IN THE SUPREME COURT OF OHIO

ANGELO D. CRAIG, *et al.*,	)	Case No. 2026-0138
Plaintiffs-Appellants,	)	
vs.	)	On Appeal from the Eighth District Court of Appeals, Cuyahoga County
BRAD CROMES, in his official capacity as treasurer of Cuyahoga County, *et al.*,	)	Court of Appeals Case No. CA-25-114917
Defendants-Appellees.	)	

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF APPELLANTS AND JURISDICTION

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STATEMENT OF INTERESTS OF AMICUS CURIAE

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3). The Buckeye Institute has been vocal in its opposition to practices in Ohio allowing government entities to seize real property to satisfy a tax debt without compensating the property owners for the equity they have accrued.

STATEMENT OF THE CASE

The Buckeye Institute adopts by reference the Statement of the Facts and Case set forth in Appellants' Memorandum in Support of Jurisdiction.

SUMMARY OF THE ARGUMENT

The Fifth Amendment's Takings Clause is unconditional. It's simple and unadorned language provides, "Nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V. The Ohio Constitution' protections against government takings are just as mandatory and even more specific: "[W]here private property shall be taken for public use, a compensation therefor shall first be made in money . . . and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Ohio Const., art. I, § 19. Those words, which restrict and qualify the traditional government power of eminent domain, carry the same meaning today that they did when they were written in quill and ink. The same historical and ideological view that linked private property to political liberty that informed the

Framers informed Ohio's Takings Clause Both clauses affirm the equitable premise that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012), quoting *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002). Indeed, the just compensation requirement is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.*, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

That original understanding of the just compensation requirement, rooted in Magna Carta and applied consistently to the present day, is that when the government takes an interest in property for public use, its duty to compensate the former owner is "categorical." *Tahoe–Sierra* at 322, citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951). In drafting the Fifth Amendment, James Madison restated familiar and uncontroversial precepts of English law that had by then taken root in colonial statutes and common law. William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 694 (1985). Colonial statutes, nascent state constitutions, and, particularly relevant for the State of Ohio—the Northwest Ordinance of 1787—all conditioned the sovereign's right to take property for the public good on just and contemporaneous compensation to the landowner.

Expressly included in this historical understanding is the principle that when the government takes property—particularly when the government takes real property to satisfy a debt—its power to take goes only so far as is necessary. A taking that leaves the government with *any* profit at the property owner's expense violates this principle. The Framers' generation, 19th-century jurists, and importantly here—the men and women who settled Ohio—rightly understood equity in real

estate to be a form of personal property and thus protected from uncompensated or unwarranted takings.

The just-compensation requirement is "categorical" in the sense that a sovereign's authority to take private property exists *only* when the taking is necessary for a public use and only to the extent that government provides contemporaneous just compensation to the property owner in return. As the U.S. Supreme Court recently held in *Tyler v. Hennepin County*, 598 U.S. 631 (2023), applying this principle to government seizures to satisfy a tax debt requires the government to compensate the property owner for his or her accrued equity in that property when it takes the property. Indeed, a "property owner has suffered a violation of his [constitutional] rights when the government takes his property without *just* compensation . . . ." (Emphasis added.) *Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 180, 184 (2019). In other words, the price at which the government later sells the property does not figure into the analysis. The question is, rather, did the government take more than what it needed to satisfy the debt?

In *Tyler,* the U.S. Supreme Court provided clear guidance on this issue. The Eighth District Court of Appeals, however, erred by applying a cramped reading of *Tyler* that missed its central point. The Court should accept jurisdiction to clarify that the Ohio Constitution—consistent with *Tyler* and the historical principles dating back to the signing of Magna Carta on the field of Runnymede, codified in the Northwest Ordinance and firmly planted in Ohio's first settlement by Rufus Putnam—applies to all tax debt takings, not merely those in which the government later sells the property at a profit. Because this categorical right to just compensation is so intertwined with basic premises on which the United States—and the State of Ohio—were founded and settled, this case presents not only a substantial constitutional question but a question of public and great general interest.

