UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ARTHUR DOE, *et al*.,

Plaintiffs,

v.

JIM HOOD, Attorney General of the State of Mississippi, *et al*,

Defendants.

Case No. 3:16-cv-00789-CWR-FKB

CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO PROCEED UNDER PSEUDONYMS AND TO FILE DOCUMENTS UNDER SEAL

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PRELIMINARY STATEMENT

Plaintiffs seek the Court's permission (1) to proceed in this lawsuit under pseudonyms and (2) to file a declaration under seal pursuant to Local Rule 79 in support of their motion for summary judgment. Such a declaration and supporting documentation, also to be filed under seal, would enable the Court to verify that Plaintiffs have standing to bring this action without the necessity of disclosing Plaintiffs' identities to the public or Defendants.

Plaintiffs, all individuals placed on the Mississippi Sex Offender Registry, so move because they reasonably fear public humiliation and reprisal based on the fact that they have been labeled as sex offenders and because they are challenging government action. If their identities are disclosed to the public as a result of the instant litigation, awareness of their status will be heightened, with increased likelihood of retaliation as a consequence.

Federal courts regularly permit plaintiffs to proceed under pseudonyms in such circumstances, particularly where they challenge government action and where the government will face no prejudice should plaintiffs' identities be hidden from view. Similarly, trial courts have ample discretion to permit plaintiffs to file confidential information under seal where the harms of publication of identifying information outweigh any public interest in disclosure or prejudice to Defendants.

Here, there is no public interest in disclosure of Plaintiffs' identities or identifying information, as such information has no bearing on the core legal questions of the case: the facial validity of Mississippi's Unnatural Intercourse Statute, Miss. Code Ann. § 97-29-59, which Plaintiffs contend the Supreme Court struck down in 2003, and the provisions of the Mississippi Sex Offender Registration Act ("the MSOR") requiring those with Unnatural Intercourse convictions to register as sex offenders. Plaintiffs' Motion for Summary Judgment, filed

simultaneously with the present motion, turns entirely on the language and effect of three statutes: the MSOR, Mississippi's Unnatural Intercourse statute, and Louisiana's Crime Against Nature by Solicitation ("CANS"). As Plaintiffs argue in that motion, Mississippi's statutes, which require that those with convictions under the Unnatural Intercourse statute and out-of-state statutes Mississippi deems equivalent register as sex offenders, are facially invalid under the Due Process and Equal Protection Clauses. The purely legal nature of these claims significantly diminishes any public interest in Plaintiffs' identities. Nor is there any need for Defendants to know Plaintiffs' identities, as their names have no bearing on the legal questions to be resolved.

While the protection of Plaintiffs' identifying information in this case will not harm Defendants or the public interest, Plaintiffs face significant harm, including extreme humiliation and potential retaliation, should their identities be disclosed. The balance of factors thus favors permitting Plaintiffs to use pseudonyms and to file identifying information under seal so that their claims can be litigated fully and without risk of exposure. Accordingly, Plaintiffs request an order granting permission (1) to proceed under pseudonyms; and (2) to file under permanent seal a declaration and accompanying documentation in support of their Motion for Summary Judgment to be viewed by the Court *in camera*, or in the alternative, to be designated Attorneys' Eyes Only and accessible only by the Court and Defendants' counsel.

BACKGROUND

As discussed in detail in Plaintiffs' Motion for Summary Judgment, Plaintiffs are residents of Mississippi who are required to register as sex offenders as a result of convictions under Mississippi's Unnatural Intercourse statute, Miss. Code Ann. § 45-33-23(h)(xi), or Louisiana's CANS statute, which Mississippi deems to be an out-of-state equivalent to the Unnatural Intercourse Statute and thus registrable under Miss. Code Ann. §§ 45-33-23(h)(xxi).

Plaintiffs mount a facial challenge to the Unnatural Intercourse statute and its continued enforcement through the MSOR, Miss. Code Ann. §§ 45-33-21 *et seq*.

