No. 15-330

In The Supreme Court of the United States

CALIFORNIA BUILDING INDUSTRY ASS'N,

Petitioner,

v.

CITY OF SAN JOSE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, REAL ESTATE PROFESSIONALS AND ASSOCIATIONS, AND THE BEACON CENTER SUPPORTING PETITIONER

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QUESTION PRESENTED

A San Jose, California ordinance conditions housing development permits upon a requirement that developers sell 15% of their newly-built homes for less than market value to city-designated buyers. Alternatively, developers may pay the City a fee in lieu. The California Supreme Court held that, even where such legislatively-mandated conditions are unrelated to the developments on which they are imposed, they are subject only to rational basis review.

The question presented is:

Whether such a permit condition, imposed legislatively, is subject to scrutiny and is invalid under the unconstitutional conditions doctrine as set out in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the protection of private property interests from unconstitutional governmental takings. This aspect of its advocacy is reflected in SLF's filing of *amicus* briefs in support of property holders in cases such as *Suitum v. Tahoe Regional Planning Authority*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

SLF is joined by a former member of the Metropolitan Nashville Council, a number of highly experienced real estate professionals, including REALTORS®, developers, builders, and mortgage bankers, as well as an additional non-profit, public interest entity.

Amicus Charles Tygard is a former member of the Metropolitan Nashville Council, serving from

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[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amici*'s intention to file this brief at least 10 days prior to the due date. No counsel for a party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.

1989 until September 1995 and again from 2002 until September 2015. He holds a Bachelor's Degree in Business Administration and Economics and owns a tax and bookkeeping service. As a Council member, he served on the Budget and Finance Committee, among others. He voted against an ordinance that the Metropolitan Nashville Council adopted on July 21, 2015 which is targeted to lead to an "affordable housing/inclusive zoning" ordinance (Nashville Ordinance) similar to the one at issue in this case. Mr. Tygard has studied this issue extensively and, along with other present and former Council members who oppose such legislation, considers this type of ordinance to be both unconstitutional and harmful.

Amicus H. Lynn Greer, of Nashville, Tennessee, has been involved in mortgage banking, property management for both commercial and residential properties, residential land development, and real estate brokerage and investment in Tennessee since he was first licensed as a REALTOR® in 1961. He has headed companies in these industries. Mr. Greer has been involved in eight to ten residential developments and has participated in the financing of others. He has been a member of the National and Tennessee Associations of Realtors and served as President of the Nashville Association of Realtors; has served as Chairman of the Mortgage Bankers Association of America, Vice President of the Tennessee Mortgage Bankers Association and President of the Tennessee Mortgage Bankers Association. Additionally, he has served as a member of the Metropolitan

Nashville Board of Equalization and as a Director of the Tennessee Regulatory Authority, which is responsible for regulating the investor owned telephone, natural gas, pipeline, and electric and water utility companies operating in Tennessee.

Amicus Wood Caldwell is a principal with the Nashville, Tennessee multifaceted real estate firm of Southeast Venture. He holds an engineering degree and has more than thirty-six years of site engineering and development experience. His development experience includes twenty-nine years of specializing in all aspects of site identification and analysis, acquisition, zoning, municipal approvals, design, construction management and marketing. An opinion piece written by Mr. Caldwell was published in the Nashville *Tennessean* on July 20, 2015, in opposition to the Nashville Ordinance.

Amicus The Pacific Group, Inc. is a real estate investment and development company concentrating in metropolitan Atlanta and the southeastern United States since 1986. With a history of more than 250 new housing and commercial property developments, it has acquired, developed and/or sold approximately 22,000 housing units and 12,500 acres. The Pacific Group believes in sound land use practice, professional planning, and design, and combines those beliefs with comprehensive execution. It has a vested interest in the region's real estate investment and development growth.

Amicus Brock Built Homes, LLC, is a well-known and well-respected homebuilder and has built over 1,300 homes in Georgia and South Carolina. It has won dozens of awards including Professionalism Awards, Obie Awards, 2008 Homebuilder of the Year presented by *amicus* Greater Atlanta Home Builders Association and the 2009 Earth Craft Builder of the Year Award. Brock Built Homes cares about its customers whose lives it strives to enrich by helping them achieve their dreams through home ownership.

Amicus Greater Atlanta Home Builders Association, Inc. (GAHBA) is a Georgia non-profit trade association that represents the interests of over 1,200 member companies, including developers, custom and speculative builders, multifamily builders, manufactured housing companies, residential remodelers and general contractors. Founded in 1945 by a group of builders, GAHBA is dedicated to prompting, protecting and preserving the homebuilding industry as a viable economic force in the Atlanta area.

