APPEAL NO. 05-16132

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES and HATTIE HOPKINS,

Plaintiffs-Appellees,

v.

FEDERAL D. GLOVER, MARK DESAULNIER, JOHN M. GIOIA, MILLIE GREENBERG, JOHN W. SWEETEN, ANNE CAIN, PATTY CHAN, LAURA O'DONAHUE, and GAYLE B. UILKEMA,

Defendants-Appellants.

Appeal from the United States District Court for the United States District Court for the Northern District of California
D.C. No. CV-04-03111-JSW (Honorable Jeffrey S. White)

APPELLEES' PETITION FOR REHEARING EN BANC

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INTRODUCTION

The panel opinion in this case conflicts with the law of the Supreme Court and of this Circuit, and fosters a split among the Circuit Courts of Appeal, thus posing questions of exceptional importance which merit *en banc* review. *See* Fed. R. App. P. 35.

The case arose when Faith Center Church Evangelistic Ministries sought access to a public meeting room intentionally opened by Contra Costa County officials for "meetings, programs, or activities of educational, cultural, or community interest" held by "[n]on-profit and civic organizations, for-profit organizations, schools and governmental organizations." *Faith Center Church v. Glover,* No. 05-16132, slip op. at 11643-44 (9th Cir. Sept. 20, 2006) ("Slip Op."). Although the County properly *allows* "quintessential religious speech" such as a "call to prayer" (*id.* at 11653) and religious "proselytizing" (*id.* at 11660) to occur in the room, it nonetheless insists on *banning* "religious worship" (*id.* at 11661) from its capacious public meeting room.

The panel upheld that ban, treating "religious worship" as a distinct category of speech that did not convey any viewpoint about subject matter that is within the very broad purposes of the forum. The panel's novel precedent merits *en banc* review because it:

I. violates the First Amendment standard that the government cannot exclude religious speech from a public meeting room by labeling the speech as "mere worship";

II. relies upon the false premise that "pure religious worship" inherently cannot communicate a viewpoint on issues such as morality or human nature;

III. analyzed only the label that was applied to private religious speech, rather than properly analyzing the substance of Faith Center's First Amendment expression;

IV. categorized a large public meeting room that is broadly available to the community for almost unlimited purposes as a "limited public forum" that is nonetheless "nonpublic" and subject only to the "reasonableness" test; and

V. disregarded Faith Center's other constitutional claims that would have upheld its right to access the meeting rooms.

The panel therefore put this Court into conflict with Supreme Court authority and has created a split with its sister Circuit Courts of Appeal. *En banc* review is necessary to remedy these conflicts.

ARGUMENT

I. THE GOVERNMENT CANNOT EXCLUDE PRIVATE RELIGIOUS SPEECH FROM A PUBLIC MEETING ROOM BY LABELING IT "PURE RELIGIOUS WORSHIP."

The panel admitted that it is "difficult to imagine . . . that religious worship could ever truly be divorced from moral instruction or character development,"

(Slip Op. at 11655 n.14), but nonetheless saw worship as a "category of discussion" that the government may suppress within a limited public forum, even when other private religious speech is allowed. *Id.* at 11655. This impermissible parsing conflicts with binding authority and wrongly suppresses Faith Center's protected speech.

Over fifty years ago the Supreme Court held that federal courts are not competent to discern whether a minister's private speech was secular or religious. *See Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953). That rule was recently applied in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). There, a Christian youth club sought access to public school rooms to sing, hold Bible lessons, and memorize Bible verses. *Id.* at 103. By policy, the school made the rooms available to the public for instruction in any branch of education, learning or the arts, and for social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community which were open to the general public. *Id.* at 102. However, the policy prohibited use "by any individual or organization for religious purposes." *Id.* at 103.

The defendant school denied the Christians access to its rooms, arguing that the proposed meetings were "the equivalent of religious worship" and thus outside the purposes of the forum. *Id.* at 103-04. The Christians ultimately prevailed when the Supreme Court held that the school's policy discriminated on the basis of

viewpoint. *Id.* at 112.

The panel erred by adopting the dissent's view of *Good News Club*, i.e. that the Club's activities were akin to "an evangelical service of worship," and thus outside the forum's purpose. *Id.* at 138 (Souter, J., dissenting). But the correct understanding of *Good News Club* is that the government cannot parse private religious speech to discern when it is "worship" or when it is not. *Id.* at 111.

