No._____

In The

Supreme Court of the United States

RICHARD ALAN WELLBELOVED-STONE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated November 10, 2019

QUESTION PRESENTED

Whether information having nothing to do with customs, obtained by an agency pursuant to a customs summons under 19 U.S.C. § 1509, should be suppressed in a criminal proceeding.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit, No. 16-4778, *United States v. Wellbeloved-Stone* (June 13, 2019 Order Denying Appeal)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Alan Wellbeloved-Stone respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The order of the United States Court of Appeal for the Fourth Circuit that is the subject of this appeal (App., *infra.* 1a) was unreported.

JURISDICTION

The final judgment of the court of appeals was entered on June 13, 2019. On August 21, 2019, Chief Justice Roberts extended the time to file a petition for a writ of certiorari to and including November 10, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

(a) **Authority** In any investigation or inquiry conducted for the purpose of ascertaining the correctness of any entry, for determining the liability of any person for duty, fees and taxes due or duties, fees and taxes which may be due the United States, for determining liability for fines and penalties, or for insuring compliance with the laws of the United States administered by the United States Customs Service, the Secretary (but no delegate of the Secretary below the rank of district director or special agent in charge) may—

> (1) examine, or cause to be examined, upon reasonable notice, any record (which for purposes of this section, includes, but is not limited to, any statement, declaration, document, or electronically generated or machine readable data) described in the notice with reasonable specificity, which may be relevant to such investigation or inquiry, except that—
>
> > (A)if such record is required by law or regulation for the entry of the merchandise (whether or not the Customs Service required its presentation at the time of entry) it shall be provided to the Customs Service within a reasonable time after demand for its

> production is made, taking into consideration the number, type, and age of the item demanded; and
>
> (B)if a person of whom demand is made under subparagraph (A) fails to comply with the demand, the person may be subject to penalty under subsection (g);
>
> . . .

INTRODUCTION

Immigrations and Customs Enforcement ("ICE"), part of the Department of Homeland Security ("DHS"), routinely uses, and abuses, the customs summons provision of 19 U.S.C. § 1509 to obtain documents that have nothing to do with customs investigations. These summons do not include a probable cause statement, or reasonable suspicion or criminal activity. After DHS sent a customs summons to Twitter in early 2017 to uncover the name and address associated with a Twitter account that had been critical of President Trump, Twitter filed for an injunction to avoid complying with the summons, arguing that the summons had no basis under the law and subverted the Stored Communications Act. DHS quietly withdrew the § 1509 summons the very next day before any adverse legal ruling on the appropriate limits of § 1509 could be issued.

After this incident came to light, the Office of Inspector General for DHS issued a Management Alert concluding an internal investigation of the use of customs summons. This investigation revealed a pattern of overuse of 1509 summons in direct contravention of already existing written policies. The Office of Inspector General was explicit that authority under 19 U.S.C. § 1509 was limited to summons for matters concerning customs enforcement only. Additional guidance

was issued, affirming the same limited authority. Yet despite the plain language of the statute, the prior written authority within DHS limiting the use of § 1509 summons, and the additional guidance issued after April of 2017, thousands of these summons are issued each year by ICE. In this case, an ICE agent sent a § 1509 summons to Kik, an internet messaging company, requesting information about a particular account. The summons warned Kik that "[f]ailure to comply with this summons will render you liable to proceedings in a U.S. District Court to enforce compliance with this summons as well as other sanctions." The result—Kik provided the information.

In the appeal below, the government defended an expansive use of 19 U.S.C. § 1509—one that would permit any agency within DHS to require production of documents and records from any person or entity as long as they are in any way relevant to anything any agency under DHS takes an interest in—all without a warrant, probable cause, or even reasonable suspicion. The use of these summons appears to be rampant. In response to a Freedom of Information Act request for a log of all 1509/customs summonses in the ICE Subpoena System, ICE responded that due to the volume of records they could only provide a few months of data. More than 4,000 summons were issued between May-October of 2018 alone. Much of the information was withheld, but the recipients were provided and included banks, telecommunications companies, internet service providers, utility companies, apartment complexes, cryptocurrency exchanges, transportation companies, public storage units, and state and local prisons.

