IN THE SUPREME COURT OF THE STATE OF OREGON

ROB HANDY,
Plaintiff-Appellant,
Respondent on Review,
v.
LANE COUNTY, JAY BOZIEVICH, SID LEIKEN, and FAYE STEWART,
Defendants-Respondents
Petitioners on Review.

Lane County Circuit Court Case No.
161213685
CA A153507
SC S063725

BRIEF ON THE MERITS-ON BEHALF OF *AMICI CURIAE* (OREGON NEWSPAPER PUBLISHERS ASSOCIATION, ALBANY DEMOCRAT-HERALD, BEAVERTON VALLEY-TIMES, CANBY HERALD, CENTRAL OREGONIAN, CORVALLIS GAZETTE-TIMES, EUGENE REGISTER-GUARD, FOREST GROVE NEWS-TIMES, GRESHAM OUTLOOK, HOOD RIVER NEWS, LAKE OSWEGO REVIEW, LEBANON EXPRESS, MADRAS PIONEER, MCMINNVILLE NEWS-REGISTER, THE OREGONIAN, POLK COUNTY ITEMIZER-OBSERVER, PORTLAND TRIBUNE, THE DALLES CHRONICLE, TIGARD AND TUALATIN TIMES, WILSONVILLE SPOKESMAN, WOODBURN INDEPENDENT)

On Review of the Decision of the Oregon Court of Appeals
on Appeal from a Limited Judgment of the Circuit Court for Lane County,
Honorable Richard L. Barron, Judge

Opinion Filed: November 4, 2015
Author of Opinion: Garrett, Presiding Judge
Concurring Judges: Ortega, J., Devore, J.
Dissenting Judge(s): Devore, J.

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I. INTRODUCTION

The legislatively adopted policy underlying the Open Public Meetings Law ("OPML" or "the Law"), ORS 192.610 to 192.690, is to inform the public about the deliberations and decision-making of public agency governing bodies. The Law's stated purpose (ORS 192.620) is:

> "The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of ORS 192.610 to 192.690 that decisions of governing bodies be arrived at openly."

With this in mind, the Oregon Newspaper Publishers Association, and the following member newspapers: Albany Democrat-Herald, Beaverton Valley-Times, Canby Harold, Central Oregonian, Corvallis Gazette-Times, Eugene Register-Guard, Forest Grove News-Times, Gresham Outlook, Hood River News, Lake Oswego Review, Lebanon Express, Madras Pioneer, McMinnville News-Register, The Oregonian, Polk County Itemizer-Observer, Portland Tribune, The Dalles Chronicle, Tigard and Tualatin Times, Wilsonville Spokesman, and Woodburn Independent (collectively "ONPA") submit this brief as *amici curiae*. The ONPA urges the Court to interpret the OPML in favor of disclosure, transparency, and accountability, consistent with the Law's rationale for adoption.

These statutes have been largely unchanged—and absolutely unaltered as to policy and purpose—since their original 1973 enactment.

Missing from the Defendants' and supporting *amici's* arguments is a recognition of the holistic nature of ORS 192.610 to 192.690. They have focused on one aspect of the entire OPML by urging that the OPML should be interpreted to limit "meetings" among public officials to "contemporaneous" occurrences.

The OPML is an integrated system for government decision-making transparency. It has elements of not only the present (so-called "contemporaneous" events) but also the future and the past.

The Law is predicated on the reality that the public may not be able to observe government in action on a regular basis and that the public may choose to do so selectively, depending on the issue. This does not lessen government's obligations to act openly under the Law.

This is why governing bodies are required to provide pre-meeting agendas to the public, inclusive of the time, place, and matters to be considered ("the future"). ORS 192.640. In addition to the discipline of creating a process for orderly, informed discussion of public business by use of a publicly circulated agenda, the public becomes aware of what deliberations and decisions are scheduled for discussion and possible action.

Of perhaps even greater importance is the OPML's requirement that activities of a governing body be recorded in a format reflecting: (a) accurate, contemporaneous documentation by some written, oral, or video form of what occurred; and (b) such record is preserved for later public access and review ("the past"). ORS 192.650.

