No. 22-219

In The Supreme Court of The United States

CARA O'CALLAGHAN AND JENEÉ MISRAJE,

Petitioners,

v.

MICHAEL V. DRAKE, IN HIS CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA; TEAMSTERS LOCAL 2010; AND ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari to the United States Court Of Appeals For The Ninth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT TEAMSTERS LOCAL 2010

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QUESTIONS PRESENTED

Whether public employees who voluntarily joined a union, signed written agreements to pay membership dues via payroll deduction for a set time period, and received membership rights and benefits in return, suffered a violation of their First Amendment rights when their employer made the deductions that they affirmatively and unambiguously had authorized.

CORPORATE DISCLOSURE STATEMENT

Respondent Teamsters Local 2010 has no parent corporation, and no company owns any stock in Respondent.

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INTRODUCTION

The lower courts unanimously and correctly have held that the deduction of union dues pursuant to a public employee's voluntary union membership and dues deduction authorization agreement does not violate the employee's First Amendment rights. The non-precedential, unpublished ruling below applies the unanimous consensus on this issue, which follows from this Court's precedent establishing that "the First Amendment does not confer ... a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

Since June 2021, this Court has denied thirteen petitions for certiorari that challenged the enforceability of union membership agreements.[1] There have been no developments in the short time since those denials that would make the unpublished decision below worthy of this Court's review.

Moreover, the court of appeals in this case held that the claims against Teamsters Local 2010 were

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[1] *Cooley v. CA Law Enforcement Ass'n*, No. 22-216, 2022 WL 16726107 (Nov. 7, 2022); *Polk v. Yee*, No. 22-213, 22 WL 16726106 (Nov. 7, 2022); *Adams v. Teamsters Local 429*, No. 21-1372, 2022 WL 4651460 (Oct. 3, 2022); *Woods v. Alaska State Employees Ass'n,* 142 S.Ct. 1110 (2022)*; Few v. United Teachers Los Angles,*142 S.Ct. 2780 (U.S. 2022); *Grossman v. Hawaii Gov't Emps. Ass'n*, 142 S.Ct. 591 (2021); *Smith v. Bieker*, 142 S.Ct. 593 (2021); *Wolf v. UPTE-CWA 9119*, 142 S.Ct. 591 (2021); *Hendrickson v. AFSCME Council 18*, 142 S.Ct. 423 (2021); *Bennett v. AFSCME, Council 31, AFL-CIO*, 142 S.Ct. 424 (2021); *Troesch v. Chicago Teachers Union*, 142 S. Ct. 425 (2021); *Fischer v. Murphy, Gov. of N.J.*, 142 S. Ct. 426 (2021); *Belgau v. Inslee*, 141 S.Ct. 2795 (2021).

properly dismissed for the additional reason that the union's alleged conduct was not state action for purposes of 42 U.S.C. § 1983. The petition does not address that issue, which provides an independent basis for the judgment below. As such, this case would not provide a suitable vehicle to address the question presented.

For all these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. Background

Petitioners Cara O'Callaghan and Jenee Misraje are employed by the Regents of the University of California (herein the "University"). By virtue of their employment, they are part of a unit represented for purposes of collective bargaining by Teamsters Local 2010 (herein "Local 2010" or the "Union"). Petitioners chose to voluntarily become members of Local 2010 and received membership rights and benefits. In their membership agreements, Petitioners voluntarily authorized their membership dues to be paid to the Union through payroll deduction. They also voluntarily agreed that this payroll-deduction authorization could be revoked only at certain times, irrespective of whether they resigned their Union membership.

Misraje's agreement provided that dues deductions could be cancelled only during an annual window period. Pursuant to her agreement, when she resigned from the Union in August 2018, her

payroll-deduction authorization continued until July 27, 2019.[2]

O'Callaghan became re-employed with the University in August 2009, and initially paid only agency fees until joining Local 2010 in May 2018. App. 7. At that time, O'Callaghan signed a membership contract, which contained a payroll-deduction authorization agreement through which she agreed "voluntarily" to pay her Union membership dues through payroll deduction. 9th Cir. Dkt. 9, p. 56. That authorization specifically provided that:

> I recognize the need for a strong union and believe everyone represented by our union should pay their fair share to support our union's activities. Therefore, I voluntarily authorize my employer to deduct from my earnings and transfer to Teamsters Local 2010 an amount equal to the regular monthly dues uniformly applicable to members of Local 2010, and I agree that this authorization shall remain in effect for the duration of the existing collective bargaining agreement, if any, and yearly thereafter until a new CBA is ratified, unless I give written notice via U.S. mail to both the employer and Local 2010 during the 30 days prior to the expiration of the CBA or if none the end of the yearly period. My check-off authorization will renew automatically, regardless of my membership status, unless

[2] Because the Petition challenges only the constitutionality of "multiyear" dues deduction commitments, Petition at 11 (argument heading), Petitioners have conceded that Misraje's dues deduction authorization was lawful.

