No. 17-1713

IN THE
Supreme Court of the United States

EMERSON ELECTRIC CO., ET AL.,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY, ET AL.
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Occupational Safety and Health Act authorizes states to enforce workplace safety laws only through mechanisms established in a federally-approved state plan, or, as the Supreme Court of California held, permits state and local government officials to impose additional penalties with different standards through invoking state laws outside of those incorporated into a state plan.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers (NAM), the largest manufacturing association in the United States, represents small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Occupational Health and Safety Act ("OSH Act") subjects employers and employees to a single set of workplace safety regulations. This law facilitates uniform, deliberate, and predictable health and safety requirements for manufacturers and other employers. States may regulate and enforce workplace safety in addition to the federal Occupational Health and Safety Administration (OSHA), but only pursuant to a federally-approved State Plan that avoids duplicative and counterpro-

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[1] Pursuant to Rule 37.2(a), NAM provided timely notice of its intention to file this brief to counsel for all parties. All parties consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel have made a monetary contribution to the preparation or submission of the brief.

ductive regulation. When a government agency or official uses a separate state law as an alternative enforcement mechanism, it undermines this system and exposes manufacturers to uncertainty and excessive civil penalties that do not advance workplace safety.

Here, a district attorney for a single California county sidestepped the system developed by the state and approved by OSHA. Following the tragic explosion of a water heater at plastics facility, the County sought penalties against a manufacturer over and above those already imposed by the California Division of Occupational Safety and Health (Cal/OSHA). It invoked a separate California law, the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, to respond to potential workplace safety violations.

This action violates the balance set in California's State Plan, which includes a civil penalty structure that promotes fair and consistent enforcement, encourages employers to adopt safety programs, and provides incentives for companies to quickly and voluntarily address violations. As a result, the California Court of Appeal found the OSH Act expressly preempted the district attorney's action, as the County sought to use the UCL as a means to impose "truly massive penalties" in addition to those approved under the State Plan.[2] Pet. App. at 67a. The California Supreme Court, however, reversed this

[2] The County also alleges violations of California's False Advertising Law (FAL), Cal. Bus. & Prof. Code § 17508, based on the same alleged violations of workplace safety laws. The FAL allegations are subject to the same preemption analysis as the County's UCL allegations.

ruling, concluding that "when a state has obtained approval of a state plan for the regulation of worker safety and health, state law preempts federal law." Pet. App. at 43a.

This Court should grant certiorari to consider whether state and local governments can circumvent the enforcement system and penalty structures provided in federally-approved State Plans by imposing penalties found in other state laws. The California Supreme Court's decision opens the door to duplicative regulation and over-enforcement in the 22 states or territories that have OSHA-approved State Plans covering both private and government workplaces. If the ruling stands, state and local officials across the country may follow Orange County's lead. The resulting actions would expose manufacturers to unpredictable pile-on liability and penalties that vastly exceed the levels set by federal workplace safety laws and approved State Plans.

ARGUMENT

I. The California Supreme Court's Ruling Exposes Manufacturers to Unpredictable, Duplicative, and Counterproductive Enforcement of Workplace Safety Standards in States with Federally-Approved Plans

Before enactment of the OSH Act in 1970, states and their subdivisions set standards for workplace safety. As a result, workplace safety regulation varied widely from incident to incident and community to community. *See* Rep. Lloyd Meeds, *A Legislative History of OSHA*, 9 Gonz. L. Rev. 327, 331 (1974). Congress enacted the OSH Act to "subject employers and employees to only one set of regulations." *Gade*

v. Nat'l Wastes Mgmt. Ass'n, 505 U.S. 88, 99 (1992) (plurality opinion). As this Court explained, the OSH Act ensures that workplace safety regulations and enforcement methods are uniform, deliberate, and predictable, which specifically includes "avoiding duplicative, and possibly counterproductive," local regulatory and enforcement regimes. *Id.*

To federally control workplace safety standards, Congress invoked its constitutional authority to expressly preempt all non-federal obligations on any occupational safety or health issue where OSHA has already promulgated a standard.[3] *See* 29 U.S.C. § 667(a). Section 18(a) of the OSH Act provides that states and their subdivisions, which include counties, may regulate or enforce an occupational safety or health issue only when there is no federal standard in effect. *See* 29 U.S.C. § 667(a).

