No. 18-1539

In the
Supreme Court of the United States

DOMINO'S PIZZA LLC,
Petitioner,
v.
GUILLERMO ROBLES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than amici, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice and have provided consent to this filing.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

The applicability of the Americans with Disabilities Act (ADA) to websites or mobile device applications (popularly known as "apps") is a recurring issue of exceptional importance to companies of all sizes across diverse sectors of the American business community. The lower courts are increasingly divided on this issue at the same time that claims alleging discrimination under the ADA based on websites or apps have skyrocketed. The Ninth Circuit's decision in this case exacerbates these concerns and will be a magnet for forum shopping. This Court's intervention is needed.

When Congress passed the ADA in 1990, its objective was to increase access for people with disabilities by providing not just a legal mandate but a *blueprint* for American businesses to make their goods and services readily accessible. Nearly three decades later, the lower courts are attempting to apply the ADA's legal mandate to a revolutionary new setting that scarcely existed in 1990—the

internet—in the absence of any guidance at all. The results have been good for virtually no one, other than an opportunistic plaintiffs' bar that has leveraged this uncertainty into a lucrative sue-and-settle practice against businesses. Businesses now face a rising sea of litigation that flows from one venue to another as plaintiffs' lawyers seek out the most favorable local precedent, leaving companies unable to tell what standards they should meet in order to provide access and avoid liability.

The unknowable legal standards for applying the ADA to the internet impose heavy litigation costs with little countervailing benefit. That in itself is a major problem, as settlements of such suits unfairly tax innovation while doing little to improve accessibility. But the Ninth Circuit's decision in this case worsens matters, by assessing those unknowable standards with regard to each *individual* mode of accessing existing goods and services, rather than looking to the overall availability of those goods and services to the named plaintiff. That mode-by-mode approach is irreconcilable with the ADA's text and structure, impractical in operation, and, ultimately, will discourage the kind of innovation and investment that would best serve the very individuals whom the ADA was rightly intended to benefit.

Moreover, if opening up a particular new mode of online access might increase accessibility for one group (for example, deaf individuals), but could not readily be made available to another group (for example, blind individuals), companies and non-profits with a footprint in the Ninth Circuit now have a strong incentive not to adopt that new mode

of access in the first place. Doing so would just expose them to a new round of litigation.

That is not a good result for anyone. It is in everyone's interest for goods and services to be as widely accessible as feasible, including over the internet. But the Ninth Circuit's decision in this case will discourage innovation that accomplishes just that by penalizing businesses for adopting new platforms and exposing them to litigation risks simply by entering this sphere. None of this will serve the ends of the ADA. And it is wholly unnecessary: the Ninth Circuit's decision is based on a profoundly flawed interpretation of the ADA.

The petition should be granted.

STATEMENT

I. THE ADA AND REGULATORY SCHEME

Congress passed the Americans with Disabilities Act in 1990 to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). Title III of the ADA mandates that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." *Id.* § 12182(a). Businesses strongly support this anti-discrimination principle.

Congress sought from the start to make the ADA's requirements clear to regulated entities. In some instances, Congress set out highly detailed requirements in the statute itself. *See, e.g.*, *id.* § 12182(b)(2)(A)(iv) (prohibiting "architectural barriers" in rail passenger cars unless they can be bypassed "by the installation of a hydraulic or other

lift"). And where Congress concluded that more detail would ultimately be needed than it had supplied, it employed an additional recipe for clarity: first, it instructed that "the Attorney General shall issue regulations . . . to carry out" the relevant requirements, *id.* § 12186(b); and, second, it implemented "[I]nterim [A]ccessibility [S]tandards" that companies could follow to ensure their public accommodations would be deemed compliant in certain circumstances. *See id.* § 12186(d)(1).

The Department of Justice (DOJ) issued final regulations in 1991. The regulations provide detailed specifications for businesses and non-profits to follow in order to make specific aspects of their facilities ADA-compliant. *See* 28 C.F.R. pt. 36, App. D § 4.3.3, at 16 (requiring, in the 1991 "Standards for Accessible Design," that "the minimum clear width of an accessible route shall be 36 [inches]"). And DOJ has updated those standards over time, just as Congress directed. *See id.* at App. B. (containing requirements updated in 2010). A business or non-profit that seeks to build a new facility, or modify an existing one, thus has clear guidance about what it must do in order to ensure that the facility is accessible to Americans with disabilities and complies with the ADA.

