

No. 21-30335

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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Ariyan, Incorporated, *doing business as* Discount Corner; M.  
Langenstein & Sons, Incorporated; Prytania Liquor  
Store, Incorporated; West Prytania, Incorporated, *doing  
business as* Prytania Mail Service / Barbara West; British  
Antiques, L.L.C., Bennet Powell; Arlen Brunson;  
Kristina Dupre; Brett Dupre; Gail Marie Hatcher;  
Betty Price; Et Al.,

Plaintiffs – Appellants,

v.

Sewerage & Water Board of New Orleans; Ghassan  
Korban, *In his Capacity as Executive Director of Sewerage & Water  
Board of New Orleans,*

Defendants – Appellees.

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**APPELLANTS' PETITION FOR REHEARING EN BANC**

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## CERTIFICATE OF INTERESTED PERSONS

No. 21-30335

*Ariyan, Inc. et al. v. Sewerage & Water Board of New Orleans, et al.*

USDC No. 2:21-CV-534 (E.D. La.)

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

### Plaintiffs-Appellants:

Ariyan, Inc.

*Doing business as* Discount Corner

M. Langenstein & Sons, Inc.

Prytania Liquor Store, Inc.

West Prytania Inc.,

*Doing business as* Prytania Mail Service/Barbara West

British Antiques, L.L.C./Bennet Powell

Fine Arts Management, L.L.C.

*Doing business as* Prytania Theatre

Superior Seafood & Oyster Bar, L.L.C.

The Magic Box, Ltd.

*Doing business as* Magic Box Toys

Mark Defelice, Savare Defelice, Jr., Esteff Defelice, and Virginia Defelice

*On behalf of the entity f/k/a Pascal Manale Restaurant*

Arlen Brunson

Kristina Dupre

Brett Dupre

Gail Marie Hatcher

Betty Price

Bojan Ristic

Patsy Searcy

Helen Green

Theada Thompson

Kim Alvarez

Allan Basik

Jill Bossier

John Bossier, Jr.

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Estate of Louise Stewart

Cathleen Hightower

Ruth Hinson

Leon Hinson

Margaret Leche

Harry Leche

George Mouledoux

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Geraldine Baloney

Abbrica Callaghan

Burnell Cotlon

Eirinn Erny

Gregory Kozlowski

Larry Hameen

Noella Hayes

Stephen Hogan

Fransisca Medina-Hogan

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Ronald Ruiz

Anne Lowenburg

Sarah A. Lowman

Barbara H. West

Nanette Colomb

Mary Kearney

Clary Kearney

Michael T. Gray

Mark Kurt

Anna Kurt

The American Insurance Company  
*As subrogee of Mark and Anna Kurt*

Virginia Carter Stevens Molony

Dat Dog Enterprises, LLC

Dat Dog Properties, LLC

Superior Bar & Grill, Inc.

The Fresh Market, Inc.

K&B Corporation

*Doing business as* Rite Aid Corporation

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Sewerage & Water Board of New Orleans

Ghassan Korban

*In his Capacity as Executive Director of Sewerage &  
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Respectfully submitted,

/s/ Randall A. Smith  
RANDALL A. SMITH

### FRAP 35(b)(1) STATEMENT

This Court should consider this case *en banc*. The panel concluded that it never violates the Fifth and Fourteenth Amendments for a local government to delay paying just compensation after it takes property, no matter how long the delay. Or even if the government outright refuses to pay. The panel affirmed the District Court’s dismissal for failure to state a claim, even though one of the plaintiffs alleged that the Sewerage Board not provided compensation for more than four years.<sup>1</sup> The panel held that federal courts are categorically barred from considering any claim that the government has unreasonably delayed complying with a state-court judgment ordering it to provide just compensation.

The panel decision conflicts with decisions of the U.S. Supreme Court. *See* Fed. R. App. P. 35(a). In *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 688 (1923), the Court held that “the requirement of just compensation is satisfied when the public faith and credit are pledged to a *reasonably prompt ascertainment and payment.*” (emphasis added). *See also Bragg v. Weaver*, 251 U.S. 57, 62 (1919) (“it is settled by the decisions of this court” that unless “adequate provision is made for the certain payment of the compensation *without unreasonable delay*” a taking

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<sup>1</sup> “Sewerage Board” refers collectively to Respondents Sewerage & Water Board of New Orleans and Ghassan Korban, in his official capacity as Executive Director of the Sewerage Board. “Petitioners” refers collectively to Ariyan, Inc. and the other Plaintiffs-Appellants.

