NO. _____

In the Supreme Court of the United States

ALEXANDER C. BAKER,

Petitioner,

v.

CLARA VESELIZA BAKER,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Second District, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents serious First Amendment prior restraint issues. It has long been established that a prior restraint comes to the Court "with a heavy presumption against its constitutional validity." (*Bantam Books v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963)). *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996)).

California's Domestic Violence Prevention Act ("DVPA") grants unbridled discretion to courts to restrain a person from free speech regarding the case, and, restrain him from filing legal actions simply because they emotionally upset his opponent in litigation.

In the present case, the courts below held that a man's pending and past civil litigation against his ex-wife (and ex-business partner) is domestic violence "abuse", "irrespective of whether the cases have any merit." Also upheld is an injunction prohibiting the publication of "any discovery documents received"; and an "absolute" prohibition against contacting "business associates" who are necessary trial witnesses and co-defendants.

The lower courts rejected a strict scrutiny analysis, claiming it to be unnecessary merely because the power of restraint is granted under a California domestic violence statute.

These findings are in conflict with the great body of First Amendment law, yet are the predictable consequences of the challenged statute's vague residual clause definition of "abuse", which controlling case law interprets to mean "any conduct that destroys

the mental or emotional calm" of the other person. The questions presented are as follows:

1. Is the DVPA's severable residual clause definition of "abuse" unconstitutionally vague and/or overbroad?

2. Is the "abuse" definition in conflict with the right to petition?

3. May a prior restraint issued under the DVPA be upheld without being subjected to strict scrutiny and narrow tailoring?

4. Do the controlling *Nadkarni* case and its progeny comprise an unconstitutional line of cases violating separation of powers and/or federal supremacy by carving out a "California family member" exception to the First Amendment?

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STATUTES

PETITION FOR A WRIT OF CERTIORARI

Alexander C. Baker respectfully petitions for a writ of certiorari to review the constitutionality of a severable portion of California's Domestic Violence Prevention Act, as applied in the judgments of the California Supreme Court, the California Court of Appeal, and the Los Angeles Superior Court in this case.

OPINIONS BELOW

The DVRO, factual findings and Opinion of the Trial Court (App., *infra*, 29a-37a) is unpublished and unreported in *Baker v. Baker*, Los Angeles Superior Court Case LD068701 (Sept. 29, 2017).

The Opinion of the California Court of Appeal (App., *infra*, 2a-28a) is unpublished and reported at *Baker v. Baker*, No. B286669, 2019 Cal. App. Unpub. LEXIS 114, at *1 (Jan. 9, 2019).

The Denial of Petition for Rehearing by the California Court of Appeal (App., *infra*, 45a) is unpublished and unreported (Feb. 4, 2019).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), after denial of the Petition for

Review by the California Supreme Court (App., *infra*, 1a) case S254132 on March 27, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the First, Fifth, and Fourteenth Amendment to the United States Constitution; California's Domestic Violence Prevention Act ("DVPA"), Cal. Fam. Code § 6200 et. seq.; California's "Anti-SLAPP" statute, Cal. Code of Civ. Pro. § 425.16; and California's "Litigation Privilege", Cal. Civ. Code § 47(b) are reproduced in the appendix at App.52a-55a.

STATEMENT OF THE CASE

This case presents recurring questions affecting the First Amendment rights of all California residents who have or previously had any family or dating relationship, *i.e.* those who may be enjoined under a DVPA restraining order.

A. Background-Litigation and Public Debate

For some 20 years, Petitioner Alexander C. Baker ("Alex") and Respondent Clara Veseliza Baker, a/k/a Clair Marlo ("Clara") were married, raised a family, and, as business partners, were successful in music composition, placing over 1000 pieces of royalty-generating music on television shows. The marriage

and business partnership ended acrimoniously in 2015. As Alex alleges, Clara had perpetrated a decade of fraud, conversion, identify theft and copyright infringement; involving forgery, secret bank accounts, fraudulent real estate conveyances and much else.

Alex wishes to pursue civil litigation against Clara and her current (his former) business associates. Alex already prevailed against Clara in a copyright infringement case in 2016, in which Alex was found to be the sole author of 11 particular songs, and awarded $23,105 in damages. (*Baker v. Marlo*, No. CV 16-2313 RGK (JPRx), 2016 U.S. Dist. LEXIS 192890 (C.D. Cal. Sep. 22, 2016)) Clara appealed to the Ninth Circuit, and Alex prevailed again, with the District Court's judgment affirmed in full. (*Baker v. Marlo*, 698 F. App'x 381 (9th Cir. 2017))

Currently pending is Los Angeles Superior Court case LC103241, in which Alex alleges fraud, conversion and other tort claims against Clara.

Alex also wishes to benefit society by participating in public debate on controversial subjects, which participation includes publishing newsworthy court papers and discovery documents into the marketplace of ideas. (App.87a-88a)

B. The DVTRO

Clara brought a DVPA restraining order action against Alex on October 26, 2016 in the Los Angeles Superior Court. No physical violence was alleged. She characterized Alex's litigation as "trying to destroy [her] livelihood," spreading "viscous rumors" causing her "fear" and "anxiety", and to lose her profession, friends, business associates and family. She sought

an injunction ordering Alex to "remove all [internet] blogs" and "false demeaning and misleading information" from the internet. (App.3a).

The Hon. Michael J. Convey issued a Domestic Violence Temporary Restraining Order ("DVTRO") granting "Stay Away" and "No Contact" orders, but denying the speech and litigation related requests, stating they could "possibly be an impermissible prior restraint" and explicitly inviting Alex to file an Anti-SLAPP motion. (App.46a-51a).

C. Issues of Free Speech and Right to Petition Were Raised to the Trial Court.

The First Amendment issues of free speech and right to petition were raised and argued at the trial court level, beginning with the DV-120 Response to Request for Domestic Violence Restraining Order:

> [Clara's] request to prohibit me from posting about her on the internet would constitute a prior restraint of free speech. As such it would require the finding of a compelling State interest under the strict scrutiny standard.

