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SUPREME COURT, STATE OF COLORADO
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Denver, Colorado 80203

Certiorari to the Court of Appeals, 2014CA0670
District Court, City and County of Denver, 2013CV30421

SCOTT GESSLER, individually and in his official capacity as Colorado Secretary of State

Petitioner,

v.

DAN GROSSMAN, SALLY H. HOPPER, BILL PINKHAM, MATT SMITH, and ROSEMARY MARSHALL, in their official capacities as members of the Independent Ethics Commission, and The Independent Ethics Commision,

Respondents.

▲ COURT USE ONLY ▲

Case Number: 2015SC462

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BRIEF OF *AMICI CURIAE* COLORADO COUNTIES, INC. AND COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER

CERTIFICATE OF COMPLIANCE

We, KELLEY G. SHIRK and GEOFFREY T. WILSON, hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certify that:

The *amici* brief complies with C.A.R. 28(g) and 29(d).

Choose one:

_X_ It contains 3,940 words (does not exceed 4,750 words).

____ It does not exceed 30 pages.

The *amici* brief complies with the content and form requirements set forth in C.A.R. 29(c).

We acknowledge that the brief may be stricken if it fails to comply with the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Kelley G. Shirk
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/s/ Geoffrey T. Wilson
GEOFFREY T. WILSON

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Colorado Statutes

Colorado Constitution

Legislative Materials

Other Authorities

STATEMENT OF THE ISSUE ADDRESSED BY *AMICI CURIAE*

Whether the Court of Appeals erred in interpreting the subject matter jurisdiction of the Independent Ethics Commission ("IEC"), created by Article XXIX, so broadly as to include any law already in existence? *See Gessler v. Grossman*, 2015 Colo. App. LEXIS 687, 2015 COA 62 (Colo. App. May 7, 2015).

STATEMENT OF INTEREST

Colorado Counties, Inc. ("CCI") is a Colorado non-profit corporation founded by the state's county commissioners in 1907 to further county government cooperation and efficiency. CCI members include sixty-two of the sixty-four county governments in Colorado. Using discussion and cooperative action, CCI works to solve the many financial, legal, administrative and legislative problems confronting county governments throughout Colorado.

CML was formed in 1923. The League is a non-profit, voluntary association of 267 of the 271 municipalities located throughout the state of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 100 home rule municipalities, 166 of the 171 statutory municipalities and the lone territorial charter city, all municipalities greater than 2,000 in population, the vast majority of those having a population of 2,000 or less.

CCI and CML have appeared as *amici curiae* for decades before this Court to express the concerns and perspective of Colorado municipalities and counties when the Court confronts significant questions that could result in unintended consequences to public officials and employees. This is such a case.

The decision of the Court of Appeals grants the IEC unlimited subject matter jurisdiction, creating the prospect of an exercise of police power over all levels of public officials and employees including those functioning on behalf of CCI and CML's constituents. This appeal involves the proper interpretation of the IEC's subject matter jurisdiction, as created by article XXIX. All levels of public officials and employees will be impacted by this Court's ruling. For now, the IEC asserts the authority to scrutinize every element of their conduct. CCI and CML seek to participate to provide the Court with a statewide local government perspective on the significant issues raised in this petition.

STATEMENT OF THE CASE

Amici Curiae adopt the statement of the case presented in Petitioner Scott Gessler's opening brief.

STATEMENT OF FACTS

Amici Curiae adopt the statement of facts presented in Petitioner Scott Gessler's opening brief.

ARGUMENT

This brief strives to provide the perspective of local government officials and employees on the Court of Appeals' broad interpretation of the IEC's scope of authority. CCI and CML recognize that the IEC jurisdiction extends to the elected and employed persons of their constituencies. Both the public entities and the personnel seek clear notice as to all specific standards applicable to their conduct and the identity of those agencies that enforce such standards. From these participants' perspective, the Court of Appeals' interpretation departs from the intended purpose of Amendment 41, granting an administrative agency too much authority to enforce the amendment, while eliminating the predictability and consistency essential to good governance. *Amici Curiae* urge the Court to reverse the Court of Appeals' judgment and limit IEC jurisdiction to that established by Amendment 41.

