No. _____

In the

Supreme Court of the United States

MICHAEL MCCARRON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented

Whether the Ninth Circuit decision that "purely hypothetical" emails can support a conviction for violation of 18 U.S.C. §2422(b) (attempted enticement of a minor) conflicted with the Seventh Circuit decision in *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008) ("Treating speech … as the 'substantial step' would abolish any requirement of a substantial step").

Whether the Ninth Circuit's reliance on "purely hypothetical" emails to support a violation of §2422(b) renders the statute unconstitutionally vague in violation of the Due Process Clause and violates the First Amendment.

Statement of Related Proceedings

- *United States v. Michael McCarron*,
  1:19-cr-00012-1 (D. Guam February 18, 2020)

- *United States v. Michael McCarron*,
  20-10072 (9th Cir. April 18, 2022)

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In the

Supreme Court of the United States

MICHAEL MCCARRON, Petitioner

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Petition for Writ of Certiorari

Petitioner Michael McCarron respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals of the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's April 18, 2022 Opinion affirming the judgment of the district court in *United States v. Michael McCarron*, Ninth Circuit Case No. 20-50171, is reported at 30 F.4th 1157 (9th Cir. 2022). (See Appendix 1-17) The Ninth Circuit's April 18, 2022 Memorandum affirming the judgment of the district court in *United States v. Michael McCarron*, Ninth Circuit Case No. 20-50171, is unreported. (See Appendix 18-21) The Ninth Circuit's June 24, 2022 Order denying rehearing and rehearing en banc is

unreported. (See Appendix 22) No written opinions (other than a minute order) were issued by the district court when it issued the rulings which are the subject of this Petition.

JURISDICTION

The Ninth Circuit entered its judgment on April 18, 2022. The Ninth Circuit denied McCarron's petition for rehearing on June 24, 2022. This petition is filed within 90 days of the Ninth Circuit's denial of the petition for rehearing.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. §3231, and the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2422(b) states:

> "(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life."

United States Constitution, First Amendment, states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fifth Amendment, states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

INTRODUCTION

McCarron was convicted of attempting to violate 18 U.S.C. §2422(b), which proscribes attempted inducement or enticement of a minor to engage in criminal sexual activity. McCarron answered an ad posted by "Brit" in the Craigslist Women-for-Men section. McCarron was looking for one-time adult sexual relations. In fact, "Brit" was an adult male Air Force officer. During their first conversation "Brit" told McCarron that she was 13. McCarron did not initially believe her. But at some point he came to accept

that "Brit" was a minor. While he continued to communicate with "Brit," McCarron was determined that they would never meet. He told "Brit" that he would love to meet with her "one day"[1] and fantasized about what they would do. However, when "Brit" repeatedly proposed meetings, McCarron demurred. McCarron's intention to never meet "Brit" was confirmed by the facts that McCarron had no history of child pornography on his devices and no history of inappropriate contact or communications with children.

The Ninth Circuit held that McCarron proposed a rendezvous with his "purely hypothetical" emails, and that McCarron's purely hypothetical references to a meeting "one day" were sufficient to constitute an attempt to violate §2422. The Ninth Circuit decision conflicts with the law of another Circuit. For example, in *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008), Judge Posner stated that the Seventh Circuit was: "surprised that the government prosecuted [Gladish] under section 2422(b). Treating speech (even obscene speech) as the 'substantial step' would abolish any requirement of a substantial step." Id. at 650.

Finally, the Opinion's reliance on purely hypothetical emails to support

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1 "One day" means so far in the future that a definite date cannot now be scheduled:

> ": at some time in the future
> //One day, it'll happen. You'll see.
> //People may one day be able to take vacations to the moon."
> https://www.merriam-webster.com/dictionary/one%20day

a criminal conviction renders the statute unconstitutionally vague in violation of the Due Process Clause and violates the First Amendment.

STATEMENT OF THE CASE

A. Emails from October 31 to November 29, 2017

McCarron was a Department of the Navy civilian on temporary duty at the naval base in Guam from approximately October 21, 2017 to November 30, 2017. While in Guam he looked online for adult sexual encounters. He responded to a posting by "Brit" on the Craigslist WFM (Women for Men) website on October 31. "Brit" was a male officer pretending to be a 13-year-old girl. "Brit" posted that she was stuck on the air force base because she could not drive. They engaged in sexual email conversations for several weeks and McCarron sent "Brit" images of his penis. Initially McCarron believed that "Brit" was lying about her age. In time he came to accept that "Brit" was a minor and determined that he would not meet with her. But he continued to email with her. During their communications, McCarron told "Brit" that he would love to meet her one day, and told her what he would love to do with her. However, due to her age, McCarron refused to meet "Brit."

