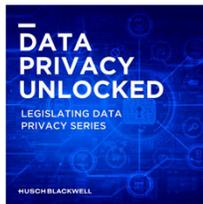


Data Privacy Unlocked: Legislating Data Privacy Series



Episode 1 – Data Privacy Unlocked: A Conversation with Representative Collin Walke of Oklahoma June 21, 2021

Speaker	Statement
David Stauss	<p>The emergence of broad state consumer privacy legislation has been one of the dominant stories in privacy law since at least 2018, when California lawmakers passed the California Consumer Privacy Act in response to Alastair Mactaggart’s ballot measure. State lawmakers have jumped into the void created by the absence of federal privacy legislation and tackled this complicated issue. In 2021 alone, lawmakers in 26 states proposed CCPA-like privacy legislation. While the federal government may eventually pass federal privacy legislation, there can be no doubt that state lawmakers are at the forefront of developing the principles that will form the foundation of privacy law in this country. Given the importance of these issues, we decided to launch a limited podcast series, interviewing some of the prominent state lawmakers who have offered these bills. Our guest today is Democratic Representative Collin Walke from Oklahoma. Representative Walke is one of the authors of HB 1602, which is entitled, The Oklahoma Computer Data Privacy Act. Representative Walke, thank you for joining us.</p>
Collin Walke	<p>Thank you very much for having me. It’s an honor and a pleasure and I always enjoy talking, so thank you very much.</p>
David Stauss	<p>I’d like to start here by saying you are the genesis of this podcast idea. I think we talked about that earlier. I saw a press conference that you gave in – during the time when you were trying to get your bill across the finish line there, and I thought, we’ve got to talk to this guy. So I know you know the listeners to this podcast are avid followers of all things</p>



Speaker	Statement
	privacy law including state privacy law, but could you just give us – I know they probably know already – but would you just give us an update on where your bill stands now?
Collin Walke	Yeah, so we finished session just a few weeks ago, and so the Oklahoma Computer Data Privacy Act ended up dying in the Senate. It was assigned to the Senate judicial chair and the irony there for everybody listening is, she's never practiced law. But she killed it, refused to give it a hearing, and so consequently it never made it back through the committee process. I'm hopeful and optimistic that next session we'll be able to move it to a committee chairperson that will actually hear it, but that's where it sits right now. It's dead for this session.
David Stauss	Now you actually got it out of the House, though, is that right?
Collin Walke	That's right. It passed overwhelmingly out of the House. We had – it was 85 to 11 and a lot of those 11 no votes was thought because it wasn't stringent enough. So it wasn't because it was a bad bill, it was just some of them didn't think it went far enough.
David Stauss	To what do you attribute the fact that you couldn't get it through the other chamber? What was the roadblock there?
Collin Walke	So that is probably most certainly gamesmanship on the backside. So the biggest opposition that we had, toward the end, came predominantly from AT&T. AT&T came out strongly against it and I can tell you a long, dirty story if you want it at some point. But in any event, they came out strongly against it on the House side. But then on the Senate side, it was originally supposed to go to a different committee. But then, next thing we knew, it got assigned to the committee chair and so I assumed that a deal had been cut or something along those lines had happened to where AT&T was able to get it killed by saying it was anti-business – you know, it would ruin all the small mom-and-pop shops in Oklahoma if we did this, the sky would fall, etc. So I think they were able to convince her to not even give it a hearing.
David Stauss	So, I mean, you can't spend 10 seconds with you without realizing you're extremely passionate on this issue. Where does that – where does your interest in this issue – come from?
Collin Walke	Because I truly believe this without any sense of irony that data privacy is the most important issue facing us right now in this country. I mean, I'm setting aside global warming. I'm setting aside all of those things because the manner and method by which we communicate today is all dictated by data, and the consequence of that is if people are able to



