NO. 01-1572

IN THE
SUPREME COURT OF THE UNITED STATES

Cook County, Illinois,
Petitioner,

vs.

United States of America *ex rel.* Janet Chandler,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND, MISSISSIPPI SCHOOL BOARDS ASSOCIATION, AND NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000), this Court held that States are not "person[s]" subject to liability under the False Claims Act ("FCA"). The question now before the Court is whether local governmental entities such as municipalities and counties are "person[s]" subject to such liability. This question is vitally important to the Texas Association of School Boards Legal Assistance Fund ("TASB Fund"), the Mississippi School Boards Association ("MSBA"), the National School Boards Association ("NSBA"), and their member school districts and boards.

The TASB is a not-for-profit corporation comprising approximately 1,045 independent Texas school districts through their elected boards of trustees.[2] Under Texas law, a school district board of trustees has "the exclusive power and duty to govern and oversee the management of the public schools of the district." TEX. EDUC. CODE ANN. § 11.151(b) (Vernon 1996). TASB's members are thus responsible for governance of the State's public school districts, consistent with state and federal law. TASB represents more than 7,000 school board members who

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[1] This brief has not been authored as a whole or in part by counsel for a party. No monetary contribution has been made to the preparation or submission of this brief other than by the *amici curiae*, their members, or their counsel. Written consent to this brief has been given by all parties and is on file with the Court.

[2] Texas law treats school districts as "quasi-municipal corporations." *San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279, 283 (Tex. 1996); *see also Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 353 (5th Cir. 1987). The filing of this brief should not be construed as an admission that school districts and their boards are not arms of the State for other relevant purposes.

preside over annual expenditures of more than $25 billion, employ more than 500,000 people, and serve more than 4 million Texas students.

The TASB Fund advocates on behalf of school districts and administrators in litigation with potential statewide impact. Established in 1980, the TASB Fund includes more than 800 school districts and is governed by officers of the TASB, the Texas Association of School Administrators, and the Texas Council of School Attorneys.

The MSBA represents the interests of public school board members responsible for educating students in kindergarten through twelfth grade in Mississippi. The MSBA's mission is to ensure quality school board performance through advocacy, technical assistance, leadership training, and information dissemination. The MSBA's membership includes representatives from more than 120 public school districts in Mississippi.

The NSBA is a not-for-profit federation of this nation's state school board associations. These boards govern more than 15,000 local school districts that serve more than 46.5 million public school students – over 90 percent of all elementary and secondary public school students in the nation. Founded in 1940, NSBA has had a longstanding interest in educational issues, particularly those affecting funding for educational purposes.

These *amici curiae* are interested in this case because significant federal funds flow to local school districts. A decision on whether local governmental entities such as school districts are subject to punitive damages under the FCA is likely to have a direct impact on the economic viability of public school systems throughout Texas, Mississippi, and the nation. The discussion that follows

uses circumstances in Texas to highlight the significant legal and practical implications of this case for local school districts and students. While the situation in Texas is illustrative, these considerations apply with equal force to school districts nationwide.

Texas school districts received a significant portion of more than $2.5 billion in federal expenditures directed towards public education in Texas in 2000-01. *See* Texas Education Agency, *Snapshot 2001* at 28 (14th ed. 2002) (cited hereafter as *"Snapshot 2001"* and available online at *www.tea.state.tx.us*). Like many other recipients of federal funds, Texas school districts have become the target of *qui tam* litigation under the FCA. *See, e.g., United States ex rel. Gudur v. Tex. Dept. of Health*, 2002 WL 511483 (S.D. Tex. 2002). The prospect that receipt and disbursement of federal funds in aid of education could subject local school districts to unpredictable and potentially enormous punitive damage awards poses a serious threat to individual school districts and to their ability to serve students. This threat has implications in light of longstanding efforts in Texas to address the funding needs of school districts with weak local tax bases, which of necessity must rely more heavily on non-local sources to approach funding levels that wealthier districts can achieve largely through local property tax revenues.

The Fifth Circuit holds that a local school board is not a "person" subject to FCA liability. *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 495 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808 (2002). The contrary holding in *United States ex rel. Chandler v. Cook County, Ill.*, 277 F.3d 969 (7th Cir.), *cert. granted*, 122 S. Ct. 2657 (2002), creates a circuit split on this issue. *Chandler* also threatens to create a perverse circumstance because poorer school districts are more likely to receive

federal funds in the course of serving their student populations. Under *Chandler*, the receipt of federal funds would carry with it a greater exposure to imposition of punitive damages on the very school districts that can least afford them. The punishment ultimately is visited upon the students themselves.

