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Utah Supreme Court

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N THE SUPREME COU
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ORIS CYPERT,

Plaintiff and Respondent,

vs.

OARD OF EDUCATION OF
ASHINGTON COUNTY SCHOO
STRICT, SHELDON B. JOHN
N, FINDLY M. JUDD, FRED
ICK R. BRUECK, GARY T.
OORE, DR. WALTER H. SNO
NALD V. McARTHUR and
VOY ESPLIN,

Defendants and Appella

APPELLANTS'

Appeal from Judgment
Plaintiff and Respon
District Court of Washingto
Honorable James P. Mc

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IN THE SUPREME COURT OF THE STATE OF UTAH

DORIS CYPERT,

Plaintiff and Respondent,

vs.

BOARD OF EDUCATION OF WASHINGTON COUNTY SCHOOL DISTRICT, SHELDON B. JOHNSON, FINDLY M. JUDD, FREDERICK R. BRUECK, GARY T. MOORE, DR. WALTER H. SNOW, RONALD V. McARTHUR and T. LAVOY ESPLIN,

Defendants and Appellants.

Case No. 12071

APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action by the Plaintiff-Respondent, a resident qualified voter of Washington County, Utah, brought on behalf of herself and all other similarly situated persons residing within the boundaries of Washington County School District, Utah, who did not pay a tax on property located in Washington County School District within the twelve months preceding May 27, 1969, against the Board of Education of Washington County School District to enjoin the issuance of certain school

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building bonds voted at a bond election held and conducted by the Defendants-Appellants on May 27, 1969, and to declare invalid those portions of Article XIV, Section 3, of the Utah Constitution and Sections 11-14-2 and 11-14-5, Utah Code Annotated, 1953, as amended, which might limit the right to vote at bond elections to those electors who have paid a property tax therein during the twelve months preceding the election.

DISPOSITION IN THE LOWER COURT

After trial of the cause on December 12, 1969, the District Court of Washington County, after entering a memorandum decision on April 2, 1970, entered a judgment and decree on April 14, 1970, (1) enjoining Defendants-Appellants from issuing or selling the bonds voted at the May 27, 1969, bond election, (2) declaring those portions of Article XIV, Section 3, Utah Constitution, and Sections 11-14-2 and 11-14-5, Utah Code Annotated, 1953, as amended, which limit the right to vote at bond elections to electors who had paid property taxes on property located in the political subdivision within twelve months preceding the date of the bond election to be void and in violation of the United States Constitution, (3) declaring that the aforesaid provisions of Article XIV, Section 3, Utah Constitution, and Sections 11-14-2 and 11-14-5, Utah Code Annotated, 1953, as amended, requiring such taxpayer vote are severable from the remainder of such sections and that Defendants-Appellants may validly hold bond elections as long as the right to vote is not limited to taxpayers only, and (4) that such decision would apply prospectively only and would

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not affect the validity of any bond election or bonds where the bond election contest period provided by Utah law had expired prior to June 16, 1969.

RELIEF SOUGHT ON APPEAL

Defendants-Appellants seek reversal of so much of the judgment of the District Court of Washington County as enjoins Defendants from selling or issuing the bonds voted at the May 27, 1969, election and declares that portion of the Constitution and statutes of the State of Utah which limit the right to vote at bond elections to those qualified electors who had paid a tax on property located within a political subdivision within twelve months of the date of the election to be unconstitutional and void, but respectfully asks that if this Court affirms the judgment of the District Court of Washington County on such counts, then this court affirm the portions of the judgment holding the aforesaid provisions of the Constitution and statutes of the State of Utah to be severable and permitting elections to be held as long as the right to vote is not limited to taxpayers only and further affirm the portion of the judgment holding that any such decision applies prospectively only.

STATEMENT OF FACTS

Plaintiff-Respondent is a resident of Washington County, Utah, and as such, a resident of Washington County School District. She is a qualified, registered elector of the County, but, during the twelve month

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period immediately preceding May 27, 1969, did not own property located within the boundaries of Washington County School District, the title to which was listed in her name on the tax rolls of Washington County, Utah, nor did she during said twelve month period pay a property tax to Washington County or to Washington County School District.

On April 8, 1969, the Defendants-Appellants adopted a resolution (See Exhibit A, R.12), calling a special bond election to be held in Washington County School District, Utah, during legal hours on May 27, 1969, upon the issuance of bonds in the amount of $1,000,000, to mature serially in not more than twenty years from their date, and to bear interest at a rate or rates not exceeding 6% per annum, for the purpose of raising money for purchasing school sites, for building or purchasing one or more school houses and supplying the same with furniture and necessary apparatus, and for improving school property under the charge of the Board of Education.

By the terms of the resolution of April 8, 1969 and the notice of election set forth in the resolution and in accordance with the provisions of Article XIV, Section 3, Utah Constitution and of Sections 11-14-2 and 11-14-5, Utah Code Annotated, 1953, the Defendants-Appellants provided that only such qualified electors of the Washington County School District as had paid a property tax in the school district within the twelve months preceding the date of the special bond election would be permitted to cast a ballot at such election on the proposition

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of the issuance of such bonds. Defendants-Appellants provided in said notice of election that qualified, registered electors of the school district presenting themselves at the polls at the special bond election on May 27, 1969, could establish that they paid a property tax on property situated within the boundaries of the said school district during the twelve months immediately preceding the date of the election either by exhibiting a receipt of the County Treasurer of Washington County, Utah, (in the form of a tax notice appropriately stamped by the County Treasurer to show payment of such tax) or, in the alternative, by taking an oath, with or without legal challenge, under the pains and penalties of perjury, that such person offering to vote at the bond election had within twelve months preceding May 27, 1969, paid a tax on property located in the school district the title to which was held in his name according to the assessment roll of Washington County, Utah, in the form in which said oath was set out at length in Section 9 of the aforesaid resolution of April 8, 1969. The election on May 27, 1969 was, in fact, conducted in accordance with these limitations. (See section 3 of Exhibit D, Resolution Canvassing Vote of June 3, 1969; Finding of Fact 3, R.89-90).