Mississippi's registry places Plaintiffs on a website that publicizes their names, addresses and photographs, and can be searched by county or by name of registrant. As a result of the requirement that they register, Plaintiffs face humiliation, shame, and prohibitions on numerous aspects of community and family life on a daily basis. It is widely acknowledged that registered sex offenders face serious repercussions when their identities are revealed. These harms would only be compounded by the opprobrium and notoriety they would face if their identities as litigants were exposed because of the public nature of the instant constitutional challenge.

ARGUMENT

I. Plaintiffs Bringing a Facial Challenge to the Constitutionality of Statutes Requiring Them to Register as Sex Offenders Should Be Permitted to Proceed Under Pseudonyms.

A. The Standard for Granting Pseudonymity.

Although the Federal Rules generally require complaints to include the names of all parties, Fed. R. Civ. P. 10(a), it is well-established that the trial courts have the discretion to "accommodate a plaintiff's asserted need to proceed anonymously through the use of a fictitious name." *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) (permitting a Mississippi parent challenging a school prayer policy to proceed under a pseudonym). A request to litigate under a pseudonym "requires a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Id*. at 186.

The Fifth Circuit articulated three factors to be evaluated in determining whether plaintiffs can proceed under a pseudonym: "(1) plaintiffs seeking anonymity [are] suing to

challenge governmental activity; (2) prosecution of the suit [compels] plaintiffs to disclose information 'of the utmost intimacy;' and (3) plaintiffs [are] compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution." *Stegall*, 653 F.2d at 185 (quoting *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 714 (5th Cir. 1979)). These factors are not rigid or exclusive categories; *Stegall* stressed that pseudonyms are appropriate where litigants face "opprobrium analogous to the infamy associated with criminal behavior" and "extensive harassment and perhaps even violent reprisals if their identities are disclosed." 653 F.2d at 186.

In the thirty-five years since *Stegall* was decided, other circuits and district courts have developed the pseudonymity standard to include additional suggested factors. The Second Circuit, collecting cases from the Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits, has set forth a list of ten "non-exhaustive" factors that courts use to grant or deny pseudonymity:

> (1) whether the litigation involves matters that are '*highly sensitive and [of a] personal nature*'; (2) 'whether identification poses *a risk of retaliatory physical or mental harm* to the . . . party [seeking to proceed anonymously] or even more critically, to innocent non-parties'; (3) whether identification presents other harms and the likely severity of those harms, including whether 'the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity'; (4) whether the plaintiff is particularly vulnerable to the possible harms of disclosure, particularly in light of his age; (5) *whether the suit is challenging the actions of the government or that of private parties*; (6) *whether the defendant is prejudiced by allowing the plaintiff to press his claims anonymously*, whether the nature of that prejudice (if any) differs at any particular stage of the litigation, and whether any prejudice can be mitigated by the district court; (7) whether the plaintiff's identity has thus far been kept confidential; (8) *whether the public's interest in the litigation is furthered by requiring the plaintiff to disclose his identity*; (9) '*whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities*'; and (10) whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff.

Sealed Plaintiff v. Sealed Defendant No. 1, 537 F.3d 185, 190 (2d Cir. 2008) (internal citations omitted) (emphasis added).