SUMMARY OF THE ARGUMENT

The Seventh Circuit's decision in *Chandler* erroneously reverses the presumption against subjecting local governmental entities to liability for punitive damages. *Chandler* allows punitive damages to be assessed in the absence of clear statutory language allowing such damages against local governmental entities, and thereby attributes an intent to Congress that is not manifested by the FCA's express terms. A host of important policy considerations confirm that Congressional intent to allow punitive damages against local governmental entities should not be lightly inferred.

These policy considerations become especially compelling when the circumstances of local school districts are considered. Authorizing treble damages awards against school districts under the FCA unconscionably punishes children for the acts of adults. Money spent to pay treble damages cannot be spent educating students.

Subjecting school districts to treble damages unjustly punishes blameless taxpayers. The punishment is inflicted not just upon those who reside in the defendant school district, but also upon taxpayers far removed from a particular district who may be called upon to contribute by means of statewide funding mechanisms.

Additionally, incongruous results may occur in situations where federal funds are jointly administered by

the State and local school districts. Under this Court's decision in *Stevens*, as interpreted in *Chandler*, a local school district would be the only party subject to liability for punitive damages under the FCA even if both entities engaged in precisely the same conduct with respect to jointly administered federal funds.

In light of the strong presumption against allowing awards of punitive damages against local governmental entities, along with the compelling policy considerations underlying that presumption, this Court should reject the Seventh Circuit's effort to expand the FCA's scope beyond its plain statutory terms.

ARGUMENT

The case involves two key questions. The first is this: What did Congress say in the FCA's express terms? The second is this: Do the statute's express terms overcome the longstanding presumption against allowing punitive damage awards against municipalities and other local governmental entities?

I.

LOCAL GOVERNMENTS ARE NOT "PERSON[S]" UNDER THE FCA

The TASB Fund, MSBA, and NSBA agree with Petitioner's threshold contention that local governments are not "person[s]" within the meaning of the FCA. Petitioner's "plain language" analysis demonstrates that Congress' use of the undefined term "person" in the FCA – unchanged since the statute's enactment in 1863 – does not encompass local governments in light of the statute's context. Contrary to the Seventh Circuit's analysis, the FCA's plain language and context cannot properly be

expanded by relying upon "evidence" such as post-enactment legislative history. *See Chandler*, 277 F.3d at 975 ("the legislative history of the 1986 amendments . . . makes it likely that the Congress, when voting on the amendments, was aware that the FCA might reach municipalities"); *but see Garibaldi*, 244 F.3d at 489 n.3 ("post-enactment legislative history [is] . . . 'utterly irrelevant' to determining the meaning of the term person in the liability portions of the False Claims Act") (quoting *Stevens*, 529 U.S. at 783 n.12).

The discussion below focuses on the related question of whether the FCA's text clearly sets forth a Congressional intent to abrogate local governments' presumptive immunity from punitive damages. *See United States ex rel. Dunleavy v. County of Del.*, 279 F.3d 219, 223 (3d Cir. 2002) ("whether the term 'person' as used in the [FCA] encompasses local governments . . . is simply the other side of the coin with respect to the question . . . whether Congress clearly abrogated local governmental immunity under the FCA"). The Seventh Circuit erred by reversing the presumption in *Chandler* and reading an abrogation of immunity into the FCA's text when no such abrogation is specifically stated. The circumstances of school districts and the ramifications of such a decision vividly illustrate why the sound policy considerations underlying this presumption should not be so casually disregarded.

II.

LOCAL GOVERNMENTS ARE PRESUMED TO BE IMMUNE FROM PUNITIVE DAMAGES

In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court assessed Congressional intent under 42 U.S.C. § 1983 in light of the longstanding presumption

against awarding punitive damages against a municipality. *Id*. at 271. The Court noted that by the time Congress enacted what is now Section 1983, "the immunity of a municipal corporation from punitive damages at common law was not open to serious question" and that "the courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation." *Id*. at 259-60 (citations omitted). This tradition of immunity remains a fixture of modern jurisprudence. *Id*. at 260-61 & n.21 ("Judicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions," and "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statute") (citations omitted).

