No. 13-1559

In the Supreme Court of the United States

JOHN B. CORR; JOHN W. GRIGSBY, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN HIGHWAY USERS ALLIANCE, RECREATION VEHICLE INDUSTRY ASSOCIATION, INC., AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, as the United States implicitly conceded below, MWAA exercises sufficient federal power to mandate separation-of-powers scrutiny for purposes of a suit seeking injunctive relief and invoking the Little Tucker Act to seek monetary relief.

2. Whether the Transfer Act violates the separation of powers, including the Executive Vesting, Appointments, and Take Care Clauses of Article II, by depriving the President of control over MWAA, an entity exercising—as the United States admits—Executive Branch functions pursuant to federal law.

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INTEREST OF AMICI CURIAE[1]

The American Highway Users Alliance ("AHUA") is a non-profit coalition encompassing a diverse range of businesses who operate fleets of vehicles, including trucking, bus, RV, and motorcycling associations. AHUA members represent millions of highway users who pay the fuel taxes, tolls, and other fees and taxes that fund America's highways. AHUA supports robust highway and bridge

[1] No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the brief. Petitioners and respondent consented to the filing of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of the *amici*'s intent to file this brief at least 10 days prior to the due date for *amicus curiae* briefs.

investments at all levels of government to keep America moving safely and efficiently.

AHUA supports the levy of user-fees and user-taxes to pay for roads and bridges. By the same token, AHUA believes those who are taxed and tolled deserve to have their contributions invested directly back into the roads they drive on. AHUA therefore strongly opposes diversion of tolls and other user-taxes. This case—addressing the unaccountable, insulated authority of the Metropolitan Washington Airports Authority ("MWAA") to raise tolls on Dulles Toll Road users by $2.8 billion to cover the costs of the Silver Line Metrorail project—is the most egregious example of highway robbery AHUA has ever seen. Not only are the toll increases diverted from the highway itself, but Dulles Toll Road users are held hostage to these escalating tolls with no ability to influence the rates through the political process. That is a textbook violation of the separation of powers which calls out for this Court's review.

The Recreation Vehicle Industry Association, Inc. ("RVIA") is the national trade association that represents the manufacturers of family camping vehicles, including motorhomes, travel trailers, fifth wheel trailers and truck campers (collectively known as "RVs"), along with component part suppliers. RVIA's members cumulatively manufactured approximately 321,100 units in 2013 (the most recent full year for which statistics are available), representing about 98 percent of all RVs produced in the United States.

RVIA is headquartered at 1896 Preston White Drive in Reston, Virginia. The majority of its

employees use the Dulles Toll Road on a daily basis for commuting to work. Moreover, millions of RVs are owned and used by American consumers on the nation's highways. Given the status held by the Washington, DC metropolitan area as a major tourist destination, these RV owners also frequently utilize the Dulles Toll Road. RVIA's employees and the consumers of the RV products made by its members have all been burdened by the steep and unprecedented increases in toll amounts on this vital road.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case centrally concerns Cato because checks-and-balances protect liberty in our constitutional scheme. MWAA's $2.8 billion toll hike on Dulles Toll Road users—who have no political recourse to challenge these charges, or the diversion of funds thus raised to an unrelated project—is a paradigmatic example of unaccountable and thus unchecked government power.

ARGUMENT

I. THE PETITION RAISES CRITICAL SEPARATION-OF-POWERS ISSUES.

This case involves a federally-created entity—the Metropolitan Washington Airports Authority or "MWAA"—which wields federal authority over the "largest and one of the most complex transportation projects in the United States."[2] Despite the fact that MWAA controls what the Deputy Secretary of the U.S. Department of Transportation has called "vitally important Federal assets,"[3] Congress expressly divested the President of any means of controlling MWAA. *See* 49 U.S.C. § 49106(a)(2) (providing that MWAA "shall be … independent of … the United States Government"). That brazen separation-of-powers violation alone merits this Court's review. "[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital

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[2] *See* http://www.wmata.com/about_metro/news/PressReleaseDetail.cfm?ReleaseID=5749 (July 25, 2014 Washington Metropolitan Area Transit Authority press release announcing that "[t]he combined phases of the Silver Line make it the largest and one of the most complex transportation projects in the United States") (last visited Sept. 18, 2014).

