

**THE CIRCUIT COURT OF ST. LOUIS COUNTY  
TWENTY-FIRST JUDICIAL CIRCUIT OF MISSOURI**

THE STATE OF MISSOURI ex rel. ERIC  
S. SCHMITT,

*Plaintiff,*

v.

THE SCHOOL DISTRICT OF CLAYTON,

*Defendant.*

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

**PETITION**

1. Mask mandates are destined for the ash heap of history.
2. Most of the country understands that masks do not work, they cause more harm than good, and the government should not require their use. Mandates have been repealed or have been struck down across the country.
3. Yet The School District of Clayton has a policy that allows it to impose mask mandates based on an arbitrary number of COVID-19 cases.
4. The School District of Clayton today requires schoolchildren to wear masks at its high school in order to attend class.
5. School districts do not have the authority to impose, at their whim, public health orders for their schoolchildren. That is doubly true when the public health order, in this case, facemasks, creates a barrier to education that far outweighs any speculative benefit.
6. Instead, school districts only have the power to issue those health rules that the General Assembly provides them—and the General Assembly did not give school districts the authority to condition in-person attendance on compliance with an arbitrary mask mandate.

7. That makes sense. The theory that mandatory masking in schools prevents the spread of COVID-19 by preventing the transmission of its causative agent, the SARS-CoV-2 virus, has no empirical or rational basis; and rejects basic principles of sound public health decision-making, medical science, and statistical analysis.

8. Indeed, far from providing any benefit, masking students imposes positive harms—physical, emotional, and developmental—on schoolchildren.

9. Since school districts lack the power to impose mask mandates, like the one at issue here, decisions about masking of children to prevent the spread of COVID-19 are reserved to parents, not to school districts. That follows from the fundamental truth that “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v. Soc’y of the Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510, 535 (1925).

10. Missouri Attorney General Eric S. Schmitt seeks to protect the welfare of Missouri’s children and the liberty and constitutional rights of the people of Missouri.

11. Attorney General Schmitt brings this action to prevent unlawful, unconstitutional, arbitrary, capricious, and unreasonable conduct by the Defendant.

### **JURISDICTION AND VENUE**

12. This Court has jurisdiction under Mo. Const. art V, § 14(a), § 527.010, RSMo, *et seq.*, § 536.150, RSMo, § 536.050, RSMo., common law power to issue writs, and other applicable law.

13. Venue is proper in this Court under §§ 508.010.2(2) and 508.050, RSMo.

### **PARTIES**

14. Plaintiff State of Missouri is a sovereign State of the United States of America.

15. Eric S. Schmitt is the 43rd Attorney General of the State of Missouri. Attorney General Schmitt is authorized to “institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state’s interests are involved.” § 27.060, RSMo.

16. Attorney General Schmitt sues to vindicate Missouri’s sovereign interest in controlling the exercise of sovereign power over individuals and entities within its borders; Missouri’s sovereign interest in ensuring the enforcement of Missouri law within Missouri’s borders; and Missouri’s quasi-sovereign and *parens patriae* interest in the freedom, health, and physical, psychological, educational, and economic well-being of a significant segment of its populace that are all harmed by the District’s mask mandate. This interest includes, but is not limited to, preventing the spread of the COVID-19 virus within the state as well as protecting the health and welfare of the State’s residents from arbitrary, capricious, unreasonable, unlawful, and ultimately harmful public health policies.

17. Attorney General Schmitt sues to vindicate Missouri’s sovereign interest in ensuring that its political subdivisions do not exercise authority vested in them under State law in a fashion that violates the Missouri Constitution or Missouri law.

18. Attorney General Schmitt sues to vindicate Missouri’s interest in ensuring that the children of the State receive an appropriate education.

19. Defendant The School District of Clayton is responsible for providing a free, public education to the children within its district. It is a public school district and is a political subdivision of the State of Missouri.

### **FACTUAL ALLEGATIONS**

20. Plaintiff incorporates the allegations in all preceding paragraphs by reference.

#### **I. The District's mask mandate**

21. At the start of the school year, in August 2021, the District had in place a mandatory masking requirement for all of its schools in response to the COVID-19 pandemic.

