No. 49130-3

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Court of Appeals, Division II
of the State of Washington

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KITSAP COUNTY,
Respondent,

v.

KITSAP RIFLE AND REVOLVER CLUB,
Appellant.

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On Appeal from the Superior Court of
Washington for Kitsap County
Cause No. 15-2-00626-8

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# AMICUS BRIEF OF NATIONAL RIFLE ASSOCIATION OF AMERICA

Anna M. Barvir
Michel & Associates, P.C.
180 E. Ocean Blvd., Suite 200
Long Beach, CA 90802
(562) 216-4453

Steven Fogg
David Edwards
Corr Cronin Michelson
Baumgardner Fogg & Moore LLP
1001 Fourth Ave., Suite 3900
Seattle, WA 98154
(206) 625-8600

Attorneys for Amicus Curiae
National Rifle Association of America

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## I. INTRODUCTION

> The state of Washington hereby *fully occupies and preempts the entire field of firearms regulation* within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. *Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter*. Such local ordinances shall have the same penalty as provided for by state law.

RCW 9.41.290 (emphasis added).

The state legislature could hardly have been clearer when it declared its intention to limit the power of local governments to regulate firearms. In the most express terms, the legislature has signaled to local governments and to the courts that the state will not tolerate local interference with a wide range of firearms-related activities. Indeed, the plain language of the preemption statute makes clear that *all* local laws of general applicability—not just those with criminal penalties—are preempted. And no case holds otherwise.

The County seeks to drive a stake through the heart of firearms preemption in Washington. Its insistence that the Court interpret RCW 9.41.290 to apply only to criminal laws and to give local governments nearly unchecked power to ban firearm use whenever it claims doing so would prevent some harm would all but repeal RCW 9.41.290. And it certainly would not serve the well-documented intent of the law.

The Court should reject the County's preemption arguments and reverse the lower court's judgment.

## II. STATE LAW PREEMPTS KITSAP COUNTY CODE SECTION 10.25

The Washington State Constitution grants local governments the power to "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Const. art. XI, § 11. By express implication, the power of any local government to regulate must yield to the power of the state. So whenever a state law occupies a given field, local regulation is preempted. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010). A statute "occupies the field" when "the legislature expressly states its intent to do so or whenever such intent is necessarily implied." *Chan v. City of Seattle*, 164 Wn. App. 549, 559, 265 P.3d 169 (2011) (citing *Lawson*, 168 Wn.2d at 679).

As the Kitsap Rifle & Revolver Club ("the Club") argues in its briefing, RCW 9.41.290 explicitly—and broadly—evinces a legislative intent to prohibit most local regulation of firearms and firearm parts and accessories. RCW 9.41.290, 9.41.300. The County seeks to expand its power to regulate in this field far beyond that which state law allows. It argues that RCW 9.41.290 preempts only criminal laws, Response Br. 24-25, and that Kitsap County Code ("KCC") Chapter 10.25 is exempt from the preemption statute, even absent actual evidence that it meets the standard necessary to trigger the exception. Response Br. at 25-31.

The County's arguments must fail. First, the sweep of RCW 9.41.290 is broad on its face. It should not be interpreted to preempt only criminal laws. The legislative intent was clearly to "*fully occupy*" the field of firearms regulation subject to a few, express limitations. RCW 9.41.290.

Second, to accept the County's interpretation of RCW 9.41.290 would eviscerate firearms preemption in Washington, leaving precious little to the state's control—a result the legislature could not have intended.

### A. RCW 9.41.290 does not prohibit only those local laws imposing criminal penalties.

The text of RCW 9.41.290 plainly evinces the Washington Legislature's intent to fully occupy the entire field of firearms regulation in the state. Nothing on the face of RCW 9.41.290 suggests that the state intended to limit its broadly stated declaration of supremacy to only criminal laws. To the contrary, the very language of the law makes clear that the legislature did not intend such a thing.