But "Brit" repeatedly pressured McCarron to meet with her. For example, on Tuesday, November 21, "Brit" said that maybe they could meet Monday (November 27). There were no communications on Monday, November 27, the date "Brit" had suggested they get together. When McCarron did not follow up on that invitation, on November 28, "Brit" said they could meet on November 29. Each time McCarron did not ask for a time or address, and instead paused communications until after the potential meeting was no longer possible. At no time did they agree on a time or place for a rendezvous.

B. November 30, 2017 Interview with Law Enforcement Agents Christine Albo and Joshua Kipp

Realizing that they would never induce McCarron to agree to a meeting with "Brit," on November 30, 2017, law enforcement executed a search warrant at McCarron's hotel room. McCarron gave a voluntary interview. He explained that when he came to Guam, he posted several listings on Craigslist seeking adult women in their mid-twenties to mid-thirties (McCarron was 32) for one-time sexual encounters. He received various responses and had a sexual encounter with one 28-year old woman.

"Brit" was one of the individuals with whom he communicated. He told law enforcement that he thought "Brit" was 18 and that he wanted to have sex with her. The agents asked why he met with the other woman and not

with "Brit." What was different about "Brit" that he wouldn't meet with her? McCarron responded that he didn't meet with "Brit" because something seemed weird, her syntax, almost every other word misspelled, strange, not developed, almost childlike.

McCarron acknowledged that "Brit" might have said she was 13 but he initially thought she was 18. He reiterated that he was not going to meet with "Brit" because she made him too nervous. They never met up because McCarron was way too nervous, way too nervous. He did not want to meet up with her. McCarron said he was not attracted to 13-year-olds. He told the agents he never had inappropriate contact with a minor and was willing to take a polygraph which he would pass. He was not attracted to children and would pass a polygraph that he never had contact with girls or boys. He had no child pornography. Guilt, including the fact that it was wrong, prevented him from meeting with "Brit." The agents did not detain McCarron.

C. March 16, 2019 Indictment

Fifteen months later, McCarron was indicted for attempted enticement of a minor under 18 U.S.C. §2422(b), which carries a mandatory minimum sentence of ten years; and attempted transfer of obscene material to a minor in violation of 18 U.S.C. §1420, which carries a ten-year statutory maximum.

D. October 31, 2019 Trial

At trial, the government presented misleadingly edited excerpts of McCarron's interview with agents; excerpts of McCarron's emails with "Brit"; testimony of AF OSI Agent Adam Ring, who posed as "Brit"; and improper testimony of NCIS SA Christine Albo,[2] who interviewed McCarron on November 30, 2017.

McCarron was convicted after, as discussed below, the government presented a false and misleading case to the jury.

E. February 11, 2020 Sentencing

The PSR reported that NCIS interviewed McCarron's wife Kristi. Kristi reported that her 14-year-old daughter SD lived with Kristi and McCarron. Kristi did not know of any inappropriate behavior between McCarron and SD. Kristi was in disbelief that McCarron could solicit a minor. McCarron helped SD with homework, and they spent time doing chores. They had a good relationship and SD referred to McCarron as dad. Every month when Kristi went to the show with her friends, McCarron and SD were alone together. SD denied that McCarron was ever inappropriate with her.

NCIS interviewed SD, who confirmed that she and McCarron did chores together. McCarron helped SD with her homework when she struggled. SD denied sexual discussions with McCarron. SD reported that McCarron never

2 The government conceded that Albo's testimony was improper.

inappropriately touched her, bought her special gifts, or made her feel uncomfortable. SD was shocked to hear of the allegations against him and denied that he was ever sexually inappropriate toward her. She continued to struggle to believe McCarron was capable of the allegation against him.

Law enforcement experts analyzed McCarron's digital devices. He had 180,000 picture and video files of adult female pornography. He visited adult video sites and chatrooms. He made 1980 Craigslist visits in November 2017. Other than the communications with "Brit," the "cyber review did not reveal any additional images of child pornography or evidence of McCarron engaging in communication with any additional underage males or females."

McCarron had no criminal history.

Personal and Family Data. McCarron had a troubled childhood. He never met his father and his mother suffered from depression. She married a man who was abusive to McCarron. For example, he would make McCarron dig his own grave in the backyard and told him that's where McCarron would be that night.