This case, however, involves the application of the ADA to a context that Congress did not expect in 1990, and for which it provided no guidance: The internet. At the time the ADA was enacted, the internet was not a significant mode of access to goods and services. The ADA was passed five years before AOL first made a connection to the internet available to ordinary Americans via a modem, and long before the advent—and explosion—of

e-commerce. Unsurprisingly, therefore, Congress appears not to have given any specific consideration to whether or how the ADA would apply in the online environment. It provided no standards that companies should use to ensure their websites are accessible, interim or otherwise, and did not even hint at the Act's application to the internet.

DOJ has never adopted such standards, either. Instead, confronted with the myriad new ways for companies and non-profits to make their goods or services available to consumers over the internet and through internet-connected devices, DOJ has proceeded through largely ad hoc efforts that have been inconsistent, even contradictory.

In 1996, for example, DOJ indicated that websites need not be accessible under Title III of the ADA if adequate alternative modes of access to a company's or non-profit's goods and services are available, such as through "Braille, large print, and/or audio materials" that "communicate the information contained in web pages." Letter from Deval L. Patrick, Assistant Attorney General, to Senator Tom Harkin at 1 (Sept. 9, 1996).[2] Four years later, DOJ took the opposite position on the same question. *See* Brief of the United States as Amicus Curiae in Support of Appellant at 7-8, 20, *Hooks v. OKbridge, Inc.*, 232 F.3d 208 (5th Cir. 2000) (No. 99-50891), 1999 WL 33806215.

By 2010, DOJ acknowledged that its sporadic litigating positions had failed to provide "clear guidance on what is required under the ADA." 75

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[2] This letter is available at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/tal712.txt.

Fed. Reg. 43,460, 43,464 (July 26, 2010). It therefore initiated a rulemaking intended to address the issue. More than seven years later, though, DOJ announced that it was abandoning the effort and withdrawing its proposals regarding a potential new rule, cautioning that even the limited guidance its proposed rulemaking had purported to provide might not be a reliable indicator of DOJ's future position. 82 Fed. Reg. 60,932, 60,932-33 (Dec. 26, 2017).

As a result, businesses and non-profits today are left with only two sources of guidance with respect to whether and how the ADA applies to websites and other internet-connected means by which they make their goods and services available to consumers: (1) the vague text of the ADA, adopted with physical facilities in mind; and (2) DOJ's inconsistent, non-binding, and unaccountable litigating positions.

II. THE EXPLOSION OF WEBSITE ACCESSIBILITY LITIGATION

The lack of guidance has left businesses and other regulated entities uncertain about whether or how the ADA applies to websites. But where some see uncertainty, others see opportunity.

Even before DOJ withdrew its advance notice of proposed rulemaking, the number of lawsuits claiming that companies' websites violated the ADA was already growing steadily. Plaintiffs filed at least 814 such suits in federal court in 2017, itself more than in any prior year.[3] And DOJ's

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[3] *See* Minh N. Vu & Susan Ryan, *2017 Website Accessibility Lawsuit Recap: A Tough Year for Businesses*, Seyfarth Shaw, ADA Title III: News & Insights (Jan. 2, 2018), https://www.adatitleiii.com/2018/01/2017-website-accessibility-lawsuit-recap-a-tough-year-for-businesses/.

withdrawal, in December 2017, sparked an explosion of new litigation. In 2018, Title III suits concerning website accessibility nearly tripled—to 2,258.[4] And that was hardly a temporary blip: through the first half of 2019 such litigation is on track to match or exceed 2018's record-setting level.[5]

A spike in litigation sometimes can at least provide greater guidance through the resulting judicial opinions. Here, though, two factors have worked against such clarity. The first is that plaintiffs' firms have employed an aggressive sue-and-settle strategy, using the threat of fee-shifting under the ADA to force companies to forego fact-heavy trials in favor of fast monetary payouts. More than 93 percent of website accessibility cases filed in 2018 have already settled—and of the cases filed in 2019, fully 55 percent settled within 60 days. *See* Taylor, *supra*, *Midyear ADA Web & App Accessibility Lawsuit Report*. Without judicial decisions against which to measure ongoing compliance, those settlements have increasingly led to a rinse-and-repeat pattern in which settling one such case just leads to another. Nearly a third of the retail companies sued since July 2017, for example, have faced *multiple* website accessibility suits. *Id.*

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[4] *See* Jason Taylor, *2018 ADA Website Accessibility Lawsuit Recap Report*, UsableNet (Dec. 26, 2018), https://blog.usablenet.com/2018-ada-web-accessibility-lawsuit-recap-report.