Defendants and their *amici* give little or no attention to this latter function of the OPML. The instances are countless where the record of what transpired is far more valuable to the public than an opportunity to observe the "contemporaneous" interactions among public officials. Our system of government relies foremost on a record of what government has chosen to do. That, as this Court has discussed numerous times, is what counts. It is the reference point for all that follows, binding both upon government and the public.

This is why the bright line Defendants and their *amici* seek is fundamentally inconsistent with the OPML. "Meetings" which involve no prior notice, no concurrent recordkeeping, and no documentation of discussion or decision are the very thing which the Law is designed to prevent. Yet, the system suggested by Defendants and their *amici* would dispense with these vital components of the OPML, even where a quorum of a governing body has

consciously exchanged information, albeit non-contemporaneously (however defined), and/or made a decision on a matter of public business.

In short, the OPML is much more than a statutory regulation of the circumstances where contact among a quorum of governing body members can occur. It also requires prior public notice of such occurrences and a record of what transpired. Virtually no discussion is given by Defendants or their *amici* to the Legislature's policy choices in these regards.

The ONPA instead supports the rule of law proposed by Plaintiff in this matter, consistent with the Court of Appeals' decision. Serial communications of a quorum of Lane County Commissioners which both deliberated and decided upon a matter under their jurisdiction occurred. Therefore, the Commissioners were required to adhere to the OPML as a "meeting." *Handy v. Lane County*, 274 Or App 644, 363 P3d 867 (2015).

The ONPA submits this brief to discuss the important consequences of Defendants' and their aligned *amici*'s proposed rules of law and to highlight to the Court the analyses of other states' appellate courts facing similar issues in the age of Skype, Facebook, cellular phones, text messages, and email transmittals, all which can be grouped or forwarded instantaneously with a simple keystroke. The ONPA will not reference in detail the facts of this case, the Court of Appeals'

decision, or the analysis of the other parties. Instead, it will focus on the legal issues related to the proper interpretation of the OPML, as well as the significant implications and legal issues raised by Defendants and their *amici.*

II. PROPOSED RULE OF LAW

A "meeting" under ORS 192.610(5) includes any deliberation or decision-making of a governing body quorum through means chosen by the quorum, including serial communications (electronic or in-person) and/or the use of intermediaries, agents, or proxies. Governing bodies may not avoid the OPML by deliberating in a series of non-quorum communications, to arrive at or deliberate towards a decision of a quorum. Additionally or alternatively, members of a governing body "meet" in violation ORS 192.630(2) when a quorum is created and a common topic of discussion is consciously addressed even "non-contemporaneously."

III. ARGUMENT

The Court should interpret the OPML broadly, consistent with the Legislature's express policy, applying the Law's requirements to all deliberations of a quorum of a governing body (however composed) on a topic upon which a quorum is required to make a decision. Those deliberations may take place via non-contemporaneous transmission or exchanges of information.

A. ***There is no time or place limitation in the OPML definition of "meeting. There is no recognition in the OPML of an "informal meeting."***

Defendants (and their aligned *amici*) suggest that only a contemporaneous gathering of a quorum could be defined as a "meeting" under the OPML. Such a rule does not comport with the policy of the Law. To the contrary, it provides an avenue for governing bodies to deliberate or decide issues without providing prior public notice or the keeping of the records of substantive discussions or decisions on public business. Defendants and their *amici* offer no Legislative support for their position. They seek to embellish a statutory process in effect for over 40 years.

ORS 192.610(5) defines a "meeting" as: "the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter." The definition further states specific exceptions: "'Meeting' does not include any on-site inspection of any project or program. 'Meeting' also does not include the attendance of members of a governing body at any national, regional or state association to which the public body or the members belong."

In interpreting statutes, Oregon courts use the familiar methodology of examining the "text in context and relevant legislative history." *State v. Ziska/Garza*, 355 Or 799, 804, 334 P3d 964 (2014). That is the methodology this

Court should use in testing Defendants' and their *amici's* arguments in defining "convene" and "deliberate" and "meeting" in ORS 192.610(5), as well as the Legislature's overall intent in adopting the OPML.