The preemptive effect of the OSH Act is well-settled law. Federal courts have recognized that the "scope of preemption in each area in which a federal standard has been promulgated is complete. All state regulations relating to the 'issue' of a federal standard are preempted even if they do not conflict with the federal scheme." *Indus. Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1310 (9th Cir. 1997). In this regard, the OSH Act preempts the field of workplace safety and health standards, precluding state laws that attempt to separately regulate or enforce those standards. As this Court has explained, "[i]t is not enough to say that the ultimate goal of both federal and state law is the same. A state law also is pre-

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[3] *See* U.S. Const. art. VI, cl. 2 (the laws of the United States "shall be the supreme Law of the Land").

empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal." *Gade*, 505 U.S. at 103 (citations omitted).

The only exception under which a state law may be used to enforce workplace safety standards is when OSHA has pre-approved a specific state law's use for that purpose. *See* 29 U.S.C. § 667(b), (f); *Gade*, 505 U.S. at 101 (recognizing "[s]tates are not permitted to assume an enforcement role" without approval). The State Plan must specify both the workplace standards "and their enforcement," which is the issue here. 29 U.S.C. § 667(b).

The Court should grant certiorari to clarify whether *Gade* allows for supplemental enforcement of workplace safety standards through state laws that are not incorporated into a State Plan. The California Supreme Court found that "the federal OSH Act as a whole does not suggest that the preempted field encompasses all means of enforcement not specifically included in the state's approved plan." Pet. App. at 28a. Conversely, the California Court of Appeal had properly observed, "it necessarily follows that a state has no authority to enact and enforce laws governing workplace safety which fall outside of that approved plan." Pet. App. at 65a.

The California Supreme Court's decision, if allowed to stand, will have significant implications for manufacturers and other employers not only in the most populous state, but nationwide. California is one of twenty-two states with a federally-approved State Plan to enforce its workplace safety laws in both private and state and local government workplaces. *See* Occupational Safety & Health Admin., U.S. Dep't of Labor, Office of State Programs, *State*

Plans, https://www.osha.gov/dcsp/osp/index.html (last visited July 23, 2018). California's State Plan, like those of other states, details who may bring an enforcement action.[4] Counties are not identified in California's State Plan, and NAM has not seen any pre-approved written agreement giving counties or other local governments the authority to levy civil fines for workplace safety violations.

Further, California's State Plan does not incorporate the UCL, which was not in force when California adopted its State plan, or the UCL's predecessor statute, as sources of enforcement for workplace safety violations. Thus, when OSHA approved California's State Plan, neither the state nor the federal agency provided the County with authority to bring a UCL action as a means of enforcing compliance with workplace safety regulations. *See Kelly v. USS-Posco Indus.*, 101 Fed. App'x 182, 184 (9th Cir. 2003) (finding the UCL "is not part of California's approved occupational health and safety plan.").

This Court should find that federal law preempts state or local government actions that attempt to enforce workplace safety standards through state laws that are not expressly incorporated into an approved

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[4] The California Legislature designated the Department of Industrial Relations and Cal/OSHA as the bodies in charge of administering and enforcing the State Plan. *See* Cal. Lab. Code §§ 6302, 6307. California Labor Code § 144 further states that "[t]he authority of any agency, department, division, bureau or any other political subdivision other than the Division of Occupational Safety and Health to assist in the administration or enforcement of any occupational safety or health standard, order, or rule . . . shall be contained in a written agreement with the Department of Industrial Relations or an agency authorized by the department to enter into such agreement."

