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May 12, 2010

Opinion No. 10-66

Constitutionality of requiring proof of citizenship when registering to vote

QUESTIONS

1. Whether the items listed in subsection (a)(1) – (6) of the proposed new section of Title 2, Chapter 2, Part 1, contained in SB194/HB270 would meet the requirement of "satisfactory evidence" without further proof that any of these items were legally issued to the person registering to vote.

2. Whether the language of subsection (a) of the proposed new section of Title 2, Chapter 2, Part 1, contained in SB194/HB270, which gives the administrator of elections the discretion to reject any voter registration application that is not accompanied by satisfactory evidence of United States citizenship, violates the Equal Protection or Due Process provisions of the Fourteenth Amendment of the United States Constitution.

3. Whether the language of the proposed new section of Title 2, Chapter 2, Part 1, contained in SB194/HB270 violates the National Voter Registration Act of 1993, the 1965 Voting Rights Act, or any other federal act protecting the rights of citizens to register to vote.

4. How would the requirements of the proposed new section of Title 2, Chapter 2, Part 1, contained in SB194/HB270 affect the National Voter Registration Act of 1993 or registration by mail applications.

5. Whether SB194/HB270 contains any other language that is constitutionally suspect.

OPINIONS

1. Based upon the plain language of subsection (a), we think a court would find that submission of any of the items listed in subsection (a) (1) – (6) would meet the requirement of "satisfactory evidence" without further proof.

2. The fact that this language appears to vest some discretion in the administrator of elections is not, in our opinion, sufficient to establish that this proposed new section is facially unconstitutional. Furthermore, in light of the provisions of Tenn. Code Ann. § 2-2-125, we think a court would find the language of subsection (a) of the proposed new section of Title 2, Chapter 2, Part 1, facially constitutional.

3. In *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007), the Ninth Circuit found, based upon the limited record before that court, that an Arizona statute virtually identical to the proposed new section to Title 2, Chapter 2, Part 1, contained in SB194/HB270 did not unconstitutionally burden the right to vote. Absent a more complete factual record than that offered in *Gonzalez*, we would expect a court to find that the proposed new section to Title 2, Chapter 2, Part 1, contained in SB194/HB270 does not unduly burden the right to vote.

Additionally, given that the language of this proposed new section contained in SB194/HB270 is virtually identical to the language of the Arizona statute, we think a court would also find that this section of SB194/HB270 does not violate the NVRA based upon the reasoning of the Ninth Circuit in *Gonzalez*. Finally, the Voting Rights Act of 1965, by its language and the case law interpreting it, is intended to prevent racial discrimination at the polls and racially motivated deprivation of rights. SB194/HB270 on its face does not discriminate on the basis of race; rather, its focus is ensuring that applicants seeking to register to vote are in fact citizens of the United States and, therefore, qualified under state and federal law to vote. Accordingly, it is our opinion that the new section to be added to Title 2, Chapter 2, Part 1 contained in SB194/HB270 does not violate the Voting Rights Act of 1965.

However, we think that the other provisions of SB194/HB270 raise separate concerns under the NVRA. SB194/HB270 would amend Tenn. Code Ann. § 2-2-115 to eliminate the provisions for registration by mail by use of postal card forms as well as the requirement that printed registration forms be designed to provide a simple method of registering by mail to vote. It would further amend Tenn. Code Ann. § 2-2-116(c) to require that the voter registration form be signed by the registrant and witnessed by the administrator of elections or the administrator's designee. Read together, these amendments would appear to eliminate the ability of an applicant to register to vote by mail or at either a mandatory or passive voter registration agency, which would be a clear violation of Section 1973gg-2(b)(2) of the NVRA.

An additional problem with the proposed amendment to Tenn. Code Ann. § 2-2-116(c) contained in SB194/HB270 is that, if enacted, the state would no longer have a statute in effect that specifically requires the disclosure of social security numbers in order to register to vote and, thus, the state would no longer be able to rely upon the grandfather exception contained in section 7(a)(2)(B) of the federal Privacy Act of 1974. Consequently, the coordinator of elections would no longer have the ability to require applicants to provide their full social security numbers when registering to vote.

4. The NVRA does not specifically forbid a state from requiring proof of United States citizenship to be submitted along with the mail voter registration form. Further, given that the new section to be added to Title 2, Chapter 2, Part 1, by SB194/HB270 is virtually identical to the Arizona statute, we think a court would find that the provisions of the proposed legislation requiring proof of United States citizenship when registering to vote do not conflict with the NRVA.

