No. 96990-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NICOLE BEDNARCZYK and CATHERINE SELIN, individually and on behalf of all others similarly situated,

Petitioners/Plaintiffs,

v.

KING COUNTY,

Respondent/Defendant.

AMICI CURIAE BRIEF OF PUBLIC JUSTICE AND THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFFS

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INTRODUCTION

When Nicole Bednarczyk was summoned for jury duty, she was faced with a stark choice: do her duty and risk failing to make ends meet, or find a way out of jury service. She faced this choice because of King County's policy of paying jurors only $10 per day for their service, a policy that drives many low-income residents, like Ms. Bednarczyk, away from serving. This systematic exclusion of low-income jurors undermines the constitutional integrity of the judiciary by increasing public perceptions of bias, decreasing the accuracy of jury verdicts, and weakening public awareness of and faith in the judiciary. Because a fundamental function of the judiciary is at stake, as a separation of powers matter, this Court has the power—and the obligation—to act.

IDENTITY AND INTEREST OF AMICI

Public Justice is a national non-profit, public interest legal organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting to preserve access to justice for victims of corporate and governmental misconduct. As a part of this work, Public Justice is concerned with ensuring that the judicial branch carries out its constitutionally-assigned duties, including ensuring that litigants have a

meaningful opportunity for their claims to be heard by a representative jury of their peers.

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in the State of Washington. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

STATEMENT OF THE CASE

The facts of this case are laid out in the parties' briefing and the Court of Appeals' opinion below.

ARGUMENT

In this case, the Plaintiffs allege that King County's practice of paying jurors a mere ten dollars per day results in the systemic exclusion of low-income individuals from jury service, in violation of the Juror Rights

Statute (RCW 2.36.080(3)). King County claims that this Court is without power to remedy this violation of law, because to do so would violate separation of powers principles. King County is wrong. The issue in this case strikes at the heart of the Court's ability to carry out its constitutional mandate to ensure the effective administration of justice. As a separation of powers matter, this Court has the power to grant Plaintiffs relief, and should do so here.

I. Separation of powers demands that the judiciary exercise its powers to ensure the integrity of its "fundamental functions."

Although not "specifically enunciated" in the constitutions of Washington State or the United States, the separation of powers doctrine is "universally recognized as deriving from the tripartite system of government established in both constitutions." *State v. Blilie*, 132 Wash. 2d 484, 489, 939 P.2d 691, 693 (1997). This constitutional diffusion of power is designed to "secure liberty" by ensuring that no single branch wields all the power of government simultaneously. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring).[1] Its main purpose is to ensure that the "fundamental functions of each branch remain inviolate." *Carrick v. Locke*, 125 Wash. 2d

[1] In interpreting and applying Washington's separation of powers doctrine, this Court "relies on federal principles regarding the separation of powers doctrine." *State v. Wadsworth*, 139 Wash. 2d 724, 735, 991 P.2d 80, 87 (2000).

129, 135, 882 P.2d 173 (1994). Separation of powers not only permits some overlap in the work of the branches, but in fact requires that each branch guard its sphere and ensure it is able to carry out its own important work.

A. The separation of powers doctrine does not draw a hard and fast line between the branches.

The courts have "never held that the Constitution requires that the three branches of Government operate with absolute independence." *Morrison v. Olson*, 487 U.S. 654, 694, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 707, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)). The Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Separation of powers does not depend on the branches being "hermetically sealed off from one another." *Carrick*, 125 Wash. 2d at 135. To the contrary, "some overlap must exist." *City of Fircrest v. Jensen*, 158 Wash. 2d 384, 393-94, 143 P.3d 776 (2006). This Court has said that the separation of powers doctrine is "grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread." *Carrick*, 125 Wash. 2d at 135 (citing *Matter of Salary of Juvenile Director*, 87 Wash. 2d 232, 240 (1976)).