[3] The Deputy Secretary's comments appear in a letter attached to a USDOT Inspector General Report ("IG Report") on MWAA. *See* U.S. Dep't of Transp., Office of the Inspector General, Report No. AV-2013-006, *MWAA's Weak Policies and Procedures Have Led to Questionable Procurement Practices, Mismanagement, and a Lack of Overall Accountability* (Nov. 1, 2012), at 50, *available at* https://www.oig.dot.gov/sites/default/files/MWAA%20Final%20Report%2010-31-012_FINAL_signed_508_rev%2012-3-12.pdf. The IG Report and the Deputy Secretary's letter are discussed, *infra*, in parts II and III.B.

functions of this Court.'" *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring in judgment) (quoting *Public Citizen v. Dep't of Justice,* 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment)). This Court has emphasized that it must assiduously correct violations of the Constitution's "checks and balances," which the Framers crafted as "the foundation of a structure of a government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

The separation-of-powers violation presented here is not, as is often the case, "mask[ed] under complicated and indirect measures." *Metro. Wash. Airport Auth. v. Citizens for the Abatement of Airport Noise, Inc.*, 501 U.S. 252, 277 (1991) ("*CAAN I*") (quoting THE FEDERALIST No. 48, at 334 (J. Cooke ed. 1961) (Madison)). Rather, the transgression is open and obvious: Congress has transferred power over the Nation's only two federally-owned airports to an ostensible interstate compact entity—including authority to levy billions in fees to support an ancillary metrorail project—while expressly insulating that entity from accountability to the President. *See* 49 U.S.C. § 49106(a)(2) (providing that MWAA "shall be … independent of Virginia and its local governments, the District of Columbia, and the United States Government"). Thus, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

As "[i]t is not every day that [the Court] encounter[s] a proper case or controversy requiring interpretation of the Constitution's structural provisions," the Court should therefore "take every

opportunity to affirm the primacy of the Constitution's enduring principles over the politics of the moment." *Noel Canning*, 134 S. Ct. at 2617 (Scalia, J., concurring in judgment). The petition in this case presents a golden opportunity to do just that.

Moreover, this case comes as no stranger to the Court. This Court has already condemned the separation-of-powers violation presented by a previous configuration of the same entity. *See CAAN I*, 501 U.S. at 275-77 (concluding that the MWAA's "Board of Review" constituted an "impermissible encroachment" on separation of powers). And, following remand from this Court in *CAAN I*, the D.C. Circuit invalidated a subsequent re-structuring of the MWAA on the same grounds. *See Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97, 105 (D.C. Cir. 1994) ("*CAAN II*") (concluding that the re-structured Board of Review "ha[s] not satisfied the concerns expressed [by this Court] in *CAAN [I]*"). Now, a third time up to bat, Congress has made the separation-of-powers problem *worse* by eliminating the Board of Review and thus further insulating MWAA's extensive exercise of federal authority from any meaningful political accountability.

Finally, while this Court typically does not wait for a split of authority before addressing separation-of-powers issues (as exemplified by its decision in *CAAN I*), the Federal Circuit's decision conflicts with this Court's separation-of-powers analysis in *CAAN I*, as well as with the D.C. Circuit's analysis in *CAAN II*. *See* Pet. at 16 (Federal Circuit's holding that MWAA was "immunized … from separation-of-powers scrutiny … squarely conflicts

with this Court's decision in *CAAN* in multiple respects"); *CAAN II* at 100-05 (following this Court's analysis in *CAAN I* and concluding that re-structured MWAA Board of Review "exercises [federal] power in violation of the doctrine of separation of powers").

II. THIS CASE SHOWS THE PRACTICAL IMPACTS OF IGNORING THE CONSTITUTION'S STRUCTURAL SAFEGUARDS.

The separation-of-powers violation in this case has already inflicted concrete and extensive harms on individuals. *See, e.g., Bond v. United* States, 131 S. Ct. 2355, 2365 (2011) (observing that "the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances"). Moreover, a USDOT report (discussed further below) has found that MWAA's management of the vital federal properties entrusted to its care has been marred by "questionable procurement practices, mismanagement, and a lack of overall accountability." This case highlights both of these unfortunate, yet predictable, consequences of overstepping the Constitution's structural guarantees that help ensure both individual liberty and political accountability.

Since taking over operations of the Dulles Toll Road in 2005, MWAA has steadily increased exactions on Toll Road drivers to pay for the Silver Line Metrorail expansion, "which those drivers are obviously not using, and may never use." Pet. at 8. MWAA has committed Toll Road users to pay at least $2.8 billion of the project's expected $5.7 billion cost through increased tolls, making them by far the

project's largest source of funds.[4] The *Washington Post* has reported that Toll Road commuters are "vulnerable" to cost increases because "tolls are the one share of the Silver Line project's funding formula that is not capped at a fixed dollar amount or percentage of the final tab."[5] Of course, Toll Road users are "vulnerable" to unchecked increases because those users alone have no political representation among relevant decision-makers.

