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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Esteban ALEMAN GONZALEZ; Jose  
Eduardo GUTIERREZ SANCHEZ,

Plaintiffs-Petitioners,

v.

Jefferson B. SESSIONS, Attorney General,  
Department of Justice; Kirstjen NIELSEN,  
Secretary, Department of Homeland Security;  
James McHENRY, Director, Executive Office  
for Immigration Review, Department of  
Justice; MaryBeth KELLER, Chief  
Immigration Judge, Executive Office for  
Immigration Review, Department of Justice;  
David W. JENNINGS, Field Office Director  
for the San Francisco Field Office of U.S.  
Immigration and Customs Enforcement,  
Department of Homeland Security; David O.  
LIVINGSTON, Sheriff, Contra Costa County;  
Kristi BUTTERFIELD, Facility Commander,  
West County Detention Facility, Contra Costa  
County,

Defendants.

Case No. \_\_\_\_\_

COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF AND PETITION FOR  
WRIT OF HABEAS CORPUS

CLASS ACTION

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**INTRODUCTION**

1  
2 1. Plaintiffs-Petitioners Esteban Aleman Gonzalez, Jose Eduardo Gutierrez Sanchez,  
3 and the class they seek to represent (collectively, “Plaintiffs”) are subjected to unlawful and  
4 prolonged detention by Defendants (the “Government”) without being afforded the most basic of  
5 procedural protections—a bond hearing—regardless of the length of their detention.

6 2. Plaintiffs are noncitizens whom the Government has detained pursuant to 8  
7 U.S.C. § 1231(a)(6) pending a determination as to whether they can remain in the United States.  
8 Most were previously removed from the United States and have since returned because they  
9 feared persecution and torture in their home country. In the vast majority of cases, Defendants  
10 have made a threshold determination that each Plaintiff meets the requirements for protection  
11 under the asylum laws, and referred Plaintiffs for what are called “withholding-only”  
12 proceedings before the Immigration Courts on their claims for protection. In the remaining cases,  
13 Plaintiffs are awaiting the threshold determination, or a reviewing court of appeals has issued a  
14 stay of removal, indicating that Plaintiffs are likely to succeed on the merits of their claims  
15 against removal from the United States. In all instances, the Department of Homeland Security  
16 (“DHS”) does not have the present authority to remove Plaintiffs from the United States as they  
17 have live claims before either an administrative or judicial adjudicative body.

18 3. Plaintiffs have been detained at least six months while they proceed with the  
19 adjudication of their immigration claims. All Plaintiffs have been detained without being given a  
20 bond hearing, where an Immigration Judge determines whether they pose a flight risk or a danger  
21 to the community.

22 4. Despite clear Ninth Circuit precedent establishing the right to a bond hearing for  
23 Plaintiffs upon their detention becoming prolonged, Defendants refuse to afford Plaintiffs the  
24 bond hearings to which they are entitled based on a blatantly incorrect interpretation of federal  
25 law.

26 5. Plaintiffs Aleman Gonzalez and Gutierrez Sanchez, along with the proposed class  
27 members, request that this Court provide relief for Plaintiffs facing prolonged detention.  
28

1 Specifically Plaintiffs seek: (i) a declaration that Plaintiffs are entitled to a prolonged detention  
2 bond hearing after 180 days in detention; and (ii) an injunction prohibiting Defendants from  
3 detaining Plaintiffs for more than 180 days without affording them an opportunity for a bond  
4 hearing before an Immigration Judge at which Defendants bear the burden of justifying the  
5 continued detention with clear and convincing evidence.

6 **JURISDICTION**

7 6. This action arises under the Constitution of the United States, the Immigration  
8 and Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.*, and the Administrative Procedure Act  
9 (“APA”), 5 U.S.C. § 500 *et seq.*

10 7. Jurisdiction is proper under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2241  
11 (habeas corpus), 28 U.S.C. § 1651 (All Writs Act), 5 U.S.C. § 701 *et seq.* (APA), 28 U.S.C.  
12 § 1361 (mandamus), 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act), and the Suspension  
13 Clause of Article I of the U.S. Constitution. The United States has waived its sovereign  
14 immunity pursuant to 5 U.S.C. § 702.

