No. 13-17132

In the United States Court of Appeals

for the Ninth Circuit

JOHN TEIXEIRA, et al.,

Plaintiffs-Appellants,

v.

COUNTY OF ALAMEDA, et al.,

Defendants-Appellees.

Appeal from Judgment of the United States District Court
for the Northern District of California
Hon. William H. Orrick, III
(Case No. 3:12-cv-03288-WHO)

BRIEF OF AMICUS CURIAE THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. ON REHEARING *EN BANC* IN SUPPORT OF PLAINTIFFS-APPELLANTS JOHN TEIXEIRA, ET AL. FILED WITH CONSENT OF ALL PARTIES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The National Shooting Sports Foundation, Inc. states it is a non-profit organization under section 501(c)(6) of the Internal Revenue Code and has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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STATEMENT OF CONSENT

All parties consented to the filing of this *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29(a). No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than amicus curiae, its members or its counsel contributed money to fund preparation and submission of this brief.

INTEREST OF *AMICUS CURIAE*

Amicus curiae The National Shooting Sports Foundation, Inc. ("NSSF") is the national trade association for the firearms, ammunition, hunting and shooting sports industry. Formed in 1961, NSSF is a 501(c)(6) tax-exempt Connecticut non-profit trade association with its principal place of business in Newtown, Connecticut. NSSF has a membership of over 12,000 federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen's organizations; public and private shooting ranges; gun clubs; and publishers. At present, more than 1,300 NSSF members are located within the State of California.

NSSF's mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and shooting sports; reaffirming and strengthening its members' commitment to the safe and responsible sale and use of

their products; and promoting a political environment that is supportive of America's traditional hunting and shooting heritage and Second Amendment freedoms.

NSSF's interest in this case derives principally from the fact that its federally licensed firearms manufacturer, distributor and retail dealer members engage in lawful commerce in firearms and ammunition in California and throughout the United States, which makes the exercise of an individual's constitutional right to keep and bear arms under the Second Amendment possible. The Second Amendment protects NSSF members and others from regulations and statutes seeking to ban, restrict or limit the exercise of Second Amendment rights – including the Alameda County ordinance at issue here – which impair the ability of responsible and law-abiding citizens to purchase firearms and ammunition, obtain education and training in safe firearms handling and use, and exercise their Second Amendment rights. As such, the determination of whether a state or local regulation improperly infringes upon the exercise of Second Amendment rights, as well as the standard applied in making such a determination, is of great importance to NSSF and its members. NSSF, therefore, submits this brief in support of Plaintiffs-Appellants.

INTRODUCTION AND SUMMARY OF ARGUMENT

Following the United States Supreme Court decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) ["*Heller*"] and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) ["*McDonald*"], it is well-established the Second Amendment protects a fundamental, individual right to keep and bear arms which extends to state and local governments. Although neither decision sets forth precisely how lower courts should evaluate laws infringing Second Amendment rights, *Heller* explicitly requires something more than rational basis scrutiny. Moreover, many appellate courts, including the Ninth Circuit, have adopted a two-step inquiry to determine whether a firearms regulation such as Alameda County Ordinance § 17.54.131 (which includes, among other things, distancing limitations precluding firearms retailers locating within 500 feet of residences, certain schools, liquor stores and other listed businesses) may be upheld. The first query is whether the challenged law burdens conduct the Second Amendment protects. If the answer is in the affirmative, the court next determines the appropriate level of scrutiny to apply on a sliding scale (the more severe the burden the more heightened the scrutiny).

Here, the Ninth Circuit panel properly applied this two-step inquiry in its May 16, 2016 Opinion when it: (1) found the right to keep and bear arms necessarily includes the right to purchase and to sell firearms, (2) determined the

subject ordinance was not presumptively lawful under *Heller*, and (3) concluded that determining the proper level of scrutiny (strict or intermediate) required evidence regarding whether Alameda County Ordinance § 17.54.131 was a complete ban on new gun stores or merely a regulation. These findings are supported by pre-existing case law as well as the recent decisions of *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016) and *Ezell v. City of Chicago*, -- F.3d. --, 2017 WL 203542 (7th Cir. January 18, 2017) ["*Ezell II*"]. Accordingly, NSSF urges the *en banc* panel to affirm the May 16, 2016 Opinion.

