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INTRODUCTION

The Ohio Constitution enshrines the right of all Ohioans to pursue referendum when they believe the General Assembly has passed a law against the interests of the people. While the power is rarely used, it represents a bold exercise of direct democracy when utilized. Specifically, the Constitution provides ninety days to any party seeking referendum, and the General Assembly may not limit or restrict that right.

This year, a coalition of Ohioans pursued referendum of House Bill 6. One of the most controversial pieces of legislation Ohio has seen in years, it bailed out Ohio's nuclear plants and two coal plants. It gutted renewable energy and energy efficiency standards. It was opposed by citizens across Ohio, yet the General Assembly passed it regardless.¹ On July 29, 2019, six days after Governor Mike DeWine signed House Bill 6, Ohioans Against Corporate Bailouts (OACB) filed referendum language with the secretary of state for signature verification. On August 29, thirty-one days after filing the original language with the attorney general and fifteen days after filing new language, OACB received permission to gather signatures. In sum, OACB had fifty-two days to gather 265,774 valid signatures to give voters the option to overturn House Bill 6. R.C. 3519.01, which requires petitions to submit a summary of their referendum for a "fair and truthful" review to the attorney general, restricted and limited the people's right to referendum. The law makes it substantially more difficult to achieve a core democratic right enshrined in Article II of the Ohio Constitution.

On October 7th, 2019, fifteen days prior to the October 22nd deadline, OACB filed its complaint in federal court to find Ohio's referendum laws unconstitutional. On October 23, the

¹ In a poll conducted by The Harris Poll prior to House Bill 6's signing, nearly 70% of respondents opposed the centerpiece of the legislation: a bailout of FirstEnergy Solutions' nuclear plants. *What America is Thinking on Energy Issues, THE HARRIS POLL, (June 2019)*, available at: <https://www.api.org/~media/Files/Policy/Nuclear-Subsidies/What-America-Is-Thinking-Ohio-Nuclear-Subsidies.pdf>.

U.S. District Court for the Southern District of Ohio certified five questions to the Ohio Supreme Court to assist in its resolution of the controversy before it. Now, the Ohio Supreme Court has the opportunity to right a wrong—the legislature has restricted the right of referendum for far too long. In today’s context, restricting the democratic power of the people represents serious risks to Ohio’s democracy, the future of Ohio’s energy system, and the fight against climate change. The questions certified to the Ohio Supreme Court will influence future efforts of the citizens of Ohio to exercise their Constitutional rights. Ohio has the opportunity to enhance and invigorate its democracy—or, it can reduce democracy to a pay-to-play game, whereby only those with the largest bank accounts can achieve meaningful change.

Since 1929, when the Ohio Legislature enacted its first referendum law limiting Ohioans’ access to referendums, only four bills have made it to the ballot. But between 1912 and 1929, when Ohio law was less restrictive, Ohioans placed nine laws on the ballot through the power of referendum. Article II, Section 1g states: “Laws may be passed to facilitate their operation but in no way limiting or restricting either such provisions or the powers herein reserved” to the people of Ohio to pursue referendum or ballot initiative. R.C. 3519.01 violates the Ohio Constitution due to the limitations placed upon the General Assembly by Article II, Section 1g.

The Supreme Court should accept the questions certified to it by the U.S. District Court for the Southern District of Ohio. The Ohio Environmental Council, Ohio Citizen Action, Moms Clean Air Force, and Ohio Voice (collectively, the “Amici”) provide this brief in support of the OACB to amplify its arguments and emphasize the public interest in an expeditious ruling.

QUESTIONS PRESENTED TO THE COURT

- (1) Whether the right to referendum set forth in Article II, Section 1 of the Ohio Constitution guarantees those circulating petitions in support of a referendum a full ninety days solely for the purpose of circulating petitions?
- (2) If so, whether R.C. 3519.01 violates the Ohio Constitution by shortening the ninety days to accommodate the fair and truthful review?
- (3) If the Ohio Constitution guarantees a petitioner ninety days to circulate petitions, whether the number of days attributable to a petitioner's own errors in submitting a referendum petition under R.C. 3519.01 is "credited" to the petition, or deducted from the ninety days?
- (4) Whether a petitioner who does not claim to be "aggrieved" by the fair and truthful determination and thus fails to appeal the denial of a certification under R.C. 3519.01(C) is entitled to credit toward the ninety days for the time spent fixing deficiencies in a fair and truthful statement?
- (5) Whether a petition gets credit toward the ninety days for the time before, or between, a petition submission when the Attorney General and Secretary of State do not have a petition to review and consider under R.C. 3519.01?