Plaintiffs need not show that they meet all or even most factors used in evaluating the need for pseudonyms; rather, the Court must balance these factors, weighing the harm to Plaintiffs if they are exposed against the prejudice to Defendants if their identities remain hidden. *Stegall*, 653 F.3d at 185. "Examples of areas where courts have allowed pseudonyms include cases involving abortion, birth control, transexuality, mental illness, welfare rights of illegitimate children, AIDS, and homosexuality." *Doe v. Griffon Mgmt LLC*, No. 14-2626, 2014 U.S. Dist. LEXIS 171779 at *4 (E.D. La. Dec. 11, 2014), quoting *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011) (granting HIV-positive litigant leave to proceed under a pseudonym in housing discrimination case). Other courts have permitted unauthorized immigrants to proceed pseudonymously in cases challenging the constitutionality of state or local statutes. *See, e.g., Lozano v. City of Hazleton*, 620 F.3d 170, 195 (3d Cir. 2010), *vacated and remanded on other grounds*, 563 U.S. 1030 (2012), *earlier findings and conclusions restated on remand*, 724 F.3d 297 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014) (affirming lower court's decision to restrict defendants' access to plaintiffs' identities); *Hispanic Interest Coalition of Alabama v. Bentley*, 691 F.3d 1236, 1247 n.8 (11th Cir. 2012) (noting lower court decision to grant immigrants the right to proceed under pseudonyms). Most relevantly, courts in the Fifth Circuit have permitted plaintiffs to pursue constitutional claims under pseudonyms, where, as here, they are challenging their inclusion on sex offender registries. *Doe v. Jindal,* 851 F. Supp. 2d 995 (E.D. La. 2012).

B. The Balance of Factors Strongly Favors Permitting Plaintiffs to Proceed Under Pseudonyms.

Pseudonymity is appropriate here for several reasons. First, the core issues being litigated – the facial invalidity of the Mississippi's Unnatural Intercourse statute and the accompanying requirement that those with convictions for Unnatural Intercourse or purported out-of-state equivalents register as sex offenders – are of a purely legal nature, rendering the public interest in Plaintiffs' identities particularly weak. Second, and relatedly, the Plaintiffs are challenging the government, which will not be prejudiced should their identities be hidden. Third, the issues the Plaintiffs raise are highly sensitive in nature, and they face "opprobrium analogous to the infamy associated with criminal behavior" and even the threat of "violent reprisals if their identities are disclosed[.]" *Stegall*, 653 F.2d at 186. Plaintiffs analyze each of these elements in turn below.

1. Plaintiffs' Facial Challenge to the Unnatural Intercourse Statute and its Enforcement Through the MSOR Presents Issues of a Purely Legal Nature, and the Public's Interest Is Not Furthered by Knowledge of Their Identities.

As explained in Plaintiffs' Complaint, Plaintiffs allege that the Defendants have subjected them to the Mississippi Sex Offender Registry in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Because the Unnatural Intercourse statute and the accompanying registration requirements are facially invalid, their identities are not relevant to the merits of the case. The core issues in this case are thus "purely legal in nature," and both the public and Defendants have an "atypically weak … interest" in knowing their names. *Sealed Plaintiff*, 537 F.3d at 190; *see also Doe v. Evans*, 202 F.R.D. 173, 175 (E.D. Pa. 2001).

The issue at the core of the due process claim in this case, explicated in detail in Plaintiffs' Motion for Summary Judgment, is whether the Unnatural Intercourse statute and its enforcement through the MSOR are facially invalid after *Lawrence v. Texas,* 539 U.S. 558 (2003). This question is of a purely legal nature that does not depend on the identities of the

Plaintiffs. *Sealed Plaintiff*, 537 F.3d at 190. In short, their identities are immaterial to the legal issues presented by this case and need not be disclosed either publicly or to defendants.

Similarly, the analysis under the Equal Protection Clause, also explained at length in Plaintiffs' motion for summary judgment, depends entirely on a comparison of the text of Mississippi's Unnatural Intercourse statute against its Prostitution statute and a comparison of Louisiana's CANS statute with Mississippi's Prostitution statute. Like Plaintiffs' Due Process claims, these issues are of a purely legal nature and do not depend on the identities of the Plaintiffs. *Sealed Plaintiff*, 537 F.3d at 190.

Moreover, where Plaintiffs' "identity information" is not central to Plaintiffs' claims, and where "litigants … would be deterred from bringing cases clarifying constitutional rights" if they could not proceed anonymously, granting permission to proceed under a pseudonym "would serve the public interest." *Lozano*, 620 F.3d at 195.