App.59a.

[. . .]

> If the Court were to find that my litigation against [Clara] constitutes 'abuse', or 'harassment' or any form of wrongdoing under the DVPA, or any form of wrongdoing whatsoever, I believe this would represent a clear violation of my Constitutional Right to petition for grievances.

App.60a.

When the Trial Court explicitly denied Alex permission to introduce evidence that his litigation was meritorious, the following exchange ensued:

> ALEX: I believe that what I need to do to defend myself in this action is to demonstrate that my lawsuits are meritorious. I think that is what is at issue here.
>
> THE COURT: I'm not—I am not going to be the arbiter of whether or not they are [meritorious] or not. You might believe that they are. They might in fact be. [Clara] does not believe that they are, and that they have been used as a method to harass her.
>
> ALEX: Right, but so isn't—
>
> THE COURT: It doesn't matter whether they are [meritorious]. I'm not going to decide that. Some of them have already been decided in your favor, some of them not. I'm not going to decide.
>
> ALEX: Well, I think that—
>
> THE COURT: Nor do I need to.
>
> ALEX: I believe that's the issue before this court in some part.
>
> THE COURT: I do not. I do not.
>
> ALEX: So it makes no difference whether my cases are meritorious or whether they're brought simply to harass, it makes no difference to this court?

> THE COURT: I think what is at issue, your belief that they are meritorious, [Clara's] belief that they are not. Whether in fact they are [meritorious] or not, it really doesn't matter.
>
> ALEX: Why not?
>
> THE COURT: Because it's the effect that the litigation has had on her irrespective of whether the cases have any merit.

App.69a-70a, emphasis added.

Alex brought an Anti-SLAPP motion (Cal. Code Civ. Pro § 425.16, *see* App.56a-57a), arguing that Clara's DVPA action arose from protected activities of free speech and right to petition:

> Internet discussion of [Clara and the record company] litigation is a matter of public interest.

App.66a.

> [Alex's] email, text and phone communications with [Clara] and her associates were steps taken prior to or during litigation, thus privileged under Cal. Civ. Code § 47(b)

App.65a, and *see* Cal. Civil Code 47(b), App.55a.

The Trial Court denied the Anti-SLAPP motion, finding that the DVPA action did not arise from protected activity. (App.42a-44a)

In explaining that contacting business associates was related to litigation, Alex quoted a California Supreme Court case, arguing to the Trial Court that:

> [T]he litigation privilege in California [Civil] Code § 47 applies to communications with some relation to a proceeding that is actually contemplated in good faith and under serious consideration by a possible party to the proceeding. The privilege extends to preliminary conversations and interviews related to contemplated action. The privilege extends to steps taken prior to judicial proceedings.

App.52a, citing *Rubin v. Green*, 1993, 4 Cal.4th 1187.

Alex again raised the issue of prior restraints to the Trial Court, explaining:

> . . . that is why I made that [internet] blog [posting discovery documents and court rulings]. I certainly didn't do it to harass [Clara] or to abuse her in any way. I was exercising my right to free speech. And in filing lawsuits, I was exercising my right to petition for grievances.

App.74a, empasis added.

D. The Trial Court's DVRO, Opinion and Findings of Fact

On September 29, 2017, Court Commissioner Alicia Y. Blanco granted a 3-year Domestic Violence Restraining Order ("DVRO"), which included Stay Away and No Contact orders, and an order that Alex "shall not videotape" Clara, and a prior restraint order that "any discovery documents received" by Alex "shall not be publicized". (App.32a). Comm. Blanco stated that the injunction against videotaping included videotaping depositions, until further order of the court.

(App.40a). Comm. Blanco ordered Alex "absolutely" not to contact Clara's business associates (App.40a-41a).

In issuing the findings of fact and opinion, the Trial Court found that:

> irrespective of the potentially meritorious nature of [Alex's] suits, that in some measure, with respect to the cases brought involving [Clara], that [Alex] brought those as a means to harass [Clara].

App.39a, emphasis added.

As to free speech, the Trial Court opined:

> The Court does not find this to be a prior restraint of free speech. Right to free speech is not absolute. This speech was not an essential part of any exposition of ideas and are of such slight social value, and as such true [sic] that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

App.6a.

E. The Appeal, Petition for Rehearing, and Petition for California Supreme Court Review

Seeking de novo review applying strict scrutiny (App.77a), Alex appealed, raising the constitutional issues of Right to Petition (App.78a, 83a), Right to Free Speech (App.84a, 85a), and Right to Due Process (App.82a, 90a). Alex argued that the DVPA as applied was violative of Civil Code § 47 Litigation Privilege (App.96a), and raised a Due Process/Void for Vague-

ness challenge to the DVPA residual definition of abuse. (App.93a-97a)

The Court of Appeal explicitly refused to apply strict scrutiny. (App.11a) Affirming the trial court in full, the Court of Appeal reasoned that:

> Harassing litigation, or litigation tactics, may also constitute both "indirect and threatening contact" as well as acts that "destroy [ ] the mental and emotional calm" of the party seeking the restraining order. (App.12a);

It was also found that Alex's litigation was used to "solely control" the other party. (App.6a)

Alex and an amicus curiae California attorney each timely filed Petitions for Rehearing, challenging the constitutionality of the DVPA definition of abuse, and because of the Court of Appeal's material omissions and misstatements of both law and fact. On February 4, 2019, the Petition for Rehearing was denied.

Alex timely filed a Petition for Review to the California Supreme Court, which petition was supported by an amicus curiae letter by the National Coalition For Men ("NCFM"). On March 27, 2019, Petition for Review was denied.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the unconstitutionally vague and overbroad definition of "abuse" found in a severable portion of California's Domestic Violence Prevention Act ("DVPA") grants unbridled discretion to impose a prior restraint of free speech, and of the right to petition. Review is urgently needed to resolve this glaring conflict with the great body of constitutional law. Otherwise, significant liberty interests of Californians will continue to be enjoined under the series of ad-hoc, capricious and arbitrary judicial rulings this portion of the DVPA invites.