I. AMENDMENT 41 CREATES SPECIFIC STANDARDS OF CONDUCT WITH PENALTY MECHANISMS APPLICABLE TO PUBLIC OFFICIALS AND EMPLOYEES TO ADDRESS INFLUENCE PEDDLING AND CORRUPTION.

Article XXIX and the legislative council materials generated in the course of its adoption describe Amendment 41 as establishing *specific* standards of conduct as set out in the Article's provisions, as well as any specified future provisions

enacted by the General Assembly. The Court of Appeals expanded the Amendment far beyond such limits.

A reviewing court generally gives deference to an administrative agency's *reasonable* interpretation of its enabling statutes. Nonetheless, Colorado courts are obliged to "construe statutes from an independent analysis of the statutory scheme." *See Coffman v. Colo. Common Cause*, 102 P.3d 999, 1005 (Colo. 2004); *Ward v. Allstate Ins. Co.*, 45 F.3d 353, 355-356 (10th Cir. 1994) (quoting *Colo. Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988)) (internal quotation marks omitted). "Agency interpretation is not binding, and if an agency misconstrues a statute, the court should not follow." *El Paso County Bd. of Equalization v. Craddock*, 850 P.2d 702, 704-05 (Colo. 1993).

In fact, where an agency's interpretation conflicts with the design of an Act, is it the court's *duty* to invalidate that interpretation. *Travelers Indem. Co. v. Barnes*, 552 P.2d 300, 303 (Colo. 1976) (citing *Reardon v. U.S.*, 491 F.2d 822, 824 (10th Cir. 1974)). "Deference would be inappropriate if it were to defeat a constitutional provision or the General Assembly's purpose in enacting a statute." *City of Fort Morgan v. Colo. Pub. Utils. Com'n*, 159 P.3d 87, 92 (Colo. 2007).

"[T]he court's duty in interpreting a constitutional amendment is to give effect to the electorate's intent in enacting the amendment." *Davidson v.*

Sandstrom, 83 P.3d 648, 654 (Colo. 2004). When the language in an amendment is ambiguous – meaning it is "reasonably susceptible to more than one interpretation" – courts must look to "the objective sought to be achieved and the mischief to be avoided by the amendment." *Id.* at 654-655. To this end, courts may consider "other relevant materials such as the ballot title and submission clause and the biennial Bluebook, which is the analysis of ballot proposals prepared by the legislature." *Id.* (quoting *In re Submission of Interrogs. on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999)) (internal quotation marks omitted).

The IEC claims unrestrained subject matter jurisdiction to enforce any Colorado law the IEC, in its discretion, views as setting standards of conduct and reporting requirements the IEC relates to ethics issues. The scope and uncertainty that flows from such assertions establishes the necessity of judicial directives to negate this interpretation.

A. Article XXIX sets out an intent to proscribe specific conduct and provides for enforcement applicable to public officials and employees.

Prior to enacting Article XXIX, the Colorado Code of Ethics, C.R.S. §§ 24-18-101, *et seq.* ("COE"), provided standards to guide the conduct of public

officials. Those standards did not apply to public *employees*[1] and no penalty mechanism for general enforcement of the COE existed. *See generally* C.R.S. §§ 24-18-101, *et seq.*

Article XXIX extends specific standards of conduct to include public *employees* and creates an internal enforcement mechanism to penalize violations of such standards. Colo. Const. art. XXIX. Article XXIX also includes a "purposes and findings" section, providing the basis for enacting this code of ethics. One stated purpose is to ensure that public officials and employees "avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated." Colo. Const. art. XXIX, § 1(1)(c). The Article further provides that ensuring propriety and preserving public trust requires that the governed "have the benefit of specific standards to guide their conduct" together with a penalty mechanism to enforce such standards. Colo. Const. art. XXIX, § 1(1)(e).