INTEREST OF AMICUS CURIAE

The Amici represent thousands of individuals across Ohio, interested not only in the referendum of House Bill 6 but also the rights of Ohioans generally to hold their legislature accountable. Some Amici participated directly in the referendum of House Bill 6, whether by encouraging members to sign the petitions, educating the public, or collecting signatures directly through volunteer petitioners. Other Amici have participated in ballot initiatives and referendums in the past and have a direct interest in seeing the democratic rights of their members upheld—as the Ohio Constitution requires. Collectively, the Amici present this brief to provide the valuable interest of the Ohioans fighting for their Constitutionally enshrined right of referendum, showcasing why the Supreme Court should accept these certified questions for consideration.

In pursuit of the democratic principles instilled in the Ohio Constitution, the Amici urge the Supreme Court to answer questions (1) and (2) in the affirmative. The Ohio Constitution provides only ninety days for circulation, and R.C. 3519.01—and its “fair and truthful” review—violates the Ohio Constitution by limiting the number of days available to petitioners. Because the ten-business-day procedure necessarily limits the right of referendum, questions (3), (4), and (5) only apply insofar as the use of a “fair and truthful” review still facilitates the referendum process.

For the purposes of the right to referendum, the “fair and truthful” review can only continue if it occurs within a procedure which does not limit the time available to referendum signature gatherers. The referendum process has been circumvented by unfair and burdensome rules created by the General Assembly for nearly a century. The injustice must continue no longer. Ohio’s democracy should favor the people, rather than those with the largest pocketbooks.

STATEMENT OF FACTS AND CASE

The Amici adopt the statement of facts and case from the preliminary memorandum filed by the OACB supporting acceptance of the Certified Questions.

ARGUMENT

Article II, Section 1 of the Ohio Constitution enshrines the democratic rights reserved to the people of Ohio. From its very first words, it emphasizes the breadth and authority of the people to take legislative action when the General Assembly fails to follow the will of its constituents.

The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives *but the people reserve to themselves* the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.

Ohio Constitution, Article II, Section 1 (emphasis added).

The power to limit the people’s right to referendum resides only with the Ohio Constitution, not with the General Assembly. And Article II, Section 1g emphasizes how the General Assembly may interact with the right of referendum: “Laws may be passed to facilitate [its] operation but in no way limiting or restricting . . . the powers herein reserved.” Simply put, “any law that attempts to limit the right of referendum beyond the restrictions provided in Section 1d, Article II, Ohio Constitution, is expressly prohibited by Section 1g, Article II, Ohio Constitution.” *State ex rel. Ohioans for Fair Dists. v. Husted*, 130 Ohio St.3d 240, 2011-Ohio-5333, 957 N.E.2d 277, ¶ 16 (Lanzinger, J., concurring in judgment only). Any limitations outside those provided in Article II, Section 1d and passed by the General Assembly violate the express provision of referendum powers to the people *from* the people.

The Supreme Court of Ohio has long held that “all statutes have a strong presumption of constitutionality.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 25. To declare a statute unconstitutional, “it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.” *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), syllabus. In answering the questions presented to the Court on the constitutionality of R.C. 3519.01, it must read the laws and constitutional provision through a lens most favorable to the democratic ideals and powers expressly granted to the people. The power of both the General Assembly and the Ohio Supreme Court were granted by the will of the people in establishing the Ohio Constitution, and the right of referendum is central to the power of the people over their elected representatives.

In the instant case, the plain language of R.C. 3519.01 is incompatible with the plain language of the Ohio Constitution. The right of referendum has a time-limit; every day matters.