5. Based upon existing case law, we are not aware of any provisions of SB 94/HB270 that would be vulnerable to a facial constitutional challenge, other than those described above.

ANALYSIS

1. You have asked a number of questions concerning SB194/H270 which would address voter registration in Tennessee. The proposed legislation would amend Tenn. Code Ann. § 2-2-116(c) by deleting that section, which set sets out a form "permanent registration record," and substituting the following language:

> (c) The permanent registration record shall include all information required to be contained on or submitted with the registration form pursuant to § 2-2-115, and shall be signed by the registrant and witnessed by the administrator of elections or the administrator's designee, and shall include the following statement of the registrant: "I, being duly sworn on oath (or affirmation) declare that I am a citizen of the United States, that the above address is my legal residence, and that I plan to remain at such residence for an undetermined period of time. To the best of my knowledge and belief all of the foregoing statements made by me are true."

The proposed legislation would further amend Tenn. Code Ann. § 2-2-115(a) by substituting the word "registration" for the words "postal card" and by deleting the language of subsection (b)(2), which currently provides that registration forms shall be designed to provide a simple method of registering to vote by mail and shall include such matter as the coordinator of elections requires to ascertain the qualifications of an individual applying to register and to prevent fraudulent registration. The bill would substitute the following language for subsection (b)(2):

> Registration forms shall include such matter as the coordinator of elections in consultation with the secretary of state requires to ascertain the qualifications of an individual applying to register under this section and to prevent fraudulent registration. The printed registration forms shall also include a statement that the applicant shall submit evidence of United States citizenship with the application and that the registrar may reject the application if no evidence of citizenship is attached.

Finally, the proposed legislation would add a new section to Title 2, Chapter 2, Part 1, which would provide that the administrator of elections may reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Evidence of such citizenship shall include, but is not limited to, any of the following: (1) the number of the applicant's driver license issued by the department of safety or a driver license, driver certificate, or nonoperating identification license issued by the equivalent governmental agency of another state within United States if that agency indicates on the applicant's driver license, driver certificate or nonoperating identification license that the person has provided satisfactory proof of United States citizenship; (2) a legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the administrator of elections; (3) a

legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number, or presentation to the administrator of the applicant's United States passport; (4) presentation to the administrator of the applicant's United States naturalization documents or the number of the certificate of naturalization; (5) other documents or methods of proof that are established pursuant to the federal Immigration Reform and Control Act of 1986; or (6) the applicant's federal Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number.

Your first question deals with the provisions of the new subsection requiring that an applicant for registration provide "satisfactory evidence" of United States citizenship. You have asked whether the items listed in subsection (a) (1) – (6) would meet the requirement of "satisfactory evidence" without further proof that any of these items were legally issued to the person registering to vote. As previously noted, subsection (a) provides that an administrator of elections may reject an application for registration that is not accompanied by "satisfactory evidence of United States citizenship" and then goes on to define such evidence of citizenship as including, but not limited to, the items listed in subsection (a)(1) – (6).

Initially, we would note that the mere submission of the items listed in subsection (a)(1) – (6) would not alone be sufficient because several of these subsections have their own qualifiers. For example, subsection (a)(1) provides that in order for a driver's license issued by another state to constitute evidence of United States citizenship, the license itself must indicate that the applicant had provided satisfactory proof of United States citizenship. Similarly, subsection (a)(2) provides that a legible photocopy of an applicant's birth certificate may constitute evidence if it "verifies citizenship to the satisfaction of the administrator of elections." Further, subsection (a)(4) provides that if the number of an applicant's certificate of naturalization is provided, that applicant is not to be included in the registration rolls until the number of the certificate of naturalization is verified with the U.S. Citizens and Immigration Services by the administrator. However, based upon the plain language of subsection (a), we think a court would find that submission of any of the items listed in subsection (a)(1) – (6) that are in full compliance with the provisions of these subsections would meet the requirement of "satisfactory evidence" without further proof.

