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SUPREME COURT OF THE STATE OF WASHINGTON

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Washington State Supreme Court

IN RE THE ADOPTION OF M.S.M.-P.;

N.P.,

APR 14 2015
Ronald R. Carpenter
Clerk
Petitioner, *bjh*

v.

A.K. and S.K.,

Respondent.

AMICUS CURIAE BRIEF OF THE DEPARTMENT OF SOCIAL
AND HEALTH SERVICES

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I. INTRODUCTION

The Washington State Department of Social and Health Services asks this Court to hold that prejudice must be found in order to raise the constitutional issue of whether a termination of parental rights hearing was properly closed. The Department takes no position on whether actual prejudice occurred in the underlying proceeding in this case, but instead asks this Court to reject the argument that the proceeding must be reversed due to structural error, even absent a finding of prejudice. Unlike in a criminal proceeding, where the structural error analysis has been applied to require reversal of court orders without a showing of prejudice, in a civil termination of parental rights proceeding there are more interests than just those of the parent or defendant – the child has a right to stability, permanency, and finality that is implicated when a court order is uncertain and can be reversed. In recognition of the child's interest in stability, permanency, and ultimately in finality, this Court should require a showing of prejudice in order to reverse a termination of parental rights order.

II. IDENTITY AND INTEREST OF AMICUS

This amicus brief is submitted by the Washington State Department of Social and Health Services. While this appeal arises from a

termination of parental rights petition filed by a private party under chapter 26.33 RCW, rather than one filed by the Department of Social and Health Services under chapter 13.34 RCW, the Department is the petitioner in thousands of dependency actions, and over a thousand termination of parental rights actions each year. The Department is also required to create and achieve a plan for permanency for thousands of foster children, either through reunification of the family or adoption or guardianship of the child by another individual.

Further, the interests of a parent and a child in a termination of parental rights proceeding brought under chapter 26.33 RCW, such as this one, are similar to those in one brought by the Department under chapter 13.34 RCW. In support of their arguments, both parties cited to an appellate decision issued in an appeal of a termination of parental rights order entered in a case where the Department was the petitioner – *In re Dependency of J.A.F.*, 168 Wn. App. 653, 278 P.3d 673 (2012). The Court's decision here is likely to impact the cases of thousands of foster children who are in the care and custody of the Department.

In addition, the Department is charged by statute with administering a system that protects and provides for the safety and well-being of children in its care. RCW 74.13.031. As part of that duty, the Department must ensure placement stability and, to the extent possible,

permanency for these children. RCW 74.13.290; RCW 13.34.134; RCW 13.34.145(4)(b)(vi). Thus, the Department has an interest in ensuring the finality of decisions in civil cases like hearings to terminate parental rights – finality that would be unduly disturbed if parents were able to raise constitutional issues like that presented in this case for the first time on appeal without showing prejudice.

III. ISSUES ADDRESSED BY AMICUS

The Department takes no position on whether the closure here violated article 1, section 10 of the state constitution, nor whether N.P. has established prejudice sufficient to show “manifest error” to raise the alleged violation for the first time on appeal and receive a new trial. The issue addressed by the Department is: May a litigant in a civil case raise on appeal an alleged violation of article 1, section 10 for closure of the court, where the litigant did not object before the trial court and fails to show prejudice from the court closure through practical and identifiable consequences.

IV. STATEMENT OF THE CASE

The Department adopts the statement of the case from the Court of Appeals opinion, *In re Adoption of M.S.M.-P.*, 181 Wn. App. 301, 325 P.3d 392 (2014).

V. ARGUMENT

This Court should require a showing of actual prejudice before a termination of parental rights order may be reversed for a constitutional error. First, no Washington appellate court has reversed an order entered in a civil proceeding due to structural error, rather than due to a finding of prejudice, and the same outcome should result here. Second, unlike in a criminal trial, the interests in a termination of parental rights proceeding include those of the child, which include the child's interest in a stable and permanent home, and therefore in finality in these proceedings.