“contravene[s] due process of law in the sense of the Fourteenth Amendment”). To maintain uniformity and compliance with the Supreme Court, the full court should consider whether an allegation that the government has “unreasonably delayed” providing compensation plausibly pleads a violation of the Fifth and Fourteenth Amendments.

The case also involves a related issue of exceptional importance. *See* Fed. R. App. P. 35(b). The self-executing nature of the right to just compensation (meaning that no waiver of sovereign immunity is needed for judicial enforcement of the right) distinguishes just compensation judgments from run-of-the-mill judgments against the government which are only justiciable because the government waived immunity.

In sum, a judgment for just compensation that is not paid without undue delay violates the Fifth and Fourteenth Amendments.

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## STATEMENT OF ISSUES

- I. Whether the Fifth Amendment requires just compensation at the time of the taking and without undue delay.
- II. Whether the self-executing nature of the Just Compensation Clause distinguishes such judgments from other judgments.

## STATEMENT OF PROCEEDINGS & FACTS

The Sewerage Board began a drainage and flood prevention project in uptown New Orleans. Before even starting the project however, the Sewerage Board recognized that its project would damage multiple properties. *See* Panel Op., ROA.61, ¶ 4. The Sewerage Board promised to compensate the owners for any damage it caused. As predicted, the project inflicted structural damage on multiple homes and businesses (including shifting porches, broken floors, cracked interior and exterior walls, broken and shifting fireplaces, leaking roofs, broken plumbing and sewer lines, cracked sidewalks, inoperable doors and windows, and loss of use and customers).

But when it came time to actually provide compensation, the Sewerage Board balked; it acknowledged little to no damage and frequently denied damage claims. As a result, over 70 property owners brought takings condemnation lawsuits in Louisiana state courts to compel the Sewerage Board to provide just compensation for takings under both the Louisiana and Federal Constitutions. *Id.* The Louisiana

state courts agreed with the owners and entered multi-million-dollar judgments against the Sewerage Board. The Louisiana appellate courts affirmed. *Id.*

The Sewerage Board, however, has never paid the ordered compensation, despite having the funds to do so. *Id.* ¶ 5. Nor has it explained why it is shirking its federal constitutional duty to compensate the owners. Although interest may be running on the judgments, one more unfulfilled promise to pay is of scant assurance to the property owners some of whom began suffering property damage in 2011.

After the Sewerage Board left the owners with just another empty promise, they brought a civil rights action in District Court, because their property was taken without just compensation. But instead of considering the merits of the property owner's takings claims (has the Sewerage Board denied, or unreasonably delayed providing just compensation for the property it has taken?), the District Court concluded that the lawsuit merely sought to enforce Louisiana court judgments. *Id.* ¶ 7. A panel of this Court affirmed, concluding that the owners lacked "private property" because Louisiana law prohibits judgment creditors from executing on judgments against the government, and there is no other mechanism under Louisiana law to compel the Sewerage Board to provide just compensation.<sup>2</sup>

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<sup>2</sup> The owner cannot enforce the judgments in state court because Article 12, Section 10(c) of the Louisiana Constitution prohibits it. *See* La. Const. art. 12, § 10(c) ("No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered.").

## ARGUMENT

### I. The Fifth Amendment Requires Compensation at the Time of the Taking, a Right That Federal Courts Are Empowered to Enforce

When the government takes property, it has a “categorical” constitutional obligation to provide just compensation. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (when government “physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner”) (internal quotation marks and citation omitted). The fundamental purpose of the Takings Clause is to “secure compensation.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536-37 (2005) (“As its text makes plain, the Takings Clause ... ‘is designed not to limit the governmental interference with property rights *per se*, but rather to *secure compensation* in the event of otherwise proper interference amounting to a taking.’”).

The duty to provide compensation for takings is “self-executing,” meaning that the government’s obligation to compensate is fixed when it takes property, and no further government action such as a waiver of sovereign immunity is needed for the owner to vindicate that right in court. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 315-16 (1987) (“We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation[.]”) (internal citation and quotations omitted). The panel decision, by

contrast, leaves property owners with no choice but to rely on the Sewerage Board's good will to (maybe) one day pay.