2. Your next question asks whether the language of subsection (a) of the proposed new section, which gives the administrator of elections the discretion to reject any application that is not accompanied by satisfactory evidence of United States citizenship, violates the Equal Protection or Due Process provisions of the Fourteenth Amendment of the United States Constitution. The fact that this language appears to vest some discretion in the administrator of elections is not, in our opinion, sufficient to establish that this proposed new section is facially unconstitutional. Facial challenges generally are disfavored because they often rest on speculation; they run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Thus, the Supreme Court has recently affirmed that, in order to succeed on a facial challenge to a statute, a plaintiff must establish that no set of circumstances exists under which the statute as written would be valid and that the law is unconstitutional in all of its applications. *See Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190

(2008); *see also Crawford v. Marion County Election Board*, 128 S.Ct. 1610, 1623 (2008 (rejecting a challenge to the facial constitutionality of Indiana's voter identification law). Here, simply the speculation that an administrator of elections might exercise his or her discretion arbitrarily and capriciously without more is not enough to establish that no set of circumstances exists under which the bill as written would be valid and, therefore, unconstitutional in all of its applications. *Washington State Grange*, 128 S.Ct. at 1190.

Additionally, we would note that Tennessee's election laws provide an administrative process for challenging the decision of an administrator who has rejected an application. Tenn. Code Ann. § 2-2-125 provides that if the administrator determines that a registrant is not entitled to be registered, the administrator shall tell the registrant the reason for the rejection and the registrant has a right to appeal the decision to the county election commission within ten days. The administrator must also offer the registrant an appeal form. On appeal, the decision of the commission on the registrant's application for registration is to be a final administrative action that presumably is subject to judicial review under a common law writ of certiorari. *See* Tenn. Code Ann. §§ 27-9-101, *et seq*. Accordingly, in light of these provisions, we think a court would likely find the language of subsection (a) of the proposed new section of Title 2, Chapter 2, Part 1, facially constitutional.

3. Your third question asks whether the language of this new section of Title 2, Chapter 2, Part 1, violates the National Voter Registration Act of 1993, the 1965 Voting Rights Act, or any other federal act protecting the rights of citizens to register to vote. A similar statute was recently reviewed by the Ninth Circuit Court of Appeals in *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007). The language of the Arizona statute, Ariz. Rev. Stats. § 16-166(F), is virtually identical to the language contained in subsection (a) of the proposed new section of Title 2, Chapter 2, Part 1 of SB 194/HB 270. In fact, the only difference is that the Arizona statute requires that any application for registration that is not accompanied "by satisfactory evidence of United States citizenship" *shall* be rejected, while SB 194/HB 270 provides that such application *may* be rejected. Otherwise, the language of these two provisions is identical.

The plaintiffs in *Gonzalez* asserted that the citizenship documentation requirement to register to vote imposed a severe burden on their fundamental right to vote. The Ninth Circuit first noted that restrictions on the right to vote that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process have been upheld as "not severe." *Id*. at 1049 (citing *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002)). The Ninth Circuit further noted that whether the law severely burdens anyone is an "intense[ly] factual inquiry [,]" requiring development of a full record. *Id*. at 1050. The court then found, based upon the limited evidence in the record, that the Arizona statute did not impose an undue burden on the constitutional right to vote, reasoning that "the vast majority of Arizona citizens in all likelihood already possess at least one of the documents sufficient for registration."[1] *Id*. Absent a more complete factual record than that offered in *Gonzalez*, we

[1] The only evidence in the record that Arizona citizens might be burdened by the law consisted of four declarations from individuals who were not parties to the litigation stating that obtaining the documentation sufficient to register would be "a burden." *Gonzalez*, 485 F.3d at 1050.

would expect a court to find the proposed new section to Title 2, Chapter 2, Part 1, contained in SB194/HB270 does not unduly burden the right to vote.

The Ninth Circuit also found that the Arizona statute was not preempted by the National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg, *et seq*., nor did it violate that Act. Instead, the court noted that

> the statute permits states to "require[ ] such identifying information . . . as is necessary to enable . . . election official[s] to assess the eligibility of the applicant." Id. at § 1973gg-7(b)(1). The NVRA clearly conditions eligibility to vote on United States citizenship. *See* 42 U.S.C. §§ 1973gg, 1973gg-7(b)(2)(A). Read together, these two provisions plainly allow states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote.

485 F.3d at 1050-51. Given that the language of the new section to be added to Title 2, Chapter 2, Part 1 contained in SB194/HB270 is virtually identical to the language of Ariz. Rev. Stats. § 16-166(F), we think a court would find that this section of SB194/HB270 does not violate the NVRA based upon the same reasoning as the Ninth Circuit in *Gonzalez*.