To the extent some courts have expressed concerns (without expressly holding) that RCW 9.41.290 may not apply beyond the criminal context, those cases are highly fact-driven and thus distinguishable. The Court should not expand the reach of those cases here. Rather, it should rely on the plain meaning of RCW 9.41.290 and hold that state preemption of firearms law applies generally, even to noncriminal laws, subject only to those exceptions set forth by the legislature.

#### 1. RCW 9.41.290 clearly preempts all local firearm laws.

Longstanding principals of statutory construction support the Club's and Amicus's view that, because the state law is clear as to its broad sweep, it would be improper to resort to extrinsic material to interpret section 9.41.290 to limit the law's scope to precluding only local criminal laws. When interpreting a statute, the court's primary role is to "ascertain and give

effect to legislative intent." *Chan*, 164 Wn. App. at 559 (citing *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010)). Whenever a statute's meaning is clear on its face, the court "must give effect to that plain meaning as the expression of what the legislature intended." *Id.* (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). *In re Eaton*, 110 Wn.2d 892, 898, 757 P.2d (1988) ("If the statute is unambiguous, its meaning is to be derived from the language of the statute alone."). While matters beyond the text may be considered when construing a statute, that inquiry is appropriate only when a statute is ambiguous—that is, when it is susceptible to two or more reasonable interpretations. *Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991); *Chan*, 164 Wn. App. at 559 (citing *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005)).

Here, the Court must ascertain the meaning and scope of RCW 9.41.290. Does it apply expansively to all local firearms laws not expressly excepted? Or does it apply only in the criminal context? The answer is clear. Subject to a few statutory exceptions, the plain language of RCW 9.41.290 preempts local governments from enacting *any* law or ordinance regulating firearms and firearm components and accessories. The statute declares that the "state of Washington hereby *fully occupies and preempts* the *entire* field of firearm regulation within the boundaries of the state," a field it broadly defines to include a litany of firearms-related conduct, "including *registration, licensing, possession, purchase, sale, and*

*discharge*." RCW 9.41.290 (emphasis added); *see also Chan*, 164 Wn. App. at 560.

RCW 9.41.290 goes on to clarify that "[l]ocal laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, *regardless of the nature of the code* . . . of such city, town, county, or municipality." RCW 9.41.290 (emphasis added). Read together (and even standing alone), these two parts of the preemption statute make clear the legislative intent to preclude *all local regulations*, not just those which criminalize the use and possession of firearms.

But the law even more pointedly addresses the limited authority of a municipality to regulate firearms, stating in relevant part that "[c]ities, towns, and counties or other municipalities may enact *only* those laws and ordinances relating to firearms that are *specifically authorized by state law, as in RCW 9.41.300*, and are consistent with this chapter." RCW 9.41.290 (emphasis added). Section 9.41.300 provides four limited areas in which local governments may regulate:

> (1) restricting firearm discharge in areas "where there is a reasonable likelihood that humans, domestic animals, or property will be jeopardized," RCW 9.41.300(2)(a);
>
> (2) restricting firearm possession in locally owned stadiums or convention centers, RCW 9.41.300(2)(b);

(3) restricting the locations in which firearms may be sold, RCW 9.41.300(3)(a); and

(4) restricting certain firearm retailers from operating within 500 feet from primary or secondary school grounds, RCW 9.41.300(3)(b).

The latter two exceptions are particularly relevant here. They each deal with *noncriminal, zoning laws*.[1] Had the legislature not intended RCW 9.41.290 to divest local governments of the authority to pass civil firearm restrictions, it would have been unnecessary to carve out limited exceptions allowing municipalities to do just that.[2] Similarly, had the state contemplated giving local governments far-reaching authority to enact zoning or licensing schemes for firearm businesses, like the Club, it would

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[1] RCW 9.41.300 itself recognizes that the sorts of local ordinances contemplated by subsections (3)(a) and (3)(b) are not generally criminal in nature. That is, subsection (4) declares that "violations of local ordinances adopted under subsection (2) must have the same penalty as provided by state law." RCW 9.41.300(4). Even though RCW 9.41.290 requires that local ordinances must exact the same penalty as state law, nowhere does RCW 9.41.300 provide this clarification as to the subsection (3) exceptions for the zoning of firearms retail businesses—ostensibly because such laws do not generally have criminal consequences.

