, applied strict scrutiny.³⁵ Lastly, a third reading argued that *Lawrence* balanced the individual and state interests, resulting in a middle ground that was neither rational basis nor strict scrutiny.³⁶ The court agreed with the third interpretation and concluded that *Lawrence* recognized a protected liberty interest for adults to engage in private, consensual sexual conduct under an intermediate standard of review.³⁷

The court concluded that *Lawrence* recognized a protected liberty interest for four reasons.³⁸ First, the court noted that *Lawrence* relied on doctrinal support that recognized a due process right to make personal decisions related to sexual conduct.³⁹ Second, the court reasoned that “the language employed [by] *Lawrence* supports the recognition of a

27. *Id.*

28. *Id.*

29. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

30. *Id.* at 49-50.

31. *Id.* at 50.

32. *Id.* at 50-51.

33. *Id.* at 51.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 52.

38. *Id.*

39. *Id.*

protected liberty interest.”⁴⁰ The court felt that the language employed unquestionably warranted special protection under the Constitution.⁴¹ Third, in overruling *Bowers*, the *Lawrence* Court relied on Justice Stevens’ dissent in *Bowers* for its controlling principles.⁴² The passage of the dissent quoted in *Lawrence* specifically mentions that decisions concerning intimacies of physical relationships are a form of liberty protected by the Due Process Clause.⁴³ Further, Justice Stevens’ dissent reviewed cases that established fundamental rights, placing the rights of adults to engage in private intimate conduct in the same category.⁴⁴ Finally, the court reasoned that if *Lawrence* had applied traditional rational basis review, the outcome would have been the opposite, because the governmental interest in question in *Lawrence* would be sufficient to uphold the statute in question under a rational basis review.⁴⁵

For these reasons, the court concluded “that *Lawrence* recognized . . . a protected liberty interest to engage in certain ‘consensual sexual intimacy in the home.’”⁴⁶ Additionally, the court found that the district court’s primary reasons for interpreting *Lawrence* as applying rational basis review were unpersuasive.⁴⁷ First, the First Circuit found that the district court erred in finding that *Lawrence* was decided under rational basis review because *Lawrence* did not explicitly identify the right in question as fundamental.⁴⁸ Second, the court found that the district court erred in concluding that the Supreme Court did not thoroughly analyze the relevant history and tradition in characterizing the alleged liberty interest, as required by *Glucksberg*; instead, it relied on the “mistaken premise” that to be relevant to a substantive due process inquiry, the pertinent history must demonstrate “affirmative government action to protect the right in question.”⁴⁹ The court in the noted case reasoned that *Lawrence*’s nonadherence to *Glucksberg* was done to disavow the exclusive approach of *Glucksberg*.⁵⁰ Third, the First Circuit reasoned that although the *Lawrence* majority failed to respond to Justice Scalia’s dissenting argument that the majority did not recognize a protected liberty interest, this did not mean that the majority was agreeing with

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 52-53.

46. *Id.* at 53.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 54.

Justice Scalia.⁵¹ Finally, the First Circuit found that the district court erred in concluding that *Lawrence* did not recognize a protected liberty interest simply because the *Lawrence* Court used the phrase “legitimate state interest,”⁵² since legitimate governmental interests must be present for a law to be constitutional regardless of the standard of review applied.⁵³ The court reasoned that the district court failed to fully understand *Lawrence*’s intermediate basis of review.⁵⁴

After concluding that *Lawrence* utilized an intermediate basis of review, the court turned to the plaintiffs’ facial challenge of DADT.⁵⁵ The court noted that a facial challenge is difficult to establish because the challenger must show that there is no set of circumstances under which the challenged law would be valid.⁵⁶ The court held that because of this requirement the plaintiffs’ facial challenge to DADT failed.⁵⁷ The court found that the *Lawrence* decision did not identify a protected liberty interest in all forms of sexual conduct, but “only a narrowly defined liberty interest in adult consensual sexual intimacy” in the confines of an individual’s home and private life.⁵⁸ This led the court to determine that DADT was in a realm not covered by this aspect of the *Lawrence* decision.⁵⁹

The court next assessed the plaintiffs’ as-applied challenge.⁶⁰ The plaintiffs asserted that the Act could apply to some conduct falling within the zone of protection identified in *Lawrence*.⁶¹ Addressing this contention, the court noted that the case involved review of congressional judgment regarding military matters.⁶² The court observed that the Supreme Court affords high deference to Congress in the context of military affairs.⁶³ The court identified two reasons for this deference.⁶⁴ The first reason involves the institutional competence of the Legislative and Executive Branches in decisions regarding military force.⁶⁵ The second reason relates to Congress’s constitutional power to “raise and

51. *Id.*

52. *Id.* at 54.

