No. 23-443

IN THE

Supreme Court of the United States

MMN INFRASTRUCTURE SERVICES, LLC,

Petitioner,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.

On Petition for Writ of Certiorari to the Michigan Supreme Court

BRIEF *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Council On State Taxation ("COST") is a non-profit trade association based in Washington, D.C. COST was originally formed in 1969 as an advisory committee to the Council of State Chambers of Commerce.[1] Today COST has grown to an independent membership of over 500 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

COST members are extensively engaged in interstate commerce and share a vital interest in ensuring states do not impede the rights of all businesses engaged in both interstate and international commerce. To that end, it is important to COST members that states impose their taxes in a manner consistent with the protections afforded by the U.S. Constitution's Commerce and Due Process Clauses. This case provides this Court with the opportunity to clarify and provide much needed guidance on the application of both Clauses to the case at hand. COST membership is concerned that the Michigan Department of Treasury ("Treasury") has included a significant capital gain in the tax base without recognizing the factors giving rise to the gain in the State's apportionment formula. Treasury's action resulted in an assessment of corporate tax that is out of all proportion to the business' activities conducted in Michigan during the tax period by MMN Infrastructure Services, LLC

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity aside from *amicus* and its counsel funded its preparation or submission. The parties received timely notice of *amicus's* intent to file this brief.

(successor-in-interest to Vectren Infrastructure Services Corp. (itself the successor to Minnesota Limited, Inc.), hereinafter "Petitioner").

COST has a long history of submitting *amicus* briefs to this Court when significant state and local tax issues are under consideration. This includes the following significant state tax cases: *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015); *Alabama Department of Revenue v. CSX Transportation, Inc.*, 575 U.S. 21 (2015); *Direct Marketing Association v. Brohl*, 575 U.S. 1 (2015); *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213 (2019); and *Steiner v. Utah State Tax Commission*, 449 P.3d 189 (Utah 2019), *cert. denied*, 140 S. Ct. 1114 (2020). More recently, COST filed *amicus* briefs in *Ferrellgas Partners, L.P. v. Director, Division of Taxation*, 251 A.3d 760 (N.J. 2021), *cert. denied*, 142 S. Ct. 1440 (2022); *Washington Bankers Association, et. al. v. State of Washington, Department of Revenue, et al.*, 495 P.3d 808 (Wash. 2021), *cert. denied*, 142 S. Ct. 2828 (2022); in *United States of America, et al. v. SuperValu, Inc., et al*., *United States, ex rel. Thomas Proctor v. Safeway, Inc*., 143 S. Ct. 1391 (2023); and *Quad Graphics, Inc. v. North Carolina Department of Revenue*, 382 N.C. 356 (N.C. 2022), *cert. denied*, 143 S. Ct. 2638 (2023).

As a long-standing representative of multijurisdictional business taxpayers, COST is uniquely positioned to provide this Court with the analytical underpinnings for why Treasury's corporate income tax assessment ignores this Court's fair apportionment requirements, violates the Commerce and Due

Process Clauses and should be reviewed by this Court.[2]

STATEMENT OF THE CASE

In early 2011 in connection with the sale of its company, Minnesota Limited made an election under 26 U.S.C. § 338(h)(10) to treat the sale for tax purposes as a sale of assets.[3] The sale transaction was a terminating event for federal income tax purposes and thus the company's tax year immediately ended on March 31, 2011.[4] This termination required the filing of three-month short period income tax returns for both federal and Michigan reporting purposes. The short period tax return reported a capital gain of approximately $51 million recognized on the asset sale. The capital gain represented approximately 93 percent of the income reported on the Michigan short period return.[5] Pet. Br. 4. While Michigan's tax law required Petitioner to include the capital gain in the tax base as provided by Michigan Complied Laws § 208.1105(2), Treasury did not permit any factors

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[2] U.S. Const. amend XIV § 1; U.S. Const. art. I, § 8, cl. 3 ("regulate[s] commerce with foreign nations, and among the several states, and with the Indian tribes").