The self-executing nature of compensation means also that it must be provided concurrently with the taking (put another way, without "unreasonable delay"), and it is not enough to take property and hand the owner an IOU. *See Joslin*, 262 U.S. at 688 ("the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment"); *Bragg*, 251 U.S. at 62 (compensation must be provided "without unreasonable delay"); *see also United States v. 9.94 Acres of Land*, 51 F. Supp. 478, 483-84 (E.D. S.C. 1943) ("Just compensation in my opinion means exactly what it says, and it means that the owner himself is entitled to receive his compensation; not that his estate or his children or his grandchildren are to receive installment payments and perhaps inherit a law suit in the far future."); *McGibson v. Roane Cty. Ct.*, 121 S.E. 99, 103 (W. Va. 1924) ("[T]here must be provided some remedy to the owner whereby he may have compensation within a reasonable time and that he will receive it must be certain. He must not be put to risk or unreasonable delay.").

The obligation to provide compensation immediately upon a taking has a long legal pedigree, starting in 1215 with King John's promises to the barons at Runnymede. *See Magna Carta* art. 18 ("No constable or other bailiff of ours shall take anyone's grain or other chattels . . . without *immediately* paying for them in

money”) (emphasis added). The requirement to pay *then* take, or to take *and* pay continues to the present day. *See, e.g.*, Declaration of Taking Act (40 U.S.C. § 3114(b) (2022) (when property is taken by the “quick take” method, title only transfers to the government, and the right to compensation vests in the owner, after the government files the declaration “*and deposit[s] in the court, to the use of the persons entitled to the compensation, the amount of the estimated compensation stated in the declaration*”) (emphasis added); *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1, 4 (1984) (describing “straight takings” under 40 U.S.C. § 257, the Court noted that government only “takes” property and obtains title and possession *after* it “tenders payment to the private owner”). But in no case does the Constitution allow the government to take, and then retain the discretion to pay or not.

The Sewerage Board, however, told Petitioners that even though it took their properties years ago, it may get around to providing compensation when (and if) it feels like it. Although the Supreme Court has never elaborated on what constitutes unreasonable delay, a rule based on the “reasonableness” of the time between the taking and the payment of just compensation is not subject to the categorical no-liability-ever rule the panel adopted. The allegations in the complaint that the Sewerage Board did not immediately satisfy the judgment should have been enough to deny its motion to dismiss, because questions of “reasonableness” are not

questions of law or pleading sufficiency, but are factual matters specific to each case. The panel opinion, however, treated this as a purely legal question, concluding that Louisiana law prohibits anyone from compelling the Sewerage Board to appropriate and pay money, even what that money represents just compensation required by the Fifth and Fourteenth Amendments. Thus, the panel concluded, there's nothing a court—even a federal court whose core mission is to protect federal civil rights—can do about it, and that a delay compensating is *never* actionable, no matter how long the delay or denial.<sup>3</sup> In short, because Louisiana law treats judgments against the government as non-enforceable, so must the Fifth Amendment.

Intuitively, however, this case presents a justiciable federal civil rights problem that the federal courts are empowered to address and remedy: the Sewerage Board has undeniably taken private property, and just as undeniably has declined to concurrently provide the just compensation that the U.S. Constitution requires. Contrary to the panel's approach, the Supreme Court has very recently emphasized that compensation is due at the time of the taking. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) (“We have long recognized that property owners may bring Fifth

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<sup>3</sup> See Panel op. at 9 (Petitioners “have succeeded in winning a money judgment. Without any judicial means to recover, they are compelled ‘to rely exclusively upon the generosity of the judgment debtor.’ But the Plaintiffs’ case before the district court turned entirely on a purported property interest not recognized in Fifth Amendment jurisprudence.”) (internal citation omitted).