> revoked during the window period described. My signature below strengthens our Union to win fair wages and benefits!

Id., alterations omitted.

On July 25, 2018, O'Callaghan sent Local 2010 a letter resigning from the Union. App. 8. The Union responded by letter, confirming that O'Callaghan's membership had been terminated, but advising her that payroll deductions would continue pursuant to the terms of her membership application, a copy of which was enclosed with the letter. *Id.,* 9th Cir. Dkt. 9, pp. 54-55. The expiration date for the applicable collective-bargaining agreement was March 31, 2022. 9th Cir. Dkt. 18, p. 7.

Nevertheless, the Union requested that the University discontinue all further dues deductions for O'Callaghan effective October 31, 2021. By the terms of her agreement with the Union, O'Callaghan in any event was free to end the deductions in March 2022. *See* 9th Cir. Dkt. 44.

B. Proceedings Below

On March 27, 2019, Petitioners filed this action in the district court, challenging the constitutionality of their dues deductions (before and after they resigned their union membership).

By Order dated September 30, 2019, U.S. District Court Judge James V. Selna granted, with prejudice, motions filed by the Union, the University and the California Attorney General to dismiss the petitioners' First Amended Complaint. App. 6-23.

Judge Selna concluded that the University's deduction of Union dues from petitioners' paychecks did not violate their First Amendment rights. Judge Selna agreed with the unanimous authority holding that *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018), does not abrogate voluntary agreements to become dues-paying members of a union. Judge Selna rejected petitioners' argument that their consent to have Union dues deducted in exchange for the benefits of Union membership was not binding because Petitioners were somehow coerced into becoming Union members. App. 13-16. This ruling effectively dismissed all of petitioners' claims regarding collection of dues while Petitioners were members of the Union and subsequent to petitioners' resignation of their Union membership.[3]

On October 4, 2019, Judge Selna entered judgment dismissing the complaint in its entirety. App. 4-5.

Petitioners then appealed Judge Selna's decision, and on April 28, 2022, the Ninth Circuit, in an unpublished Memorandum, upheld Judge Selna's dismissal of the complaint. In relevant part, the court stated:

> The trial court correctly determined that the Defendants did not violate Appellants' First Amendment rights. Although the First Amendment protects against compelled association, it does not permit one to renege on voluntary agreements. *Belgau v. Inslee*, 975

[3] The petition does not raise issues regarding the claims alleged below regarding collection of nonmember agency fees (before issuance of the *Janus* decision) or exclusive representation bargaining.

> F.3d 940, 951 (9th Cir. 2020). Appellants affirmatively agreed to join the Union and authorized the University to deduct dues from their wages pursuant to the terms of their agreements, including terms limiting when they could withdraw authorization. Additionally, Appellants' § 1983 claim against the Union fails for lack of state action under *Belgau. Id.* at 946–47. Therefore, Appellants' First Amendment claim was properly dismissed

App. 2.

On June 6, 2022, the Court of Appeals denied Petitioners' petition for rehearing *en banc*. App. 11, 28-29.

REASONS FOR DENYING THE PETITION

I. Petitioners do not question the Ninth Circuit's independent holding that the Union's conduct was not "state action" for purposes of 42 U.S.C. § 1983.

In *Belgau*, the Ninth Circuit rejected Section 1983 claims brought by former union members to challenge dues deductions that the plaintiffs had authorized. The Ninth Circuit held in *Belgau* that the plaintiffs' Section 1983 claims against the defendant union failed as a threshold matter because the union was a private party and its receipt of membership dues pursuant to its private agreements with its members did not constitute "state action" sufficient to support a claim against the union under § 1983. *Id.* at 946–49.

The Ninth Circuit, in its Memorandum decision below, likewise ruled that petitioners' "§ 1983 claim against the Union fails for lack of state action under *Belgau*." App. 2. The Ninth Circuit stated that this was an "[a]dditional[]" reason for affirming the district court's judgment. *Id.* Yet petitioners here do not address that additional reason for dismissing their Section 1983 claim against the Union. Petitioners have thus tacitly conceded that the claim against the Union was properly dismissed for lack of state action.