Article XXIX, section 3, defines prohibited conduct that is deemed in violation of the public trust and creates perceptions of influence – the Gift Ban.

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[1] Section 24-18-101 *et seq.*, C.R.S. is the Colorado statutory code of ethics applicable to local government officials, defined to include any elected or appointed official of a local government, but not employees of a local government. §24-18-102(6), C.R.S.

Colo. Const. art. XXIX, § 1(3). The Gift Ban specifies prohibited conduct revolving around the receipt of gifts and other forms of influence peddling. Article XXIX, section 4 restricts another specific type of conduct related to influence peddling – representation after leaving office. Both sections establish very specific restraints on the conduct of public officials and employees, as contemplated by the Article's purpose statement.

Because Article XXIX also recognizes the need to create an internal enforcement mechanism, section 5 creates the IEC as the administrative enforcement mechanism while section 6 sets out the penalty schedule. Section 6 creates a monetary penalty – "double the amount of the financial equivalent of any benefits obtained" – fueling the concept that the mechanism exists to prevent or punish influence peddling that might generate monetary gain in specific fashion.

Article XXIX also contemplates the General Assembly enacting additional specific standards of conduct to facilitate the operation of its provisions. Colo. Const. art. XXIX, § 9. The Court of Appeals' interpretation of the IEC's scope of

authority might threaten to render any such effort superfluous if affirmed here.[2] This is because no additional legislation to add specific standards of conduct to facilitate the IEC's operations would be necessary if the IEC already possesses the authority to enforce all Colorado law in existence to the extent the IEC decides such law sets standards of conduct and reporting requirements related to ethics issues to the satisfaction of the IEC.

Moreover, the ambiguous phrase "any other standards of conduct and reporting requirements as provided by law" appears nowhere within Article XXIX other than in section 5, creating the IEC. As demonstrated below, the creation of The IEC was an afterthought in drafting Amendment 41; added as a means to enforce the provisions as written. Because the drafters also included a provision allowing for future legislation, the drafters sought to avoid limiting the IEC to enforcing the initial provisions of the Amendment, provided the General Assembly expanded that scope in the future.

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[2] Article XXIX cannot be interpreted to render language superfluous. *See Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005) (citations omitted). The Article must be construed to give consistent and harmonious effect to all its parts. *Id.* (citing *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246, 253 (Colo. 1996) ("If separate clauses in the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, we should adopt that construction which results in harmony.'") (string citations omitted).

The remaining text of Article XXIX demonstrates an intent to proscribe and penalize the specific conduct enumerated in the Article; behavior that could be said to violate the public trust by creating impressions of influence peddling. Nothing in the statutory structure contemplates the IEC's scope of authority expanding to most other laws in existence. To the contrary, the language of the Article assures those governed by the IEC that they *must* have the benefit of *specific standards* to guide their conduct. *See* art. XXIX, § 1(1)(e). The provisions of Article XXIX open the door for future legislation; not the floodgates that will be breached if the IEC is free to administer and enforce all the laws deemed relevant by the IEC.

B. The legislative history of Amendment 41 demonstrates the intent to proscribe specific conduct and provides for enforcement applicable to public officials and employees.

The ambiguous language "any other standards of conduct and reporting requirements as provided by law," construed by the Court of Appeals to include any law in existence, appears four times in Article XXIX, section 5. Though Article XXIX, section 2 contains a definitions section, the phrase is not defined. Given the breadth of the phrase, lack of any definition, and its inclusion without definitive context, multiple interpretations might be argued. However, the legislative council materials generated as the Article was created demonstrate a progression of ballot proposals that gave rise to Amendment 41 and establish the

electorate's intent. *See Davidson*, 83 P.3d at 654 (finding courts may consider all relevant legislative materials to ascertain the objective sought to be achieved and the mischief to be avoided by an amendment).