Good News Club was presaged by *Widmar v. Vincent*, 454 U.S. 263 (1981), where the Court rejected a "distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious 'speech acts' . . . constituting 'worship.'" *Id.* at 269 n.6. Trying to distinguish between religious worship and religious speech has no "intelligible content" and no "relevance" to the constitutional issue. *Id.* And "even if the distinction drew an arguably principled line," the Court explained, "it is highly doubtful that it would lie within the judicial competence to administer." *Id.* (emphasis added). More bluntly, the County's alleged constitutional difference between religious speech and religious worship "lacks a foundation in either the Constitution or in our cases, and that . . . is judicially unmanageable." *Id.* at 272.

To be sure, in the government speech context courts may distinguish between religious speech *qua* religious speech and speech *about* religion. Unfortunately, the panel extrapolated that proposition into the improper rule that a

court is competent to identify when private religious speech is transmuted into "mere worship." Slip Op. at 11659 (citing *Widmar* at 126 n.3 (Scalia, J., concurring)).

The panel expanded Justice Scalia's comment far beyond the bounds[1] of established constitutional jurisprudence which leads to absurd results. Consider the Christians who are permitted to read Scripture in this public meeting place, yet cannot "worship." What, then, if they read *Psalms* 95:6-7: "Come, let us bow down in worship before the Lord our Maker; for he is our God and we are the people of his pasture, the flock under his care."? Is the government official who chances to overhear those words to assume that it is permissible Scripture reading, or should he conclude that it is forbidden "worship" and eject the Christians from the public meeting room?

Perhaps such absurd results explain why the Supreme Court has never held that federal courts are competent to say when one form of private religious speech, such as preaching, teaching, or singing, becomes "mere worship." Instead, *Widmar*, *Good News Club*, and *Fowler* teach that the courts lack authority to parse one form of private religious speech from another.

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[1] However, the limited reach of footnote 3 is made clear by the quote taken from *School District of Abington Township v. Schempp*, 374 U.S. 290, 293-94 (1951): "State schools in their official capacity may not teach religion but may teach about religion."

II. THE PANEL'S CONCLUSION THAT "MERE WORSHIP" CANNOT COMMUNICATE ANY VIEWPOINT CONFLICTS WITH SUPREME COURT AUTHORITY.

The panel "disagree[d] that prohibiting worship services in the Antioch Library meeting room constitutes viewpoint discrimination." Slip Op. at 11652. In essence, the panel conceives of "mere" or "pure" worship and conjectures that, by its very nature, such speech cannot communicate any views regarding morality, human character, or any other subject matter.

The panel erred because to "worship" inherently communicates a viewpoint about the object of worship. "Worship" is defined as (1) "reverence offered a divine being or supernatural power; *also* an act of expressing such reverence;" (2) "a form of religious practice with its creed and ritual;" and (3) "extravagant respect or admiration for or devotion to an object of esteem <~ of the dollar>." *Webster's New Collegiate Dictionary* 1352 (1974). Fundamentally, all worship expresses the viewpoint that its object – whether religious (e.g. God) or secular (e.g. money) – is deserving of admiration and reverence. Thus, whatever "mere" worship may be, it would still send a collateral message regarding the object of the worship.[2]

[2] To the extent that the panel conceives of "worship" as uniquely religious, it errs. Examples abound of other groups – some nominally religious; others wholly secular – that identify themselves via rituals akin to worship: the Boy Scouts' Oath, fraternity and sorority pledges, and even the Pledge of Allegiance are analogs to "worship" that present views about the group's purpose, goals, and values.

When the appellate court in *Good News Club* evaluated religious speech by which children would "cultivate their relationship with God through Jesus Christ," it concluded that excluding such "quintessentially religious" speech was not a viewpoint on a subject within a forum which permitted discussions of morality and character development.

The Supreme Court reversed, firmly disagreeing that "something that is 'quintessentially religious' [i.e. worship] . . . cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." *Good News Club*, 533 U.S. at 111 (citing *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 512 (2d Cir. 2000) (Jacobs, J., dissenting) ("[W]hen the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters")).

Had the panel found viewpoint discrimination, it would have reached the correct result and permitted Faith Center to access the public meeting room—and avoided conflict with Supreme Court authority.