ARGUMENT

Taking their lead from Judge Silverman's dissent in the panel's opinion, Defendants/Appellants and their *amici* would characterize this case as a "mundane zoning dispute," gleefully have the district court apply an easily satisfied rational basis test to the ordinance at issue, and call it a day. And, if this case involved a fast food eatery or an auto parts store and a general zoning regulation, they might well be correct. To the contrary, however, this case involves a specific anti-gun ordinance directly targeting firearms retailers, which includes arbitrary and wholly unsupported distancing restrictions. Accordingly, the Second Amendment compels the application of a heightened level of scrutiny forcing Alameda County to justify a close fit between those restrictions and the public interests they purportedly serve.

Silvester, 843 F.3d 816 (upholding after trial California's 10-day waiting period following purchase of a firearm), confirms the Ninth Circuit's process in evaluating whether the 500-foot distance limitation on firearms retailers set forth in Alameda County Ordinance § 17.54.131 is valid. First, the Court examines whether the challenged law burdens conduct protected by the Second Amendment based on a "'historical understanding of the scope of the right.'" *Id*. at 821 (citing *Heller*, 554 U.S. at 625). This query involves examining whether persuasive historical evidence shows the regulation does not impinge on the Second Amendment right as it was historically understood. *Id*. "'Laws restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis.'" *Id*. (citing *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*en banc*)). The court also looks at whether the challenged law falls within the limited category of "presumptively lawful regulatory measures" identified in *Heller*. *Id*.; *see also Fyock v. Sunnyvale*, 779 F.3d 991, 996–97 (9th Cir. 2015).

Second, the court must determine the appropriate level of scrutiny to apply. *See Silvester*, 843 F.3d at 821 (citing *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014)). The court considers: "(1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right." *Id*. If the challenged law imposes

"such a severe restriction on the fundamental right of self-defense of the home that it amounts to a destruction of the Second Amendment right" it will be found unconstitutional under any level of scrutiny. *See id*. A law implicating the core of the Second Amendment right and severely burdening that right is subject to strict scrutiny. *See id*. (citing *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)). Otherwise, intermediate scrutiny is appropriate. *See id*. Rational basis scrutiny, however, is inappropriate in evaluating the validity of a law infringing Second Amendment rights. *See Heller*, 554 U.S. at 628 n. 27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

In determining the level of scrutiny to apply – and ultimately in applying such scrutiny – "'[t]he municipality's evidence must fairly support the municipality's rationale for its ordinance.'" *Ezell v. City of Chicago*, 651 F.3d 684, 709 (7th Cir. 2011) ["*Ezell I*"] (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002)). "[T]here must be evidence" to support the rationale for the challenged regulations; "lawyers' talk is insufficient." *Ezell II* at *7 (citing *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir.

2009)). Alameda County's speculation is simply not enough.[1] Here, given the procedural posture of the case, the only "evidence" the Court may consider in ruling on Defendants-Appellees' Motion to Dismiss are the facts alleged in the First Amended Complaint. And those alleged facts – that there is no parcel within unincorporated Alameda County for a firearms retailer to operate and not violate the 500-foot distancing limitation[2] – show the subject ordinance acts as a complete ban on the sale of firearms in unincorporated Alameda County[3] and is unconstitutional under any level of scrutiny given the severity of the restriction.

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[1] Whether and to what extent Alameda County can come forward with real evidence to support the 500-foot distancing limitation remains to be seen. If *Ezell II* is any guide, however, persuasive evidence will be woefully lacking. There, the court found the City of Chicago "provided no evidentiary support" for its claims that the presence of shooting ranges attracted gun thieves, caused airborne lead contamination or carried an increased risk of fire. *Ezell II* at *12–13. If Alameda County intends to assert firearms retailers generate increased crime or create other dangers to county residents, it must come forward with admissible, compelling evidence to support those claims.

[2] The fact Alameda County chose 500 feet – not 750 feet, 300 feet, 175 feet or 63 1/3 feet – as its distancing limitation will be fully explored on remand. The evidence will likely show this measurement was chosen arbitrarily and without use of any principled scientific method linking the operation of firearms retailers to verifiable dangers or risks. Indeed, it is not a stretch to envision how anti-gun County Supervisors might wish to manipulate both the distance used and the business establishments enumerated in the ordinance – adding perhaps parks, movie theaters, colleges, massage parlors or other places – to effectively red-line all firearms retailers from locating anywhere in unincorporated Alameda County. Such conduct could not, however, pass constitutional muster under the appropriate level of scrutiny.