Physical Condition. McCarron was born with a cleft lip and underwent multiple reparative surgeries until age 16. He has scars on his lip and right hip from past cleft lip surgeries. He bears multiple scars on his left forearm from self-inflicted wounds.

Mental and Emotional Health. McCarron has been diagnosed with bipolar disorder. He has attempted suicide three times in the past, in 2007, 2009 and 2018. All three attempts were made by cutting his left wrist and forearm. He had periods of mental health treatment: outpatient treatment in 2007; diagnosis of bipolar disorder by a psychiatrist in 2014; and treatment from 2016-17.

Substance Abuse. McCarron had a history of alcohol abuse, consuming hard liquor four or five times a week. He attended AA two or three times a day in 2017 and 2018. He last drank alcohol in March 2019.

Educational, Vocational and Special Skills. McCarron graduated from high school in 2003. He attended Vincennes University, an online college, in 2006 and earned certifications in computer repair. He enrolled in online courses from 2017-2018. He possessed specialized training in electronics obtained while he served in the United States Navy.

Military History. McCarron enlisted in the Navy in 2003. He received basic and advanced training and served as an Electronics Technician. He was deployed for six months to the Persian and Arabian Gulfs. He was honorably discharged in 2009.

Employment. From 2003-2009, McCarron was an active duty sailor in the Navy. From 2010-2017 he was employed at the Puget Sound Naval Shipyard as an Electronics Mechanic Leader. He lost his security clearance

as a result of the offense and resigned. From 2018-2019 he was employed as a technician-PCVD Equipment. He resigned from this employment to tend to his legal situation. In 2019 he was employed as a food delivery person by Door Dash.

The district court sentenced McCarron to the 120-month mandatory minimum sentence required by §2422.

F. Appeal

1. Issues Raised by McCarron

On appeal, McCarron contended there was insufficient evidence to support his §2422 conviction because there was no evidence of an attempt to violate the statute. Mere preparation is not a substantial step towards committing a crime. To constitute a substantial step, the defendant's act or actions must unequivocally demonstrate that the crime will take place unless interrupted by an independent circumstances. In this case, there was no substantial step. Contrary to the requirement that the defendant's actions must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances, in this case "Brit" repeatedly invited and then badgered McCarron to visit "Brit" and he simply would not accede to her demands.

McCarron also objected to the prejudicially misleading excerpts of McCarron's interview. The excerpts played at trial were misleadingly edited

to indicate that McCarron confessed to intending to meet with a minor when, in fact, the full statements show that McCarron consistently stated that he refused to meet with "Brit" after he realized she was a minor.

Although McCarron engaged in sexually explicit conversations with "Brit," he never intended to meet her. "Brit" repeatedly pressured McCarron for a meeting. But every time a meeting was proposed, McCarron became evasive until it was too late for the meeting. Realizing McCarron would never agree to meet with "Brit," law enforcement detained McCarron. During his voluntary interview, McCarron told the agents that initially he believed "Brit," who posted on an adult WFM website, was an adult. McCarron explained that he was looking on Craigslist for a sexual encounter and that he had a sexual encounter with another adult woman that he met on the site. When Albo asked McCarron why he met with the other woman and not "Brit," McCarron said it was guilt that drove him not to meet with "Brit." Guilt because "Brit" seemed not developed, almost childlike. McCarron was not going to meet with "Brit."

But that was not what the jury heard. The government misleadingly excerpted the interview so the jury heard that McCarron wanted to have sexual relations with "Brit." The jury never heard that McCarron initially thought "Brit" was 18 and was not going to meet with "Brit" once he realized she was a child. The jury never heard McCarron's statement that guilt over

"Brit's" childlike nature made McCarron decide that he would not meet with "Brit." Instead, the jury heard SA Kipp's mischaracterization that McCarron felt guilty because he was going to get caught.

Then, after having presented the false impression that McCarron wanted to have sex with 13-year-old "Brit," the government presented the untrue and improper testimony of SA Albo (which the government conceded was improper) that McCarron admitted to having intended to violate Guam law.

McCarron objected to the improper and baseless opinion testimony by SA Albo. Over defense relevance objections, SA Albo was allowed to testify that the conduct that McCarron "mentioned" during his interview would have violated Guam law. Albo therefore testified to the ultimate legal issue that the jury had to decide: whether McCarron knowingly attempted to induce "Brit" to engage in sexual conduct that violated Guam law. The Opening Brief argued that this testimony was wrong and prejudicial for various reasons.

