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COLORADO SUPREME COURT 2 East 14th Avenue, Denver, CO 80203	
Colorado Court of Appeals Cases 12CA0595 Opinion by Davidson, CJ., Marquez, J., concur. Webb, J. dissents. District Court of Arapahoe County The Honorable Elizabeth Volz Case Number 2011CV1464	
Petitioner: BRANDON COATS v. Respondent: DISH NETWORK, LLC	♦ COURT USE ONLY ♦
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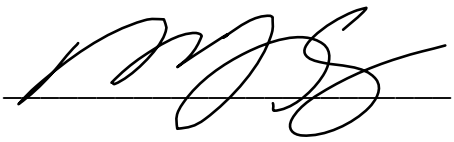
AMENDED PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 53 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that this Petition complies with C.A.R. 53(a) in that it contains 3782 words, exclusive of the caption, certificates, table of contents, appendix, and attached documents, and thus does not exceed the limit of 3,800 words. Further, this Petition contains, in the following order and under separate heading:

> (1) an advisory listing of the issues; (2) reference to the official or unofficial reports of the opinion or judgment and decree of the court appearing in the appendix; (3) a concise statement of the grounds on which jurisdiction of this Court pursuant to C.A.R. 53(a)(3); (4) a concise statement of the case containing the matters material to consideration of the issues presented; (5) a direct and concise argument amplifying the reasons relied on for the allowance of the writ; and (6) an appendix containing (a) copies of the opinions in the lower courts; and, (b) the text of any pertinent statutes or ordinances. C.A.R. 53(a)(6)).

I acknowledge that my Petition may be stricken if it fails to comply with any of C.A.R. 32 or C.A.R. 53.



Michael D. Evans # 39407

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ISSUE(S) PRESENTED FOR REVIEW

Whether the Colorado's Lawful Activities Statute, § 24-34-402.5, C.R.S., protects a sick or disabled employee from being terminated by a Colorado employer for lawfully engaging in the use of medical marijuana pursuant to Colo. Const. art. XVIII, § 14 after work hours and off company property, and where despite the presence of T.H.C., there is no additional evidence of impairment, poor performance, occupational safety risk, or conflict with federal obligation?

REFERENCE TO THE OFFICIAL REPORT OF THE JUDGMENT OF THE COURT

The April 25, 2013, opinion of the Court of Appeals is *Coats v. Dish Network, L.L.C.,* 2013 COA 62 at 2013 WL 1767846 (Colo. App. 2013). That opinion, along with the February 29, 2012 ruling of the district court, are included in the Appendix.

JURISDICTION

This petition arises from the trial court's order ruling affirmed by the Court of Appeals. This Court has jurisdiction pursuant to § 13-4-108, C.R.S. and C.A.R. Rule 49. Copies of both of these rulings are in the appendix to this Petition. This petition was timely filed subsequent to the April 25, 2013, published opinion by

the Court of Appeals and the order entered by this Court on June 7, 2013, granting an extension of time to file this petition until July 5, 2013.

STATEMENT OF THE CASE

A. Overview

Brandon Coats asserts that his Colorado-based former employer, DISH Network, L.L.C., violated Colorado's Lawful Activity Statute, § 24-34-402.5, C.R.S., when it terminated his employment based solely on finding an unknown amount of Tetrahydrocannabinol or "T.H.C." in his body.

Mr. Coats, a quadriplegic and registered medical marijuana patient, used medical marijuana in compliance with Colo. Const. art. XVIII, § 14, after work hours, and off company property. During his employment as a telephone customer service representative, Mr. Coats had satisfactory job performance, did not request any work place accommodation, and did not exhibit any signs of impairment or influence. The mere presence of T.H.C. is not dispositive of a person's level of intoxication or impairment.

Colorado's Lawful Activity Statute, § 24-34-402.5, C.R.S., prohibits Colorado employers like DISH from discriminating against or terminating employees for engaging in lawful off-duty conduct in this state. Both Colo. Const.

art. XVIII, § 14 and § 16 expressly provide for the lawful use of marijuana in Colorado.

