No. 24-5758

IN THE

Supreme Court of the United States

ERISTON WILSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This prosecution was a classic case of guilt by association. At trial, the only evidence that Petitioner Eriston Wilson participated in *this* crime was "ten photographs and videos of Mr. Wilson that officers found on [his co-defendant]'s phone" that showed the two to be friends with a certain build, and wearing a certain type of clothing. C.A. ROA 275-76; Pet. App. 3a. A search of Petitioner's home revealed nothing of evidentiary value. No physical evidence connected him to the crime. Instead, the government relied on evidence about Petitioner's participation in a *prior* robbery, arguing that that evidence showed robbery is just "what he does." That was its principal basis for contending that Petitioner was the unidentified individual in surveillance footage of the charged robberies. Because the government could not prove that Petitioner was guilty of *this* crime, it encouraged the jury to convict him based on prior misdeeds—precisely what Rule 404(b) is meant to guard against.

Had Petitioner been tried in the Second, Third, Fourth, or Seventh Circuits, the evidence of his prior crime would have been excluded. It was admitted solely to show intent, and those four circuits hold that such evidence is inadmissible when intent is "not meaningfully disputed by the defense." *United States v. Miller*, 673 F.3d 688, 697 (7th Cir. 2012); *accord, e.g.*, *United States v. Foster*, 891 F.3d 93, 108 (3d Cir. 2018) ("[T]he testimony concerning other acts must materially advance the prosecution's case.") (internal quotation marks omitted); *United States v. Sterling*, 860 F.3d 233, 247 (4th Cir. 2017) (prior-crimes evidence must be "probative of an essential claim or an element in a manner not offered by other evidence available to the government") (internal quotation marks omitted); *United States v. Ortiz*, 857

F.2d 900, 904 (2d Cir. 1988) ("Intent is not placed in issue by a defense that the defendant did not do the charged act at all."); Pet. 17-19 (citing cases).

But because Petitioner was tried in the Fifth Circuit, the jury was permitted to convict him based not on evidence relating to this crime, but based on prior misdeeds. That court—like the First, Eighth, and Eleventh Circuits—has recast Rule 404(b) from a rule of exclusion to a "rule of inclusion." Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 Colum. L. Rev. 769, 772-73 (2018). There is an entrenched "circuit split on the use of prior bad acts to prove the defendant's mental state when the defendant does not actively contest mental state at trial." Capra, *supra*, at 797. The Court should resolve that split and correct the erroneous decision below.

I. The Circuits Are Intractably Split On How To Apply Rule 404(b) When Intent Is Not Actively Contested.

In attempting to explain away this well-recognized circuit split, the government misstates the disagreement among the lower courts. It says there is no conflict of authority because lower courts simply reach different results in assessing whether particular other-acts evidence is admissible. BIO 15-18. On the contrary, the circuits employ different legal rules about whether a defendant's not-guilty plea, standing alone, automatically renders other-acts evidence relevant to a non-propensity purpose as required by Rule 404(b). *See* Fed. R. Evid. 404(b)(1)-(2). In at least four circuits, anytime a defendant pleads not guilty, his prior bad acts are automatically relevant to his mental state under Rule 404(b). By contrast, four circuits

have expressly rejected that categorical rule, instead requiring some indication beyond the mere fact of a not-guilty plea that a defendant's mental state is at issue. On this proper understanding of the tests applied in the lower courts, the division of authority is clear.

A. As the Petition establishes, there is a "pervasive circuit conflict over the proper application of Rule 404(b)." Pet. 19. The Fifth Circuit holds that "[t]he mere entry of a not guilty plea in a conspiracy case raises the issue of intent sufficiently to justify the admissibility of extrinsic offense evidence." *United States v. Cockrell*, 587 F.3d 674, 679 (5th Cir. 2009); *see* Pet. 14. Under that rule, evidence of intent is admissible regardless of whether intent is "in dispute at trial." Pet. App. 10a. According to the Fifth Circuit, a defendant's not-guilty plea *by itself* puts the defendant's mental state at issue.