State Plan, such as the UCL. Otherwise, the California Supreme Court's ruling will send a signal to state and local officials across the country that they can pile-on enforcement actions and penalties, and disregard the process and constraints carefully developed in a State Plan.

II. The California Supreme Court Erred in Allowing State and Local Governments to Use New Enforcement Mechanisms "Related to" an Approved Standard Without Obtaining OSHA Approval

The Court should also grant certiorari to consider the California Supreme Court's holding that while "any new enforcement mechanism that is related to an existing approved standard should be submitted to the Secretary . . . it does not follow that the new method is preempted until approved." Pet. App. at 29a. States can readily propose changes to their State Plans and should be required to obtain approval before applying such mechanisms to manufacturers and other employers.

The reality is that California has not amended its State Plan to include the County or UCL in its enforcement regime, despite the opportunity to do so. OSHA regulations provide a uniform process for states to submit and OSHA to approve changes to a State Plan. *See* 29 C.F.R. § 1953.3(b). Changes that have no federal parallel—such as California's enforcement of workplace safety standards through its unfair competition statute—are considered "State-initiated changes" and must be submitted to OSHA for review and approval because they "could have an impact on the effectiveness of a State program." *Id.* § 1953.1(c); *see also id.* § 1953.4(d) (defining "State-

initiated changes" as "any change to the State plan which is undertaken at a State's option and is not necessitated by Federal requirements" including "legislative, regulatory, administrative, policy or procedural changes which impact on the effectiveness of the State program").

The importance of this process was evident when citizens petitioned to add the warning requirements of a California law, known as Proposition 65, to its State Plan. *See Cal. Lab. Fed'n v. Cal. Occupational Safety & Health Standards Bd.*, 221 Cal. App. 3d 1547, 1550 (1990). In that case, the claim was that Proposition 65 was a statute of general applicability because it required warning all individuals in the state, but a California appellate court said it "cannot accept the premise that Proposition 65 is not a state law governing occupational safety and health . . . simply because it also applies outside the workplace and exempts certain employers from its requirements." *Id.* at 1557. Therefore, the court found that Prop. 65 warning regulations must be adopted and incorporated into the state Cal/OSHA plan and submitted to the Secretary of Labor for approval. *See id.* at 1559 (citing 29 U.S.C. § 667). Through the Secretary's process of considering the State Plan amendments, citizens and employers submitted more than 200 comments on Proposition 65's potential impact on workplace safety. 62 Fed. Reg. 31,159, 31,162 (June 6, 1997). After reflecting on these comments, the Secretary approved a plan that *limited* the scope of private enforcement in the workplace under Proposition 65. *See id.*

The California Supreme Court summarily dismissed the importance of this process when it found

that Congress did not specify that amendments to the State Plan "must be submitted to the Secretary of Labor for approval *before they are implemented*." Pet. App. at 36a (emphasis in original).

Had California moved to incorporate the UCL into its workplace safety enforcement regime, Cal/OSHA would have had to follow a similar process by which affected employees and employers could comment. The statute, the case law, and the record of prior administrative amendments demonstrate that workplace safety regulations and enforcement methods benefit from public debate and comment. Contrary to the California Supreme Court's ruling, neither courts nor federal or state agencies can subvert this statutorily required process. *See Gade*, 505 U.S. at 103-04 ("If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the Secretary of Labor.").

The California Supreme Court properly recognized that a state that seeks to enforce the OSH Act must submit a state plan addressing both workplace safety standards and the enforcement mechanisms. *See* Pet. App. at 34a (citing 29 U.S.C. § 667(b)). The court went astray, however, in finding that a state (including local governments) could supplement the approved enforcement process by applying state laws that vary significantly from the State Plan in their scope and potential penalties. *See id.* at 34a-35a.