This Court's Rule 14.1(a) provides, in relevant part: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." Whether the Ninth Circuit properly concluded that the Section 1983 claims against the Union failed for lack of state action is not "fairly included" within the petition. The question of state action, not raised by the petition, is a threshold inquiry that in no way depends on the merits of Petitioners' First Amendment claim. And it is a question that is analytically different from the question presented in the petition: "Whether a union can trap a government worker into paying dues for longer than one year under *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018)." Petition, p. i. Petitioners thus have not properly presented for review the Court of Appeals' determination that the Section 1983 claim against the Union was properly dismissed for lack of state action. *See, e. g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30–33 (1993). And petitioners certainly have not shown that this separate state action question is worthy of review.

Accordingly, as "this Court reviews judgments, not opinions," *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), the petition should be denied because petitioners have not provided a basis for reversing the Ninth Circuit's below.[4]

II. The Ninth Circuit's decision follows the uniform consensus and faithfully applies this Court's precedents.

Even if the petition were not properly denied for the reasons explained above, it does not present a legal issue worthy of this Court's review.

In *Belgau*, the Ninth Circuit held that the deduction of dues pursuant to public employees' own voluntary, affirmative, written authorizations does not violate the First Amendment. *Belgau*, 975 F.3d at 950–52. The Ninth Circuit explained that "[w]hen 'legal obligations ... are self-imposed,' state law, not the First Amendment, normally governs," and the First Amendment does not "provide a right to 'disregard promises that would otherwise be enforced under state law.'" *Id.* at 950 (quoting *Cohen*, 501 U.S. at 671). The plaintiffs' public employer had simply "honored the terms and conditions of a bargained-for contract" between private parties "by deducting union dues only from the payrolls of Employees who gave voluntary authorization to do so." *Id.* The

[4] In addition to suing the Union, petitioners also sued state officials. But those officials have sovereign immunity from claims for retrospective relief, and Petitioners' claims for prospective relief against those officials are moot now that their dues deductions have ceased and all obligations in their membership agreements have been satisfied.

Ninth Circuit concluded that "[n]o fact supports even a whiff of compulsion." *Id.*

The Ninth Circuit in *Belgau* rejected the same argument that petitioners press here — that *Janus* imposed a new heightened "waiver" standard for voluntary union membership agreements. *Id.* at 951–52. The Ninth Circuit explained:

> The Court [in *Janus*] considered whether a waiver could be presumed for the deduction of agency fees only after concluding that the practice of automatically deducting agency fees from nonmembers violates the First Amendment.... The Court discussed constitutional waiver *because* it concluded that nonmembers' First Amendment right had been infringed, and in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement.

Id. at 952 (emphasis in original).

Like the Ninth Circuit, the circuit courts that have addressed the issue have all "recogniz[ed] that *Janus* does not extend a First Amendment right to avoid paying union dues" that a public employee affirmatively agreed to pay as part of a private contract through which the employee received the benefits of union membership. *Belgau*, 975 F.3d at 951, *cert. denied*, 141 S. Ct. 2795 (2021).[5]

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[5] *See Fischer v. Governor of New Jersey,* 842 F. App'x 741, 753 & n.18 (3d Cir. 2021) (". . . *Janus* does not give plaintiffs the right to terminate their commitments to pay union dues unless and until those commitments expire under the plain terms of their membership agreements."), *cert. denied*, 142 S. Ct. 426 (2021);

This Court has recently denied petitions for certiorari in nine of those cases. *See supra* at 1, n.1. Dozens of district courts have reached the same conclusion.[6] Given the unanimous consensus of the