[5] *See* Jason Taylor, *Midyear ADA Web & App Accessibility Lawsuit Report*, UsableNet (July 2, 2019), https://blog.usablenet.com/midyear-ada-web-accessibility-lawsuit-report-blog.

On the rare occasion that a defendant decides to litigate to judgment, a second factor comes into play. The surge in ADA website accessibility litigation has been driven by a highly concentrated plaintiffs' bar, with just 10 plaintiffs' firms accounting for more than 82 percent of all such suits filed in federal court in 2018. *See, e.g.*, Taylor, *supra*, *2018 ADA Website Accessibility Lawsuit Recap Report*. That centralized control—and the fact that website accessibility litigation can be filed in any district in the United States where the defendant is subject to personal jurisdiction, *see* 28 U.S.C §§ 1391(b), (c)(2), (d)—has facilitated aggressive forum shopping, with plaintiffs' firms identifying plaintiffs and filing suit in a small handful of jurisdictions they have deemed most favorable. When a court in one of those jurisdictions issues a decision that the plaintiffs' bar does not like, they simply pick up their litigation bags and refile in a different jurisdiction, thereby preventing any one jurisdiction from building up a developed body of case law on what is and is not compliant that companies could look to for guidance.

This case is a prime example. Federal courts in California have long led the nation in terms of overall number of Title III suits filed, and until 2017, California federal courts were one of the top few venues for website accessibility litigation, too.[6] But after the District Court in this case granted Domino's motion to dismiss in 2017, plaintiffs filed

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[6] *See* Kristina M. Launey & Melissa Aristizabal, *Website Accessibility Lawsuit Filings Still Going Strong*, Seyfarth Shaw, ADA Title III: News & Insights (Aug. 22, 2017), https://www.adatitleiii.com/2017/08/website-accessibility-lawsuit-filings-still-going-strong/.

just nine new federal lawsuits about website accessibility in California in 2017 and eleven such suits in 2018—even as the number of such suits filed in other jurisdictions skyrocketed.[7]

In January 2019, however, the Ninth Circuit reversed the District Court's decision in this case. In doing so, it articulated a new standard under which *each* "website and app must provide effective communication and facilitate 'full and equal enjoyment' of [a company's] goods and services to its customers who are disabled." Pet. App. 17a. The Ninth Circuit's new standard makes it far easier to bring ADA claims, because a plaintiff can focus on each individual mode of accessing the offerings available from a company's physical locations, without alleging that they lack full and equal access to those offerings when taking into account the *complete* universe of ways in which the company provides its goods or services to the public. And plaintiffs' firms have responded like plaintiffs' firms: Website accessibility suits have surged back into California federal district courts, with 70 such suits filed in the first half of the year alone—more than seven times as many as the federal courts there saw

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[7] *See* Vu & Ryan, *supra, 2017 Website Accessibility Lawsuit Recap: A Tough Year for Businesses*. The 2018 figure reflects searches of the PACER system performed by employees of UsableNet in conjunction with its annual reports on ADA web accessibility lawsuits. *See, e.g.*, Taylor, *supra*, *2018 ADA Web Accessibility Lawsuit Recap Report*. UsableNet provided PACER-derived data from 2018 and 2019 to amici's counsel for use in the preparation of this brief; that data serves as the basis for the figures reported in the text throughout this brief without other citation.

in *all* of 2018. And that does not even account for suits filed within other States in the Circuit.

ARGUMENT

I. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

The conflicting caselaw and lack of clear standards for Title III's applicability to websites and apps has created an issue of uniquely pressing national concern, on which this Court's guidance is urgently needed. The current and worsening uncertainty favors no one, except perhaps the small class of plaintiffs' firms that have driven this litigation. Uncertainty and related litigation costs hurt businesses. And the surest way to avoid such costs is to reduce online offerings and innovations in the first place, hurting consumers—including the very individuals the ADA seeks to protect.

Such suits affect the entire economy. Especially as e-commerce has taken off, the applicability of the ADA to websites and apps is a matter of unquestioned importance to businesses as well as consumers. Indeed, apps, in particular, now cover almost all facets of life. As this Court observed just last term, "'There's an app for that' has become part of the 21st-century American lexicon." *Apple, Inc. v. Pepper,* 139 S. Ct. 1514, 1518 (2019). And increasingly, where there's an app or other online offering, an ADA lawsuit is soon to follow.