53. *Id.* at 54-55.

54. *Id.* at 54-56.

55. *Id.* at 56.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 57.

63. *Id.*

64. *Id.*

65. *Id.*

support armies and to make all laws necessary and proper to that end.”⁶⁶ The court concluded that this deference heavily influences the analysis and resolution of constitutional challenges arising in the context of military affairs.⁶⁷ In light of this high level of deference, the court examined the process by which Congress passed the Act and the rationale behind it.⁶⁸ The court concluded that the circumstances surrounding the passage of DADT demonstrated that Congress and the Executive branch engaged in intense study of the issues and considered the constitutional rights of gay and lesbian service members.⁶⁹ The court conceded that Congress determined “the Act was necessary to preserve the military’s effectiveness as a fighting force.”⁷⁰ Further, the court found that the government’s interest in military affairs surpasses the government interest at stake in *Lawrence*.⁷¹ Thus, the court held that it had no choice but to dismiss the plaintiffs’ as-applied challenge.⁷²

The court next assessed the plaintiffs’ claim that the Act was unconstitutional under principles of equal protection.⁷³ This claim was based on the Act’s differential treatment of homosexual and heterosexual military members.⁷⁴ The court sought to determine the proper standard of review regarding equal protection, and specifically whether homosexuals constituted a suspect class subject to heightened judicial scrutiny under equal protection principles.⁷⁵ The plaintiffs argued that the district court erred in applying rational basis review in light of the Supreme Court decision in *Romer v. Evans*, and additionally that *Lawrence* required a more demanding standard than rational basis.⁷⁶ The First Circuit disagreed and found that the *Romer* decision did not recognize homosexuals as a suspect class for equal protection purposes.⁷⁷ Further, the court reasoned that because the *Lawrence* Court declined to base its holding on equal protection principles, even though that option was suggested in arguments, *Lawrence* did not change the standard of review applicable to a legislative classification based on sexual

66. *Id.* (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968))

67. *Id.*

68. *Id.* at 58.

69. *Id.* at 58-49.

70. *Id.* at 60.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 60-61.

76. *Id.* at 61.

77. *Id.*

orientation.⁷⁸ The First Circuit held that neither *Romer* nor *Lawrence* mandated a heightened scrutiny of DADT for equal protection purposes and, consequently, rational basis was the correct standard of review.⁷⁹ The court surmised that Congress provided a reasonable explanation for its decision in formulating DADT, and therefore the Act survived rational basis review in light of the substantial deference owed to Congress regarding military affairs.⁸⁰ The court upheld the district court's rejection of the equal protection claim "because homosexuals are not a suspect class and the legitimate interests Congress put forward are rationally served by the Act."⁸¹

The last issue before the court was the claim that DADT violated the First Amendment because it subjected a member to separation from service for making a statement identifying himself or herself as a homosexual.⁸² The plaintiffs claimed that this aspect of the Act restricted the content of their speech and forced them to pretend that they were heterosexual.⁸³ However, the court noted that the plaintiffs did not claim that they were separated from service due to their expressive activities.⁸⁴ This argument was first raised on appeal, and the court declined to rule on the claim as there was no evidence that the terms of the Act indicated that such activities would trigger separation.⁸⁵ The court reasoned that the Act does not punish a member for making a statement regarding sexual orientation because separation is mandated only when a member has engaged, intends to engage, or has a propensity to engage in a homosexual act.⁸⁶ The court stated that this was still a question of conduct and that a member's speech had only evidentiary significance.⁸⁷

The court recognized that First Amendment protections exist even in the military, but again spoke of the deferential treatment afforded in such a context, and noted that the essence of military service is the subordination of the individual to the needs of service.⁸⁸ The court determined that although the First Amendment challenge to the Act was

78. *Id.*

79. *Id.*

80. *Id.* at 62.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 62-63.