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Oliver v. SEIU Local 668, 830 F. App'x 76, 79 (3d Cir. 2020) (unpublished) ("Oliver was faced with a constitutional choice - whether or not to join the Union—and she chose to become a member."); *Few v. United Teachers Los Angeles*, 2022 U.S. App. LEXIS 2545 (9th Cir. 2022) (unpublished) (noting that summary judgment was appropriate on the claims for back dues pre-*Janus* because *Belgau* controls this issue), *cert denied*, 142 S. Ct. 2780 (2022); *Bennett v. Council 31 of the AFSCME*, *AFL-CIO*, 991 F.3d 724, 729–33 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 424 (2021) ("*Janus* said nothing about union members who, like Bennett, freely chose to join a union and voluntarily authorized the deduction of union dues, and who thus consented to subsidizing a union."); *Hendrickson v. AFSCME Council 18,* 992 F.3d 950, 961 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 423 (2021); *see also*, *LaSpina v. SEIU Pennsylvania State Council*, 985 F.3d 278, 287 (3d Cir. 2021)*; Grossman v. Hawaii Gov't Emps. Ass'n*, 854 F. App'x 911, 912 (9th Cir. 2021) (unpublished), *cert. denied*, 142 S. Ct. 591 (2021); *Smith v. Bieker*, 854 F. App'x 937 (9th Cir. 2021) (unpublished), *cert. denied*, 142 S. Ct. 593 (2021); *Wolf v. Shaw*, 2021 U.S. App. LEXIS 28039 (9th Cir. Sept. 16, 2021) (unpublished), *cert. denied sub nom.*, *Wolf v. UPTE-CWA 9199*, 142 S. Ct. 591 (2021); *Wagner v. University of Washington*, 2022 U.S. App. LEXIS 14295, at *2-4 (9th Cir. May 25, 2022) (unpublished); *Littler v. Ohio Ass'n of Pub. Sch. Employees*, 2022 U.S. App. LEXIS 8182, at *15-16 (6th Cir. Mar. 28, 2022) (unpublished); *Troesch v. Chicago Teachers Union, Local Union No. 1*, 2021 U.S. App. LEXIS 19108 (7th Cir. Apr. 15, 2021) (unpublished), *cert. denied*, 142 S. Ct. 425 (2021).

[6] *See*, *e.g.*, *Smith v. SEIU, Local 668*, 566 F.Supp.3d 251, 262-64 (M.D. Pa. 2021); *Barlow v. SEIU, Local 668*, 566 F.Supp.3d 287, 297-300 (M.D. Pa. 2021) (pending appeal to the Third Circuit); *Biddiscombe v. SEIU, Local 668*, 566 F.Supp.3d 269, 280-82 (M.D. Pa. 2021) (pending appeal to the Third Circuit); *Fultz v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 13*, 551 F. Supp. 3d 518, 525-26 (M.D. Pa. 2021); *Mendez v. Cal. Teachers Ass'n*, 419 F. Supp. 3d 1182, 1186 (N.D. Cal. 2020)

lower courts, there is no reason for this Court to intervene.

Petitioners' arguments in any event conflict with *Cohen*, which did not apply a special, heightened "waiver" analysis to a newspaper's promise not to reveal the identity of a confidential source, because the government's enforcement of the promise did not give rise to a First Amendment objection that needed to be waived. The same is true here. Private parties often enter into agreements that implicate First Amendment rights — arbitration agreements, nondisclosure agreements, annual magazine subscriptions — and courts routinely honor those agreements. Outside the context of criminal suspects in custody or criminal defendants pleading guilty, a voluntary, affirmative, and unambiguous agreement is sufficient. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 234–49 (1973) (consent to search is waiver of Fourth Amendment right against involuntary searches).[7]

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aff'd, 854 F. App'x 920 (9th Cir. 2021); *Allen v. Ohio Civil Serv. Emps. Ass'n AFSCME, Local 11*, 2020 U.S. Dist. LEXIS 48481, at *33-34, n.10 (S.D. Ohio Mar. 20, 2020) (citing, in footnote 10, to "the unanimous post-*Janus* district court decisions holding that employees who voluntarily chose to join a union. . . cannot renege on their promises to pay union dues").

[7] While the Court cited "waiver" cases in *Janus*, it did so not to tacitly overrule *Cohen*, but to make clear that the States cannot presume from nonmembers' inaction that they wish to support a union. The four "waiver" cases *Janus* cited concerned whether waiver could be found solely from the plaintiff's inaction. *See Johnson v. Zerbst*, 304 U.S. 458, 468–69 (1938) (addressing whether pro se defendant had properly waived his Sixth Amendment right to counsel by failing to ask that counsel be appointed); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–80 (1999) (rejecting argument that State had "constructively" waived its sovereign immunity by

While conceding that dues deduction authorization agreements with annual terms are perfectly acceptable, petitioners argue that what is different in this case is that Petitioner O'Callaghan entered into a multi-year agreement, instead of an agreement terminable annually. The arguments petitioners summon in support of this theory, however, are policy arguments advocating for legislative or regulatory action, not arguments asserting legally material bases for distinguishing application of the law to a multi-year agreement from that applicable to an annual agreement.[8]

Petitioners urge that public employees should not be allowed to voluntarily enter into dues deduction authorization agreements that are irrevocable for some unspecified time longer than one year. They cite a number of cases for the proposition that a waiver of a constitutional right "should not ... be deemed *forever* binding." Petition at p. 18, emphasis

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engaging in activity that Congress decided to regulate); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 315, 322 (2012) (nonmembers of union could not be deemed to consent to union political assessment through their silence); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142–44 (1967) (libel defendant could not be deemed to have waived, through its silence, libel defense later recognized in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)). And contrary to petitioners' assertion at page 12 of their Petition, *Janus* said nothing about "multiyear window periods [being subjected] to heightened First Amendment scrutiny."