The First, Eighth, and Eleventh Circuits apply the same categorical rule. Pet. 16-17. In those courts, as in the Fifth Circuit, if a defendant pleads not guilty, evidence of prior bad acts is automatically relevant for a non-propensity purpose—e.g., intent. *See, e.g.*, *United States v. Cooper*, 990 F.3d 576, 584 (8th Cir. 2021) ("Because [the defendant] pled not guilty, his intent was at issue; thus, evidence of his prior [acts] was relevant to his intent."); *United States v. Thomas*, 593 F.3d 752, 758 (8th Cir. 2010) ("We have previously rejected the (effectively identical) argument that, while intent may be *an* issue in a given case, intent is not *in* issue when a defendant completely denies participation in the crime."); *United States v. Matthews*, 431 F.3d 1296, 1311 (11th Cir. 2005) ("Matthews's plea of not guilty, without an accompany-

ing affirmative removal, made his intent a material issue."); *United States v. Zeuli*, 725 F.2d 813, 816 (1st Cir. 1984) ("In *every* conspiracy case, … a not guilty plea renders the defendant's intent a material issue and imposes a difficult burden on the government.") (emphasis added).

Contrary to the government's assertion (at 15), these courts themselves recognize that "other circuits have reached a contrary decision." *United States v. Butler*, 102 F.3d 1191, 1196 (11th Cir. 1997). And they have done so, like the Fifth Circuit here, over arguments by defendants "that they never specifically 'put intent at issue' and therefore that the government could not rely on intent as a basis for the admission of the evidence." *United States v. Costa*, 947 F.2d 919, 925 (11th Cir. 1991); Pet. App. 10a (rejecting argument that "intent was not in dispute at trial because the evidence presented definitively proved that the two perpetrators committed the seven robberies in concert with each other").

For almost two decades, some judges in these circuits have recognized the danger of the categorical rule, explaining that it "undermines Rule 404(b) itself and represents a perversion of the origins of the circuit's doctrine in this context." *Matthews*, 431 F.3d at 1313 (Tjoflat, J., specially concurring). As they note, "if the government can do without such evidence, fairness dictates that it should." *United States v. Pollock*, 926 F.2d 1044, 1049 (11th Cir. 1991). But, even though the rule presents "a 'heads I win; tails you lose' proposition," panel after panel applies it because "it is presently the law." *Id.*

For this reason, the four circuits on the other side of the split have rejected the

categorical rule. They "prohibit the prosecution from admitting such evidence until it is apparent that the defendant is *actively contesting* the element of mental state." Capra, *supra*, at 795. Contrary to the government's assertion (at 15), these courts' legal rules are "meaningfully distinct from the one applied by the court of appeals below": they reject the Fifth Circuit's rule and require a more searching analysis to determine whether prior bad acts are relevant for a non-propensity purpose. Pet. 17; *see, e.g.*, *United States v. Caldwell*, 760 F.3d 267, 281 (3d Cir. 2014) (rejecting "the proposition that, merely … denying guilt of an offense with a knowledge-based *mens rea*," "is sufficient to place knowledge at issue."); *Sterling*, 860 F.3d at 247 ("Just because the charged crime includes an intent element, however, 'does not throw open the door to any sort of other crimes evidence.'" (citation omitted)); *Ortiz*, 857 F.2d at 904 ("[I]ntent is not placed in issue by a defense that the defendant did not do the charged act at all.")[1]; *Miller*, 673 F.3d at 697 ("When … intent is not meaningfully disputed by the defense, and the bad acts evidence is relevant to intent only because it implies a pattern or propensity to so intend, the trial court abuses its discretion by admitting it.").[2]

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[1] The government's discussion of *Ortiz* misses the mark. It notes a statement in *Ortiz* that a defendant may take mental state out of issue by, for instance, unequivocally stipulating to it. BIO 17-18. Of course that is true. But what matters for present purposes is that, contrary to the decision below, *Ortiz* and other Second Circuit decisions hold that "a defense that the defendant did not do the charged act at all" fails to put the defendant's mental state at issue. 857 F.2d at 904. The government does not dispute that the Second Circuit articulated that rule or that it conflicts with the Fifth Circuit's categorical rule.