B. Procedural Background

On February 29, 2012 the Honorable Judge Volze of the Arapahoe County District Court dismissed Mr. Coat's single claim against DISH, § 24-34-402.5 C.R.S., under C.R.C.P. 12(b)(5), finding that medical use of marijuana is not a "lawful activity" because Colo. Const. art. XVIII, § 14 only provides an affirmative defense to a criminal prosecution. This decision was issued prior to the enactment of Colo. Const. art. XVIII, § 16 in December 2012.

On April 25, 2013, the Honorable Judge Davidson of the Court of Appeals, with Judge Marquez concurring, abandoned the district court's analysis, but nonetheless affirmed 2-1 on different grounds, finding that use of marijuana in Colorado, including medical marijuana, is not a "lawful activity" under Colorado's Lawful Activity Statute, § 24-34-402.5, C.R.S., because marijuana is proscribed by federal statute 21 U.S.C. § 844(a). In its analysis, the Court of Appeals held that "…for an activity to be "lawful" in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law, but complies with state law cannot be "lawful" under the ordinary meaning of that term." *Coats*, 2013 COA 62 at ¶14. It declined to address whether Colo.

Const. art. XVIII, § 14 conferred a constitutional right to medical marijuana use. Although the decision of the Court of Appeals combined two briefed cases, Mr. Coats only petitions for writ of certiorari on the substantive issues raised in the 2012CA595 case, as the 2012CA1704 case dealing with attorney fees was correctly decided by the court.

The Honorable Judge Webb dissented, finding that a "lawful activity" under § 24-34-402.5, C.R.S. should be defined by Colorado law, not federal law. Judge Webb also concluded that medical marijuana use pursuant to Colo. Const. art. XVIII, § 14, is lawful.

C. Material Facts

No one disputes these facts. Since the age of sixteen, Mr. Coats has been confined to a wheelchair with limited use of his hands. Despite the physical challenges he faced with quadriplegia, he sought out full-time employment and was hired as a telephone customer service representative with DISH Network, where he worked for three years until his untimely termination.

Besides paralysis, Mr. Coats suffers from involuntary muscle movements, or spasms, which are both painful and embarrassing. After prolonged treatment with various conventional, prescribed medications failed, a licensed Colorado physician recommended that Mr. Coats medically use marijuana to treat the spasms. Mr.

Coats registered and received state-approval for medical marijuana use. Thereafter, he used marijuana after working hours and off company property, in compliance with Colo. Const. art. XVIII, § 14. The medical use of marijuana has dramatically decreased his muscle spasms and improved his quality of life.

While employed with DISH, Mr. Coats never held an executive position, nor was required to perform any occupationally hazardous activity. Given his physical limitations, this was possibly the only job that he could realistically perform. He never requested any accommodation for marijuana use, and nor did he bring or use it while at work, during work hours, or on company property. Throughout his employment Mr. Coats had satisfactory performance reviews, and DISH never accused or suspected him of being impaired or under the influence while at work.

DISH terminated Mr. Coats' employment solely based the results of a company drug test that showed the presence of an unknown amount of Tetrahydrocannabinol or "T.H.C." in Mr. Coats' system. DISH claimed that the presence of T.H.C. violated its drug-free work place policy, however the existence of the policy, its terms, effective date, or its delivery to Mr. Coats is absent from the record. Similarly, the record is void of any evidence that DISH was attempting to comply with any federal obligations. Because T.H.C. remains in the body for an

extended period of time, the mere presence of it is not dispositive of a person's level of intoxication or impairment.

Despite continuing efforts, Mr. Coats remains unemployed to date and based on the opinion issued below, he will likely remain so if he wishes to relieve his physical symptoms with the only effective medical treatment for him, marijuana.