The exclusionary rule is the only way that the Government will be deterred from continuing to use § 1509 summons without any legal authority to do so.

STATEMENT OF THE CASE

Mr. Wellbeloved-Stone used an internet message program, Kik, to engage in a conversation with an undercover agent. CAJA 232-235. Following the conversation, the agent contacted Homeland Security Investigations (HSI), part of ICE. CAJA 333. HSI sent a summons to Kik, under the purported authority of 19 U.S.C. § 1509, requesting the name, address, phone numbers, usage records, payment and bank account information, and login information for the account that Mr. Wellbeloved-Stone had used. CAJA 127. Kik provided the requested information, which identified his IP address. CAJA 128-42. A second summons to Comcast linked his account to his real name and address, and was used to obtain a search warrant of Mr. Wellbeloved-Stone's residence. CAJA 143-44. When the warrant was executed, local authorities found images constituting child pornography. CAJA 11-12.

Mr. Wellbeloved-Stone was then federally indicted on three counts related to child pornography. CAJA 14. He moved the court to suppress the evidence obtained as a result of the unauthorized use of the customs summons. CAJA 86, 197. The district court denied that motion, as well as the other motions to dismiss and to suppress. CAJA 5-6 Mr. Wellbeloved-Stone was sentenced to 23 years, and timely appealed to the Fourth Circuit.

In an unpublished opinion, the Fourth Circuit found that "[w]e need not

address whether the summonses were valid because, even if they were invalid, Wellbeloved-Stone had no reasonable expectation of privacy in his IP address or subscriber information, and Congress did not provide a statutory suppression remedy for information obtained in violation of § 1509." App. 3a. In addition, the court below relied on Fourth Circuit precedent finding there is "no exclusionary rule generally applicable to statutory violations." App. 4a (internal citation omitted).

REASONS FOR GRANTING THE PETITION

There is no circuit split on the appropriate use of customs summons under 19 U.S.C. § 1509. Apart from the public exposure that resulted from Twitter fighting the use of this provision for what appeared to be political retaliation, the use of this provision flies largely under the radar. And use is not occasional. Records produced in response to a recent Freedom of Information act request suggest that ICE used more than 4,000 customs summons between just May and October of 2018. This was after the Office of Inspector General for DHS issued a Management Alert unequivocally stating that authority under 19 U.S.C. § 1509 was limited to summons for matters concerning customs enforcement, and that "both verbal and written guidance" had been delivered to agents about the proper use of these summons. CAJA 115.

The summonses exceed the scope of DHS's authority under 19 U.S.C. § 1509 for at least three reasons. First, 19 U.S.C. § 1509 limits the purpose of a summons under this statute to instances where there is an investigation or inquiry concerning the importation of merchandise, not where there is a potential *criminal*

investigation. Second, each the summons sought production of records that are not of the narrowly limited type authorized for obtaining under 19 U.S.C. § 1509. Third, 19 U.S.C. § 1509 authorizes only the United States Customs Service ("USCS") to issue a summons pursuant to this statute, not DHS or ICE.

The exclusionary rule exists for circumstances precisely such as this – as a court-created tool to combat police misconduct. *See, e.g., Alderman v. United States*, 394 U.S. 165 (1969). The exclusionary rule's "prime purpose is to deter future unlawful police conduct." *United States v. Calandra*, 414 U.S. 338 (1974). In *Herring v. United States*, 555 U.S. 135, 143 (2009), this Court explained that "[t]he extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." "[A]n assessment of the flagrancy of the police misconduct constitute an important step in the calculus" of applying the rule. *United States v. Leon*, 468 U.S. 897, 911 (1984). Indeed, "police conduct must be sufficiently deliberate" such that "exclusion can meaningfully deter it" and "[a]s laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring*, 555 U.S. at 144. Preventing the government's systemic, and apparently increasing use, of customs summons without regard for its own policies for use is worth the price of exclusion in this case.