To overcome the presumption against awarding punitive damages against municipalities, a claimant must establish that Congress ***specifically intended*** to abolish the presumption in enacting the statute in question. *Id*. at 263 ("Congress would have specifically so provided had it wished to abolish the doctrine") (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)). Absent a specific indication of Congressional intent to abrogate immunity from punitive damages, the claimant must address "whether considerations of public policy dictate a contrary result." *Id*. at 266.

This Court has identified several compelling policy considerations that inform an analysis of whether Congress intended to impose punitive damages on the innocent citizens and taxpayers who reside in a municipality:

> Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers,

> who took no part in the commission of the tort. . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

Id. at 267; *see also id*. at 263 ("In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. . . . Compensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers. The courts thus protected the public from unjust punishment, and the municipalities from undue fiscal constraints"); *id*. at 261 ("Those [damages] which the plaintiff has recovered in the present case . . ., being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification") (quoting *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 677 (La. 1846)).

Assuming that Congress adopted the FCA's treble damages scheme in part to deter future wrongdoing, this Court has rejected such a rationale as a basis for overcoming the presumption of immunity. First, this Court noted that "it is far from clear that municipal officials . . . would be deterred from wrongdoing by the knowledge that

large punitive awards could be assessed based on the wealth of their municipality" because "[i]ndemnification may not be available to the municipality under local law, and even if it were, officials likely will not be able themselves to pay such sizable awards. Thus, assuming, *arguendo*, that the responsible official is not impervious to shame and humiliation, the impact on the individual tortfeasor of this deterrence in the air is at best uncertain." *Id*. at 268-69.

Second, this Court has rejected the notion that punitive damages are necessary to spur corrective action against the offending official since "[t]he more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." *Id*. at 269 (quoting *Carlson v. Green*, 446 U.S. 14, 21 (1980)). Furthermore, "if additional protection is needed, the compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office." *Id*.

Third, the Court noted that, as a practical matter, a punitive damages award against an individual official would be a more effective means of deterring future misconduct than a punitive damages award against a municipality, particularly since the burden of such an award "would most likely fall upon the citizen-taxpayer" rather than the individual official. *Id*. at 269-70.

Finally, the Court concluded that the potentially sizable and unpredictable nature of punitive damages awards strongly argues against abolishing the presumption of immunity. *Id*. at 270-71. Absent a "compelling" reason for awarding punitive damages, any possible benefit of such an award does not outweigh the "possible strain" that the

award may inflict "on local treasuries and therefore on services available to the public at large." *Id*. at 271.

These policy considerations form the backdrop against which *Chandler*'s analysis of Congressional intent must be examined.

III.

CHANDLER'S ANALYSIS IMPROPERLY REVERSES THE PRESUMPTION AGAINST IMPOSING PUNITIVE DAMAGES ON LOCAL GOVERNMENTS

The starting point is simple enough: As this Court stated in *Stevens*, "the current version of the FCA imposes damages that are ***essentially punitive*** in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Stevens*, 529 U.S. at 784 (emphasis added). These words apply with equal force to school districts.

The Seventh Circuit's decision in *Chandler* ignores – indeed, it reverses – this historical presumption against awarding punitive damages against local governments. The Seventh Circuit improperly held that local governments are liable for punitive damages under the FCA because there is no evidence Congress intended to exempt them from such liability in enacting the FCA. *Chandler*, 277 F.3d at 979 ("In enacting the 1986 changes to the [FCA], which form the basis of Cook County's immunity argument, Congress did not indicate in any way that it intended to exempt municipal entities from the scope of the statute. When it desires to exempt municipal entities from federal statutory schemes, Congress has not hesitated to do so" / "[D]espite the presumption against the imposition of punitive damages

on municipalities, it is clear that Congress, in enacting the 1986 changes to the FCA, made a conscious choice to increase the recoverable damages while in no way indicating that it wished to exempt municipalities").

The Seventh Circuit's analysis turns the presumption of immunity on its head by requiring local governments to establish that Congress intended to ***exempt*** them from liability for punitive damages, rather than requiring claimants to establish that Congress expressly stated an intent to ***include*** local governments among the "person[s]" subject to punitive damages under the FCA.

In essence, the Seventh Circuit concludes that "Congress spoke by not speaking." *See Boureslan v. Aramco*, 857 F.2d 1014, 1020 (5th Cir. 1988), *aff'd*, 892 F.2d 1271 (5th Cir. 1990) (en banc), *aff'd sub nom. E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). This conclusion is erroneous because, as the Fifth Circuit observed in an analogous context involving the presumption against extraterritorial application of United States statutes, "silence will not reverse the presumption." *Boureslan*, 857 F.2d at 1020.