22. On information and belief, the District Board has delegated, to some extent, the decision to impose masking requirements on administrators and has not consistently approved their decisions.

23. At that time, a statewide emergency declaration under Chapter 44 was in effect relating to COVID-19.

24. On information and belief, the District Board failed to consistently reauthorize its earlier masking requirement every thirty days.

25. The district wide Mask Mandate was rescinded and replaced on April 4, 2022 with a building-by-building trigger-based Mask Mandate System ("Trigger Mandate"). *See* Exhibit A.

26. While the Trigger Mandate does not define what constitutes a "mask," on information and belief, cloth masks suffice and are the dominant method of compliance.

27. The Trigger Mandate does not have an end date.

28. On information and belief, the District relies on state statutes as authorizing the Mask Mandate.

29. When the COVID-19 positive infection rate at a district school reaches the trigger rate of one-and-a-half percent (1.5%) of a school's total population for three consecutive days, a Trigger Mandate is initiated for that particular building.

30. On information and belief, students, staff and visitors who are required to mask at a Trigger Mandate school are not required to wear a mask if they visit a different District school even if that visit takes place the very same day.

31. The District's ostensible reason for instituting the Trigger Mandate is to prevent or limit the spread of COVID-19 in a particular District building.

32. The Trigger Mandate:

- a. Requires students, staff and visitors to wear a face covering, specifically allows students to comply by wearing a cloth mask, and does not specify what type of mask students must use;
- b. Requires students, staff and visitors to wear a mask while on school property, including when indoors and receiving in person instruction;
- c. Has very few, incredibly limited exceptions, and does not exempt vaccinated or previously infected students, staff or visitors;
- d. Stays in place for at least two weeks, and will be extended until the total positivity rate drops below 1.5% for three consecutive days.

33. Based on a 1.5% threshold, a mask mandate will be imposed when as few as six cases are detected in some school buildings.

34. The Trigger Mandate contains masking requirements in addition to the building percentage triggers.

35. Under the District’s current policy, students and staff in the Pre-K and Early Childhood Programs are required to wear face coverings indoors “until our early childhood students have access to the COVID-19 vaccine and have had the opportunity to be fully vaccinated.” Ex. A, p. 1.

36. Under the District’s current policy, students and staff returning from quarantine after five days are required to wear a face mask until the quarantine period is complete.

37. Under the District’s current policy, “Masks may still be required in certain classrooms or areas of a building depending upon the health and safety needs of individual students or staff members.” Ex. A, p. 2.

38. In the Trigger Mandate, the District also established a set of quarantine and isolation rules.

39. Under the District’s current policy, a K-12 student or staff member who tests positive for COVID-19 must stay home for at least five days.

40. Under the District’s current policy, a Pre-K student who tests positive for COVID-19 must stay home for 10 days.

41. Under the District’s current policy, a K-12 student or staff member who is a close contact to a COVID-19 case and not fully vaccinated is excluded from school or work for at least five days.

42. Under the District’s current policy, a Pre-K student who is a close contact to a COVID-19 case is excluded from school for 10 days.

43. When the District instituted an earlier mask mandate in August 2021, a statewide emergency declaration under Chapter 44 was in effect relating to COVID-19 and Missouri’s recovery efforts. But there was no such declaration in effect as of April 4, 2022.

44. On April 1, 2022, the Missouri Governor declared an end to the COVID-19 pandemic and announced that the disease was now endemic in Missouri.

45. The Trigger Mandate has the effect of the August 2021 mandate in that compliance with the Trigger Mandate requires the same conduct as compliance with the August 2021 mandate.

46. On or about May 8, 2022, COVID-19 infection rates at Clayton High School, a school in the School District of Clayton, reached the 1.5% trigger threshold and the District instituted a Trigger Mandate at Clayton High School that will be in effect until at least May 22, 2022.

47. At the time of filing this Petition, masks are required in Clayton High School and The Family Center. *See* Exhibit B.