1. **ICE's use of customs summons under 19 U.S.C. § 1509 for non-customs information violates federal law**

19 U.S.C. § 1509 confers authority on the Secretary of the United States Customs Service ("USCS") (or a delegate at or above the rank of district director or

special agent in charge) to compel disclosure of records only in connection with

> any investigation or inquiry conducted for the purpose of ascertaining the correctness of any entry, for determining the liability of any person for duty, fees and taxes due or duties, fees and taxes which may be due the United States, for determining liability for fines and penalties, or for insuring compliance with the laws of the United States administered by the United States Customs Service.

19 U.S.C. § 1509(a). The first three listed items clearly relate narrowly to imports, and the meaning of the fourth is "cabin[ed]" by the first three. *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (applying "the principle of noscitur a sociis—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress'" *quoting Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)).

Further, the fourth phrase is expressly limited to laws administered by USCS. However, even if ICE, or Customs and Border Patrol ("CBP"), or DHS more broadly, could be substituted for USCS in this sentence, laws *administered* by an entity, are distinct from laws that may be *enforced* by the entity. When Congress granted the limited power of an administrative summons to USCS it was to manage or conduct a *regulatory* function of "duty, fees and taxes" and compliance with related Customs laws managed by USCS – not to enforce any and all of the criminal laws that HSI elects to investigate.

a. Customs Summons Only Allow Compelled Production of Importation-Related Documents

Section 1509 does not authorize DHS, or any agency under DHS, to compel

production of the internet account-related records. The Secretary of USCS, or his delegate, can only compel the production of records that fall within a narrow category defined in 15 U.S.C. § 1509(d)(1)(A). *See* 15 U.S.C. § 1509(a)(2)(D) ("[T]he Secretary ... may … summon … any … person he may deem proper … to produce records, as defined in subsection (d)(1)(A)."). Subsection 1509(d)(1)(A) limits the "records" whose production may be permissibly compelled through a summons to those (1) that are "required to be kept under section 1508 of this title" and (2) "regarding which there is probable cause to believe that they pertain to merchandise the importation of which into the United States is prohibited."

To the contrary, Section 1508 requires importers to maintain certain records relating to their activity of *importing merchandise*. *See United States v. Frowein*, 727 F.2d 227, 233 (2nd Cir. 1984) ("Section 1508 … imposes recordkeeping requirements on those who import or cause goods to be imported."). Specifically, the entities that must maintain records under section 1508 are limited to the following: any "owner, importer, consignee, importer of record, entry filer, or other party who—(A) imports merchandise into the customs territory of the United States, files a drawback claim, or transports or stores merchandise carried or held under bond, or (B) knowingly causes the importation or transportation or storage of merchandise carried or held under bond into or from the customs territory of the United States," 19 U.S.C. § 1508(a)(1); or any "agent of any party described in paragraph (1)," *id.* § 1508(a)(2); or any "person whose activities require the filing of a declaration of entry, or both," *id.* § 1508(a)(3). The records Section 1508 requires these entities to

maintain are limited to records that both "pertain to any such activity, or to the information contained in the records required by this chapter in connection with any such activity" and "are normally kept in the ordinary course of business." 19 U.S.C. § 1508(a)(3). Subsection 1509(d)(1)(A)(ii) likewise limits the scope of records that may be compelled pursuant to a summons to records relating to the importation of merchandise—specifically, records "pertain[ing] to merchandise the importation of which into the United States is prohibited."

