

IN THE SUPREME COURT OF PENNSYLVANIA

No. 29 MAP 2020

FIREARMS OWNERS AGAINST CRIME; KIM STOLFER; JOSHUA FIRST;
AND HOWARD BULLOCK,

Appellees,

v.

CITY OF HARRISBURG, MAYER ERIC PAPENFUSE AND POLICE CHIEF
THOMAS CARTER,

Appellants.

**BRIEF OF *AMICI CURIAE* ACLU OF PENNSYLVANIA AND
COMMUNITY LEGAL SERVICES, INC., IN SUPPORT OF APPELLEES**

On Appeal from the Order of the Commonwealth Court entered September 12,
2019, at No. 1434 C.C. 2018, reversing the judgment of the Court of Common
Pleas of Dauphin County, entered on October 9, 2018 at No. 2015-CV-354.

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

The **American Civil Liberties Union** is a nonprofit, nonpartisan organization dedicated to preserving and defending principles of individual liberty and equality embodied in the United States Constitution and civil rights and personal privacy laws. The **ACLU of Pennsylvania**, one of the ACLU's state affiliates, appears as *amicus curiae* with regularity in cases that raise issues of individual liberty and equality for those who reside in Pennsylvania. The standing question raised here is such an issue.

Community Legal Services, Inc. is a non-profit law firm providing free civil legal services to the low-income population of Philadelphia. CLS represents its clients on legal issues related to employment, housing, public benefits, utilities, child welfare, and other basic human needs. CLS often appears before this and other state and federal courts both as counsel of record and as *amicus* for the interests of its clients.

CLS maximizes its results for its clients by both representing clients individually and engaging in impact advocacy meant to protect the interests of low-income Philadelphians more broadly. Litigation in Pennsylvania's state courts is a

¹ *Amici* certify that no person or entity other than *amici curiae*, their members, or counsel has: (i) paid in whole or in part for the preparation of this *amici curiae* brief; or (ii) authored in whole or in part this *amici curiae* brief.

critical tool of its impact advocacy. CLS regularly challenges state and local laws and practices under the Pennsylvania Constitution and state statutes.

To be clear, *Amici*, and their counsel, take no position on the merit of the ordinances involved in this proceeding or the substance of the challenges made to those ordinances. Their appearance as *Amici Curiae* is limited to an analysis of the standing principles before this Court.

Standing doctrine matters to *Amici* and to the people of the Commonwealth. When the doors of the courthouse are closed, *Amici* cannot vindicate the rights of their clients, nor advance their organizational missions to promote liberty and equality. *Amici's* experience in representing individuals and organizations who are impacted by government actions that curtail or diminish rights substantiates the critical importance of Pennsylvania's prudential standing principles. *Amici's* ability to help protect those rights depends on such principles and they urge this Court to preserve them.

PRELIMINARY STATEMENT

Over the last half century, this Court has refined the core working principles underlying Pennsylvania's prudential standing doctrine—principles that have served this Commonwealth well as they have been adapted and applied in specific controversies. These core principles are context-specific and flexible, and properly

facilitate access to justice when government actions impact rights held by individuals or organizations.

Appellants and their *amici* would have this Court revise these principles in a highly restrictive manner that echoes Article III of the U.S. Constitution, as though the limiting requirements in Article III reflect prudential standing principles. That is a demonstrably false analogy and, if embraced, it would close the courthouse doors to individuals and organizations seeking to vindicate their rights that have been abrogated or circumscribed by state or local action. That effort is misdirected in this forum.

Federal courts are courts of limited jurisdiction and federal standing principles based on Article III reflect this. In marked contrast, Pennsylvania courts are vested by Article V of the Pennsylvania Constitution with the entire and plenary judicial power of the Commonwealth. Those powers give our courts the authority and duty to resolve *bona fide* controversies impacting the rights of the people of Pennsylvania. This Court's prudential standing precedents accordingly allow such *bona fide* controversies to be adjudicated whether or not they constitute "cases or controversies" as defined by federal doctrine.