Amicus Anthony Roberts is an African-American real estate professional in Nashville, Tennessee. He possesses a degree in Architecture. From personal experience as well as from years of hearing the concerns of his clients, members of the minority community, fellow residential real estate professionals, and business owners, it is his position that legislation of this nature, by forcing individuals to live in places designated by the government, is harmful to the minority community. *Amicus* Denny Jones is a real estate professional and is the Director/Owner of

RE/MAX Greater Atlanta, a leading real estate firm. He is Past Chairman of the Political Affairs Full Committee for the National Association of REALTORS® and was a member of the National Association of REALTORS® Political Strategy Task Force. Both Mr. Roberts' and Mr. Jones' real estate clients include individuals who, by virtue of hard work, saving and furthering their educations, are able to realize their dreams to buy and sell relatively modest homes outside of low-income and subsidized housing areas. Therefore, *amici* are particularly concerned for these families and the negative effects that affordable housing/inclusive zoning or below-market ordinances have on their investments.

Amicus The Beacon Center is a non-profit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals. The Beacon Center has a vested interest in seeing the issue presented in this brief addressed by the Court.

Collectively, *amici* maintain that a below-market, "affordable" housing ordinance requiring home builders to sell new homes for less than market value or below the cost of construction, or in the alternative, pay a fee to the government, is an unconstitutional exaction, prohibited under the Constitution's Takings Clause. *Amici* intend to insist that any lower-income or "affordable" housing solutions remain within constitutional parameters, allow the free market to

work, and respect the property rights of all Americans.

SUMMARY OF ARGUMENT

"Below-market affordable housing and inclusionary zoning" programs (below-market housing programs) must comply with the Constitution. As Petitioner correctly points out, the San Jose program results in an unconstitutional taking of property interests in direct violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. *Amici* write separately to show that the United States Department of Housing and Urban Development (HUD), other federal regulators, local housing authorities, and activists are using and will use this Court's recent decision in *Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), to fuel their pursuit of meritless redistributive housing-related disparate impact claims. This country has already seen an uptick in below-market housing programs including HUD's unprecedented imposition on state and local governments and local ordinances similar to that enacted by San Jose – all of which result in unconstitutional takings and are unlikely to cure affordable housing problems. The proliferation of these confiscatory programs is expected to give rise to an equivalent proliferation of legal challenges. This Court should bar programs like that of San Jose and

correctly apply the Constitution, which will render such future challenges unnecessary.

By granting certiorari, this Court has an opportunity to circumscribe the power of agencies, local and state governments, and courts to impose remedies beyond the limits of either a statute or the Constitution. It also provides this Court with an opportunity to ensure that the constitutional rights of all property owners are not sacrificed for programs that, in reality, will produce less housing at higher prices. The California Supreme Court's decision violates not only the express wording of the Takings Clause, but also clear case law, including *Suitum*, *Dolan*, and *Lucas*, *supra*, and must be reversed.

ARGUMENT

As this Court acknowledged in *Texas Dep't of Housing*, disparate impact claims are necessarily subject to prudential and constitutional limitations. This Court should grant the petition for writ of certiorari because without additional instruction, regulators and legislators may be tempted to create below-market housing programs like San Jose's, which would result in widespread legislative exactions. *Amici* observe that already, HUD's new Affirmatively Furthering Fair Housing Rule (AFFH Rule), 80 Fed. Reg. 42272 (July 16, 2015), and actions taken by several local governments presage implementation of so-called fair housing initiatives that are at odds

with this Court's previous approach and certain bedrock principles this Court expressly preserved in *Texas Dep't of Housing*. Further, drawing upon their substantial experience in the real estate industry, *amici* explain how below-market housing programs produce less housing at higher prices, harm constituencies they are ostensibly intended to benefit, distort the housing and lending markets, and are generally counterproductive.

I. Disparate impact claims under the Fair Housing Act are, necessarily, subject to constitutional and prudential limitations.

Programs like those of San Jose that seek to provide housing to people solely based on their income level are beyond the scope of the Fair Housing Act (the Act), 42 U.S.C. § 3601, *et seq.*, because the Act simply does not provide income-based protection. Rather, the Act bars discrimination based on "race, color, religion, sex, familial status, national origin, or disability" in housing-related transactions. 42 U.S.C. §§ 3604, 3605. In response to public comments on the AFFH Rule, HUD itself even acknowledged these limitations of the Act, "agree[ing] . . . that the Fair Housing Act does not prohibit discrimination on the basis of income or other characteristics not specified in the Act." AFFH Rule, 80 Fed. Reg. at 42283. The wording of the statutory protection limits a court's recognition of disparate impact claims.