Amendment claims against the Federal Government as soon as their property has been taken.”) (internal citations omitted). The Court has also reminded that the term “private property” in the Fifth Amendment is not subject to blanket, categorical rules.<sup>4</sup> Moreover, the panel’s rationale imposes a bitter irony: the state court concluding that the Sewerage Board took property, and the court having issued a judgment for just compensation has put the owners in a *worse* position than if they had never obtained these rulings. There’s little doubt that had the owners brought this lawsuit in the District Court and achieved the same outcome as they could today, that court would not let the Sewerage Board ignore a *federal* judgment, because the Supremacy Clause and the federal courts’ enforcement power under the Fourteenth Amendment and civil rights statutes could not be cast aside.<sup>5</sup> The Supreme Court has also recently counseled that courts should avoid overly technical, crabbed readings of the Just Compensation Clause, especially when state and local

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<sup>4</sup> “As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law. . . . [But] [u]nder the Constitution, property rights ‘cannot be so easily manipulated.’ Our decisions consistently reflect this intuitive approach.” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2075-76 (2021) (internal citation omitted).

<sup>5</sup> The owners here were required to bring their federal claims in Louisiana state courts. At the time of filing, the Supreme Court had not yet decided in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) that property owners are entitled to bring takings claims in federal court, without first asking for state court review.

governments are the ones flaunting federal constitutional obligations.<sup>6</sup> The panel decision thus harkens a return to the time when federal courts washed their hands of the ability to enforce the self-executing obligation to provide compensation, and played no role in holding local governments accountable for violating federal rights.

Before the foundational shift in constitutional thinking in the aftermath of the Civil War, the Fifth Amendment's condition on government's exercise of power (property may be taken, but compensation must be first provided) was viewed only as a limitation on the *federal* government. *See Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833). It was solely a state court problem if a state or local government took property and did not provide compensation; the Court held that the Bill of Rights only limited the federal government, and therefore, property owners could not rely on the federal courts to do anything when a state or local government violated their rights. The panel similarly concluded that because this case involves a local government, federal courts are simply powerless in the face of a refusal to meet its fundamental obligations: federal courts don't enforce state court judgments, even if the refusal to comply with the judgment may trigger a violation of the U.S. Constitution. Respect for state procedures means that all a federal court can do is sympathize with the property owners' plight and point them

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<sup>6</sup> *See, e.g., Pakdel v. City & Cty. of San Francisco*, 141 S. Ct. 2226, 2330 (2021); 141 S. Ct. at 2230 (takings cases should be consistent "with the ordinary operation of civil-rights suits"). *See also* 42 U.S.C. § 1983.



in the direction of the state judgment-enforcement procedures (even while acknowledging that the Sewerage Board cannot be compelled to satisfy a state court judgment under these very same procedures. Slip op. at 9 (“Like the district court, we understand the Plaintiffs’ frustration.”). *See Newman Marchive P’ship, Inc. v. City of Shreveport*, 979 So. 2d 1262, 1265-71 (La. 2008) (mandamus is not available to compel a local government to pay a judgment).

The Fourteenth Amendment (and the civil rights statutes adopted to give it teeth), however, mean that when someone’s federal rights are violated by a local government, federal courts are not forced to sit idly by and offer nothing but sympathy. They can do more, because *Barron* and similar cases are no longer controlling. Indeed, a local government’s obligation to provide compensation when it takes property is so essential, it was the very first right in the Bill of Rights that the Supreme Court applied to state and local governments under the Fourteenth Amendment’s Due Process Clause. *See Chicago, B.&Q. R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (“In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States[.]”).

The panel decision leaves it entirely up to the Sewerage Board when, or if, to fulfill its federal constitutional obligation. Review by the full court is needed to reaffirm the self-executing nature of the compensation mandate, and to reclaim the power of the federal courts to address allegations of federal civil rights violations.

## **II. Compensation Judgments Are Different From Other Judgments**

Contrary to the panel’s conclusion, “private property” referred to in the Fifth Amendment includes a judgment for just compensation. The property owners here are not simply judgment creditors asking a federal court to enhance their collection efforts. Rather, they are seeking to vindicate their right to timely just compensation, a right and a remedy expressed in the text of the Fifth Amendment. *First English*, 482 U.S. at 316 (“[T]he compensation remedy is required by the Constitution.”). The panel concluded this made no difference because, under *Folsom v. City of New Orleans*, 109 U.S. 285 (1883), a just compensation judgment is due the same respect as a plain-old tort or contract judgment against the government (none):

But even if the underlying judgments were based on violations of federal rights, we are not sure why that distinction would make a difference. ... But since *Folsom* said there is no property right to timely payment on a judgment, there must be something special about a judgment based on federal constitutional rights that confers this additional property interest for the Plaintiffs’ argument to succeed. Plaintiffs do not explain why the legal right underlying a judgment would create this additional property right for some judgments and not others, and it remains unclear to us. It seems that a judgment compensating someone for a breach of contract should confer no less a property interest than a judgment compensating someone for the police’s excessive force.