In keeping with these principles, the U.S. Supreme Court has "recognized the constitutionality of a 'twilight area' in which the activities of the separate Branches merge." *Mistretta v. United States*, 488 U.S. 361, 386, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). As Justice Brandeis observed, separation of powers left to each branch the "power to exercise, in some respects, functions in their nature executive, legislative and judicial." *Myers v. United States*, 272 U.S. 52, 291, 47 S.Ct. 21, 71 L.Ed. 160 (1926) (Brandeis, J., dissenting). In exercising these powers, the courts must of course be cautious not to "trench upon the prerogatives of other departments of government." *Washington State Bar Ass'n v. State*, 125 Wash. 2d 901, 907, 890 P.2d 1047 (1995). But they also must insist that the other branches not usurp their functions or intrude on the judiciary's ability to act independently. *Id.*

The Court, therefore, need not exercise its powers in a "cribbed or confined" manner, but instead must approach its work with "flexibility and practicality," having as its object the goal of doing "right and justice." *Carrick*, 125 Wash 2d at 135; *Toscano v. Greene Music*, 21 Cal. Rptr. 3d 732, 738 (2004). This may mean exercising powers that are best described as quasi-legislative or executive, in addition to traditional judicial functions. For example, it is well established that separation of powers principles are

not offended when the court engages in "nonjudicial" functions like rulemaking. *See, e.g.*, 28 U.S.C. §§ 2072, 2521; *Mistretta*, 488 U.S. at 388. Such overlapping functions may be particularly appropriate where they are addressed to matters that have traditionally been the responsibility of the judicial branch. *See Mistretta*, 488 U.S. at 388 (finding placement of Sentencing Commission in the judiciary comports with separation of powers in recognition of the "shared responsibility" of the branches in the sentencing function).

Courts regularly employ their powers to "say what the law is" and to fashion relief for violations in ways that result in such overlaps. For instance, this Court has observed that the judicial and legislative functions often work cooperatively, noting that Washington's legislature "has an established practice of defining prohibited acts in general terms, leaving to the judicial and executive branches the task of establishing specifics." *Wadsworth*, 139 Wash.2d at 735.

And, although the appropriation power is reserved to the legislative branch, it is well within the power of the judiciary to provide guidance as to how that power should be exercised to comport with constitutional principles. Courts regularly construe laws and issue injunctions even when doing so has the effect of directing outlays of public money. *See Edelman*

v. Jordan, 415 U.S. 651, 667–68, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (court decrees permissible where "fiscal consequences to state treasuries" are the "necessary result of compliance"). For example, in *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978) this Court rejected assertions that it would violate separation of powers for this Court to give effect to the Washington State Constitution by requiring the state to appropriate additional education funds. *Id.* at 504-05. And courts frequently grant requests for injunctive relief requiring the provision of specific services or expenditures of public money in cases decided under statutes such as the Americans with Disabilities Act or the Voting Rights Act. *See, e.g, Nat'l Fed'n of the Blind, Inc. v. Lamone*, No. CIV.A. RDB-14-1631, 2014 WL 4388342, at *15 (D. Md. Sept. 4, 2014), *aff'd sub nom. Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016) (requiring state to make tool available for 2014 election to allow blind individuals to vote); *Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004) (requiring that specific medical center be kept open, despite local government protest that it needed to close for budgetary reasons); *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982) (relief may include earmarking of public funds); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 966 (D. Nev. 2016) (requiring opening of additional in-person polling places); *United States v. Berks Cty., Pa.*, 250 F.

Supp. 2d 525 (E.D. Pa. 2003) (requiring provision of services to voters with limited English proficiency). Similarly, in the nationwide effort to desegregate schools, courts have required school districts to provide programs and services they otherwise would not have offered. *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 284-85, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) (collecting cases). This Court, too, has mandated public expenditures as a result of its statutory interpretation. In *In re Grove*, 127 Wash. 2d 221, 897 P.2d 1252 (1995), for example, this Court interpreted RCW 10.101 to require "public payment" of the expenses and fees necessary to satisfy a civil litigant's right to counsel on an appeal as of right. *Id.* at 243-35.

These cases present no separation of powers problem. After all, Courts are obligated to "adjudicate claims that the law is not being observed." *Dopico*, 687 F.2d at 653. And "the expenditure of funds cannot be considered a harm if the law requires it." *Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach*, 846 F. Supp. 986, 993 (S.D. Fla. 1994). Although fashioning appropriate relief in a particular case might be difficult, "that difficulty does not justify abandoning the task." *Id.; see also Smith v. Miller*, 153 Colo. 35, 40, 384 P.2d 738, 741 (1963) (en banc) ("It is incumbent upon each department to assert and exercise all its powers whenever public necessity requires it to do so.").