This Court should grant certiorari to firmly establish that before a state may use a law as part of its workplace safety enforcement regime, it must incorporate it into its State Plan. The approval process for amending State Plans assures that OSHA, state au-

thorities, manufacturers and other employers, workers, and other interested stakeholders can weigh the multitude of factors implicated by local claims that follow state action, such as the County's UCL claim here.

This process assures that the focus is on the effectiveness of the mechanism and penalty structure as a means of facilitating safe workplaces. After an incident, particularly when deaths are involved, the fine sought can be driven by political or public pressure to maximize a penalty. Such a penalty may implicate a multitude of concerns, all of which should be considered before such actions are permitted.[5]

III. Reversal is Needed to Preserve Balanced and Consistent Enforcement

Congress expressly preempted state law and required specific prior-OSHA approval of any State Plan to assure that OSHA works with states to carefully craft a regulatory regime that establishes uniform health and safety requirements in the workplace, as discussed above. *See Gade*, 505 U.S. at 99. To this end, California is among the states that have worked with OSHA to develop a detailed process for

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[5] *See, e.g.*, David Lieber, *Eighth Amendment – The Excessive Fine Clause*, 84 J. Crim. L. & Criminology 805 (1994); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300-01 (1989) (O'Connor, J., concurring) (stating courts should give "substantial deference" to the legislature in determining appropriate levels of civil fines); Courtney M. Malveaux, *OSHA Enforcement of the "As Effective As" Standard for State Plans: Serving Process or People?*, 46 U. Rich. L. Rev. 323, 337 (2011) (noting increased penalties for violations can lead to an increase in litigation and divert funds from workplace safety compliance programs).

filing complaints, evaluating workplace hazards, abating violations, and assessing penalties. *See* 29 C.F.R. § 1952.7; U.S. Dep't of Labor, Occupational Safety & Health Admin., Office of State Programs, *California State Plan*, https://www.osha.gov/dcsp/osp/stateprogs/california.html (last visited July 23, 2018). Other state laws, such as California's UCL, are not tailored to addressing workplace safety issues and their application in that context is unpredictable and potentially counterproductive.

A. State Plans Include Enforcement Processes that are Carefully Tuned to Advance Workplace Safety

Following the accident at the manufacturing facility in this case, Cal/OSHA investigated the matter as it is charged to do under California Labor Code §§ 6302 and 6307. The enforcement methods for such an incident are specified by California law and approved by OSHA as part of the State Plan. Cal. Lab. Code §§ 6317 to 6319; 29 C.F.R. § 1952.7. As a result of its investigation, Cal/OSHA cited the Petitioner with five "serious" violations and one "willful" violation. Pet. App. at 3a.

California's pre-approved State Plan establishes a well-developed framework for how Cal/OSHA is to assess civil penalties for such violations, including maximum per violation amounts and factors that may be considered to determine a penalty within the permissible range. As a baseline, the Labor Code currently sets a civil penalty of up to $12,471 for each violation that does not qualify as a "serious violation." Cal. Lab. Code § 6427; *see also id.* § 6432 (specifying conditions giving rise to a rebuttable presumption of a "serious violation"). Each serious viola-

tion is subject to a civil penalty of up to $25,000 for each violation. *Id*. § 6428. A willful or repeated violation opens the door to a civil penalty of up to $124,709 per violation. *Id*. § 6429.[6] Employers that fail to timely address a violation are subject to up to $15,000 per day in fines until the violation is abated. *Id*. § 6430(a).

The Labor Code further instructs regulators to consider specific factors when reaching the precise amount of a penalty, including the size of the employer, the gravity of the violation, the good faith of the employer, including timely abatement, and whether the employer has a history of violations. Cal. Lab. Code § 6319(c). When an employer has engaged in a "serious, willful, or repeated violation" that has caused a serious injury, exposure or death, or failed to correct a serious violation in the time permitted, California law requires the Division to impose the maximum penalty unless the violator is a small business. *See id.* § 6319(d). When that is not the case, the Labor Code defines and quantifies a multitude of factors that essentially create a matrix for arriving at a fine so that the penalty is appropriate and consistent for those circumstances. *See* Cal. Code Regs. tit. 8, § 335.