Speaker	Statement
David Stauss	<p>manipulate that data, they are able to manipulate you and that's what we're seeing with these echo chambers and everything else that's going on is the manipulation, unwitting manipulation on our part, and participation in this process that is dividing our country and making the world a worse place, which is not the purpose of the internet. It was never the purpose of search engines or any of those sorts of things, but that's what ended up happening and that's why it's such a big concern for me.</p>
Collin Walke	<p>So, explain to me, then, you know, your bill is different than – I mean a number of state bills are based off of Reuven Carlyle's bill out of Washington, the Washington Privacy Act. The one that passed in Virginia was based off of that one. Your bill is different. It's got CCK in it. It's got, you know, maybe a little bit of Washington Privacy Act in it. But it's a different bill unto itself. How did you develop and write your bill?</p>
Collin Walke	<p>As you noted in an email when we first met, no one had Oklahoma on the radar. We're known more for cowboys and oil and gas than we are for technology. And that's especially true for me. I consider myself a Luddite. So, in 2019, I read <i>Zucked</i> by Roger McNamee and I went, Oh, my god, and my eyes were opened. I mean, I had heard about Edward Snowden and those sorts of things, but it just seemed kind of too far away. This hit me right in the face, and so I immediately reached out to Mr. McNamee to ask him if he would be willing to help me with this, and he was more than willing. He's now a bona fide Okie as a matter of fact. And so I worked collaboratively with him to figure out what would work, what wouldn't work, and one issue that I knew was most important was opt in versus opt out.</p>
David Stauss	Yeah.
Collin Walke	<p>That, to me, was the crux of all of data privacy – is who has control, you or them? And so that's why I made my bill opt in and that's how it got crafted. I basically just started from a bill out of Texas that mirrored Washington's and the CCPA. I put in the right to be forgotten and then I also added in the opt-in provision as opposed to opt out. So it was his guidance and his wisdom that kind of showed me where to go with that.</p>
David Stauss	<p>Have you, going through that process – the answer could easily be no – going through that process, did you ever talk with any other state lawmakers who were in a similar position as you?</p>
Collin Walke	<p>So I had reached out to a few. In fact, one whose language I stole from Texas – I reached out to him. I didn't hear back from him and I talked to</p>



Speaker**Statement**

one other legislator, I want to say from California, on part of one of the aspects of my bill. But actually, in crafting the legislation – I need to take a step back – we also did an interim study. And what an interim study in Oklahoma is, is you basically get two or three hours to come in and have different people voice their aspects of potential legislation. So we had Mr. McNamee come in, we had an industry side come in from Washington, DC, and then we also had a local company, an ISP, Cox Communications, come in so that we could, you know, get their perspectives on it and see, okay, what would be something they would bite off on and what wouldn't they bite off on?

David Stauss

And while we're in the lobbying process... I think we talked in the prelude to jumping on the podcast, I think what, what listeners are really interested in is sort of like that inside baseball, right? The things that we can't see that that are going on. We see the amendments. We see the process. We all know what's going on behind closed doors. What were the sticking points with your bill that, you know, raised these issues that ultimately, you know, didn't allow it to get across the finish line this year?

Collin Walke

Well, so first and foremost, we knew that this was going to be a difficult hill to climb. We knew it was going to be difficult because of the opt-in provision specifically. We knew that businesses weren't going to like that and so one of the things that we did was – and the co-sponsor of this bill in the House was the majority leader for the Republicans representing Josh West. And he's my best friend in the House even though we're on opposite sides of the aisle. He's rural, I'm urban. But, you know, we knew that this was more important than partisanship. And so by enlisting him he was able to help get his caucus on board. So, before it ever hit the floor of the House – we had more than 40 co-authors between the House and the Senate – and so initially when we started getting lobbying it was always on the opt-in. It was also the private right of action that was problematic and we actually ended up pulling that out before it was presented on the House floor as part of a compromise. But the bottom line was no one wanted the bill. After I got it out of committee, a lot of the local stakeholders did come to the table and have good faith negotiations about what we can do to go forward and I actually crafted some decent legislation from their perspective. Those conversations proved fruitful, but not all tech companies like AT&T came to the table. And the consequence of that was, is I think that they carried the water for everybody else because no one really wanted data privacy in Oklahoma. I don't think anybody wants data privacy in the industry anyway anywhere because it's such a profitable item.