The context includes other related provisions of a statutory scheme. *Lane County v. LCDC*, 325 Or 569, 578, 942 P2d 278 (1997) ("[W]e do not look at one subsection of a statute in a vacuum; rather, we construe each part together with the other parts in an attempt to produce a harmonious whole."). Here, ORS 192.620, describing the policy behind the OPML is relevant, as is ORS 192.630(2), which clarifies what members of a governing body may not do—that is, "a quorum of a governing body may not meet in private for the purpose of deciding on or deliberating toward a decision on any matter." Additionally, the Law's process requirements provide important guidance as to how the OPML is to operate.

"Convene" means "to come together, meet, or assemble in a group or body (as in a formal meeting for some specific purpose)." *Webster's Third New Int'l Dictionary* 497 (unabridged ed 2002). A decision is defined by statute as "any determination, action, vote or final disposition" by the governing body. ORS 192.610(1). The OPML term "deliberate" is not defined by statute. It is defined by the dictionary as "to ponder or think about with measured careful consideration and

often with formal discussion before reaching a decision or conclusion." *Webster's* at 596; s*ee also Handy*, 274 Or App at 657 n 10 (discussing same).

Notably, the OPML does not limit the time, place, circumstances, or mode of communication among a quorum in defining any of the above terms. The Legislature wisely did not restrict the specifics to the telephone and hard copy technology prevalent in 1973. The definitions were shaped in broad terms to accomplish the Legislative policy of openness.

Despite these realities, Defendants' urge the Court to interpret "convene" narrowly, to apply only to "formal" meetings. However, such an interpretation does not serve the purpose of the OPML or work as a definition. Although the Legislature obviously meant for governing bodies to meet only through prescribed meetings processes, such a definition cannot function if it only applies to "formal meetings." That is, if the OPML only applies to formal meetings, then it could be ignored by convening "informal" meetings. The statute makes no such distinction between formal and informal meetings. This ensures that the public can be aware of, and observe all, quorum deliberations. Defendants and their *amici* offer no guidance as to how an "informal" meeting is to be conducted, nor what record is kept of its outcome. Under the Law, a meeting involves the gathering of a governing body quorum—however constructed.

The meeting definition includes the concept of an assembling of a quorum, but also an action/purpose requirement: "in order to make a decision or to deliberate toward a decision on any matter." ORS 192.610(5). Here, the definition of deliberate becomes relevant. Taken together, a meeting occurs when a quorum assembles to ponder or discuss a matter and/or a decision that a quorum must agree on. Such a definition is consistent with the Legislature's direction that deliberations of a governing body be open to the public and that a quorum may not meet in private to discuss or decide matters relevant to the governing body.

B. ***Members of a governing body may "convene" when using an intermediary, agent, or proxy to convey deliberations.***

Here, Ms. Richardson, the County Administrator and former Lane County Counsel, conveyed the positions of two members of the Commission in emails to a third Commissioner, who, in turn, replied to that message. *Handy*, 274 Or App at 647-48. The Supreme Court of Iowa recently decided a case strikingly similar to this one—*Hutchison v. Shull*, __ NW2d __, 2016 WL 1072131 (Iowa S Ct March 18, 2016). The Iowa Court's opinion is discussed below. Its analysis is persuasive and consistent with Oregon law and germane to the specifics of this case.

The Board of Supervisors is a three-member-elected body which governs Warren County, Iowa. The Board of Supervisors directed its

Administrator—Ms. Furler—to make recommendations for reorganizing the County workforce and eliminating some positions. As Ms. Furler worked on this assignment, she had several meetings with each member of the Board, "[d]uring these discussions, Administrator Furler allowed the individual supervisors to voice their thoughts and concerns on various topics. She then reported those thoughts and concerns to the other supervisors." *Hutchison*, at *3. Administrator Furler then had more meetings with each of the supervisors to finalize the plan, "At the end of each meeting Administrator Furler had with an individual supervisor, she would find out whether that supervisor was going to approve whatever aspect of the reorganization plan they had discussed during that particular meeting. Administrator Furler and the Supervisors held all these meetings in private and without posting advance notice to the public." *Id.* at *4.