48. Upon information and belief, the District intends for summer school classes to be subject to the Trigger Mandate.

49. Upon information and belief, the District excludes any unmasked individual from a building where a mask mandate is in place due to operation of the Trigger Mandate.

## **II. Public Health Decision-Making**

50. Public health decision-making requires considering a number of factors, some of which are quantitative (*e.g.*, disease severity, characteristics of the virus), some of which are qualitative (*e.g.*, a community's trust in public health officials and anticipated reactions), and some that blend these factors.

51. Public health decision-making recognizes that many public health decisions are made in the absence of complete information, and understands that decisions must be continuously updated in light of new information.

52. Public health decision-making understands that public health decisions consider not just the effect of a decision on the transmission of a disease, but also the social and economic effects a decision may have on the public at large.

53. Public health decision-making understands that it is important to enact policies that disturb the normal functioning of society as little as possible and impose the least amount of stress as possible.

54. In short, rational public health decision-making is a holistic process that requires consideration of innumerable factors, many of which defy ready quantification.

### **III. SARS-CoV-2 and COVID-19 characteristics**

55. SARS-CoV-2 is a virus that causes COVID-19, which is an influenza-like illness. Like the flu, COVID-19 is a respiratory illness spread primarily through droplets and small, aerosolized particles.

56. COVID-19, as a global pandemic, affected the entire State of Missouri, and continues to affect the entire State of Missouri as an endemic disease like the common cold (which is also caused by coronaviruses, like COVID-19), the seasonal flu, and any number of other ailments.

57. The extent of transmission of COVID-19 ebbs and flows based on a number of factors, including seasonality and the presence of new variants of SARS-CoV-2. Omicron is the dominant SARS-CoV-2 variant in Missouri.

58. Doctors report that the omicron variant of SARS-CoV-2 appears to be mild and much less virulent than prior variants and the original virus. For example, Dr. Anthony Fauci (director of the National Institute of Allergy and Infectious Diseases) recently commented that “all indications point to a lesser severity of omicron versus delta.” Kevin Breuninger, *Fauci Says All Indications Suggest that Omicron is Less Severe Than Delta, But Warns Against Complacency*,



CNBC (Dec. 29, 2021), <https://cnb.cx/3ru9F4J>.

59. Likewise, reports suggest that the BA.2 subvariant is “30% more transmissible than the original omicron variant” but that it does not “appear to cause more severe illness than [omicron].” Shala Farzan, *More Contagious Omicron Variant Detected in Missouri, Spreading in St. Louis County*, St. Louis Public Radio (Mar. 23, 2022), <https://news.stlpublicradio.org/health-science-environment/2022-03-23/more-contagious-omicron-variant-detected-in-missouri-spreading-in-st-louis-county>.

60. Regardless of variant, COVID-19 is not a serious health risk for the vast majority of the population—and especially for children and young adults. Rather, the risk of serious negative health outcomes from COVID-19 goes up with age. Thus, children—especially healthy children—do not face a significant risk of serious illness or death if they catch COVID-19.

61. It is likely that the vast majority of people in Missouri have some form of immunity to COVID-19 either due to vaccination or prior infection. Current evidence indicates that natural immunity (*i.e.*, immunity from prior infection), is durable and protects against reinfection and severe health outcomes. Current evidence suggests that vaccine-mediated immunity, while inferior to natural immunity, provides protection against severe, negative health outcomes for at least a season.

62. Furthermore, there is no evidence that children drive the spread of COVID-19, omicron or omicron subvariants. Bearing that out is evidence that schools are not sources of COVID-19 transmission/outbreaks in a community, but rather transmission of COVID-19 in school reflects patterns of community transmission.