[2] RCW 9.41.300 was amended in 1994 to specifically add these narrow zoning exceptions to preemption, while still barring municipalities from otherwise burdening firearms businesses any more than other similarly zoned businesses. *See* RCW 9.41.300(3)(a) ("Cities, towns, and counties may enact ordinances restricting the areas in their respective jurisdictions in which firearms may be sold, but, . . . a business selling firearms may not be treated more restrictively than other businesses located within the same zone."). The Final Bill Report for this amendment stated that it was necessary because "the state has preempted the area of firearms regulation" and "counties and cities are not authorized to regulate, through zoning, where firearms may be sold." Final Bill Report, E2SHB 2319 at 8 (1994), *available at* http://apps.leg.wa.gov/documents/billdocs/1993-94/Htm/Bill%20Reports/House/2319-S2.FBR.htm.

not have provided only a limited exemption for certain types of firearm businesses.

By design, the legislature reserved to cities and counties only the limited power to regulate firearms as set forth in the code. This Court should decline the County's invitation to read a further—extraordinarily broad—exception into the firearms preemption statute. "Where a statute provides for a stated exception, no other exceptions will be assumed by implication." *Jepson v. Dep't of Labor and Indus.*, 89 Wn.2d 394, 404, 573 P.2d 10 (1977) (en banc) (collecting cases). Indeed, the Court should heed the words of the appellate court in *Cherry v. Municipality of Metropolitan Seattle*: "The sweep of RCW 9.41.290 is broad. If it is too broad, it is up to the Legislature, not this court, to narrow it." 57 Wn. App. 164, 168, 787 P.2d 73 (1990), *rev'd sub nom. Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794 (1991).[3]

**2. Case law does not conclusively hold that RCW 9.41.290 precludes only criminal laws.**

Seeking to escape the plain meaning of RCW 9.41.290, the County references two Washington Supreme Court cases, *Pacific Northwest Shooting Park Association v. City of Sequim* (*PNSPA*) and *Cherry v. Municipality of Metropolitan Seattle*, to support its claim that state preemption does not apply outside the criminal context. But, as the County

[3] As discussed in Part II.A.2, *infra*, the reversal of *Cherry v. Municipality of Metropolitan Seattle*, 57 Wn. App. 164, 787 P.2d 73 (1990), does not cast doubt upon Amicus's argument that RCW 9.41.290 generally applies outside the criminal context. It certainly does not do away with the well-settled principal that it is the place of the legislature, not the courts, to write the law.

appropriately concedes, neither case "conclusively decide[s] the issue of whether [RCW 9.41.290] precludes civil regulations." Response Br. 24. Instead, the cases support a much narrower limitation on the scope of RCW 9.41.290—*i.e.*, that it applies only to "laws or regulations of general application." *Pac. Nw. Shooting Park Ass'n*, 158 Wn.2d 342, 356, 144 P.3d 276 (2006) (en banc); *see also Cherry*, 116 Wn.2d at 801.

In *Cherry*, the Court considered whether RCW 9.41.290 bars a city employer from prohibiting the possession of concealed firearms by public employees on the job. 116 Wn.2d at 746. Because RCW 9.41.290 did not plainly prohibit such policies on its face, the court looked to the legislative history, noting that the law was enacted "to eliminate a multiplicity of local laws relating to firearms *and* to advance uniformity in criminal firearms regulation." *Id.* at 801 (emphasis added). "Because the legislature only intended to preempt firearm laws that applied 'to the general public,' the [C]ourt concluded internal employment rules and policies for employee conduct limiting possession of firearms at the workplace are not preempted." *Chan*, 164 Wn. App. at 563 (quoting *Cherry*, 116 Wn.2d at 801). The Court did *not* hold that local governments have free rein to adopt and enforce civil regulations related to firearms.