[2] The government claims that the Fourth and Seventh Circuits have in some cases stated that a "not-guilty plea puts one's intent at issue and thereby makes relevant

B. The government denies the existence of what judges and commentators have recognized: that "there is a circuit split on the use of prior bad acts to prove the defendant's mental state when the defendant does not actively contest mental state at trial." Capra, *supra*, at 797. It claims instead that courts merely apply a "case-by-case" analysis to determine the admissibility of Rule 404(b) evidence. BIO 15. But as set forth in the Petition and above, courts plainly are applying different legal rules. It is beside the point that courts *also* apply a case-by-case analysis in what the government recognizes (at 13-14) is a separate part of their Rule 404(b) analysis.[3]

The government likewise misses the point in emphasizing that courts on the Fifth Circuit's side of the split sometimes exclude Rule 404(b) evidence while courts on the other side of the split sometimes admit it. BIO 15-16. The ultimate decision to exclude or admit rests on factors beyond the legal rule on which there is a divi-

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evidence of similar prior crimes when that evidence proves criminal intent." BIO 16 (citing *Sterling*, 860 F.3d at 247; *United States v. Gomez*, 763 F.3d 845, 858-59 (7th Cir. 2014) (en banc)). On the contrary, *Sterling* rejected the type of categorical rule applied in the First, Fifth, Eighth, and Eleventh Circuits: "Just because the charged crime includes an intent element … 'does not throw open the door to any sort of other crimes evidence.'" 860 F.3d at 247 (citation omitted). And although the Seventh Circuit in *Gomez* rejected the requirement that a defendant "meaningfully dispute" intent for it to be relevant, it "reiterate[d] that the district court should consider the degree to which the non-propensity issue actually is contested when evaluating the probative value of the proposed other-act evidence." 763 F.3d at 859-60.

[3] In the Fifth Circuit, for instance, admissibility under Rule 404(b) "hinges on whether (1) it is relevant to an issue other than the defendant's character, and (2) it 'possess[es] probative value that is not substantially outweighed by its undue prejudice' under Federal Rule of Evidence 403." *United States v. Smith*, 804 F.3d 724, 735 (5th Cir. 2015) (quoting *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc)); *see also, e.g.*, *Cooper*, 990 F.3d at 584 (four-part test); *United States v. Butler*, 102 F.3d 1191, 1195 (11th Cir. 1997) (three-part test).

sion of authority. In *United States v. Jackson*, for instance, the court first applied the categorical rule that many other courts would reject, but ultimately determined the evidence should have been excluded after applying the remaining steps. 339 F.3d 349, 355-57 (5th Cir. 2003).

That courts on the Fifth Circuit's side of the split might sometimes exclude evidence under Rule 403 given the weak probative value of Rule 404(b) evidence in cases where intent is not at issue does not render the split illusory, as the government claims (at 16). Nor does this fact diminish its importance. On the contrary, the relevance inquiry is decisive in the vast majority of cases applying the Fifth Circuit's rule, particularly given abuse-of-discretion review. *See* Pet. 14. As a result, like the decision below, courts on the Fifth Circuit's side of the split "reflexively invoke[]" the categorical rule, "frequently without reference to context, or any other analysis for that matter, to admit any and all prior acts (involving drugs) in drug conspiracy cases." *Matthews*, 431 F.3d at 1315 (Tjoflat, J., specially concurring).