15 8. This Court may grant declaratory and injunctive relief pursuant to 28 U.S.C.  
16 § 2241, 5 U.S.C. § 702, 28 U.S.C. § 1651, and 28 U.S.C. §§ 2201-02.

17 **VENUE**

18 9. Venue is proper in this District under 28 U.S.C. § 1391(e) because at least one  
19 federal Defendant is in this District, Plaintiffs Aleman Gonzalez and Gutierrez Sanchez are  
20 detained in this District, and a substantial part of the events or omissions giving rise to the claims  
21 in this action took place in this District. In addition, no real property is involved in this action.

22 10. Intradistrict Assignment: As required by Local Rule 3-5(b), this case may be  
23 assigned to the San Francisco Division because this case is not one of the enumerated types of  
24 cases in Civil Local Rule 3-2(c), and because a substantial part of events and omissions occurred  
25 in San Francisco. *See* Civil L.R. 3-2(c), (d).

26 **PARTIES**

27 11. Plaintiff Esteban ALEMAN GONZALEZ is a native and citizen of Mexico. He  
28 entered the United States for the first time in 2000, was summarily removed, and shortly

1 thereafter reentered that same year. He has lived in the United States since that time and is  
2 currently in “withholding-only” proceedings. He has been detained for over 200 days in  
3 Richmond, California, at the Contra Costa West County Detention Facility.

4 12. Plaintiff Jose Eduardo GUTIERREZ SANCHEZ is a native and citizen of  
5 Mexico. He entered the United States for the first time in 2009 and was summarily removed in  
6 2009. He last re-entered the United States in 2015. Since that time, he has lived in the United  
7 States with his U.S. citizen wife and two young U.S. citizen children. He is currently in  
8 “withholding-only” proceedings. He has been detained for over 180 days in Richmond,  
9 California, at the Contra Costa West County Detention Facility.

10 13. Defendant Jefferson B. SESSIONS is sued in his official capacity as Attorney  
11 General of the United States and head of the Department of Justice (“DOJ”). In this capacity, he  
12 is responsible for the administration of the immigration laws pursuant to 8 U.S.C. § 1103 and  
13 oversees the Executive Office for Immigration Review (“EOIR”), a component of the DOJ,  
14 which includes the immigration courts and the Board of Immigration Appeals (“BIA” or  
15 “Board”). He is empowered to oversee the adjudication of removal and bond hearings and by  
16 regulation has delegated that power to the nation’s Immigration Judges and the BIA.

17 14. Defendant Kirstjen NIELSEN is sued in her official capacity as the Secretary of  
18 the DHS. She is the executive officer who has been given authority to manage and control U.S.  
19 Immigration and Customs Enforcement (“ICE”). As such, she is the ultimate legal custodian of  
20 Plaintiffs Aleman Gonzalez and Gutierrez Sanchez.

21 15. Defendant James McHENRY is sued in his official capacity as Director of EOIR.  
22 In his capacity he is responsible for overseeing EOIR’s principal mission “to adjudicate  
23 immigration cases by fairly, expeditiously, and uniformly interpreting and administering the  
24 nation’s immigration laws.” *See* Executive Office for Immigration Review, <http://www.justice.gov/eoir> (last visited 03/21/2018). In addition, he has the responsibility for the supervision of all  
25 personnel employed by the EOIR in carrying out their regulatory duties. *See* Office of the  
26 Director, <https://www.justice.gov/eoir/office-of-the-director> (last visited 3/21/2018).



1           22.     If, however, an individual expresses a fear of returning to their country of  
2 removal, the reinstated removal order is not executed per the regulatory scheme set forth in 8  
3 C.F.R. § 208.31. Rather, upon expressing a fear, the individual “shall be immediately referred to  
4 an asylum officer for an interview to determine whether the [individual] has a reasonable fear of  
5 persecution or torture pursuant to [8 C.F.R.] § 208.31.” 8 C.F.R. § 241.8.