A. Civil Litigants Must Show "Manifest Error" to Raise Issues For the First Time on Appeal

1. This Court's Rules Require "Manifest Error" to Raise an Issue for the First Time on Appeal

In general, a party seeking to raise an issue on appeal that was not raised before the trial court must show "manifest error" affecting a constitutional right.¹ RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). Here, there appears to be no dispute that the alleged error affected a constitutional right, so the question of whether to apply this exception to the general rule prohibiting new issues on appeal turns on whether N.P. can show manifest error. To show manifest error, a

¹ RAP 2.5 enumerates two other exceptions, not applicable here, to the rule that new issues may not be raised on appeal: lack of trial court jurisdiction and failure to establish facts upon which relief can be granted. RAP 2.5(a)(1), (2).

party must show that the alleged error had “practical and identifiable consequences in the trial of the case.” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (citing *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001)). The Department takes no position on whether N.P. is able to establish such practical and identifiable consequences here, but urges the Court to adhere to its precedent in requiring such a showing in civil cases.

N.P. argues that he may raise an open-courts issue for the first time on appeal because “the waiver of constitutional rights is never presumed.” Pet’r Supp. Br. at 7. But where a litigant fails to object at trial and cannot demonstrate prejudice from an alleged constitutional error, the exact opposite is the rule. RAP 2.5(a)(3). It is only the rare exception in criminal cases where an error is considered “structural” so as to avoid the normal operation of RAP 2.5(a) and its requirement of manifest error. As discussed below, this Court has never recognized the “structural error” exception in civil cases. *E.g., In re the Det. of D.F.F.*, 172 Wn.2d 37, 48, 256 P.3d 357 (2011) (five-justice plurality holding that structural error does not apply in civil cases) (J. Johnson, J., concurring; Madsen, C.J., dissenting). Tellingly, N.P. relies on criminal cases analyzing waiver of a defendant’s right under article 1, section 22, to support this proposition. Pet’r Supp. Br. at 7 (citing *State v. Frawley*, 181 Wn.2d 452, 463, 334 P.3d 1022 (2014); *State v. Herron*, 177 Wn. App. 96, 104, 318 P.3d 281

(2013), *review granted*, 182 Wn.2d 1001 (2015)). As the Court of Appeals properly held, those criminal cases addressing violations of article 1, section 22, have no application here. *In re Adoption of M.S.M.-P.*, 181 Wn. App. at 314; *see also J.A.F.*, 168 Wn. App. at 664 (holding that test for waiver of article 1, section 22 is not applicable for article 1, section 10).

The requirement that parties raise objections to the trial court serves several important functions. First, it encourages the efficient use of judicial resources by allowing the trial court to correct errors rather than have an appeal and retrial. *E.g., O'Hara*, 167 Wn.2d at 97-98. Second, it encourages the prevention of error in the first place, because all parties will have an interest in raising the alleged error in the trial court, rather than creating an incentive for a party who expects to lose to remain silent and have an "ace in the hole" on appeal. Third, and perhaps most importantly in cases affecting the placement or parentage of children, the rule upholds the important judicial policy of finality of decisions.

The policies that underscore the importance of raising objections before the trial court, which are upheld through application of RAP 2.5(a) to all constitutional issues raised for the first time on appeal, are even more prevalent in the case of alleged violations of article 1, section 10. This is because not all closures of the courtroom violate article 1, section

10. Rather, it is only a court closure that is done without the trial court properly weighing certain factors that causes a violation of article 1, section 10. *In re Adoption M.S.M.-P.*, 181 Wn. App. at 308 (citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982); *State v. Bone-Club*, 128 Wn.2d 254, 260, 906 P.2d 325 (1995)). Thus, encouraging objections at trial will safeguard not only the litigants' interest in justice being administered openly, but also that of the public's, by ensuring that the trial court properly considers the relevant factors identified by this Court before entertaining closure of the courtroom.