Likewise, it is hardly surprising that circuits on the other side of the split sometimes "uph[o]ld the admission of Rule 404(b) evidence" notwithstanding their more demanding test. BIO 16. After all, there can be reasons other than the bare fact of a defendant's not guilty plea for concluding that the defendant's mental state is at issue and that the evidence therefore is admissible. *See, e.g.*, *United States v. Bailey*, 990 F.2d 119, 124 (4th Cir. 1993) (defendant advanced an argument that "made his intent … the primary issue for the jury to decide"); *Foster*, 891 F.3d at 108 ("neither [defendant] suggests that the District Court erred in determining that motive was a

proper non-propensity purpose for admitting" other-acts evidence). In *United States v. Gomez*, the Seventh Circuit "cautioned that it's not enough for the proponent of the other-act evidence simply to point to a purpose in the 'permitted' list and assert that the other-act evidence is relevant to it." 763 F.3d at 856, 863 (holding that the government "offer[ed] no theory other than propensity to connect the [bad acts evidence] to [the defendant's] identity" as the coconspirator). The proponent must show the evidence's "admission is supported by some propensity-free chain of reasoning." *Id.* at 856.

In short, the government's focus on case-by-case admissibility determinations (at 15) does nothing to undermine the existence of the split. The split does not turn on the "outcome" of any particular case (*contra* BIO 16), but on the fact that—as both courts and scholars have recognized—different courts are articulating and applying different legal rules.

C. Finally, the government claims that decisions from the Second, Third, Fourth, and Seventh Circuits do not establish a split of authority because they "rested on case-specific factors that are absent here." BIO 16. Not so. All one need do is apply the rule in those cases to the circumstances in this case to disprove the government's point. This case makes clear that different rules yield different results in similar cases based on the happenstance of geography.

In this case, the government was permitted to introduce highly damaging prior-act evidence without making any specific showing of relevance. The government's Rule 404(b) notice, for instance, simply stated that the government sought to intro-

duce evidence of his extrinsic robbery offense "to show [Mr. Wilson's] motive, intent, preparation, plan, knowledge, and absence of mistake or lack of accident"—i.e., the full list of purposes in Rule 404(b)(2). *United States v. Weldon*, No. 2:19-cr-034, ECF No. 69, at 6 (E.D. La. Oct. 9, 2019). In a subsequent filing, the government elaborated that the evidence was relevant to Mr. Wilson's "knowledge, plans, and conspiring to commit armed robberies" and "also go[es] to show [his] identity." *Weldon*, ECF No. 112, at 2-3 (E.D. La. Dec. 6, 2019).

The government does not contest the Fifth Circuit's ruling that admitting the Rule 404(b) evidence to prove Mr. Wilson's *identity* was improper. Pet. App. 9a. Nor does the government contend that Mr. Wilson did anything at trial to dispute that the person in the video intentionally participated in the conspiracy. As the prosecutor made clear to the jury, the intent of the two suspects who committed the robberies underlying the conspiracy charge was obvious:

> A conspiracy is pretty simple. … It's exactly what you would think it would be. It's two people working together to commit a crime. That's what they are doing. They agree to work together to try to accomplish the goal of committing a crime.
>
> That's what these guys did in this particular case. Clearly, they both worked together. You saw it from every video, that they were together. They had a plan and every one of those were similar. They went in and they decided to rob those convenience stores.

Weldon, ECF No. 274, at 207 (E.D. La. Oct. 20, 2021). Nonetheless, because Mr. Wilson was tried in the Fifth Circuit, the government was permitted to introduce evidence of a prior robbery and then argue to the jury that Mr. Wilson "went and committed another [robbery]" after his co-defendant went to jail because "*That's*

what he does. That's how he supports himself." *Weldon*, ECF No. 274, at 227-28 (E.D. La. Oct. 20, 2021) (emphasis added). This is precisely the type of damaging propensity inference that Rule 404(b) was designed to prohibit.

The government cannot dispute that, had Mr. Wilson been tried in the Second, Third, Fourth, or Seventh Circuit, the court would have applied a different legal rule. Pet. 17-19. And that different legal rule would have resulted in the exclusion of the highly prejudicial evidence regarding Mr. Wilson's commission of an unrelated robbery. For instance, the Third Circuit would have held that Mr. Wilson did not "put his [intent] at issue" "merely by denying guilt," and that intent thus "was not a proper basis for admitting" evidence about the May 2019 robbery. *Caldwell*, 760 F.3d at 281. Likewise, in the Second Circuit, because Mr. Wilson maintains that he "did not do the charged act at all," the court would apply the bright-line rule that "evidence of other acts is not admissible for the purpose of proving intent." *Ortiz*, 857 F.2d at 904.