California Family Code § 6203 contains a list of enumerated abuse definitions, followed by a patently ambiguous "residual clause," further defining "abuse" as "any behavior that has been or could be enjoined under Section 6320," which section then contains a different list of behaviors. (App.54a-55a) This residual clause is similar to residual clauses recently struck down for vagueness by this Court in cases *Johnson v. United States*, (2015) 135 S.Ct. 2551 ("*Johnson*") and *Sessions v. Dimaya*, (2018) 138 S.Ct. ("*Dimaya*").

The DVPA residual definition of abuse is void for the same reason a Guam family violence statute was recently struck down in *People v. Shimizu* (2017) 2017 Guam 11, 2017 WL 4390303—people of ordinary intelligence cannot know what conduct is prohibited.

Shockingly, on its face, the DVPA explicitly authorizes finding "abuse" in innocent conduct such as "telephoning", "contacting" and "coming within a specified

distance of" a family member, because these behaviors are listed in Section 6320 among those which "could be" enjoined. (App.52a)

Another "behavior" listed in Section 6320 that "could be" enjoined, and thus could constitute abuse, is "disturbing the peace of the other party". (App.54a) In trying to ascertain what actual behaviors are prohibited under "disturbing the peace", *In Re Marriage of Nadkarni* (2009) turned to the dictionary to resolve its "plain meaning", and found that "disturbing the peace" means "conduct that destroys the mental or emotional calm" of the other party (*In Re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1497 ("*Nadkarni*"; or the "*Nadkarni* rule").

Numerous subsequent published California cases have cited *Nadkarni* for the proposition that speech can constitute DV abuse if it destroys emotional calm (see *e.g. In re Marriage of Evilsizor & Sweeney*, 237 Cal.App.4th 1416, 1427, 189 Cal.Rptr.3d 1, 4 (2015) ("*Evilsizor*"), finding DV abuse in the dissemination of estranged wife's text messages, and her testimony of emotional upset). Nevertheless, the underlying vagueness inherent to "disturbing the peace" remains unresolved, because *Nadkarni's* "mental and emotional calm" rule relates entirely to the emotional effect on the accuser, while saying nothing about the conduct of the accused.

What actual "behaviors" are prohibited under the *Nadkarni* rule? Issuing a threat of immediate bodily harm would surely destroy the other person's mental or emotional calm, and the law is well-settled that such threatening conduct is not protected speech, and may be enjoined. It is unnecessary for the DVPA

residual clause to cover true threats, because the unchallenged regular case portion of the DVPA abuse definition explicitly prohibits placing another person in "reasonable apprehension of imminent serious bodily injury". (Cal. Family Code § 6203(3), App.52a)

And, many far less serious behaviors-some of them constitutionally protected—might "upset", "anger", or "annoy" the other person, thus also be said to destroy another's "mental or emotional calm."

Would wearing an "offensive" slogan on a t-shirt constitute abuse, if it genuinely angered the other person? What about using contraceptives that the other person considers "immoral"? How about voting for the "wrong" political candidate? Each of these hypotheticals could certainly "disturb" someone's "peace", yet each is constitutionally protected activity. A destroyed emotional calm could mean any mental state from "mildly annoyed" to "mortal fear of imminent death" and all points in between. To phrase it as succinctly as possible, the full range of conduct prohibited by the DVPA residual clause is unknowable.

The present case illustrates the ever-widening scope of the residual clause's unconstitutional reach, as Alex's past and pending civil litigation against Clara is found to be DV abuse, "irrespective of the potentially meritorious nature of the suits". (App.39a). Even Alex's litigation tactics in defending the DVPA action itself were characterized by the Court of Appeal to constitute a method to "annoy, harass, and control", and thus DV abuse. (App.12a).

Moreover, Alex is enjoined from publishing "any documents received in discovery"—clearly a prior restraint—without need to first find the speech unpro-

tected, and without need to narrowly tailor the order. The residual clause thus stands squarely at odds with free speech, the right to petition, and essentially all prior First Amendment case law in those areas.

The DVPA invites *ad hoc*, capricious and arbitrary judicial legislation in every instance of speech-based alleged "abuse". Ultimately, *Nadkarni* and its progeny should be removed from the body of controlling California precedent by this Court's opinion that describes them as an unconstitutional violation of the Separation of Powers and Federal Supremacy doctrines. Such an opinion must recognize that the severable residual clause portion of the DVPA statute is unconstitutionally vague and overbroad, violative of the free speech and right to petition clauses of the First Amendment, and, the due process clause of the Fifth and Fourteenth Amendments.

I. THE SEVERABLE DVPA RESIDUAL CLAUSE DEFINITION OF "ABUSE" IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

A. On Its Face and as Applied, the DVPA Residual Clause Definition of "Abuse" is Unconstitutionally Vague Under Controlling U.S. Supreme Court Cases *Johnson* (2015) and *Dimaya* (2018).

This Court has instructed:

> [V]agueness may invalidate a law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits. Second, it may author-

> ize and encourage arbitrary and discriminatory enforcement.

Oral Argument, App.95a, citing *City of Chicago v. Morales*, 527 U.S. 41, at 56 (1999).

At Family Code § 6203, the DVPA enumerates a number of behaviors defined to constitute "abuse", followed by a residual clause that further defines abuse as "any behavior that has been or could be enjoined pursuant to Section 6320". (App.54a)

Such statutory "residual clause" definitions of prohibited conduct have come under special scrutiny in recent cases before this Court, resulting in their invalidation as unconstitutional. *Johnson* held that a residual clause is unconstitutional if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement" (*Johnson, supra*, at 2553); and on that basis struck as void for vagueness the clause prohibiting behavior that:

> . . . otherwise involves conduct that presents a serious potential risk of physical injury to another.

Johnson, supra, at 2555-2556.

Like the DVPA's clause, the residual clause in *Johnson* followed a list of enumerated offenses. Similarly, *Dimaya* evaluated and found a statute's residual clause unconstitutionally vague:

> Because the clause has both an ordinary-case requirement and an ill-defined risk threshold, it necessarily devolves into guess-

> work and intuition, invites arbitrary enforcement, and fails to provide fair notice.