B. This Court has robust inherent powers to safeguard its fundamental functions.

Where the judiciary's fundamental functions are at stake, separation of powers concerns demand that the courts have inherent authority to "protect[] the due and orderly administration of justice" and maintain their own "authority and dignity." *Cooke v. United States*, 267 U.S. 517, 539, 45 S.Ct. 390, 69 L.Ed. 767 (1925). As this Court has said, "the judicial function extends beyond the determination of questions in controversy and includes functions necessary or incidental to the adjudicative role." *In re Juvenile Dir.*, 87 Wash. 2d at 242. These powers work in tandem, and at times overlap, with powers granted through legislative pronouncements. *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir. 1995) (rules promulgated by Congress are not "substitutes for the inherent power," which can be both "broader and narrower" than rule-based or statutory powers).

Courts' inherent powers are grounded in the need for the judiciary to ensure that its fundamental functions remain inviolate. The contempt power, for instance, ensures that court dictates are respected. And it is well established that courts have the power to ensure they can carry out their constitutional mandates by providing for adequate pay for those persons and officials whose participation is integral to the court's functions. *See, e.g.*, *Makeen v. Colorado*, No. 14-CV-3452-WJM-CBS, 2016 WL 8470186, at

*7 (D. Colo. Sept. 16, 2016) ("state court's management of its administrative functions, including how much the state pays to note takers . . . are 'unique judicial functions'"); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966) (expressing "no doubt" that court has authority to deal with subject of pay for court appointed attorneys); *Smith*, 153 Colo. 35 (judges empowered to fix salaries of court employees); *Millholen v. Riley*, 211 Cal. 29, 293 P. 69 (1930) (inherent power to fix salary of secretaries to appellate courts).

Among those necessary persons are members of the jury, the "treatment and keeping" of whom it is the court's "undoubted duty" to see to. *Lycoming Cty. Comm'rs v. Hall*, 7 Watts 290, 291, 1838 WL 3239, at *1 (Pa. 1838) ("It is the undoubted duty of the court to prescribe the manner of [jurors'] treatment and keeping; and it must sometimes occasion unusual expense. [This cost] must be at the public charge, for it is as much a part of the contingent expenses of the court, as is the price of the fire wood and candles consumed in the court room.").

When necessary, one of the "many forms" this inherent power to provide for necessary funding may take is the *compulsion* of that funding. *In re Juvenile Dir.*, 87 Wash. 2d at 245. This power is not a "recent innovation," but remains as vital to the court's ability to protect its

constitutional role as ever. *See id.* (citing, *inter alia*, *Lycoming Cty.*, 1838 WL 3239, at *1; *Carpenter v. County of Dane*, 9 Wis. 274 (1859) (compensation of counsel appointed by court for indigent); *State ex rel. Howard v. Smith*, 15 Mo.App. 412 (1884) (court janitors); *People ex rel. Cole v. Board of Supervisors*, 39 Hun 299, 300 (N.Y. 1886) ("[T]here is an inherent power of the court . . . to incur such expense as may judicially be determined to be necessary in cases of exigency, to maintain authority, punish offenders, and prevent the miscarriage of justice.")).

This Court has made clear that the inherent power to compel funding for necessary court functions is a "constitutional imperative." *In re Juvenile Dir.*, 87 Wash. 2d at 244. This Court compared the judiciary's exclusion from the government budgeting process to the "King's purse"—a practice "violative" of the notion of separation of powers for its infringement on the independence of the judiciary ("and incidentally of juries"). *Id.* at 244. Finding that "judicial freedom from improper influence is essential," this Court noted that "a court is not free if it is under financial pressure." *Id.* (quoting *Carlson v. State ex rel. Stodola*, 247 Ind. 631, 633 (1966)). For this reason, the court must have the tools to ensure its fundamental functions are adequately funded.

Regardless of how the Court exercises its powers of self-protection, the Court cannot abdicate its duty to do so. *Zylstra v. Piva*, 85 Wash. 2d 743, 748–49, 539 P.2d 823, 826 (1975) ("The court cannot, of course, relinquish either its power or its obligation to keep its own house in order."). The judiciary must "ensure its own survival." *In re Juvenile Dir.*, 87 Wash. 2d at 245.

II. Because the jury is a fundamental function of the judiciary, separation of powers principles require the Court to address threats to the integrity of the jury system.

The Plaintiffs' claim here—that King County disproportionately excludes low-income jurors from service—strikes at the heart of the judiciary's ability to carry out its constitutionally-assigned role. As a matter of separation of powers, this Court has the power, and the obligation, to address this deficiency.