87. *Id.* at 63.

88. *Id.* at 62.

a legitimate argument, the case at bar failed to supply a proper set of facts that would trigger such a claim.⁸⁹

The court then reviewed the plaintiffs' argument that the Act's rebuttable presumption violated First Amendment rights.⁹⁰ The court concluded that there might be circumstances in which the rebuttable presumption results in a valid First Amendment challenge; for example, if a service member stated she was homosexual, proved she had not engaged in the articulated conduct, yet was still separated from service.⁹¹ However, because the noted case did not contain facts that fell under this scenario, the argument was irrelevant.⁹² The court ended its decision by concluding that it must dismiss the plaintiffs' challenges due to the special deference granted to Congressional decision-making in the area of military affairs.⁹³

The dissent focused on the rebuttable presumption and its effect on First Amendment rights.⁹⁴ The dissent argued that if the Act were applied to punish statements about a member's homosexual status, that would constitute a content-based speech restriction subject to strict scrutiny.⁹⁵ The dissent argued that, under this interpretation, there was a viable cause of action that the burden on homosexual members' speech was greater than was essential to the government's interest in preventing the occurrence of homosexual acts in the military.⁹⁶ The dissent argued that such deference did not equate to abdication and that the strongest deference regarding speech is in a purely military setting.⁹⁷ The dissent found that the Act's control of both public and private speech, including speech that was both off-base and off-duty, was the Act's most troubling aspect.⁹⁸ Concluding that this control of private speech in nonmilitary settings amounted to the undue burdening of the plaintiffs' First Amendment rights, the dissent asserted that the motion to dismiss the claim should be denied.⁹⁹

89. *Id.* at 64.

90. *Id.* at 63-64.

91. *Id.* at 64.

92. *Id.* at 65.

93. *Id.*

94. *Cook v. Gates*, 528 F.3d 42, 65-74 (1st Cir. 2008) (Saris, J., concurring in part and dissenting in part).

95. *Id.* at 70.

96. *Id.* at 71.

97. *Id.* at 73.

98. *Id.*

99. *Id.* at 74.

IV. ANALYSIS

An examination of the conclusions of the *Cook* court must be placed in context with other contemporary challenges to DADT brought in light of the *Lawrence* decision. A particularly noteworthy example is *Witt v. Air Force*, a case filed by an Air Force service member whose illustrious military career was derailed by the prejudicial repercussions of DADT.¹⁰⁰

Major Margaret Witt joined the Air Force in 1987 as a Second Lieutenant and subsequently rose through the ranks to her current rank of Major.¹⁰¹ Major Witt was a decorated officer, commended and rewarded for her accomplishments and abilities; she even appeared on recruitment materials.¹⁰² During her career, Major Witt was in a committed and long-term relationship with another woman, though she never had sexual relations while on duty or while on the grounds of any Air Force base.¹⁰³ Major Witt never told any member of the military that she was homosexual or that she was involved in a relationship.¹⁰⁴ In July 2004, Major Witt became aware that the Air Force was initiating an investigation under DADT for her suspected homosexuality.¹⁰⁵ Major Witt refused to speak with the military about the details of her private life, and separation proceedings were initiated.¹⁰⁶ During the separation proceedings, Major Witt was prevented from accruing points toward promotion and from earning retirement benefits.¹⁰⁷ The Air Force took this action when Major Witt was less than one year short of twenty years of service and a full retirement pension.¹⁰⁸ Ultimately, the Air Force notified Major Witt that it was discharging her due to her homosexuality.¹⁰⁹ Major Witt responded by filing suit against the Air Force, the Secretary of Defense, the Secretary of the Air Force, and her Air Force commander.¹¹⁰ Major Witt argued that her discharge under the rubric of DADT violated substantive and procedural due process and the Equal Protection Clause.¹¹¹

100. *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008).

101. *Id.* at 809.

102. *Id.*

103. *Id.*

104. *Id.* at 810.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 809.