[3] 26 U.S.C. § 338(h)(10) allows a taxpayer for federal tax purposes to elect to treat a stock sale of an entity as a sale of the entity's assets.

[4] 26 U.S.C. § 1361(b)(1)(B). The tax year also terminated for Michigan income tax purposes. Michigan Compiled Laws § 208.1111(3).

[5] Petitioner was headquartered in Minnesota; however, it only engaged in pipeline repair activities in Michigan during the first 3 months of 2011. Those repair activities in Michigan were not significantly related to its overall activities that created its significant capital gains income for the short-period tax return.

representing the approximately $51 million in capital gain to be included in the State's apportionment formula.[6]

Petitioner filed its short period return treating the sale of all its assets as sales, including in both the numerator and denominator of the sales apportionment formula the sales that gave rise to the gain. This reasonable method resulted in an approximate 15 percent apportionment factor. However, Treasury rejected this interpretation, finding the asset sales did not meet the statutory definition of "sales" and removed representation of the sales giving rise to the capital gain from the apportionment factor. This resulted in approximately 70 percent of Petitioner's income being apportioned to Michigan for the short period return. Pet. Br. 5-6. Petitioner responded by seeking the use of the "safety valve" allowed by Michigan Compiled Laws § 208.1309 (and the vast majority of other states) which permits the use of an alternative apportionment formula when a state's standard apportionment formula does not fairly represent the extent of a taxpayer's business activity in the state. This "safety valve" also comports with the Model Compact Article IV, Division of Income, as last revised by the Multistate Tax Commission on July 29, 2015. Multistate Tax Commission, *Multistate Tax Compact*, Article IV. Division of Income, Section 18, August 4, 1967, amended July 29, 2015, https://www.mtc.gov/the-commission/multistate-tax-compact/. That model legislation contains an alternative apportion-

[6] Michigan utilizes a single sales factor to apportion income. Michigan Compiled Laws § 208.1303(1). For purposes of computing the sales factor the term "sale" is narrowly defined as receipts that are earned in the ordinary course of the taxpayer's trade or business. Michigan Compiled Laws § 206.609(4).

ment provision in section 18 for outcomes that do not fairly represent a taxpayer's activity in a state. *Id.* Treasury, however, rejected Petitioner's request.

Petitioner challenged Treasury's actions resulting in protracted litigation. The Michigan Supreme Court affirmed Treasury's actions by a narrow 4-3 margin holding that the Petitioner was not entitled to use the State's safety valve to properly reflect the income derived from its activities in Michigan during the short-period tax year. The Michigan Supreme Court also held that the statutory formula did not violate the Commerce Clause and Due Process requirements of the U.S. Constitution. Petitioner, then timely filed a petition for writ of certiorari requesting this Court's review.[7]

SUMMARY OF THE ARGUMENT

Fair apportionment and the prohibition on taxing extraterritorial values are key elements of this Court's state tax jurisprudence. In the instant case, the Michigan Supreme Court ignored precedent by this Court where a state apportionment formula was found to unreasonably and arbitrarily attribute to the state income out of all appropriate proportion to the business transacted by the taxpayer. *Hans Rees' Sons, Inc. v. State of North Carolina ex. rel. Maxwell, Commissioner of Revenue*, 283 U.S.123 (1931). Indeed, Petitioner and other *amici* argue this point quite convincingly.

[7] On October 31, Michigan Department of the Attorney General filed notice that it did not intend to file a response to the petition for a writ of certiorari unless one is requested by the Court.

This brief, however, focuses on an equally compelling requirement that is the continuing cause of much confusion among taxpayers and tax administrators. Constitutionally, fair apportionment also requires symmetry between the tax base and the apportionment factors. While the fact pattern in this case is unique – with a one-time capital gain intersecting with a short-period return – the inclusion of significant income in the corporate tax base without any factor representation in a state's apportionment formula is all too commonplace.