Speaker	Statement
David Stauss	What about privacy advocates? Were they engaged in the stakeholder process?
Collin Walke	So, that's interesting because there was nobody there lobbying on behalf of it. I was able to make connections with Consumer Reports and another DC lobbying group, privacy advocacy group as well, and they were helpful in crafting the legislation. They did ask what other things they could do, but at that stage we knew it was coming out of the House. We knew the problem was going to be, Who could we get it assigned to in the Senate? So there wasn't a lot that they could do. All of the heavy lobbying, though, was against it and I still think it's a testament that it passed 85 to 11 with zero people lobbying for it.
David Stauss	My understanding from our pre-call is, you know next year's another year and you're going to make a run at this again next year. What does that look like? Same bill? Are you working on it with stakeholders over the summer? Walk us through that process.
Collin Walke	Depending on what happens between now and the next session, we may go with that bill and amend it. I know that one of the issues is going to be opt in, opt out. I may run a clean version with an opt-in provision and let – if somebody else thinks they can get an opt-out provision – let them do that. But I have three or four other data privacy pieces of legislation that I'm going to be proposing as well, including education curriculum. I've learned of other software companies that are able to skirt FERPA and HIPAA and actually implement software programs in schools without parental consent. There's things like that that I want to be able to address that might be more narrow and targeted, but would be nonetheless beneficial. So I – depending on what happens in the interim –I'll either run a clean opt-in bill or we'll see what we can get done on the one that's sitting in the Senate and see if we can get it moved.
David Stauss	So, let me ask you this: In March of this year, Virginia passed a version of Carlyle's Washington Privacy Act. A portion of it is opt in, right? But it's more – I think we'd agree – it's more business friendly than the bill that you were running. Does seeing something like that happen encourage you in your efforts in Oklahoma, or is it, hey, I wish it was a better bill? I mean, how does something like that, you know, affect you?
Collin Walke	It's all, it's all of the above. I mean, in part of my negotiations I spoke with a few people and asked, "Hey, if it comes down to it should I live and die on the hill of opt in or opt out?" Right? And, you know, even though Virginia is, you know, opt out and more business friendly, something is probably better than nothing. The flip side of that coin, though, and my biggest concern, is that the more weak bills we pass in



Speaker	Statement
David Stauss	<p>these states, the more of an excuse and justification it is for the federal government to pass something weak. Because I do think that they are going to come along, and they are going to pass something. But when you have, you know, 30 states that have implemented, you know, not very rigorous laws and regulations, then the feds are not going to be incentivized to do something more abrasive and more aggressive.</p>
Collin Walke	<p>Yeah, let's talk about that, right? Because, you know, one of the arguments against states legislating in this area is this is really a 50- state issue. This is the federal government that should be doing – doing this legislation. What's your opinion on that?</p>
David Stauss	<p>I call B.S. on that whole patchwork argument. And the reason I do is because in one of the meetings we had a conglomeration of local tech companies in Oklahoma. We actually do have a very good incubator system that's being developed here in Oklahoma City. And we had a sit down. And I was expecting to get yelled at during this. But one of the individuals actually said, "You know, I don't see why this is such a big deal. We're already telling our clients to do this." And that's the point. If you were just to comply with the GDPR, just pick out the most rigorous data privacy law you can think of, and that's what you ought to be doing in the first place cause it ain't your data, it's mine. And so I don't – you know, that's the bottom line when looking at legislation for data privacy is, is it for privacy or is it for profit? And I think too often we let the profits take the way of our privacy.</p>
Collin Walke	<p>Do you have a sense of what you think – and I'm clearly asking you to crystal ball this, right? But do you have a sense of what it would take – the number of states-wise – to pass...that would have to pass state privacy legislation that would get the federal government to act? Is there – is it three states? Is it five states? Is it 30? What do you think?</p>
David Stauss	<p>I actually kind of think the opposite. I don't think there's a tipping point in states. Look, for example, at the expanse of, or the expansion of, medical marijuana and recreational marijuana. In spite of, you know, I think a majority of states at this stage have some form of a marijuana program in their state, and the federal government still hasn't, you know, made it legal, federally. So, I don't know that there's a tipping point. I think it's more of a tipping point of public perception because that's, you know... My friends in Oklahoma, we talk about it. We're not Washington-style politics. We're friends. We hang out. We talk. What you see on TV that's, you know, WWF. That's not real life, or at least not the life that we live. But I think that once we reach that boiling point nationwide – where that's when people really appreciate what this is doing to themselves, their children's mental health and the society at</p>