Any action by the legislature to limit the days available to gather signatures must be scrutinized for both its intent and effect. Limiting the number of days available to gather signatures does not facilitate the operation and goals of referendum. The General Assembly could develop a process which properly facilitates and achieves the same goals as the “fair and truthful” summary without limiting or restricting the right of referendum. Ohio’s current system flies in the face of democratic principles utilized across the country when citizens seek to overturn the actions of their elected officials. Ohio must find these laws unconstitutional now, lest it become a state where only the wealthiest groups can accomplish legislative change.

(1) The plain language of the Ohio Constitution provides ninety days for referendum, emphasizing the legislature may only facilitate that right, rather than restrict or limit it.

Article II, Section 1 of the Ohio Constitution bars any law passed by the General Assembly from going into effect “until ninety days after it shall have been filed by the governor in the office of the secretary of state.” Then, “when a petition signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed,” *Id.*, the secretary of state is required to submit a referendum on the ballot for all voters to consider. The ninety-day delay built into Ohio law following signing by the governor was designed *specifically* to facilitate referendum. It is the only moment outlined in the Ohio Constitution when the people can overturn a signed law; given the need to acquire over 250,000 valid signatures, *every day matters*.

The plain language of the Ohio Constitution does not envision any of the procedures placed upon the referendum process by R.C. 3519.01. Under R.C. 3519.01, a group of electors seeking referendum must first gather one thousand signatures. Next, they must submit those signatures to the secretary of state and attorney general, along with a summary of the law they

seek to overturn. The secretary of state and attorney general use ten business days to validate the signatures and, “if in the attorney general’s opinion, the summary is a fair and truthful statement of the measure to be referred, so certify.” R.C. 3519.01(B)(3). None of these provisions have any basis in the Ohio Constitution.

However, under Article II, Section 1g, the right of referendum is self-executing. If the General Assembly had never passed laws regulating the referendum process, *Ohioans would still have the right to referendum*. The procedures necessary to place language on the ballot to overturn an act of the General Assembly are all spelled out within the Constitution, including explicit limitations upon the power (found in Sections 1d and 1e). Without R.C. 3519.01, Ohioans seeking referendum would follow the Constitution’s clear process.

Article II, Section 1g establishes petition requirements, preparation, submission, and ballot language procedures. Each referendum must contain “a full and correct copy of the title, and text of the law, section, or item . . . sought to be referred.” *Id.* Signers of referendum petitions must provide the date and the address of their residence. *Id.* The Constitution even includes sufficient detail regarding the signing of petitions in ink and the need for the petition circulator to sign the part-petition that they “witnessed the affixing of every signature.” *Id.*

After submitting signatures to the secretary of state for review, they must determine the sufficiency of the signatures one hundred five days prior to the election. *Id.* The Ohio Supreme Court has jurisdiction over appeals made regarding the sufficiency of signatures or petitions. *Id.* Section 1g further provides for a ten-day cure, if the signatures are not sufficient following the secretary of state’s review. *Id.* And once on the ballot, Section 1g describes how the measure should appear on the ballot, including an emphasis on the need for a “true copy of all laws or proposed laws.” *Id.* The particular detail provided in the Constitution for referendum was