In short, Mississippi's Unnatural Intercourse statute and the provision of the MSOR requiring that those with Unnatural Intercourse convictions or their out-of-state equivalents register violate the Due Process and Equal Protection clauses on their face. Because the identities of the Plaintiffs are irrelevant to any possible defense of the facial validity of the MSOR, and because the public interest would be served affirmatively by Plaintiffs' moving forward to vindicate their constitutional rights, the public interest weighs in favor of a grant of pseudonymity.

2. Disclosure of Plaintiffs' Identities is Unnecessary to Adjudication of Plaintiffs' Constitutional Claims.

There is no prejudice to Defendants if Plaintiffs' identities remain protected, as public release of their names is unnecessary for Defendants to mount a defense to Plaintiffs' claims that the statutes at issue are facially invalid. Litigants who challenge governmental activity have a

strong interest in proceeding under pseudonyms. *Stegall*, 653 F.2d at 185. This is because "[i]n such circumstances the plaintiff presumably represents a minority interest (and may be subject to stigmatization), and there is arguably a public interest in a vindication of his rights. In addition, the government is viewed as having a less significant interest in protecting its reputation from damaging allegations than the ordinary individual defendant," particularly in the class action context. *E.W. v. N.Y. Blood Center*, 213 F.R.D. 108, 111 (E.D.N.Y. 2003) (citing *Roe v. Wade*, 410 U.S. 113 (1973)). *See also S. Methodist Univ. Ass'n of Women Law Students,* 599 F.2d at 713 (pseudonymous challenges to "constitutional, statutory or regulatory validity of government activity. . . involve no injury to the Government's 'reputation'" and therefore do not pose the same risk to state actors as do suits against private individuals).

Because Plaintiffs here challenge governmental action and do not seek damages, and because the challenge is to the facial validity of laws of the State of Mississippi, the government will not be prejudiced if Plaintiffs' identities and identifying information are hidden. These factors weigh in favor of a grant of pseudonymity.

3. Plaintiffs' Identities Are of a Highly Sensitive Nature, and if Revealed Could Pose Risks of Significant Harm.

It is axiomatic that identification as a sex offender is accompanied by intense stigma, humiliation, and the public "opprobrium" that justifies a grant of pseudonymity. *Stegall,* 653 F.2d at 185. Indeed, *Lawrence* itself makes clear that the stigma of sex offender registration requirements is one of the devastating results of unconstitutional sodomy convictions: "The stigma the … statute imposes, moreover, is not trivial…. [T]he convicted person would come within the [sex offender] registration laws of at least four States were he or she to be subject to their jurisdiction." 539 U.S. at 575 (citing the sex offender registration laws of four states, including Mississippi as, *inter alia*, rationale for striking down sodomy statutes). The registration

requirements that attend sodomy convictions "underscore[] the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition." *Id.* at 576.

As a result, numerous courts have noted the potential for retaliation when permitting registered sex offenders filing challenges to the sex offender registry to proceed under pseudonyms. *See, e.g., Doe v. City of Albuquerque*, 667 F.3d 1111, 1115 n.1 (10th Cir. 2012) (noting that registered sex offender was permitted to bring suit under a pseudonym because "he fears retaliation"); *Doe v. Harris*, 640 F.3d 972, 973 n.1 (9th Cir. 2011) (allowing plaintiff-appellee "to proceed under a pseudonym because drawing public attention to his status as a sex offender is precisely the consequence that he seeks to avoid by bringing this suit"); *Doe v. Jindal,* 851 F. Supp. 2d 995 (E.D. La. 2012) (using pseudonyms in equal protection challenge to placement on sex offender registry).