The two summonses in this case plainly did not request records relating to the importation of merchandise or that Kik or Comcast were required to maintain under § 1508.

b. *Customs Summons May Only be Issued by the USCS*

19 U.S.C. § 1509 confers authority on the USCS to administratively enforce the import-export laws and various trade agreements. DHS, which issued the summonses in question, does not appear in the text of 19 U.S.C. § 1509. In fact, USCS is a federal agency that ceased to exist after March 1, 2003, when it was reorganized under DHS as CBP.[1] Today, there are seven different agencies that are grouped under DHS: CBP, United States Citizenship and Immigration Services, United States Coast Guard, Federal Emergency Management Agency, ICE, United

[1] According to the CBP website, "U.S. Customs Service, which traced its original functions to July 31, 1789…closed with the dawn of CBP, but its commissioner became the leader of CBP and the majority of its staff and responsibilities came to CBP." *See* https://www.cbp.gov/about/history (last accessed October 3, 2018).

States Secret Service, and the Transportation Security Administration.[2] While Section 403(1) of Homeland Security Act of 2002 transferred the functions, personnel, assets, and liability of the USCS from the Secretary of the Treasury to the Secretary of Homeland Security, it did not amend 19 U.S.C. § 1509 or otherwise broaden that narrow statutory grant. Therefore, there is nothing to support the claim that this narrow grant of summons authority to the now-non-existent USCS can be expanded to include every later-formed agency that happens to be lumped under the DHS – an entity dramatically larger in size and scope of mission than the USCS, and that did not exist until March of 2003.

2. ICE's use of customs summons for non-customs information violates its own policies.

The straight-forward statutory interpretation needs no further support. But confirmation of this reading can be found with DHS itself. The Office of Inspector General issued a Management Bulletin in November 2017, following an internal investigation at DHS after Twitter challenged the propriety of a § 1509 summons in federal court. CAJA 109-23. Specifically, DHS sent a § 1509 summons to Twitter in early 2017 to uncover subscriber information (the name and address) for a particular account that had been critical of President Trump. CAJA 111. Twitter filed an injunction to avoid complying with this subpoena in the United States District Court for the Northern District of California in April 2017. This complaint

[2] *See* Organizational Chart for Department of Homeland Security, available at https://www.dhs.gov/sites/default/files/publications/Public%20Org%20Charts%202017.08.15.pdf (last accessed October 2, 2018).

carefully analyzed § 1509 and its limitation to records related to the importation of merchandise.[3] DHS withdrew the § 1509 summons the very next day before any adverse decision could be issued.[4]

In its review of the use of § 1509 summons, OIG affirmed that this request from DHS for subscriber information from Twitter was "unrelated to the importation of merchandise or the assessment and collection of customs duties" and stated that CBP "may have exceeded the scope of its authority under Section 1509 when it issued the summons to Twitter." CAJA 112. More telling, however, is an email that the Executive Director of CBP's Investigative Operations Division circulated to personnel a month after the Twitter incident, on May 25, 2017, "clarifying the limited contexts in which Section 1509 Summonses may properly be used" as:

> OPR IOD may utilize a 1509 summons authority in investigations and inquiries involving employee misconduct, but only where such misconduct is connected to the importation, certain exportations, or transportation or storage under bond, of merchandise. In such investigations, OPR may use a 1509 summons to obtain entry records or other records required to be kept under 19 U.S.C. § 1508. **In instances where records are sought from third parties, such as telecommunications providers, social media outlets, and banks, who are not otherwise obligated to keep records pursuant to 1508, the issuance of a 1509 summons requires probable cause to *believe* that the *records relate* to an importation of merchandise that is prohibited. Prior to issuance of a section 1509 summons to a third party, OPR agents are required to consult with the appropriate Associate/Assistance Chief Counsel office.**

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[3] Complaint, *Twitter v. U.S. Dep't of Homeland Security et al*, Case 3:17-cv-01916, N.D.Ca. April 6, 2017, ECF #1. The complaint is also available at: https://s3.amazonaws.com/big.assets.huffingtonpost.com/show_multidocs.pl.pdf

[4] *See, e.g.,* https://www.reuters.com/article/us-twitter-lawsuit/twitter-pulls-lawsuit-over-anti-trump-account-says-summons-withdrawn-idUSKBN1792N9 (last accessed Dec. 7, 2017)

Id. (emphasis added). Therefore, two months before the first summons issued in this case, DHS had interpreted § 1509 to only permit the issuance of summons where an investigation concerned importation of merchandise and not for criminal investigations.