Given this, *Amici* dispute the proposition advanced by the Appellants and their *amici* that the Commonwealth Court's decision should be reversed because of a danger of judicial overreach or the threat of municipal bankruptcy. As other public

entities and officials have done before, Appellants maintain that their restrictive view must take hold or the sky will fall. They highlight their overall legal spending and forecast an uncontrolled increase if affected parties are allowed to bring suits over the constitutionality of local actions. But if past is prologue, the existing prudential standing framework makes this threat an unlikely one.

Moreover, the constitutional rights of Pennsylvanians are important, and defending local initiatives against constitutional challenge is a part of the basic duty of government. If the initiatives are legally sound, they should be sustained. But if state or local actions are constitutionally dubious, the role of the Pennsylvania courts has not been, and should not be, to protect the public fisc by closing the courthouse doors. In that instance, the state or municipality that took the challenged action should be called to account just as Pennsylvania's prudential standing doctrine provides.

Put simply, after years of application, this Court's flexible prudential standing principles have not caused the parade of horrors that Appellants and their *amici* imagine. There is no credible reason to think that this will change if the time-tested principles of standing this Court has established are upheld.

I. PENNSYLVANIA’S PRUDENTIAL STANDING PRINCIPLES ARE BROADER AND MORE FLEXIBLE THAN ARTICLE III AND THEY SHOULD BE.

This Court’s prudential standing jurisprudence has established several core working principles that provide an effective framework for resolving standing issues. These principles provide for a broader and more flexible approach to standing than the one limiting federal courts’ jurisdiction under Article III of the U.S. Constitution. This Court’s less restrictive conception of prudential standing is critical to ensuring that the people of this Commonwealth are able to redress *bona fide* grievances associated with legislative enactments that allegedly infringe constitutional or other rights. Here, the Commonwealth Court resisted the call for it to walk back from these established principles in determining whether the proper plaintiffs were before it. The result that followed is exactly what this Court’s precedents require.

A. Prudential standing principles applied in Pennsylvania are not encumbered by the limitations inherent in Article III of the United States Constitution.

It is well settled that Pennsylvania's law of standing is not borrowed from the constraints of the federal “case or controversy” requirement rooted in Article III of the US Constitution. As the Court has observed,

In contrast to the federal approach, notions of case or controversy and justiciability have no constitutional predicate, do not involve a court's

jurisdiction, and are regarded instead as prudential concerns implicating courts' self-imposed limitations[.]

William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 437 (Pa. 2017) (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013)). Indeed, this Court has taken steps to put distance between its prudential standing jurisprudence and the more restrictive confines of Article III. See *In re Hickson*, 821 A.2d 1238, 1243 n.5 (Pa. 2003) (“State courts . . . are not governed by Article III and are thus not bound to adhere to the federal definition of standing. [And], the Pennsylvania Constitution has no counterpart to Article III's ‘case or controversy’ requirement.”); *Johnson v. Am. Std.*, 8 A.3d 318, 329, n.9 (2010) (“Unlike the federal courts, which derive their standing requirements from Article III of the United States Constitution, standing for Pennsylvania litigants has been created judicially.”); *Commonwealth v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014) (“In Pennsylvania, the doctrine of standing at issue in this matter is a prudential, judicially created principle”).

Notwithstanding the suggestions advanced by Appellants and their *amici*, Pennsylvania’s prudential standing principles do not incorporate federal standing principles as reflected in Article III. That is by design. It is widely understood that “the essential underpinnings of federal justiciability doctrine do not translate well to state courts. The nature of the broad ‘judicial power’ conferred in state constitutions is different from the limited authority that the framers of our Federal Constitution

spelled out in Article III.” Hon. Jack Landau, *FOREWORD: State Constitutionalism and the Limits of Judicial Power*, 69 Rutgers L. Rev. 1309 (2017) (recognizing also that the “federal justiciability doctrine itself is based on historical footing that is something less than sound and—as is widely recognized—makes little doctrinal sense on its own terms”); see William J. Brennan, *State Constitutions & the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 490-92 (1977) (noting that “state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts”); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1940 (2001) (“[S]tate courts . . . should not conform their rules of access to those that have developed under Article III. Instead, state systems should take an independent and pragmatic approach to judicial authority in order to facilitate and support their integral and vibrant role in state governance.”). See generally *William Penn Sch. Dist.*, 170 A.3d at 465-66 (Dougherty, J. concurring) (recognizing the importance of judicial consideration of issues of constitutional and statewide import).