[8] *See, e.g.*, petitioner's reference to 29 U.S.C. § 186(4) at pp. 13-14 of the petition, and to the Federal Labor Relations Authority's "general statement of policy" interpreting 5 U.S.C. § 7115(a), issued in 71 FLRA 571 (Reb. 14, 2020), at p. 15 of the petition. Indeed, the FLRA is currently considering through it rule-making process a reversal of the general statement of policy issued in in 2020. *See* 87 FR 78014-01 (Dec. 21, 2022).

added. The authorization at issue here, however, is not binding in perpetuity. And the cases cited by petitioners merely affirm that individuals cannot be deprived of a right to revoke a waiver of the right to a jury trial, the right to a trial before a district court judge, or the right to counsel. None of the cases remotely suggests that a voluntary agreement between two private parties that may implicate the private parties' constitutional rights is unconstitutional if the agreement lasts for more than one year.[9]

Petitioners also cite a series of cases for the proposition that "waiver of one's constitutional rights can become stale due to the passage of time or intervening events." Petition at p. 18. But, again, the cases cited do not support the conclusion that voluntary private contracts are subject to a constitutional time limit. The cases cited all address the continuing effectiveness of a Miranda warning

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[9] The cases cited are *United States v. Mortensen*, 860 F.2d 948, 950 (9th Cir. 1988) ("We conclude as to this issue that waiver of a jury trial does not bar a demand for a jury on retrial of the same case unless the original waiver explicitly covers this contingency"); *United States v. Groth*, 682 F.2d 578, 580 (6th Cir. 1982) ("Accordingly, both precedent and policy require us to reverse Lee's conviction because Lee should have been permitted to withdraw his consent to trial by the magistrate*"); United States v. Lee*, 539 F.2d 606, 610 (6th Cir. 1976) (motion to withdraw jury waiver was untimely); *Zemunski v. Kenney*, 984 F.2d 953, 954 (8th Cir. 1993) ("In federal practice, a waiver of counsel has been held to remain in effect despite various breaks in the proceedings"); *People v. Crayton*, 48 P.3d 1136, 1146 (2002) ("Parties who waive the right to a jury in one proceeding cannot be deemed to have given up the right for all subsequent proceedings"); and *Wilson v. Horsley*, 974 P.2d 316, 322 (1999) (party who consents to trial before a magistrate may withdraw the consent).

and the circumstances under which an individual is entitled to a renewed Miranda warning. For example, in *United States v. Andaverde*, 64 F.3d 1305, 1312 (9th Cir. 1995), the court noted: "The courts have generally rejected a *per se* rule as to when a suspect must be readvised of his rights after the passage of time or a change in questioners." And in *United States v. Hinkley*, 803 F.3d 85, 92 (1st Cir. 2015), the court observed, "Miranda warnings need not be renewed every time there is a break in questioning. Once an effective Miranda warning is administered, those warnings remain effective until the passage of time or an intervening event makes the defendant unable to fully consider the effect of a waiver."[10]

It is one thing to say that an oral admonishment delivered by the police to a suspect -- the Miranda warning -- might, depending on circumstances, need to be renewed; it is something else altogether, and completely unrelated to the first, to suggest that a multi-year contract between two private parties may not impose obligations that last for more than one year. The dues deduction authorization at issue here was a written contract for which O'Callaghan received consideration in the form of membership rights and benefits. There is no need to impute into this dues deduction authorization an opportunity for rescission; the right to rescind is already contained in the contract itself. Nor, as noted above, is there any constitutional basis for creating a new obligation on

[10] The other cases cited by petitioners - *United States v. Nguyen*, 608 F.3d 368, 375 (8th Cir. 2010); *United States v. Pruden*, 398 F.3d 241, 246–47 (3d Cir. 2005); and *State of Nebraska v. Miah S. (In re Miah S.),* 861 N.W.2d 406 (2015) - are all consistent with these basic rules regarding Miranda warnings.

labor unions to "warn" public employees before they enter into dues deduction authorization contracts that they are waiving a First Amendment right to refrain from doing so. Absent such a constitutional obligation, the Miranda cases cited by petitioners are completely irrelevant to the present case.

California also has a Public Employment Relations Board and state court system that are entirely competent to address claims that a particular agreement is unconscionable or was the product of coercion or duress or fraud. Petitioners have not established a sufficient basis for constitutionalizing state contract law. They did not even exhaust potential state law claims.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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