The problem of fair apportionment is exacerbated by conflicting and contradictory state court opinions on the necessity for, and parameters of, factor representation when significant amounts of income are included in the tax base without any factors representing the source of that income.[8] While this Court has provided general guidance on fair apportionment, there is a need for this Court to reaffirm that the states must satisfy the constitutional requirements of fair apportionment when there is significant asymmetry between the tax base and the factors used to apportion that base. [9]

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[8] The fair apportionment issue is also raised when significant amounts of gross receipts are included in the tax base while excluding the factors giving rise to those receipts in the apportionment formula.

[9] Another kind of fair representation – having voting rights in connection with taxation ("no taxation without representation") – was one of the cornerstones of the early American republic. The American colonists on December 16, 1773, in a well-known revolt known as the "Boston Tea Party" grew increasingly frustrated with taxes imposed on them without having any representation with Britain's Parliamentary government. *See* Britannica, The Editors of Encyclopedia., *Boston Tea Party*. Encyclopedia

ARGUMENT

I. CONSTITUTIONAL FAIR APPORTIONMENT REQUIRES SYMMETRY BETWEEN THE TAX BASE AND THE APPORTIONMENT FACTORS.

Fair apportionment and the prohibition on taxing extraterritorial values are long-standing elements of this Court's state tax jurisprudence. This Court has repeatedly held that income attribution to a State is subject to constitutional restraints. The denial of alternative apportionment by Treasury, affirmed by the Michigan Supreme Court, ignores the basic tenets of state taxation enunciated by this Court to ensure states' taxes are fairly attributed to a taxpayer's activity in a state. Under Due Process Clause principles, a state may not tax a corporation's property, income, or gross receipts unless there is "some definite link, some minimum connection" between the state and the corporation's activities within the state. *Miller Bros. v. Maryland*, 347 U.S. 340, 344-345 (1954). Income cannot be subject to tax if the state lacks a "minimum connection" or "definite link" with the taxpayer's activities and the income related to those activities in the taxing jurisdiction. *Id.*; *see Wisconsin v. J.C. Penney*, 311 U.S. 435 (1940).

A state tax scheme must also pass muster under the Commerce Clause. To satisfy Commerce Clause requirements, the tax must: (a) be applied to an activity with a substantial nexus with the taxing state; (b) be fairly apportioned; (c) not discriminate against interstate commerce; and (d) be fairly related to the service provided by the state. *Complete Auto Transit, Inc. v.*

Britannica, https://www.britannica.com/event/Boston-Tea-Party (last visited Nov. 10, 2023).

Brady, 430 U.S. 274, 279 (1977). At issue in this matter is the second prong (fair apportionment) of *Complete Auto.* Although 93 percent of the tax base included in Michigan's taxable income was attributable to the capital gain from the sale of a business, the State's apportionment formula excluded the (sales) factors associated with the capital gain. Addressing the second prong of *Compete Auto*, a fairly apportioned tax must satisfy two thresholds. *Okla. Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 185 (1995). First, a fairly apportioned tax must be internally consistent. This threshold is not directly at issue in this case. Second, the formula must be externally consistent; the factors in the formula must actually reflect "a reasonable sense of how income is generated." *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). External consistency requires a rational relationship between the taxpayer's business activity in the state and the factors in the apportionment formula.[10]

Treasury's actions require review as they violate the external consistency standard of fair apportionment enunciated by this Court.[11] The Michigan statutory apportionment formula, without utilizing its "safety valve" allowing for alternative apportionment, was

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[10] The external consistency standard is also related to the fourth prong of the *Complete Auto Transit* test, whether the tax reaches beyond the portion of value that is fairly attributable to the economic activity in the taxing state.

