



Center for Law and Global Justice

School of Law  
2130 Fulton Street  
San Francisco, CA 94117-1080  
TEL. 415 422-3333  
FAX 415 422-5440

**Response to *amicus* briefs of Sixteen Members of Congress, the State of Florida, and Solidarity Center with respect to international law before the U.S. Supreme Court  
*Graham v. Florida* (08-7412) and *Sullivan v. Florida* (08-7621)**

**Prepared by Connie de la Vega and Michelle Leighton, counsel for human rights groups and bar associations (Amnesty International *et al.*)**

**<http://www.law.usfca.edu/academics/projects/jlwop.html>**

**Email: [delavega@usfca.edu](mailto:delavega@usfca.edu) or [mleighton@usfca.edu](mailto:mleighton@usfca.edu)**

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**Summary of Response**

To obfuscate the argument that the application of international law is useful guidance for the Supreme Court to consider in interpreting our laws —the Sixteen Members of Congress amici argue that the prohibition of juvenile life without parole (JWLOP) is not a norm of customary international law. They attempt to refute the argument that most, if not all, nations comply. The State of Florida also challenges the evidence of global compliance and the Solidarity Center amici brief raises several other concerns. These claims fail.

In Sum: There is no evidence that any person who committed the offense under 18 is serving such a sentence outside of the United States. None of the briefs point to any evidence of such, though they seek to suggest this at times in their references to CRC reports. Each country and their CRC reports is summarized in the Chart below and refutes amici's attempt to confuse the parties and the Court. In addition, some of the JLWOP examples given by amici are really referring to "life sentences" or sentences for a specific period even if called JLWOP. While JLWOP is on the books in some countries, as was acknowledged in the amicus brief Amnesty International et al., (at <http://ziefbrief.typepad.com/files/amicusbrief-1.pdf>), there is no evidence that the sentence has been used.

The non-self-executing declaration by the U.S. in ratifying the International Covenant on Civil and Political Rights ("ICCPR") and other treaties was not intended to render these human rights treaties inoperative or ineffective in the U.S. Further, contrary to the argument by the Solidarity Center amici, while the *Sosa* standard is not at issue in this case, the norm prohibiting JLWOP is sufficiently definite to be used for constitutional interpretation.

More detailed responses to each brief are provided below. Following is a country-by-Country Chart summarizing the CRC reports and refuting their claims.

## **I. Sixteen Members of Congress Reply Brief**

### **A. Virtually all other nations comply with the prohibition against JLWOP and at a minimum acknowledge that they are bound to comply.**

- The JLWOP sentence is not imposed by any country outside of the U.S. The Sixteen Members of Congress amici list countries and point to the Committee on Rights of the Child (“CRC’s”) “concerns” that some laws might possibly allow such a sentence. While some countries may have laws that conceivably would allow the LWOP sentence (as recognized in Amnesty International, et.al., amicus brief, <http://ziefbrief.typepad.com/files/amicusbrief-1.pdf> and the law review article “Sentencing Children to Die in Prison, there are no reported cases where this is applied to persons who were under 18 at the time of the offence in the world today, except in the U.S. Amici point to no cases where this has been imposed on juveniles or where there are juveniles serving outside the U.S. (See Chart below of each country and their actual law/concern.) None of the reports they cite to in their brief contains any information to the contrary.
- Some of the examples of JLWOP given by amici are in fact not JLWOP. (See e.g. Santa Lucia and Dominica.) In other cases, JLWOP is defined as a term of years without parole, not an indefinite “life” sentence. (See, e.g. Belize – LWOP means 18-20 years; Bangladesh – life means 30 years; Niger – no LWOP for children but LWOP means 10-30 years.)
- Amici use life sentences interchangeably with JLWOP. (See, e.g. China, Jamaica, Japan, where it is not an option for juveniles, and Netherlands.)
- Even if there were one or two countries in which a child offender could be found to be serving, the Court should follow it’s reasoning in *Roper v. Simmons*—there is virtually global and widespread adherence to the norm. There is universal ratification (all except Somalia and the U.S.) of the CRC and a widespread, consistent practice among nations not to impose JWLOP sentence. Moreover, countries have changed their laws in response to concerns raised by the CRC Committee. (See, e.g. Liberia.)
- Not one of the reservations to the CRC cited by amici includes a reservation to the prohibition against JLWOP in 37(a). See treaty ratifications and reservations at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) .) The reservations cited by amici are all general statements regarding Sharia law. The only specifics mentioned are religious rights and adoption. (See, e.g. Afghanistan, Iraq, Jordan, Maldives, Mauritania, Syrian Arab Republic, and United Arab Emirates.) There is no evidence that those countries mentioned even have JLWOP. The countries that included reservations on juvenile justice did so with respect to the Article 37(c) prohibition against detaining juveniles with adults. (See, e.g. Australia, Canada, Iceland, Japan, New Zealand, Switzerland, and the United Kingdom – most of