REASONS TO GRANT THIS PETITION FOR WRIT OF CERTIORARI

This case provides a set of undisputed, compelling facts for this Court to weigh in on a straight forward, profound question of law not previously addressed by this Court (although several Justices of this Court indicated they would grant certiorari on similar issues to the one presented here). Specifically, the Court of Appeals decision in this case highlights the following issues:

A. the interplay of state and federal law regarding medical marijuana use in Colorado cannot continue to go unaddressed, and will almost certainly impact national decisions and discussions;

B. the appropriate statutory interpretation of Colorado's Lawful Activity Statute, as the Court of Appeals opinion in this case potentially overrules or abrogates this Court's prior holding in *Watson v. Public Service Co. of Colo.*, 207 P.3d 860, 864 (Colo. 2008) (holding any means all);

C. the real and serious impact of allowing Colorado employers to potentially terminate over 120,000 sick and disabled Colorado employees who are using medical marijuana with state approval upon the recommendations of their physicians to control serious medical conditions, forcing them to choose between their health and medical treatment, and their employability;

D. the much needed guidance to hundreds of thousands of people, including patient-employees, providers, growers, state regulators, and employers in Colorado regarding medical marijuana use from a definitive opinion that resolves lower courts' divided, conflicting, and inconsistent interpretations of this state's constitutional and statutory law.

This case is the ideal vehicle to assess the issues presented.

A. Federal and State Law Interplay

If the Court of Appeals decision is upheld, then either the Tenth Amendment has been eviscerated, or Colo. Const. art. XVIII, § 16, and possibly § 14 are unconstitutional. This justifies review by this Court.

The Court of Appeals held "…for an activity to be "lawful" in Colorado, it must be permitted by, and not contrary to, both state and federal law….an activity that violates federal law, but complies with state law cannot be "lawful" under the ordinary meaning of that term." *Coats*, 2013 COA 62 at ¶14. In support of its

conclusion, it cites federal statute 21 U.S.C. § 844(a) (proscribing marijuana), as well as *Gonzales v. Raich*, 545 U.S. 1 (2005).

However, neither the federal Controlled Substances Act, nor the U.S. Supreme Court's decision in *Gonzales* prohibit states like Colorado from creating laws under the Tenth Amendment that, while not permitted by federal law, do not actually conflict with federal law under the Supremacy Clause and pre-emption doctrine. See 21 U.S.C. § 903; *Gonzales v. Raich*, 545 U.S. 1, 14, 26-29 (2005); *Rice v. Santa Fe Elevator Corp*. 331 U.S. at 230; *City of Garden Grove v. Superior Court*, 157 Cal.App. 4th 355, 382-383 (Cal.App. 2008); *United States v. Patton*, 451 F.3d 615, 626-627 (10th Cir. Kan. 2006). The very existence of both Article XVIII, § 14 and § 16 in the Colorado Constitution illustrates this fact and contradicts the Court of Appeals decision in *Coats*.

An analysis of federal preemption issues begins with "the basic assumption that Congress did not intend to displace state law." *Middleton v. Hartman*, 45 P.3d 721, 731-732 (Colo. 2002) citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, (1947).

Colorado has recognized a broad power of the general assembly in the area of its police powers, which includes legislating for the health and welfare of its citizens. *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660 (Colo.

1972). *See also In re Interrogatories of Governor*, 52 P.2d 663 (Colo. 1935); *Mayor, Aldermen and Commonalty of City of New York v. Miln*, 36 U.S. 102, 103 (1837); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919). Colorado has permitted sick and disabled people to use marijuana for medicinal purposes as recommended by a licensed physician. An express exercise of police, health, and welfare powers are within the language of Colo. Const. art. XVIII, § 14, as well as the legislative declaration for C.R.S. 12-43.3-101 et seq. Title 12 itself is designated as "Health Care."

Colorado also regulates the employer-employee relationship under its police powers. *Dunbar v. Hoffman*, 468 P.2d 742, 744 (1970). In fact, the exercise of police power can be interpreted as an assertion of independence from federal law. "[P]rotecting employees' off-the-job autonomy is primarily a matter of state concern." *Coats*, 2013 COA 62 at ¶51.

In *Coats*, the Court of Appeals did not analyze the Supremacy Clause, pre-emption, or the Tenth Amendment. (The same important constitutional issues were also avoided in both *Beinor* and *Watkins*.) While it may have been interpreting the ordinary meaning of the word "lawful" within Colorado's Lawful Activity Statute, § 24-34-402.5, neither Colo. Const. art.