The petition in this case states that, since 2005, "MWAA has more than tripled its exactions from Toll Road drivers in order to pay for the Metrorail." Pet. at 8. That actually *understates* the increases MWAA has imposed on Toll Road users. As of 2014, MWAA has hiked tolls by a staggering 466%.[6] This has inflated the average commuter's monthly cost from $50 to $140, creating real burdens on many Toll Road users, reducing Toll Road usage, and exacerbating congestion on nearby roadways.[7] Toll

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[4] *See* Dulles Corridor Metrorail Project, *Frequently Asked Questions,* available at http://www.dullesmetro.com/info/faqs.cfm.html#3 (last visited Sept. 18, 2014); Pet. at 8-9.

[5] *See* Lori Aratani and Mary Pat Flaherty, *Dulles Toll Road Users Shoulder an Increasing Share of Silver Line's Costs*, Washington Post, July 12, 2014, *available at* http://www.washingtonpost.com/local/trafficandcommuting/dulles-toll-road-users-shoulder-an-increasing-share-of-silver-lines-costs/2014/07/12/efa84a6a-09e6-11e4-a0dd-f2b22a257353_story.html?hpid=z3 (last visited Sept. 18, 2014).

[6] *See, e.g.,* http://www.metwashairports.com/tollroad/4519.htm (listing Main Toll Plaza increases from $0.75 in 2005 to $2.50 in 2014) (last visited Sept. 18, 2014).

[7] *See* Lori Aratani, *Higher Tolls Pushing Many Off the Dulles Toll Road*, Washington Post, May 31, 2014, *available at*

Road users, of course, have no political recourse because no one elected official, much less the President, is accountable for MWAA's actions.

Moreover, MWAA's insulation from political accountability appears to have led to predictable mismanagement, corruption, and self-dealing. The title of a November 2012 report by the USDOT Inspector General ("IG Report") says it all: "MWAA's Weak Policies and Procedures Have Led to Questionable Procurement Practices, Mismanagement, and a Lack of Overall Accountability."[8] The Report cautions that, "[a]s an independent public body subject to few Federal and State laws, MWAA must rely on the strength of its policies and processes to ensure credibility in its management of two of the Nation's largest airports and a multibillion-dollar public transit construction project." IG Report at 38. Nonetheless, the Report bluntly concludes that "MWAA's ambiguous policies and ineffectual controls have put these assets and millions of Federal dollars at significant risk of fraud, waste, and abuse and have helped create a culture that prioritizes personal agendas over the best interests of the Authority." *Id.*[9] Unsurprisingly,

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http://www.washingtonpost.com/local/trafficandcommuting/higher-tolls-pushing-many-off-the-dulles-toll-road/2014/05/31/e3dd933c-e11b-11e3-810f-764fe508b82d_story.html (last visited Sept. 18, 2014).

[8] *See* IG Report, *supra* note 3; *see also id.* at 4 (finding that "MWAA's policies and processes have not ensured accountability and transparency for activities conducted by its Board of Directors").

[9] In October 2012, the Deputy Secretary of Transportation responded to a draft version of the IG Report with similar

a 2014 statute grants the USDOT Inspector General oversight over MWAA, including the authority "to audit and investigate MWAA" and "to observe closed executive sessions of the MWAA Board of Directors." Consolidated Appropriations Act of 2014, Div. L, Title III, Pub. L. No. 113-76, 128 Stat. 600.

III. MWAA EXERCISES FEDERAL POWER FOR FEDERAL PURPOSES.

As the petition correctly explains, the Federal Circuit erred by concluding that MWAA "is not a federal instrumentality for the purpose of Petitioners' claims," based primarily on the *absence* of federal control over MWAA. Pet. App. 24-25. The Federal Circuit's circular reasoning contradicted this Court's separation-of-powers analysis in *CAAN I*, and was subsequently undermined by the United States' *amicus curiae* brief following transfer to the Fourth Circuit. *See generally* Pet. at 18 (explaining that, with the exception of congressional members on the Board of Review, "all of the factors that led this Court [in *CAAN I*] to conclude that the Board of Review exercised federal power apply with equal force to MWAA here"); *id.* at 18-19 (explaining that the United States' *amicus curiae* arguments in the

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condemnations. (The letter is included as an Appendix to the report at pages 48-50). For instance, the Deputy Secretary characterized the draft report as uncovering "numerous ethical and fiscal lapses, including the frequent award of contracts without free and open competition, cases of nepotism, and instances where employees accepted favors and gifts in the ordinary course of business. *This pattern of conduct is simply unacceptable for a public body entrusted with the management and operation of important Federal assets*. This way of doing business cannot continue." IG Report at 48 (emphasis added).