The issue of whether Ariz. Rev. Stats. § 16-166(F) violated the Voting Rights Act of 1965 (VRA), 42 U.S.C. §§ 1971, *et seq*., was not raised in the *Gonzalez* case. That Act provides in pertinent part as follows:

> (a)(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.
>
> (2) No person acting under color of law shall –
>
> (A) In determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;
>
> (B) Deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such

> error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

The VRA, by its language and the case law interpreting it, is intended to prevent racial discrimination at the polls and racially motivated deprivation of rights. *See Broyles v. Texas*, 618 F.Supp.2d 661, 697 (S.D. Tex. 2009) (citing *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 839 (S.D. Ind. 2006) ("[W]ell-settled law establishes that § 1971 was enacted pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in voting requirements.")); *Willing v. Lake Orion Community Schools Bd. of Trustees*, 924 F.Supp. 815, 820 (E.D. Mich. 1996); *see also Powell v. Power*, 436 F.2d 84, 86-87 (2d Cir. 1970) (declining an opportunity to convert the Voting Rights Act into "a general mandate in which Federal courts may correct election deficiencies of any sort"). Additionally, the VRA only applies to "citizens of the United States who are otherwise qualified by law to vote." SB 194/HB 270 on its face does not discriminate on the basis of race; rather, its focus is ensuring that applicants seeking to register to vote are in fact citizens of the United States and, therefore, qualified under state and federal law to vote. Accordingly, it is our opinion that the new section to be added to Title 2, Chapter 2, Part 1 contained in SB194/HB270 does not violate the Voting Rights Act of 1965.

While we have opined that the new section of Title 2, Chapter 2, Part 1 contained in SB194/HB270 does not violate the NVRA, we think that the other provisions of SB194/HB270 raise separate concerns under the NVRA. The NVRA was enacted by Congress in 1993 to, among other things, "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). The Act provides that

> notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office –
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> (1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 1973gg-3 of this title;
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> (2) by mail application pursuant to section 1973gg-4 of this title; and
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> (3) by application in person –
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> (A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and
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> (B) at a Federal, State, or nongovernmental office designated under section 1973gg-5 of this title.

Section 1973gg-5(a)(2) requires each state to designate as voter registration agencies all offices in the state that provide public assistance and state-funded programs primarily engaged in

providing services to persons with disabilities. These agencies are known as "mandatory voter registration agencies." In Tennessee, the Departments of Health, Human Services, Mental Health and Developmental Disabilities, and Veterans Affairs have been designated as mandatory voter registration agencies. These mandatory voter registration agencies are required under the Act to:

> 1) distribute mail voter registration application forms with each application for public assistance and/or services to persons with disabilities, and with each recertification, renewal or change of address form relating to such assistance and/or services;
>
> 2) assist applicants in completing voter registration forms;
>
> 3) accept completed voter registration forms and timely transmit them to the appropriate election official.

The Act further requires states to designate other state and local government offices such as public libraries and county clerks as voter registration agencies. These agencies are known as "passive voter registration agencies." In Tennessee, public libraries, public high schools, offices of county clerks and offices of register of deeds have been designated as passive voter registration agencies. These agencies are simply required to make mail-in voter registration forms available in a conspicuous location, provide assistance, if requested, and accept completed forms and timely transmit them to the appropriate county election commissions.

Section 1973gg-4(a) of the Act requires each state to accept and use the mail voter registration application form prescribed by the Federal Election Commission. In addition, states may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b). That section provides that any such mail voter registration form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1). The mail voter registration form also "shall include a statement that specifies each eligibility requirement (including citizenship)." 42 U.S.C. § 1973gg-7(b)(2)(A).

In accordance with these requirements of the NVRA, Tennessee law currently provides as follows:

> (a) Qualified voters may register by mail by use of postal card forms in such a manner as provided for in this section.
>
> (b)(1) The coordinator of elections shall prepare voter registration forms in accordance with the provisions of this section and shall provide for the printing of an ample quantity of such registration forms to be distributed under the provisions of this section.

> (2) Printed registration forms shall be designed to provide a simple method of registering by mail to vote. Registration forms shall include such matter as the coordinator of elections requires to ascertain the qualifications of an individual applying to register under the provisions of this section and to prevent fraudulent registration.

Tenn. Code Ann. § 2-2-115. Section 2-2-116(c) sets forth the specific information that is required to be provided on the registration form and further requires that the form be signed by the applicant and witnesses as indicated on the form.