#### **IV. Masks fail to provide adequate protection and evidence indicates they may be positively harmful**

63. Requiring masks in community settings—such as inside school district buildings—

is a public health order. *See, e.g.*, Thomas V. Inglesby et al., *Disease Mitigation Measures in the Control of Pandemic Influenza*, 4 *BIOSECURITY & BIOTERRORISM: BIODEFENSE STRATEGY, PRACTICE, & SCI.* 362, 372 (2006). But mandatory masking is a public health measure that, prior to 2020, experts agreed would do little to no good in preventing disease and may, in fact, cause positive harm. *Id.*

64. Doctors appear to agree that it is time to “retire the cloth mask.” Former commissioner of the FDA, Dr. Scott Gottlieb, has said, “Cloth masks aren’t going to provide a lot of protection, that’s the bottom line. This is an airborne illness. We now understand that, and a cloth mask is not going to protect you from a virus that spreads through airborne transmission.” Full Transcript: Dr. Scott Gottlieb on ‘Face the Nation,’ January 2, 2022, CBS NEWS (Jan. 2, 2022), <https://cbsn.ws/3558jWB>. Indeed even masking advocates admit that “[c]loth masks are little more than facial decorations. There’s no place for them in light of Omicron.” Kristen Rogers, *Why You Should Upgrade Your Mask As the Omicron Variant Spreads*, CNN HEALTH (Dec. 24, 2021), <https://cnn.it/3GL4h3s>.

65. That is consistent with the data. Cloth and surgical masks are not effective at preventing the spread of COVID-19. Many studies show no distinguishable difference between places with mask mandates and those without them. And studies claiming that masks are effective at preventing the spread of COVID-19 are generally of poor quality and are unreliable. Indeed, mask wearing may even be counterproductive in preventing the spread of disease.

66. Furthermore, there are documented harms associated with long-term wearing of masks. Studies, for example, have found that children who wear masks in schools suffer physical discomfort (*e.g.*, headaches), mental and emotional pain (*e.g.*, less happiness or irritability), and are less capable at school. Masks could also impair the educational and emotional development

of children.

67. As a group of scientists and doctors summarized, “[s]tudent masking has no scientifically established benefit in real-world use” and, while “[p]otential harms from long-term masking are poorly understood, ... reports on mask removal have noted social and emotional benefits for students.” Urgency of Normal, *Children, COVID, and the Urgency of Normal* 23 (last updated Feb. 18, 2022).

68. Mask mandates—especially for schoolchildren—represent a reversal of a long-held consensus on the merits of community masking, and rests on assumptions and premises that reject the fundamental tenets of modern medicine, statistical analysis, and public health decision-making. They do so while failing a cost-benefit analysis and imposing real, tangible harm.

**COUNT ONE – DECLARATION THAT THE MASK MANDATE IS VOID**

69. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

70. The District is a political subdivision within the meaning of § 67.265.1, RSMo.

71. The original Mask Mandate is an “order” within the meaning of § 67.265.1, RSMo.

72. The current Mask Mandate is an “order” within the meaning of § 67.265.1, RSMo.

73. The District issued its original Mask Mandate when there was an emergency order declared pursuant to chapter 44, RSMo.

74. The original Mask Mandate was subject to the requirements of § 67.265.1(1) at the time it was issued.

75. On March 30, 2022, the School Board voted to terminate the original Mask Mandate and replace it with the Trigger Mandate effective April 4, 2022. The original Mask Mandate then became a prohibited order under § 67.265.2.

76. Section 67.265.5, RSMo, provides: “No political subdivision of this state shall make or modify any orders that have the effect, directly or indirectly, of a prohibited order under this section.” § 67.265.5, RSMo.

77. The current Trigger Mandate has the same effect as the original Mask Mandate that the School Board voted to terminate, which is a prohibited order.

78. As a result, the Trigger Mandate is a prohibited and unlawful order.

**COUNT TWO – MASK MANDATE IS UNLAWFUL**

79. Plaintiff incorporates by reference the allegations in all preceding paragraphs.

80. Plaintiff challenges the validity of the Mask Mandate, and seeks a declaration that it is unlawful and *ultra vires*.

81. By law, “[i]t shall be the general duty and responsibility of the [DHSS] of health and senior services to safeguard the health of the people in the state and all its subdivisions.” § 192.020.1, RSMo.

82. DHSS has not delegated, and indeed could not delegate, that authority to school districts.

83. The local health authority has not issued an order requiring schoolchildren to wear masks.

84. The local health authority cannot issue an order requiring schoolchildren to wear masks.

85. Neither the Missouri Constitution nor the General Assembly has expressly or impliedly granted the School District a general police power to enact law for the public welfare.