Fourth Circuit "confirmed that MWAA exercises *federal* power for purposes of petitioners' separation-of-powers claim").

Here, *amicus* provides additional considerations that demonstrate that MWAA exercises federal power for federal purposes.

A. Congress drives MWAA, not Virginia or D.C.

The Federal Circuit reasoned that, "though it may partly owe its existence to an Act of Congress," MWAA nonetheless "was in large part created by, and exercises the authority of, Virginia and the District of Columbia." Pet. App. 23. The court was mistaken. Whereas MWAA may superficially take the form of an interstate compact entity, in actual substance MWAA exercises federal power over federal property pursuant to federal law.

Congress's own actions with respect to MWAA loudly contradict the notion that MWAA exercises state authority:

- In 1986, Congress created MWAA, its Board of Review, and its Board of Directors. Virginia and D.C. amended their acts accordingly.[10]

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[10] Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, Title VI, 110 Stat. 3341-376. Specifically, section 607(c)—codified at 49 U.S.C. § 49106(b) and reprinted at Pet. App. 75—"authorized" MWAA to "acquire, maintain, improve, operate, protect, and promote the Metropolitan Washington Airports for public purposes," "to issue bonds," "to acquire real and personal property," and "to levy fees or other charges." Section 607(e) created a Board of Directors comprised of 11 members, 5 appointed by the Virginia Governor, 3 by the D.C. Mayor, 2 by the Maryland Governor, and 1 by the President.

- In 1991, Congress responded to this Court's decision in *CAAN I* by altering the membership and powers of MWAA's Board of Review.[11]
- In 1996, Congress responded to the D.C. Circuit's invalidation of the re-structured Board of Review in *CAAN II* by abolishing that board and increasing the number of presidential appointments to MWAA's Board of Directors. Virginia and D.C. followed suit.[12]
- In 1998, Congress directed National Airport to be renamed Ronald Reagan Washington National Airport.[13]
- In 2011, Congress made further changes to the composition of MWAA's Board of Directors. Virginia and D.C. thereafter conformed.[14]
- In 2014, Congress subjected MWAA to oversight of the DOT Inspector General.[15]

Section 607(f) created a Board of Review composed of members of Congress and disabled the Board of Directors from performing certain functions if the Board of Review was invalidated. Finally, Virginia and D.C. amended their interstate compact to provide for the Board of Review. *See* 1987 Va. Acts ch. 665; 1987 D.C. Law 7-18.

[11] Metropolitan Washington Airports Amendments of 1991, Pub. L. No. 102-240, Title VII, 105 Stat. 2197.

[12] Metropolitan Washington Airports Amendments of 1996, Pub. L. No. 104-264, Title IX, 110 Stat. 3274; 1997 Va. Acts ch. 661; D.C. Law 12-8.

[13] Pub. L. No. 105-154, 112 Stat. 3.

[14] Pub. L. No. 112-55, Section 191, 125 Stat. 671; 2012 Va. Acts ch. 549; D.C. Law 19-222.

The last item in that list, the 2014 oversight legislation, poses the issue most starkly. To put it mildly, this is not the way Congress would treat an interstate compact entity exercising state authority. Either that 2014 legislation is a permissible exercise of Congress's power to regulate a federal entity (in which case MWAA must necessarily violate the separation of powers, *see* Pet. 20-25), *or* the 2014 legislation intrudes upon the internal governance of a state-created entity (in which case the legislation must necessarily violate the Tenth Amendment). *See, e.g., New York v. United States*, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."). It is not difficult to see the right answer: Congress ordered MWAA to submit to federal oversight because MWAA exercises federal authority that needs overseeing—and MWAA has not challenged Congress's authority to do so.

In sum, contrary to the Federal Circuit's conclusion, Congress's consistent treatment of MWAA does not paint a picture of an entity that "exercises the authority of … Virginia and the District of Columbia." Pet. App. 23. To the contrary, when it comes to MWAA, Congress is firmly in the driver's seat; Virginia and D.C. are merely along for

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[15] Consolidated Appropriations Act of 2014, Div. L, Title III, Pub. L. No. 113-76, 128 Stat. 600.

the ride, but the politically helpless users of the Dulles Toll Road are saddled with the bill.