Plaintiff-Respondent was unable to comply with the limitations on voting established by the Board of Education. She could not legally and properly execute the taxpayer oath and could not present evidence of payment of the required tax. Accordingly, Plaintiff-Respondent did not vote at the special bond election (Tr. 6).

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The special bond election was held on May 27, 1969 and on June 3, 1969 the returns were canvassed by the Defendants-Appellants. (See Exhibit D, Finding of Fact 7, R. 90-91). It was determined that a majority of the persons voting at such special bond election voted in favor of the issuance of $1,000,000 general obligation school building bonds of the school district. The Defendants-Appellants found that only qualified registered electors of the Washington County School District who had paid a property tax therein in the twelve months preceding the election were permitted to vote at the election.

On September 22, 1969 the Defendants-Appellants adopted a resolution authorizing the issuance of $400,000 School Building Bonds, Series of December 1, 1969, of the Board of Education of Washington County School District, being part of the $1,000,000 bonds authorized at the May 27, 1969, special bond election. (See Exhibit B, R. 29-40; Finding of Fact 8, R. 91). In Section 7 of said resolution of September 22, the Defendants-Appellants authorized and directed the Clerk of the Board of Education to contact potential purchasers of the $400,000 bonds therein authorized, and to supply all necessary information to such potential purchasers so that bids for the sale of the bonds could be submitted to the defendant Board of Education for consideration and acceptance.

On June 16, 1969, subsequent to the special bond election held in Washington County School District and conducted by the Defendants-Appellants, and subsequent to the canvass of the results of said special bond election.

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but prior to the expiration of the forty-day period computed from the date the returns of the election are canvassed and the results thereof declared within which Section 11-14-12, Utah Code Annotated, 1953, permits election contests to be filed challenging bond elections, the United States Supreme Court handed down opinions in two cases relating to the validity, under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, of state restrictions on qualifications to vote at certain local elections. The two cases decided on June 16, 1969, are *Kramer v. Union Free School District,* 395 U.S. 621, 23 L. Ed.2d 583, 89 S.Ct. 1886 (1969), and *Cipriano v. City of Houma,* 395 U.S. 701, 23 L.Ed. 2d 647, 89 S.Ct. 1897 (1969). In both cases the Supreme Court of the United States held certain state statutes which restricted the right to vote at the local elections involved to qualified electors who also qualified as the owners of property upon which ad valorem taxes were paid, to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The *Kramer* case, dealt with the right to vote at school elections generally, but the *Cipriano* case dealt with the right to vote at an election held upon the question of the issuance of municipal electric utility revenue bonds.

In the *Cipriano* case the Supreme Court of the United States, after holding the provisions of Louisiana law which limit the right to vote at revenue bond elections to qualified, taxpaying electors to be in violation

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of the Federal Constitution, and hence the election at which the bonds in question were approved to be invalid, null and void, nevertheless specified that its decision would not be fully retroactive. The pertinent portion of the language of the court at page 652 discussing the prospective nature of its opinion is quoted as follows:

> Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 77 L.Ed. 360, 366, 53 S. Ct. 145, 85 A.L.R. 254 (1932). See *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 84 L.Ed. 329, 60 S.Ct. 317 (1940). Cf. *Linkletter v. Walker,* 381 U.S. 618, 14 L.Ed. 2d 601, 85 S.Ct. 1731 (1965). Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election results has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization.

Pursuant to the provisions of Section 11-14-12, Utah Code Annotated, 1953, the period for bringing an election contest under Utah law challenging the results and

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validity of the May 27, 1969, special bond election conducted by Defendants-Appellants expired on July 14, 1969. The Plaintiff-Respondent suing on behalf of herself and all other similarly situated persons who are residents of Washington County School District, but who did not own property located within the boundaries of the Washington County School District on which they had paid a tax within twelve months of the May 27, 1969, election held and conducted by Defendants-Appellants, filed suit against the Defendants-Appellants on December 4, 1969, which date was after the expiration of the 40-day bond election contest period provided in the Utah Municipal Bond Act by Section 11-14-12, Utah Code Annotated, 1953.

ARGUMENT

POINT I

THE COURT BELOW ERRED IN HOLDING THAT AS TO GENERAL OBLIGATION BOND ELECTIONS THE TAXPAYER VOTING REQUIREMENT OF ARTICLE XIV, SECTION 3, OF THE UTAH CONSTITUTION AND OF SECTIONS 11-14-2 AND 11-14-5, UTAH CODE ANNOTATED, 1953, AS AMENDED, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is submitted that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, as recently interpreted by the Supreme Court of the United States in *Kramer* and *Cipriano,* does

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not support the holding by the court below that Article XIV, Section 3, of the Utah Constitution and Sections 11-14-2 and 11-14-5 of the Utah Code Annotated, 1953, as amended, which require a taxpayer vote on the question of incurring indebtedness, are unconstitutional as applied to general obligation bond elections. The *Kramer* and *Cipriano* opinions were not concerned with elections on the issuance of general obligation bonds. *Kramer* was wholly unrelated to the issuance of bonds and *Cipriano* was concerned only with the issuance of revenue bonds, and they are therefore not authority for invalidating the provisions of the Utah Constitution and statutes which require that only property taxpaying electors may vote at general obligation bond elections.