In 2019 alone, ADA online accessibility lawsuits have impacted not just retailers (more than 600 of whom were sued in the first half of the year) and restaurants (at least 113 such suits), but also dozens of companies and non-profits involved in industries as varied as healthcare (at least 36 suits), banking

and financial services (at least 14), real estate (at least 40), travel and hospitality (at least 44), and entertainment (at least 82). ADA litigation has become almost as universal as apps themselves.

Even before the Ninth Circuit's decision in this case, the explosion of website accessibility litigation under the ADA was already imposing huge, unjustified costs on American businesses and non-profits. The decision below adds fuel to the fire. By allowing plaintiffs to focus their allegations on whether individual modes of access to the offerings of a company or non-profit are fully and equally accessible to those with specific disabilities, the Ninth Circuit's approach significantly lowers the bar for what a plaintiff must plead to survive a motion to dismiss and ultimately prove to prevail.

The plaintiff here, for example, had no need to plead that he was denied full and equal access to Domino's pizzas. Rather, it was enough to plead (in highly general terms) that he was not equally able to obtain a customized pizza *through Domino's website* or *through Domino's app*. Under such a standard, it will be even more difficult for defendants to eliminate meritless claims early on, adding litigation costs and inviting further nuisance suits. That result, by itself, would cry out for this Court's review in an area of federal litigation that has already seen such astronomical growth in recent years.

But the even more serious problem with the Ninth Circuit's decision is the incentives it creates for companies and non-profits that want to avoid litigation in the first place. By indicating that each method of access to a company's goods and services must itself be equally and fully accessible to all individuals, *see* Pet. App. 17a, the Ninth Circuit's

decision will discourage companies from pursuing holistic, multi-pronged approaches to providing access to individuals with disabilities.

Even where a new mode of web-enabled access might increase accessibility for one group (for example, allowing blind individuals to place orders through an audio-based interface using an Amazon Alexa device), companies and non-profits within the Ninth Circuit now have a strong incentive not to adopt that new mode of access if it cannot readily be made available to another group (for example, deaf individuals who could not hear the prompts). Doing so would just expose them to a new round of litigation, especially given the lack of DOJ guidance about how to ensure ADA compliance. In some cases, companies might decide that the costs are worth it. But in many other cases, especially for small businesses and startups in the Ninth Circuit for whom a single lawsuit could be disastrous, the logical conclusion will be to just limit their offerings.

In effect, the Ninth Circuit's decision imposes an ADA litigation tax on new innovations, without regard to whether a company already provides full and equal access to its goods and services through existing channels. A decision imposing that sort of drag on entrepreneurial advances impacting the ability of businesses to avail themselves of one of the greatest technological developments in history unquestionably warrants further review.

II. THE NINTH CIRCUIT'S DECISION IS PROFOUNDLY WRONG

The decision below not only exacerbates the existing conflict and confusion on the applicability of the ADA to the internet, but is also wrong. The ADA

does not require that each mode of access itself be equally accessible, and interpreting it to do so raises serious practical and constitutional problems with which the Ninth Circuit's decision failed to grapple.

A. The Ninth Circuit's Focus On Each Discrete Mode of Access Is Misguided

Title III of the ADA guarantees full and equal access to "the full and equal enjoyment of the *goods, services, facilities, privileges, advantages, or accommodations* of any place of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). Nowhere in the text of the Act or its implementing regulations, however, does the ADA require that each *mode* of "connect[ing] customers to . . . goods and services" must be individually and separately analyzed. Pet. App. 9a. That analysis not only exponentially expands the requirements (and costs) of the Act, but is profoundly mistaken.

To take a physical example, imagine a Domino's restaurant with an entrance several feet above street level, with a wheelchair-accessible entrance ramp leading up to the main entrance door from one direction and a stairway coming from the other. Under the ADA, such a setup would be perfectly permissible, because it provides for the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of that location by those with and without disabilities alike. 42 U.S.C. § 12182(a). Pizza is freely accessible to all individuals, disabled or not.