ARGUMENT AND LAW

I. Introduction: Ohio's founders understood and valued property rights.

On July 22, 1796, Moses Cleaveland[1]—lawyer, Revolutionary War veteran, and General Agent for the Connecticut Land Company—arrived with his surveying party at the mouth of the Cuyahoga River to lay out the plat map for the property where, 213 years later, Angelo Craig, Angela Taylor, and Abraham David would live. *See* Harvey Rice, *An Account of the Lineage of General Moses Cleaveland, of Canterbury (Wyndham County), Conn. The Founder of the City of Cleveland, Ohio (with Portrait)* (1885). Roughly a decade earlier and 170 miles to the southwest, another Revolutionary War General, Rufus Putnam, whose image adorns the rear wall of the Court's chamber, had led the first group of settlers into Ohio and established Marietta. While neither General Cleaveland nor General Putnam could not have foreseen the city that those plat-lines would become, both would have understood land and the accrued equity in it not only as an asset but a guarantor of liberty. Both would have understood that when a government could appropriate private property for its own use—regardless of how the government eventually disposed of it—without just compensation and rendering back to the landowner the value in excess of the government's need, a taking has occurred. And both would have understood that without a categorical guarantee of just and contemporaneous compensation, it would be difficult to persuade settlers to buy land and risk their lives and fortunes on the frontier.

Indeed, Putnam, along with his partner in the Ohio Company Reverend Mannasah Cutler were two of the driving force behind the Northwest Ordinance of 1787, which had had opened the

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[1] So spelled—in 1831, the "Cleveland Advertiser," a newspaper in the city that Cleaveland founded, dropped the "a" from Cleaveland's name to save space on the paper's masthead. The shortened spelling stuck. Henry E. Bourne, *The Story of Cleveland*, *reprinted in* 14 New England Magazine, at 744 (1896).

Connecticut Western Reserve to settlement. That foundational document not only barred slavery and encouraged public education in the new territory but of great importance to those risking their lives and fortunes on the frontier, protected private property against government takings. More importantly, Cleaveland and Putnam would have understood—like the citizens who ratified the Fifth Amendment, the first United States Congress that re-enacted the Northwest Ordinance, and the drafters of Ohio's constitutional compensation requirements—that the sovereign's right to take private property for public use is conditioned on payment of just compensation. Because this right is so intimately connected to Ohio and the premises on which it was founded, the question this case presents is of substantial constitutional importance and great public and general interest. The Court should accept jurisdiction.

II. Magna Carta and colonial law guaranteed just compensation for governmental takings.

The requirement that "just compensation" must accompany any taking of private property has a pedigree stretching back nearly a millennium. The U.S. Supreme Court has observed that the roots of the Just Compensation Clause extend "back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings." *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). Specifically, Clause 28 of Magna Carta forbade any "constable or other bailiff" from taking "corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." (Citation omitted.) *Id*. And Chapter 31 placed an outright prohibition on "the king or his officers taking timber" from land without the owner's consent. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 564 (1972).

These principles of Magna Carta sailed with the first English colonists to the New World and established themselves firmly in American soil. For example, in 1641, Massachusetts adopted a provision in its Body of Liberties, prohibiting "mans Cattel or goods of what kinde soever" from

being "pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford." Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far"*, 49 Am. U. L. Rev. 181, 209 (1999).

Most colonial legislatures, however, did not initially recognize a blanket governmental obligation to compensate a property owner for the public taking of his property. Treanor at 694. Rather, the duty to provide just compensation flowed from the specific statute authorizing the taking. Under these "purveyance statutes," legislatures often included payment as a matter of simple justice. Thus, "compensation became a feature [ ] through the American colonial period." Stoebuck at 575. According to Stoebuck, "purveyance statutes" were "in themselves examples of the principle that government must pay for what it takes." *Id.* at 576. In other words, the colonial legislatures usually employed a "pay as you go" policy, with each statute that authorized a taking including an offsetting appropriation to compensate the landowner.

Takings by colonial governments for roads provide an interesting parallel to the practices at issue here. In the colonial period, governments often took unimproved wilderness to create highways that almost always benefitted the property and the landowner. *See id.* at 583 ("In a time when unimproved land was generally of little worth, a new road would give more value than it took."). Yet, despite significantly improving the value of the adjacent land, colonial legislatures still viewed compensation to landowners as a matter of fundamental fairness. For example, in 1639, the Massachusetts Bay colony amended its general highway act to provide that "'if any man suffer any extraordinary damage in his improved ground,' he would receive 'some reasonable satisfaction' from the town." John F. Hart, *Takings and Compensation in Early America: The Colonial Highway Acts in Social Context*, 40 Am. J. Legal Hist. 253, 258 (1996).