For instance, when determining the "gravity of the violation," the Division must consider the severity, extent, and likelihood of the injury. *Id*. § 335(a). The severity of the violation is ranked as "low," "me-

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[6] As discussed in Section III.B, California increased its maximum civil penalties in 2017 and subjected civil penalty levels to annual inflation adjustments beginning on January 1, 2018. The applicable penalty levels were lower at the time the violations in this case were alleged.

dium," or "high," based on extent of injury likely to result from the violation. *Id.* § 335(a)(1). Businesses are then classified by size based on established ranges of the number of employees. *Id.* § 335(b). An employer's good faith is ranked "good" (effective), "fair" (average), or "poor" (no effective safety program). *Id.* § 335(c). An employer's history of previous violations is similarly ranked good, fair, or poor. *Id.* § 335(d).

In the event of a serious violation, the Division begins the calculation with the base amount of $18,000. *Id.* § 336(c). That penalty is adjusted up or down based on other factors. For example, the penalty is adjusted up 25% when the injury is severe. *Id.* The result of this process is an "adjusted penalty" based on specific circumstances at issue, which the Division can multiply by two, four, or ten, if it is the business's first, second, or third repeated violation, respectively. *Id.* § 336(g). Further, the Division's published Policy and Procedure Manual provides guidance on when each instance of noncompliance is considered to be a separate violation. *See* Cal/OSHA, Policy and Procedure Manual, P&P C-10 (last revised Aug. 1, 1994), https://www.dir.ca.gov/DOSHPol/P&PC-10A.htm. Cal/OSHA's goal in assessing these fines is not merely punitive, but to provide an incentive for employers to prevent workplace safety and health hazards and to voluntarily address unsafe conditions. *See id.*

Thus, the administrative mechanism that swung into action after the manufacturing accident at issue in this case was legislatively enacted, implemented by Cal/OSHA, and federally approved. Penalties were carefully calculated to ensure fair and consistent enforcement, encourage the manufacturer to

adopt strong safety programs, and facilitate the quick remediation of the alleged violations.

B. When State and Local Officials Use Laws to Enforce Workplace Safety Standards that are Not Intended or Approved for that Purpose, Their Actions Undermine the Deliberative, Open, and Prescriptive Methods Incorporated Into State Plans

A local government's use of a law outside an approved State Plan to impose civil penalties for workplace safety violations can undermine the precise and careful balancing of state and federal regulators. Use of the UCL is a prime example. Penalties established by state law to apply to a broad range of conduct, such as anti-competitive practices and deceptive advertising, should not be used as a blunt instrument to pile on punishments for workplace safety violations.

As the California Court of Appeal appreciated, the penalty structure in the UCL is completely inconsistent with the State Plan. *See* Pet. App. at 67a-68a. The UCL authorizes government officials to seek a civil penalty of up to $2,500 per violation. *See* Cal. Bus. & Prof. Code § 17206(a). While this may appear to be less than the maximum penalty authorized by the Labor Code for both general and serious workplace safety violations, the multipliers are calculated differently, leading to millions of dollars of potential liability exposure. As the Court of Appeal explained, a fine of $2,500 per day per employee that the defendant was allegedly out of compliance could be multiplied to create "a potential penalty in excess of $1 million per employee, for each cause of action."

Pet. App. at 68a. This liability exposure would dwarf the civil fine structure approved in the State Plan.