This entrenched division of authority richly merits the Court's review.

II. The Fifth Circuit's Rule Contravenes This Court's Precedents And The Rules of Evidence.

As the Petition demonstrates, the Fifth Circuit's categorical rule is flatly incompatible with *Huddleston* and the plain language and purpose of Rule 404(b). Pet. 12-16. By presuming that evidence of unrelated crimes is admissible, the Fifth Circuit treats Rule 404(b) as "a rule of inclusion." Capra, *supra*, at 788. But Rule 404(b) was designed to be "a rule of general exclusion, and carries with it no presumption of admissibility." *Caldwell*, 760 F.3d at 276 (internal quotations marks omitted); *Unit-*

ed States v. Lucas, 357 F.3d 599, 611 (6th Cir. 2004) (Rosen, J., concurring) (explaining that "Rule 404(b)'s basic rule of exclusion … has its source in the common law"); *see also Huddleston v. United States*, 485 U.S. 681, 691 (1988) (evidence of bad acts must be "offered for a proper purpose").

The government attempts to square the Fifth Circuit's categorical rule with *Huddleston* by arguing that it offered the 2019 robbery to prove Mr. Wilson's intent. BIO 10-11, 13. It says that, because Mr. Wilson had unlawful intent when committing the earlier robbery, "it is more likely that he knew the unlawful purpose of and intended to commit the charged conspiracy." BIO 11 (internal alterations and quotations omitted). But as the government's closing argument made clear, *supra* 9-10, Mr. Wilson did not dispute intent. After all, the evidence necessary to prove his involvement in the charged robberies also would prove that he intended to commit those robberies with another individual. Pet. 5-6.

With intent out of the picture, the evidence served no "proper purpose" under Rule 404(b), *Huddleston*, 485 U.S. at 686, and all that remained was an impermissible assertion about Mr. Wilson's propensity to commit a crime: that Mr. Wilson committed a robbery in 2019 and therefore is more likely to be *the type of person* that would knowingly participate in a conspiracy involving robberies. That is exactly what the government argued in closing: "That's what he does. That's how he supports himself." *Weldon*, ECF No. 274, at 227-28 (E.D. La. Oct. 20, 2021). Judges outside of the Fifth Circuit have recognized precisely this danger. *E.g.*, *Matthews*, 431 F.3d at 1318 (Tjoflat, J., specially concurring) (Fifth Circuit's categorical rule

"serves to admit propensity evidence in the name of intent"); *Miller*, 673 F.3d at 698 (the government's "bad acts evidence was not probative of intent except through an improper propensity inference"). Introducing such evidence for the purpose of urging inferences about character flatly violates Rule 404(b). *See* Capra, *supra*, at 770-80; *Matthews*, 431 F.3d at 1318 (Tjoflat, J., specially concurring) ("[The evidence's] only relevance is sheer propensity: the theory of being that the defendant acted illegally then, and is likely to be acting illegally now. This is precisely the inference the law does not allow.").

The government acknowledges that Petitioner in this case did not dispute intent, but contends that, "for evidence to be admissible, '[t]he fact to which the evidence is directed need not be in dispute.'" BIO 12 (quoting *Old Chief v. United States*, 519 U.S. 172, 179 (1997)). That is true for the purposes of Rule 401. *See Old Chief*, 519 U.S. at 179 (explaining that "evidentiary relevance under Rule 401" is not "affected by the availability of alternative proofs of the element to which it went"). But Rule 404(b) is not coextensive with Rule 401. If it were, then propensity evidence—which is relevant in some sense—would simply be admissible, and everyone agrees that it is not. *See* BIO 9-10; *Caldwell*, 760 F.3d at 274 (recognizing that prior convictions satisfy Rule 401's definition of relevance, "at least to the extent a criminal defendant's prior offenses make it more likely he would commit the same crime again").[4] On the contrary, Rule 404(b) reflects "the common law tradition"