Similarly, the New York colonial legislature evolved from a position of leaving the question of compensation to local governments to adopting a 1721 highway act that required the government to pay "the true and full Value of the Land" if a highway was "laid through 'Improv'd or Inclosed Lands.'" *Id.* at 261. Connecticut's statute largely mirrored New York's. *Id*. at 290. And in 1700, Pennsylvania revised its highway statute to provide that "where it was necessary to lay a road through 'improved lands . . . the value thereof' would be paid to the owner." *Id.* at 261.

Although compensation for highway takings was not universal—Virginia and Maryland, for example, did not provide compensation for land taken for highways, and New York frequently amended its statute to provide more protection for highways in certain counties and less in others—the principle of no taking without compensation had taken root. *Id.* at 258–261. In other words, land purchasers understood that land, like currency, was fungible, and that they could recover their equity even if the land was taken to satisfy other debts. In ordering compensation for highway takings, colonial legislatures well understood that it was government action—in the form of royal grants, land purchases, treaties (albeit often dishonored), and the implied government protection of paid-in equity that went with them—that made the land available for settlement in the first place.

But while pre-revolutionary colonists had been content to trust their legislatures to provide compensation when fair, the experience of the Revolutionary War impressed on them the need for broader and more consistent protection of property rights. Treanor at 700–701. The Revolutionary War brought with it the seizures of property by both the British Regulars and the Continental Army. St. George Tucker, the author of the first published treatise on the U.S. Constitution and editor of the 1803 edition of Blackstone's Commentaries, posited that the new nation's shift to the inclusion of compensation requirements in state constitutions, the Northwest Ordinance, and the Takings Clause was probably due in part to "the arbitrary and oppressive mode of obtaining supplies for

the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever." 1 William Blackstone, *Commentaries with Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, at 305–06 (St. George Tucker ed., 1803). Indeed, during the war, many of the newly independent states had enacted legislation allowing the confiscation of loyalist property. Consequently, Americans were less "secure in their property rights between 1776 and 1787 as they had been during the Colonial period." Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*, at 154 (1985).

Some Founders, including Madison, were concerned that this confiscation threatened the long-term safety of property rights in general. *See* James W. Ely, Jr., *Property Rights in American History*, at 4 (1997); *see also* Treanor at 709 (noting Madison's opposition to the seizure of loyalist property). John Adams also saw the protection of property and the larger cause of liberty as inextricably bound: "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila, in* 6 Works of John Adams 223, 280 (Charles Adams ed., 1851). The Framers thus sought to restore that security, which would, in turn, both foster and fortify liberty, as it was broadly understood.

III. The Framers and succeeding generations held the just compensation requirement to be categorical and fundamental.

Soon after the Revolutionary War's conclusion, Madison voiced his concerns over the erosion of property rights that had attended the conflict, writing to Jefferson that "[t]he necessity of . . . guarding the rights of property was for obvious reasons unattended to in the commencement of the Revolution" and citing the need for positive steps to secure those rights in the new country. Treanor at 709.

While the colonial right to compensation for a taking of property often relied on a patchwork of purveyance statutes and general reliance on the common law, the Congress of the Confederation of the United States provided what was to be the first national statement on the matter when it enacted the Northwest Ordinance of 1787. In essence, the Northwest Ordinance provided the first national "pre-constitutional codification of the eminent domain power." Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 54 (1999).[2] In language that prefigured the Fifth Amendment, the 1787 Northwest Ordinance provided that

> No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.

An Ordinance for the Government of the Territory of the United States North-west of the River Ohio, Confed. Cong., art. 2 (1787).

The Northwest Ordinance's cannot be understated. Chief Justice Salmon Chase remarked that "[n]ever, 'in the history of the world, did a measure of legislation so accurately fulfill, and yet so mightily exceed, the anticipations of the legislators. The Ordinance has been well described as having been a pillar of cloud by day and of fire by night in the settlement and government of the Northwestern States." Salmon P. Chase, *Comments upon the ordinance of 1787, from the Statutes of Ohio* (1833), *in* The History of Warren County Ohio (1882). And the chief lobbyists for that Act, the men without whom it would likely not been enacted were General Rufus Putnam and his partner in the Ohio Company, Reverend Manasseh Cutler. *See generally* Louis W. Potts, *Manasseh Cutler, Lobbyist*, 96 Ohio Hist. J. 101, 111–114 (1987); *see also* W.E. Gilmore, *The Ordinance of*

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[2] While the Northwest Ordinance provided the first "national" statement of the just compensation requirement, the Vermont Constitution of 1777 and the Massachusetts Constitution of 1780 included similar categorical requirements. Treanor at 701.