- these reservations are couched in terms of whether separate facilities are available.) The reservation by Singapore is general, dealing with law and order, with the only specific reservation addressing corporal punishment.
- B. The assertion by 16 Members of Congress Amici, on page 3 (and their arguments) that the human rights groups and bar associations’ theory is that U.S. is “bound to obey the provisions under Article 37 of U.N. Convention on Rights of Child” is inaccurate.
- Amnesty International et al. do not assert that the US is “bound” by a treaty it has not ratified. Treaties can certainly reflect or codify customary international law norms and *jus cogens*. In this case, customary international law prohibits imposing JWLOP. Article 37 of the CRC prohibits this expressly, and thus reflects a rule of customary international law.
  - Amnesty, et al. amici argue that the Court should use this customary international norm as guidance that such a sentence is “disproportionate” and is cruel and unusual punishment for juveniles committing crimes under age 18 under the United States Constitution.
- C. The lengthy discussion by amici that the norm prohibiting JLWOP should not be considered by the Court because it has not crystallized into a *jus cogens* norm, (pages 4 - 14) is simply their dispute with the cases and scholarly legal opinions, as set forth by the Amnesty International et al. amici (<http://ziefbrief.typepad.com/files/amicusbrief-1.pdf>).
- 16 Members of Congress Amici appear not to dispute that *jus cogens* is an accepted international legal theory of binding law but just that it is not applicable here to JLWOP.
  - The evidence we provide in the amicus brief amply demonstrates that the norm is certainly one of “customary international law” even if legal theorists debate whether it has reached the level of a nonderogable norm of international law (*jus cogens*).
  - Since amici Amnesty International, et.al, urge the Court to use the global norm prohibiting JLWOP as “guidance”, as it did with the international customary norm in *Roper v. Simmons*, the Court need not determine whether this norm is a general customary norm or one that has crystallized into “*jus cogens*.” Thus, a debate on *jus cogens* is unnecessary for the Court’s decision.
  - The non-self-executing declaration of treaty obligations under the ICCPR and other human rights treaties was not intended to make these treaties inoperative in the U.S. Rather, it only intended to prohibit private causes of action which is also not at issue here. Senate Committee on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, p. 19 (1992). Congress specifically stated, “The United States understands that this Convention [ICCPR] shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the State and local governments;...”(Id.).

4. Amici's argument (page 35 ) that the Committee on Rights of the Child (CRC) raised concerns in various areas of the treaty with countries who reported to them and that this is evidence that countries do not comply with the treaty is misplaced.

- The CRC reports cover a wide range of issues related to children's health, education, care and juvenile treatment.
- The fact that amici point to concerns of the CRC that certain countries need to improve their protection of children's rights or their juvenile justice systems is not evidence that these countries impose JWLOP.
- Indeed, the few reports by those countries clarify that where there is doubt that in relation to JLWOP they do not use it or intend to rectify the law. None of the reports suggest there are children serving such sentences.