6           23.     A DHS asylum officer, absent exceptional circumstances, must make a  
7 determination as to whether the individual has a reasonable fear within ten days. 8 C.F.R.  
8 § 208.31. The asylum officer conducts an interview with the individual, in a non-adversarial  
9 manner, to determine whether the individual has a reasonable fear of persecution or torture. *Id.*  
10 Individuals have a right to both representation and interpretation in these interviews. *Id.*

11           24.     If the individual is determined to have a “reasonable fear” of persecution, the  
12 individual is placed in “withholding-only” proceedings before an Immigration Judge, through  
13 which the individual can apply for withholding of removal and protection under the Convention  
14 Against Torture (“CAT”). *See* 8 C.F.R. § 208.31; 8 C.F.R. § 208.16.

15           25.     Withholding of removal prohibits an individual’s removal to a country where  
16 their “life or freedom would be threatened . . . because of [their] race, religion, nationality,  
17 membership in a particular social group or political opinion.” 8 U.S.C. § 1231(b)(3)(A). CAT  
18 protection is afforded to those who establish that “it is more likely than not that he or she would  
19 be tortured if removed to the proposed country of removal.” 8 C.F.R. § 208.16(c)(2). Both forms  
20 of protection ensure compliance with the United States’ statutory and treaty-based obligations  
21 not to remove individuals to countries where they would face persecution or torture. *See*  
22 *generally* Foreign Affairs Reform and Restructuring Act of 1998, § 2242, Pub. L. 105-277, 112  
23 Stat. 2681, 2681-821.

24           26.     “Withholding-only” proceedings operate just like removal proceedings under 8  
25 U.S.C. § 1229a, INA § 240. As a result, the individual is entitled to the full panoply of  
26 regulatory, statutory, and constitutional rights, including an appeal to the Board and a petition for  
27 review before the circuit court of appeals. *See* 8 C.F.R. § 1208.31; 8 U.S.C. § 1252(a)(1). The  
28 only meaningful difference between “withholding-only” proceedings conducted pursuant to 8



1 C.F.R. § 208.16, and removal proceedings conducted pursuant to 8 C.F.R. § 1240, is that in  
2 “withholding-only” proceedings, the Immigration Court is limited to adjudicating claims for  
3 withholding of removal and protection under the CAT.

4 27. In the event that an asylum officer determines that an individual does not have a  
5 reasonable fear of persecution or torture, the individual is entitled to review of that decision  
6 before an Immigration Judge. *See* 8 C.F.R. § 208.31. If the Immigration Judge concurs with the  
7 asylum officer’s determination that the individual does not have a reasonable fear of persecution  
8 or torture, the individual is not permitted to appeal that decision to the Board; however, the  
9 individual can file a petition for review with the circuit court of appeals. *See* 8 U.S.C.  
10 § 1252(a)(1); *Andrade-Garcia v. Lynch*, 828 F.3d 829, 831 (9th Cir. 2016).

11 28. Individuals, via a petition for review to a federal court of appeals, can also  
12 challenge the reinstated removal order itself, by either challenging the “factual predicates for  
13 reinstatement” or raising “constitutional claims or questions of law.” *See Villa-Anguiano v.*  
14 *Holder*, 727 F.3d 873, 877-78 (9th Cir. 2013) (internal quotation marks and citations omitted).

15 29. Under current Ninth Circuit law, all individuals with reinstated removal orders—  
16 whether they are challenging their reinstated removal order, are in “withholding-only”  
17 proceedings, or are seeking agency or judicial review of a decision by an Immigration Judge—  
18 are detained pursuant to 8 U.S.C. § 1231(a)(6). *See Padilla-Ramirez v. Bible*, 862 F.3d 881 (9th  
19 Cir. 2017), *amended and superseded*, 882 F.3d 826, 830-32 (9th Cir. 2018).

20 30. Although the vast majority of Plaintiffs have reinstated removal orders, the  
21 proposed class also consists of individuals detained under § 1231(a)(6) who have been issued  
22 administratively final removal orders pursuant to 8 U.S.C. § 1228(b), as well as individuals who  
23 are awaiting judicial review of the BIA’s denial of a motion to reopen removal proceedings, *see*  
24 8 U.S.C. § 1229a(c)(7), and who have been issued a judicial stay of removal. *See Padilla-*  
25 *Ramirez*, 882 F.3d at 830-32; *Diouf v. Mukasey*, 542 F.3d 1222, 1230 (9th Cir. 2008) (*Diouf I*).