XVIII, § 14 or § 16 would be "lawful" under that definition because of 21 U.S.C. § 844(a). *Coats*, 2013 COA 62 at ¶14.

B. Questions of Statutory Interpretation

i. A Dictionary Substituting for *Watson*

In this case the Court of Appeals relied on a narrow dictionary definition of "lawful" and ignored the actual law in Colorado along with the well-established public policies of the Colorado Lawful Activities Statute and Constitution. *Coats*, 2013 COA 62 at ¶13. Courts should use dictionary definitions "as sources of statutory meaning only with great caution." *United States v. Costello*, 666 F.3d 1040, 1043 (7th Cir. 2012) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)). A mature and developed jurisprudence should "not to make a fortress out of the dictionary." *Id*. "Dictionary definitions are acontextual, whereas the meaning of sentences depends critically on context, including all sorts of background understandings." *Id*. at 1044.

This extremely narrow construction of the statute violates this Court's doctrine that courts should construe remedial statutes broadly. *Watson v. Public Service Co. of Colorado*, 207 P.3d 860, 864 (2008). It also potentially overruled or abrogated this Court's holding in *Watson*. This justifies review by this Court.

The legislature's intent in creating § 24-34-402.5, C.R.S. was to protect the public policy of one's freedom to engage in lawful activities after work without fear of losing one's job. This Court previously recognized it as a remedial statute that should be construed broadly. *Watson*, 207 P.3d 860, 864 (2008). Prior to *Coats*, "any lawful activity" in § 24-34-402.5, C.R.S. was interpreted as "all" legal activity. *Id*. As "one of the broadest of its kind in the United States," Colorado's Lawful Activity Statute prohibits the termination of an employee for engaging in "any lawful activity." Keynen J. Wall, Jr. & Jacqueline Johnson, *Colorado's Lawful Activity Statute: Balancing Employee Privacy and the Rights of Employees*, 35 COLO. LAW. 41, 41 (Dec. 2006).

ii. <u>Medical Marijuana Is Lawful</u>

Colorado's current statutory and constitutional law, (especially citizen-initiated constitutional law), taxation and regulation, as well as supporting legislative materials such as Blue Books and ballot titles provide this Court with clear and ample direction as to this State's policy on marijuana use as lawful. Colo. Const. art. XVIII, § 14(4)(a), (2)(e); § 16(1)(a), (3)(a),(3)(d), (8); C.R.S. § 18-18-406.3(1)(f); Colorado Legislative Council, Research Pub. No. 475-6, An Analysis of 2000 Ballot Proposals 1 (2000). *See also People v. Watkins*, 2012 COA 15, P23 (Colo. App. 2012) (medical marijuana use as lawful); *Beinor,* 262 P.3d 970, 978-

980 (Colo. App. 2011) (Gabriel, J., dissenting).; *Coats,* 2013 COA 62 at ¶ 56 (Colo. App. 2013) (Webb, J., dissenting).

The plain and ordinary meaning of a law requires it to be given an application that does not lead to an absurd result. As Judge Gabriel wrote in his dissent of *Beinor*, "…many patients who are eligible to use medical marijuana would likely abandon their right to do so, because even lawful use at home would put their benefits, and perhaps even their jobs, at risk. I do not believe that the voters who passed the medical marijuana amendment intended section 14(10)(b) to sweep that broadly. Cf. § 24-34-402.5, C.R.S. 2010 (providing that, subject to certain exceptions, it is a discriminatory or unfair employment practice for an employer to terminate the employment of an employee for engaging in lawful activity off the premises of the employer during non-working hours)." *Beinor,* 262 P.3d 970, 980-981 (Colo. App. 2011) (Gabriel, J., dissenting).

iii. No Federal Law Implicitly Incorporated Into State Law

The Court of Appeals also held that state statutes implicitly incorporate federal law absent express language to the contrary. *Coats*, 2013 COA 62 at ¶20. This is a highly questionable conclusion based on principals of statutory interpretation, Tenth Amendment, and preemption law and justifies review by this Court.