The Supreme Court of the United States in the *Cipriano* opinion was very careful to limit its opinion to the revenue bond situation, the Court declaring in Footnote 5 at page 651:

> As in *Kramer v. Union Free School District No.* 15, U.S. , 23 L.Ed.2d 583, 89 S.Ct. , we find it unnecessary to decide whether a state might, in some circumstances, limit the franchise to those "primarily interested."

It is apparent therefore that the Supreme Court of the United States went out of its way in the *Cipriano* opinion to indicate that its decision was not to be applied to types of bond elections other than the revenue bond type of election before the Court in that case.

The court below was therefore in error in determining that the opinion in the *Cipriano* case is determinative

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of the validity of the porvisions of the Utah Constitution and statutes which limit the right to vote at general obligation bond elections to taxpayers. On the contrary, it is submitted that there are ample valid constitutional grounds for reaching the contrary result and therefore it is requested that this Court find and hold that the Equal Protection Clause is not violated by the present voter qualification provisions of the Utah Constitution and statutes as applied to general obligation bond elections.

The rationale for holding that the constitutional theory of *Kramer* and *Cipriano* should not apply to a case involving a general obligation bond election rests in the significant difference between general obligation bonds and revenue bonds. While the debt represented by the latter is payable only from the revenues generated by the project constructed with the bond proceeds, the debt represented by general obligation bonds is legally payable from taxes levied only upon property owners. Section 11-14-19 of the Utah Code Annotated, 1953, as amended, provides that all bonds not payable solely from revenues constitute full general obligations to which the full faith and credit of the political subdivision is pledged, and further provides that such bonds enjoy an obligation on the part of the issuing entity to levy and collect annually ad valorem taxes without limitation as to rate or amount fully sufficient for the purpose. Furthermore, it is provided in Sections 59-10-3 and 59-10-42 Utah Code Annotated, 1953, as amended, that taxes are made a lien on the property of a taxpayer and that such lien may be foreclosed upon for the pur-

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pose of collecting delinquent taxes. Therefore, through the obligor on a general obligation bond may nominally be the issuing entity, in effect it is a composite of the property taxpayers who, because of their ownership of property, can be taxed for the entire payment of the principal and interest on the bonds. Failure to pay the tax can lead to the loss of the property. It is these facts which provide the very critical difference between the nature of the general obligation bonds involved in this appeal and those voted at the revenue bond electoin contested in *Cipriano,* and it is because of this difference that the Defendants-Appellants seek to have this Court reverse the court below and hold constitutional the property taxpayer requirements of Utah law.

When disallowing the limitation of the franchise in revenue bond elections in the *Cipriano* case, the United States Supreme Court itself emphasized the significance of this difference between revenue and general obligation bonds. In reaching the conclusion that the benefits and burdens of a revenue bond issue fall indiscriminately on both property owners and non-property owners alike, the Court emphasized that this conclusion was reached because, *inter-alia,* of the fundamental characteristics of revenue bonds. The language of the Court at page 651 is as follows:

> The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue. Property owners, like non-property owners, use the utilities and pay the rates; however, the impact on them is unconnected to their status as property taxpayers.

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By using this approach to demonstrate the irrationality of the state's determination that property taxpayers are more greatly affected by the issuance of revenue bonds than are non-property taxpayers, the United States Supreme Court distinguished bonds "financed" by property tax revenues from the effect of its holding. In making this distinction the Court indirectly, yet clearly, sustained the viability of the property taxpayer requirement in general obligation bond elections; and, therefore, it must be said that if the *Cipriano* decision concerns general obligation bond elections at all, it tends to enforce rather than deny the validity of the property taxpayer requirement in such elections.

In *Cipriano,* the United States Supreme Court alluded to the *Kramer* case saying that in *Kramer* it had stated that "the Court must determine whether the exclusions are necessary to promote a compelling state interest" in determining the constitutionality of a state statute which grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others. As a guideline or test to be used in determining whether or not the compelling state interest exists, the Court explained that an examination must be made as to whether or not those otherwise qualified voters who are excluded are "in fact substantially less interested or affected than those the statute includes." In determining the unconstitutionality of the property taxpayer requirement in revenue bond elections the Court noted that the exclusion of non-property taxpayers could not withstand the scrutiny of this examination, but to

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make this determination the Court did, as already mentioned, distinguish general obligation bonds. In effect, through its reasoning in the *Cipriano* case, the United States Supreme Court seems to have answered the very question presented in the case at hand.

While it may be conceded that the benefits reaped from the issuance of general obligation school bonds fall indiscriminately upon all residents of the community, both property taxpayers and non-property taxpayers alike, legally the burden falls *entirely* upon those taxpayers who will provide the funds for the payment of the principal of and the interest on the bonds. While non-property tax-payers may have a subjective "interest" in the issuance of general obligation bonds, it must be said that because they have no part in the payment of principal and interest on these bonds they are "substantially less interested or affected" than the property taxpayers who legally carry the entire burden of repayment of the bond issue together with interest thereon.

When a public project is financed with revenue bonds, such as the utility system with which the Court was concerned in *Cipriano*, all residents of the community are burdened and benefited irrespective of their ownership of property. As the Court mentioned in *Cipriano*, the burden might be in the form of increased rates if the bonds are voted and the benefit might be in the form of an addition to the funds of the general coffers of the city if the utility system should generate a profit after the payment of debt service on the bonds and other ex-

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penses of operation. Further benefit could accrue to all because of better utility service resulting from the expenditure of the bond proceeds. But what the Court was not faced with in *Cipriano,* but which does exist in this appeal, is the overwhelming burden placed upon property taxpayers by Utah law if the bonds are issued, compared with the fact that the law places no comparable burden upon non-property taxpayers. While both property taxpayers and non-property taxpayers can benefit from new public projects financed with general obligation bonds, it is the property taxpayers solely who are legally required to pay the costs of financing those projects.