## **II. State of Florida Reply Brief**

- On pages 43- 44, respondent states that..."Just as each state's sentencing structure is different, even more variety exists in the criminal justice and sentencing systems around the world. Notably, the data fails to explain fully the reasons why nations may have chosen to structure their juvenile sentencing laws differently. For all that is known, a multitude of practical concerns, totally unrelated to issues of cruel and unusual punishment, may account for the actual reasons why other nations do not impose life sentences on juveniles." This argument ignores the fact that each country complies with the prohibition against using LWOP for juveniles and reports to the CRC on their juvenile sentencing to demonstrate that they do comply with the treaty rules, including the prohibition of JLWOP.
- Respondents also state that the statements about other countries' compliance with this norm relies "almost exclusively, on those nations' self reports." The arguments of Amnesty International et al. are based on human rights group reports as well as the government reports submitted to the CRC. The latter include citations to specific statutes. It is not clear what more could be used to establish the law and practice on this issue. Respondent does not provide any evidence that there are children serving LWOP anywhere.

## **III. The Solidarity Center Reply Brief**

The Solidarity Center's arguments are misguided in various respects.

- First, *Sosa* (542 U.S. 692 (2004)) is inapplicable here since the international norms are not being used to support a cause of action. Amnesty International et al. cited to authority for considering international law to help interpret the U.S. constitution and law in the brief.
- Second, the norm is sufficiently definite at any rate – the language is clear and adherence is universal but for in the U.S. starting in the mid-1990s as noted in the Amnesty International, et.al., brief and above.
- Third, the Solidarity Center brief makes assertions about how violent U.S. society is compared to other countries with no evidence for those statements.

**See Below Chart for a country-by-country analysis of reports to and from the Committee on Rights of the Child ("CRC"), clarifying and refuting claims of the Sixteen Members of Congress Brief.**

**COUNTRY-BY-COUNTRY CRC ANALYSIS: USF LAW SCHOOL, CENTER FOR LAW AND GLOBAL JUSTICE**

Country	Congress Amici Brief Claim (Death Penalty, LWOP, Life)	Corrected Citations and Comments	Juveniles the Congress Amici have evidence are Serving LWOP	Juveniles Known to be Serving LWOP
Bangladesh	<p>Death Penalty and LWOP (page 28)</p> <p>The Congressional Brief says Bangladesh permits the death penalty and LWOP. It cites the CRC Committee report: CRC/C/BGD/CO/4, 26 June 2009</p>	<p><u>What CRC report says:</u></p> <p>In para 46, page 11, of its concluding observations:  “46. The Committee reiterates its concern regarding capital punishment for children and its retroactive application for persons who had committed offenses when they were children between the ages of 16 to 18 years old which contradicts article 37 (a) of the Convention.  47. The Committee recommends that the State party take immediate steps to halt the imposition of death penalty for crimes committed by persons under 18 and abolish the death penalty.”(CRC/C/BGD/CO/4, 26 June 2009)</p> <p><u>What Bangladesh reported:</u></p> <p>In 2003, the concern appears to be 16 and 17 year olds. Bangladesh clarified its law however that life imprisonment means it is for a term 30 years. The 2008 report does not change the definition of life sentences. (CRC/C/BGD/4, 28 October 2008)  It does not, however, suggest that death is absolutely prohibited.</p> <p>"47. Information on the minimum legal age set by national legislation for various purposes is given below...</p> <p>(j) Capital punishment and life imprisonment - (capital punishment) 17 years; (life imprisonment) in certain exceptional circumstances 7 years if presumption of capacity not rebutted, otherwise 12 years (see article 37 (a));...</p> <p>"The Children Act prohibits the use of capital punishment against children under 16 years of age. ...In the event that [for certain offenses] ...the child has been found guilty is punishable with life imprisonment, then a sentence of life imprisonment <sup>19</sup> can be imposed on such a child. (Para 47 (j), page 13, CRC/C/65/Add.22, 14 March 2003).</p> <p>Footnote 19 states: <sup>19</sup> “Under the Penal Code 1860 “imprisonment for life” means rigorous imprisonment for 30 years.”</p> <p>Bangladesh further states that this is rarely imposed. Id.</p>	<b>0</b>	<b>0</b>