The County's reliance on *PNSPA* fares no better. There, a shooting association challenged a city's authority to restrict certain firearm transfers at a gun show held at a city-owned convention center. *PNSPA*, 158 Wn.2d at 346-47. While the Court recognized in passing the legislative intent behind RCW 9.41.290 in 1961 was to "eliminate conflicting municipal

criminal codes," *id.* at 356, it did not address the numerous amendments to the law in the past 50 years that have repeatedly confirmed that it applies broadly to all firearm laws.[4] Instead, the Court upheld the restrictions on other grounds. Namely, that state law expressly authorizes cities to restrict firearms possession in its locally owned convention centers. *Id.* at 355 (citing RCW 9.41.300(2)(b)). And "that when a municipality acts in a capacity that is comparable to that of a private party, the preemption clause does not apply." *Id.* at 357 (citing *Cherry*, 116 Wn.2d 794)). In other words, it was critical to the holding in *PNSPA* that the city was "acting in

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[4] The preemption statutes have been amended three times in response to judicial interpretations that limited the scope of firearm preemption. In 1983, the Legislature amended RCW 9.41.290 to prospectively preclude local laws that were more restrictive than or exceeded state laws in response to a trial court's holding that RCW 9.41.290 only preempted legislation that was in effect when it was passed in 1961. *See Second Amendment Foundation v. City of Renton*, 35 Wn. App. 583, 583 & 588 n.3, 668 P.2d 596 (1983).

In response to a court holding that the 1983 amendment only preempted inconsistent local firearms laws and the State did not specifically regulate possession, the legislature amended RCW 9.41.290 again in 1985 to add that "Washington hereby fully occupies and preempts the entire field of firearms regulation" and created RCW 9.41.300 which prohibited possession of firearms in certain places but allowed municipalities to enact certain possession laws "notwithstanding" RCW 9.41.290. *Id.* at 588; Laws of 1985, ch. 428 §§ 1-2.

Ten years later, in *City of Seattle v. Ballsmider*, the Court of Appeals found that this "notwithstanding" language in RCW 9.41.300 was intended "to allow local governments relatively unlimited authority in one specific area—*i.e.*, the discharge of firearms in areas where people, domestic animals, or property would be endangered." 71 Wn. App. 159, 162-63, 856 P.2d 1113 (1993). The next year, the legislature *again* amended RCW 9.41.290 to abrogate *Ballsmider*. The legislature mandated that local laws and ordinances are only permitted as specifically delineated in RCW 9.41.300 and removed the "notwithstanding" language from RCW 9.41.300. *See* Laws of 1994, 1st Sp. Sess., ch. 7, §§ 428-29.

The legislative history tells a story: every time a court has sought to restrict the preemptive field, the Legislature has forcefully struck back and reaffirmed or expanded the all-inclusive scope of RCW 9.41.290. *See Chan*, 164 Wn. App. at 551-53 (summarizing history).

its private capacity as a property owner," *id.*, and that the restrictions neatly fell within the express exception for regulating firearms on city-owned property. *Id.* Again, the fact that the restriction was not criminal was neither determinative nor relevant.

The County's adoption of KCC 10.25 is not like the city actions challenged in *Cherry* and *PNSPA*. Unlike the local governments in those cases, the County was not "'act[ing] as a proprietor of a business enterprise for the private advantage of the [municipality].'" *Chan*, 164 Wn. App. at 564 (quoting *PNSPA*, 158 Wn.2d at 357). To the contrary, in passing an ordinance directly prohibiting certain firearm discharges on private property and crafting a licensing scheme approving others, the County was serving its function as a governing body enacting generally applicable laws—the very sorts of laws precluded by RCW 9.41.290 under *Cherry* and *PNSPA*.