What is more, this additional guidance should never have been necessary because pre-existing Special Agent Internal Operating Procedures already limited the proper uses of § 1509 summonses within CBP. The Special Agent Internal Operating Procedures, issued on April 15, 2016, stated that § 1509 summonses authorized "the examination of records to ensure compliance with customs law," that the summonses "cannot be used in drug-smuggling or export investigation," and that the summonses could only be used to obtain information "related to Title 8 and Title 19 violations" but that "[a]bsent a nexus to a Title 8 or Title 19 violation" the summonses "may not be used." CAJA 112. Title 8 of course pertains to aliens and nationality related offenses, and Title 19 to customs duties. Neither include child sex offenses.

3. ICE is using 1509 summons with great frequency

In response to a FOIA request, ICE produced a spreadsheet showing the number of times that a DHS Form 3115 Summons was used between May of 2008 and October of 2008.[5] While the FOIA response did not include information about

[5] The FOIA request and subsequent production of records is available here: https://www.muckrock.com/foi/united-states-of-america-10/ice-subpoena-system-1509-summonses-54010/.

what information was requested in the more than 4,000 summons that were issued, the response shows who the requests were submitted to. A wide range of well-known telecommunications companies and banks received summons.[6] But a number of other companies received summons as well. Airline companies, hotels, local jails, stores, self-storage facilities, utility companies, universities, a casino, a construction company, and a McDonald's.[7]

The implication is that a vast amount of information held by companies is being produced through these summons, which say on their face that "[f]ailure to comply with this summons will render you liable to proceedings in a U.S. District Court to enforce compliance with this summons as well as other sanctions." CAJA 125. At least in this case, the summons was a direct work-around to the Stored

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[6] Including, for example: Amazon, American Express, AOL, Apple, AT&T, Bank of America, Capital One, Cellular South, Century Link, Charter Communications, Comcast Cable, Cox Communications, Dropbox, Facebook, Federal Reserve Bank of New York, Frontier Communications, Google, Instagram, J.P. Morgan Chase, Jet Blue Airways, Kik Interactive, Microsoft, Snapchat, Sprint, Time Warner Cable, T-Mobile, Verizon Wireless, Yahoo,

[7] A partial summary includes: American Airlines, Baymont Inn and Suites, Bergen County Jail, Bj's Wholesale Club, Brownells (an online firearm distributor), the California Employment Development Department, Country Inns & Suites, Cubesmart Self Storage, Days Inn McKinney, Delta Airlines, DHL Express, eBay, El Paso Electric, El Paso Water Utilities, Equifax, Experian, Extended Stay America, Extra Space Storage, Ezbiolab, Inc., E-Zpass Maryland, Federal Bureau of Prisons, Federal Express, Fox Creek Apartments, Greyhound Lines, Hampden County Sheriff's Department, Hampton Inn, Harvard University, Hertz Corporation, Hillsborough County Public Schools, Holiday Inn, Hollywood Casino at Charles Town Races, J.H. Berra Construction Co. Inc., Kentucky Office of Employment and Training, La Quinta Inns & Suites, McDonald's, Metropolitan Correctional Center San Diego, Miami-Dade County Supervisor of Elections, Motel 6, Nationwide Insurance Company, New Mexico Gas Company, Paypal, Samsung Electronics, Target, UPS, Walmart,

Communications Act, 18 U.S.C. §§ 2701-2712, which provides some privacy protections for communications on the internet absent a subpoena—not a summons issued without any probable cause or reasonable suspicion.