III. THE PANEL FAILED TO ANALYZE THE SUBSTANCE OF FAITH CENTER'S EVENT, AS REQUIRED BY *GOOD NEWS CLUB*.

Footnote 4 of *Good News Club* leads us to the third point, that for constitutional purposes, "what matters is the substance of the Club's activities." *Id.* at 112 n.4. *Good News Club* requires courts to look into the *substance* of the speaker's activities to determine if it touches on a subject matter permissible within

the forum. *Id.* at 112 n.4; *accord Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 331 F.3d 342, 354 (2d Cir. 2003) (despite characterizing church's activity as a "weekly worship service," the court evaluated the substance of the services and found them indistinguishable from those in *Good News Club*).

The panel completely ignored the substance of Faith Center's event, focusing myopically on the word "worship" in a flyer announcing the day's schedule. Slip Op. at 11635. Had it examined the substance, the panel would have recognized that Faith Center's worship was of the same character as the religious activities in *Bronx Household*, *Widmar*, and *Good News Club* and not placed this Court in conflict with those authorities.[3]

For over fifty years the Supreme Court has rejected government attempts to censor religious speech based on mere labels. Consider *Fowler*, where a city barred "religious meeting[s]" in a public park, (345 U.S. at 67), but in practice the city would allow "church services." *Id.* at 68. The city arrested the leader of a Jehovah's Witnesses group because he only gave an "address," which in the city's eyes was an impermissible "religious meeting" rather than a permissible church

[3] The "praise and worship" program here included a sermon. Slip Op. at 11635. In *Bronx Household*, the court distinguished preaching from such "quintessentially religious" elements such as prayer, singing hymns, and communion. 331 F.3d at 354. Of course, there is "endless" variety in the topics covered in sermons. Slip Op. at 11683-84 (Tallman, J., dissenting).

service. The Court rejected that self-serving sophistry:

> Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. . . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Id. at 70. In the same way, neither the library officials nor the panel are competent to classify Pastor Hopkins's religious speech as "worship" and subject her to the exclusionary regulation.

The panel doggedly insisted that these constitutional flaws would be absolved by Faith Center's self disclosure of "worship" and further insisted that the Plaintiffs conceded that "mere worship" was segregable from other religious speech, based upon a brief exchange at the preliminary injunction hearing:

> [Counsel for the County]: I have to take issue a little bit with the characterization that it is defendants who have characterized what Faith Center is doing as worship. Faith Center has characterized it that way, your honor.
>
> The Court: I know. They are making the argument <u>even assuming it's worship</u>. That gets into a set of new questions.
> ***
> The Court: What is your bottom line? Is your bottom line then the Court cannot issue any injunction which has the effect of precluding, as you would call it, mere worship in the library rooms?
>
> [Counsel for Faith Center]: That's right, your honor.

Slip Op. at 11638 n.6 (emphasis added).

The panel erred because it relied on a very heavily redacted quote. Counsel's full answer was: "That's right, Your Honor. An injunction – an injunction should not be crafted as to make a distinction between religious speech activities because this distinction is what the *Widmar* Court rejected as impossible to determine and incompetent for the government and courts to attempt to do." (Excerpts of Record ("ER") 109 lns. 9-14) (emphasis added). Faith Center did not concede that it was engaging in "mere worship" devoid of any other meaning. Indeed, counsel thrice stated that it was impossible to parse out religious worship in this way (ER 69-70; 109, 119). The panel's reliance on this heavily redacted quote is yet another error that led it into conflict with binding authority.

In any event, Faith Center's application spoke of more than "mere worship;" it explicitly stated that the entire meeting purposed to teach and encourage Christian salvation and build up community. (ER 33). Each of these characteristics would entail speech within the forum's purposes. To the extent that worship was a component of the meeting, it served these overarching purposes and cannot be segregated as some form of "pure" worship that was so heavenly that it had no earthly viewpoint to communicate.

Moreover, self-disclosure imposes the risk of chilling First Amendment speech through self-censorship. *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1134-1135 (9th Cir. 2004); *accord Ariz. Right to Life Political Action*

Comm. v. Bayless, 320 F.3d 1002, 1006 (9th Cir. 2003) (self-censorship comprises a constitutional injury); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) (constitutional injury if vague laws force speaker to "hedge and trim" his speech to avoid enforcement). Indeed, forcing a religious group to self-censor "worship" as a condition of access cuts to the very identity of the group:

> The assembly of those bound by common beliefs and observances not only serves to create a sense of community among the members through the shared expression of their beliefs, it also communicates to outsiders the church's identity as a group devoted to a common ideal. By group worship, each worshipper communicates to outsiders the identity of the group and his own identity as a member of it, a form of self-expression.