[11] The external consistency standard is also linked to the Due Process requirement that income attributed to a state must be rationally related to the values or activities within the taxing state. *See Norfolk & W.R. Co. v. Mo. State Tax Comm.*, 390 U.S. 417 (1968) *rehg. denied*, 390 U.S. 1046 (1968). A tax that is not fairly apportioned will likely tax income with little or no connection with a state and will thus result in no rational relationship to a taxpayer's business activities in such state.

devoid of any factors that contributed to the significant capital gain Petitioner was required to include in its Michigan taxable income. The inclusion of the capital gain is clearly not a *de minimis* source of income. As stated above, this lack of symmetry resulted in approximately 70 percent of the entire enterprise value being apportioned to Michigan, a state that played at best a minimal part in contributing to the Petitioner's overall value.

It is clear from this Court's established holdings that a state tax imposed on a multistate business must "be fairly apportioned to reflect the business conducted in the state." *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). To achieve fair apportionment the apportionment factors must reflect the activities that generate the taxpayer's income in the state. In other words, there must be "a rational relationship between the tax and the values connected with the taxing State." *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008) (internal quotes omitted, citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992)). Michigan's prescribed apportionment formula as applied did not reasonably reflect how the enterprise value was generated, and Treasury's rejection of Petitioner's request to use an alternative apportionment formula resulted in unconstitutional taxation which is out of all appropriate proportion to how the enterprise valued was earned. Bottom line, in reversing the 3-0 decision by the Michigan Court of Appeals and affirming Treasury's actions, the Supreme Court of Michigan refused to allow the use of an apportionment method to properly reflect a rational relationship between income attributed to Michigan and Petitioner's business activities within the State. The Michigan Supreme Court's actions are directly contrary to the external consistency component of fair

apportionment enunciated by this Court and result in the taxation of extraterritorial values.

II. THE SUBSTANTIAL CONFLICT AMONG LOWER COURTS OVER FAIR APPORTIONMENT REINFORCES THE NEED FOR GUIDANCE FROM THIS COURT.

The instant case has some unusual elements, such as the distortion caused by the short-period tax year, but it shares in common with numerous other state tax cases over the last three decades an asymmetry between the inclusion of income in the tax base and the exclusion of apportionment factors relating to such income.

Along with one-time capital gains, other categories of income included in state income tax bases without factor representation which have been litigated in state courts are dividends,[12] intangible income such as royalties and trademarks,[13] partnership interests,[14] and those involving capital tax bases.[15] Each of these cases raised issues of fair apportionment (and the ones involving foreign income also raise the issue of discrimination).

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[12] *See Tambrands, Inc. v. State Tax Assessor*, 595 A.2d 1039 (Me. 1991); *E.I. Dupont de Nemours & Co. v. State Tax Assessor*, 675 A.2d 82 (1996).

[13] *See Am. Tel. & Tel. Co. v. Wis. Dep't of Revenue*, 422 N.W.2d 629 (Wis. Ct. App. 1988), *review denied*, 428 N.W.2d 554 (Wis. 1988); *NCR Corp. v. Comptroller of Treasury, Income Tax Div*., 544 A.2d 764 (Md. 1988).

[14] *See H.J. Heinz Co. v. Chumley*, No. M2010-00202-COA-Ro3CV, 2011 WL 2569755 (Tenn. Ct. App. June 28, 2011); *Homart Dev. Co. v. Norberg*, 529 A.2d 115 (R.I. 1987).

[15] *See Miss. Dep't of Revenue v. Comcast of Ga./Va., Inc.*, 300 So.3d 532 (Miss. 2020).

While these cases span a range of states and years at issue, they share two traits in common. First, the state included the particular type of income in the corporate tax base, and second, the state excluded the factors related to the production of the income (property, payroll, or sales depending on the state's methodology) entirely from the calculation of the apportionment formula. As a result, in each instance, there was asymmetry between the category of income included in the tax base and the related apportionment factors that were excluded from the apportionment formula.

Moreover, in these cases, the asymmetry generally involved the inclusion of a significant portion of the taxable income. For instance, in *American Telephone & Telegraph Co. v. Wisconsin Department of Revenue,* 422 N.W.2d 629 (Wis. Ct. App. 1988), *review denied*, 428 N.W.2d 554 (Wis. 1988), Wisconsin included about $2.9 billion in intangible income from subsidiaries in the tax base without any representation from the factors that contributed to the production of the intangible income. The amount of income included in the tax base without factor representation totaled about 85% of all the income included in the tax base. *Id*. at 546-47.