Dimaya, *supra* at 1207.

Likewise, the DVPA definition of abuse at California Family Code § 6203 has a listing of ordinary abuse:

> (1) To intentionally or recklessly cause or attempt to cause bodily injury.
>
> (2) Sexual assault.
>
> (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.

App.54a.

Then, § 6203 presents an ill-defined residual clause:

> (4) to engage in any behavior that has been or could be enjoined under Section 6230.

App.54a.

As with *Johnson* and *Dimaya*, the DVPA's "has been or could be enjoined" residual clause fails to provide fair notice, and leaves the general public to guess what conduct is prohibited.

Does "has been enjoined" mean that the accused person had previously been enjoined? If so, does this still apply if the prior order is no longer in force? Or, does "has been enjoined" mean that some other person, not the accused, has been enjoined from that behavior? If so, does it apply only to orders described in published opinions? And what if that order has now expired? We are left to guess.

"Could be enjoined" calls for speculation as to what has not yet been, but might possibly be enjoined. Under the *Nadkarni* rule, anything that affects the emotional calm of another person, *i.e.* essentially anything, "could be" enjoined.

The opinion of this case provides a troubling example, affirming, without actual discussion, an appealed Trial Court finding that:

> . . . while [Alex] does have the right to use the legal process, he does not have the right to use it as a means to solely control [Clara].

App.6a.

No member of the public can determine whether proposed litigation would be found to "solely control" the defendant, especially in light of the fact that the courts below determined that such a finding may be made irrespective of whether the case has any merit.

Therefore, this Court should find that the residual clause definition of "abuse" is void for vagueness and overbreadth.

B. *Dimaya* Held That a Civil Statute with Severe Consequences Requires Scrutiny Similar to That of a Criminal Statute.

Dimaya found that a "civil statute with a severe consequence required a scrutiny similar to that of a criminal statute, rather than a more deferential standard of review of the statute." (See *Dimaya*, *supra*, at 1228.) Under the DVPA, significant liberty interests are at issue, such as the right to parent, to possess a firearm, to exercise free speech, and to petition for grievances. Thus, the DVPA should be held to high

constitutional standards in a void for vagueness challenge.

C. On Its Face, the DVPA "Contacting", "Telephoning" and "Coming Within a Specified Distance" Definitions of Abuse Are Unconstitutionally Vague.

A plain reading of Cal. Family Code § 6320 reveals that "contacting", "telephoning" and "coming within a specified distance" of the other party are behaviors that "could be enjoined". (App.54a) Surely telephoning, contacting or coming within a specified distance are actions that one could employ to threaten or harm another. But without any qualifier, these are perfectly innocent behaviors.

Good parenting necessarily involves contacting and coming close to a child. Thus, a person of normal intelligence would be completely confused by § 6320, which appears to brand natural and loving acts as "abuse". A failure to define terms in a way the public can understand is contrary to law, and ignores the principle that vagueness must be measured ex ante- "before the Court gives definitive meaning to a statutory provision, not after." (*Sykes v. United States*, 564 U.S. 1, 32, 131 S.Ct. 2267, 2286 (2011).)

The DVPA residual definition of abuse (that incorporates non-abusive terms) is therefore unconstitutionally vague on its face.

D. Under Both *Johnson* and *Dimaya*, This Court Overturned the Prior "Any Application" Rule.

Nobody disputes that California has a legitimate interest in preventing domestic violence, or that the

DVPA has constitutionally permissible applications. This Court has previously said that a law is facially unconstitutional only if it "is impermissibly vague in all of its applications." (*Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, (1982) 5 U.S. 489, at 495, 102 S.Ct. 1186)

However, the prior "any constitutional application" rule is no more. Elaborating on *Johnson, Dimaya* rejected prior legal opinions that suggest that a court may not invalidate a statute for vagueness if it is clear in any of its applications, holding that both cases:

> . . . squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp. 576 U.S., at ___, 135 S.Ct., at 2561.

Dimaya, supra, 138 S.Ct. 1204, 1214, fn 3; and *see also Martin v. State* (2018) 259 So.3d 33, at 740-741.

Thus, the Court should find the DVPA severable residual clause unconstitutionally vague despite constitutional applications of the DVPA in general.

II. THE DVPA RESIDUAL CLAUSE IMPERMISSIBLY GRANTS UNBRIDLED DISCRETION.

Citing this Court's *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 752, 108 S.Ct. 2138, 2141 (1988) ("*Lakewood*"), the Eleventh Circuit recently explained the impermissible nature of unbridled discretion in issuing a prior restraint:

> Perhaps the plainest example of an unconstitutional grant of unbridled discretion is a law that gives a government official power

> to [allow or disallow speech] but that provides no standards by which the official's decision must be guided. *See Sentinel Communs.* 936 F.2d at 1198-99. In these circumstances, the official can grant or deny [speech] for any reason she wishes. Such a grant of unconstrained power is unconstitutional under the First Amendment for two reasons: first, it creates an incentive for speakers to self-censor in hopes of being [allowed to exercise free speech], and second, it is difficult for courts to determine whether an official's standardless [ ] decision was impermissibly based on content or viewpoint. *See Lakewood*, 486 U.S. at 757-59.

Barrett v. Walker Cty. Sch. Dist., 872 F.3d 1209, 1221 (11th Cir. 2017).

As upheld by the California Supreme Court and Court of Appeal, the Trial Court here exercised unbridled discretion by enjoining Alex from contacting necessary trial witnesses, enjoining him from publishing "any documents received in discovery", and by finding that his civil litigation was domestic violence abuse "irrespective of whether the cases have any merit". Such holdings conflict with this Court's opinion in *Lakewood*:

> The doctrine forbidding unbridled discretion requires that the limits the [government official] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. The [law's] minimal requirement that the [government official]

> state his reasons for [prohibiting speech] does not provide the standards necessary to ensure constitutional decisionmaking, nor does it, of necessity, provide a solid foundation for eventual judicial review.
>
> . . .
>
> [S]uch review does not substitute for concrete standards to guide the decisionmaker's discretion.