And, as this Court noted in *Texas Dep't of Housing*, disparate impact claims cannot be based solely on statistical disparities (such as income disparities):

> [A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. [Citation omitted.] Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and "would almost inexorably lead" governmental or private entities to use "numerical quotas," and serious constitutional questions then could arise. [Citation omitted.]

135 S. Ct. at 2523.

In determining the scope of a disparate impact claim, constitutional and prudential limitations must be considered. With respect to programs pursuing below-market affordable housing and inclusionary zoning, such pursuit is subject to competing practical priorities that must be accommodated. As this Court warned, "it would be paradoxical to construe the [Act] to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable." *Id*. Accordingly, "[e]ntrepreneurs must be

given latitude to consider market factors" and zoning officials must be free to consider "a mix of factors" without being exposed to suit. *Id*.

The Act cannot and "does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities." *Id*. This is because identifying the steps that best serve the interests of the protected community is not easy and must respect our founding principles of the free market and private property rights.

> From the standpoint of determining advantage or disadvantage to racial minorities, it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa. If those sorts of judgment are subject to challenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas – a circumstance that itself raises serious constitutional concerns.

Id. Since income is outside the reach of the Act in any case, governments and agencies – federal, state or local – cannot use income as an excuse to dictate where people can or must live, or the prices for which they can or must buy or sell their homes, or require payment of a tribute in lieu thereof.

This Court should grant the petition for certiorari and provide instruction for lower courts and administrators to utilize in assessing below-market housing programs like San Jose's, whether a matter of constitutionality or of statutory construction. Otherwise, existing below-market housing programs and new programs that follow in the wake of *Texas Dep't of Housing* and the new AFFH Rule may replicate San Jose's program, resulting in widespread constitutional violations.

The California Supreme Court's decision now being appealed must not be allowed to stand.

II. Below-market housing programs are likely to proliferate in the wake of *Texas Dep't of Housing*.

The need for this Court to hear this case and provide additional instruction following *Texas Dep't of Housing* cannot be understated.

HUD appears to have interpreted *Texas Dep't of Housing* as a "green light" to work with the regulated community and impose below-market housing programs on localities throughout the country, thereby extending the Act's reach well beyond its statutory scope. Only weeks after this Court issued its opinion, HUD jumped into action, publishing the AFFH Rule. *See generally* AFFH Rule, 80 Fed. Reg. 42272. Through the AFFH Rule, HUD gave itself unprecedented authority to approve or disapprove local and state governments' housing and zoning policies based

on criteria and objectives beyond the limits of the Act. *Id*. The AFFH Rule fueled the adoption of below-market housing initiatives which amount to legislative exactions, such as the Nashville Ordinance.

Specifically, the AFFH Rule provides that program participants must prepare an assessment of "fair housing" for HUD's review. In response to public comments, HUD contended that it "developed the [AFFH Rule] as a mechanism to enable program participants to more effectively identify and address fair housing issues and contributing factors." AFFH Rule, 80 Fed. Reg. at 42282. It went on to explain that the process prescribed in the AFFH Rule will guide program participants "in considering access to public transportation, quality schools and jobs, exposure to poverty, environmental health hazards, and the location of deteriorated or abandoned properties when identifying where fair housing issues may exist." *Id*. Program participants must submit their below-market housing program for review, which entails only a limited conclusion that the program "meets the required elements." 24 C.F.R. § 5.162(a)(2).

Despite its attempts to justify a need for the AFFH Rule, in response to public comments about the AFFH Rule's effect on investment of federal funds in racially or ethnically concentrated areas of poverty, HUD ostensibly remained agnostic. It said, "the duty to affirmatively further fair housing does not dictate or preclude particular investments or strategies as a matter of law." AFFH Rule, 80 Fed. Reg. at 42279.

HUD recognized the value of "place-based strategies" but warned:

> There could be issues, however, with strategies that rely solely on investment in areas with high racial or ethnic concentrations of low-income residents to the exclusion of providing access to affordable housing outside of those areas. For example, in areas with a history of segregation, if a program participant has the ability to create opportunities outside of the segregated, low-income areas but declines to do so in favor of place-based strategies, there could be a legitimate claim that HUD and its program participants were acting to preclude a choice of neighborhoods to historically segregated groups, as well as failing to affirmatively further fair housing as required by the Fair Housing Act.