The Department accordingly urges the Court to adhere to its longstanding rule stating that while litigants in civil cases may raise constitutional issues for the first time on appeal, they must demonstrate that they were prejudiced by the alleged error before doing so.

2. Case Law Establishes That Structural Error Does Not Apply in Civil Proceedings to Circumvent RAP 2.5

The Court of Appeals correctly rejected the notion that it should presume prejudice from a court closure through application of the criminal doctrine of structural error in this civil case. *In re Adoption of M.S.M.-P.*, 181 Wn. App. at 313-14. This Court and the Court of Appeals have consistently rejected application of this criminal doctrine in a civil case, and N.P. fails to demonstrate that this precedent is incorrect or harmful.

Accordingly, this Court should affirm the Court of Appeals holding requiring an appellant in a civil case to show manifest error in order to raise an alleged violation of article 1, section 10 for the first time on appeal.

“Structural error” is error that defies harmless error analysis and “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). This Court has relied on the doctrine in criminal cases to presume prejudice without requiring a defendant to show practical and identifiable consequences from violations of a defendant’s right to a public trial under article 1, section 22 and the requirement that justice be “administered openly” under article 1, section 10. *E.g.*, *State v. Njonge*, 181 Wn.2d 546, 554, 334 P.3d 1068 (2014) (citing *State v. Wise*, 176 Wn.2d 1, 13-16, 288 P.3d 1113 (2012)). Relatedly, this Court has recognized in criminal cases that a public trial claim may be raised for the first time on appeal without an independent showing of prejudice. *Id.*

Time and time again, this Court and the Court of Appeals have rejected application of this doctrine in civil cases. In *D.F.F.*, a case involving a violation of article 1, section 10, five justices of this Court explicitly rejected application of structural error in a civil case. 172

Wn.2d at 48-49 (J. Johnson, J., Chambers, J., concurring, and Madsen, C.J., Fairhurst, J., C. Johnson, J., dissenting). Instead, these five justices distinguished violations of article 1, section 10 in a civil case from violations of article 1, section 22 in a criminal case, and required a showing of prejudice to warrant relief. *Id.* Two years later, this Court again rejected application of structural error in a civil case, noting that “this Court has never reversed civil judgments for harmless error” and that “[f]ive justices of this court explicitly rejected the proposition that the concept of ‘structural error’ had a place outside of criminal law.” *Saleemi v. Doctor’s Assocs., Inc.*, 176 Wn.2d 368, 381, 385-86, 292 P.3d 108 (2013) (citing *D.F.F.*, 172 Wn.2d at 48, 53).

Court of Appeals opinions have followed this Court’s direction, repeatedly holding that a party must show prejudice to raise alleged violations of article 1, section 10 in a civil case for the first time on appeal. *In re Det. of Reyes*, 176 Wn. App. 821, 315 P.3d 532 (2013) (requiring showing of prejudice for alleged violation of article 1, section 10 in sexually violent predator civil commitment proceeding), *review granted*, 182 Wn.2d 1001 (2015); *In re Dependency of J.A.F.*, 168 Wn. App. at 62-63 (requiring showing of prejudice for alleged violation of article 1, section 10 in termination of parental rights case); *In re Det. of Ticeson*, 159 Wn. App. 374, 386-87, 246 P.3d 550 (2011) (requiring showing of

prejudice for alleged violation of article 1, section 10 in sexually violent predator civil commitment proceeding), *abrogated on other grounds by State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012).