1787: Some Investigations as to the Authorship of the famous Sixth Article, 14 Ohio Hist. J. 148 (1905).

Limiting takings to those that are necessary and requiring full compensation for them is thus part of Ohio's origin story. When subscribers invested in the Ohio Company, and when they loaded their wagons and lit out for the West, the men and women who settled what would become Cuyahoga County would have relied—at least in part—on this national policy protecting them from uncompensated government takings.

The Framers' writings following ratification of the Fifth Amendment leave no doubt of the importance that they assigned to the protection of private property. Madison, in particular, saw broad protection for property—both real and intangible—as the proper end of government. James Madison, *Property, in* 1 The Founders' Constitution, Chap. 16, Doc. 23 (University of Chicago Press, 1977), available at https://tinyurl.com/34cz994u. Indeed, Madison considered protection of property as a government responsibility commensurate with protection of individuals. The Federalist No. 54 (James Madison) ("Government is instituted no less for protection of the property, than of the persons of individuals."). And after the experiences of the Revolutionary War, he believed it necessary "to erect strong safeguards for rights in general and for property rights in particular." Treanor at 694. The just compensation clause—although intended to have relatively narrow legal consequences—was just such a safeguard. And although Madison viewed the Fifth Amendment as a restatement of what was already unquestionably the law, he believed that the codification of these pre-existing guarantees into the Bill of Rights would serve the hortatory purpose of encouraging respect for private property: "Paper barriers have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community." *Id.* at 710, citing James Madison, *Speech Proposing the Bill*

of Rights, in 12 The Papers of James Madison, at 204–05 (C. Hobson & R. Rutland eds. 1979).

Following ratification, Madison's broader vision took hold in American jurisprudence. Professor Treanor explains that "[i]n addition to limiting the national government's freedom of action, the just compensation clause served an educative role: It inculcated the belief that an uncompensated taking was a violation of a fundamental right. . . . [T]he Fifth Amendment was a national declaration of respect for property rights." *Id.* at 714. By the 1820s, the principle of just compensation had won general acceptance. *Id.*

In the landmark case of *Gardner v. Village of Newburgh*, Chancellor Kent articulated the broad Madisonian view that had begun at Runnymede, crossed the ocean, survived a war, and firmly established its place as the fundamental law of the new nation:

> I may go further, and show that this inviolability of private property, even as it respects the acts and the wants of the state, *unless a just indemnity be afforded,* has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of government. Such an article is to be seen in the bill of rights annexed to the constitutions of the states of *Pennsylvania, Delaware,* and *Ohio* . . . .
>
> But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the constitution of the *United States*, "that private property shall not be taken for public use, without just compensation."

Gardner v. Village of Newburgh, 2 Johns. Ch. 162 (N.Y. Ch. 1816).

IV. English and American law have long recognized that the government—if it takes at all—may take no more than is necessary.

Courts and commentators—most notably this court in interpreting Ohio's property projections—have explained that the sovereign's authority to take property is constrained by two equitable limitations: "'the public use requirement' and 'just compensation' rule." *Norwood v. Horney*, 2006-Ohio-3799, ¶ 40, citing Charles E. Cohen, *Eminent Domain after Kelo v. City of New London: An argument for Banning Economic Development Takings*, 29 Harv. J. L. & Pub. Policy 491, 532 (2006); Stoebuck at 595. But a significant component of the public use

requirement is the government's duty to refrain from taking more property than is necessary for the public purpose. *Norwood* at ¶ 41.