The fact that Plaintiffs are already required to register in Mississippi does not undermine their position; they are among hundreds of Mississippi residents complying with the MSOR, and they attract no particular publicity unless neighbors or acquaintances take affirmative steps to research their status. And it is well-documented and acknowledged that individuals registered as sex offenders face very serious, and potentially deadly, consequences when their identities are revealed. *See* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 86-92 (2007), available at https://www.hrw.org/reports/2007/us0907/ (last accessed Nov. 2, 2016) (documenting harassment, intimidation, physical assault, and killings of registered sex offenders around the United States); *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) (incidents targeting registered sex offenders "happen with sufficient frequency and publicity that registrants justifiably live in fear of them"). All the Plaintiffs will face continual fear of harassment if

exposed as litigants in the instant case. Where participation in a lawsuit would result in an "exponentially greater risk of harassment," *Lozano*, 620 F.3d at 195 (internal citations omitted), plaintiffs should be permitted to proceed under pseudonyms.

II. Plaintiffs Who Face Significant Harm if Exposed Should Be Permitted to File Identifying Information Under Seal.

A. The Standard for Granting Permission to File Documents Under Seal.

While the public has a right to inspect and copy judicial records in federal courts, "[t]hat right 'is not absolute.'" *Test Masters Educ. Servs. v. Robin Singh Educ. Servs.*, 799 F.3d 437, 454 (5th Cir. 2015), quoting *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993). "'Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.'" *Id.*, quoting *Van Waeyenberghe*, 990 F.2d at 848. Such improper purposes may include the use of records to "gratify private spite or promote public scandal." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) (internal citations and quotation marks omitted). When exercising their discretion to permit the filing of documents under seal, district courts must "'balance the public's common law right of access against the interests favoring nondisclosure.'" *Test Masters*, 799 F.3d at 454, quoting *Van Waeyenberghe*, 990 F.2d at 848.

Courts often permit the filing of confidential information under seal in cases where parties seek to protect "corporate ownership information." *See, e.g., Pierce v. Mississippi*, No. 3:15-cv-109-SA-JMV, 2016 U.S. Dist. LEXIS 21716 (N.D. Miss. Feb. 23, 2016) at *3-4 (collecting recent cases). Such an order is at least as appropriate in in public interest cases where the moving parties face particular personal risk. Where the moving party could be "stigmatized and humiliated if the sensitive information in the record is made public . . . that is reason enough to seal the file and keep it sealed." *Webster Groves School Dist. v. Pulitzer Pub. Co.*,

898 F.2d 1371, 1377 (8th Cir. 1990). Further, in lawsuits challenging government activity, it is not unusual for courts to permit plaintiffs who could be subject to "considerable harassment" to allow only the Court and counsel access to identity information. *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004) (permitting affidavits documenting identities and standing to be filed under seal, available only to defendants' counsel, in Establishment Clause challenge to school district).

Local Rule 79 requires that moving parties provide a non-confidential description of what is to be sealed; a statement of why sealing is necessary, and why another procedure will not suffice; references to governing case law; and, unless permanent sealing is sought, a statement of the period of time the party seeks to have the matter maintained under seal and how the matter is to be handled upon unsealing. *See* Local Rule 79(e)(4). Plaintiffs address each of these requirements below.

B. The Balance of Factors Favors Granting Plaintiffs' Motion to File Confidential Documents Under Seal.

For reasons similar to those favoring a grant of pseudonymity, *see* Part (I) *supra*, the balance of factors weighs in favor of permitting Plaintiffs to file under seal the Declaration of Alexis Agathocleous in Support of Plaintiffs' Motion for Summary Judgment ("Agathocleous Declaration") as well as supporting documentation containing identifying information about Plaintiffs. Defendants seek to limit access to the sealed documents to the Court, or, in the alternative, to the Court and to counsel for Defendants.

The Agathocleous Declaration and supporting documents that Plaintiffs seek to submit under seal for the limited purpose of establishing their standing to litigate this case. The Agathocleous Declaration discloses the Plaintiffs' true identities. The supporting documentation that accompanies that declaration demonstrates that each Plaintiff is registered as a sex offender

in Mississippi, and that they are so registered solely as a result of an Unnatural Intercourse conviction, or a CANS conviction from Louisiana (which Mississippi treats as a conviction under its own Unnatural Intercourse statute). This information will allow the Court to satisfy itself that each Plaintiff has standing.