In adhering to this state's longstanding principle that structural error has no place in civil law, and particularly in cases involving alleged courtroom closures, courts have relied on the distinction between a criminal defendant's right to a public trial protected by article 1, section 22, and the non-individualized constitutional guarantee that justice be administered openly in article 1, section 10. *E.g.*, *D.F.F.*, 172 Wn.2d at 48, 53; *In re Dependency J.A.F.*, 168 Wn. App. at 664. *But see State v. Sliert*, 181 Wn.2d 598, 334 P.3d 1088 (2014) (lead opinion stating structural error applies in criminal case for violation of article 1, section 10). Courts have also noted the difficulties of applying structural error to a right, like article 1, section 10, enjoyed by the public and not just by the individual litigants. Under such circumstances, structural error might lead to members of the public demanding a retrial due to a closed hearing when none of the parties have appealed. *See D.F.F.*, 172 Wn.2d at 56 (Madsen, C.J., dissenting). As Chief Justice Madsen noted in *D.F.F.*, applying structural error in a civil case for violations of article 1, section 10 "comports neither with case law nor common sense" *Id.* at 57. The

Department thus urges the Court to adhere to its precedent and affirm the Court of Appeals' rejection of structural error in this civil case.

B. Children Have An Interest in Stability, Permanency, and Finality of Legal Proceedings

Among the policies promoted by adherence to RAP 2.5(a)'s requirement of showing manifest error to raise an issue for the first time on appeal is the finality of judgments. This policy is crucial as it applies to decisions regarding placement or parentage of children because stability and permanency for children are among the most important factors contributing to their well-being. Unlike in a criminal proceeding, a civil termination of parental rights proceeding involves the rights of an additional individual – the child who is the subject of the proceeding. Children have a right to – and need – a stable and permanent home, and speedy resolution of legal proceedings. These interests would be harmed if a termination of parental rights order may be reversed for structural error, even in the absence of actual prejudice.

1. Federal and State Child Welfare Policies Recognize that Children Have a Right to a Stable and Permanent Home, and to Speedy Resolution of Legal Proceedings

A parent's fundamental right in the care and custody of his child is not absolute. *In re Dependency of T.C.C.B.*, 138 Wn. App. 791, 796, 158 P.3d 1251 (2007) (citing *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108

(1980)). *See also In re Welfare of Shantay C.J.*, 121 Wn. App. 926, 935, 91 P.3d 909 (2004). Under RCW 13.34.020, when the child's rights to basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. RCW 13.34.020 states:

When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.

The Washington State Legislature has found that "meeting the needs of vulnerable children who enter the child welfare system includes protecting the child's right to a safe, stable, and permanent home[.]" Laws of 2008, ch. 152, § 1. However, in 2008, foster children's cases were not being processed as required by federal and state standards. Therefore, the Legislature again changed the law "to encourage a greater focus on children's developmental needs and to promote closer adherence to timeliness standards in the resolution of dependency cases." Laws of 2008, ch. 152, § 1. As a result, when a foster child has been in out-of-home care for 15 of the last 22 months, the court must order the Department to file a petition seeking termination of parental rights, unless

a good cause exception applies. Laws of 2008, ch. 152, §§ 2(3), 3.

Courts in other jurisdictions have observed that the presence of a child's interest in a civil termination of parental rights proceeding is a key difference when the court considers the interests in a termination of parental rights proceeding, rather than a criminal trial. *In re R.E.S.*, 19 A.3d 785, 789 (D.C. 2011). "Unlike a criminal proceeding, which implicates the personal liberty interest of a criminal defendant, a termination proceeding involves more than a parent's fundamental liberty interest in the care, custody, and control of his child. The child's interests in stability, safety, security, and a normal family home are also at stake, as well as the prompt finality that protects those interests." *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 324, 173 P.3d 1021, 1025–26 (2007) (citations omitted) (internal quotation marks omitted).