In *H.J. Heinz Co., v. Chumley*, No. M2010-00202-COA-Ro3CV, 2011 WL 2569755 (Tenn. Ct. App. June 28, 2011), Tennessee included approximately $117 million of investment partnership income in the tax base without any representation from the factors that contributed to the production of the income. The amount of income included in the tax base without factor representation totaled about 26% of all the income included in the tax base. *Id*. at 2.

In *Mississippi Department of Revenue v. Comcast of Georgia/Virginia, Inc.*, 300 So.3d 532 (Miss. 2020), Mississippi included $15 billion in capital investments of unitary subsidiaries to the capital tax base, without any representation from the factors that were associated with the unitary subsidiaries. The amount of capital included in the capital tax base without factor representation totaled 76% of all capital included in the capital tax base. *Id*. at 542-543.

In *Tambrands, Inc. v. State Tax Assessor*, 595 A.2d 1039 (Me. 1991) case, Maine added about $7.5 million of foreign dividend income to the tax base without any representation from the factors that contributed to the production of the income. The foreign dividends were derived from income earned by Tambrands' foreign affiliates in Canada, France, and the United Kingdom. The Supreme Judicial Court of Maine held that inclusion of the foreign dividends in the corporate income tax base without factor representation was unconstitutional and remanded the case with instructions to include additional factors to fairly represent Tambrands' business activity. *Id*.

The problem of fair apportionment is exacerbated by conflicting and contradictory state court opinions, relying on this Court's precedents, on the necessity for and parameters of factor representation when income is included in the tax base without any factors associated with the income.[16] The level of confusion at the state level both in outcomes and analysis underscores how important it is for this Court to grant certiorari in this case and provide guidance on the constitutional constraints where there is a significant asymmetry between inclusion of income in the corpo-

[16] *See* Pet. Br. 18-26.

rate tax base and the exclusion of factors related to that income from the apportionment formula.

These conflicts among the states highlight the increasing risk of continuing litigation if this Court does not provide additional guidance. In *American Telephone & Telegraph Co*., where the Wisconsin intermediary Court of Appeals ruled for the taxpayers and required the intangible income from subsidiaries in the corporate tax base to be included in the apportionment formula, the Wisconsin Court relied upon this Court's precedence to find that the state's apportionment formula "did not reflect a reasonable sense of how AT&T's income is generated and taxes value earned outside the borders of Wisconsin, contrary to … the due process and commerce clauses of the United States Constitution." *Am. Tel. & Tel.*, 422 N.W.2d at 637. The Wisconsin Court further cited this Court's opinions in *Container Corp. Container Corp.* ("…the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated."); *General Motors Corp. v. District of Columbia* ("However, a state may not tax such income by use of an apportionment formula unless the formula 'display[s] a modicum of reasonable relation to corporate activities within the State.'"); and *J.C. Penney* ("The simple but controlling question is whether the state has given anything for which it can ask return."). *Id*. at 635 (citing *Container Corp.*, 463 U.S. at 169-170, and *General Motors Corp. v. District of Columbia*, 380 U.S. 533, 561 (1965)); *Id.* at 636 (citing *J.C. Penney*, 311 U.S. at 444).

Similarly, in *Tambrands, Inc*., the Supreme Judicial Court of Maine ruled for the taxpayers in a case involving the inclusion of foreign dividends in the corporate income tax base without any foreign factor

representation. The Maine court held that: "… the income taxable by Maine under the Assessor's formula does not truly reflect Tambrands' connection with Maine and fails to meet the test of fairness required by the due process clause." *Tambrands, Inc*., 595 A.2d at 1044. As authority for its constitutional analysis, the Maine court cited *Container Corp.* and *Mobil Oil Corp. v. Commissioner of Taxes*, 445 US. 425 (1980). *Id*.