Belize	<p>LWOP alleged (page 27-28)</p> <p>Congressional brief suggests Belize has LWOP for juveniles, quoting the CRC accurately (CRC/C/15/Add.252, 31 March 2005, para 70-71)</p>	<p><u>What CRC report says:</u></p> <p>“...The Committee is deeply concerned about the fact that children as young as 9 years of age can be sentenced to life imprisonment without provision for parole...” Page 17, para. 70.</p> <p>Committee recommends:</p> <p>« (c) As regards life imprisonment of children without provision for parole, to urgently review its domestic legislation, particularly the provisions of the Indictable Procedures Act (chapter 96 of the Laws of Belize) and the Court of Appeal Act (chapter 90 of the Laws of Belize), in order to bring its domestic laws into full conformity with the provisions and principles of the Convention;”</p> <p>(P.17, para 71 (c) CRC/C/15/Add.252, 31 Mar. 2005)</p> <p><u>What Belize reported:</u></p> <p>“85. The right not to “be subjected to torture or to inhuman or degrading punishment or other treatment” is guaranteed in the Belize Constitution Act (S. 7). <u>The Indictable Procedures Act exempts a person under the age of eighteen years at the time of committing an offence punishable by death, from a sentence of death (S. 146 (2)). However, a 1998 amendment to that provision requires the court to impose a sentence of life imprisonment on such an offender (in lieu of this having been at “Her Majesty’s pleasure”). According to the provisions of the Court of Appeal Act (S. 23 (1)(c)) there is no capacity to seek a review of <b>that</b> life sentence (apart from such grounds as new evidence). <b>Life imprisonment means a sentence of eighteen to twenty years, without provision for parole. It can apply to children as young as nine years of age.</b>”</u></p> <p>(emphasis added)</p> <p>(CRC/C/65/Add.29, 13 July 2004, p.33)</p>	0	0
Burkina Faso	<p>Death Penalty and LWOP alleged (page 28)</p> <p>The Congressional Brief says Burkina Faso permits the death penalty and LWOP. It cites the CRC Committee report: CRC/C/15/Add.193. 9, para. 60, October 2002.</p>	<p><u>What CRC report says:</u></p> <p>In para. 60:</p> <p>“60. ...The Committee is deeply concerned at the <b>possibility</b> that children of 16 and 17 years of age are treated like adults and can be subjected to the death penalty or life imprisonment, which is a serious violation of article 37 of the Convention;”</p> <p>(emphasis added) (CRC/C/15/Add 193, 9 Oct. 2002), page 15, para 60).</p> <p><u>What Burkina Faso reported:</u></p> <p>The most recent Bangladesh report clarifies no juveniles have ever been given the sentence:</p> <p>“324. Capital punishment and life imprisonment, ...are still in force in Burkina Faso <u>but in practice have never been imposed on a child.</u></p> <p>325. Although the CC provides for capital punishment and minors over 16 may be treated as adults and receive such a sentence, <u>no minor has in fact so far been sentenced to capital punishment or life imprisonment. Moreover, under CC article</u></p>	0	0



		<p><u>57, convicted minors are, as a rule, subject to rehabilitation measures.</u> CRC/C/BFA/3-4, 30 March 2009)</p>		
Dominica	<p>LWOP alleged (page 29)</p>	<p><u>What CRC report says:</u></p> <p>“46. The Committee is concerned at the lack of juvenile courts and at the fact that children may be sentenced to a penalty at the “President’s pleasure”, to life imprisonment and to whipping in private.”</p> <p>Para 47: CRC recommends Dominica abolish life in prison NOT JLWOP. <u>CRC Rep on Dominica 2004 (CRC/C/15/Add.238) p. 9</u></p> <p><u>What Dominica reported:</u> "161 (1): “The Offences Against the Person Act (chap. 10:31) stipulates that the sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time the offence was committed he was under the age of 18 years. However, it is possible for such persons to be given life imprisonment without the possibility of release.” Dominica's report indicates that under 10:31 of the Offences Against the Person Act, no juveniles would receive death but would serve at the President's pleasure and reports: " For the past five years, six juveniles have been convicted on manslaughter charges. <u>One is at present serving a seven-year prison term for manslaughter.</u>" There is no indication of any kids serving longer sentences, or LWOP.</p>	0	0
Gambia	<p>Death Penalty and LWOP alleged (page 29)</p> <p>The Congressional Brief says Gambia permits the death penalty and LWOP. It cites the CRC Committee report: CRC/C/15/Add.165 para. 68.</p>	<p><u>What CRC report says:</u> "The Committee is deeply concerned at <b>the possibility</b> that a child <b>may</b> be sentenced to the death penalty." (emphasis added) (CRC/C/15/Add.165, 6 November 2001)</p> <p><u>What Gambia reported:</u> The most recent Gambia state report (28 September 2000): "20....acknowledges the use of the juvenile death penalty but does not specifically address LWOP. In para 84 the State says, "...<u>However, the death penalty should not be applicable to children or young persons absolutely</u> ." (CRC/C/3/Add.61, paras. 83, p. 20)</p>	0	0
Guatemala	<p>Death Penalty and LWOP (page 29)</p> <p>The Congressional Brief says Guatemala permits</p>	<p><u>What CRC report says:</u> Congressional brief cites the 1996 report of Committee, para. 47. There is no para 47. However, there is a statement by the Committee in para 15, which relevant part reads:</p>	0	0