This emphasis on the child's rights when in conflict with the parent's rights derives from a fundamental change in federal child welfare policy that occurred with the passage of the Adoption and Safe Families Act of 1997. In 1997, the United States Congress recognized that it had "inadvertently created a system that keeps children in the limbo of foster care," and that new legislation was required to "[move] children toward adoption with dispatch." 105 Cong. Rec. H10782 (daily ed. Nov. 13, 1997) (statement of Rep. Shaw). The intended goal was "to put a stop to

children lingering in foster care for years.” 105 Cong. Rec. S12526 (daily ed. Nov. 13, 1997) (statement of Sen. Chafee). Speaking in support of the bill, Senator Rockefeller stated, “A happy, permanent home life provides more than just a safe haven for kids; it gives kids confidence to grow into positive contributors to our society.” 105 Cong. Rec. S12672 (daily ed. Nov. 13, 1997). By failing to establish stable, permanent homes for foster children, we deny children “the fundamental supports they need to become satisfied and caring adults.” 105 Cong. Rec. S12671 (daily ed. Nov. 13, 1997) (statement of Sen. Rockefeller). Rather than disputing the merits of reunification versus adoption endlessly, the bill directed states to “do what is right for the child[,]” but to “get on with it” and “[n]ot to tarry.” 105 Cong. Rec. H10789 (daily ed. Nov. 13, 1997) (statement of Rep. Levin).

The goal of the bill was to “ensure our children grow up in the sanctuary of a permanent, loving home instead of a temporary shelter.” 105 Cong. Rec. H10788 (daily ed. Nov. 13, 1997) (statement of Rep. Camp). A co-sponsor of the bill stated, “What this bill is about really, though, is to have a child in a permanent home.” 105 Cong. Rec. H10790 (daily ed. Nov. 13, 1997) (statement of Rep. Kennelly). The urgency of a child’s need for stability and permanency was summed up with the words of one three-year-old, who, when she met her adoptive family, said with her hands on her hips, “Where have you been?” 105 Cong. Rec. H10790

(daily ed. Nov. 13, 1997) (statement of Rep. Shaw).

Thus, the Adoption and Safe Families Act of 1997 included two fundamental and linked changes in the law. First, it required that “in determining reasonable efforts to be made with respect to a child, . . . the child’s health and safety shall be the paramount concern[.]” Pub. L. No. 105-89 § 101, 111 Stat. 2116 (1997). And, second, when a foster child had been in out-of-home care for 15 of the last 22 months, the law required states to file a petition to terminate the parental rights of the child’s parents, and to identify and approve a qualified family for adoption. Pub. L. No. 105-89 § 103, 111 Stat. 2118 (1997).

2. Children Are Harmed By Delays in Permanency and by Placement Instability

Children who remain in the temporary status of foster care long-term are more likely to experience significant negative results. Maas and Engler’s landmark 1959 study, *Children in Need of Parents*, illuminated the plight of children who drifted aimlessly in foster care. Henry S. Maas & Richard E. Engler, *Children in need of parents* (New York, Columbia University Press 1959). Based on a longitudinal study of over 5,500 children from 1999-2007, the National Survey of Child and Adolescent Well-Being resulted in several key conclusions that confirmed what Maas and Engler had found over 40 years earlier. Ringeisen, H, Tueller, S.,

Testa, M., Dolan, M., & Smith, K. (2013), *Risk of long-term foster care placement among children involved with the child welfare system*, OPRE Report #2013-30, Washington, DC: Office of Planning, Research and Evaluation, Administration for Children and Families, U.S. Department of Health and Human Services, *available at*: http://www.acf.hhs.gov/programs/opre/abuse_neglect/nscaw/ (last visited Apr. 1, 2015). The longer a foster child remains in foster care, the lower the chances are that the child will achieve permanency. *Id.*

Also, the longer a child remains in foster care, the greater the risk the child will experience more changes in placement. *Id.* Instability in where and with whom a child lives has a significant negative impact on the behavioral well-being of the child. David M. Rubin, Amanda L.R. O'Reilly, Xianqun Luan, A. Russell Localio, "The Impact of Placement Stability on Behavioral Well-being for Children in Foster Care 119:2" *Pediatrics*, 2007 at 336-44. The younger the child who is first placed in foster care, and the more placements the child has, the greater the association with stress-induced physiological changes in the brain. Philip Fisher, Megan Gunnar, Mary Dozier, Jacqueline Bruce, Katherine Pears, (2006) "Effects of therapeutic interventions for foster children on behavioral problems, caregiver attachment, and stress regulatory neural systems," 1094, *Ann. N.Y. Acad. Science*, 215-22 (Dec. 2006).