Sealing is necessary to protect Plaintiffs from the retaliation, stigma, humiliation and opprobrium that Plaintiffs would face as a result of publication of their names, identifying information, and status as sex offenders. *See* Part I(B)(3) *supra*. Plaintiffs' proposed procedure is narrowly tailored to the need to protect Plaintiffs from harm, as Plaintiffs propose to file a redacted version of the Agathocleous Declaration and supporting documentation publically, with names and identifying information withheld from both the public and the individual Defendants. Because this case involves a challenge to government agencies with multiple employees, there is a risk of even inadvertent dissemination of Plaintiffs' information if their names are disclosed to individual Defendants. There is therefore no narrower procedure that would provide Plaintiffs with the necessary protection.

Governing case law supports permission to file under seal, and the rationale for sealing this declaration and these documents dovetails precisely with the rationale for granting pseudonymity: disclosure of this information to the public or Defendants is unnecessary to the adjudication of the Motion for Summary Judgment pending before the Court, the public interest in disclosure is negligible, and the risks borne by Plaintiffs in revealing their identities or similar information is high. *See* Part (I) *supra*. Indeed, a grant of pseudonymity would have no effect without an accompanying order to seal records of their identities and the convictions that give them standing to proceed in this case.

Because courts may deny public access where publication could be used to "gratify private spite or promote public scandal," *Nixon*, 435 U.S. at 598, and because Plaintiffs' names, identifying information, and sex offender registration status could be put to "improper use," *Test Masters*, 799 F.3d at 454, filing of such information under seal is appropriate and necessary. The public will not be harmed by nondisclosure. To the contrary, the public has an interest in the vindication of Plaintiffs' constitutional rights, and that interest is served by providing narrowly tailored protection from publication of Plaintiffs' identifying information. *Lozano*, 620 F.3d at 195.

Nor will Defendants be harmed should they be denied access to Plaintiffs' identities. Where "Doe Plaintiffs' identity information [is] not central to their claims, restricting [government defendants'] access to that information would not be prejudicial." *Lozano*, 620 F.3d at 195 (affirming lower court's holding, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 513 (M.D. Pa. 2007), that local government "can defend itself adequately without information about the anonymous plaintiffs' identities"). *See also Doe v. Porter*, 370 F.3d at 560. Where plaintiffs have alleged that publication of their names could expose them and their families to "'threats of physical and economic retaliation,'" courts have hidden the identities of named plaintiffs in class action suits from even private defendants. *Does I Thru XXIII v. Advanced Textile Corporation,* 214 F.3d 1058, 1063 (9th Cir. 2000).

Here, disclosure of plaintiffs' names to individual Defendants places them at risk of retaliation by government officials who retain a considerable degree of control over Plaintiffs' daily lives. Moreover, Defendants are responsible for large bureaucracies that depend on local implementation of the sex offender registration laws. The potential for dissemination of Plaintiffs' identifying information to the public is multiplied where numerous government

employees could have access to Plaintiffs' names. Thus, if permission to proceed under pseudonyms is granted, Plaintiffs' identities should be hidden not only from the public but also from Defendants.

Finally, Plaintiffs seek to have the Agathocleous Declaration and supporting documentation filed under permanent seal, as there is no more public interest in disclosure of such information upon termination of the litigation than there is during the pendency of the proceedings.

In sum, the balance of factors weighs strongly in favor of permitting Plaintiffs to file the above-described information under permanent seal.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant this motion and permit (1) plaintiffs to proceed in the litigation under pseudonyms and (2) file the Agathocleous Declaration and accompanying documentation in support of Plaintiffs' Motion for Summary Judgment under permanent seal to be viewed by the Court *in camera*, or in the alternative, to be designated Attorneys' Eyes Only and accessible only by the Court and Defendants' counsel.

Respectfully submitted this 3rd day of November, 2016,

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