The prudential standing principles reflected in this Court’s cases fulfill the purpose behind courts of general jurisdiction—namely, that the people of this Commonwealth can have their *bona fide* disputes heard. Cf. Pa. Const. art. I, § 11 (“All courts shall be open; and every man for an injury done him in his lands, goods,

person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”). Pennsylvania’s prudential standing principles, therefore, are intended to provide—and do provide—access to the justice system to litigate the validity of government actions. That is sound public policy in principle and, as discussed below, in practice.

B. This Court’s established working principles provide the appropriate framework for courts in undertaking a prudential standing analysis.

For two generations, this Court has recognized that the “core concept” underlying standing “is that a person who is *not adversely affected in any way* by the matter he seeks to challenge is not ‘aggrieved’ thereby and has no standing to obtain a judicial resolution of his challenge.” *Wm. Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975) (emphasis added). By parity of reasoning, however, this Court has said that a party may establish standing by showing that they *are affected*—that is, that the party has a “substantial, direct and immediate interest in the outcome of the litigation.” *In re Hickson*, 821 A.2d at 1243.

This Court’s prudential standing doctrine calls for a “substantial” interest. But in contrast to Appellants’ claims, an interest can be “substantial” without involving either significant economic hardship or professional disaster. It “simply means that the individual’s interest must have substance—there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having

others comply with the law.” *Wm. Penn Parking Garage*, 346 A.2d at 282. Thus, a “substantial interest” is present “if there is a causal connection between the asserted violation and the harm complained of,” and that interest “is immediate if that causal connection is not remote or speculative.” *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2003) (internal quotation marks omitted).

This Court’s standing decisions have articulated a set of core working principles directed to determining whether a particular plaintiff has the needed “substantial, direct and immediate interest in the outcome of the litigation.” *In re Hickson*, 821 A.2d at 1243. These core principles, taken together, avoid putting prospective plaintiffs to the choice between relinquishing their rights and risking punishment for failing to obey a challenged enactment, while at the same time preserving principles of ripeness and other justiciability doctrines.

Pre-enforcement review. The first of these core principles is the concept of pre-enforcement review—a principle driven by the need to avoid visiting an unfair Hobson’s choice on the plaintiff-litigants.

Pennsylvania’s standing doctrine does not require plaintiffs to violate regulations and open themselves to sanctions for engaging in protected conduct as the price of admission to the courthouse. And for good reason: the rights of Pennsylvanians are guaranteed to the average person as well as the courageous individual who is willing to risk jail to assert her rights.

Thus, in *Robinson Township*, 83 A.3d at 924-25, this Court faced a contingent claim by a doctor who challenged a statute that would have barred him from seeking information to treat his patients. This Court dismissed the objections to the doctor's standing, finding his interest in litigating the validity of the statute was "neither remote nor speculative." In making that finding, this Court explained the doctor's difficult position:

Dr. Khan describes the untenable and objectionable position in which Act 13 places him: choosing between violating a Section 3222.1(b) confidentiality agreement and violating his legal and ethical obligations to treat a patient by accepted standards, or not taking a case and refusing a patient medical care

Id. at 924.²

² The Court went on to identify other cases in which pre-enforcement review had been recognized:

Our existing jurisprudence permits pre-enforcement review of statutory provisions in cases in which petitioners must choose between equally unappealing options and where the third option, here refusing to provide medical services to a patient, is equally undesirable. *See, e.g., Cozen O'Connor v. City of Phila. Bd. of Ethics*, 608 Pa. 570, 13 A.3d 464 (Pa. 2011) (law firm has standing to test validity of Ethics Act provision in advance of undertaking potentially prohibited action where alternative is testing law by defying it and potentially damaging firm's ethical standing and reputation; third option of maintaining client debt on books for decades equally unappealing); *Shaulis v. Pa. State Ethics Comm'n*, 574 Pa. 680, 833 A.2d 123 (Pa. 2003) (attorney has standing to challenge statutory limitation on her practice of law in certain venues without taking prohibited action that would expose her to ethical investigation she was attempting to forestall; third option of foregoing practice in area of expertise equally unappealing); *see also Arsenal Coal Co. v. Commonwealth*, 505 Pa. 198, 477 A.2d 1333 (Pa. 1984)

Similarly, in *Yocum v. Commonwealth*, 161 A.3d 228 (Pa. 2017), the petitioner sought pre-enforcement declaratory and injunctive relief of an aspect of the Pennsylvania Race Horse Development and Gaming Act that restricted certain employees of the Gaming Control Board from soliciting or accepting employment with a gaming facility for two years after their tenure on the board. *Id.* at 231. Addressing the predicament the plaintiff faced, the Court recognized that “if she took the actions proscribed by [the Act] and tried to obtain new employment in Pennsylvania's gaming industry, she would be in violation of the Act, exposing herself—and her potential employer—to adverse consequences, including damage to her reputation, and potentially instigating the loss of her new employer's gaming license.” *Id.* at 237.

By removing these untenable choices and minimizing the risk to plaintiffs (of either the loss of rights or of an enforcement action), this Court has ensured that potential litigants have a clear path to the courthouse and are able to seek review of challenged enactments that plainly impact their rights or interests.

(pre-enforcement review of regulations is appropriate where lengthy process of addressing regulations' validity in enforcement action would result in ongoing uncertainty in industry and potential operational impediments and penalties).
Robinson Twp., 83 A.3d at 924.

Ripeness. Pennsylvania’s courts also are sensitive to the possibility that particular controversies may require factual specificity to achieve an effective resolution. To that end, a second working principle, ripeness, is often considered in connection with the standing inquiry. This principle ensures that the right plaintiff is bringing the right claim at the right time. In *Robinson Township*, this Court observed that “[s]tanding and ripeness are distinct concepts insofar as ripeness also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute.” 83 A.3d at 917. Thus, ripeness looks at the availability of facts to prosecute the litigation, rather than simply a plaintiff’s position vis-à-vis the litigation in the form of the right protected and the relief sought.

Zone of Interests. As a final working principle, this Court has recognized that “standing will be found more readily where protection of the type of interest asserted is among the policies underlying the legal rule relied upon by the person claiming to be aggrieved.” *Wm. Penn Parking Garage*, 346 A.2d at 284 (internal quotation marks omitted). To that end, this Court has recognized that “[s]hould, however, a party’s immediate interest not be apparent, a zone of interests analysis may (and should) be employed to assist a court in determining whether a party has been sufficiently aggrieved, and therefore has standing.” *Johnson*, 8 A.3d at 333. Thus, if a prospective plaintiff claims entitlement to protection under a particular statute or constitutional provision, and the plaintiff is within the “zone of interests” intended

to be protected by that statute or provision, doubts should be resolved in favor of standing, and the courts should proceed to the merits.

Taken together, these well-defined principles provide a workable and appropriate framework for lower courts addressing standing issues. On the one hand, they serve as an important check on improper suits brought by improper plaintiffs. On the other, they allow suits by the right plaintiffs to go forward. A court looks first at the choices a plaintiff faces when confronting the application of a statute and the concreteness of the interests affected. Then, the court turns to the state of the factual record underlying the controversy. And finally, the court examines the interests protected by the legal provisions upon which the plaintiffs rely. If these inquiries reveal a *bona fide* plaintiff with a *bona fide* controversy, then that controversy should be adjudicated—just as the Commonwealth Court found here.