No one would seriously contend in such a scenario that the restaurant violated the ADA because the *stairway itself* is not wheelchair-accessible. The stairway and entrance ramp are two

separate modes of access to the same goods and services found in the restaurant, and taken *together* they make the goods and services inside fully and equally accessible to all. That is all the ADA demands. The statute does not require an examination of each individual mode of access to determine whether *that mode* is fully and equally accessible. Indeed, any other rule would lead to the conclusion that stairways violate federal law, since examined in and of themselves they cannot provide full and equal access to those in wheelchairs.

DOJ regulations reinforce the point. The ADA requires places of public accommodation to ensure that individuals with disabilities experience no difference in the full enjoyment of goods and services "because of the absence of auxiliary aids and services." 42 U.S.C. § 12182(b)(2)(A)(iii). In carrying out that provision, DOJ has required places of public accommodation to "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. § 36.303(c)(1). And as the Ninth Circuit itself has held, "[b]y its very definition, an auxiliary aid or service is an additional and different service that establishments . . . offer the disabled." *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 672 (9th Cir. 2010).

The clear implication of those statutory and regulatory provisions is that even where some modes of access to a public accommodation's goods or services are not fully accessible to individuals with disabilities, the public accommodation can still comply with the ADA by ensuring that *other* modes of access that facilitate "effective communication with individuals with disabilities" are available. 28

C.F.R. § 36.303(c)(1). For example, a restaurant that posts its menu on a sign that can only be read by customers without vision impairments has not violated the ADA if it also makes available auxiliary aids—such as a menu printed in Braille or available on an audio recording—that provide blind customers with full and equal access to its food offerings. *See id.* § 36.303(b)(2). And, as DOJ's own regulations provide, "the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication." *Id.* § 36.303(c)(1)(ii).

The Ninth Circuit's decision, however, abandons that commonsense approach in the digital world. It focuses in a vacuum on whether Domino's website or mobile application was fully and equally accessible in its own right, without requiring the plaintiff to plead that other modes of access were insufficient to provide effective communication (such as a telephone call from the very same phone on which the mobile application was loaded). *See* Pet. App. 17a. Allowing this complaint to move forward would be like allowing a suit solely based on an allegation that "the stairway into the restaurant is not wheelchair accessible," without requiring the additional allegation that "there is no separate wheelchair ramp by which to access the restaurant." Nothing in the ADA calls for that result, online or off.

As long as Domino's makes pizza freely accessible to all, the ADA simply does not subject Domino's to liability for selling pizza through an app, as well.

B. The Ninth Circuit's Decision Raises Serious Practical and Constitutional Concerns

In addition to misreading key statutory and regulatory language, the decision below raises serious practical and constitutional concerns. As discussed, the Ninth Circuit looked at the accessibility of Domino's website and app in a vacuum, without considering the (many) other modes of access to the goods and services provided from Domino's restaurants. But separating out websites and apps into distinct categories, analyzed without reference to accessibility already established through other means, just heightens the practical significance of the lack of statutory and regulatory guidance on online accessibility.

The District Court here held that under the Due Process Clause, it would be unconstitutional to apply the ADA to Domino's website or app, given the notice problems that arise from such a regime. *See* Pet. App. 34a-35a. How is a business supposed to know how to ensure that its website complies with the ADA, if there are no meaningful standards for it to follow in setting it up? But the Court need not go that far. Instead, the more measured approach would be to simply hold that Congress would not have intended the ADA to apply in the first place to a discrete mode of access as to which it provided *absolutely* no guidance, because doing so would make it effectively impossible for regulated entities to ensure compliance with their statutory obligations.

III. THIS COURT'S GUIDANCE IS NEEDED

In addition to correcting these errors, this Court's intervention is needed to resolve the growing conflict

and confusion on this issue across the country. The petition canvasses those conflicts, and how they are implicated in this case. *See* Pet. 15-25. As petitioner notes (at 9-10), one way of creating uniformity would have been through regulation. *See* 42 U.S.C. § 12186(b). But despite its longstanding recognition of the lack of clarity in this area, DOJ has failed to do so and, instead, seems to be conflicted on the right standard itself. And in the absence of action from DOJ, plaintiffs' lawyers have filled in the void, becoming through litigation and settlement the *de facto* regulators of website compliance with the ADA. Their central interest, though, is not in developing a coherent body of rules to encourage greater accessibility; it is in extracting quick settlements and related attorney's fees, while leaving themselves free to come knocking again at a later date.

This issue is too important, and too pervasive, to allow this uncertainty and litigation tax to persist any longer. And this case provides an excellent vehicle in which to provide the needed guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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