No. 17-1692

IN THE

Supreme Court of the United States

MOSTAFA R. AHSAN,
Petitioner,
v.
STAPLES THE OFFICE SUPERSTORE EAST, INC. AND STAPLES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to decide whether a federal court of appeals may review a district court's denial of a motion for a new trial made on the ground that the verdict is against the weight of the evidence, an issue that has no practical importance generally, and that certainly could not be outcome determinative in this case.

RULE 29.6 DISCLOSURE

Staples the Office Superstore East, Inc., now known as Office Superstore East LLC, is a wholly owned subsidiary of USR Parent Inc., which is not a publicly traded corporation.

Staples, Inc. is a wholly owned subsidiary of Arch Parent, Inc., which is not a publicly traded corporation.

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STATEMENT OF THE CASE

Petitioner asks this Court to review a purely academic question that, to respondents' knowledge, has never impacted the outcome of any federal case, and that indisputably will have no impact on the outcome of this one. The petition should be denied.

1. This lawsuit arises out of a 2011 incident in a store operated by Staples the Office Superstore East, Inc., now known as Office Superstore East LLC ("Staples"). Pet. App. 7a. Petitioner alleged that he was hit by boxes that fell from a shelf, causing him to sustain injuries to his head, neck, and shoulder. Pet. App. 8a. Staples conceded that its negligence caused one or two boxes to fall from a shelf. But Staples disputed the nature and extent of plaintiff's injuries, including whether its negligence proximately caused plaintiff to sustain any injuries at all, and so the parties proceeded to a trial limited to the causation and damages issues. Pet. App. 8a.

The trial spanned six days, and included testimony from more than ten witnesses. Pet. App. 12a-28a. On the Special Verdict Sheet, the jury was asked to determine whether Staples' "negligence proximately cause[d] any of plaintiff's injuries arising out of the incident on September 2, 2011." The jury returned a verdict for Staples, finding that its negligence did not proximately cause any injury to plaintiff. Pet. App. 8a.

2. Petitioner then filed a motion for a new trial, arguing that the jury's verdict was against the weight of the credible evidence. Pet. App. 8a. The district court denied the motion in a detailed, twenty-seven page opinion that analyzed all of the evi-

dence at trial and concluded that the "verdict reflected the jury's assessment of the credibility of the witnesses, and was not against the weight of the evidence, egregious, or a miscarriage of justice." Pet. App. 30a.

In particular, the district court explained that the trial turned on credibility determinations and a battle of experts, and nothing required the jury to accept petitioner's version of events. In fact, petitioner's argument that he had suffered a variety of serious injuries from the falling boxes was impeached "with his own inconsistent statements about how the accident occurred, his repeated failures to provide [his experts] with complete and accurate accounts of his pre-existing conditions, and evidence of his post-accident activities that seemed inconsistent with the injuries and limitations he described." Pet. App. 13a. Petitioner's credibility was also undermined by his own experts' similar testimony "that he repeatedly failed to provide them with accurate information about his pre-accident symptoms and complaints, and provided inconsistent information about whether the boxes struck him on his head when they fell." Pet. App. 29a-30a. And those experts even conceded that his claimed injuries could have been "degenerative or age-related." Pet. App. 14a.

3. Petitioner appealed the district court's denial of his motion for a new trial, and the court of appeals affirmed in an unpublished opinion. Pet. App. 3a. The court explained that, under circuit precedent, the district court's denial of "a motion for a new trial made on the ground that the verdict was against the weight of the evidence . . . is not reviewable on ap-

peal." Pet. App. 4a. The court of appeals noted that it would review a district court's denial of a motion for new trial that challenged "not only the weight of the evidence but also its sufficiency." *Id.* But even construing petitioner as having made a challenge to the sufficiency of the evidence, the Second Circuit affirmed "substantially for the reasons cited by the District Court." *Id.*

4. Petitioner sought rehearing en banc, which was denied. Pet. App. 36a.

REASONS FOR DENYING THE WRIT

The question presented is whether a federal appellate court has authority to review a district court's denial of a motion for new trial made on weight-of-the-evidence grounds. The divergence in how appellate courts approach such denials has absolutely no practical importance. Petitioner does not cite a single case in which an appellate court has ever found that a district court abused its discretion by denying a motion for a new trial made on weight-of-the-evidence grounds, and respondents have not located any such case. And even if the question presented could have an effect in some theoretical case, petitioner does not even attempt to argue that the question presented could conceivably have any impact on the outcome of *this* case. Finally, the decision below is correct.

The petition should be denied.