II. PENNSYLVANIA’S PRUDENTIAL STANDING PRINCIPLES WERE PROPERLY APPLIED BY THE COMMONWEALTH COURT IN THIS CASE.

The plaintiffs in this proceeding are individuals who lawfully possess firearms and entities that represent them. They seek declaratory and injunctive relief in an effort to protect what they view as an infringement of their constitutional rights—a situation this Court has recognized confers standing on a prospective plaintiff. *See, e.g., Robinson Twp.*, 83 A.3d at 921-25 (finding that individuals and organizations

had standing to vindicate constitutional rights by way of declaratory and injunctive relief). Given these facts, the Commonwealth Court’s unanimous determination that those claims should be adjudicated falls squarely within the proper application of this Court’s prudential standing framework.

Here, pre-enforcement review is necessary to avoid putting plaintiffs to the choice between foregoing what they believe to be their constitutional right and suffering enforcement under the challenged ordinances. As the Commonwealth Court put it, “[t]he current, actual, and threatened enforcement of the challenged ordinances has a chilling effect on the Individual Plaintiffs’ rights to engage in constitutionally protected activities with respect to firearms.” Op. at 11.³

In considering the standing issue, moreover, the Commonwealth Court assiduously adhered to the path laid out by this Court in *Robinson Township*, concluding that Plaintiffs “have no real alternative avenue to address their grievance. They can curb their conduct to conform to the ordinances’ mandates or they can willfully violate the law and face criminal prosecution. Like the [plaintiffs in other

³ If Plaintiffs relied on an asserted interest in protecting their free speech rights, this Court likewise would have recognized that the chilling effect on their free speech rights was direct and immediate, and thus sufficient to allow them to challenge the statute without violating it. The principles relied on by the Plaintiffs here, by contrast, are rules that they claim protect gun owners. And as gun owners, they can claim standing to challenge the enactments without risking their freedom. This Court’s precedents provide for the same result in both cases because both cases present *bona fide* disputes impacting the rights invoked.

standing cases], Appellants face equally unappealing options.” Op. at 22. None of this broke new ground or raised anything revolutionary. Instead, consistent with this Court’s established working principles, the Commonwealth Court summed it up this way: “It . . . makes little sense to force law-abiding citizens to rely on law breakers to advocate their interests.” *Id.*

Finding that pre-enforcement review was warranted, the Commonwealth Court then properly took the next step and determined that the factual development was adequate. On this point, the court identified numerous relevant facts about each Plaintiff that revealed the concreteness of the controversy. *See* Op. at 10-19 (addressing both individual standing and associational standing for FOAC). The Court saw no shortcomings in the factual record, and none exist. Appellants indicated their intent to enforce the statutes involved and no one said otherwise. Notwithstanding Appellants’ claims, the only remaining step in the ripeness inquiry is one this Court has not required potential plaintiffs to take—that is, actually violating the challenged ordinance and subjecting themselves to enforcement penalties.

Finally, zone of interest principles also reaffirm the finding of standing. Specifically, the record shows that all Plaintiffs are firearm owners who wish to keep and bear arms within the City of Harrisburg—or, in the case of FOAC, to protect its members’ rights to do so. *See* Op. at 10-19. Given that the right asserted is directly

implicated by conduct Plaintiffs otherwise would engage in, Plaintiffs plainly fall within the zone of interests conceivably protected by both the Second Amendment and Article I, Section 21 of the Pennsylvania Constitution.

In short, the recognized working principles that guide the prudential standing analysis fully support the result reached by the Commonwealth Court. There is no reason to abandon these principles to fashion some novel exception for this case.

III. PENNSYLVANIA'S PRUDENTIAL STANDING PRINCIPLES PROPERLY FACILITATE ACCESS TO COURTS AND TIMELY ADJUDICATION OF FUNDAMENTAL RIGHTS.

Appellants have argued that conferring standing on the Plaintiffs will open the floodgates to challenges of legislative or municipal enactments. There is no credible support for this view. This Court's prudential standing requirements have been applied for a half century and no uncontrolled flood of litigation has followed. Quite the opposite, in fact. This Court's prudential standing framework has left *bona fide* controversies in court and thrown hypothetical controversies out. The application has been careful and thoughtful, and there is no crisis to avert.