Id. That studied agnosticism supposedly defers to program participants to devise their own strategies, although it is certainly a not-so-veiled threat; and to date, not surprisingly and as intended, those programs mirror San Jose's below-market housing program.

Beyond that, HUD's phrase "ability to create opportunities outside of the segregated, low-income areas" is deeply problematic. First, as stated above, income does not equate to discrimination based on race and other factors listed in the Act, that Congress intended the Act to remedy. The Act does not protect or favor people on account of low income. "Segregated" and "low-income" are not synonymous, so the

phrase is based on a false premise. Second, a program participant's "ability" is limited by the Takings Clause of the United States Constitution and similar provisions of state constitutions, and by the core principles of the free market and private property. A program participant should not be deemed by HUD, a court, or anyone else to have the "ability" to require someone to buy or sell a home for either less than, or more than, it is worth at fair market value, or to pay a fee in lieu of such a manipulated sale.

An example of a locality that has already followed in San Jose's footsteps is Davidson County, Tennessee. On July 21, 2015, the Metropolitan Council adopted a below-market housing ordinance that will lead to imposition of exactions that take from some to give to others. The Nashville Ordinance set the "goal of requiring [that] at least fourteen percent of the units in all residential development in Davidson County, including new construction and renovation be reserved and used for Affordable Housing and/or Workforce Housing." Substitute Ordinance BL2015-1139, ch. 17.10.020, *available at* http://www.nashville.gov/mc/ordinances/term_2011_2015/bl2015_1139.htm (last visited Oct. 15, 2015). Those designations cover households that earn respectively 60 percent or less and between 60 and 120 percent of the median income in Davidson County.

HUD wasted no time in promulgating its final AFFH Rule, nor did Davidson County in enacting the Nashville Ordinance. These developments underscore

the importance of this case and the opportunity for the Court to quickly prevent any further unconstitutional takings that result when below-market housing programs include mandatory set asides.

III. Below-market housing programs like those of San Jose and Nashville will not cure affordable housing problems.

Below-market housing programs that mandate the reservation of specified portions of new or renovated developments for low or moderate income individuals, like those in San Jose and Nashville, will generate less housing at higher prices. Experience tells us so.

Two years ago, California Governor Jerry Brown vetoed a bill that would have authorized cities and counties in California to establish inclusionary housing requirements as a condition of development. In his veto message, Governor Brown noted, "As Mayor of Oakland, I saw how difficult it can be to attract development to low and middle income communities. Requiring developers to include below-market units in their projects can exacerbate these challenges, even while not meaningfully increasing the amount of affordable housing in a given community." Letter from California Governor Edmund G. Brown, Jr. to the Members of the California State Assembly (Oct. 15, 2013), *available at* https://www.gov.ca.gov/docs/AB_1229_2013_Veto_Message.pdf (last visited Oct. 15, 2015).

Three scholars found that the California cities that imposed below-market housing mandates ended up with ten percent fewer homes and 20 percent higher prices. They studied changes in the population and housing prices in the California cities that adopted below-market housing mandates between 1990 and 2000. The scholars found that these mandates operate as a form of price control, which is itself a form of taxation that has predictable effects on supply (less) and price (higher). Tom Means, Edward Stringham, Edward Lopez, *Independent Policy Report – Below-Market Housing Mandates as Takings: Measuring Their Impact* (The Independent Institute) (Nov. 2007), *available at* http://www.independent.org/pdf/policy_reports/2007-11-09-housing.pdf.

As they note, the production of below-cost housing in California cities that have adopted such mandates has been paltry. "Over the course of thirty years in the entire San Francisco Bay Area, below-market mandates have resulted in the production of only 6,836 affordable units, an average of 228 per year." *Below-Market Housing*, at 8. "Controlling for the length of time each program has been in effect, the average jurisdiction has produced only 14.7 units for each year since adopting a below-market housing mandate." *Id*. This stands in stark contrast to the rosy, pie-in-the-sky aspirational assumptions made by "affordable housing/inclusive zoning" proponents. The direct costs to developers, builders and homeowners affected by these mandates far exceed any benefit to

any lower-income individuals or categories of individuals.

