

**No. 21-30505**

In the United States Court of Appeals  
For the Fifth Circuit

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STATE OF LOUISIANA, ET AL.,  
*Plaintiffs- Appellees,*

v.

JOSEPH R. BIDEN, JR., ET AL.,  
*Defendants - Appellants.*

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Appeal from the United States District Court for the Western District of Louisiana  
No. 2:21-cv-778 (Hon. Terry A. Doughty)

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**BRIEF FOR AMICI CURIAE AMERICAN PETROLEUM  
INSTITUTE, NATIONAL OCEAN INDUSTRIES ASSOCIATION,  
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,  
INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS,  
INTERNATIONAL ASSOCIATION OF GEOPHYSICAL  
CONTRACTORS, AMERICAN EXPLORATION & PRODUCTION  
COUNCIL, PETROLEUM ALLIANCE OF OKLAHOMA, UTAH  
PETROLEUM ASSOCIATION, AND WESTERN STATES PETROLEUM  
ASSOCIATION IN SUPPORT OF APPELLEES**

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## **SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that, in addition to those persons listed in the parties’ principal briefs, the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 and in Fifth Circuit Local Rule 29.2 have an interest in this *amici* brief and in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

### *1. Amici Curiae*<sup>1</sup>

- a. American Petroleum Institute (“API”)
- b. National Ocean Industries Association (“NOIA”)
- c. Independent Petroleum Association of America (“IPAA”)
- d. International Association of Drilling Contractors (“IADC”)
- e. International Association of Geophysical Contractors (“IAGC”)
- f. American Exploration & Production Council (“AXPC”)
- g. Petroleum Alliance of Oklahoma (“Petroleum Alliance”)
- h. Utah Petroleum Association (“UPA”)
- i. Western States Petroleum Association (“WSPA”)

### *2. Counsel for Amici Curiae*

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<sup>1</sup> No *amicus* herein is a publicly held corporation, no *amicus* herein holds any parent companies, and no company has a ten percent or greater ownership interest in any *amicus* herein.

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TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* .....1

ARGUMENT .....5

I. The Government Fails to Rebut Appellees’ Likelihood of Success on the Merits. ....5

II. Continued Federal Leasing Is Critical to Safe and Responsible Domestic Energy Production. ....7

III. The Preliminary Injunction Avoids Interim Harms and Serves the Public Interest in Continued Leasing. ....11

CONCLUSION .....14

## TABLE OF AUTHORITIES

### Cases

<i>Breton Energy, L.L.C. v. Mariner Energy Res., Inc.</i> , 764 F.3d 394 (5th Cir. 2014) .....	10
<i>Louisiana v. Biden</i> , No. 2:21-CV-00778, 2021 WL 2446010 (W.D. La. June 15, 2021).....	13

### Statutes

30 U.S.C. § 1756 .....	10
30 U.S.C. § 187 .....	10
30 U.S.C. § 225 .....	10
43 U.S.C. § 1334 .....	10
43 U.S.C. § 1344(d)(3).....	12
43 U.S.C. §1344(f).....	12

### Regulations

30 C.F.R. § 556.304 .....	11
30 C.F.R. § 556.305 .....	11
30 C.F.R. § 556.308 .....	11
30 C.F.R. part 556, subpart B .....	12

### Other Authorities

86 Fed. Reg. 10,132 (Feb. 18, 2021) .....	13
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### **INTEREST OF *AMICI CURIAE***

API is a national trade association representing over 580 members from all aspects of America's oil and gas industry, including federal oil and gas lessees. Among API's mandates is representing the economic and legal interests of the oil and natural gas industry in legal proceedings. API's members bid on federal oil and gas leases during federal lease sales, for both onshore and offshore tracts. Other API members include service and supply firms that rely on servicing federal oil and gas leases.