Albo's testimony that McCarron mentioned conduct that would have violated Guam law was baseless. When McCarron said he intended to meet with "Brit" for sexual relations, it was when he believed that "Brit" was 18. That would not have violated Guam law. Once McCarron realized that "Brit" was 13, he repeatedly said he did not intend to meet her.

Albo inappropriately gave an opinion on the ultimate legal issue before the jury -- whether McCarron intended to violate Guam law. It was all the more prejudicial because it was untrue.

McCarron was convicted only because the government presented a false and misleading case to the jury.

2. Ninth Circuit Opinion

The Opinion stated that to convict McCarron under 18 U.S.C. §2422(b), the government needed to prove that "he knowingly (1) attempted to (2) persuade, induce, entice, or coerce (3) a person under 18 years of age (4) to engage in sexual activity that would constitute a criminal offense." "An attempt conviction requires evidence that the defendant 'intended to violate the statute and took a substantial step toward completing the violation.'" Moreover, "a defendant's 'actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances.'" (App. 10-11)

The Opinion held that a rational juror could conclude that the facts viewed most favorably to the government demonstrated that McCarron attempted to induce a minor's assent to unlawful sexual activity. (App. 16)

According to the Opinion:

> "[W]hen a defendant initiates conversation with a minor, describes the sexual acts that he would like to perform on the minor, and

proposes a rendezvous to perform those acts, he has crossed the line toward persuading, inducing, enticing, or coercing a minor to engage in unlawful sexual activity." [*United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007)]. As set forth in Part II.B.2 below , there can be no doubt that McCarron did all these things." (App. 12)

The Court held that:

"McCarron's multiple proposed lurid rendezvous, even if purely hypothetical, suffice as evidence of a substantial step in his attempt to cause a minor's assent to unlawful sexual activity. See 18 U.S.C. § 2422(b); *Goetzke*, 494 F.3d at 1237." (App. 13)

3. Ninth Circuit Memorandum Disposition

The Memorandum separately rejected McCarron's evidentiary claims. The Memorandum held that Albo's testimony, which the government conceded was improper, was not a basis for reversal. On plain error review, the Memorandum held that McCarron failed to carry his burden of persuasion "in view of the overwhelming evidence against him." The Memorandum held that because McCarron intentionally withdrew his Rule 106 objection to the video excerpts of his interview, he waived any review. Additionally, the Memorandum held that the government's editing was neither misleading nor harmful. (App. 19)

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit Erroneously Held That Purely Hypothetical Emails Could Constitute an Attempt to Violate §2422

The Opinion held that McCarron made an attempt to violate §2422 because McCarron proposed a rendezvous to perform sexual acts. However, the statement that McCarron proposed a rendezvous is baseless. A rendezvous is defined as "a meeting at an appointed place and time." https://www.merriam-webster.com/dictionary/rendezvous. See also https://www.dictionary.com/browse/rendezvous ("an agreement between two or more persons to meet at a certain time and place"). McCarron never proposed a time and place for a meeting.

The Opinion claimed that McCarron invited "Brit" to meet him by mentioning his hotel room number. (App. 14 n.4) However, as the Opinion elsewhere observes, "Brit" represented that she was stuck on the military base because she could not drive. (App. 4) Thus "Brit" could not come to McCarron's hotel room. And McCarron, who stated during his interview that he was drunk during his nightly postings, told the agents that he routinely posted his hotel room number on his Craigslist posts due to his inebriation. Moreover, "Brit" never mentioned her address. Accordingly, no place was agreed upon. Nor was a date or time ever agreed upon.

Instead, the extent to which McCarron referenced a meeting was his statement that he would love to meet "Brit" "one day." (App. 6) As discussed above, the phrase "one day" means so far in the future that a definite date can't currently be proposed, e.g., "People may one day be able to take vacations to the moon." https://www.merriam-webster.com/dictionary/one%20day.

Thus McCarron was referencing a hypothetical meeting at some far distant time too far in the future to set a definite date (when, among other things, "Brit" would no longer be a minor). This cannot constitute proposing a rendezvous with a minor.

B. Notably, the Ninth Circuit Opinion Conflicts with Other Ninth Circuit Decisions

The Opinion's holding that a "purely hypothetical" proposed rendezvous is sufficient to constitute an attempt to violate §2422 (App. 13) conflicts with other opinions in the Ninth Circuit. The Ninth Circuit has previously held that fantasy texting does not constitute a violation of §2422. See, e.g., *United States v. Hofus*, 598 F.3d 1171, 1180 (9th Cir. 2010) (if "Hofus engaged in texting B.T. 'in fantasy alone,' it would necessarily follow that Hofus did not possess the requisite mens rea to violate § 2422"). See also *United States v. Dhingra*, 371 F.3d 557, 565 (9th Cir. 2004) ("Merely engaging in sexually explicit communication does not constitute a § 2422(b)

violation; the defendant must engage in the conversation *for the purpose of* inducing a minor into sexual activity." (Emphasis in original.))