The necessity limitation also boasts a long and respected pedigree in the historical development of takings jurisprudence. This principle of necessity, like the just compensation requirement, finds its roots in Magna Carta. Historians noted that before Magna Carta, seizure of property to fulfill debts to the Crown was a common practice: "The sheriff and bailiffs of the district, where [the] deceased's estates lay, were in the habit of seizing everything" to secure the interests of the King" and "sold chattels out of all proportion to the sum actually due" and often refused to disgorge the surplus. Vincent R. Johnson, *The Ancient Magna Carta & the Modern Rule of Law: 1215 to 2015*, 47 St. Mary's L.J. 1, 47 (2015). Clause 26 of Magna Carta remedied that situation by requiring that when goods were seized to satisfy a debt, "the value of the goods seized had to approximate the value of the debt." *Id.* English law thus recognized "equity" in a person's real and personal property.

Indeed, Blackstone himself, in a passage undoubtedly known to the Founders, summarized the well-understood limitation on tax seizures, stating that "whenever the government seized property for delinquent taxes, it did so subject to an 'implied contract in law to . . . render back the overplus'" if the property was sold to satisfy the delinquency. 2 Blackstone, *Commentaries on the Laws of England*, at 452 (1893). The King was due what he was owed, but nothing more.

Expounding on this principle, Thomas Cooley noted in his 1871 *Treatise on Constitutional Limits*—which surveyed the common law of the day—that any appropriations (takings) beyond necessity are illegitimate:

> The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made. When a part only of a man's premises is needed by the public, the necessity

> for the appropriation of that part will not justify the taking of the whole, even though compensation be made therefor.

Thomas M. Cooley, *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*, at 1147 (2d ed. 1871).

V. Subsequent developments establish that equity in land is a form of personal property.

Applying the twin principles that the government must pay for what it takes and can take no more than what it needs means that a government actor must compensate a landowner for his equity in property when it seizes the property for a tax debt. History and experience teach that equity is a protected property interest.

"Property interests, of course, are not created by the Constitution." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Instead, as the Supreme Court has explained, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Here, the original understanding of the Takings Clause plainly encompasses a property right to recover the surplus of the property's value and the tax debt collected regardless of how the county eventually disposes of the property.

This is essentially the holding of *Tyler*. To the extent that a taking of Ms. Tyler's property was needed to make the government whole for its delinquent taxes, the net taking must be limited to only what was actually owed. If the government sees a need to appropriate *all* of her property without crediting back the equity, it must provide just compensation. Neither the Fifth Amendment nor the Ohio Constitution allow for a third option. The constitutional abuse comes into sharp relief when one considers that in this situation, Cuyahoga County is both creditor and sovereign. It both takes the property and in large part has control over how to dispose of it. Clearly, no private creditor

could keep property valued in excess of what was owed to it in a foreclosure, regardless of what that creditor eventually chose to do with the property.

This is the understanding upon which Ohio's founder and its early settlers related. Justice Cooley, this time in his treatise on the *Law of Taxation*, summarized the common law of the early Republic regarding tax sales thus:

> It is not for a moment to be supposed that any statute would be adopted without [payment of surplus equity] or some equivalent provision for the owner's benefit. And such a provision must be strictly obeyed. A sale of the whole when less would pay the tax is void, and a sale of the remainder after the tax had been satisfied by the sale of a part would also be void, for the very plain reason that the power to sell would be exhausted the moment the tax was collected.

Thomas M. Cooley, *A Treatise on the Law of Taxation including the Law of Local Assessments*, at 344 (1876) (collecting cases). Note that Cooley's conclusion that the power to sell is exhausted when the tax was collected is consistent with the principle that a taking is only constitutional when there is just compensation. Again, equity is property. In this case, the fact that the county did not realize any proceeds on the post-taking sale is immaterial. The Fifth Amendment and the Ohio Constitution require just compensation, in the form of a monetary payment, before the taking is completed. *See* Ohio Const., art. I, § 19 ("[W]here private property shall be taken for public use, a a compensation therefor shall first be made in money.").

Taken together, the original understanding of the Fifth Amendment and American common law—the understanding that Ohio's settlers would have brought with them to the Western Reserve—was that private property was sacrosanct and a source of other fundamental rights. A corollary to that understanding is that equity in land was a form of private property. Accordingly, no government can take that property without just compensation.

CONCLUSION

For the reasons stated above and in the Petitioners' Brief, the Court should accept jurisdiction over this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above *Amicus Curiae Brief of The Buckeye Institute in Support of Appellant and Jurisdiction* was served this 23rd day of February 2026 via e-mail on:

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