NOIA is a national trade organization that represents and advances a dynamic and growing offshore energy industry, including federal oil and gas lessees. NOIA's members include offshore federal oil and gas lessees and bidders in offshore federal lease sales. NOIA and its members provide solutions that support communities and protect workers, the public, and the environment. For nearly 50 years, NOIA has been committed to ensuring a strong, viable U.S. offshore energy industry capable of meeting the energy needs of our nation in an efficient and environmentally responsible manner.

IPAA represents thousands of America's independent oil and natural gas producers. IPAA members are the primary producers of the nation's oil and natural gas and account for 83 percent of America's oil production and 90 percent of its natural gas output. Independent producers are a driving force in our economy and

support roughly 4.5 million jobs in the United States. IPAA member companies are innovative leaders and broke the code to usher in the shale oil and natural gas revolution in the United States.

IADC, established in 1940, operates on six continents, and its members are acknowledged leaders in onshore and offshore drilling operations around the world. IADC is globally recognized for its work in providing: accreditation programs for a competent global upstream energy workforce; technical publications serving industry and regulatory authorities; international conferences; and collaborative government-industry advocacy work. IADC's collective efforts contribute to operational proficiencies that underpin the world's upstream energy industry while sustaining high standards of safety, environmental stewardship, and operational efficiency.

IAGC is a private non-profit trade association that represents approximately 50 members from all segments of the geophysical and exploration industry. IAGC has existed for 50 years and is the only global trade organization solely dedicated to the geophysical and exploration industry. Through advocacy, outreach, and development of industry guidelines, IAGC focuses on issues that affect the core businesses of the geophysical and exploration industry, including issues involving the ability of its members to conduct exploratory activities on offshore and onshore federal lands.

AXPC is a national trade association representing 25 of the largest independent oil and natural gas exploration and production companies in the United States. AXPC companies are among leaders across the world in the cleanest and safest onshore production of oil and gas, while supporting millions of Americans in high-paying jobs and investing a wealth of resources in its communities. Dedicated to safety, science, and technological advancement, AXPC members strive to deliver affordable, reliable energy to consumers while positively impacting the economy and the communities in which they live and operate.

The Petroleum Alliance is the oil and natural gas trade association created by the merger of the Oklahoma Independent Petroleum Association and the Oklahoma Oil & Gas Association. The Petroleum Alliance is the only trade association in Oklahoma that represents all segments of the oil and gas industry in Oklahoma. Its 1,300 members include independent oil and natural gas producers, drilling contractors, midstream companies, service and supply companies, refineries, contractors, individuals, and mineral owners.

UPA is a Utah-based, statewide petroleum trade association representing companies involved in all aspects of Utah's oil and gas industry. UPA exists to serve its member companies and advance the responsible development of Utah's natural resources and manufacture of fuels that drive Utah's economy. Its members range from independent producers to major oil and natural gas companies widely



recognized as industry leaders responsible for driving technology advancement resulting in environmental and efficiency gains.

WSPA is a non-profit trade association representing the companies that account for petroleum exploration, production, refining, transportation, and marketing in Arizona, California, Nevada, Oregon, and Washington. WSPA is dedicated to ensuring Americans continue to have safe and reliable access to petroleum products through policies that are socially, economically, and environmentally responsible.

*Amici* and other industry plaintiffs have brought a related case, *American Petroleum Institute et al. v. U.S. Dept. of the Interior et al*, No. 2:21-CV-2506 (W.D. La. 2021), challenging the same federal oil and gas leasing moratorium in the same district court as the instant action by Appellees. A motion to consolidate that case with Appellees' case is pending before the district court. *See American Petroleum Institute, et al. v. U.S. Dep't of the Interior, et al*, No. 2:21-CV-2506, ECF No. 23 (W.D. La. Sept. 29, 2021). Disposition of this appeal may affect shared legal and factual issues presented in the two cases.