Though the Plaintiff-Respondent argues that she too will in some minimal degree share in payment of the costs of debt service on the bonds because of the fact that she pays other taxes (such as sales taxes) to the state, and the Legislature deposits some of these taxes in the state school fund and ultimately these are distributed to school districts, nevertheless the Legislature ordering the collection and distribution of these taxes is one composed of representatives elected by all qualified voters, both property taxpayers and non-property taxpayers alike. It cannot, therefore, be said that by voting for the issuance of general obligation school bonds, the property taxpayers in the school district have imposed a burden on persons who pay no taxes on property within the school district. The burden on such non-taxpayers is not the burden of tax levies to repay the bond issue but is the burden of a general tax imposed by a body of representatives elected by all qualified voters.

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With full knowledge that the entire burden of a general obligation bond issue would fall solely upon property taxpayers, the framers of the Utah Constitution and the members of the Utah Legislature must be said to have had a constitutionally valid compelling interest for limiting the franchise to property taxpayers in general obligation bond elections. This is the objective of the state policy, and it is clear that the voting classification chosen is necessary to attain this objective.

Harper v. Virginia State Board of Elections, 383 U.S. 663, 16 L.Ed.2d 169, 86 S.Ct. 1079 (1966) is related to the case at hand because in its most general sense it concerns the payment of moneys as a prerequisite to voting. In *Harper* the United States Supreme Court concluded "that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."

What was before the Court in *Harper* was a poll tax, the enforcement of which took the form of disenfranchisement of those who did not pay it. The payment of the tax was unrelated to the matter being voted upon at the election. While the money to be paid in *Harper* was in the nature of a fee, the property taxpayer requirement in a general obligation bond election exists for the purpose of limiting the vote to those electors who will remain legally liable to provide the funds for the payment of the bonds. This certainly could not be considered a fee paid for voting. The payment of taxes is to be made

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irrespective of whether or not an election is pending. The Court in *Harper* emphasized that "[t]o introduce wealth or payment of a fee as measure of a voter's qualification is to introduce a capricious or irrelevant factor." This was the situation in *Harper*. But when a case does arise, like *Cipriano,* in which the precondition to voting is a relevant factor to the classification, in which the precondition is not at all capricious, the *Harper* ruling would not apply to it. This can be seen in the language of the *Cipriano* decision. An examination of that decision indicates that nowhere does the Court speak in the sweeping language of *Harper* about the payment of moneys as a prerequisite to voting being conclusively a violation of the equal protection clause. To the contrary the Court initially recognized the inapplicability of such an approach and as heretofore pointed out in this brief assumed arguendo that in some circumstances a state might limit the franchise to "specially interested" qualified voters. Assuming then, that such a limitation could be made, the Court explained that whether or not equal protection was denied those excluded from voting depended upon whether or not they were substantially less interested or affected than those included. It must be said, therefore, that in a case such as *Cipriano,* or the case before this Court, the broad language of *Harper* is inapplicable. What is applicable is the test of whether or not those excluded from voting were substantially less interested or affected than those included, and the result of that test, as already discussed, must be a determination that those excluded were indeed less interested or affected.

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Since the date of the *Cipriano* decision, there have been several decisions rendered by both federal and state courts on the applicability of the opinions of the Supreme Court of the United States in *Kramer* and *Cipriano* to the constitutionality of property taxpayer qualifications. At this writing, all of such decisions have not been officially reported and by stipulation by counsel concurrently with the filing of this brief there have been filed with the Court copies of the opinions cited in this brief as to which official citations are not yet available so that the Court might examine the texts of those opinions.

There is presently pending in the United States Supreme Court the case of *City of Phoenix, Arizona, et al v. Emily Kolodziejski,* No. 1066, October Term 1969, argued orally on March 31, 1970, and which is on appeal from a decision of the United States District Court for the District of Arizona, rendered on December 17, 1969, ...F. Supp. .... (1969). In the *Phoenix* case, a three judge federal court enjoined the issuance of certain general obligation and revenue bonds voted at an election held in the City of Phoenix, Arizona, on June 10, 1969, at which only real property taxpayers were permitted to participate, on the ground that such election was held and conducted in violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. The federal court treated the decision of the United States Supreme Court in *Cipriano* as controlling as to both general obligation and revenue bonds and simply stated that it could find "no evidence which would justify

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a distinction between revenue bonds and general obligation bonds."

The *Phoenix* case was submitted to the United States Supreme Court by both parties on the theory that Arizona law does not contain an election contest provision of the nature referred to and relied upon in the opinion handed down in the *Cipriano* case, which as will be demonstrated in Point II of this brief is a significant difference from the situation presented in this appeal.

In *Stewart et al v. The Parish School Board of the Parish of St. Charles et al,* Civil No. 69-2818, U.S. District Court, Eastern District of Louisiana, New Orleans Division, a three judge federal district court rendered a decision on February 25, 1970, ... F. Supp. .... (1970), holding that the statutes and Constitution of the State of Louisiana which limit the right to vote at general obligation bond elections to taxpayers to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The *Stewart* decision involved a suit filed prior to the expiration of the 60-day peremption period with respect to the challenging of bond elections provided under Louisiana law and the court in that case applied its decision as to other bond elections prospectively from the date of its opinion. Notice of the appeal of the *Stewart* case to the United States Supreme Court has been filed by the defendant, Parish School Board.