86. Neither the General Assembly, DHSS, nor the School Board has delegated to the superintendent a general power to issue public health orders like the Mask Mandate.

87. Neither the General Assembly, DHSS, nor the School Board could delegate to the superintendent a general power to issue public health orders like the Mask Mandate.

88. Thus, Missouri law does not authorize Defendant to impose a Mask Mandate.

89. The District does not have authority to impose a Mask Mandate for public health reasons.

90. For those reasons, the Mask Mandate, whether initiated by a trigger scheme or otherwise, is an unlawful order and Missouri's schoolchildren should not be subject to it.

**COUNT THREE – THE DECISION TO INSTITUTE A MASK MANDATE IS UNREASONABLE, ARBITRARY, AND CAPRICIOUS**

91. Plaintiff incorporates by reference the allegations in all preceding paragraphs.

92. Plaintiff challenges the validity of the District's decision to institute a Mask Mandate as a COVID-19 mitigation measure, and seeks a declaration that that it is unreasonable, arbitrary, and capricious. The decision to impose a Mask Mandate—however operationalized—is a decision that the District's students, staff, and visitors do not have a legal right to be unmasked in District buildings and imposes on them a legal duty to wear masks when so ordered. Furthermore, the decision determines legal rights and duties with regards to access to District buildings because, on information and belief, individuals who do not wear a mask are not allowed into District buildings when there is a mask mandate in place.

93. Plaintiff can challenge that decision under § 536.150, RSMo, as well as by common-law writ proceedings.

94. School Districts are “agencies” within the definition under the Missouri Administrative Procedure Act. *See P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 818 (Mo. Ct. App. 2011). School Districts may not exercise their power in an “unreasonable, arbitrary,

capricious or unlawful manner.” *Magenheim v. Bd. of Educ. of Sch. Dist. of Riverview Gardens*, 347 S.W.2d 409, 417 (Mo. App. 1961).

95. The District’s decision to mask schoolchildren (defined as all children who are of the age to attend Pre-K-12 school) as well as staff and visitors is premised on the scientifically dubious idea that wearing cloth or surgical facemasks somehow slow or prevent the spread of COVID-19 and its variants and thus its decision to institute Mask Mandates requires schoolchildren, staff and visitors at District schools to wear a mask, with few exceptions, when they are at school. That decision is arbitrary and capricious.

96. Government action is arbitrary, capricious, and unreasonable when it is based on *post hoc* rationalization, when it fails to consider an important part of the problem it is addressing, and when it fails to consider less restrictive alternatives before infringing on citizens’ liberty. *See, e.g., Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905, 1909 (2020); *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015). “[A]n agency which completely fails to consider an important aspect or factor of the issue before it may also be found to have acted arbitrarily and capriciously.” *Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882, 892 (Mo. App. W.D. 1995) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In addition, agencies must consider whether there are less restrictive policies that would achieve their goals. *See Regents of the Univ. of Calif.*, 140 S. Ct. at 1912 (quoting *State Farm Mut. Auto.*, 463 U.S. at 51).

97. On information and belief, the District failed to consider fully the potential social, pedagogical, and economic consequences of the Mask Mandate on District students, staff, visitors and the community.

98. On information and belief, the District failed to fully consider key characteristics of COVID-19, including severity of disease among different age and risk groups, availability and effectiveness of control measures and treatment options, and the fact that many people have immunity either because of vaccination or prior infection.

99. On information and belief, the District failed to consider the fact that the Omicron variant is less likely to cause severe illness and death.

100. On information and belief, the District failed to grapple with a large swath of relevant science, data, statistics, studies, or alternatives when it decided to use facemasks as a COVID-19 mitigation strategy. That includes failing to grapple with the weakness of the evidence supporting community masking as a mitigation measure, and the significant evidence showing that masking does very little or nothing to prevent the spread of COVID-19.