[3] To the extent Defendants-Appellees and their *amici* assert individuals can exercise Second Amendment rights by simply purchasing firearms outside of

I. The Right to Keep and Bear Arms Necessarily Includes the Right to Purchase and Sell Firearms and Ammunition and Falls Squarely Within Second Amendment Protection.

The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." As set forth in *Heller* and *McDonald*, the right to keep and bear arms is a fundamental – and enumerated – individual right applicable to state and local governments. *See Heller*, 554 U.S. 570; *see also McDonald*, 561 U.S. 742. Such a right is not a "second-class" right. Rather, it is "fundamental to our scheme of ordered liberty" and should be afforded the same respect as rights guaranteed by the First, Fourth and Fifth Amendments. *See generally McDonald*, 561 U.S. at 767.

Though the Second Amendment does not specifically articulate acts or behavior necessary to exercise such rights, certain unarticulated rights are implicit in enumerated guarantees. For example, "the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof

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unincorporated Alameda County, such arguments have been rejected. *See Ezell I*, 651 F.3d at 697 (rejecting arguments "that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction"). The court in *Ezell I* referred to such an assumption as "profoundly misplaced" and found application of First Amendment principles applicable in the Second Amendment context: "'"one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."'" *Id*. (quoting *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76–77 (1981)).

beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees . . . . [F]undamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579–80 (1980). In various contexts, such unarticulated rights are viewed as necessary to the exercise of an enumerated fundamental right.

Here, the unarticulated Second Amendment right at issue is the right to purchase and sell firearms and ammunition and to provide firearms training and instruction in the use of firearms.[4] Such rights are obvious and necessary prerequisites for an individual to safely keep and bear arms and therefore fall within Second Amendment protection.[5] For example, *Jackson*, 746 F.3d 953

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[4] Alameda County Code § 17.54.131 refers generally to "firearms sales." Because no definition of "firearms sales" appears in the Alameda County Code, *amicus curiae* reads the term broadly to also include the right to purchase and sell ammunition and to provide firearms training and instruction.

[5] In California, where the right to keep and bears arms and ammunition is uniquely burdened by numerous highly restrictive state regulations, including those purportedly enacted for safety reasons (*see, e.g.*, the Firearms Safety Device requirement [Cal. Pen. Code §§ 23635-23690], the requirement for a Firearms Safety Certificate [Cal. Pen. Code § 26840], the Safe Handling Demonstration requirement [Cal. Pen. Code § 26850], waiting requirements [Cal. Pen. Code § 27540], and the maintenance of a Safe Handgun Roster [Cal. Pen. Code § 32015]), the ready availability of retailers who provide education, training, and state-mandated safety classes, takes on added significance and is also cloaked in Second

(evaluating an ordinance banning the sale of hollow point bullets) concluded the sale of ammunition fell within the scope of protected Second Amendment rights. If the purchase and sale of ammunition is within the Second Amendment's protection, then surely the sale and purchase of firearms and ammunition are also within that protection.

In *Ezell I*, 651 F.3d at 704, the Seventh Circuit recognized the individual right of armed defense includes a corresponding right to acquire and maintain proficiency in firearm use through target practice at a range. The Seventh Circuit further stated the right to possess firearms for protection "wouldn't mean much without the training and practice that make it effective." *Id*. Similarly, the right to keep and bear arms would not mean much if individuals are unable to readily purchase firearms or ammunition in their own communities.

More recently, *Ezell II* addressed a zoning ordinance with distance limitations very similar to the ones at issue here. The City of Chicago enacted a zoning restriction only allowing gun ranges as special uses in manufacturing districts and a zoning restriction prohibiting gun ranges within 100 feet of another range or within 500 feet of a residential district, school, place of worship, and

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Amendment protections. In other words, in states where burdens on firearms ownership are great, ancillary activities should be as protected as the right to keep and bear arms.