Speaker	Statement
David Stauss	<p>large – that’s when the politicians will finally act. They always act too late, but it’s only when there’s a critical point. But I don’t think it’s a matter of how many states have to pass it.</p>
David Stauss	<p>You mentioned earlier – and I wanted to go back to it– you mentioned you had a Republican co-sponsor on this bill. And, you know, it was notable, at least to me – and I think we talked about it – I didn’t have Oklahoma circled on my map of states I expected to be going after privacy law. That’s a tribute to you; it really is. I mean, you really clearly pushed this issue. But it was a surprise to many that Oklahoma would really jump in here. And you were able to put together a bipartisan coalition to propose the bill and then, you know, you mentioned all the co-authors as well, drawing from so many across the aisle. And we’re seeing some of that as well in Colorado now. The bill that’s getting moved through Colorado is bipartisan. Do you view this as a party, you know, and what is a society that is hyper-partisan, right? The parties don’t agree on anything, right? It seems like data privacy is an area where you can get large-scale agreements on these issues.</p>
Collin Walke	<p>Oh, absolutely! And the reason is because it’s enshrined in our Constitution. You have a right to privacy guaranteed by the Fourth Amendment. Oklahoma hasn’t voted – not a single county in Oklahoma has voted – for a Democratic president since before Barack Obama. Okay, we’re a red state. But that also means that that’s because we love our privacy in this state. And when you tell somebody, “Hey, Roomba® is mapping your house and sending it back to the mother ship so they can sell it to somebody in China – what do you think about that?” it gets them hot and bothered and they’re like, “Well, that ain’t right.” And, you know, I actually had one very, very, very conservative individual come up to me afterwards and say, “You know, your debate swayed me whenever you said that you can choose privacy over profits or profits over privacy.” And because she realized – you know what? – in principles privacy matters much more than whatever the billion-dollar industry is going to profit off of us.</p>
David Stauss	<p>You mentioned before, I mean, one of the issues that does seem to divide. And it’s interesting, right? Because it divides across party lines, but it also divides internally on party lines. You saw it in Florida where it was all Republican legislature and they weren’t able to pass legislation. It was based on the private right of action. It was based on, like, how do we hold businesses accountable? And you mentioned earlier that you had a private right of action – yours – and you pulled it back as part of the compromise. I think I...what I’d love to hear is, (a) What is your point of view on enforcement? And then (b) Why were you willing to give up on</p>



Speaker	Statement
	the private right of action?
Collin Walke	Well, so I want to be clear, I'm probably not as well-versed in all the other bills that are there....
David Stauss	Sure, okay.
Collin Walke	...I mean there's a lot, there's been a lot, but what I would say is this: The reason I was kind of willing to pull out the private right of action is because it was similar to California. So, you know, it was like you could get \$2,500 per violation or \$7,500 for an intentional. It was a fairly nominal amount. So, I think that if you're going to do a private right of action, maybe it ought to be something meaningful, right? Like you just actually literally have a private right of action and we establish statutory damages at \$50,000 or \$100,000 a pop – something that's really meaningful. Because I do otherwise get the concern about a floodgate litigation. Because otherwise anybody can go down and file a small claims lawsuit in Oklahoma for \$5,000, and how many times does that take before it really just becomes an annoyance and a nuisance? That being said, there has to be an enforcement mechanism with some teeth and I think that an attorney general enforcement mechanism is probably the wisest way to go if we're not going to actually put in some meaningful teeth to liquidated damages for violation of the act.
David Stauss	So, one of the things – I'm not sure if you studied this issue; I'd be interested if you had... California passed its law and then it revised its law, the California Privacy Rights Act. One aspect of the California Privacy Rights Act that I think will give it a lot more heft in the enforcement mechanism is they created a state agency called a California Privacy Protection Agency. That's, you know, essentially a data protection authority that will go in and enforce that law. Is that anything that you ever considered as sort of like a compromise position? I know it costs money, and the – state agencies I think has been the issue, but is that something that you thought about or considered?
Collin Walke	No, actually, I hadn't. I thought about it especially when I was drafting it. I had learned about that since then. But the reason I hadn't was because Oklahoma requires a balanced budget and so we can't borrow any money and we're always broke. The consequence also was originally I had the corporation commission in there and they had given some sort of wild fiscal analysis that this was going to cost millions of dollars for them to man up and, you know, add employees, etc. And so I figured, well, we already had a consumer protection agency insofar as the AG is concerned and he's the one that enforces the Consumer Protection Act. He's already got the people; they already kind of do this. So that's how we flipped it.