Lakewood, supra, at 2141.

Here, under the *Nadkarni* rule, the Court's discretion was guided only by a consideration of whether speech will "destroy the mental or emotional calm" of the other person. Lacking within the DVPA are any concrete standards to guide the decisionmaker's discretion. Under the DVPA, prior restraints may issue with no consideration as to whether the enjoined activity is constitutionally protected, as occurred here.

Therefore, the Court should find that the DVPA residual clause grants impermissible unbridled discretion.

III. STRICT SCRUTINY MUST BE APPLIED TO ANY PRIOR RESTRAINT OF SPEECH ISSUED UNDER THE DVPA.

A. As Applied, the DVPA Residual Definition of Abuse Bypasses Strict Scrutiny and Invites a Prior Restraint Without First Finding That Speech Is Unprotected.

The Court of Appeal upheld the trial court order that "any discovery documents obtained by Alex in

litigation shall not be publicized." (App.14a). A prior restraint of expression exists when the government can deny access to a forum before the expression occurs. This Court has long held that:

> Any system of prior restraints of expression comes to the United States Supreme Court bearing a heavy presumption against its constitutional validity . . .

N.Y. Times Co. v. United States, 403 U.S. 713, 714, 91 S.Ct. 2140, 2141 (1971).

"As a general rule, gag orders on trial participants are subject to strict judicial scrutiny and may not be imposed unless (1) the speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest; (2) the order is narrowly tailored to protect that interest; and (3) no less restrictive alternatives are available." (*Steiner v. Superior Court*, 220 Cal.App.4th 1479, 1480, 164 Cal.Rptr.3d 155, 157 (2013) ("*Steiner*" or California's "*Steiner test*")

Injunctions against publishing court proceedings must "survive the strict scrutiny of prior restraint analysis". (*San Jose Mercury News, Inc. v. Criminal Grand Jury*, 122 Cal.App.4th 410, 411, 18 Cal.Rptr.3d 645, 646 (2004).) "Prior restraints are presumptively unconstitutional and face strict scrutiny." (*Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1249 (11th Cir. 2004))

In 2018 the First Circuit applied strict scrutiny and overturned an injunction prohibiting a defendant from repeating six specific statements found to be

defamatory, because of "its failure to make any allowance for contextual variation", explaining that:

> Words that were false and spoken with actual malice on one occasion might be true on a different occasion or might be spoken without actual malice. What is more, language that may subject a person to scorn, hatred, ridicule, or contempt in one setting may have a materially different effect in some other setting.

Sindi v. El-Moslimany, 896 F.3d 1, 33 (1st Cir. 2018, ("*Sindi*").

If a prior restraint is overturned for lack of narrow tailoring after a finding of defamation with actual malice, as in *Sindi*, surely a prior restraint must be overturned here, where no specific statements were ever identified as being unprotected. Indeed, the injunction in this case applies to speech that has not even occurred yet—documents that may be obtained in discovery, and contacting business associates as trial participants.

Ignoring well-settled law, the Court of Appeal in this case explicitly declined to apply strict scrutiny, finding that a prior restraint of free speech triggers strict scrutiny in a civil lawsuit, but "not a family law restraining order covering the type of harassing conduct discussed here" (App.11a) The Court below thus carves an unprecedented "California family member" exception to the First Amendment.

Here, the Court found that, "[b]ecause the restraining order does not regulate any particular content or viewpoint, it is content-neutral and not subject to

strict scrutiny." (App.11a, citing *DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864) Whether the gag order here was content-neutral or not is arguable, because it is specifically the content of discovery documents that is targeted. But it is a prior restraint regardless, thus avoidance of strict scrutiny conflicts with existing First Amendment law.

The injunction prohibiting Alex from publishing "any documents received in discovery" is a gag order, which "must survive strict scrutiny." (*In re Murphy-Brown, LLC*, 907 F.3d 788, 792 (4th Cir. 2018)) A gag order in a civil case is "an impermissible prior restraint violative of both the United States and California constitutions." (*Freedom Communications Inc. v. the Superior Court.* (*Gonzales*) 167 Cal App 4th 150)

As with the present matter, *Evans v. Evans* (2008) contended with the issue of alleged harassment in the form of an ex spouse publishing allegedly private material. *Evans* properly found that the prior restraint order was "vague and overbroad because it did not indicate what statements might violate the order." (*Evans v. Evans*, 162 Cal.App.4th 1157, 1158, 76 Cal.Rptr.3d 859, 863 (2008).)

Here, under the *Nadkarni* rule, a prior restraint of material identified only as "any documents received in discovery" is justified on the mere finding that its future publication may "destroy the mental or emotional calm" of Clara. No *Steiner* test is required. No finding of unprotected speech is required. No narrow tailoring is required. As the Trial Court here aptly put it, all that matters is "the effect that the litigation has had on her". (App.70a)

B. As Applied, the DVPA Residual Definition of Abuse Invites a Prior Restraint That Is Not Narrowly Tailored, Conflicting with First Amendment Law.

The DVRO in this case prohibits the publication of any document received in discovery, and prohibits the contacting of necessary trial witnesses. The Courts below would have done well to heed *Balboa Island Vill. Inn, Inc. v. Lemen*, 40 Cal.4th 1141, 1142, 57 (2007) ("*Lemen*"), which is instructive on our First Amendment:

> To be valid, the injunction had to be limited to prohibiting . . . repeating [unprotected] statements. The injunction could not prevent the critic from presenting . . . grievances to government officials.

Lemen, supra, at 1142.

The DVRO contains a prior restraint against speech that has not already occurred, has not been found injurious, but which does seek to present grievances to government officials. While the Appeal Court Opinion here seems to assume that documents obtained in discovery are confidential, *Evans* explains that:

> The mere fact that information is contained in court files or concerns divorce proceedings does not necessarily mean it is confidential and cannot be disclosed.
>
> . . .
>
> [A]n order enjoining the disclosure must be narrowly tailored to protect only these

> specific interests and should not unnecessarily interfere with a person's free speech rights.