The pertinent legislative council materials evince an intent to add an internal penalty mechanism to conduct previously addressed in the COE without enforcement provisions – the receipt of gifts – while including a group not previously regulated by the COE – public *employees*. No legislative background material support the notion that every Colorado statute, however remotely it may qualify as regulating an ethics issue, was to be enforced by the IEC.

A progression of ballot initiative proposals reviewed by the Legislative Council Staff and Office of Legislative Legal Services (the "Legislative Council") establish the original intent of Amendment 41. The initial text proposed by proponents Pete Maysmith and Martha Tierney,[3] does not create the IEC, and contains no subject matter jurisdiction clause. *See* Proposed Initiative Measure 2005-2006 #121, Text of Measure ("Legislative Council Materials").[4] The IEC

[3] In 2006, when Amendment 41 was proposed, Martha Tierney was a practicing attorney with Kelly Haglund Garnsey & Kahn and Pete Maysmith was the director of Colorado Common Cause.

[4] The Legislative Council materials for Amendment 41, Ethics in Government are available at Colorado Legislative Council webpage: http://www.leg.state.co.us/lcs/0506initrefr.nsf/reviewcomment?openview&Count=30

was proposed only after the Legislative Council issued questions to proponents as to responsibility for imposing any contemplated penalty. *See* Legislative Council Materials, *supra* note 4, *Concerning Ethics in Government Memorandum of May 4, 2006 Review and Comment Hearing*, p. 13 (2005-2006). An amended text included creation of the IEC. *See* Legislative Council Materials, *supra* note 4, #120, Text of Measure.

Following that revision, the Legislative Council's memorandum reflected on the purpose of creating the IEC. Paragraph eleven of the "Purpose" section reads, "[t]o authorize the independent ethics commission to adopt rules for administering and enforcing *the provisions of the new constitutional article* created by the measure and *other specified statutory provisions*." *See* Legislative Council Materials, *supra* note 4, #120, *Concerning Ethics in Government Memorandum of May 4, 2006 Review and Comment Hearing*, p. 3. (emphasis added). Paragraph fifteen provides a purpose for the complaint filing procedure also referencing the intent to cover "provisions of the new constitutional article created by the measure *or certain statutory provisions*." *Id.* at p.4. (emphasis added). Finally, paragraph sixteen contemplates penalties being assessed for violations of only "the new constitutional article." *Id.* No stated purpose of the amendment reflects the intent to provide a broad and unknown jurisdiction. To the contrary, the purpose

statements all exhibit the intent to limit enforcement to the provisions in the Article itself or to other *specified provisions*.

Moreover, the revised text of Amendment 41 creating the IEC proposed the following *specific* statutory provisions in place of the ambiguous language in question today: "arising under this article and under sections 24-18-101 *et seq.*, 24-6-203, 24-6-302, C.R.S. or any successor sections." *See* Legislative Council Materials, *supra* note 4, #120, Text of Measure. That language was revised prior to preparation of the Bluebook, perhaps due to a substantive question posed in paragraph 33(b) of the Legislative Council's memorandum on initiative #118 asking:

> Why do the proponents restrict the bases for complaints, as described in subsection (1) of Section 5, to those sections of law identified? Is it possible that there are other sections of law or constitutional provisions that may give rise to ethical duties? Is it not possible that the general assembly may adopt new provisions in the future that give rise to ethical duties or standards?

See Legislative Council Materials, *supra* note 4, #120, *Concerning Ethics in Government Memorandum of May 4, 2006 Review and Comment Hearing*, p. 17.

Accordingly, the final version of Amendment 41 appearing in the Bluebook expanded the subject matter jurisdiction to "any other standards of conduct and reporting requirements as provided by law." Because the question that preceded that revision asked proponents to contemplate the General Assembly someday

adopting new provisions that give rise to additional ethical duties or standards, the phrase expands subject matter jurisdiction to new standards of conduct that the General Assembly decides should fall under the IEC's authority but no further.