Speaker	Statement
	But, no, we would not have the financial wherewithal to otherwise make that happen.
David Stauss	You know, if you did do AG enforcement, would you try to allocate additional funds to the AG's office to hire new lawyers – those types of things? Is that something that was discussed at all?
Collin Walke	Yes. And so basically the way we had made that work was he was – the AG was – allowed to recover attorney's fees and costs on top of the fines and fees going into a dedicated revenue source for the AG specifically.
David Stauss	What – you know, kind of looking at these bills across the nation – what I've personally observed as significant is, is whether the attorney general's office supports or objects to the bill. So, for example, in Washington state the AG's office objects to it and they send representatives to testify against the bill. But in Colorado earlier this week, the attorney general's office sent somebody to testify in support of the bill in Colorado. I think that's a big deal. In Oklahoma, did the AG's office get engaged in your process at all? Were they part of the stakeholder process?
Collin Walke	Not so much the stakeholder process, but when we decided to switch from the corporation commission and needed another enforcement mechanism, we reached out to the AG's office and he was really supportive of it, worked with his office on the language necessary for their office to get the funding and those sorts of things, as well as the punishment and fines and fees. So we did work with the AG's office collaboratively. You know, they never came out in favor of it or opposed to it one way or the other but they, you know, clearly helped us along the way.
David Stauss	Yeah, it seems like that's an important threshold – for whatever reason, that's become an important threshold in these issues. One thing I wanted to ask as well is how much are you attuned to what other states are doing in this space? Is that significant to you or is it, or is it just sort of like, hey, we're going to do what Oklahoma needs done?
Collin Walke	No, it's certainly important and I've since, you know, since I started thinking about this and doing it, I've been following along and watching the highlights of these other states and what's happening with their bills because it matters. And, you know, I want to see good legislation come out if for no other reason so I can steal and try to pass it in Oklahoma. But I want to see good legislation come out so I want to stay on top of it because I do think that it's something that we need to have implemented nationwide, and so I want to see what other states are doing.



Speaker	Statement
David Stauss	One aspect that I thought was interesting about your bill, among all the other bills, is the monetary threshold for applicability. So, Washington has a \$25 million annual gross revenue threshold. I'm sorry, California has a \$25 million annual gross revenue threshold. The bills being run in Virginia, Washington and Colorado – they don't have a gross revenue threshold; they just talk about the number of consumers. If memory serves, your bill was \$10 million annual gross revenue. The listeners can't see you, but I can see you shaking your head so I haven't gotten it completely wrong here. I imagine that was deliberate; I imagine that changing that number was deliberate. Can you talk about that some?
Collin Walke	Yeah, and that goes back to the balance of overly restrictive to not restrictive enough and why some of the people voted against it, which was it wasn't restrictive enough, right? I mean, so if you theoretically had revenues of \$9.999 million, you don't have to comply with the act. So, I appreciate that argument, I do, because if I had my druthers and I could wave a magic wand, I would absolutely make it apply to everybody. In fact, I would make everything opt in and I would make this – I would put data analytic companies who use our data out of business. That's what I would try and do. But I can't. And recognizing that there's got to be a less restrictive alternative to shutting everybody out, we were able to figure, well, Oklahoma's a smaller market. We took all those things into consideration and ultimately determined, okay, well we'll use that number. So, it was thoughtful, but you know there wasn't anything magic about that.
David Stauss	I think you just touched on it with your answer to the last question, but I wanted to kind of tee it up for you. Are there aspects that you think just have to be in a privacy bill? Maybe transparency? Maybe the right to be forgotten? Maybe the right to access data? For you personally, is there just sort of like a red line that if it wasn't – if you didn't have this in the privacy bill – it just wouldn't be worth passing it?
Collin Walke	Yeah, I think the right to request and delete information – you know, to opt out. You've got to have that. You know, how feasible a true right to be forgotten is, I don't know. I don't know the real expense involved with that. But, I would certainly say, you know, at one point in time I got a draft of my legislation back from a lobbyist and it had literally taken out the ability to ask, "What information do you have?" and to delete it. I mean, well, then, what's – what does this do? It's just paper at this stage. So, I mean, they don't even like that. But I think that's got to be in there, bare minimum, because if somebody down the road decides, "You know what? I'm tired of all these random ads," etc. – whatever it is – they ought to have control of their data and be able to request that. It's theirs,