*Amici* file this brief on behalf of their many members adversely affected by Appellants' illegal actions in implementing a moratorium on all new federal oil and natural gas leasing onshore and on the Outer Continental Shelf ("OCS"). *Amici's* members include many bidders that have participated in recent federal oil and gas

lease sales and intend to do so in the future. As Appellees’ brief correctly observes, the federal leasing moratorium “alters the legal rights of private parties seeking to bid on leases.” Appellees’ Brief at 25; *see also id.* at 30 (the moratorium “alters the obligations of federal officials to hold such lease sales—and thereby the rights of bidders to engage in them”). *Amici* support and incorporate by reference Appellees’ merits arguments. *Amici* submit this brief principally to amplify for the Court’s attention the importance of maintaining the federal leasing systems created by Congress and, accordingly, of affirming the district court’s preliminary injunction order.

No counsel for any party in this case authored this brief in whole or in part. No party, party’s counsel, or any person other than *amici* and their members has contributed money to the preparation or submission of this brief. All parties in this case consent to the filing of this *amici* brief.

## **ARGUMENT**

### **I. THE GOVERNMENT FAILS TO REBUT APPELLEES’ LIKELIHOOD OF SUCCESS ON THE MERITS.**

The district court rightly preliminarily enjoined implementation of the federal government’s unprecedented, blanket, and indefinite moratorium (or “pause”) on federal onshore and offshore oil and gas lease sales. To avoid duplication, *amici* endorse and incorporate by reference the arguments presented in Appellees’ brief on appeal. In sum, as the district court found, no statute, regulation, or other authority,

including President Biden’s Executive Order 14008, enabled the U.S. Department of the Interior (“DOI”) to systematically and indefinitely cancel every scheduled federal lease sale. Moreover, the administrative record fails to support cancellations on either a wholesale or an individual basis. Since January 2021, instead of holding the dozens of federal oil and gas lease sales that normally would have been held in that time span, DOI has held only one federal lease sale, offshore Lease Sale 257 in November 2021. But for the preliminary injunction order on appeal, DOI would not even have held that belated lease sale, and would be not be taking steps toward further lease sales in 2022 and beyond. Moreover, the preliminary injunction order continues to be needed as DOI has not publicly demonstrated that it is taking sufficient action to hold OCS Lease Sales 259 and 261 in 2022.

In particular, *amici* concur with Appellees that the government’s appeal fails to address the blanket pause on leasing plainly evident in the record, and should be rejected on that basis alone. DOI’s inactions over the past year with respect to federal lease sales required by Congress show the so-called “pause” is indeed a moratorium. Rather than grapple with reality, the government perpetuates the fiction that its failure to hold a single federal oil and gas lease sale absent the preliminary injunction somehow comprised a coincidental series of unrelated decisions on individual lease sales. But as Appellees argued and the district court correctly determined, the government has, in fact, implemented a wholesale pause on federal oil and gas lease

sales, which is a final action reviewable under the Administrative Procedure Act, apart from any final action on an individual lease sale. ROA.2126. *Amici* further agree that a preliminary injunction is appropriate because, in adopting a wholesale pause, the government has abrogated applicable federal law compelling regular lease sales, public engagement in decisions involving federal oil and gas leasing, and reasoned explanations for reversals in agency positions.

## **II. CONTINUED FEDERAL LEASING IS CRITICAL TO SAFE AND RESPONSIBLE DOMESTIC ENERGY PRODUCTION.**

*Amici* focus herein on the harms presented by the federal leasing moratorium and the corresponding importance of affirming the district court's preliminary injunction, which enables continued federal leasing. As representatives of members that are federal oil and gas lessees or that service or otherwise support federal oil and gas lessees, *amici* can provide a unique perspective on these issues in addition to Appellees' cogent arguments from the view of affected States.

The government's federal leasing moratorium deprives *amici*'s members of the opportunity to obtain new federal oil and gas leases. Though no company is entitled to a lease of any desired tract, wholesale denial of the opportunity to bid is contrary to law and economically and environmentally untenable. These adverse effects are also shared by Appellee States and the United States taxpayer who would not receive sizeable bonus bid revenues at the leasing stage, and rentals each year

thereafter, none of which are refundable if those leases do not ultimately produce oil and gas.