	<p>the death penalty and LWOP. It cites the CRC 1996 Committee report: CRC/C/15/Add.154 para. 47. It then quotes from 2001 CRC report.</p>	<p>“15. ...Equally, the Committee is deeply concerned that national legislation does not prohibit capital punishment or life imprisonment without the possibility of release, as required by the provisions of article 37 (a) of the Convention.” There is no mention that these sentences have ever been imposed on a juvenile.</p> <p><u>What Guatemala Reported:</u></p> <p>The 1995-96 State's report does not indicate that there are death or JLWOP sentences for juveniles. Its report provides the following only—so it is not clear why the Committee was concerned:</p> <p>“145. Article 20... minors whose conduct violates the criminal law shall be cared for in specialized institutions and by specialized personnel and that they may not on any ground be confined in a gaol or place of detention intended for adults. Article 60 of the current <u>Minors Code develops these provisions by stipulating that minors may not be charged with a crime or misdemeanour</u> and that their antisocial acts are to be regarded as disturbed behaviour requiring specialized treatment and not punishment.” (emphasis added).(CRC/C/3/Add.33 20 April 1995)</p> <p>In 2001, the CRC report on Guatemala says nothing about death penalty or life sentences, though it does indicate its concern with previous recommendations on juvenile justice reform. This is too broad to surmise JLWOP and death penalty are still of concern. Moreover, there is nothing to indicate in Guatemala's 2000 report to the committee that death or JLWOP are even possibilities.</p> <p>Guatemala also filed a report (only available in Spanish) in 2008. The report indicates that judges have discretion in giving a variety of sentences to juveniles but JLWOP and death penalty are not listed and deprivation of liberty is only used as last resort. (CRC/C/GTM/3-4, paras. 238, 241, 14 April 2008)</p>		
Liberia	<p>Death Penalty and LWOP alleged (page 30)</p> <p>Congressional Brief alleges that Liberia permits both the Death Penalty and LWOP, citing CRC Committee report:</p>	<p><u>What CRC report says:</u></p> <p>“The fact that capital punishment and imprisonment without possibility of release can be applied under Penal Law to children aged 16 and 17 years at the time the crime was committed is also a major issue of concern for the Committee.” (para 66, p. 14, CRC/C/15/Add.236,1 July 2004).</p> <p><u>What Liberia reported:</u></p> <p>Liberia, in its most recent report (para 310) acknowledges that CRC report was concerned with LWOP and death penalty, for 16 and 17 year olds, then</p>	0	0