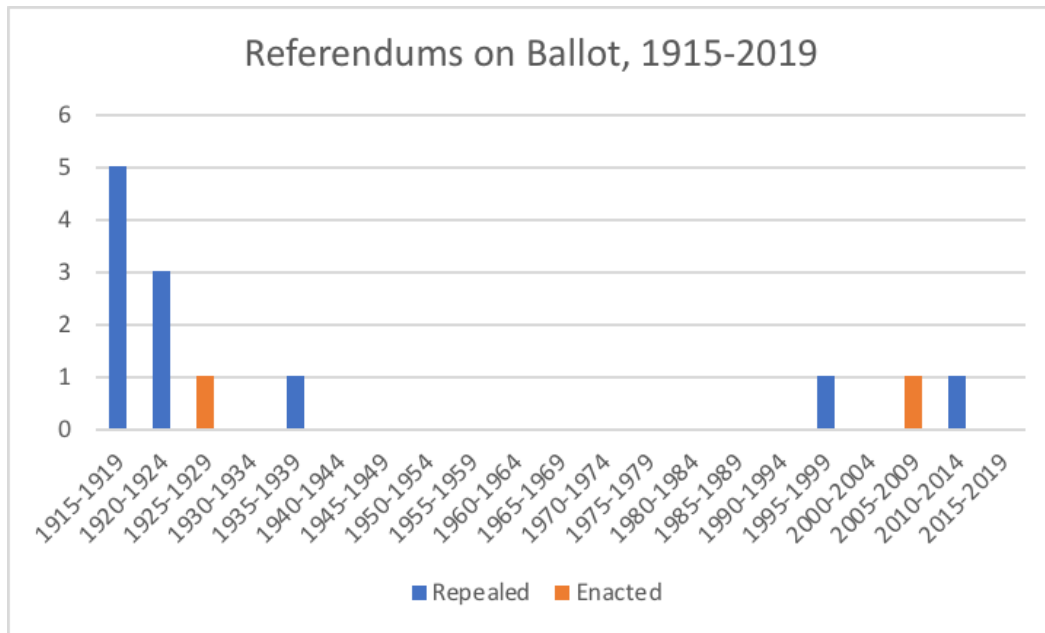
recognized by this Court three years after its original adoption: “the astonishing thing about these provisions is not their brevity, but the minutia and detail with which the Constitution makers provided for safe-guarding the initiative and referendum as to constitutional amendments.” *Hockett v. State Liquor Licensing Bd.*, 91 Ohio St. 176, 182, 110 N.E. 485 (1915).

Throughout Article II—and in particular, Section 1g—no provision ever requires a summary be affixed to the petitions circulated for referendum. No provision encourages or permits the secretary of state to review petition language prior to petition circulation. No provision requires the secretary of state to review a thousand signatures prior to allowing petition circulation. No provision permits the attorney general to review summary language or any portion of the petition. No provision permits the Ohio General Assembly to eliminate up to sixteen days of petition circulation, approximately one-sixth of the days permitted for referendum signature gathering. And no provision of the Constitution permits the General Assembly to require a second review of up to sixteen days if the language fails the “fair and truthful” test.

Section 1g ends with a key clause, worth emphasizing again: “The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation but in no way limiting or restricting either such provisions or the powers herein reserved.” If the Ohio General Assembly passes no “facilitating” provisions, then the procedures outlined in the Ohio Constitution are the procedures followed to place a referendum on the ballot. The General Assembly need not provide any extra processes, but it may—to *facilitate* the process of referendum and ballot initiative, not to limit or restrict it.

In 1929, the Ohio Legislature enacted G.C. 4785-15, the first iteration of a procedural requirement. G.C. 4785-15 (predecessor section to R.C. 3519.01). It required citizens to submit a

summary of any law they wished to repeal to the Attorney General, who would reject it if it is not “fair and truthful.” *Id.* The difference between referendum efforts after the date Ohio citizens won the right to referendum (1912) until 1929, and referendum efforts after 1929, highlights the chilling effect of the procedural requirements.



From 1915 to 1929, nine referendum petitions placed laws onto the Ohio ballot.² From 1930 to 2019, only four measures have qualified for the ballot. The lack of referendum occurred despite technological revolutions creating easy travel and the onset of mass communication, which should have made acquiring signatures easier despite Ohio’s growing population. And Ohio’s population in 1930 was 6.6 million; even ninety years ago, significant resources would have been needed to put a referendum on the ballot.³

² See *Proposed constitutional amendments, initiated legislation and laws challenged by referendum, submitted to the electors*, State Library Digital Collection, <https://www.ohiomemory.org/digital/collection/p267401ccp2/id/1370> (accessed Nov. 11, 2019) (listing Ohio ballot measures from 1912-2005). See also *List of Ohio ballot measures*, Ballotpedia, https://ballotpedia.org/List_of_Ohio_ballot_measures (accessed Nov. 11, 2019) (providing links to Ohio ballot measures by year from 1850-2019).