26 31. Ninth Circuit law establishes the right to a bond hearing for those subject to  
27 prolonged detention under 8 U.S.C. § 1231(a)(6). In *Diouf v. Napolitano*, 634 F.3d 1081, 1084  
28 (9th Cir. 2011) (*Diouf II*), the Ninth Circuit, noting the serious Constitutional concerns that arise



1 from prolonged civil detention without procedural protections, applied the canon of  
2 constitutional avoidance and “construe[d] § 1231(a)(6) as requiring an individualized bond  
3 hearing, before an immigration judge, for [individuals] facing prolonged detention under that  
4 provision.” *Id.* at 1086. Prolonged detention has been defined as detention beyond six months.  
5 *See Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008); *see also*  
6 *Diouf II*, 634 F.3d at 1091.

7 32. The Supreme Court’s recent decision in *Jennings v. Rodriguez*, 138 S. Ct. 830,  
8 842-44 (2018), strongly supports *Diouf II*. *Jennings* held that two other immigration detention  
9 statutes, Sections 1225 and 1236(c) of 8 U.S.C., could not be read to authorize a bond hearing.  
10 By contrast, the Court observed that because § 1231(a)(6) states that certain individuals “may be  
11 detained,” there is not “necessarily unlimited discretion” in detaining individuals. *See id.* at 843  
12 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) (applying canon of constitutional  
13 avoidance to construe Section 1231(a)(6) not to authorize detention beyond six months where  
14 removal is not reasonably foreseeable)).

15 33. The Ninth Circuit has additionally held that, at prolonged detention hearings, the  
16 government bears the burden of proving that the detained individual is either a flight risk or a  
17 danger to the community by “clear and convincing evidence.” *See Singh v. Holder*, 638 F.3d  
18 1196 (9th Cir. 2011).

19 34. Taken together, *Diouf II*, *Padilla-Ramirez*, and *Singh* require that all individuals  
20 in the Ninth Circuit whose removal orders have been reinstated, or who have administratively  
21 final removal orders pursuant to 8 U.S.C. § 1228(b), or who are awaiting judicial review of the  
22 BIA’s denial of a motion to reopen removal proceedings with a judicial stay in place, be  
23 provided a bond hearing after six months of detention where the government bears the burden of  
24 proving by clear and convincing evidence that the individual is a flight risk or a danger to the  
25 community.

## 26 **FACTUAL ALLEGATIONS**

1           35. Plaintiff Esteban Aleman Gonzalez is a native and citizen of Mexico. He entered  
2 the United States on April 14, 2000, and was expeditiously removed that same day. He re-  
3 entered the United States shortly thereafter, and has resided in the United States since 2000.

4           36. On August 18, 2017, Mr. Aleman Gonzalez was arrested at his home in Antioch,  
5 California. He shares custody of his two U.S. citizen daughters, ages five and three, and is their  
6 primary source of financial support. He has no criminal convictions. He has been detained by  
7 DHS at the Contra Costa West County Detention Facility since the date of his arrest.

8           37. DHS issued a notice reinstating his prior order of removal under 8 U.S.C.  
9 § 1231(a)(5). Mr. Aleman Gonzalez, however, expressed his fear of returning to Mexico and the  
10 execution of the reinstated order was suspended per the regulatory scheme set forth at 8 C.F.R.  
11 § 1208.31.

12           38. On August 30, 2017, a DHS asylum officer found Mr. Aleman Gonzalez to have a  
13 reasonable fear of persecution or torture in Mexico by members of the Zeta drug cartel. Pursuant  
14 to 8 C.F.R. §§ 208.31 and 208.16, his case was referred to the San Francisco Immigration Court  
15 for “withholding-only” proceedings.