[4] Nor is Rule 404(b) coextensive with Rule 403. Yet the government concedes that application of the Fifth Circuit's categorical rule means evidence of bad acts is in-

that "disallow[s] resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." *Michelson v. United States*, 335 U.S. 469, 475 (1948). Critically, "[t]he inquiry" into a defendant's "character, disposition[] [or] reputation" "is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id.* at 475-76 (footnote omitted).[5]

Instead, Rule 404(b) requires that evidence of unrelated crimes be more than simply relevant. "[F]irst, … the evidence [must] be offered for a proper purpose; second, [the evidence must pass] the relevancy requirement of Rule 402 … ; third, … the trial court must … determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice." *Huddleston*, 485 U.S. at 691; BIO 13-14. The government's arguments ignore the first of these requirements. And, when an element is undisputed, evidence put forth to prove that

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admissible only if it is more prejudicial than probative. BIO 14 (arguing that the categorical rule "does not mean that the other-act evidence will necessarily be admissible" because "the court must still find that the probative value is not substantially outweighed by undue prejudice").

[5] The same reasons counsel against relying on a limiting instruction to cure a jury's improper inferences. *Contra* BIO 15; *Michelson*, 335 U.S. at 476 ("The overriding policy of excluding [character] evidence … is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."); Capra, *supra*, at 831 (recognizing that admitting unrelated crimes evidence has had a "devastating effect … on juries" that "is well-documented"). Moreover, the jury easily could have relied on the 2019 robbery to find that Mr. Wilson shared an identity with the second individual in the footage, given the district court's admission of that evidence as relevant to his identity in the charged crimes. Pet. App. 9a. The limiting instruction could not have cured this improper use of evidence.

element is unlikely to have been "offered for a proper purpose" under *Huddleston*. In Mr. Wilson's case, it was not.

Finally, the government insists, the lower court correctly held that the 2019 robbery was more probative than prejudicial because the government "had no other evidence to show [Mr. Wilson's] state of mind" for the charged offense. BIO 11. But the evidence should have been excluded pursuant to Rule 404(b) regardless of its probative value because it was offered for an improper purpose. *See supra* 11-12. Moreover, the government offered surveillance footage of each of the robberies underlying the conspiracy charge. Pet. App. 3a. Surely video evidence of individuals committing a crime is probative of their states of mind at the time of the crime, or at the very least, sufficient to prove an otherwise undisputed element of the offense.

III. This Case Is An Ideal Vehicle To Resolve The Split.

This is an ideal vehicle for this Court to consider the question presented, a point to which the government does not meaningfully respond. There are no factual complications or preservation issues that would impede this Court's review, and prevailing on the question presented would be outcome-determinative for Mr. Wilson. *Supra* 10. Indeed, Mr. Wilson's case is an exceptionally good vehicle for resolving the circuit split because the evidence against Mr. Wilson at trial was otherwise especially slim. Pet. 3-4. Had the district court excluded the 404(b) evidence—as district courts in the Second, Third, Fourth and Seventh Circuits would have done, *supra* 4-5, 10—then Mr. Wilson likely would be a free man. This is particularly true given "the uniquely prejudicial impact that prior bad act evidence has on a jury." *Caldwell*, 760 F.3d at 275; *United States v. Beasley*, 809 F.2d 1273, 1279 (7th Cir.

1987) (recognizing that 404(b) evidence poses "the risk that jurors will act on the basis of emotion or an inference via the blackening of the defendant's character").

The question presented is fundamentally important and recurring. Whether evidence of unrelated crimes automatically clears Rule 404(b)(2)'s bar in conspiracy trials is a critical issue not just for Mr. Wilson, but for any defendant charged with conspiracy who pleads not guilty, of whom there are many. Simply put, "Given the frequency with which other-acts evidence is admitted through Rule 404(b) in federal criminal cases, there is some urgency to define the proper application of that Rule." Capra, *supra*, at 774 n.15. This Court should intervene to resolve the division of authority and safeguard defendants' rights at trial.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Court should grant the Petition.

Respectfully submitted,

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