In addition, the UCL provides considerably more discretion than is permitted in the Labor Code when evaluating the appropriate size of a civil penalty. *See* Cal. Bus. & Prof. Code § 17206(b). The factors for assessing the amount of a civil penalty under the UCL vary significantly from the Labor Code and are non-exclusive. *See id.* Therefore, each of California's 58 district attorneys, all of whom are empowered to bring civil penalty actions under the UCL, could take distinct approaches to pursuing penalties.[7] Finally, there may be an incentive for local officials to bring high-dollar UCL actions. When UCL actions are brought by California's Attorney General, half of the penalty collected is shared with the county or city in which the judgment is entered. *See id.* § 17206(c). When a UCL action is brought by a District Attorney or County Counsel, however, the full penalty collected is retained by the county. *See id.*

If state and local officials, not just in California, but around the country are permitted to use general consumer protection and other laws to punish workplace safety violations, then employers will be subject to duplicative and wildly unpredictable penalties. Shared authority to bring consumer protection actions is not unique to California. Other states, including those with State Plans, have consumer protection laws that authorize local officials, in addition to the state attorney general, to bring enforcement actions. *See, e.g.*, Md. Code Ann., Com. Law § 13-103

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[7] The UCL extends this authority to the Attorney General, county counsel, city attorneys, and prosecutors. *See* Cal. Bus. & Prof. Code § 17206(a).

(authorizing enforcement of the Maryland Consumer Protection Act by "each agency of the State within the scope of its authority" and permitting counties and municipalities to adopt and enforce more stringent provisions); Mich. Comp. Law Ann. § 445.915 (authorizing enforcement of the Michigan Consumer Protection Act by prosecuting attorneys in addition to the attorney general); Or. Rev. Stat. §§ 646.605(5), 646.632 (authorizing the district attorney of any county to bring Unfair Trade Practices Act claims). The path taken by the California Supreme Court exponentially increases the likelihood that state consumer protection and other laws will be misused as an alternative means to enforce workplace safety standards.

As is the case here, lawsuits by state and local officials may second guess the carefully balanced decisions of government agencies charged with overseeing the State Plan. Regardless of whether one disagrees with the action taken by the designated state agency or the amount of the fine imposed, the potential for such decentralized, wide-ranging penalties is precisely why Congress preempted state and local enforcement of workplace safety violations other than as approved in a State Plan.

These duplicative actions would come on the heels of a substantial hike in the amount of civil penalties manufacturers face for OSHA violations. In 2016, civil penalty levels for federal agencies, including OSHA, were adjusted to reflect 25 years of inflation. *See* Federal Civil Penalties Inflation Adjustment Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 599-600 (2015). As a result of this law, OSHA bumped the maximum penalty for serious vio-

lations from $7,000 to $12,471 and the penalty for willful or repeated violations from $70,000 to $124,709—an immediate increase of nearly eighty percent. *See* 81 Fed. Reg. 43,430, 43,439 (July 1, 2016). The Act indexed these amounts to inflation, resulting in penalty levels that automatically rise each year. *See* Pub. L. No. 114-74, § 701, 129 Stat. 599. As a result, the federal penalty levels stand today at $12,934 for serious violations and $129,336 for willful or repeated violations. *See* 83 Fed. Reg. 7, 17 (Jan. 2, 2018) (codified at 29 C.F.R. § 1903.15(d)).

States, including California, adjusted their civil penalty levels as a result of the federal change. *See* S.B. 96 § 31 (Cal. 2017) (amending Cal. Lab. Code § 6429(a)); *see also* Cal. Code Regs. tit. 8, § 336 (as amended Sept. 14, 2017) (providing for civil penalty of up to $12,726 for each regulatory violation and $127,254 for each willful violation). The ability of Congress and States to increase and adjust civil penalties for workplace safety violations further demonstrates that it is unnecessary and unsound to impose duplicative and different penalties outside this structure, and that the OSH Act preempts such actions.

We urge the Court to consider the significant public policy issues that arise for manufacturers and other employers when local officials use state laws that are not intended to address workplace safety and not included in approved State Plans to enforce OSHA regulations.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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