16           39. Mr. Aleman Gonzalez applied for withholding of removal and relief under the  
17 CAT by filing U.S. Citizenship and Immigration Services (“USCIS”) Application Form I-589  
18 with the San Francisco Immigration Court on November 13, 2017. He is currently scheduled for  
19 an individual hearing on his withholding of removal and CAT application on June 13, 2018.

20           40. On February 18, 2018, after 187 days in detention, Mr. Aleman Gonzalez  
21 requested a bond hearing before an Immigration Judge in San Francisco. On February 27, 2018  
22 Immigration Judge Joseph Park of the San Francisco Immigration Court ruled that he did not  
23 have jurisdiction to conduct a hearing and therefore refused to do so.

24           41. On March 15, 2018, Mr. Aleman Gonzalez appealed that decision to the BIA  
25 where it remains pending.

26           42. Mr. Aleman Gonzalez remains in custody at the West County Detention Facility,  
27 and has been detained for well over 200 days as of the time of filing of this Complaint.  
28

1           43. Plaintiff Jose Eduardo Gutierrez Sanchez is a native and citizen of Mexico. He  
2 first entered the United States on May 19, 2009, and was expeditiously removed on June 9, 2009.  
3 Mr. Gutierrez Sanchez again tried to enter the United States after he was attacked and beaten in  
4 Mexico, but was again removed. He re-entered the United States in approximately November  
5 2015, and has resided here since then.

6           44. Mr. Gutierrez Sanchez was detained by DHS on or about September 25, 2017.  
7 Prior to his detention, he resided in San Lorenzo, California with his U.S citizen wife and two  
8 young U.S. citizen daughters. Mr. Gutierrez Sanchez was the sole source of financial support for  
9 their household.

10           45. DHS issued a notice reinstating his prior order of removal under 8 U.S.C.  
11 § 1231(a)(5). Mr. Gutierrez Sanchez was given a reasonable fear interview with a DHS asylum  
12 officer because he expressed fear of being harmed in Mexico.

13           46. At his reasonable fear interview, Mr. Gutierrez Sanchez expressed fear that, if  
14 returned to Mexico, he would be harmed as a bisexual man. Mr. Gutierrez Sanchez already  
15 experienced past torture in Mexico by organized crime on account of his sexual orientation. A  
16 DHS asylum officer found that he had a reasonable fear or persecution or torture in Mexico, and  
17 he was placed in “withholding-only” proceedings before the San Francisco Immigration Court.  
18 *See* 8 C.F.R. §§ 208.31 and 208.16.

19           47. Mr. Gutierrez Sanchez subsequently applied for withholding of removal and relief  
20 under the CAT by filing USCIS Form I-589 with the San Francisco Immigration Court on  
21 February 20, 2018. Mr. Gutierrez Sanchez is currently scheduled for an individual hearing on his  
22 withholding of removal and CAT application on April 19, 2018.

23           48. On March 5, 2018, Mr. Gutierrez Sanchez filed a request with the San Francisco  
24 Immigration Court that a bond hearing be held on or after March 24, 2018, his 180th day of  
25 detention. On March 21, 2018, Immigration Judge Alison E. Daw of the San Francisco  
26 Immigration Court ruled that she did not have jurisdiction to conduct a hearing and therefore  
27 refused to do so.



1           54.     The proposed class meets the requirements of Rule 23(a)(1) because it is so  
2 numerous that the joinder of all members is impracticable. The number of individuals who are  
3 being denied prolonged detention bond hearings through the Ninth Circuit is not known with  
4 precision but, on information and belief, there are at least sixty known class members.

5           55.     Moreover, because Plaintiffs are detained pending a decision on their case, they  
6 may either win their cases and be released, or lose their cases and be deported. The inherently  
7 transitory state of the proposed class further demonstrates that joinder is impracticable.

8           56.     The proposed class meets the commonality requirements of Rule 23(a)(2) because  
9 all proposed class members have been or will be subject to the same common practice:  
10 Defendants' refusal to provide a bond hearing at 180 days of detention to individuals detained  
11 pursuant to § 1231(a)(6).