multiple other uses.[6] *See Ezell II* at *2. The District Court for the Northern District of Illinois granted in part and denied in part Ezell's and the City of Chicago's cross-motions for summary judgment, ultimately upholding the distance limitation while finding the manufacturing district restriction invalid. *Ezell v. City of Chicago*, 70 F.Supp.3d 871 (N.D. Ill. 2014), *rev'd in part, aff'd in part and remanded*, *Ezell II* at *1. The Seventh Circuit considered the manufacturing district and distance limitations as one regulation and found, when taken together, they "dramatically limit the ability to site a shooting range within city limits. Under the combined effect of these two regulations, only 2.2% of the city's total acreage is even theoretically available, and the commercial viability of any of these parcels is questionable—so much so that no shooting range yet exists." *Ezell II* at *1, *5. As a result, "Chicagoans' Second Amendment right to maintain proficiency in firearm use via target practice at a range" was severely restricted. *Id*. at *1. Using the same two-step inquiry adopted by the Ninth Circuit (*see Silvester*, 843 F.3d at 820–22), the Seventh Circuit reversed in part and affirmed in part the lower court's decision and held the distancing limitation and manufacturing district limitation were unconstitutional.

[6] The City of Chicago also enacted a provision barring anyone under the age of 18 from entering a shooting range.

Here, the situation Alameda County Ordinance § 17.54.131 creates with its distancing limitations is even more oppressive than the distancing limitation at issue in *Ezell II* because, according to the First Amended Complaint, there are *no areas* within unincorporated Alameda County where a firearms retailer may establish a location. (Excerpts of Record ["ER"] at p. 50.) The instant appeal was taken from an order granting Defendants-Appellees' Motion to Dismiss First Amended Complaint. Appellant's Opening Brief at pp. 6–7. Thus, this fact (and others in the First Amended Complaint) must be accepted as true and construed in the light most favorable to Plaintiffs-Appellants as the non-moving parties. *See Gompper v. VISX, Inc*., 298 F.3d 893, 895 (9th Cir. 2002). Accordingly, the subject ordinance operates as a complete ban on the sale of firearms in unincorporated Alameda County. Because the First Amended Complaint states a viable claim for relief on its face, the district court's dismissal was inappropriate. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

II. A Form of Heightened Scrutiny Must Be Applied to Evaluate the Subject Ordinance.

As *Heller* teaches: (1) some form of heightened scrutiny will apply in evaluating the constitutionality of laws infringing on Second Amendment rights, and (2) rational basis is insufficient. *See Heller*, 554 U.S. at 628 n. 27; *see also Silvester*, 843 F.3d at 821–22. However, to determine the appropriate level of scrutiny the Court must look to the severity of the burden the subject ordinance

places on Second Amendment rights. If the burden is severe enough – such as a complete ban on firearms retailers in unincorporated Alameda County – and "amounts to a destruction of the Second Amendment right," the challenged law will be unconstitutional no matter the level of scrutiny. *Silvester*, 843 F.3d at 821. A severe burden implicating the "core of the Second Amendment right" will be subject to strict scrutiny. *Id*. Finally, if the implicated right is not a "core" Second Amendment right, or if the challenged law does not place a "substantial burden" on exercise of the Second Amendment right, intermediate scrutiny is appropriate. *Id*.

Based on the facts alleged in the First Amended Complaint, Alameda County Ordinance § 17.54.131 is unconstitutional under any level of scrutiny because it operates as a total ban on firearms retailers locating within unincorporated Alameda County. *See generally Heller*, 554 U.S. at 635. Such a claim is "plausible on its face" and survives Defendants-Appellees' Motion to Dismiss. *See Bell Atl. Corp.*, 550 U.S. at 570. Even considering the unsubstantiated assertions Defendants-Appellees set forth in their Motion to Dismiss, all that is shown is a dispute between the parties, not that Plaintiffs-Appellants have no plausible claim. Accordingly, this panel should affirm the May 16, 2016 Opinion remanding the matter to the District Court for the Northern District of California and finding Plaintiffs-Appellants claim to be well-pled.

III. The Subject Alameda County Ordinance is Not Presumptively Lawful.

Defendants-Appellees assert, without citation to controlling authority, the above two-step inquiry is unnecessary because Alameda County Ordinance § 17.54.131 regulates the commercial sale of firearms and is within the category of laws *Heller* deemed presumptively lawful. *See* Appellee's Petition for Rehearing or Rehearing En Banc at pp. 7–10. In support of their proposition that a zoning regulation is within the category of "conditions and qualifications on the commercial sale of firearms," Defendants-Appellees cite to cases which have nothing to do with distance limitations such as the one at issue here. *See generally Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012); *United States v. Castro*, No. 10-50160, 2011 WL 6157466 (9th Cir. 2011); *United States v. Vongxy*, 594 F.3d 1111 (9th Cir. 2010); *Petramala v. U.S. Dept. of Justice*, 481 F.Appx. 395 (9th Cir. 2012). Rather, the cases Defendants-Appellees cite address "qualifications and conditions" relating to felons and mentally ill persons possessing firearms, selling firearms without a license and a county ordinance prohibiting gun sales on county-owned property.