Governor Brown's veto message presaged this Court's warning that the consequences of disparate impact litigation may be counterproductive. *Amici* noted above that in *Texas Dep't of Housing*, the Court "hedged" its recognition of disparate impact claims in the housing arena. By that, *amici* mean that the Court recognized that such claims must be limited in their scope so that the rights, the interests, and the realities of private parties acting in the market are protected and preserved. As this Court observed: "If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system." *Texas Dep't of Housing*, 135 S. Ct. at 2524. Accordingly,

> disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification – or, in the case of a governmental entity, an analogous public interest – a court must determine that a plaintiff has shown that there is "an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs." [Citation omitted.]

Id. at 2518.

Below-market housing programs like those of San Jose and Nashville operate in contravention to the free market. They do not just result in a taking of private property. They do so in a way that disrupts markets and is likely to lead to a result that is the opposite of the one its advocates want. Means, Stringham, and Lopez noted that the fact and size of the taking can be derived by comparing the value of a development priced at the median price in a community to the value of the same development priced with 50 percent of the units under below-market price controls. *Below-Market Housing*, at 4-6. A below-market mandate of 14 or 15 percent is just a smaller exaction, but the magnitude of an unconstitutional exaction does not matter; what matters is the exaction itself.

That exaction comes in the first instance from the builder or developer. Those builders and developers will of necessity spread most or all of the cost to the buyers of the other units in the project. That will punish those who do not need a subsidy. As *amicus* Wood Caldwell explained:

> [A]ffordable housing has to be subsidized by someone. Artificially reducing the rent for 14 percent of the residents in a development means the other 86 percent have to make up the difference by paying above-market rates.
>
> It's likely that young couples who can afford an apartment at market rates won't be able to afford the artificially inflated rate – so they're out and the subsidized renters are in.

> Is it right to price one group out of the market in order to provide below-market rates to another group?

Wood Caldwell, *Why Affordable Housing Mandates Don't Work*, The Tennessean, July 20, 2015, *available at* http://www.tennessean.com/story/opinion/contributors/2015/07/20/affordable-housing-mandates-work/30429691/ (last visited Oct. 15, 2015).

Rather than continuing to do business under onerous, confiscatory mandates, builders and developers can move their work to other jurisdictions, like neighboring counties that do not have below-market housing mandates. As *amicus* Wood Caldwell observed, if one million people are expected to move to Middle Tennessee in the next twenty years, it makes little sense for Nashville to price them out of the market or limit their choices as to where within the affected county they will live, driving those new residents to neighboring counties. *See id*.

Moreover, an unconstitutional taking results if a below-market housing ordinance prohibits the initial buyer of a below-market home from reselling the home at market price. Common sense dictates that an overwhelming majority of those who buy a starter or modest home hope to be upwardly mobile and ultimately live in a larger home. Common sense also tells us that homes usually appreciate in value. If a low-to-moderate income homeowner cannot realize the appreciation that the home would attain on the free

market, he or she is unfairly and unconstitutionally penalized.

Amici are also well aware that developers and builders will be unable to obtain financing to build units in developments where the market value is manipulated and skewed up or down. Would-be homeowners will likewise be unable to obtain a loan for a house that is not based on a fair-market-value appraisal.

Finally, advocates of below-market housing ignore the realities of home ownership. Property taxes increase, repairs have to be made, and insurance premiums paid – and paid for at full market price. These realities may be compounded if the builder uses lower-quality materials to help recoup the loss on the sale price, so that the home falls into disrepair sooner. If a person needs favoritism in order to purchase a home, there is no assurance that he or she will be able to bear the ancillary costs of ownership of the home over time.

Amici have learned through years of experience that there is no shortage of affordable housing; it just may not be distributed where the mavens of below-market housing want it to be. More particularly, it is just not located in the trendy, hot-market areas of cities. And advocates for below-market housing programs like those of San Jose and Nashville, including HUD, cannot cope with that.

Instead, the Tennessee *amici* point to the redevelopment of a block of publicly-owned housing in

Nashville as a better solution. The city plans to tear down those 500 units and rebuild with increased density and a mix of pricing. Residents who do not need artificially lower-priced homes will have the free choice to buy or not to buy the full-priced homes in the redevelopment.

That solution is better than ordinances such as the San Jose or Nashville Ordinance, and better than the AFFH Rule, because the cost of the below-market homes is paid for by all of the taxpayers. The development is based on free market principles and freedom of choice. It is not a burdensome, direct exaction from a few based on top-down government mandates.

This Court should grant certiorari in this case to promote tax-based and free market solutions and avert the unconstitutional takings that result from below-market housing mandates.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, *amici* respectfully request that this Court grant certiorari, and on review, reverse the decision of the Supreme Court of California.

Respectfully submitted,

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