12           57.     Similarly, the proposed class meets the typicality requirements of Rule 23(a)(3)  
13 because the claims of the representative Plaintiffs are typical of the claims of the class as a  
14 whole. Plaintiffs Aleman Gonzalez and Gutierrez Sanchez, and the class they seek to represent,  
15 are all individuals detained pursuant to § 1231(a)(6) who have been or will be denied a six-  
16 month bond hearing.

17           58.     The adequacy requirements of Rule 23(a)(4) also are met. Plaintiffs know of no  
18 conflict between their interests and those of the proposed class. Plaintiffs seek the same relief as  
19 the other members of the class, namely a bond hearing after six months of detention in which the  
20 Government bears the burden to prove by clear and convincing evidence sufficient risk of flight  
21 or dangerousness to warrant continued prolonged detention. In defending their own rights,  
22 Plaintiffs Aleman Gonzalez and Gutierrez Sanchez will defend the rights of all class members  
23 fairly and adequately.

24           59.     Plaintiffs are represented by counsel with deep knowledge of immigration law,  
25 and extensive experience litigating class actions and complex cases. Counsel have the requisite  
26 level of expertise to adequately prosecute this case on behalf of Plaintiffs and the proposed class.

27 \_\_\_\_\_  
28 Report and Recommendation Granting Summary Judgment as to the 1231(a)(6) Class Members  
(W.D. Wash. Jan. 23, 2018).



1 69. Defendants' actions constitute an unlawful withholding of an agency action and  
2 unlawful agency action in violation of the APA.

3 **COUNT THREE**

4 **(Violation of the Due Process Clause)**

5 70. All the foregoing allegations are repeated and realleged as though fully set forth  
6 herein.

7 71. The Due Process Clause of the Fifth Amendment to the United States Constitution  
8 requires an adequate hearing before a neutral decision maker to determine whether prolonged  
9 immigration detention is justified by the prevention of flight risk and danger to the community.

10 72. Defendants' practice of denying Plaintiffs Aleman Gonzalez and Gutierrez  
11 Sanchez and proposed class members individualized bond hearings after six months thus violates  
12 the Due Process Clause of the United States Constitution.

13 **PRAYER FOR RELIEF**

14 Wherefore, Plaintiffs pray this Court to:

15 73. Assume jurisdiction over this matter;

16 74. Certify a class pursuant to Federal Rule of Civil Procedure 23;

17 75. Order Defendants to automatically conduct bond hearings after six months of  
18 detention for Plaintiffs Aleman Gonzalez and Gutierrez Sanchez and all class members who have  
19 not yet been afforded a bond hearing and have or will have been detained by Defendants for at  
20 least six months;

21 76. Declare that Defendants' refusal to conduct individualized bond hearings after six  
22 months violates the INA, the APA, and the United States Constitution;

23 77. Order Defendants to immediately cease refusing to conduct individualized bond  
24 hearings after six months, and order all Immigration Judges within the Ninth Circuit to conduct a  
25 bond hearing for any Plaintiff who has not yet been afforded a bond hearing at which the  
26 Government carries the burden of proof by clear and convincing evidence to demonstrate that the  
27 Plaintiff is a flight risk or a danger to the community; and, if bond is denied, to review and hold a  
28 new bond hearing every six months to determine if release is warranted.



1 78. Award reasonable costs and attorneys' fees under the Equal Access to Justice Act,  
2 and any other applicable statute or regulation; and

3 79. Grant such further relief as the Court may deem proper.  
4

5 March 27, 2018

Respectfully submitted,

6  
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18 By: s/Matthew H. Green  
19 Matthew H. Green

20 AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF SOUTHERN CALIFORNIA

21 By: s/Michael Kaufman  
22 Michael Kaufman

23 AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NORTHERN CALIFORNIA

24 By: s/Vasudha Talla  
25 Vasudha Talla  
26 Julia Mass

27  
28 <sup>2</sup> Per Civil L.R. 5-1(i), I attest that I obtained concurrence in the filing of this documents from each of the other signatories.

AMERICAN CIVIL LIBERTIES UNION  
SAN DIEGO AND IMPERIAL COUNTIES

By: s/Bardis Vakili

Bardis Vakili

*Attorneys for Plaintiffs-Petitioners and the  
Proposed Class*

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