On the other hand, there have been four decisions in state courts decided since the *Cipriano* decision which

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have sustained property taxpayer qualifications as applied to general obligation bond elections.

In *Handy v. Parish School Board of the Parish of Acadia,* Civil No. 3042, Court of Appeal, Third Circuit, State of Louisiana, a three Judge court of appeal rendered a decision on April 30, 1970, holding that the provisions of the Louisiana constitution and statutes which restrict the right to vote in general obligation bond elections to property taxpayers does not violate the Equal Protection clause of the Fourteenth Amendment to the Federal Constitution. In distinguishing the *Phoenix* case and disagreeing with the conclusions reached in the *Stewart* case, the court held that the owners of property who by law are required to pay the indebtedness have a "primary interest," as opposed to a "remote" or "indirect" interest in the outcome of an election and that there exists a "compelling state interest" which justifies such constitutional and statutory provisions.

In *Muench v. Paine et al,* 463 P.2d 939 (Idaho 1970), the Supreme Court of the State of Idaho denied a writ of prohibition seeking to prevent the issuance of certain school bonds and held in a well-reasoned opinion that the *Kramer* and *Cipriano* opinions did not determine the question of the application of the constitutional doctrine set forth in those cases to general obligation bonds. The Idaho Supreme Court then further held that because of the differences between bonds payable from the revenues of a project and those payable from property taxes which are secured by a lien on the property involved, the non-property taxpayers do not have such a real and substan-

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tial interest in the outcome of the general obligation bond election as property taxpayers have and therefore that the non-property owners as a class are substantially less affected by the outcome of a general obligation bond election than are property owners.

In addition to the *Muench* and *Handy* cases, the Oklahoma Supreme Court in two cases, *Settle v. Board of County Commissioners of the County of Muskogee,* 462 P.2d 646 (Okla. 1970) and *Settle v. The City of Muskogee,* 462 P.2d 642 (Okla. 1970), distinguished the decisions of *Kramer* and *Cipriano* and held that the taxpayer requirement of Section 27 of Article 10 of the Oklahoma Constitution properly limits the right to vote to those primarily interested and that the extent to which a non-property taxpayer is interested or affected is indirect and remote.

It is submitted that the rationale adopted by the Louisiana Court in the *Handy* case and by the Oklahoma and Idaho courts holding that the Constitution of the United States does not invalidate state constitutional and statutory provisions which limit the right to vote at general obligation bond elections to taxpayers should be adopted by this Court in this appeal.

It must be recognized, however, that as interpreted by this Court in *Fjeldsted v. Ogden City,* 83 Utah 278, 28 P.2d 144 (1933) and in *Wadsworth v. Santaquin,* 83 Utah 321, 28 P.2d 161 (1933), Article XIV, Section 3, of the Utah Constitution requires an election upon the issuance of revenue bonds where the revenues of an exist-

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ing public utility are to be pledged to the repayment of the bonds and as to which revenue bond election only property taxpayers may vote. The *Cipriano* decision would appear to apply to the voting of revenue bonds under such circumstances in Utah, but it is submitted that the judgment of the court below in holding that the taxpayer election requirement is void and unconstitutional as applied to all bond elections, not just revenue bond elections, is inappropriate and should be reversed by this Court on this appeal.

POINT II

THE COURT BELOW ERRED IN ENJOINING THE ISSUANCE OF THE BONDS AS THE PLAINTIFF-RESPONDENT IS BARRED FROM ATTACKING THE VALIDITY OF THE ELECTION BY THE PROVISIONS OF SECTION 11-14-12, UTAH CODE ANNOTATED, 1953.

The court below improperly assumed that the decision of the United States Supreme Court in *Cipriano* governed the disposition of the allegation of the Plaintiff-Respondent which sought to declare the provisions of the Utah Constitution and statutes to be invalid as limiting the right to vote at a general obligation bond election to taxpayers. The United States Supreme Court in the *Cipriano* decision stated that as to revenue bonds it would apply its decision only where under state law the time for challenging the election result had not then expired, or in cases brought within the time specified by state law for challenging the election and which were

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not yet final on June 16, 1969. The court below, treating a general obligation bond election as being subject to the prospective language of the *Cipriano* opinion, thus erroneously held that inasmuch as on June 16, 1969, the 40-day election contest period prescribed in Section 11-14-12, Utah Code Annotated, 1953, had not expired, the decision of the lower court dealing with the basic constitutional question of the validity of taxpayer qualifications at general obligation bond elections would apply to the bond election of May 27, 1969. It is submitted that this is erroneous, that as demonstrated in Point I of this brief, the United States Supreme Court has not decided the constitutional question with respect to general obligation bonds and that it was improper for the court below to disregard the fact that the 40-day election contest period of Section 11-14-12 had expired on July 14, 1969, months before the filing of this action on December 4, 1969, by the Plaintiff-Respondent.

Section 11-14-12 (3) Utah Code Annotated, 1953, contains the following language:

> "No contest shall be maintained and no bond election shall be set aside or held invalid unless a complaint is filed within the period prescribed in this section."

It is the position of the Defendants-Appellants that it was the intention of the United States Supreme Court in the *Cipriano* case to deal only with revenue bonds and that the language in the *Cipriano* opinion with respect to the passage of the state contest period on June 16, 1969, cannot logically be applied to contests with respect

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to general obligation bond elections. It is true that litigation is now pending in the United States Supreme Court on the question of the applicability of the constitutional doctrine of the *Kramer* and *Cipriano* decisions to general obligation bond elections, but it is nevertheless submitted that in such a decision if the United States Supreme Court applies such doctrine to general obligation bonds it will undoubtedly establish a new prospective date for the application of its opinion to general obligation bonds. Inasmuch as the *Phoenix* case does not involve a state election contest provision, such decision as will be demonstrated later on will not change the fact that as to the May 27, 1969 bond election the state contest period has expired barring Plaintiff-Respondent from seeking to enjoin the issuance of the bonds.