The County nevertheless suggests that state preemption does not apply here because KCC 10.25 does not impose "criminal regulations governing an individual's use of a firearm" in the way that the provisions of RCW Chapter 9.41 do. Response Br. 25. Taking a leap further, the County claims that because the law regulates only shooting range operations, it "only indirectly regulates firearms in the same way that zoning laws, local tax codes, and business licensing requirements" do and is not preempted by state law. Response Br. 25. The County's argument misses the mark.

First, KCC 10.25 is generally a discharge prohibition—the violation of which exposes the shooter, or anyone who aids or abets the shooter, to

criminal penalties under KCC 1.12.[5] The sections dealing with range licensing exist in support of an exception to the criminal discharge ban for shooting activities at a licensed facility. KCC 10.25.030(2) (exception to discharge ban for activities on licensed shooting range); KCC 10.25.060–10.25.140 (shooting range regulations). If the range is not licensed per KCC 10.25, anyone shooting (or allowing shooting) on the property is guilty of a misdemeanor. KCC 10.25.020, 10.25.030(2), 1.12.010–1.12.020. So, in fact, KCC 10.25 *does* directly impose criminal sanctions for an individual's use of a firearm, and the County cannot deny the existence of criminal penalties simply because they are found in a different section of the code. *See Chan*, 164 Wn. App. at 559 (finding that, even assuming the need for a criminal penalty for preemption to attach, Seattle enforced its ban of firearms in parks with criminal trespass statutes).[6]

But even if it did not, the County's comparison of the provisions of KCC 10.25 to "zoning laws, local tax code, and business licensing requirements" does not help its cause. Recall, RCW 9.41.290 allows for

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[5] Chapter 10.25 is entitled "Firearms Discharge," and KCC 10.25.020 clearly delineates those areas where the discharge of firearms is prohibited in Kitsap County. KCC 1.12.010 makes the violation of the code a misdemeanor, while KCC 1.12.020 clarifies that "[e]very person concerned in the commission of a misdemeanor, whether he or she directly commits the act constituting the offense, *or aids or abets in its commission*, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a misdemeanor, is a principal, and shall be proceeded against and punished as such." (Emphasis added).

[6] Notably, *Chan* did not hold that criminal enforcement was required for preemption. There was no argument by the plaintiffs in *Chan* that preemption should apply to non-criminal statutes, because that argument was irrelevant given the application of trespass statutes. Thus, the Court simply disposed of Seattle's semantic argument that the ban on firearms in the park was not criminal in nature. The same result is warranted here.

local regulation relating to firearms "specifically authorized by state law," so long as such laws are also "consistent with [RCW Chapter 9.41]." State law generally authorizes local governments to regulate zoning, taxing, and business licensing, subject to the limitation that such regulation does not conflict with state laws governing such matters. RCW 36.32.120 (county powers); RCW 35.22.280 (town and city powers).[7] But when these laws go too far—by criminalizing firearm discharges on private property without the prior approval of the county, for instance—they become *inconsistent* with RCW 9.41.290, and they are preempted by state law.

### B. The County's interpretation of RCW sections 9.41.290 and 9.41.300 leaves little to state control.

The County argues finally that, even if RCW 9.41.290 precludes civil laws, KCC 10.25 still survives because RCW 9.41.300(2) authorizes local governments to ban the discharge of firearms "where there is a reasonable likelihood that humans, domestic animals, or property will be jeopardized." Response Br. 25-31. And though the legislative history of KCC 10.25 includes only conclusory legislative "findings" about public safety, the County claims to have met its burden to establish a "reasonable likelihood" of harm because legislative findings are given the benefit of much doubt. Response Br. 27-28 (citing *Clean v. State*, 130 Wn.2d 782,

[7] What's more, RCW 9.41.300(3) carefully carves out an exception to RCW 9.41.290, allowing local governments to dictate where certain firearm retailers may operate (*i.e.*, zoning for firearm retailers). The inclusion of this express exception for certain firearm business suggests that no other such exceptions were contemplated or intended.