Beyond individually cancelled sales, the moratorium upends the United States' stable leasing regime and the legal certainty upon which industry relies to justify the huge investments necessary to produce domestic energy. *Amici* have repeatedly made these points to DOI, including during its "review" of federal oil and gas leasing pursuant to Section 208 of Executive Order 14008. *See, e.g.*, API written comments at 6-7 ("In the more than 100 years since Congress enacted the Mineral Leasing Act (MLA), and the nearly 70 years since the Outer Continental Shelf Lands Act (OCSLA) was adopted, API's members have confidently invested hundreds of billions of dollars to develop oil and gas resources on federally managed lands in reliance on a legally sound and stable leasing and lease management regime governed by those statutes. These companies have expended these considerable energy, time, and financial resources at substantial economic risk posed by high capital costs and leases' uncertain production potential." ).<sup>2</sup>

This legal stability is essential because federal resource exploration is a long-term endeavor that entails leasing based on incomplete information. *Amici's* members have invested billions of dollars in acquiring and exploring federal oil and

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<sup>2</sup> <https://www.api.org/-/media/Files/News/Letters-Comments/2020/API-Comments-for-DOI-Comprehensive-Review-of-Federal-Oil-and-Gas-Program.pdf>.

gas leases in reliance that adjacent tracts needed to complete the development of an oil and gas prospect would be available for lease in scheduled and statutorily mandated lease sales. As API has informed DOI, “[i]t takes several years of due diligence, and a sizable investment, for a company to analyze the underlying geology, perform the necessary technology and engineering assessments, finalize commercial arrangements, and coordinate the logistics of exploration and development projects before a company can determine if a lease contains commercial quantities of oil and natural gas.” *Id.* at 10. Moreover, “[n]ot every lease contains resources in commercial quantities, nor does every non-producing lease represent a potential discovery.” *Id.* That is, *amici*’s members often need to explore or appraise multiple additional lease tracts in an area for production activities to be efficient. Especially on the deepwater OCS, a reliable leasing process, resulting in consistent access to new leases as new information is obtained, is critical to engage in exploration and development activities within deadlines specified before leases expire. If *amici*’s members cannot obtain access to the additional leases necessary to complete development plans, their substantial investments are significantly diminished or may be entirely lost.

The federal leasing moratorium also conflicts with environmental protection and waste prevention. As DOI itself has concluded, failure to hold oil and gas lease sales results in greater dependence on foreign sources produced with far less

protective environmental requirements. *Amici* and their members are committed to environmental protection and are stewards of the lands and waters on which they lease and operate. Moreover, DOI's governing statutes not only call for expeditious development of domestic energy, but also prohibit undue waste. *See* 30 U.S.C. §§ 187, 225, 1756; 43 U.S.C. § 1334. A prohibition on new leasing equates to a mandate to leave resources in the ground, or to only partially develop resources covered by both leased and unleased lands, which thereby creates rather than prevents waste. *See Breton Energy, L.L.C. v. Mariner Energy Res., Inc.*, 764 F.3d 394, 404 n.25 (5th Cir. 2014) (imprudent action that renders subsurface hydrocarbons unrecoverable is underground waste); United States' Cross Motion for Summary Judgment and Response to Plaintiffs' Motions for Summary Judgment at 14, *California v. Bernhardt*, No. 4:18-cv-05712-YGR, ECF No. 123, at 14 (N.D. Cal. Aug. 12, 2019) ("[W]aste [encompasses] not only the waste of produced oil and gas that an operator fails to capture, but also the waste of oil and gas that remained in the ground and was not produced and used for the public good.") (citing legislative history of DOI's obligation to prevent waste of oil and gas under the Mineral Leasing Act).