Litigation arising with respect to the property taxpayer requirement in general obligation bond elections held in the State of Louisiana both before and after the decision in the *Cipriano* case should be considered by this Court in determining whether the court below was correct in enjoining the issuance and sale of the bonds. It is urged that on the basis of the following discussed cases this Court should hold that the 40-day election contest period provided by Section 11-14-12 be applied to this litigation and that it hold that Plaintiff-Respondent is barred from bringing an action to enjoin the issuance of the bonds.

In the case of *Andrieux v. East Baton Rouge Parish School Board,* 227 So.2d 370 (La. 1969), suit was brought subsequent to the passage of the 60-day contest period

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provided in Section 14 (n) of Article 14 of the Louisiana Constitution questioning the validity of general obligation bonds voted at a taxpayer election held prior to June 16, 1969. The Louisiana Supreme Court, emphasizing that in *Cipriano* the United States Supreme Court recognized that state prescriptive or peremptive provisions were valid as a bar to such attacks, held that even though the relief sought was for an alleged deprivation of federal constitutional rights, the suit could not be maintained if it was filed subsequent to the 60-day period following promulgation of the election results. Citing the *Andrieux* case, the Louisiana Supreme Court in *Strick Chambers v. Road District No.* 505 *of Tangipahoa Parish, Louisiana,* 229 So.2d 698 (La. 1969) sustained the dismissal by a trial court of a suit challenging the legality of a road district general obligation bond and tax election held on June 7, 1969, on *Cipriano* grounds because the litigation was not filed until after the passage of the 60-day peremption period. An application for a writ of certiorari was filed in the United States Supreme Court, which application was denied by the United States Supreme Court on March 2, 1970. It is significant to note that on February 24, 1970, the Supreme Court of the United States noted probable jurisdiction in the *Phoenix* case dealing with the application of *Cipriano* to general obligation bonds where no defense was made under such a state contest period.

In addition to the decision of the Louisiana Supreme Court mentioned above, in *Hobbs v. Police Jury of Morehouse Parish,* Civil Action No. 14836, United States Dis-

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trict Court for the Western District of Louisiana, Shreveport Division, ... F. Supp. ...., (1970), a three judge federal district court on January 3, 1970, dismissed an action contesting a Louisiana general obligation bond election on the ground that only property taxpayers were permitted to vote, because a proper party plaintiff had not brought the action within the 60-day period subsequent to the date of the promulgation of the election result as required by Louisiana law. In the *Hobbs* case an improper party plaintiff (a non-taxpayer who was also not registered to vote) originally filed the suit within te 60-day period, and after te 60-day period had run the court denied an attempt to substitute a plaintiff who would have originally had standing to sue. In the decision the federal district court characterized the Louisiana 60-day period as peremptive, emphasizing that the lapse of the prescribed period operates as a complete extinguishment of the right to bring the action.

The fundamental notion involved here, of permitting a state statute of limitations to apply to those rights of a complainant acquired from federal law is one recognized not only in the decision just mentioned by also one which has been clearly recognized in past decisions of the United States Supreme Court. In *O'Sullivan v. Felix,* 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914), a plaintiff who was molested while attempting to vote at a general election brought a civil action which arose under a federal civil rights act. Faced with an attempt by the defendants to dismiss the action as one against which the state prescriptive period had run, the Supreme Court made clear

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that because "the action depends upon or arises under the laws of the United States does not preclude the application of the statute of limitations of the state . . . " and that it was "therefore not necessary to pursue in detail the argument of plaintiff based on the postulate that 'the Sovereign alone can limit the right of action . . .' " (at 233 U.S. 322) Similarly, see *Baker v. F & F Investment* (C.C.A. 7, 1970) 420 F.2d 1191, wherein the federal appellate court, citing *O'Sullivan,* found that an Illinois statute of limitations could apply to rights acquired from a federal act, the Court stating at page 1194 that "Limitations on the period within which a right may be redressed do not conflict with the existence of that right."

This same approach of applying a state prescriptive period against federal rights has also been followed when those rights were acquired directly from the Federal Constitution and not merely from an act of Congress. In *Benedict v. City of New York* (C.C.A. 2, 1917) 247 Fed. 758, aff'd 250 U.S. 321, 39 S.Ct. 476, 63 L.Ed. 1005 (1919), the complaintant was the holder of certain unpaid and overdue special assessment certificates of Long Island City, New York, and was suing the City of New York as the successor of Long Island City. The complainant asserted rights acquired directly from the Federal Constitution, arguing that he had been deprived of his property without due process of law, and that the obligation of the contract under which the certificates sued upon were issued had been impaired by certain legislation of the State of New York. The plaintiff argued that a trust in his favor had, therefore, been violated and that an

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accounting and liability should be due him for its breach. It appeared from the facts that the City Treasurer had foreclosed upon and then sold certain land securing the assessments for an amount far less than the assessments themselves and also that the New York Legislature, subsequent to the time of the issuance of the certificates, provided that lands securing the certificates could be purchased with certificates at par value. For purposes of reaching the defendant's statute of limitations argument, the Court of Appeals assumed the validity of the complaint but found that it had been filed 17 years after the cause of action had accrued. Since both the state's six and its ten year statutes of limitations were violated, the Court found it unnecessary to choose which of the two was applicable to the facts, and instead merely determined that the plaintiff had delayed too long in bringing the suit both under a statute of limitations theory and under the equitable doctrine of laches. Citing *O'Sullivan,* the Appellate Court stated at page 767:

> In the absence of any statute of limitations enacted by Congress, the federal courts of equity usually follow the state statutes; and they do this even in actions which depend upon or arise under the laws of the United States . . . The complainant is here asserting an equitable right, and it is true that as a general rule the equity jurisdiction of the United States is not affected by state laws. That principle can not be invoked however to deprive a federal equity court of the power to refuse relief to a suitor whose right is barred by a state statute of limitations. Such statutes are not binding upon federal courts in suits in equity, yet those courts may and generally do apply the statutes upon principles of analogy; and such

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statutes have been applied by these courts to claims against trustees.