³ Ohio’s population acquired from public data made available by Google and pulled from U.S. Census Bureau databases. Available at: https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&met_y=population&idim=state:39:26:42&hl=en&dl=en

As the population of Ohio grows, “so grows the number of signatures required to meet the 6 percent constitutional requirement the ten business-day provision might work to restrict, rather than facilitate, the referendum process under some plausible set of circumstances.” *Schaller v. Rogers*, 2008-Ohio-4464, ¶ 52. While the court in *Schaller* did not overturn the lower court’s decision under an abuse of discretion standard, *see id.*, it recognized the potentially restrictive nature of the ten-business-day process. The question, however, should not be to what extent a particular provision restricts the right of referendum; if a procedure makes the process more onerous at all, it restricts or limits the right and violates the final words of Article II, Section 1g. The Ohio Constitution contains no qualifier allowing the Ohio General Assembly to limit the amount of time available, even if the limitation ensures a nebulous goal of clarifying the referendum language. Rather, the General Assembly could—and perhaps should—pass laws achieving similar goals without eliminating days available for signature gathering.

(2) The General Assembly could easily develop an alternative statutory scheme which ensures “fair and truthful statements” while also providing ninety days.

To place a referendum on the ballot in 2019, over 265,000 valid signatures are needed.⁴ If Ohio citizens could start gathering signatures on the first day following the signing of a bill, they would need to acquire nearly 3000 valid signatures per day. Under R.C. 3519.01(B), following at ten business days of review by the secretary of state and attorney general, citizens seeking referendum most likely have seventy to seventy-five days to gather signatures. If they have seventy-five days, they must gather over 3500 signatures a day, an increase of roughly eighteen per cent more signatures per day. If the attorney general does not approve the required “summary” language, and the citizens must create a new summary and resubmit to new

⁴ See Dave Yost, Ohio Attorney General, *Initiative and Referendum Signature Requirements*, <https://www.ohioattorneygeneral.gov/Legal/Ballot-Initiatives/Initiative-and-Referendum-Signature-Requirements> (accessed Nov. 12, 2019).

signatures and language, at least thirty will have passed. If a group has only sixty days to gather signatures, they must gather almost 4400 signatures per day, an increase in nearly fifty percent more signatures per day.

The process provided by the Ohio General Assembly, on its face, violates the Constitution. Gathering signatures requires money, volunteers, or both—and by decreasing the amount of time available to gather signatures, the statute limits access to referendum to only well-funded groups able to pay for it to happen in less time. Ninety days is already a short time to gather 265,000 signatures. Every day eliminated by any procedure matters—and Ohioans have lost at least fourteen from the outset.

More importantly, the General Assembly has different procedures at its disposal which achieve a similar goal while not restricting the right of referendum. Many other states across the nation use other procedures while protecting the right, and many others can easily be envisioned. For instance, the secretary of state could have summary language already prepared for potential groups seeking referendum—prepared alongside a bill and ready once the governor has signed it. Alternatively, the attorney general could write a “fair and truthful” summary for a committee seeking referendum—in fact, the California attorney general does exactly that. Cal. Code 9006.

Or, citizens seeking referendum could circulate petitions utilizing only the language of the bill for which they seek referendum, as expressly permitted by the language of the Ohio Constitution. Any of these methods would provide Ohio citizens with a more ample opportunity to pursue referendum without the undue limitations provided by the current procedure. Regardless, Ohio’s current system fails to facilitate the right of referendum. The historical record shows that Ohio’s procedures restrict the right of referendum. Significantly, many other states have laws which actually facilitate it.

(3) Other states have developed effective procedures which facilitate the referendum process, rather than limit it.

States across the country have a right in their constitutions similar to Ohio's referendum provisions. Importantly, many state constitutions do not include language restricting their legislatures from limiting the right of referendum. And very few states have as restrictive of a review procedure as R.C. 3519.01. In fact, Alaska, California, Massachusetts, North Dakota, and Wyoming require a state actor to prepare summary language, rather than the referendum committee.