Interpreting Article XXIX to limit the IEC's scope of authority to the specific provisions of the Article and any future provisions the General Assembly may specify is the only logical interpretation of the statutory language and the legislative history. It is clear that the objective sought and the mischief to be avoided by creating Amendment 41 was to preclude the appearance of influence peddling through gifts to all government officials *and employees*, and that the IEC was created as a mechanism to enforce that objective together with any other objective the General Assembly deems appropriate.[5] To the extent any law is ambiguous, the benefit of the doubt should be provided to the citizens and not to regulators seeking an expansion of authority.

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[5] The IEC declared this the very purpose of Article XXIX by stating as follows: "[w]hen the public hears about the Broncos gift to the Clerk's Office, it may well be viewed as a gesture that governmental services are for sale. This is just the sort of conduct that *Article XXIX was created to prevent.*" *See* IEC Advisory Opinion No. 14-01 (emphasis added).

II. EXPANDING IEC JURISDICTION TO ENFORCE UNSPECIFIED LAWS IS INEFFICIENT AND INCONSISTENT.

An unrestrained interpretation of IEC jurisdiction and authority could waste governmental resources, create uncertainty and confusion for those subject to the IEC's jurisdiction, and affords the public no assurance that the purpose of the law will be fostered.

A. Government efficiency is impeded by unlimited jurisdiction and overlapping authority.

The IEC cannot perform its duties with efficiency if complaints may be based on any existing law covering standards of conduct and reporting requirements generally related to the ethics issues it is to enforce. Such effort is already subject to the administration of other state agencies, as is already apparent, and poses the prospect of duplicative or conflicting results. Further, even the IEC recognizes some limits on its jurisdiction.

The Complaints, Advisory Opinions, Position Statements, and Letter Rulings issued by the IEC from 2008 through 2016 establish that two of the thirteen letter rulings, thirteen of the eighty-nine advisory opinions, and six of the sixteen complaints investigated[6] involve the assessment of laws outside the scope

[6] One hundred thirty-three complaints were submitted to the IEC; sixteen were deemed non-frivolous and fully investigated by the IEC.

of Article XXIX. Thus, twenty-one of the administrative actions of the IEC were unnecessary under an appropriate interpretation of its authority. Those twenty-one administrative actions also risked overlapping with enforcement functions assigned to other state agencies – a conflict the Article attempts to address.

Article XXIX, section 8 provides that "[a]ny provisions in the statutes of this state in conflict or inconsistent with this article are hereby declared to be preempted by this article and inapplicable to the matters covered by and provided for in this article." Read together with the Court of Appeals' interpretation of the IEC's sweeping jurisdiction, this preemption clause creates more uncertainty than clarity. If the IEC may enforce any law in existence, the clause may limit or even abolish other agencies and other codes of conduct. Even the IEC notes this confusion in an advisory opinion on conduct that it decides should fall under C.R.S. §§ 24-18-101, *et seq.* rather than any provision in Article XXIX:

> It is unclear to what extent these statutes and others cited in this opinion have been superseded by the passage of Amendment 41 (Constitution Art. XXIX). The Commission notes that the drafters intended that the IEC preempt similar bodies charged with rendering advice on ethics-related issues. Proposed Initiative Measure 2005-2006 #118, Concerning Ethics in Government Transcript of May 4, 2006 Review and Comment Hearing, p. 24. Further, the drafters intended that Art. XXIX would preempt conflicting statutory provisions which are less strict and that the General Assembly would enact legislation to make conforming amendments. Id. pp. 20-21.

See Advisory Opinion 11-11.[7]

Regardless of the preemption clause, the IEC notes the importance of deferring to other state agencies in a better position to regulate the conduct of those falling directly under their purview. *See* Advisory Opinion No. 13-13 (stating "in general, absent clear facts to the contrary, the Commission is inclined to rely on the position of the state agency involved, given their superior understanding of the duties performed by the state employee involved."); *See also* Advisory Opinion 13-05 and Letter Rulings 14-02 and 10-02 (also providing the same deference to a different state agency).