The United States Supreme Court, in an opinion by Mr. Justice Brandeis, affirmed the court below reemphasizing the significance of the state's statute of limitations in guiding a federal court of equity faced with an action on a stale claim.

On the basis of the foregoing cases, especially those decided since the *Cipriano* case, it is submitted that the proper approach for this Court to take is to hold that the Legislature of the State of Utah has concluded that there is a compelling interest in the state to see that at some time in the electoral process the election results become fixed and incontestable. Purchasers of bonds must have this assurance, and a failure of the state judiciary to recognize the prescriptive nature of the contest period would affect the market for municipal securities issued by Utah political subdivisions. Therefore, it is requested that this court adopt the position taken by the Louisiana Supreme Court and hold that the plaintiff had no right after July 14, 1969, to sue to enjoin the issuance of the bonds. This result is particularly applicable and should be followed by this Court in view of the fact that the basic constitutional question has not been heretofore decided by the United States Supreme Court. When the Phoenix case is decided by the Supreme Court there is no reason now available to believe that the court would in any way hold that its decision would apply to general obligation bond elections conducted subsequent to June 16, 1969. If this Court should affirm the decision of the trial

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court in declaring that the constitutional and statutory provisions limiting the right to vote at bond elections to taxpayers does apply to general obligation bond elections, nevertheless it is submitted that this Court should in part reverse the judgment of the trial court and hold that since the action enjoining the issuance of the bonds was not properly and timely brought that the bonds in question may nevertheless be issued by the Defendants-Appellants. There is little to distinguish this case from the situation in the *Chambers* case, certiorari on which was denied a week subsequent to the noting of jurisdiction by the United States Supreme Court in the *Phoenix* case, and it is urged that this court adopt as to Utah bond elections the theory approved by the Louisiana Supreme Court as to Louisiana bond elections and which is fully supported by decisions of the United States Supreme Court.

POINT III

THE COURT BELOW WAS CORRECT IN HOLDING THAT TO THE EXTENT ARTICLE XIV, SECTION 3, OF THE UTAH CONSTITUTION AND SECTIONS 11-14-2 AND 11-14-5, UTAH CODE ANNOTATED, 1953, AS AMENDED, VIOLATE THE UNITED STATES CONSTITUTION BY REQUIRING A TAXPAYER VOTE AT BOND ELECTIONS, SUCH PROVISIONS ARE SEVERABLE AND DEFENDANTS-APPELLANTS ARE AUTHORIZED TO HOLD A GENERAL OBLIGATION BOND ELECTION AS LONG AS THE PROPOSITION IS NOT LIMITED TO TAXPAYERS.

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If subsequent to the decision in this case the United States Supreme Court should render a decision in the Phoenix case holding that it is not proper to limit the right to vote at general obligation bond elections to taxpayers only or if this Court should affirm the decision of the court below invalidating such provisions of Utah law then it is respectfully requested by Defendants-Appellants that this Court affirm the holding of the court below that such provisions are severable and that bond elections at which all qualified electors are permitted to vote may be conducted. In this connection it is desired to call this Court's attention to the provisions of Senate Bill No. 3 of the 1970 Session of the Utah Legislature, Chapter 4, Laws of Utah, 1970, wherein the Legislature of the State of Utah set forth as its intention and policy that if the provisions of the Utah Constitution which limit the right to vote at a bond election to the qualified electors of the municipality as shall have paid a property tax therein in the year preceding the election are removed by constitutional amendment or are held to be in violation of the Constitution of the United States by this Court or by the Supreme Court of the United States then it is the express intention of the Legislature that propositions for the issuance of bonds under the Utah Municipal Bond Act shall be submitted at an election at which all qualified electors may vote.

The law with respect to the maximum rate of interest which school bonds could bear in effect at the time the Defendants-Appellants adopted the resolution submitting

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the bond proposition at the May 27, 1969, election was 6% per annum. Recognizing the current high interest rates obtaining in the municipal bond market, the Utah Legislature has raised the maximum rate of interest which school bonds may bear to 8%. See Senate Bill No. 3, 1970 Session of the Utah Legislature, Chapter 4, Laws of Utah, 1970. In view of the current bond market it is therefore entirely possible that if this Court should hold that the court below was in error when it enjoined the issuance of the bonds voted at the May 27, 1969, election, nevertheless it would be impossible to sell those bonds subject to a 6% voted interest rate. If this were to be the case, then it would be necessary for the Defendants-Appellants to submit a new proposition to the voters of the school district at a higher maximum interest rate. If a decision is reached in the *Phoenix* case, or in this case, or both, which should result in affirming the constitutional principle enunciated by the trial court below that the provisions limiting the right to vote to taxpayers are unconstitutional, then the Defendants-Appellants request that this Court provide guidance to Utah political subdivisions by affirming the holding of the trial court that such provisions are severable and that a bond election may be legally held where the proposition is submitted to all qualified electors, in accordance with the policies established by the Legislature of the State of Utah in Senate Bill No. 3, *supra*. There are many other political subdivisions in the State of Utah which face the same problems of uncertainty which arise as to the resubmission of the bonds in this litigation. The Legislature has attempted to do all that

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it can constitutionally do toward providing the necessary enabling legislation prior to a resolution of the constitutional issues raised by the *Cipriano* case as far as general obligation bond elections are concerned prior to the actual decisions by this Court in this case and by the United States Supreme Court in the pending *Phoenix* case. It is therefore respectfully requested that this Court provide guidelines to this school district and to other political subdivisions in the state who must undertake bonding programs in order that some indication may be had as to whether or not, absent a constitutional amendment, authority exists for the submission of bond propositions to all qualified electors of the political subdivision involved as to both general obligation and revenue bond propositions if that is ultimately decided by the courts of this land to be constitutionally required.