The district court's preliminary injunction order thus preserves the stable legal system and statutory purposes mandating federal oil and gas leasing, and protects key investments in reliance on that system. This Court should affirm.

### **III. THE PRELIMINARY INJUNCTION AVOIDS INTERIM HARMS AND SERVES THE PUBLIC INTEREST IN CONTINUED LEASING.**

The federal leasing moratorium and the administrative record demonstrate that affirmance of the district court's preliminary injunction is crucial to continued federal leasing and realization of the consequent benefits therefrom. The government has given no indication that, absent the preliminary injunction, it would resume federal lease sales. Even with the preliminary injunction in place for nearly seven months, the government has not issued a single federal oil and gas lease as of the date of filing of this brief. Other than holding one OCS lease sale in 2021, the government to date has only issued draft environmental documents and made no commitments to holding further lease sales or issuing any leases onshore or offshore in 2022. That includes the remaining two OCS sales (Lease Sales 259 and 261) specified under the current Five-Year Leasing Program for 2021 and 2022. Among other things, DOI must issue a Proposed Notice of Sale as well as a Final Notice of Sale before those OCS sales can be held. 30 C.F.R. §§ 556.304, .305, and .308. DOI has not done so.

Also telling of DOI's lack of intent to conduct further lease sales is the government's failure to take the necessary steps to prepare and maintain a new Five-Year Leasing Program for OCS oil and gas leasing. The current 2017-2022 Five-Year Leasing Program is scheduled to expire this year. Without a Program timely in place, no lease sales can occur on the OCS after the current Program expires. *See* 43



U.S.C. § 1344(d)(3). Yet, the government has provided no documents, update, or other showing that it has engaged in the multi-year statutory or regulatory steps required to prepare and approve a new Program. *See* 43 U.S.C. §1344(f); 30 C.F.R. part 556, subpart B. DOI's response to a Congressional inquiry regarding the next Five-Year Leasing Program was devoid of any information. *See* Exhibit 1 (June 23, 2021, letter from Sen. Cassidy to DOI); Exhibit 2 (Oct. 4, 2021, letter from DOI to Sen. Cassidy). Affirming the preliminary injunction and requiring DOI to proceed with scheduled lease sales is important to ensure the government does not run out the clock on the current Five-Year Leasing Program, and fail to adopt a new Program, to accomplish the same result as its illegal leasing moratorium.

The recent OCS Lease Sale 257 held pursuant to the district court's preliminary injunction illustrates the high level of interest in continued federal oil and gas leasing and the practical importance of the preliminary injunction in ensuring such lease sales occur. DOI had cancelled Lease Sale 257 expressly pursuant to Executive Order 14008.<sup>3</sup> After the district court's preliminary injunction order, DOI then reinstated that sale with a new proposed sale notice, final sale notice, and Record of Decision.<sup>4</sup> That lease sale proved immensely successful. A total of 33

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<sup>3</sup> 86 Fed. Reg. 10,132 (Feb. 18, 2021),

<https://www.boem.gov/sites/default/files/documents/about-boem/86-FR-10132.pdf>

<sup>4</sup> *See Louisiana v. Biden*, No. 2:21-CV-00778, 2021 WL 2446010, at \*15, 22 (W.D. La. June 15, 2021) (*Louisiana* R. Doc. 139); Bureau of Ocean Energy Management ("BOEM") Website, <https://www.boem.gov/Sale-257>; *id*,

companies filed 317 bids on 308 different tracts as part of the lease sale.<sup>5</sup> Companies submitted over \$191 million in high bids on lease tracts as part of the sale. As of the date of filing of this brief, DOI has not awarded any leases covered by those bids. Until such time as the leases are awarded, the balance of the bonus bids will not be payable. As Appellees describe, coastal States are entitled to a substantial percentage of those bonus bids, and local economies also benefit from increased activity supporting those leases.