	CRC/C/15/Add.236, para. 68.	states:  “312. The Children’s Law will amend the Penal Law to abolish life imprisonment without release and capital punishment for children. The new law further incorporates diversionary measures, the right to a fair trial, training for personnel involved in juvenile justice, and other measures in line with the UNCRC General Comment on Juvenile Justice.” <u>Aug. 2009 (CRC/C/LBR/2-4, p.75).</u>		
Niger	Death Penalty and LWOP alleged (page 26)  Congressional Brief alleges that Niger permits both the Death Penalty and LWOP, citing CRC Committee report: CRC/C/NER/CO/2, 18 June 2009, para. 81.	<u>What CRC report says:</u>  80.. ...The Committee is also concerned that the national law (99-11) on juvenile justice does not cover all cases involving minors and that children aged 16 to 18 who commit crimes together with adults are brought before adults courts and may face the death penalty. The Committee reiterates its deep concern that children continue to be detained together with adults. 81. The Committee urges the State party ...(a) Take immediate steps to halt and abolish by law imposition of death penalty and life sentence <sup>st</sup> for crimes committed by persons under 18 “ (CRC/51 <sup>st</sup> session / 12 June 2009 /unedited version) <a href="http://www2.ohchr.org/english/bodies/crc/docs/co/CR-C-C-NER-CO-2.pdf">http://www2.ohchr.org/english/bodies/crc/docs/co/CR-C-C-NER-CO-2.pdf</a>  <u>What Niger reported:</u> "378. Article 33 of Order No. 99-11 of 11 May 1999 stipulates that in cases where a minor under 18 years of age has acted knowingly, the penalties imposed shall be as follows: •If the acts committed by the minor are punishable by the death penalty or life imprisonment, the minor shall be sentenced to a term of no more than 10 to 30 years;" (CRC/C/NER/2, 20 Nov. 2008), page 76)  Page 31, para 127, further clarifies: “127. Pursuant to Order No. 99-11 of 14 March 1999, <u>the death penalty may not be imposed on any person under 18 years of age.</u> ”	0	0
Saint Lucia	JLWOP (page 30)	<u>What CRC report says:</u>  The Congressional Brief cites the CRC Committee report: CRC/C/15/Add.258 para. 72. However, in Saint Lucia’s most recent state report, CRC/C/28/Add.23 para. 283-285, it is not clear that Saint Lucia allows Juvenile Life Without Parole- the report only indicated “life imprisonment” not LWOP	0	0
<b>ONLY LIFE</b>	<b>SENTENCES</b>	<b>ALLEGED FOR THESE COUNTRIES</b>		
China	Life Imprisonment (page 29)	<u>What CRC report says:</u>  The Congressional Brief cites the CRC Committee report: CRC/C/CHN/CO/2, para. 89,	0	0

		which indicates that China still has life imprisonment for juveniles. China's most recent report also confirms that it still employs life imprisonment for juveniles: CRC/C/83/Add.9, para. 308.		
Jamaica	Life Imprisonment (page 29)	<p><u>What CRC report says:</u></p> <p>The Congressional Brief cites the CRC Committee report: CRC/C/15/Add.210, para. 57(b). Jamaica's most recent state report was unavailable in English- but may have undated information. (CRC/C/70/Add.15)</p>	0	0
Japan	Life Imprisonment (page 29)	<p><u>What CRC report says:</u></p> <p>The Congressional Brief cites the CRC Committee report: CRC/C/15/Add.231, para. 53. Japan's state report indicates that life imprisonment is NOT an option for juveniles. CRC/C/104/Add.2, para. 403.</p>	0	0
Netherlands	Life Imprisonment (page 27)  Congressional brief quotes CRC concern that 16 and 17 yr olds may be tried as adults and can be convicted to life sentences CRC/C/NLD/CO/3 30 January 2009 )	<p><u>What CRC report says:</u></p> <p>Quote is accurate but it only discusses "life sentences", not LWOP.</p> <p><u>What Netherlands reported:</u></p> <p>"In the case of certain offences, this could mean that the court could impose a life sentence. It should be stressed, however, that this is no more than a theoretical possibility. <b>In practice, no Dutch court has ever imposed such a sentence on a minor.</b>" (emphasis added) (page 19, para 95, CRC/C/NLD/3, 23 July 2008).</p>	0	0
Trinidad and Tobago	Life Imprisonment (page 30)	<p><u>What CRC report says:</u></p> <p>The Congressional Brief cites the CRC Committee report: CRC/C/TTO/CO/2 Para. 73. The state report indicates that LWOP is not a possibility for juveniles and does not directly mention life imprisonment. CRC/C/83/Add.12, para. 631.</p>	0	0
Saudi Arabia	Possibility of death penalty (page 30)	<p><u>What CRC report says:</u></p> <p>The Congressional Brief cites the CRC Committee report: CRC/C/SAU/CO/2, para. 32. The state report indicates that the law forbids capital punishment for juveniles (CRC/C/136/Add.1, para. 120).</p>	0	0

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