Defendants-Appellants submit that the decision of the Court below on the question of severability is correct and that there is ample authority for a decision by this Court that the offending parts of the Constitution have been erased instanter from the Utah Constitution and that authority exists to hold bond elections and to permit all qualified electors to vote without the necessity of a constitutional amendment removing the offending parts or further enabling legislation other than contained in Senate Bill No. 3, *supra*. Similar situations have arisen in the past regarding the abolition of state constitutional provisions required by United States constitutional amendments or interpretations of the courts. In *People v. Holmes*, 173 N.E. 145 (Ill. 1930), the Nineteenth

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Amendment to the Constitution permitting women the right to vote was held by its own force to supersede all inconsistent state and federal provisions without questioning the right of elections to be conducted permitting all qualified voters the right to vote. The Mississippi Supreme Court in *Ratcliff v. Board of Supervisors,* 193 So.2d 137 (Miss. 1966), held that the judicial invalidation of the Poll Tax by the United States Supreme Court as a qualification of voting had only the effect of writing out of the state constitution such requirement.

In order to prevent a further delay in the financing of needed public facilities, it is requested that this Court answer this question and affirm the holding of the court below that valid bond elections may now be conducted in the State of Utah at which all qualified electors may vote if by action of this Court or by action of the Supreme Court of the United States provisions in the Utah Constitution and statutes limiting the right to vote to taxpayers are declared to be unconstitutional.

POINT IV

ANY DECISION OF THIS COURT WITH RESPECT TO THE VALIDITY OF THE BONDS SHOULD BE MADE PROSPECTIVE ONLY.

In the *Cipriano* case as noted in Point II, *supra*, the United States Supreme Court recognized the necessity of making its decision with respect to revenue bonds prospective so as not to affect the validity of outstand-

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ing bonds. Likewise, if this Court should find that the provisions of the Constitution and laws of the State of Utah violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, then in order to protect the credit of the various political subdivisions of the State of Utah and to prevent the casting of doubt on the validity of outstanding bonds issued by those political subdivisions it is respectfully requested that this Court, following the *Cipriano* decision and the court below, apply its decision in this case prospectively only. As in the *Cipriano* opinion the technique of making decisions prospective only has been adopted in recent years by various courts including this Court in *Carter v. Beaver County Service Area No. One,* 16 Utah 2d 280, 399 P.2d 440 (1965). A leading case decided by the United States Supreme Court is *Great Northern Railway Co. v. Sunburst Oil & Refining Co.* 287 U.S. 358 (1932) commented on in *Schaefer,* The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U.L. Rev. 631 (1967). This decision has been followed in many areas in addition to the *Cipriano* case, notably in *Linkletter v. Walker,* 381 U.S. 618 (1965). A state decision discussing this problem is the Washington Supreme Court decision in *State v. Martin,* 284 P.2d 833 (Wash. 1963) where the court overruled one of its prior decisions with respect to constitutional doctrine but provided that the opinion would be applied prospectively only with respect to outstanding bonds which had been issued under the prior construction of the constitution.

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The court below held that its decision would apply only to bond elections where the contest period provided by Utah law had not expired on June 16, 1969. As has been argued in this brief, this Court should hold that the *Cipriano* date does not govern the validity of general obligation bond elections and therefore this Court should feel free to apply a new prospective date to the validity of bond elections. If the Supreme Court of the United States should decide this question by affirming the decision of the trial court in the *Phoenix* case and fix a new prospective date, that date would of course govern the validity of bonds and of bond elections in Utah. However, in absence of such a decision, it is requested that this Court make clear that it is the date of its decision rather than June 16, 1969, which governs the validity of general obligation bond elections and that its decision will be applied prospectively only. As to bonds which have been issued and are in the hands of holders, it is requested that this Court specifically state that any opinion or decision in this case affirming the trial court will not affect such bonds which have been actually issued and delivered prior to the date of such opinion.

CONCLUSION

Defendants-Appellants are faced with the need of obtaining the financing of additional school facilities through the issuance of school building bonds in order to provide the capital funds to pay the cost of such construction. It is requested that this Court reverse

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the decision of the court below to the extent that it enjoins the issuance of the bonds by the Defendants-Appellants voted at the May 27, 1969, election. As has been argued in this brief, it is submitted that irrespective of the constitutional doctrines of the *Cipriano, Kramer* and *Harper* decisions and whatever may be adopted by the United States Supreme Court in the pending *Phoenix* case, the passage of the 40-day election contest period provided by Utah law without challenge to the validity of the bond election prevents any inquiry at this time into the validity of the bonds voted at the May 27, 1969, election and that as to such election there can be no constitutional question raised under state law. It is requested that this Court hold that any invalid provisions of the statutes and Constitution are severable and in such event that if necessary in order to sell the bonds voted at the May 27, 1969, election, a new election may be conducted in the Washington County School District at which all qualified electors may vote.

Respectfully submitted,

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