By abrogating immunity from punitive damages in the absence of a specific expression of Congressional intent to do so, the Seventh Circuit opens the door to the imposition of FCA treble damages on innocent taxpayers. The circumstances of Texas school districts highlight the pernicious effects that will flow from this unwarranted expansion of FCA liability.

IV.

ALLOWING PUNITIVE DAMAGES AGAINST SCHOOL DISTRICTS ULTIMATELY VISITS THE PENALTY UPON BLAMELESS STUDENTS AND TAXPAYERS

Compelling public policy considerations support proper application of the presumption here. Money used to satisfy a punitive damages judgment against a school district cannot be used to educate students. The punishment likely will be visited not only upon an individual school district, but also upon taxpayers outside the school district who cannot plausibly be said to have enjoyed some illicit "benefit" from the targeted conduct.

As the Fifth Circuit recognized in *Garibaldi*, "punishing a local government is pointless." 244 F.3d at 491. "The punishment, in the form of higher taxes or reduced public services, is visited upon the blameless." *Id.* "Neither the taxpayers nor the schoolchildren of Orleans Parish played any role in the conduct giving rise to the School Board's liability." *Id.* "Extracting damages from them – damages that are far more than is needed to compensate the federal government for whatever losses it has suffered – is supported . . . by . . . '[n]either reason nor justice.'" *Id.* at 491-92 (quoting *City of Newport*, 453 U.S. at 267).[3]

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[3] A number of courts have declined to subject school districts to liability for punitive damages in other contexts. *See, e.g., Doe v. Londonderry Sch. Dist.*, 970 F. Supp. 64, 76 (D.N.H. 1997) (presumption bars recovery of punitive damages against school districts under Title IX); *Scott v. Abilene Indep. Sch. Dist.*, 438 F. Supp. 594, 599 (N.D. Tex. 1977) (presumption bars recovery of punitive damages against school districts under Section 1983).

The Seventh Circuit responds to this argument by positing that "the taxpayers themselves have been enriched by the fraudulent conduct of" the local governmental entity. *Chandler*, 277 F.3d at 978. "Thus, even though some of the burden of the FCA's treble damages shifts to the local taxpayers, this shift is not unjust, because the local taxpayers have already received, without justification, some of the benefit." *Id*.

The Seventh Circuit's reasoning cannot withstand scrutiny. It is tenuous at best to require "repayment" of indirect "benefits" received in some highly abstract sense by the taxpayers at large. It is more tenuous yet to require threefold "repayment" of these indirect and abstract "benefits."

The Seventh Circuit's reasoning becomes even more strained when the interests of students are factored into the equation. Common sense defeats any suggestion that it is "not unjust" to punish schoolchildren for conduct undertaken by others – conduct the students themselves could have had no conceivable role in committing. This argument is especially untenable under *City of Newport*, in which the Court recognized the inequity of forcing innocent taxpayers "who took no part in the commission of the tort" to shoulder the burden of punitive damages. *See* discussion *supra*, pp. 7-8. No rational public policy interest is served by forcing schoolchildren to pay for an adult's acts through a reduction in services that would accompany a school district's payment of treble damages. In keeping with *City of Newport*, this Court should decline to consider the asserted benefits a local governmental entity's constituents may receive in determining whether punitive damages properly have been expressly authorized against a local governmental entity. *Id*.

Additional circumstances involving Texas school districts confirm that *Chandler* erred by attributing to Congress an unspoken intent to subject local governments to punitive damages under the FCA.

The Seventh Circuit assumes that a primary consideration is the propriety of shifting treble damages to "local taxpayers [who] have already received, without justification, some of the benefit" from submission of false claims for payment. *See Chandler*, 277 F.3d at 978. This perspective is too narrow because, as school funding in Texas illustrates, "local taxpayers" are not the only ones to whom such damages are shifted.