When the Colorado legislature intends to define a term with reference to both state and federal law, it does so specifically. *See e.g.* § 18-17-103(6); § 11-60-102; § 25-1.5-103(2)(b.5), C.R.S. Moreover, the suggestion that the Colorado legislature has the ability to write federal law out of state statutes directly undermines the Court of Appeals entire holding. If a state legislature intended to include any other body of law, such as federal law, within a state statute, it would expressly do so. *State v. Cote*, 945 A.2d 412, 421-422 (2008); *Nika v. State*, 198 P.3d 839, 850-851 (2008). Logic and reason agree.

iv. Federal Law is Separate & Distinct from State Law

Congress has legislated extensively in the field of employer-employee relations. See, e.g., 29 U.S.C. § 621 et seq. (Age Discrimination in Employment Act); 42 U.S.C. § 12132 et seq. (Americans with Disabilities Act Title I and Title V); 42 U.S.C. § 2000e et seq. (Title VII of the Civil Rights Act of 1964 and 1991).

Despite this, Colorado chose to create separate and distinct employment laws to define the types of discriminatory and unfair practices it wished to regulate and enforce in this state and codified them under the Colorado Civil Rights Act. There is no federal counterpart to the Colorado Lawful Activities Statute, nor does it have any direct or indirect application of federal law. *See e.g. Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Ore. 2010). These

simple factors were over-looked by the Court of Appeals in interpreting Section 402.5 to include federal law.

While the Court of Appeals argues that it has applied the language of statute as written, it overlooked *who* wrote it. State laws are made by the state legislature, who only as the jurisdiction, and therefore the intent, to govern and control state actions through state agencies. See generally Colo. Const. art. V, § 1.

Since state agencies like the Department of Regulatory Agencies cannot enforce violations of federal law, the Colorado Lawful Activities Statute, § 24-34-402.5, C.R.S., could not incorporate, even implicitly, federal law. *Arizona v. United States*, 132 S.Ct. 2492, 2501 (2012); *State v. Nelson*, 195 P.3d 826 (Mont. 2008); *In re Martin*, 134 U.S. 372, 376 (U.S. 1890); Colo. Const. art. V, § 21. *See also People v. Watkins*, 2012 COA 15, P33 (Colo. Ct. App. 2012).

v. Conclusion

Therefore, if *Watson* is to be upheld, the Court of Appeals decision must be reversed and Colorado laws such as Colo. Const. art. XVIII, § 14 and § 16 must be considered lawful activities under Colorado's Lawful Activities Statute, § 24-34-402.5, C.R.S.

C. Profound Impact on Colorado Citizens

The Court of Appeals decision renders parts of the Colorado constitution and statutory code meaningless, a functional repeal of medical marijuana laws for those patients who are fortunate to be gainfully employed and not absorbing state resources. The right to use medical marijuana is little more than a meaningless academic exercise – mere words on the pages of this State's Constitution. This inconsistency related to separation of powers compels careful scrutiny by this Court.

The majority has sided with employers, stating that "…forbidding a Colorado employer from terminating an employee for federally prohibited off-the-job activity is of sufficient policy import that we cannot infer, from plain statutory language to the contrary and silence in the legislative discussions, the legislative intent to do just that." *Coats*, 2013 COA 62 at ¶19.

But the employee side is just as compelling. Data collected by the Colorado Department for Public Health states that over 120,000 registered patient-employees could be affected by an adverse ruling in an already troubled economy. The average age of a patient is forty-one (41) years old, which means not only that they are contributing members of society, but also likely to be carrying a mortgage and supporting spouses and children. Ninety-four (94%) percent of patients complain

of severe pain, while muscle spasms, like those Mr. Coats experiences, account for the second-most reported condition at nineteen (19%) percent.

Mr. Coats must face the same predicament of hundreds of thousands of Coloradans now face with the Court of Appeals decision - keep taking effective medication recommended by your physician – or risk losing your job.