Going forward, the preliminary injunction similarly will protect against severe consequences of perpetuating the leasing moratorium. The U.S. oil and gas industry as a whole directly and indirectly supports more than 11 million U.S. jobs and makes up nearly 8 percent of the U.S. economy.<sup>6</sup> In Fiscal Year 2020 alone, the industry paid nearly \$500 million in bonus bids and lease rentals, and more than \$7.5 billion

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<https://www.boem.gov/oil-gas-energy/leasing/sale-257-stipulations> (pre-sale map encompassing lease blocks in the Central and Western Gulf of Mexico); BOEM Press Release, <https://www.boem.gov/newsroom/press-releases/gulf-mexico-lease-sale-results-announced>.

<sup>5</sup> See BOEM Website, Sale Day Statistics – Sale 257, <https://www.boem.gov/sites/default/files/documents/oil-gas-energy/leasing/sale-257-stats.pdf>.

<sup>6</sup> PricewaterhouseCoopers LLP, “Impacts of the Oil and Natural Gas Industry on the US Economy in 2019” at E-1 (July 2021 report prepared for API), <https://www.api.org/-/media/Files/Policy/American-Energy/PwC/API-PWC-Economic-Impact-Report.pdf?la=en&hash=A7ABE1A05C4F9DEBBD2D2B6D0FFAF5F4B40A3EF4>.

in total revenues.<sup>7</sup> Per publicly available estimates prepared for API, a federal leasing ban would result in the elimination of 157,000 jobs if continued through 2025, including in many of Appellee States.<sup>8</sup> Similarly, API estimates that a moratorium extended over eight years would reduce the cumulative Gross Domestic Product of the United States by \$400 billion in 2018 dollars.<sup>9</sup>

In fact, the preliminary injunction has already protected against some of these consequences. As noted above, Lease Sale 257 yielded over \$191 million in just the bonuses from high bids. Upon BOEM's acceptance of those high bids, these revenues will be distributed to the U.S. Treasury, the Land and Water Conservation Fund, and States, counties, and parish governments located along the U.S. Gulf Coast—all of which depend upon those revenues, as well as the revenues from the future production from those leases. As Appellees have shown, the preliminary injunction protects against such unnecessary harms and serves the public interest.

## CONCLUSION

For all the reasons discussed herein and in Appellees' Brief, *amici* respectfully request that the Court affirm the district court's preliminary injunction.

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<sup>7</sup> See ONRR, Royalty Revenue Data, <https://revenuedata.doi.gov/query-data/>.

<sup>8</sup> OnLocation, Inc., "The Consequences of a New Leasing Ban on Federal Lands and Waters" at 7, 8 (April 2021 report prepared for API), <https://www.api.org/-/media/Files/Policy/Exploration/2021/OnLocation-updated-federal-leasing-and-development-ban-study.pdf>.

<sup>9</sup> *Id.* at 7.

Respectfully submitted,

Dated: January 13, 2022

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### **CERTIFICATE OF SERVICE**

I hereby certify that on January 13, 2022, I electronically filed the foregoing brief with the Clerk of Court by using the CM/ECF system, which will send notice of electronic filing to the parties' attorneys of record.

Dated: January 13, 2022

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### CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. Rule 29(a)(4), that the foregoing brief *amici curiae* brief complies with the type-volume limitations of Fed. R. App. P. Rules 29(a)(5) and 32(a)(7)(B) and Fifth Circuit Rule 29.3 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,207 words, as computed by Microsoft Word. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: January 13, 2022

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### **CERTIFICATE OF ELECTRONIC COMPLIANCE**

I hereby certify that, in the foregoing brief using the Fifth Circuit CM/ECF document filing system, (1) the privacy redactions required by the Fifth Circuit Rule 25.2.13 are not necessary in this filing, (2) the electronic submission and the paper document filed will be exact copies, and (3) the document has been scanned for viruses with the most recent version of use Symantec Endpoint Protection and is free of viruses.

Dated: January 13, 2022

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