A. There Is No Circuit Conflict That Merits This Court's Review

1. The Second Circuit rule petitioner asks this Court to review is very narrow. The Second Circuit will review a trial court's denial of a post-trial motion challenging the legal sufficiency of the evidence, *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1199 (2d Cir. 1995), as it did in this case, Pet. App. 4a. That court will also review a trial court's *grant* of a new trial motion on the basis that the verdict was contrary to the weight of the evidence. *Stonewall*, 73 F.3d at 1199. But the Second Circuit holds that the denial of a challenge based on the weight of the evidence alone "is one of those few rulings that is simply unavailable for appellate review." *Id.* Thus, "the loser's only appellate recourse is to challenge the legal sufficiency of the evidence." *Id.* The Second Circuit has long followed that rule, in reliance on longstanding precedent of this Court. *See, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940).

2. Petitioner correctly notes that other courts of appeals have asserted the authority to review denials of motions for a new trial based on the weight of evidence. But this theoretical conflict has absolutely no practical importance, because these courts never actually reverse such denials based on the weight of evidence. That is because the courts of appeals that permit appellate review of the denial of a weight-of-the-evidence challenge are extremely deferential to district courts' analysis of the evidence.

a. The standard of review in appeals of district court denials of new-trial motions on weight-of-

evidence grounds is all but insurmountable. The Eighth Circuit, for example, has made clear that when a district court denies a motion for a new trial "based on its conclusion that the verdict is not contrary to the weight of the evidence, its holding is *virtually unassailable*." *Nanninga v. Three Rivers Elec. Coop.*, 236 F.3d 902, 908 (8th Cir. 2000) (quotation omitted; emphasis added). Many other courts have similarly emphasized the limited nature of review, indicating that they would reverse in only the most "exceptional circumstances." *Forrester v. White*, 846 F.2d 29, 31 (7th Cir. 1988); *see also*, *e.g.*, *United States v. Dale*, 991 F.2d 819, 838 (D.C. Cir. 1993) (scope of review is "particularly narrow" when the court's decision accords with the jury's); *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 241 (4th Cir. 2016) (court "will not reverse such a decision save in the most exceptional circumstances" (quotation omitted)). And the Ninth Circuit will not make any attempt to weigh the evidence itself or judge the credibility of witnesses, and instead will reverse only for a legal error in ruling on such a motion. *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1372 (9th Cir. 1987).

b. Because of this extremely deferential standard of review, there is *no* case in which a court of appeals has actually reversed a district court's denial of such a new-trial motion based on the weight of the evidence. At least respondents are not aware of any such case, and the petition does not purport to identify one. Rather, every single case the petition cites

involving review of such orders *affirms* the district court.[1]

The Wright & Miller treatise that petitioner repeatedly cites does report that "[a]ctual cases of reversal because the verdict is against the weight of the evidence are extremely few," and identifies four cases from the past 60 years as having reversed district courts on this ground. Wright & Miller, 11 *Federal Practice and Procedure* § 2819 (3d ed.). But each of these reversals was actually on the ground that there was no legally sufficient evidence to support the verdict—a ground for reversal also available in the Second Circuit.

In three of the four cases Wright & Miller cites, the court of appeals expressly emphasized that it was reversing the district court because there was *no evidence* supporting the jury's verdict. *See Molski v.*

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[1] *See Leonard v. Stemtech Int'l Inc.*, 834 F.3d 376, 386-88 (3d Cir. 2016); *Arnez v. TJX Cos.*, 644 F. App'x 180, 183 (3d Cir. 2016); *Gentry*, 816 F.3d at 241; *Industrias Magromer Cueros y Pieles S.A. v. La. Bayou Furs Inc.*, 293 F.3d 912, 924-25 (5th Cir. 2002); *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1110 (10th Cir. 2001); *Stebbins v. Clark*, 5 F. App'x 196, 201 (4th Cir. 2001); *Woolard v. JLG Indus., Inc.*, 210 F.3d 1158, 1168 (10th Cir. 2000); *Nanninga*, 236 F.3d at 908; *McClain v. Owens-Corning Fiberglas Corp.*, 139 F.3d 1124, 1126 (7th Cir. 1998); *Ahern v. Scholz*, 85 F.3d 774, 780 (1st Cir. 1996); *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 506 (6th Cir. 1998); *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1407 (7th Cir. 1991); *Blu-J, Inc. v. Kemper C.P.A. Grp.*, 916 F.2d 637, 643 (11th Cir. 1990); *Green v. Am. Airlines, Inc.*, 804 F.2d 453, 455 (8th Cir. 1986); *Landes Constr.*, 833 F.2d at 1372; *Valm v. Hercules Fish Prods. Inc.*, 701 F.2d 235, 237 (1st Cir. 1983); *E. Air Lines, Inc. v. Union Trust Co.*, 239 F.2d 25, 30 (D.C. Cir. 1956).