B. The Executive treats MWAA like a federal agency.

Additionally, the Executive Branch's actions with respect to MWAA also confirm that MWAA exercises federal, not state, authority.

First, following this Court's *CAAN I* decision, the Department of Justice took a litigation position that essentially confirms the petitioners' arguments here. After this Court invalidated MWAA's Board of Review in *CAAN I*, Congress altered the board's powers from veto to quasi-advisory, and eliminated the requirement that the board be composed of members of Congress. Metropolitan Washington Airports Amendments of 1991, Pub. L. No. 102-240, Title VII, 105 Stat. 2197. Those changes did not save the board, however. In subsequent litigation, both the district court and the D.C. Circuit ruled that the re-structured board still labored under the same separation-of-powers defects which had doomed it in *CAAN I*. *See CAAN II* at 105; *Hechinger v. Metro. Wash. Airports Auth.*, 845 F.Supp. 902, 907-09 (D.D.C. 1994).

In *CAAN II*, the Department of Justice filed a brief in the D.C. Circuit supporting the parties *challenging* the re-structured Board of Review, deploying arguments that echo those made against MWAA in the present certiorari petition. For instance, DOJ argued that the new board—despite Congress's alterations—still encroached on separation-of-powers principles because it exercised federal power. *See* Br. for Intervenor United States

in *Hechinger v. Wash. Metro. Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994), at 13-14 (No. 94-7036) (arguing revised board violated separation of powers because it was (1) created at the initiative of congress; (2) exercised powers delineated by Congress; and (3) exercised those powers to protect "an acknowledged federal interest"); *id.* at 23 (stating the board played a "key role in the execution and administration of the [federal] statutory scheme [governing MWAA]" and asserting that "[w]e believe this power is most properly labeled as executive in nature"); *id.* ("Since the Board of Review wields federal authority, its exercise of executive power violates the Appointments Clause. That is true regardless of whether or not the Board acts as agent of Congress."); *id.* at 26 (stating that "'it is federal law that resulted in the establishment of the Board of Review with its particular composition and authority'") (citing *Citizens for the Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth.*, 917 F.2d 48, 54 (D.C. Cir. 1990)). All of the factors that led DOJ to argue for the Board of Review's unconstitutionality in 1994 apply with full force to MWAA as it operates today.

Second, in July 2012, U.S. Secretary of Transportation Ray LaHood sent a scathing letter to MWAA demanding that MWAA open its books and records to the USDOT Inspector General.[16] Based on "significant concerns about MWAA's policies and procedures in contracting, ethics, and travel, and the lack of transparency and accountability in the

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[16] http://www.metwashairports.com/file/LaHood.Curto_7.31.12. pdf (last visited Sept. 28, 2014).

activities of MWAA's Board of Directors," USDOT appointed an Accountability Officer and demanded she be given "access to [MWAA's] personnel and documents" as well as "access to … all Board of Directors meetings … including general and closed sessions." *Id.* Not only does this letter show that MWAA is a "public body" that exercises power over "Federal interests," *id.*, but the spectacle of a cabinet officer being reduced to sending a demand letter to a subordinate officer makes a mockery of the President's authority to control his subordinates.

Third, as discussed in part II *supra*, in November 2012 the USDOT Inspector General issued a report condemning MWAA for "questionable procurement practices," "mismanagement," and a "lack of overall accountability." IG Report at 1. A month before, in October 2012, the Deputy Secretary of Transportation had responded to a draft version of the report. *See* Letter from USDOT Deputy Secretary John D. Porcari to Inspector General Calvin L. Scovel III (October 18, 2012) (attached as an Appendix to the IG Report at pages 48-50). In that letter, the Deputy Secretary referred to MWAA as "a public body entrusted with the management and operation of important Federal assets." IG Report at 48. Continuing in this vein, the Deputy Secretary stated: "As established by statute, MWAA is a public entity with considerable autonomy. While the Department will continue to hold MWAA accountable in its management and operation of *vitally important Federal assets*, it is primarily incumbent on MWAA to institute the reforms needed to regain the public's trust." *Id.* at 50 (emphasis added).

None of these Executive Branch actions are remotely consistent with the notion, espoused by the Federal Circuit below, that MWAA is merely engaged in an exercise of *state* authority. To the contrary, throughout its history, the Executive has treated MWAA as a federal instrumentality exercising federal power, because that is precisely what it *is*.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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