In contrast, the Supreme Judicial Court of Maine in *E.I. Dupont* undermined *Tambrands, Inc.*, and affirmed a corporation was required to include its foreign subsidiary dividends in its Maine tax returns. After reviewing this Court's decisions in *Kraft General Foods v. Iowa Dep't of Revenue*, 505 U.S. 71 (1992) and *Container Corp.*, Maine concluded Dupont's foreign subsidiaries' dividends could be included in the tax base without factor representations because the result would not have exceeded the amount owed if Dupont's tax was computed using worldwide combined reporting. *E.I. Dupont*, 675 A.2d at 86-91.

Additionally, in *H.J. Heinz*, a Tennessee intermediary Court of Appeals held that dividends received from foreign subsidiaries were subject to tax, concluding such dividends did not require factor representation because, unlike *Mobil Oil* where the income was directly received from its subsidiaries operating outside the United States, the dividend income originally flowed through another entity. *H.J. Heinz*, 2011 WL 2569755 at 34-38. Ultimately the court found the taxpayer failed to meet the evidentiary standard to prove the State's apportionment formula was grossly distorted or unfair. *Id*. at 38.

Despite this Court's general guidance provided in *Hans Rees'*; *Container Corp.*; *Jefferson Lines*; and *MeadWestvaco*, these conflicting state decisions cry out for more specific guidance to avoid continued uneven application by the states of the constitutional requirements where there is significant asymmetry between the tax base and the factors used to apportion that base.

III. THE EXTREMELY LIMITED ACCESS TO THE FEDERAL COURTS FOR REVIEW OF STATE TAX CASES HAS STYMIED FURTHER GUIDANCE.

State tax litigation is unique because it is subject to two constraints not existing in other areas of the law: the Tax Injunction Act and the comity doctrine. The Tax Injunction Act bars suits in federal courts to "enjoin, suspend or restrain the assessment, levy or collection" of state taxes, except where no "plain, speedy and efficient remedy" is available in state court. 28 U.S.C. § 1341. Rarely have these conditions been satisfied. Under the comity doctrine, "federal courts refrain from interfer[ing] … with the fiscal operations of the state governments . . . in all cases where the Federal rights of the persons could otherwise be preserved unimpaired." *Direct Mktg.*, 575 U.S. at 15 (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421 (2010)). This doctrine typically denies access to the federal courts. Both the Tax Injunction Act and the comity doctrine heavily constrain taxpayers' access to lower federal courts in state tax litigation. Indeed, such access is rare.

Such jurisdictional restrictions are unique to state tax controversies, and since 1988 when Congress eliminated mandatory review by this Court of state tax cases involving questions of federal law, petitions

for writ of certiorari in state cases are subject to this Court's discretionary review.[17] In sharp contrast, other statutory or constitutional disputes involving environmental, health care, voting rights, educational issues and the like have no similar impediments or obstacles to federal review. In state tax controversies, taxpayers must rely almost exclusively on state courts to arbitrate federal constitutional challenges of state taxes. And as in this case, there is no check on state supreme courts without action by this Court which will result in further tensions and inconsistencies that will arise if states, such as Michigan, impose their own views on U.S. Constitutional restraints.

CONCLUSION

This case presents the powerful opportunity to grant plenary review or summarily reverse the Michigan Supreme Court's decision. The asymmetry between the inclusion of income in the corporate tax base and exclusion of related factors in the apportionment formula is exacerbated by conflicting and contradictory state court opinions on the necessity for and parameters of factor representation. Moreover, recent changes in the federal tax code and state statutes seeking to increase their inclusion of income in the tax base (*e.g.*, income from non-U.S. sources) without providing factor representation in the apportionment formula, increase the need for this Court's guidance to establish the parameters of fair apportionment.

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[17] *See* P.L. 100-352, 102 Stat. 662 (June 27, 1988) (codified at 28 U.S.C. § 1254).

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