4. The result is flagrant, systemic abuse that can only be curtailed by the exclusionary rule.

Applying the exclusionary rule in this case is the only way to deter future misuse of the § 1509 summons whether by ICE or CBP. Last year, a spokesperson for ICE defended their use of customs summons, stating that they "may be used in any HSI investigation or inquiry conducted for the purpose of ensuring compliance with the laws of the United States, as administered by HSI."[8] This is the same position that the district court ratified below – a vast expansion from the limited grant of authority in § 1509, and a position in direct contradiction to the interpretation of § 1509 provided by the OIG. There is simply no reason that the statutory language means one thing when it comes to CBP, but another thing when it comes to ICE.

The exclusionary rule is also necessary because internal policies limiting the use of § 1509 summons have not been effective in constraining their use. The exclusionary rule exists for circumstances precisely such as this – as a court-created tool to combat police misconduct. *See, e.g., Alderman,* 394 U.S. 165. The exclusionary rule's "prime purpose is to deter future unlawful police conduct."

[8] Musgrave, Shawn and Sarah Jeong, How ICE Used an Obscure Rule to Pursue the Owners of a Korean Porn Site, *The Verge*, Sept. 27, 2018, available at https://www.theverge.com/2018/9/27/15186356/ice-korean-porn-customs-law-soranet-spycam-homeland-security (last accessed October 2, 2018).

Calandra, 414 U.S. 338. In *Herring v. United States*, 555 U.S. 135, 143 (2009), this Court explained that "[t]he extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." Further, "an assessment of the flagrancy of the police misconduct constitute an important step in the calculus" of applying the rule. *Leon*, 468 U.S. at 911. The standard for exclusion is met here because the "police conduct [is] sufficiently deliberate" and "exclusion can meaningfully deter it." *Herring*, 555 U.S. at 144. Further, ICE is "sufficiently culpable that such deterrence is worth the price paid by the justice system" and the conduct is "deliberate, reckless, or grossly negligent conduct." *Id*. Preventing the government from using these summonses in the absence of any accountability or reasonable suspicion of criminal activity is worth the price of exclusion in this case.

There is precedent for using the exclusionary rule to remedy overreach of an administrative summons in precisely a case such as this. In *United States v. Genser*, 582 F.2d 292 (3rd Cir. 1978), the Third Circuit explained that suppression was the only practical remedy to cure statutory abuse if an administrative summons issued pursuant to 26 U.S.C. § 7602 exceeded the authority of that statute. At the relevant time, § 7602 permitted the IRS to issue summonses to persons to obtain testimony and documents for the limited purpose of "ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax…or collecting any such liability." After *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978),

the IRS could not in good faith, by means of a § 7602 summons, gather evidence solely for a criminal investigation. In *Genser*, the Third Circuit remanded the case to the district court to hold a hearing to determine the purpose for the challenged summonses. 582 F.2d at 311. In explaining why suppression would be appropriate, the Third Circuit explained

> If a court determines in the context of enforcement proceedings that a summons was illegally issued, it will deny enforcement of the summons…That summons is no less illegal merely because it escapes detection at the investigatory stage. The prophylactic principles which operate at the enforcement level are equally appropriate to the trial stage, and suppression is the only practical remedy at that point to cure the statutory abuse.

Id. at 308; *see also United States v. Weiss*, 566 F.Supp. 1452 (C.D.Cal. 1983) (dismissing criminal prosecution sua sponte and with prejudice because IRS acted with institutional bad faith in gathering criminal evidence for prosecution through a civil summons); *United States v. Dahlstrum*, 493 F.Supp. 966, 971-73 (C.D.Cal. 1980) (indictment dismissed with prejudice "to preserve the interests of a taxpayer defendant subjected to this type of governmental misconduct, even though fueled only by 'institutional bad faith' and not any personal bad faith").

No remedy but the exclusionary rule can restrain this Government intrusion into protected privacies. There is evidence both that ICE issued these summons in contravention of both internal DHS policies and clear statutory language, and that ICE continues to use them for any inquiry or investigation by HSI regardless of its connection to customs inquiries or the Tariff Act of 1930.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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