Islamic Ctr. of Miss., Inc. v. City of Starkville, 840 F.2d 293, 300 (5th Cir. 1988). The panel's reliance on labels and failure to consider the substance of Faith Center's activities leaves it in clear conflict with the foregoing authorities and merits review *en banc*.

IV. THE PANEL MISCHARACTERIZED THE FORUM IN CONFLICT WITH SEVERAL SISTER CIRCUITS' HOLDINGS.

The County explicitly purposed "to invite the community at large to participate in the use of the meeting room for expressive activity." Slip Op. at 11644.[4] The only relevant restrictions were (1) schools could not use the room

[4] Banning worshipers from the library actually runs contrary to this purpose, and the lack of fit between purpose and policy is sound grounds to strike the policy. *See Ballen v. City of Redmond*, Nos. 04-35606, 04-35758, 2006 WL 2640537 at *5 (9th Cir. Sept. 15, 2006) (striking down ordinance that does not provide a reasonable fit between the restriction and the goal).

"for instructional purposes as a regular part of the curriculum; and (2) the room could not be used for "religious services." *Id.* at 11645.[5] In holding that the meeting room is a limited public forum, the panel created conflict with other circuits and again improperly justified the suppression of protected religious speech.

First, the panel stated that "[r]equiring prior permission for access to forum demonstrates that a public forum has not been created by designation." *Id.* at 11645. But this is only true if permission is not granted as a matter of course. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). Here, many diverse organizations used the meeting room[6] and the only indication that anyone other than Faith Center was denied access was the County's understanding" that political campaign meetings were "precluded by statute" – but not by the policy itself.[7] (ER 99 lns. 19-23).

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[5] The imposition of a fee on some groups applies only to meetings not opened to the public (ER 35) and is irrelevant to the access sought by Faith Center.

[6] Antioch meeting room users included the Sierra Club, Narcotics Anonymous, and a Democratic Club (Supp. ER 7-8, 11). Other libraries subject to the county policy hosted the Walden Park HOA (Supp. ER 4); the Girl Scouts (Supp. ER 6); Moraga Historical Society, Bucks & Ducks, Jewish Family & Children's Services, Moragans for Housing Options, IPMS Plastic Modelers, and the Concord Art Association (Supp. ER 9-15).

[7] This wobbly, inadmissible evidence undermines the panel's reliance upon the library consistently enforcing its restrictions. Slip Op. at 11645. "Consistency of

Secondly, the panel treated the few, narrow limits on speech in the meeting room as dispositive of the forum's nature. However,

> it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.

New York Magazine v. Metro. Transp. Auth., 136 F.3d 123, 129-130 (2d Cir. 1998) (emphasis added). The danger highlighted in *New York Magazine* is incarnate in the County's anti-worship policy that was used to transmute this classic designated public forum into a "limited" forum.

The panel then argues that because a library is "quintessentially a place dedicated to quiet, to knowledge, and to beauty," then this large meeting room (estimated to hold 110 people (ER 98 lns. 22-24)) is not a designated public forum. That ignores the fact that the public meeting room is not coterminous with the library's reading area and stacks, but rather adjoins the staff break room (ER 41 ¶ 5) where devotion to quiet is certainly less of a concern. It also ignores the undisputed fact that excessive noise was not an issue for the County. Slip Op. at 11635 n.1. In short, this rationale is self-contradicting.

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enforcement" says less about who was excluded than it shows that the County consistently *allowed* diverse groups to use its meeting rooms.

Most importantly, the panel's holding flatly contradicts *Concerned Women for America, Inc. v. Lafayette County*, where the Fifth Circuit held that an auditorium in a library was a designated public forum. 883 F.2d 32, 34 (5th Cir. 1989). The panel "distinguished" our case from *Concerned Women* by pointing out that Antioch Library named its facility a "meeting room" rather than an "auditorium" (Slip Op. at 11657 n.16), as if that were a difference of constitutional moment.