A. The jury system is a "fundamental function" of the judicial power of the State.

The Court must take responsibility for ensuring the proper functioning of the jury system because the jury is a fundamental function of the judiciary, representing the essential democratic core of the judicial power. From the moment of the founding, the jury was written into the fibers of the nation's form of government, at the very heart of the judicial branch. U.S. Const. Art. III, § 2 (the "trial of all crimes, except in cases of

impeachment; shall be by Jury."); *see also id.*, Amend. VII ("the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."). The addition of the civil jury guarantee in the Bill of Rights was crucial to the ratification of the new U.S. Constitution. *See Id.* at 656-73; Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 92-95 (Dec. 1966). Among the states, the right of jury trial in criminal cases was one of the few universal guarantees, becoming the "only right secured in all state constitutions penned between 1776 and 1787." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1183 (1991). Additionally, all thirteen of the original states ensured the right of trial by jury in civil cases. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment,* 57 Minn. L. Rev. 639, 655 (1973). Like its brethren, the Washington State Constitution declares that the "right of trial by jury shall remain inviolate." Wash. Const. Art. I, § 21.

In this constitutional structure, the right to trial by jury is "no mere procedural formality, but a fundamental reservation of power." *Blakely v. Washington*, 542 U.S. 296, 306, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). It is the means by which the Constitution ensures "the people's ultimate

control" of the judiciary. *Id.* By constitutional design, the "jury acts as a vital check against the wrongful exercise of power." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). The jury system ensures "governance by the people" and "permits the people to participate in and provide another check on potential abuses of courts and government." *State v. Evans*, 154 Wash. 2d 438, 445–46 (2005). In the words of the "Federal Farmer," juries "secure to the people at large, their just and rightful controul in the judicial department." Letters From The Federal Farmer (XV), in 5 THE COMPLETE ANTI-FEDERALIST, at 320. As Alexis de Tocqueville observed, the jury "places the real direction of society in the hands of the governed," and "invests the people, or that class of citizens, with the direction of society." 1 Alexis de Tocqueville, Democracy in America 293-94 (Phillips Bradley ed., Vintage Books 1954). The guarantee of trial by jury, as a result, is "widely perceived as a hallmark of the fairness, integrity and public acceptance of judicial proceedings." *Wheeler v. United States*, 930 A.2d 232, 248 (D.C. 2007). In short, the jury is the democratic heart of the judicial branch. Threats to the jury, therefore, represent existential threats to the branch.

Accordingly, courts have long recognized their responsibility for the "treatment and keeping" of members of the jury. *Lycoming Cty.*, 1838 WL

3239, at *1. The U.S. Supreme Court, on multiple occasions, has found that it is eminently appropriate—if not required—that the court "should exercise [its] power of supervision over the administration of justice" to address the systematic exclusion of sectors of the populace from participation in jury service. *Ballard v. United States*, 329 U.S. 187, 193, 67 S.Ct. 261, 91 L.Ed. 181 (1946). In *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946), the Court considered the exclusion of "all persons who work for a daily wage" from jury lists, and in *Ballard*, the exclusion of women. In both instances, the Court found that such exclusion did not comport with the constitutional guarantee of a representative jury. Invoking the court's power of supervision over the administration of justice, the Court rejected both systems of exclusion.

B. Exclusion of low-income jurors undermines the constitutional integrity of the judiciary.

Exclusion of entire subgroups of the populace from jury service undermines the judiciary's institutional legitimacy in at least three ways.[2] First, exclusion erodes the perception that the judicial process is fair, increasing the sense that judicial proceedings are infected by bias. Second,

[2] In accordance with this Court's rules, amici do not seek to replicate arguments made elsewhere by the parties or other amici. Exclusion of low-income jurors and jurors of color inflicts numerous harms, not only on the judiciary directly but also on defendants, excluded citizens, and the community alike. But because those harms are addressed elsewhere in the record, this brief focuses only on harms that accrue directly to the judiciary in its efforts to fulfil its constitutional demands.

exclusion decreases the accuracy of jury verdicts, undermining the ability of the judiciary to seek the truth. And third, exclusion precludes those sectors of society that are kept from jury service from benefitting from the reinforcing educative function of serving on a jury, which itself undermines public knowledge of and faith in the judiciary.

1. Exclusion of groups from jury service undermines the perception that judicial proceedings render fair and impartial verdicts.