111. *Id.*

The United States Court of Appeals for the Ninth Circuit determined that the procedural due process claim was not yet ripe for adjudication because the injuries asserted by Major Witt regarding her discharge had not yet occurred and she had not been formally discharged at the time of the ruling.¹¹² The court concluded that Major Witt met the standing requirements for equal protection and substantive due process claims.¹¹³ The court, however, affirmed the district court's dismissal of the equal protection claim under a rational basis review.¹¹⁴ The full court denied a petition for rehearing en banc on December 4, 2008.¹¹⁵ Judge O'Scannlain argued in his dissent from the denial of rehearing en banc that the district court's original dismissal was correct.¹¹⁶ Further, Judge O'Scannlain disagreed with the decision to analyze the issue under an intermediate level of scrutiny.¹¹⁷

As was the case in *Cook*, the *Witt* court's questioning of the proper basis of review regarding the substantive due process claim elicited the most promising news for the LGBT community. Like the First Circuit in *Cook*, the *Witt* court analyzed the *Lawrence* decision and its impact on questions of discriminatory treatment of homosexuals and concluded that rational basis was no longer the appropriate standard of review.¹¹⁸ The majority agreed with the First Circuit that *Lawrence* required an examination of DADT under a level of scrutiny more stringent than rational basis.¹¹⁹ To determine the proper structure when applying a heightened level of scrutiny to legislation which "attempts to intrude upon the personal and private lives of homosexuals,"¹²⁰ the Ninth Circuit looked to the Court's decision in *Sell v. United States*. In *Sell*, the Court employed a heightened scrutiny standard consisting of four factors: first, "important governmental interest[s must be] at stake"; second, the government's intrusion must "significantly further those [important] state interests"; third, the intrusion must be "necessary to further those interests"; and fourth (in the context of *Sell*, which concerned the legality of medicating a mentally ill defendant for the purpose of his standing trial), the administration of drugs must be "medically appropriate."¹²¹ The

112. *Id.* at 813.

113. *Id.* at 812.

114. *Id.* at 821.

115. *Witt v. Dep't of Air Force*, 548 F.3d 1264, 1265 (9th Cir. 2008) (O'Scannlain, J., dissenting).

116. *Id.*

117. *Id.*

118. *Witt*, 527 F.3d at 813.

119. *Id.* at 816.

120. *Id.* at 819-20.

121. *Sell v. United States*, 539 U.S. 166, 180-81 (2003).

Ninth Circuit adopted the first three of these factors as the heightened scrutiny balancing analysis required by *Lawrence*.¹²²

The dissent in *Witt* argued that DADT must be subjected to strict scrutiny.¹²³ This position was based on the belief that the Due Process Clause's guarantee of privacy and autonomy firmly protected the right to engage in private, consensual sexual relations.¹²⁴ Although the outcome of *Witt's* substantive and procedural due process claims has not been determined, both *Witt* and *Cook* mark a return of the question of the legality of DADT.

Though the *Cook* court ultimately concluded that the challenges to the DADT Act should be dismissed, its determination that due process challenges be reviewed under an intermediate level of scrutiny is a tremendous advance for LGBT rights. Additionally, the use of an intermediate standard of review in the case has particular significance because of the high level of deference generally given in the context of military affairs. The positive effect of the *Lawrence* decision continues to be seen in all areas of judicial decisions regarding LGBT rights, as shown in *Cook v. Gates* and *Witt v. Department of Air Force*. One may take solace that even with negative rulings like that in the noted case, the ultimate fate of DADT remains in significant question.

The *Cook* court left areas open to further challenges to DADT should a particular set of circumstances arise. Perhaps most important for future challenges to DADT is the court's reasoning that with the proper circumstances in the context of the rebuttable presumption, a First Amendment challenge to the Act may result in the repeal of the legislation. The high level of deference in the context of congressional action in military affairs is clearly a significant hurdle to overcome, but the court's reasoning bodes well for future attempts to overturn the Act. Specifically, the dissent provided a level of optimism regarding a First Amendment challenge to the Act, particularly when separation of a member is based on private, nonmilitary speech. *Cook* and *Witt* show that the viability and legitimacy of DADT remains open for debate.

The ability of LGBT Americans to serve their country faithfully should be recognized and honored. While the *Cook* court ultimately upheld the discriminatory DADT statute, the decision should be considered a positive result in the fight to eliminate the prejudicial effects

122. *Witt*, 527 F.3d at 818-19.

123. *Id.* at 822.

124. *Id.* at 823.

of the DADT statute, and, in turn, to further the recognition of all inalienable rights of the LGBT community.

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