Panel op. at 6-7.

But there is an essential difference between a judgement affirming the constitutional obligation to provide just compensation and a tort or contract judgment, or even a judgment for violations of other civil rights. Unlike here, liability in each of these claims is predicated on the government's waiver of sovereign immunity. One presumably cannot sue "someone for a breach of contract" or "for the police's excessive force" and obtain money damages based solely on the text of the Constitution. Thus, the Supreme Court has held that "[s]tatutory recognition was not necessary" for the Just Compensation requirement, and such claims arise directly under the Constitution. *See Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.").

This distinguishes *Folsom*, the case the panel relied upon to conclude that even though state-court judgments qualify as "property," nonpayment cannot result in Fifth Amendment liability because the Sewer Board technically remains obligated to provide compensation, even though in reality it has 100% discretion whether to even actually do so. There, state courts entered money judgments against the city for

its failure to control riots. These judgments could not be fully satisfied because the city lacked the authority to issue additional tax levies. The judgment creditors sued in state court, seeking an order compelling the city to impose taxes necessary to satisfy the judgments. The Supreme Court held that because the city's liability was premised on a waiver of sovereign immunity, the state could condition that waiver on any limitations "the legislature may see fit to make." *Id.* at 288 (the waiver of immunity is subject to "to any change the legislature may see fit to make, either in the extent of the liability or in the means of its enforcement").

Here, by contrast, the text of the Fifth Amendment expressly details the remedy for a taking: just compensation. Thus, a waiver of the government's sovereign immunity is not needed. *United States v. Clarke*, 445 U.S. 253, 257 (1980) ("A landowner is entitled to bring such an action as a result of 'the self-executing character of the constitutional provision with respect to compensation[.]'" (citation omitted)). The panel overlooked the Just Compensation Clause's self-executing nature, and instead rendered Louisiana law supreme. See Panel op. at 8.

But state law can no more limit the federal right to timely just compensation any more than Congress can definitively establish the amount of compensation. *See Monogahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893) ("[C]ongress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature

may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial.”). Whether the government has provided sufficient compensation, or timely compensation, remains questions reserved for judicial determination. The panel’s conclusion that Louisiana may limit the self-executing Fifth Amendment right to be provided compensation without undue delay runs squarely into Justice Gorsuch’s statement in *Bay Point Props., Inc. v. Mississippi Dep’t of Transp. Com’n*, 137 S. Ct. 2002 (2017), that “the teachings of this Court’s cases holding that legislatures generally cannot limit the compensation due under the Takings Clause of the Constitution,” mean that cases such as this are “of general importance as well, for many states have adopted statutes” limiting the availability of just compensation, and “[g]iven all of this, these are questions the Court ought take up at its next opportunity.” *Id.*

Other courts have recently recognized that government lacks the ability to limit its own liability to provide compensation for takings. For example, in *Fla. Dep’t of Agric. v. Dolliver*, 283 So. 3d 953, 960 (Fla. Dist. Ct. App. 2019), the court held that a Florida statute permitting the government to avoid a compensation judgment and prohibiting enforcement was unconstitutional:

No legislative pronouncement may thwart the implementation of a constitutional mandate—particularly where, as is typically the case and here, the constitutional provision is self-executing.

*Id.* at 960. By contrast, the panel's rationale allows the Sewerage Board to be the sole judge of its own constitutional obligation. *Cf. Monongahela*, 148 U.S. at 327.

The limitation of the relief sought here to just compensation judgments should allay any concerns that vacating the District Court's dismissal and remanding for a determination whether, in light of the circumstances, the Sewerage Board's delay in providing compensation is undue or unreasonable, would open the floodgates and turn federal district courts into run-of-the-mill judgment enforcement agencies. No other provision in the Constitution both expressly recognizes a government power (to take property for public use), and also expressly commands a specific remedy (just compensation).

### CONCLUSION

The full court should consider these issues *en banc*. the District Court's dismissal should be reversed, and the case remanded to consider whether the Sewerage Board's delay in providing compensation is unreasonable.

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Respectfully submitted,

s/Kathryn D. Valois

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