Evans, *supra*, at 1158.

Under the unbridled discretion granted by the DVPA, a prior restraint order need not be narrowly tailored. If a future publication might reasonably be expected to emotionally upset the other person-which many newsworthy items have the ability to do-an injunction will lie.

The primary purpose of obtaining documents in discovery is, of course, to introduce them as exhibits at trial. The holding here makes no such allowance, thus preventing a person subject to such an order from "presenting grievances to government officials". (*Lemen*, *supra*.)

Enjoining the contacting of trial participants is impermissible. *See Hurvitz v. Hoefflin* (2000) 84 Cal. App.4th 1232 ("*Hurvitz*"), at 1245 ("The order in this case is particularly troubling because of its chilling effect on the litigants' ability to properly prepare for trial.")

The order here has a chilling effect on Alex's ability to prepare for trial, and for that reason the Court should grant Certiorari.

IV. THE SEVERABLE RESIDUAL CLAUSE DEFINITION OF "ABUSE" IN CALIFORNIA'S DOMESTIC VIOLENCE PREVENTION ACT IS IN CONFLICT WITH THE RIGHT TO PETITION AND THE LITIGATION PRIVILEGE.

A. As Applied, the DVPA Residual Definition of Abuse Conflicts with the California Civil Code § 47 Litigation Privilege.

The Court of Appeal held that under the DVPA, "acts of harassment in the form of litigation tactics are not constitutionally protected". (App.10a). The sole requirement for enjoining "litigation tactics" was that they were "disturbing the peace of the other party" (Cal. Family Code § 6230, App.54a), which under the *Nadkarni* rule means that it "destroys the mental or emotional calm". Indeed, the Court of Appeal upheld the trial court's finding that "irrespective of the potentially meritorious nature of [Alex's] suits, that in some measure, with respect to the cases brought involving [Clara], that [Alex] brought those as a means to harass [Clara]. (App.81a, emphasis added.)

The finding that Alex's civil litigation against his ex wife constitutes abuse, irrespective of whether the cases had merit, conflicts with the Litigation Privilege codified at California's Civil Code § 47(b) (App.57a), and valid controlling case law interpreting it. Opining in *Rubin v. Green*, 4 Cal.4th 1187, 1203 (1993) ("*Rubin*"), and citing the California Supreme Court's landmark *Silberg v. Anderson*, 50 Cal.3d 205, 209, 266 (1990) ("*Silberg*"), valid controlling law emphasizes the importance of the Litigation Privilege:

> Unless the conditions requisite to a malicious prosecution action are pleaded and

> proven, section 47(b) denies relief in such circumstances [seeking to enjoin litigation-related communications], not only because that result is deemed necessary to secure the greater interest in ensuring unhindered access to the courts, but also because, as we noted in *Silberg*, *supra*, 50 Cal.3d 205, the original litigation itself provides an efficient forum in which to "expos[e] during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result." (*Id.* at p. 214.)

Rubin, *supra*, 1203, 17, emphasis added.

Just like *Rubin*, here Alex's ex-wife filed the DVRO seeking an injunction in the wake of allegedly tortious litigation-related communications. Substantially all of the communications which ultimately were found to constitute DV abuse here-a civil complaint containing strong allegations, evidentiary exhibits of documents obtained in discovery, contacting business associates as trial witnesses, providing financial information to expert witnesses-were litigation-related communications in which Clara had been a party.

The pending litigation here provided a proper forum for Clara to bring any abusive litigation claims she may have had, per *Rubin.* But the Courts below ignored *Silberg's* instruction, as the vague and overbroad residual definition of DV abuse invited them to do.

The Courts below did not find that the conditions requisite for a malicious prosecution action had been

either pleaded or proven. Under better law, section 47(b) should have denied relief in these circumstances (*Rubin, supra.*)

Better law holds that:

> The litigation privilege in California code section 47 applies to communications with some relation to a proceeding that is actually contemplated in good faith and under serious consideration by a possible party to the proceeding. The privilege extends to preliminary conversations and interviews related to contemplated action. The privilege extends to steps taken prior to judicial proceedings.

Rubin, supra, at 1187.

The Court of Appeal characterized a police report for identity-theft that Alex filed against Clara as "false". (App.4a). Never mind that the Trial Court disallowed handwriting evidence that would prove the police report true. Regardless, the "overwhelming majority of cases conclude that when a citizen contacts law enforcement personnel to report suspected criminal activity and to instigate law enforcement personnel to respond, the communication also enjoys an unqualified privilege under Cal. Civ. Code § 47(b)." (*Hagberg v. Cal. Fed. Bank*, 32 Cal.4th 350, 351, 7 Cal.Rptr.3d 803, 805, 81 P.3d 244, 245 (2004) emphasis added.)

Here, the Court of Appeal stated as "applicable law" that the "First Amendment to the United States Constitution provides that 'Congress shall make no law . . . abridging the freedom of speech. . . . '". (App. 10a). While free speech is also at issue in this case,

by omitting the right to petition from the First Amendment, the Court sidestepped a constitutional issue that requires de novo review-the litigation privilege. Had the Court instead confronted the issue, it would have noted, as the *Rubin* Court did, that:

> . . . permitting plaintiff's claim for injunctive relief here would upset the carefully constructed balance between "the freedom of an individual to seek redress in the courts and the interest of a potential defendant in being free from unjustified litigation" . . . by effectively destroying the availability of the [litigation] privilege in any case in which a litigation adversary was prompted to claim that the conduct of the . . . opposite party [was improper]. Whatever the ultimate outcome of the ensuing . . . lawsuit, additional litigation will have been fomented and the presentation of potentially meritorious claims stifled.

Rubin, supra at 1203-04.

Potentially meritorious claims have been and will be stifled, because all litigation may be presumed to "disturb the peace" of the other party. The DVPA residual definition of abuse did not require balancing Alex's freedom to seek redress in the courts against his ex wife's interest in being free from unjustified litigation, as the U.S. Constitution, the California Constitution, Civil Code § 47, *Silberg* and its progeny all require.