Appellants nevertheless ask this Court to retrench and move toward a much more restrictive conception of standing. They maintain this is necessary for preserving municipal solvency, as well as for the proper functioning of our judicial system. But the import of their proposal would be to limit the potential challengers to local enactments to those willing to risk prosecution. As it has done before, this

Court should reject these overtures and stick with the principles it has set down. People in this Commonwealth should have access to the courts to challenge legislative enactments that may infringe their rights. If those enactments are legally sound, they will be sustained. But if they are constitutionally dubious, Pennsylvania courts should not immunize them from challenge merely because municipalities must expend funds to defend them. On the contrary, the relative merits of the enactments should be tested when there is a threat to peoples' rights. If the public officials or entities believe they are lawful, then they should step forward and defend them. The alternative is a form of immunity from challenge that would lead to the intolerable result of sanctioning the abridgement of rights.

Beyond that, Appellants would further limit court access for cases like this one by putting additional requirements into the standing calculus; for example, limiting standing to situations where a plaintiff has either a professional or ethical obligation to bring suit. *See* Pet. at 20-21. But Pennsylvania's standing doctrine imposes no such limits. If in fact the Plaintiffs' constitutional rights are violated by the constraints the ordinances here impose, the fact that they are not professionally obligated to assert those rights is irrelevant. Appellants' argument in fact would rob prudential standing of its most basic attributes—breadth and flexibility. Here, the Plaintiffs invoke constitutional rights and seek to protect their activities in pursuit of those rights that are foreclosed by the ordinances involved. No one disputes that

point. Even Appellants must admit what the ordinances plainly intend. The threat of enforcement also is real and not imagined, and Appellants have said so. There thus is every reason to adjudicate Plaintiffs' claims, not insulate the ordinances from scrutiny.

In the final analysis, as this Court has recognized, shutting the courthouse doors when there is a demonstrated need for redress compromises the very purpose behind courts of general jurisdiction. *See Robinson Twp.*, 83 A.3d at 917. Prudential standing principles are not designed to be a barrier to entry. They are intended to facilitate resolution of *bona fide* controversies by the courts. This is as it should be. When constitutional or other rights are at stake, the default should be for *more*—not less—access to the courthouse even if it comes at the cost of a few more lawsuits. *Cf. Kuren v. Luzerne Cnty.*, 146 A.3d 715, 749 (Pa. 2016) (“We recognize that our decision could prompt similar lawsuits in many of Pennsylvania's sixty-seven counties. However, the potential burden of such litigation cannot outweigh our Commonwealth's obligation to comply meaningfully and completely with [constitutional imperatives].”). Put another way, Pennsylvania courts have not and should not protect the municipal fisc by artificially closing the courthouse doors.

Finally, the lesson of history is clear. Decades of precedents have created a workable set of prudential rules that make the Commonwealth's courts available to its residents when there are good reasons to do so. Continuing in that vein will not

only provide access for the aggrieved parties in this case, it will enfranchise future plaintiffs who demonstrate a substantial interest in challenging enactments that invade or impact constitutional or other rights. State and municipal legislators should not obtain the benefit of standing principles that force the Hobson's choice on prospective plaintiffs that this Court has studiously avoided. Yet deferral to Appellants and their *amici* will accomplish precisely that result for this case and others that are certain to follow. Affirming the decision below will, in contrast, allow this Court's prudential standing principles to fulfill their intended goal.

CONCLUSION

For the reasons stated, the decision of the Commonwealth Court should be affirmed.

Dated: August 17, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: August 17, 2020

/s/ James C. Martin

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amici Curiae* consists of 4,369 words, excluding those portions of the brief not required to be counted, and thus complies with the word limit requirement of Pennsylvania Rule of Appellate Procedure 531(b)(3).

Dated: August 17, 2020

/s/ James C. Martin
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