Accordingly, the Ninth Circuit's precedents establish that purely hypothetical emailing does not violate §2422.

C. The Ninth Circuit Opinion Conflicts with Decisions of Other Courts of Appeal

The Ninth Circuit's conclusion that purely hypothetical emailing violates §2422 (Opinion, 13) similarly conflicts with a decisions of another Circuit. For example, in *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008), Gladish was caught in a sting operation in which a government agent impersonated a 14-year-old girl "Abagail" in an internet chat room. Gladish and "Abagail" engaged in graphic sexual chats and Gladish sent "Abagail" a video of Gladish masturbating. "Abagail" agreed to have sex with Gladish, and Gladish discussed the possibility of traveling to meet "Abagail," but no arrangements were made. Gladish was then arrested. Id. at 648. The Seventh Circuit reversed Gladish's §2422(b) conviction with instructions to acquit.

The Seventh Circuit observed that in the usual prosecution based on a sting operation, the defendant is arrested upon arrival when he goes to meet the pretend minor. Alternatively, a substantial step can consist of "making arrangements for meeting the girl, as by agreeing on a time and place for the

meeting." Id. at 649. Or a substantial step "can be taking other preparatory steps, such as making a hotel reservation, purchasing a gift, or buying a bus or train ticket, especially one that is nonrefundable." Id. at 649.

Importantly, the Seventh Circuit observed that in all the cases cited by the government or found by the Court's independent research, there was more than explicit sex talk. Id. at 649. Gladish's talk and sending a video were equally consistent with his having intended to obtain sexual satisfaction vicariously. The Court observed that there was no indication that Gladish had ever had sex with an underage girl. Id. at 650.

In fact, Judge Posner stated that the Seventh Circuit was:

> "surprised that the government prosecuted [Gladish] under section 2422(b). Treating speech (even obscene speech) as the 'substantial step' would abolish any requirement of a substantial step." Id. at 650.

The Seventh Circuit's opinion in *Gladish* conflicts with the Ninth Circuit's Opinion. As in *Gladish*, here there was nothing but sex talk. There was no substantial step. The government repeatedly attempted to induce McCarron to make arrangements to meet "Brit," but McCarron refused to do so. As McCarron indicated in the interview which the government refused to let the jury hear, McCarron had decided not to meet with "Brit" after he came to believe that she was a minor. Instead, as in Gladish, McCarron may have obtained vicarious gratification from his emails with "Brit."

There was far less evidence of attempt in this case than there was in *Gladish*, where the Seventh Circuit was surprised that the government would prosecute. McCarron never proposed, and never intended to conduct, a rendezvous with "Brit."

D. The Opinion's Interpretation Would Violate the Due Process Clause and the First Amendment

The Opinion's conclusion that a violation of §2422 can be based on purely hypothetical emailing violates the Due Process Clause. The government is prohibited from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Beckles v. United States*, 137 S. Ct. 886, 892 (2017). A statute that imposes a ten-year mandatory minimum sentence based on purely hypothetical fantasizing about the far-distant future is unconstitutionally vague.

Similarly, the Opinion's interpretation would render the statute violative of the First Amendment. In *United States v. Dhingra*, 371 F.3d 557, 563 (9th Cir. 2004), the Ninth Circuit upheld §2422(b) against a First Amendment challenge on the ground that "§ 2422(b) contemplates the category of conduct in which speech is the vehicle for the commission of a crime." See also *United States v. Meek*, 366 F.3d 705, 721 (9th Cir. 2004) ("there is no otherwise legitimate speech jeopardized by § 2422 because the

statute only criminalizes conduct, i.e. the targeted inducement of minors for illegal sexual activity. Here, speech is merely the vehicle through which a pedophile ensnares the victim").

Accordingly, the Ninth Circuit held that the reason that §2422 does not violate the First Amendment is because the statute criminalizes conduct -- the targeted inducement of minors for illegal sexual activity. If, as the Opinion holds, purely hypothetical emailing violates §2422(b), then the Ninth Circuit's rationale for upholding the statute against a First Amendment challenge fails.

CONCLUSION

For all the foregoing reasons, Petitioner Michael McCarron submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: September 21, 2022 By: _____
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