807-08, 928 P.2d 1054 (1996)). But in this case, such extreme deference would not serve the interests of the law.

The County's interpretation that RCW 9.41.290 bars only criminal laws, coupled with its claim that the legislative findings of local governments should be given so much deference as to require no supporting evidence, would decimate the state preemption of firearms-related laws. Firearm discharge inherently poses some risk of harm—so, without requiring some level of evidence on the legislative record to support a particularized threat of harm in a given area, *literally any local discharge ban would pass muster*. In the face of a state law that *broadly* preempts local regulation in this field, that could not have been what the legislature intended. Indeed, this is exactly the kind of unlimited authority that the legislature confirmed did not exist when it abrogated *Ballsmider* and required strict compliance with the narrow exceptions laid out in RCW 9.41.300. *See* Laws of 1994, 1st Sp. Sess., ch. 7, §§ 428-29. More than mere platitudes about public safety should be required to trigger the firearm discharge exception of RCW 9.41.300(2)(a).

On the other hand, accepting the position of Amicus and the Club would not disrupt current case law, and it would still leave much to the control of local governments. Indeed, under *Cherry* and *PNSPA*, local governments are left broad authority to enact rules and regulations whenever they are acting as the proprietors of a business. They may generally prohibit firearm possession in locally owned convention centers and stadiums. RCW 9.41.300(2)(b). They may enact ordinances restricting

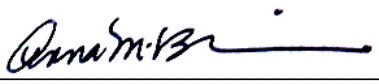
the location of certain firearm retail businesses. RCW 9.41.300(3)(a)-(b). They may *even enact criminal discharge laws*, if the legislative record fairly supports a finding that "there is a reasonable likelihood that humans, domestic animals, or property will be jeopardized." RCW 9.41.300(2)(a). They may not, however, enact the far-reaching public restrictions found in KCC 10.25.

## III. CONCLUSION

For the reasons laid out above, Amicus National Rifle Association of America respectfully asks this court to find in favor of the Club, holding that KCC 10.25 is preempted by RCW 9.41.290 and reversing the trial court's decision.

Dated: May 15, 2017

MICHEL & ASSOCIATES, P.C.



Anna M. Barvir, *pro hac vice (pending)*
CSBN 268728

CORR CRONIN MICHELSON
BAUMGARDNER FOGG & MOORE LLP

*s/ David Edwards*
Steven Fogg, WSBA No. 23528
David Edwards, WSBA No. 44680

Attorneys for Amicus Curiae
National Rifle Association of America

## CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner Fogg & Moore LLP, attorneys for Amicus Curiae National Rifle Association of America, Inc.

2. On this 15th day of May 2017, I caused the document to which this certificate is attached to be filed with the Clerk of the Court of Appeals, Division II, of the state of Washington, and served upon the following via email:

Tina Robinson
Christine M. Palmer
Laura F. Zippel
Kitsap County Prosecutor's Office
614 Division St., MS-35A
Port Orchard, WA 98366
cmpalmer@co.kitsap.wa.us
Attorney for Respondent Kitsap County

Bruce O. Danielson
Danielson Law Office, P.S.
1001 4th Avenue, Suite 3022
Seattle, WA 98154
bruce@brucedanielsonlaw.com
Attorney for Appellant Kitsap Rifle and Revolver Club

Dennis D. Reynolds
Denis D. Reynolds Law Office
200 Winslow Way W., #380
Bainbridge Island, WA 98110
dennis@ddrlaw.com
Attorney for Appellant Kitsap Rifle and Revolver Club

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

*s/ Leslie Nims*
Leslie Nims

## CORR CRONIN MICHELSON BAUMGARDNER FOGG &

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