It is absurd to interpret the IEC's authority to cover any law in existence it finds relevant, limiting or abolishing other codes of conduct together with the agencies charged with enforcing those conflicting provisions as the IEC sees fit.[8] The overall structure of the Article and the legislative history never hint that the drafters intended such a result, while even the IEC recognizes the importance of maintaining and deferring to other state agencies better equipped to govern certain

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[7] The cited IEC Complaints, Advisory Opinions, Position Statements, and Letter Rulings are available on the IEC website: https://www.colorado.gov/pacific/iec.

[8] "[A] statutory interpretation leading to an illogical or absurd result will not be followed." *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 593 (Colo. 2005) (internal quotation marks and citations omitted).

conduct. To assure that Article XXIX did not abolish or limit all other state agencies and codes of conduct, a bright line must establish the scope of IEC authority. Conflicting or duplicate rulings may otherwise occur along with confusion and a waste of tax payer dollars.

There is also a potential for conflicting opinions, not only among different agencies, but within the IEC itself. For example, the underlying case dealt with an alleged violation of the State Fiscal Rules. The IEC claimed jurisdiction. Since then, the IEC opined its jurisdiction is somewhat limited as to such rules: "[q]uestions regarding the interpretation of the State Fiscal Rules generally are more appropriately answered by contacting the Office of the State Controller." *See* Advisory Opinion No. 13-04. The equivocal language used in this statement creates the risk of unpredictable results and uncertainty sure to bring disrepute to the entire government.

Additionally, the IEC acknowledges that its authority overlaps the State Personnel Rules while Article XII, section 14 grants the State Personnel Board exclusive authority to enforce its rules. *See* Final Order 08-01. The IEC issued an advisory opinion with regard to possible violations of the State Personnel Board Rule despite such exclusivity. *See* Advisory Opinion No. 14-20.

Finally, the IEC issued an order in 2009 that found no jurisdiction to enforce a statute – C.R.S. § 24-6-402 – recognizing some limit on its scope of authority. *See* Advisory Opinion 09-08.

Article XXIX could not be intended to create a super agency tasked to enforce every code of conduct in existence. Although the IEC may sometimes recognize the limits of its own jurisdiction, in at least one instance, judicial direction is essential to guide and inform both the IEC and those regulated by Article XXIX.

B. Establishing unlimited and overlapping jurisdiction over any conceivable standard of conduct risks inconsistent unrestricted rulings.

When a state agency's subject matter jurisdiction is duplicative and overlapping, everyone wonders: who is responsible for what?

If the IEC possesses unlimited authority, how do the agencies decide on the standards of conduct within their jurisdiction? When multiple agencies administer and enforce overlapping standards of conduct, what precludes duplicative and conflicting opinions that create confusion and uncertainty among the citizens governed by those standards?

The Court of Appeals leaves CCI and CML constituents without notice as to the specific standards that must guide their conduct, as well as which agency

governs those standards, and whose advisory opinions must be followed. All levels of public officials and employees remain vulnerable to a limitless font of restraint on their conduct. Even the most persistent among them may face the penalties for tripping over such rules, however inadvertently.

Limiting IEC jurisdiction to the administration and enforcement of the provisions in Article XXIX and such future specific provisions as may be enacted by the General Assembly is the intended scope of Amendment 41. This approach avoids the inefficiency, uncertainty, and confusion that must otherwise result.

CONCLUSION

Amici Curiae Colorado Counties, Inc. and Colorado Municipal League respectfully request that this Court reverse the Court of Appeals' judgment.

Dated this 15th day of August, 2016.

Respectfully submitted,

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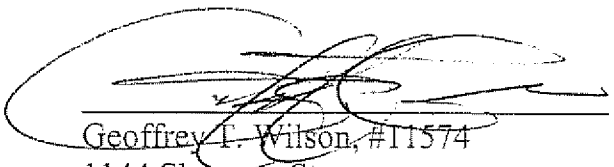

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