M.J. Cable, Inc., 481 F.3d 724, 731 (9th Cir. 2007) (noting that "the record contains *no evidence* in support of the verdict") (emphasis added); *Urti v. Transp. Commercial Corp.*, 479 F.2d 766, 767-68 (5th Cir. 1973) ("We hold that there is *no evidence* in the record tending to show contributory negligence and that the district court erred as a matter of law in denying a new trial.") (emphasis added); *Georgia-Pacific Corp. v. United States*, 264 F.2d 161, 165 (5th Cir. 1959) (agreeing with appellant that there "was a *complete lack of evidence* to support the verdict") (emphasis added). The only case that even arguably rested on a weight-of-evidence ground is *Bank of America, N.A. v. JB Hanna, LLC*, 766 F.3d 841 (8th Cir. 2014). But that case also ultimately turned on the lack of sufficient evidence as a matter of law; the court of appeals endorsed the district court's observation that had it "known that the facts were going to be as they ultimately came out at trial, [it] would have granted summary judgment on the plaintiff's case." *Id.* at 851. Thus, the appellant in each of these cases could have gotten relief in the Second Circuit.

In fact, the Second Circuit's rule that denials of new trial motions made on weight-of-the-evidence grounds are unreviewable is of such little consequence that *even the Second Circuit* does not always follow it. In at least two published cases, the Second Circuit has stated that it will review the denial of such a motion for abuse of discretion, before affirming the trial court's decision in short order. *See ING Global v. United Parcel Serv. Oasis Supply Corp.*, 757 F.3d 92, 99 (2d Cir. 2014); *Harris v. O'Hare*, 770

F.3d 224, 233 (2d Cir. 2014). No one appears ever to have noticed this intra-circuit conflict, presumably because it has no practical consequence whatever.

2. Contrary to petitioner's suggestion, Pet. 26-27, the Court's grant of certiorari in *Gasperini v. Center of Humanities, Inc.*, 518 U.S. 415 (1996), does not remotely suggest that the question presented here is worthy of this Court's review. Unlike the question presented here, the question at issue in *Gasperini*—i.e., whether appellate courts may review the excessiveness of a jury award—does have substantial practical significance. Courts do reverse district court rulings on new-trial motions based on the excessiveness of jury awards, as cases cited in the petition demonstrate. Pet. 12-13 (citing *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400, 407-08 (4th Cir. 1948); *Hoskins v. Blalock*, 384 F.2d 169, 171-72 (6th Cir. 1967); *Evans v. Fogarty*, 241 F. App'x 542, 562 (10th Cir. 2007)). In fact, such cases abound. *See* Wright & Miller § 2820 n.38 (identifying 13 cases in which appellate courts ordered remittitur or new trial from the 1980s and 1990s alone); *id.* n.11 (identifying 11 additional cases of reversal based on size of verdict); *see also, e.g.*, *Bravo v. United States*, 532 F.3d 1154, 1169 (11th Cir. 2008); *Lebron v. United States*, 279 F.3d 321, 327 (5th Cir. 2002); *Thomas v. Tex. Dep't of Crim. Just.*, 297 F.3d 361, 367 (5th Cir. 2002). In contrast to the question presented in *Gasperini*, the question presented here is unlikely ever to make any difference to anyone.

B. This Case Is A Particularly Poor Vehicle For Consideration Of The Circuit Conflict Because The Question Presented Is Not Outcome Determinative

1. Even if the alleged division between the circuits could make a difference in theory, it plainly makes no difference in this case because there is no plausible argument that the district court abused its discretion in denying petitioner's motion for a new trial based on the weight of the evidence.

Trial in this matter lasted for six days, with testimony from more than ten witnesses presented by the parties. In denying petitioner's new-trial motion, the district court painstakingly recounted in a lengthy opinion all of the evidence and testimony concerning whether Staples caused petitioner's injury. *See* Pet. App. 12a-30a. The court summarized the relevant testimony and its reasoning as follows:

> Plaintiff's claims of injuries were impeached . . . with his own inconsistent statements about how the accident occurred, his repeated failures to provide treating physicians complete and accurate accounts of his pre-existing conditions, and evidence of his post-accident activities that seemed inconsistent with the injuries and limitations he described. The doctors who treated plaintiff and testified on his behalf at trial were cross-examined about plaintiff's prior injuries and complaints and ultimately acknowledged at least some uncertainty about the degree to which plaintiff's injuries were caused by the accident in the Staples store. Finally, de-

> fendant's medical experts testified that plaintiff's medical records did not include any objective findings indicating that plaintiff suffered traumatic, as opposed to degenerative or age-related, injures. Defendant's experts also called into serious question the theory proposed by plaintiff's expert to explain how plaintiff sustained a brain injury as a result of the falling boxes. The jury apparently chose to credit the testimony and other evidence indicating that any injuries plaintiff sustained or symptoms he suffered were caused by circumstances other than the falling Staples boxes, and it was reasonable and within its province to do so.