101. On information and belief, the District failed to consider the harms masking imposes on schoolchildren.

102. On information and belief, the District failed to consider the fact that masking to prevent the spread of a disease like COVID-19 represents a reversal in prior policy that did not require masking to prevent the spread of a disease like COVID-19.

103. The factors listed above are not an exhaustive list. Ultimately, the Mask Mandate represents an irrational analysis of the costs and benefits of mandating community masking. For those reasons, and more, the Mask Mandate is unreasonable, arbitrary, and capricious.

**COUNT FOUR – THE DISTRICT’S TRIGGER MANDATE IS UNREASONABLE,  
ARBITRARY, AND CAPRICIOUS**

104. Plaintiff incorporates by reference the allegations in all preceding paragraphs.

105. Plaintiff challenges the validity of the District’s Trigger Mandate and seeks a declaration that that it is unreasonable, arbitrary, and capricious.

106. The District's Trigger Mandate requires that all students, staff and visitors at a particular school wear facemasks if the rolling seven-day average COVID-19 infection rate at that school reaches or exceeds 1.5%. That decision is arbitrary and capricious.

107. The Trigger Mandate determines when the legal duty to wear masks to enter a District building is imposed.

108. Plaintiff can challenge that decision under § 536.150, RSMo, as well as by common-law writ proceedings.

109. On information and belief, the District failed to consider all the factors that make the Mask Mandate arbitrary and capricious when it decided to impose the Trigger Mandate.

110. The District has no rational basis for choosing 1.5% as its trigger threshold as opposed to any other arbitrarily selected number.

111. On information and belief, the District cannot show that its Trigger Mandate (1) slows or stops the spread of COVID-19 in Clayton High School, (2) slows or stops the spread of COVID-19 in the District generally, or (3) provides any benefit that outweighs its harms.

112. The District failed to consider the fact that public health authorities do not consider transmission alone as justifying a mask mandate. *See CDC, COVID-19 Community Levels* (last updated Mar. 24, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html>.

113. On information and belief, the District failed to consider the fact that the ongoing threat of imposing COVID-19 mitigation measures negatively affects the psychological well-being of the District's students.

114. The factors listed above are not an exhaustive list. Ultimately, the Trigger Mandate represents an irrational analysis of the costs and benefits of mandating community masking. For those reasons, and more, the Trigger Mandate is unreasonable, arbitrary, and



capricious.

**COUNT FIVE – VIOLATION OF MISSOURI CONSTITUTION, ART. IX, § 1(a)**

115. Plaintiff incorporates by reference the allegations in all preceding paragraphs.

116. Article IX, § 1(a) of the Missouri Constitution provides schoolchildren a right to a free public education.

117. Since any District mask mandate arbitrarily prohibits schoolchildren from attending class in-person in the District, serves no legitimate public health purpose, and is unlawful, it violates the rights of schoolchildren in the District to a free public education.

118. To the extent that the District provides virtual learning, that is no substitute for in-person instruction and cannot remedy the constitutional violation.

119. Thus, the District cannot lawfully impose a masking requirement, be it trigger based or otherwise.

**CONCLUSION**

WHEREFORE, Plaintiff respectfully requests that this Court:

- a. Declare that the Mask Mandate is unconstitutional, unlawful, and/or *ultra vires*;
- b. Declare that the Mask Mandate is arbitrary, capricious, unreasonable, and invalid;
- c. Declare that the District's original Mask Mandate is a prohibited order under § 67.265, RSMo;
- d. Enjoin the District and its officers, employees, and agents from enforcing the Mask Mandate or any similar order that has the effect, directly or indirectly, of implementing the Mask Mandate;

- e. Grant relief by injunction, certiorari, mandamus, prohibition, or other appropriate action against the District and its officers, employees, and agents, providing that the Mask Mandate is unlawful, arbitrary, capricious, unreasonable, and invalid;
- f. Enter a final judgment in Plaintiff's favor on all Counts in this Petition; and
- g. Grant such other and further relief as the Court deems just and proper under the circumstances.

Dated: May 19, 2022

Respectfully submitted,

**ERIC S. SCHMITT**  
**Attorney General of Missouri**

/s/ James S. Atkins

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