In contrast, placement stability helps children develop healthy, secure relationships. Sonya Leathers, *Foster Children's Behavioral Disturbance and Detachment from Caregivers and Community Institutions.*" Children and Youth Services Review, at 239-68 (2002). Youth who experience minimized placement changes are more likely to experience fewer school changes, less trauma and distress, less mental health and behavioral problems and increased probabilities for academic achievement. Yvon Gauthier, Gilles Fortin, Gloria Jeliu, *Clinical application of attachment theory in permanency planning for children in foster care: The importance of continuity of care,*" Infant Mental Health Journal, at 379-96 (2004); David Rubin, Evaline Allesandrini, Chris Feudtner, David Mandell, A. Russell Localio & Trevor Hadley, *Placement stability and mental health costs for children in foster care,* Pediatrics, 113 No. 5 at 1336-41 (2004).

3. Reversing Placement Decisions or Termination of Parental Rights Decisions With No Showing of Prejudice Inhibits Permanency and Stability for Children

If this Court were to adopt a rule allowing parents to raise alleged violations of article 1, section 10 for the first time on appeal and requiring reversal without any showing of prejudice, the permanency and stability so important to a child's well-being would suffer. Reversals of

terminations of parental rights or placement decisions can uproot children from adoptive families or stable foster home placements, and cause harmful disruptions to a child's life and emotional welfare.

The Department acknowledges the important interests at stake for parents in such hearings, and the societal value placed on maintaining family integrity if possible. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1982) (parents have a fundamental liberty interest in the care, custody and control of their children); *In re Dependency of Schermer*, 161 Wn.2d 927, 943, 169 P.3d 452 (2007) (purpose of a dependency is to allow courts to order measures to preserve and mend family ties). Thus, the Department fully supports a parent's right to appeal from placement or termination decisions, and to obtain reversal of those decisions when the parents can demonstrate error justifying reversal. But application of structural error in child welfare cases would cause *unwarranted* upheaval to a child's stability – unwarranted because it will require reversal of placement and termination decisions even where a parent cannot make any showing that the alleged error had any impact on the trial – or even if the alleged error actually favored the parent at trial. The Department respectfully submits that children should undergo such upheaval only when necessary, and that child welfare cases are particularly ill-suited for

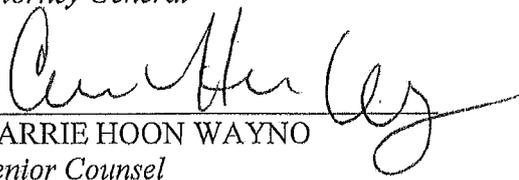
exceptions to the general rule requiring a showing of manifest error to raise an issue for the first time on appeal.

VI. CONCLUSION

The Department respectfully asks this Court to hold that prejudice must be found in order to raise the constitutional issue of whether a termination of parental rights hearing was properly closed. Unlike in a criminal proceeding, a civil termination of parental rights proceeding involves the rights of an additional individual – the child who is the subject of the proceeding. Children both need, and have a right to, a stable and permanent home, and to finality in legal proceedings. This interest would be harmed if a placement or termination of parental rights order may be reversed for structural error, even in the absence of actual prejudice.

RESPECTFULLY SUBMITTED this 3 day of April, 2015.

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PROOF OF SERVICE

I certify that I served a true and correct copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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

DATED this 3rd day of April 2015 at Tumwater, Washington.



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- Motion to File Brief of Amicus Curiae Washington State Department of Social and Health Services
- Amicus Curiae Brief of the Department of Social and Health Services

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Thank you

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