Texas school districts obtain revenues from an amalgam of sources, including local property taxes, state appropriations, and federal funding. *See Snapshot 2001* at 23.[4] School districts with weak local tax bases receive a greater proportion of their revenues from non-local sources; in contrast, wealthier districts fund their operations with a greater percentage of local property taxes. *Id*. at 24-26. It follows that obtaining money to pay an adverse judgment against a school district is not necessarily a matter of using funds collected from "local taxpayers." *See San Antonio*

[4] Due to disparities in the abilities of different school districts to raise revenue through local property taxes, the Texas Legislature adopted a finance system for supplementing local revenues. *Snapshot 2001* at 23. After a decade-long legal battle in which the Legislature's school funding mechanisms repeatedly were invalidated under the Texas Constitution, the Legislature enacted a system in 1993 that survived review. *Id*.; *see Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995). This system features a mechanism under which school districts exceeding a certain "wealth level" must choose among various options for equalizing wealth levels, including the option to contract to educate students in other districts. *See Snapshot 2001* at 25-26. Of the 83 districts exceeding the equalized wealth level in 2000-2001, 43 chose this option or this option combined with another. *Id*. at 26.

Indep. School Dist., 936 S.W.2d at 284 ("a judgment against a school district may be paid with funds initially appropriated to the school district by the State. . . . A judgment against a school district must be paid from the funds of the school district, whether generated locally or appropriated by the State"). Rather, taxpayers statewide may, in effect, shoulder part of the treble damages burden imposed on a particular school district. Even if one grants the benefit of some considerable doubt to the Seventh Circuit's justification for penalizing "local taxpayers," that justification surely does not stretch far enough to cover taxpayers across the State who may subsidize an individual school district's punitive damages award.

Consider too the circumstance that federal money may be administered jointly by the State and a local school district. *See Snapshot 2001* at 27 ("Often, federal appropriations permit both local and state use of each state's allocation. The portion of the state's allocation to be spent by local school districts is distributed by formula"). Under *Chandler*, a school district could be subject to treble damages while its partner the State would not be subject to FCA liability – even if both entities engage in precisely the same conduct with respect to jointly administered federal funds.

Finally, the complex web of federal statutes and regulations governing local education also should be considered. Many school districts receive federal funds for use in connection with federal education programs. If school districts are subject to liability under the FCA, they will be faced with a Hobson's choice between (1) accepting federal funds and subjecting themselves to potentially ruinous liability for violations of the requirements for obtaining and spending such funds; or (2) foregoing federal

funds and depriving students of the opportunities and benefits such funds provide.

A recent example of federal funding for local education is the No Child Left Behind Act of 2001 ("NCLBA"), which authorizes the distribution of billions of dollars in grants each year to State and local educational agencies.[5] These grants fund a range of worthy initiatives, including programs to improve academic achievement, reading programs for children, prevention and intervention programs for neglected, delinquent, or at-risk children, school dropout prevention initiatives, teacher training and recruiting programs, and education technology programs. *See* 20 U.S.C. §§ 6301, *et. seq*.

The statutory provisions governing applications for and disbursements of federal funds under the NCLBA are voluminous and complicated; the accompanying regulations being developed to implement the NCLBA promise to add new layers of complexity. *Qui tam* litigation thrives in an oxygen-rich environment of federal money, statutory complexity, and regulatory ambiguity. Local school districts and administrators attempting to navigate these complexities may have to consider foregoing such funds, and the opportunities and benefits they can provide, rather than face the risk of treble damages based on a misstep in the process of applying for and disbursing federal dollars. Subjecting school districts to liability under the FCA thus undercuts the NCLBA's goal of improving education and creates a disincentive for school districts to participate in federally funded programs.

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[5] An overview of the NCLBA's goals and requirements is available online from the Department of Education at *www.edu.gov*.

These risks are underscored by the development of a jurisprudentially suspect "implied certification" theory of FCA liability, under which statutory penalties are predicated upon a claimant's purported "implied but false" certification that it has complied with all regulatory requirements affecting the federal government's payment decision.[6] While the viability of such a theory is subject to serious doubt, its emergence nonetheless promises to fuel new litigation efforts as relators and the *qui tam* bar seek to broaden the FCA's scope.

Under these circumstances, lightly attributing to Congress an intent to subject local governmental entities to punitive damages is inappropriate and unwarranted. These circumstances emphasize the importance of insisting upon the requisite clear statement of Congressional intent to abrogate immunity from punitive damages. The FCA's plain terms do not meet this high threshold.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed and rendered in favor of Cook County, Illinois.

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[6] *See, e.g., United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *Mikes v. Strauss*, 274 F.3d 687, 699-700 (2d Cir. 2001); *Shaw v. AAA Eng'g and Drafting*, 213 F.3d 519, 531-33 (10th Cir. 2000); *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).

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