B. As Applied, the DVPA Residual Definition of Abuse Invites Enjoining Meritorious Litigation, in Conflict with the First Amendment Right to Petition and Controlling Cases.

The First Amendment guarantees, in relevant part, "the right . . . to petition the Government for a redress of grievances." (U.S. Constitution, Amend I.) Here, the Court of Appeal found that the trial court "was authorized to conclude that Alex's litigation tactics . . . were abusive under the DVPA and did not constitute the type of speech afforded protection under the First Amendment." (App.14a, citing *Evilsizor*, *supra*, 237 Cal.App.4th 1416.) The Opinion sidesteps the Right to Petition issue, as the only constitutional argument in *Evilsizor* was that "the restraining order is an improper prior restraint of his rights to free speech". (*Evilsizor*, *supra* at 1427.)

Although *Evilsizor* did not contend with the right to petition, it should have. This Court should review the chilling effect that the DVPA residual definition of abuse had on the party's right to petition in that case, which began when:

> In response to her text messages being used as exhibits, Evilsizor filed a request for a restraining order under the DVPA.

Evilsizor, *supra* at 1421.

There, as here, the DVPA was clearly being invoked as a litigation tactic. Under the California Evidence Code, Evilsizor's text messages may have been deemed inadmissible on a finding of irrelevance, hearsay, privilege, lacks foundation, etc. Or, if the text messages were found probative, yet confidential, they

could have been admitted and placed under seal. Instead, the DVPA residual clause allowed the *Evilsizor* Court to bypass the Evidence Code, and apparently exclude evidence entirely on the finding that dissemination of the text messages destroyed Evilsizor's "mental or emotional calm", *i.e.* the *Nadkarni* rule. (*Evilsizor*, *supra*, at 1424.)

The Court of Appeal made reference to "abusive litigation tactics" which "have been caught up in this order limiting [Alex's] abusive conduct." (App.15a) No Court below ever explained which litigation tactics were "abusive", because, under the *Nadkarni* rule, a DVRO may enjoin litigation tactics simply on a finding that they upset the other party, which litigation undisputedly tends to do. The residual clause thus invites a court to conclude that anyone who litigates against an ex family member is "engaging in abusive litigation tactics", then justify it by opining that "rights to petition . . . are not the objects of the court's ruling". (App.15a) This is a distinction without a difference. Around the circular reasoning of the DVPA residual clause, abuse is the litigation, and litigation is the abuse.

The Court of Appeal finds "authority to restrain [a person] from contacting [ex spouse's] business associates [who are necessary trial witnesses] to the extent that such contact perpetuated this harassing behavior." (App.16a, citing *Nadkarni*, *supra*, at pp. 1496-1497.) How could a person seeking to comprehend the DVPA definition of abuse determine whether or not contacting an ex spouse's business associates as trial witnesses perpetuates harassing behavior?

The Opinion states that "[t]o the extent that [a DVPA] order interferes with [a person's] Right to Petition, such interference is incidental to the restriction on [the person's] conduct, and is not unconstitutional." (App.16a, citing *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal.4th 121, 126, 87 (1999) ("*Aguilar*"). The Appeal Court's citation notwithstanding, the DVPA is in conflict with *Aguilar*.

> The United States Supreme Court has held repeatedly that an injunction against speech generally will not be considered an unconstitutional prior restraint if it is issued after [the trier of fact] has determined that the speech is not constitutionally protected.

Aguilar, *supra*, at 140, emphasis added, referring specifically to *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 764, fn. 2 [114 S.Ct. 2516, 2524, 129 L. Ed. 2d 593, 607.

Better law requires that for litigation to be considered abusive, it must be unmeritorious. Moreover, the existing case is the proper forum in which to obtain remedy for such, to avoid multiplicity of actions. (*Rubin*, *supra* at 214.) The Third Appellate District upheld the constitutionality of California's Vexatious Litigant statute only after noting the litigant's "five previous losing lawsuits, combined with the fact that he filed another suit which was found to lack merit" (*Wolfgram v. Wells Fargo Bank*, 53 Cal.App.4th 43, 47, 61 Cal. Rptr.2d 694, 696 (1997) ("*Wolfgram*".)

Wolfgram held that "an impairment of the right to petition must be narrowly drawn" (*Wolfgram*, *supra*, at 47.) The Opinion thus conflicts with *Wolfgram* by affirming a trial court which opined, "[Alex's lawsuits]

might in fact be [meritorious]. Some of them have already been decided in [Alex's] favor, some of them not. I'm not going to decide [whether Alex's pending litigation has merit]. Nor do I need to." (App.69a-70a, emphasis added.)

Under a constitutional DVPA, the court would indeed "need to" determine whether litigation was meritorious prior to enjoining it as abusive or harassing. But what matters under the DVPA as presently constructed is only that an ex family member "does not believe that [the lawsuits] are [meritorious], and that they have been used as a method to harass her." (App.79a-81a) As upheld by the courts below, a jurist has issued an ad hoc, capricious and arbitrary finding of "abuse" based on just such a "belief", and nothing more. This unconstitutional result is grounds to grant certiorari.

V. *NADKARNI* AND ITS PROGENY COMPRISE AN UNCONSTITUTIONAL LINE OF CASES VIOLATING SEPARATION OF POWERS, AND FEDERAL SUPREMACY BY CREATING A "CALIFORNIA FAMILY MEMBER" EXCEPTION TO THE FIRST AMENDMENT.

A. The *Nadkarni* Rule Violates Separation of Powers.

The doctrine of separation of powers seeks to prevent the legislature from passing vague or overbroad laws that leave courts to decide, on an ad-hoc basis, what behaviors violate those laws. Here, Alex was aggrieved by a decision of the trial court that litigation constitutes domestic violence "abuse," a result which had not previously been reached in any published decision.