Pet. App. 13a-14a. The district court considered the full trial record, and its ruling that the jury's verdict was not against the weight of the evidence is unassailable. Indeed, petitioner does not even attempt to explain how the district court possibly could be held to have abused its discretion in refusing to set aside the jury's verdict based on the weight of evidence.

2. This Court's experience before *Gasperini* illustrates the wisdom of foregoing review of a vehicle this poor. Before *Gasperini*, this Court "twice granted certiorari to decide the unsettled issue" of the scope of appellate review of "a federal trial court's denial of a motion to set aside a jury's verdict as excessive," but "ultimately resolved the cases on other grounds." *Gasperini*, 518 U.S. at 434 (citing *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156 (1968), and *Neese v. S. Ry. Co.*, 350 U.S. 77 (1955)). In both cases, this Court concluded there was no need to re-

solve the question presented because there was no doubt that the district courts had not, in fact, abused their discretion. *See Grunenthal*, 393 U.S. at 163 (Harlan, J., dissenting) (explaining that majority declined to decide the question presented, "preferring to rest its decision upon the alleged correctness of the District Court's action in the circumstances of the case"); *Neese*, 350 U.S. at 77 (refusing to answer question because "[e]ven assuming such appellate power to exist under the Seventh Amendment, we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion"). There would similarly be no reason to address the question presented if certiorari were granted here.

C. The Decision Below Is Correct

The Second Circuit's rule is in any event required by the Seventh Amendment and comports with sound practical considerations.

1. The Seventh Amendment's "re-examination clause" provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." This Court has held in a "long and unbroken line of decisions" that appellate courts may not "review the action of a federal trial court in granting or denying a motion for a new trial for error of fact." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933) (involving a trial court's denial of a motion for new trial); *Socony-Vacuum*, 310 U.S. at 248 ("Certainly, denial of a motion for a new trial on the grounds that the verdict was against the

weight of the evidence would not be subject to review.").

That precedent is correct. An appellate court plainly must "re-examine" the facts found by the jury in order to conclude that the trial court clearly erred in finding the verdict not against the weight of the evidence.

Contrary to petitioner's contention, Pet. 16-22, "the rules of the common law" did not permit appellate tribunals to order a new trial on the ground that the verdict was against the weight of the evidence. As petitioner notes, at common law, most civil suits were initiated before panels of judges sitting en banc at Westminster, but were actually heard by so-called *nisi prius* judges—single judges traveling to the location of the controversy to oversee the trial. Pet. 16-17. Disappointed litigants could then make motions for a new trial to the en banc court. But, crucially, the en banc courts *never actually granted* any such motion made on the ground that the verdict was contrary to the weight of the evidence *unless* the *nisi prius* judge himself certified that in his view the verdict should be set aside. As one widely-cited article put it: "An exhaustive examination of the early English cases has revealed not a single case where an English court at common law ever granted a new trial, as being against the evidence, unless the judge or judges who sat with the jury stated in open court, or certified, that the verdict was against the evidence and he was dissatisfied with the verdict." Weisbrod, *Limitations on Trial by Jury in Illinois*, 19 Chi. Kent L. Rev. 91, 92 (1940); *see also* Charles Alan Wright, *The Doubtful Omniscience of Appellate*

Courts, 41 Minn. L. Rev. 751, 762 n.50 (1957) ("I do not find in the literature any disagreement with this conclusion, nor have I found any case contrary to the rule Weisbrod states.").