Courts have often recognized that infirmities in how the jury is constituted threaten the institutional legitimacy of the judiciary. For example, the U.S. Supreme Court has found that discrimination in the selection of jurors "casts doubt on the integrity of the judicial process." *Rose v. Mitchell*, 443 U.S. 545, 556, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Discrimination in jury selection and the resulting exclusion of sectors of the community undermines, for example, the entire criminal justice system by placing "the fairness of a criminal proceeding in doubt." *Powers*, 499 U.S. at 411. If the jury is not chosen in accordance with law, the Supreme Court has said that the "verdict will not be accepted or understood" by the "criminal defendant and the community as a whole" as "given in accordance with the law by persons who are fair." *Id.* at 413. Not only do unrepresentative juries increase the risk that any given decision will be

tinged by bias, but even where bias does not in fact infect the decisional process, their very unrepresentativeness creates the *appearance* of bias. *Peters*, 407 U.S. at 502–03; *see also United States v. Green*, 389 F. Supp. 2d 29, 36 (D. Mass. 2005) ("The stakes could not be higher. Undermining the right to a representative jury casts a pall over all jury trials in our District."). The damage of denying a representative jury therefore does injury "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard*, 329 U.S. at 195.

2. *Exclusion undermines the judiciary's ability to seek the truth by decreasing the accuracy of jury verdicts.*

It has often been stated that the "very nature of a trial [is] a search for the truth." *E.g. Nix v. Whiteside*, 475 U.S. 157, 166, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). In that search, the jury has primary responsibility for adjudicating facts. U.S. Const. art. III, § 2; *id.* Amends. VI, VII. The exclusion of low-income citizens hinders the jury system in achieving this constitutionally-assigned function by decreasing the accuracy of jury findings. *See, e.g.*, Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 Judicature 226, 227 (2008) ("Heterogeneous juries have an edge in fact finding, especially when the matters at issue incorporate social norms and

judgments, as jury trials often do."); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, Journal of Personality and Social Psychology, Vol. 90, No. 4, 597–612 (2006) (finding that racially diverse mock juries engaged in more thorough and accurate deliberations than more homogeneous juries).[3] The resulting juries are deprived of the diversity of life experiences and perspectives that would allow them to fulfill their constitutional promise.

3. Exclusion undermines public knowledge of and respect for the judiciary by denying the educative benefit of jury service to those excluded.

Jury service provides a built-in constitutional mechanism to educate all citizens firsthand in the operation of their justice system and the rule of law. De Tocqueville observed that the jury is "one of the most efficacious means for the education of the people which society can employ," a "free school which is always open and in which every juror learns his rights . . . and is given practical lessons in the law." Alexis de Tocqueville, Democracy in America 295-96 (Bradley rev. ed. 1945). Through this education, jury service "spreads respect for the courts' decisions and for the idea of right." Victoria A. Farrar-Myers, Ph.D. & Jason B. Myers, *Echoes*

[3] *Available at* https://www.apa.org/pubs/journals/releases/psp-904597.pdf.

of the Founding: The Jury in Civil Cases as Conferrer of Legitimacy, 54 SMU L. Rev. 1857, 1859 (2001) (quoting de Tocqueville). *See also* 2 THE COMPLETE ANTI-FEDERALIST 249-50 (service allows jurors "to acquire information and knowledge in the affairs and government of society; and to come forward, in turn, as the centinels and guardians of each other"). When citizens are excluded from service, they lose out on this education, and in turn "lose confidence in the court and its verdicts." *Powers*, 499 U.S. at 413–14. This harms not only the excluded juror, but ultimately the judiciary itself.

C. The Court has the duty to address this threat to its integrity.

As described above, separation of powers not only permits the Court to protect itself from threats to its constitutional functions, but in some cases demands that it do so. Given the foundational importance of the jury and the damage that flaws in the jury system inflicts, the Court has an obligation to address King County's systematic exclusion of jurors from service on the basis of economic status. The court would be justified in invoking its inherent powers to compel funding to ensure the judiciary is able to carry out this necessary function. But it need not do so here. The legislature has provided for the protection of jurors from exclusion on the basis of economic status through RCW 2.36.080(3), and it is emphatically the

province of the Court to interpret this statute and give it effect. The Court has the tools with which to protect King County's jury system. It should do so here.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court vacate the judgment below.

DATED this 27th day of September, 2019

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