The decision is also in tension with *Hopper v. City of Pasco*, where the walls of a city hall building became a designated forum when officials opened them for the unique purpose of "provid[ing] a venue for artists to display their work." 241 F.3d 1067, 1073 (9th Cir. 2001). Even where there was an unusual facility (city hall walls) made available to only one type of passive expression, this Court held that the city had opened a designated forum subject to strict scrutiny. *Id.*

The panel's analysis also conflicts with *Church on the Rock v. City of Albuquerque,* 84 F.3d 1273, 1278 (10th Cir. 1996). There, a designated forum was found where speakers had to be of a certain age or older and all the meetings and presentations were limited to topics of interest to senior citizens. *Id.*

In our case, the only relevant restriction other than the worship ban is that schools cannot use the room "for instructional purposes as a regular part of the curriculum." Slip Op. at 11645. But, the government may not "pick and choose to

whom it grants access for purposes of expressive activity simply by framing its access policy to carve out even minute slices of speech which, for one reason or another, it finds objectionable." *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1378 (3d Cir. 1990). Yet this is precisely what the County is doing by carving out a narrow slice of speech to justify excluding Faith Center.

The panel's conclusion is at odds with a number of other circuit court decisions as well. *See, e.g., Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991) (school district created a designated public forum by opening its facilities for educational program, cultural events, and meetings by community, civic and service organizations, government agencies); *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 704 (4th Cir. 1994) (school district created a designated public forum by opening its facilities for meetings by cultural, civic, educational, religious and private groups). Given the glut of authority with which the panel's decision conflicts, *en banc* review is necessary.

V. THE PANEL DECISION IGNORED FAITH CENTER'S OTHER CONSTITUTIONAL CLAIMS AND, BY OVERTURNING THE PRELIMINARY INJUNCTION, SUBJECTS FAITH CENTER TO ONGOING IRREPARABLE HARM.

The panel paid no heed to Faith Center's other claims which reinforce the likelihood of success and would be additional support to maintain the preliminary injunction, particularly in light of its targeted impact on religious conduct.

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be *Hamlet* without the prince.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (emphasis in original) (internal citations omitted). Thus, a "law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). The County insists that "[o]nly religious groups engage in worship" (ER 91 lns. 14-15) and so cannot escape the conclusion that its worship ban targets religiously motivated conduct. This is not a "rare case" that can survive scrutiny, and the panel's refusal to consider the claim put Faith Center back where it was two years ago—suffering irreparable harm from the infringement of its First Amendment rights.

The panel used only a reasonableness test, entirely disregarding the Free Exercise Clause. Nothing in the panel's analysis even suggests that the County would have a compelling interest in banning worship and it would surely fail strict scrutiny.

Additionally, the panel ignored the Establishment Clause prohibition on the government imposing regulations which have a primary effect of inhibiting

religion, which would also have led the panel to a correct decision to affirm the temporary injunctive relief. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

Similarly, the Equal Protection Clause requires strict scrutiny of a government classification between similarly-situated groups "when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Faith Center is similarly-situated with the other groups that use the meeting room because it discusses educational, cultural, and community issues – which is the express purpose of the forum. (Slip Op. 11634). But because Faith Center chooses to address these topics from a religious perspective that incorporates worship, it is selectively excluded from the forum. This distinction is subject to strict scrutiny.

In closing, we note that there is absolutely no merit to the County's argument that it has a compelling interest in excluding religious worship services to avoid a violation of the Establishment Clause. Excluding "religious groups from a forum otherwise open to all would demonstrate government hostility to religion rather than neutrality contemplated by the Establishment Clause. *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993).

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In sum, the panel failed to reach several causes of action that would have independently justified the lower court's temporary injunction and protected Faith Center from further injury to its First Amendment interests.

CONCLUSION

Rehearing en banc is necessary to comply with Supreme Court precedent, secure the uniformity of this Court's decisions, and to avoid fostering a circuit split.

Dated: October 2, 2006

Respectfully submitted,

Timothy D. Chandler, Esq.
Attorney for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 35-4

I certify that pursuant to Circuit Rule 35-4, the attached petition for rehearing en banc is proportionally spaced, has a typeface of 14 point or more and contains 4,191 words.

Dated: October 2, 2006

Timothy D. Chandler, Esq.
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellees' Petition for Rehearing En Banc was this day served upon:

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by placing the documents in sealed UPS Express boxes and affixing a pre-paid airbills addressed as set forth above, and causing the boxes to be delivered to a UPS agent for next day delivery.

Folsom, CA this 2nd day of October, 2006.

Michele L. Magnaghi
MICHELE L. MAGNAGHI
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