Perhaps recognizing that difficulty, petitioner purports to identify two English cases in which an en banc court ordered a new trial on weight of the evidence grounds absent the certification of the *nisi prius* judge. Pet. 19. But neither case fits that description. The first ordered a new trial because a crucial witness was excluded from the trial, not because the verdict was against the weight of the evidence. *Norris v. Freeman*, 95 Eng. Rep. 921, 921, 3 Wils. K.B. 38, 39 (1769). And the second, while less clear cut, focuses on the en banc Justices' view that witnesses at trial "ought not to have been admitted to give evidence against their own attestation" as to the validity of a will. *Goodtitle v. Clayton*, 98 Eng. Rep. 159, 160; 4 Burr. 2224, 2225 (1768). Both cases therefore fall within the long-recognized rule that appellate courts may set aside a verdict "for some error of law which intervened in the proceeding." *Chicago B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 246 (1897) (quotation omitted); *see also id.* ("The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo by an appellate court, for some error of law

which intervened in the proceedings.") (quotation omitted).[2]

2. Petitioner emphasizes this Court's holding in *Gasperini* that appellate courts have authority to review a trial court's denial of a motion for a new trial on the ground that a jury's monetary award is excessive. But assuming *Gasperini* is correct (something respondent reserves the right to dispute if the Court were to grant certiorari), it is readily distinguishable.

Gasperini relied on the Second Circuit's own explanation in 1961 that, in considering trial court excessiveness rulings, courts "must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." *Gasperini*, 518 U.S. at 435 (quoting *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961)). As Justice Stevens put it in his separate opinion in *Gasperini*, the question whether the amount of a jury verdict is excessive does not involve re-weighing facts found by the jury, but rather asks a reviewing court to "determine whether, on the facts as found below, the legal standard has been met." *Id.* at 443 (Stevens, J., dissenting on other grounds).

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[2] *See also* 3 W. Blackstone, Commentaries on the Laws of England 387 (1768) (grounds for new trial include "if it appears by the judge's report, *certified to the court*, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith") (emphasis added).

The question whether a verdict is excessive is therefore directly analogous to "reversal for refusal to direct a verdict for insufficiency of evidence," which is undoubtedly a true question of law. *Armentrout*, 166 F.2d at 408. Petitioner cites this same passage from *Armentrout* as if it supports appellate review of weight of the evidence denials, failing to appreciate that *Armentrout*, like *Gasperini*, did not address a weight-of-the-evidence challenge, but rather concerned appellate review of an excessiveness ruling. Pet. 12. The same is true of the only other case that petitioner believes provides a substantive explanation for his proposed rule. Pet. 12-13 (citing *Hoskins*, 384 F.2d at 171). Indeed, in practice, the question whether a verdict is excessive "boils down to" whether the plaintiff provided "evidence sufficient to support" an award of a specific amount. *Thomas*, 297 F.3d at 368 (asking whether plaintiff presented "evidence sufficient to support the $100,000 award for future emotional harm").

In contrast to the question whether a jury verdict is excessive, there is no practical way to identify a "legal question"—let alone a legal error—in the trial court's inherently discretionary decision that the evidence is not only legally sufficient to support the verdict, but also not so contrary to the verdict that a new trial is warranted.[3] The standard guiding the trial court's determination of such motions is so nec-

[3] The Seventh Amendment permits district courts themselves to re-examine a jury's fact finding and set aside a verdict as against the weight of the evidence because "the rules of the common law" allowed the judge or judges who oversaw the trial to do so. *See* Weisbrod, *supra*, at 93.

essarily vague and dependent upon credibility and weight determinations that it "may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on" them. Wright & Miller § 2806. There is simply no way for an appellate court to identify a legal error in such an inherently discretionary decision.

Proving the point, some appellate courts asserting authority to conclude that a trial court committed clear error in finding a verdict not against the weight of the evidence openly claim the authority to *themselves* "weigh the evidence and consider the credibility of witnesses." *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998); *see also United States v. Walker*, 393 F.3d 842, 848 (8th Cir. 2005) (court will reverse "if the evidence weighs heavily enough against the verdict that a miscarriage of justice may have occurred") (quotations omitted). Notably, petitioner never explains what purportedly "legal" inquiry he believes the court of appeals here should have engaged in, apart from simply reweighing the evidence and credibility of the witnesses for itself.

3. Petitioner's rule would not only violate the Seventh Amendment, but also impose burdens on appellate courts for no discernible purpose. As the Second Circuit has explained, review "of a trial court's ruling assessing the weight of the evidence imposes on an appellate court far more of a burden than arises from review of a ruling rejecting a challenge to the sufficiency of the evidence." *Stonewall*, 73 F.3d at 1199. After all, a sufficiency challenge concludes once sufficient evidence is identified,

whereas a weight-of-the-evidence challenge requires "an assessment of all the evidence." *Id.* This substantial burden, moreover, is simply not worth the candle. Again, appellate courts are likely never to actually reverse a trial court's denial of a weight-of-evidence motion. Under petitioner's rule, "extra burdens are put on the appellate courts and the burdens are for no good purpose." Wright & Miller § 2819. Petitioner's rule, in other words, is not only bad law but bad policy. The Second Circuit's decision is correct and there is no reason to disturb it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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