There is no indication the *Heller* court meant to include distance limitations in "laws imposing conditions and qualifications on the commercial sale of arms" as a category of presumptively valid laws. *Heller*, 554 U.S. at 626–27. In fact, existing appellate case law suggests such ordinances are *not* entitled to

presumptive validity. *See generally Ezell II* at *1, *5–*7 (evaluating the constitutionality of a distance limitation for shooting ranges under intermediate scrutiny and finding such a limitation implicated Second Amendment rights). Instead, "conditions and qualifications" on commercial firearms sales likely describes the array of federal and state laws which impose numerous and varied restrictions on firearms retailers, including federal licensing requirements, record keeping requirements, secure storage requirements, and other similar requirements – not zoning regulations.

Even assuming the subject ordinance is presumptively lawful, which it is not, Defendants-Appellees concede such presumption would merely shift the burden to Plaintiffs-Appellants; it does not conclusively establish the constitutionality of Alameda County Ordinance § 17.54.131 or suggest the ordinance is not subject to some level of heightened scrutiny. Appellee Petition for Rehearing or Rehearing En Banc at pp. 9–10. Here, as the First Amended Complaint alleges, the ordinance acts as a ban on the commercial sale of firearms in unincorporated Alameda County.[7] If that is true, the subject ordinance, at a minimum, must be subjected to heightened scrutiny.

[7] Alameda County Ordinance § 17.54.131 acts as a ban on new commercial firearms retailers according to the First Amended Complaint because no parcels comply with the stated distance limitations. (ER at 50.) The ordinance and the limited record do not establish whether the ordinance applies to existing firearms retailers in unincorporated Alameda County and of which Defendants-Appellees

CONCLUSION

The right to keep and bear arms, as well as ancillary conduct needed to exercise Second Amendment rights, are important rights entitled to the same protections afforded other fundamental rights. These protections include evaluating the constitutionality of laws infringing on Second Amendment rights using strict or intermediate scrutiny. To dismiss Plaintiffs-Appellants' claims challenging the subject distance limitation – a regulation which does not fall within *Heller's* presumption of validity – at the very initial stages of pleading on a Motion to Dismiss and without the development of a record in no way provides such protection.

As the First Amended Complaint alleges, Defendants-Appellees' distance limitations as currently drafted effectively ban the location of firearms retailers in unincorporated Alameda County. As such, Alameda County Ordinance § 17.54.131 is subject to a form of heightened scrutiny to be determined upon development of a factual record. At a minimum, however, the subject ordinance

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claim there are four (which is disputed by Plaintiffs-Appellants). *See generally* Alameda County Ordinance § 17.54.131; *see also* ER. Assuming the alleged existing firearms retailers were required to obtain conditional use permits, conditional use permits expire and eventually require renewal. *See generally* Alameda County Ordinance § 17.54.150. It is entirely possible, and even probable given Plaintiffs-Appellants' experience, the allegedly existing firearms retailers' applications for renewal of a conditional use permit would be denied given the requirements of Alameda County Ordinance § 17.54.131.

must pass intermediate scrutiny. The Ninth Circuit's May 16, 2016 Opinion correctly utilized and applied the two-step inquiry previously adopted in *Chovan* and recently applied in *Silvester* and *Ezell II*. As such, the May 16, 2016 Opinion should be affirmed.

Dated: January 27, 2017

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CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 32-4

Pursuant to Ninth Circuit Rule 32-1 and Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the Brief of Amicus Curiae The National Shooting Sports Foundation, Inc. in Support of Plaintiffs-Appellants John Teixeira, et al. Filed with Consent of All Parties complies with the length limits set forth at Ninth Circuit Rule 32-4 as well as the type size and type face set forth in Federal Rule of Appellate Procedure 32(a)(5) and (6). The brief is proportionally spaced, has a typeface of 14 points and contains 3,928 words excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: January 27, 2017

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9th Circuit Case Number(s) 13-17132

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