Speaker	Statement
	man. It's nobody else's.
David Stauss	So, you had mentioned some other privacy bills that you are going to be running next legislative session. Sounds like they are around children's rights. Just tell me a little bit about what you have in the cooker so to speak.
Collin Walke	<p>Yeah, yeah, yeah. So, the first one would be mandating some form of data privacy education in high schools because, as you all know, tech experts, kids have these things with them all day long. It's not good for their mental health and who knows what they're doing, having done with their data. So that's the first one because just like me, I mean, I was completely ignorant of this until I read a book on it and I don't know too many other kids, at least in Oklahoma, that know or understand what's really happening when they're on the internet.</p> <p>The other bill that I'm looking at is... There's at least one software company that I'm aware of and basically they go into schools and – it's a good idea, I don't want to knock the idea – the idea is we are going to do mental health assessments on these kids. But they're sitting in there with a laptop open and the whole class can see it and it asks questions like: Do your mom and dad drink? Do they go to church? How often do they fight? Are you, you know, interested in dating somebody? Who is it? And because of the way the data is handled and managed, it escapes FERPA and it escapes HIPAA and that just – and not only that but parents don't have to consent to it – and that just seems to me to be completely egregious invasion of privacy, let alone the fact that, what happens if one of those other kids in the classroom sees what, you know, little Timmy put down for an answer? So, we need to put some guardrails in place on that.</p> <p>So, those are the two off the top of my head. But I just saw that California passed a law recently, and I forget what it was, but it made me go, That's something I want to look at, so...</p>
David Stauss	Is it the smart speaker one?
Collin Walke	Yeah, yeah.
David Stauss	Yeah, California always is doing something. They've always got some bill out there. So last ques – we're at our time, but my last question to you then is, I kind of want to know what path forward is in 2021. I think we mentioned earlier, right? You're going to run it again but what is that? What does that look like? When does the legislature open? You know, what's your plan for trying to get it across the finish line? All those types of things?



Speaker	Statement
Collin Walke	So, Josh West, Representative Josh West and myself, we're both very aggressive guys and the industry really wanted to try – most of the industry wanted to try – and come to the table and reach a resolution last session because they know that we're not going to stop. And so between now and the end of summer, Representative West and I are going to talk about exactly what we want to do for next session and then potentially bring the stakeholders back in to the table. Our session starts in February. We have to have our legislation on file by January, January 15th usually, and then it, you know, goes all over from there. You know, to the extent that we could use the vehicle that's sitting in the Senate, that's probably the preferred method because we know that if we can get that amended in a way that we like, as soon as they pass it out of the Senate we can pass it in the House lickety-split. So, that would, hopefully, be the easiest pathway forward.
David Stauss	So, if I understand you correctly, would you try to introduce it in the Senate first, then, and get the response?
Collin Walke	It will just sit there until next session, so I can file a bill at the beginning of February and it has to review – start in the House and do all that. Or, I can pick up where we left off with the bill that's sitting in the Senate and amend that somehow and then just kick it back over to the House to approve the amendments.
David Stauss	Okay, so it may be in February where we don't see a new bill get filed in Oklahoma?
Collin Walke	That's right. But I'll make sure, I'll make sure to let you know so you can let everybody know what we're planning on doing and, you know, what our prospects are.
David Stauss	I love that. As you know, we push out a lot of content on the blog and it's of interest to our readers and our listeners, so...
Collin Walke	I read the blogs so I appreciate you doing it.
David Stauss	Oh, thanks, thank you for that. Shameless plug at the end of the podcast. Representative Walke, I do want to thank you for your time today. It's been a pleasure getting a chance to talk with you. Like I said at the beginning, I mean, it's clear that you've got a mastery over this subject. It's clear, absent you this wouldn't be getting pushed in Oklahoma, so really is a tribute to your time and effort on this.
Collin Walke	Well, I appreciate it. Keep keeping me informed so that I don't look like an idiot on the House floor. So, thank you for that.



Speaker	Statement
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David Stauss	I'll do.
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