Applicable principles were explained in *Dimaya*:

> [L]egislators may not "abdicate their responsibilities for setting the standards . . . " *Smith v. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974), by leaving to judges the power to decide "the various crimes includable in [a] vague phrase," . . . *See Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis").

Dimaya, supra, 138 S.Ct. 1204, 1227-1228.

Twin City Fire Ins. Co. v. Leija (2018) 244 Ariz 493 ("*Twin City*"), appears to be the first opinion by a State Supreme Court addressing the separation of powers themes of *Dimaya*:

> [C]ourtrooms are ill-suited to a legislative forum [because] courts render decisions based not on broad social considerations but on the specific facts of the cases and parties before them
>
> [. . .]
>
> [O]nce we enter the lawmaking arena, we must necessarily construct the law as we go along
>
> [. . .]
>
> [T]hose who consult the statutes in this area will be misinformed, because the applicable rule exists only in an evolving series of court decisions.

Twin City, supra, at 499-502.

The record in this appeal included the following from a California Commissioner engaged in ad hoc judicial law making:

> "Because it's the effect that the litigation has had on her, irrespective of whether the cases have merit."

App.80a.

The Court of Appeal "acknowledged Alex's right to use the legal process" but found that he "does not have the right to use it as a means to solely control" his ex wife, which the court found "he has done here." (App.6a)

An unconstitutional statute is inviting courts to engage in ad hoc, arbitrary judicial legislation. No prior authority had held that any litigation, let alone defense litigation in the DVPA action itself, could be used as a means to "control" another party, and thereby constitute domestic violence abuse.

The Court must "avoid an interpretation that would lead to absurd consequences". (*Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1146, 167 Cal.Rptr.3d 664, 669.) Absurd consequences certainly flow from the instant finding that litigation may be deemed DV abuse, because a DVPA action is itself litigation, and may reasonably be assumed to "destroy the mental or emotional calm" of the defendant. (*see* App.81a) Does filing a restraining order under the DVPA constitute abuse under the DVPA?

No rule by which to decide which litigation tactics will constitute abuse, and which will not, is discernible

here. The capricious and arbitrary nature of a court finding that litigation-even litigation under other case numbers, and defense litigation in the DVPA action itself-constitutes abuse for violence-prevention purposes, reveals how unconstitutional the residual clause definition of abuse is. This violates the Separation of Powers, and will continue to have chilling effects on the rights of those affected.

Certiorari should be granted, as ultimately *Nadkarni* must be overruled, Cal. Family Code § 6203(a)(4) declared unconstitutional, and the California Courts reversed.

B. *Nadkarni* and its Progeny Create an Unconstitutional "California Family Member" Exception to the First Amendment Violating Federal Supremacy.

The DVPA is applicable to Californians who have dated, or have family related by consanguinity or affinity within the second degree. (*See* California Family Code § 6211, App.55a) *Nadkarni* and its progeny thus created a "California Family Members" exception to the First Amendment that violates Federal Supremacy.

In California, one can say or write things that would be protected speech if, for example, were said to a teacher, but are unprotected if said to a sister, wife or date. This court should do what the Supreme Court of Guam recently did. *People v. Shimizu* declared a statutory definition of family violence void for vagueness after examining its inconsistency with First Amendment protections such as protection of

threatening words other than unprotected "true threats" of "imminent" harm. The *Shimizu* court wrote:

> [Guam's family violence statute] is impermissibly vague in that it does not adequately inform citizens of what conduct is prohibited by the statute. . . . Although the statute clearly proscribes placing a family member in fear of bodily injury, it did not provide her with standards to govern her conduct, such as requiring that the fear be reasonable or that the fear be that of imminent bodily injury.

People v. Shimizu (2017) 2017 Guam 11, 2017 WL 4390303 (Supreme Court-Guam) ("*Shimizu*") at 33-34, emphasis added.

The DVPA ignores supreme and applicable Federal law and well known First Amendment principles, since the *Nadkarni* rule relates not to conduct of the accused, but only to the emotions of the accuser. *Shimizu* recognized that Guam's similar statute did the same, and declared the statute unconstitutional. Well-established law sets out distinctions between protected free speech, and unprotected speech provoking fears of violence. One older, better case explained:

> Violence and threats of violence . . . fall outside the protection of the First Amendment because they coerce by unlawful conduct, rather than persuade by expression, and thus play no part in the 'marketplace of ideas.' As such, they are punishable because of the state's interest in protecting individuals from fear of violence, the disruption fear engenders

> and the possibility the threatened violence will occur. (Emphasis added.)

In re M.S. (1995) 10 Cal.4th 698.

Here, Alex's past and anticipated future publications on the internet are to the marketplace of ideas. They are not threats of imminent violence. They are issues in the public interest, such as copyright, and recent changes in intellectual property law. (App.66a) These do not fall within recognized exceptions to First Amendment protection—such as defamation, fighting words, obscenity, invasion of privacy, or true threats. But since they were publications regarding an ex-wife, they lost protection in California.

Several State courts have held that statutory prohibitions on "abuse" are facially unconstitutional. For a California opinion declaring a statutory prohibition on "abuse" facially unconstitutional, *see Ketchens v. Reiner* (1987) 194 Cal.App.3d 470. Many opinions from other States are in accord, evaluating, for example, the use of the word "bitch" as it triggers analysis of whether statutes barring "abuse" are be overbroad or vague. *See, e.g., Shoemaker v. State of Arkansas* (2001) 343 Ark. 727, 38 S.W.3d 350, 152 Ed. Law Rep. 364; *In re Nickolas S.*, (2011) 226 Ariz. 182, at 186; *West v. State* (2016) 300 Ga. 39, 793 S.E.2d 57, 338 Ed. Law Rep. 560.

In the context of divorce litigation and restraining orders, a court order that a spouse refrain from "annoying" the other spouse has been held too vague to be enforced. (*Gottlieb v. S.Ct.* (1959) 168 Cal.App.2d 309, 312-313).

The need to bring the DVPA abuse definition into harmony with our Constitution is grounds to grant certiorari.

CONCLUSION

In light of the foregoing, Alexander C. Baker respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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