SB194/HB270 would amend these statutes to eliminate the provisions for registration by mail by use of postal card forms as well as the requirement that printed registration forms be designed to provide a simple method of registering by mail to vote. It would further delete the specific information required in Tenn. Code Ann. § 2-2-116(c) and instead simply require that the permanent registration record "include all information required to be contained on or submitted with the registration form pursuant to § 2-2-115, and shall be signed by the registrant and witnessed by the administrator of elections or the administrator's designee." The problems with these amendments are two-fold. First, Section 1973gg-7(b)(3) of the NVRA specifically provides that a mail voter registration form "may not include any requirement for notarization or other formal authentication." The amendment to Tenn. Code Ann. § 2-2-116 that would require a voter registration application form to be witnessed by the administrator of elections or the administrator's designee could be construed as a requirement of "other formal authentication" in violation of Section 1973gg-7(b)(3). Second, this proposed amendment read in conjunction with the proposed amendments to Tenn. Code Ann. § 2-2-115 would appear to eliminate the ability of an applicant to register to vote by mail – particularly in light of the requirement that the signing of the voter registration form be witnessed by the administrator of elections or the administrator's designee.[2] This would be a clear violation of Section 1973gg-2(b)(2) of the NVRA.

An additional problem with the proposed amendment to Tenn. Code Ann. § 2-2-116 is that it would eliminate the ability of the coordinator of elections to require applicants to provide their full social security numbers when registering to vote. Pursuant to section 7(a)(1) of the federal Privacy Act of 1974, the state is otherwise prohibited from requiring an individual to provide his or her social security number in order to register to vote unless one of the exceptions contained in subsection (2) is applicable. *See* Privacy Act of 1974, Pub.L. No. 93-579, §7, 88 Stat. 1896, 1909 (1974), *reprinted in* 5 U.S.C. § 552a note (2003). In *McKay v. Thompson*, 226 F.3d 752, (6th Cir. 2000) the court found that Tennessee's statute requiring the disclosure of social security numbers to register to vote met the "grandfather" exemption contained in section 7(a)(2)(B) of the Privacy Act. Specifically, the court found that Tennessee had enacted Tenn. Code Ann. § 2-2-116 and that, based upon the evidence in the record, Tennessee had maintained "a system of records in existence and operating before January 1, 1975, . . . [by which] disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual." *McKay v. Thompson*, 226 F.3d at 755. This Office has previously opined, however, that, in order for the grandfather exemption to apply, not only must a state have a system of

[2] Currently, Tenn. Code Ann. § 2-2-116 provides that the registration form be sworn to either by the administrator of elections "or other person taking affidavit" if the registrant signs by a mark or cannot sign at all.

records requiring the disclosure of social security numbers in existence and operating prior to January 1, 1975, but such system must be kept in its existing state. *See* Op. Tenn. Atty. Gen. 09-45 (April 2, 2009)(copy attached). With the passage of SB 194/HB 270, the state would no longer have a statute in effect that specifically requires the disclosure of social security numbers in order to register to vote and thus, would no longer be able to rely upon the grandfather exception contained in section 7(a)(2)(B) of the Privacy Act.

4. Your fourth question asks how the requirements of the new section contained in SB194/HB270 would affect the NVRA or registration by mail applications. The NVRA does not specifically forbid a state from requiring proof of United States citizenship to be submitted along with the mail voter registration form. *See, e.g., McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (finding that Tennessee voter registration form requiring social security number did not violate NVRA because NVRA did not forbid use of social security numbers). Moreover, as previously discussed, the Ninth Circuit has found that the NVRA does not act as a ceiling preventing states from enforcing their own laws requiring voter qualifications and, therefore, that the Arizona statute requiring proof of United States citizenship when registering to vote did not conflict with the NVRA. *See Gonzalez*, 485 F.3d at 1050-51. Given that the new section to be added to Title 2, Chapter 2, Part 1, in SB194/HB270 is virtually identical to the Arizona statute, we think a court would find that the provisions of the proposed legislation requiring proof of United States citizenship when registering to vote does not conflict with the NRVA.[3]

5. Your final question asks whether SB194/HB270 contains any other language which is constitutionally suspect. Based upon existing case law, we are not aware of any other provisions of SB194/HB270 that would be vulnerable to a facial constitutional challenge.

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[3]Additionally, we would note that Section 15483(b) of the Help America Vote Act contemplates the submission of additional documentation by applicants when registering to vote by mail.

Requested by:

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