D. District & Appellate Decisions Suggest this Court's Review Is Needed

In *People v. Watkins*, 2012 COA 15, P23 (Colo. App. 2012), a concurring opinion held that "a patient's medical use of marijuana within the limits set forth in the Amendment is deemed 'lawful' under subsection (4)(a) of the Amendment" (referring to Colo. Const. art. XVIII, § 14).

In *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 976 (Colo. App. 2011), the majority concluded that Colo. Const. art. XVIII, § 14 is expressly limited to protecting patients against criminal prosecution. However, the dissent found art. XVIII, § 14 ambiguous and concluded it conferred limited constitutional rights to lawfully possess and use medical marijuana. *Beinor,* 262 P.3d 970, 978-981 (Colo. App. 2011) (Gabriel, J., dissenting). *See also Beinor*, 2012 Colo. LEXIS 355 (Colo. 2012) (Justices Bender and Marquez indicating they would

grant certiorari on whether art. XVIII § 14 conferred a right to use medical marijuana or merely protection from criminal prosecution).

In this case the district court held that Colo. Const. art. XVIII, § 14 only provides an affirmative defense to a criminal prosecution. But on appeal, the majority abandoned that argument and held that unless otherwise specified, a lawful activity must comply with both state and federal law. *Coats*, 2013 COA 62 at ¶14. The majority published its decision and did not significantly rely on either *Beinor* or *Watkins*. The dissent found that a lawful activity under a state statute is determined by state law, and specifically found that medical marijuana use under art. XVIII, § 14 is lawful. *Coats,* 2013 COA 62 at ¶ 41 (Colo. App. 2013) (Webb, J., dissenting).

CONCLUSION

No higher court can justify, defend, or support what is in this State's Constitution or statutory code, and no other court will protect the hundreds of thousands of sick and disabled medical marijuana patient-employees in this State from unlawful termination. This Court can do both in this case without violating federal law or setting overbroad precedent, and it should do so. For if a seriously disabled patient like Mr. Coats, who was a model employee and law abiding

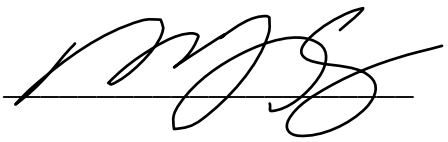
citizen, cannot prevail against a Colorado corporation like DISH Network with these set of facts, it is hard to imagine whom might and under what circumstances.

Because of the specific facts of Mr. Coats' case, the Court could decide this case in a way that would not be setting a blanket policy that Colorado employers could not ever terminate their employees for marijuana use. Instead, consideration should be made for those sick or disabled patient-employees who are in non-hazardous occupations, perform well, and only use medical marijuana in compliance with Colo. Const. art. XVIII, § 14 after work hours, and off company property. Absent a finding of specific and articulable facts by the employer on workplace performance, accommodation, or safety, the mere presence of T.H.C. in the body of a medical marijuana patient-employee should not be the sole basis for a Colorado employer to terminate employment considering Colorado's Lawful Activities Statute, § 24-34-402.5, C.R.S. Colorado employers like DISH Network should be required to respect the laws of the State where they are incorporated.

WHEREFORE, Mr. Coats respectfully requests this Court to grant this Petition for Writ of Certiorari, to recognize his claim as a matter of law, to reverse the dismissal of his claim, to remand the claim to the district court for a trial on all issues so triable, and for any other relief to which Mr. Coats may be entitled to law or in equity.

Dated: July 5, 2013

Respectfully submitted,



Atty. Michael D. Evans, #39407

CERTIFICATE OF SERVICE

I certify that on July 5, 2013, I mailed or ICCES E-Filed a copy of this AMENDED PETITION FOR WRIT OF CERTIORARI to:

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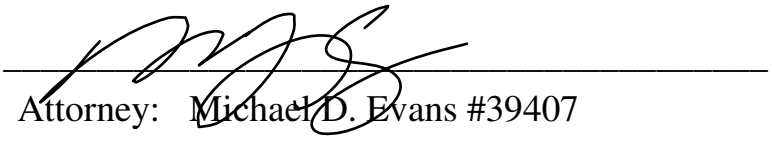

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