In Alaska, the lieutenant governor prepares the petition and summary. *See* Alaska Stat. 15.45.320. In California, the attorney general is in charge of drafting the summary and title of the referendum, within 10 days of receipt of the text of a proposed referendum. *See* Cal. Elec. 9006. California also does not include language in its constitution ensuring the legislature cannot restrict or limit the right of referendum. *See* Cal. Const. Art. II § 10(e). In Wyoming, the secretary of state prepares petitions following receiving an appropriate number of signatures from a formed committee. *See* Wyo. Stat. 22-24-402; *See also* Wyo. Stat. 22-24-407.

In Michigan and Maryland, citizen groups seeking referendum may submit language to the secretary of state for approval, but they are not required to do so. In Maryland, petitions must include a "fair and truthful" summary statement; however, circulators may immediately pursue signatures without approval from the state. *See* Md. Elec. Law 6-201; *See also* Md. Elec. Law 6-202. In Michigan, circulators may submit a summary (one-hundred words or less) for approval prior to circulating but are not required to do so. Mich. Stat. 168.482(b).

Other states simply require the text of the bill be attached to the referendum petition. In Montana, only the text of the bill is required. Mont. Stat. 13-27-205. In Missouri, there is no requirement for a summary. When petitions with all signature requirements are submitted to the

secretary of state, the Secretary will submit it to the attorney general who prepares a summary for the ballot itself. *See* Mo. Stat. T. IX, 116.025. And in Oklahoma, the secretary of state provides forms for referendum use and merely requires the petitions include a “simple statement” including the gist of the bill in the margins of each signature sheet. *See* 34 Okl.St. Ann. 3.

Only two states have referendum procedures similar to Ohio: Colorado and Arizona. In Colorado, citizens submit petition language to a legislative council which then provides edits to the document. Colo.Rev.Stat. 1-40-105. If the citizens accept the edits, the language is submitted to the Secretary of State. Colo.Rev.Stat. 1-40-106. However, the Colorado constitution does not include language prohibiting restriction or limitation of the right of referendum. *See* Colo. Const. Art. V 1(3). Arizona utilizes a lengthy registration process with the secretary of state and requires a 100-word summary; however, like Colorado, Arizona’s constitution does not include language equivalent to Ohio’s Section 1g. *See* Ariz. Const. Art. IV, 1, Pt. 1(4).

Ohio’s referendum procedure stands alone. Other states have developed procedures which properly facilitate the right of referendum, even when their constitutions do not limit the legislature from doing so. Ohio, however, has created a system which can eliminate nearly half the days provided for the people of Ohio to overturn laws. As it stands, the fair and truthful summary process provided by R.C. 3519.01 violates the Ohio Constitution. Ohio courts have noted that “the ten business-day provision might work to restrict, rather than facilitate, the referendum process under some plausible set of circumstances,” *see Schaller v. Rogers* at ¶ 52, but on its face, the process violates the right to referendum. Given the significance of the violation, the Supreme Court of Ohio should answer the questions certified to it by the U.S. District Court and defend the democratic rights held by the people.

CONCLUSION

No one can deny the political firestorm that enveloped Ohio following the passage of House Bill 6. The state's citizens witnessed one of the most contentious referendums ever to occur. If the referendum had been given a fair shake under Ohio law, having its full ninety days (or even close to it), the story would have been different. Ninety days for signature gathering is significantly more time than fifty-two days—the amount of time available to the House Bill 6 referendum circulators. But the important question is not whether the referendum would have succeeded if it had ninety days. Rather, the Ohio Supreme Court must ask whether the procedure found in R.C. 3519.01, on its face, violates the rights of Ohioans, *even if* it was possible to place the referendum on the ballot with fifty-two days, or sixty days, or seventy-five days.

If the Ohio Supreme Court upholds the current law, it will affirm what Ohioans now know: only with millions of dollars and an army of ironclad signature gatherers can citizens place a referendum on the ballot. On the other hand, finding R.C. 3519.01 unconstitutional and providing petition circulators with their deserved rights under Article II, Section 1 of the Ohio Constitution upholds and affirms the democratic rights of all Ohioans. And when Ohioans face existential risks such as climate change, every right—and day—counts.

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I hereby certify that a copy of the foregoing brief was served upon the following parties of record via electronic transmission this November 13, 2019.

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