Following the termination of many employees, six employees filed suit against the Supervisors and County for violation of Iowa's Open Public Meetings Law. On appeal, the Iowa Supreme Court addressed whether the separate but reported, serial meetings between the individual Supervisors and Ms. Furler were "Meetings" under Iowa Code Section 21.2(2), part of Iowa's public meetings law.[1]

[1] Iowa Code Section 21.2(2) provides:

> "'Meeting' means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where

The plaintiffs asserted that "each meeting between an individual board member and the county administrator during which the administrator deliberated the reorganization plan at the behest of another board member legally constituted an informal in-person gathering of a majority of the board involving deliberation concerning matters within the scope of the board's policy-making duties." *Hutchison*, at *10.

The Iowa Supreme Court agreed with the plaintiffs:

> "Were we to assume the legislature was unfamiliar with agency principles when it enacted the open meetings law, we might construe the term 'gathering' narrowly to conclude the open meetings requirements apply only to face-to-face deliberations during which a majority of the members of a governmental body are personally physically present and to electronic or serial submajority deliberations among a majority of members occurring in close temporal proximity. However, such a narrow construction of the term would clearly be at odds with the intended scope and purpose of our open meetings law 'to assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people.' *See [Iowa*

> there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter."

> *Code]* § 21.1.[2] Adopting the interpretation of section 21.2(2) urged by the board and its members would result in absurd consequences undermining the clear purpose of the open meetings law."

Hutchison, at *10. As the Iowa Court observed, it was not the first to determine that agency principles applied to the convening of governing bodies:

> "Indeed, the concept of agency is so fundamental to the common law that some courts have *assumed* a gathering personally attended by fewer public officials than is required to satisfy a statutory definition of "meeting" may nonetheless constitute a meeting whenever a sufficient number of public officials attend the gathering by virtue of their agents. *Claxton Enter. v. Evans Cty. Bd. of Comm'rs,* 249 Ga App 870, 549 SE2d 830, 834–35 (2001) (stating that 'a meeting is required to be open only when a quorum of a governing body or its agents have gathered' though the statute defined 'meeting' as 'the gathering of a quorum of the members of the governing body of an agency or of any committee ... at a designated time and place ... at which official action is to be taken' (quoting Ga Code Ann § 50–14–1(a)(2) (1999))); *State ex rel. Newspapers, Inc. v. Showers,* 135 Wis 2d 77, 398 NW2d 154, 164–65 (1987) ('Common sense also tells us * * * that if proxies are present so as to realistically make-up a majority, the Open Meeting Law applies.')."[3]

Hutchison, at *11.

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[2] The Iowa statute specifically mentions "informal" gatherings, unlike ORS 192.610. If the Oregon Legislature meant for "meetings" to be of two types, it would have adopted the statute accordingly. Instead, the Oregon legislature specifically exempted some types of gatherings, like on-site inspections and attendance at conferences.

[3] The Wisconsin case cited by the Iowa Court is particularly interesting, because the definition of "Meeting" under Wisconsin law used the verb "convening." Wis. Stat. 19.82(2); *State ex rel. Newspapers, Inc.*, 398 NW2d at 158.

Additionally, other states have reached similar conclusions regarding electronic communications and serial meetings under their open public meetings statutes. *See, e.g.*, *Wood v. Battle Ground Sch. Dist.*, 107 Wash App 550, 564, 27 P3d 1208, 1217 (2001) (exchange of emails can constitute a "meeting" under Washington's Open Public Meetings Act); *Blackford v. Sch. Bd. of Orange County,* 375 So2d 578, 580 (Fla Dist Ct App 1979) (successive meetings between school superintendent and individual school board members violated Florida's Sunshine Law); Commonwealth of Massachusetts, Office of Attorney General, Open Meeting Law Guide, March 18, 2015, available at http://www.mass.gov/ago/docs/government/oml/oml-guide.pdf ("Courts have held that the Open Meeting Law applies when members of a public body communicate in a serial manner in order to evade the application of the law."); *Del Papa v. Bd. of Regents of the Univ. & Cmty. Coll. Sys.,* 114 Nev 388, 956 P2d 770, 778 (1998) (use of serial electronic communication by quorum of public body to deliberate toward or to make a decision violates state open meeting law).

As was the case in Iowa, the principals of agency and apparent or implied agency were well established in Oregon at the time the OPML was drafted. *See Barnes v. Eastern & Western Lbr. Co.*, 205 Or 553, 574, 287 P2d 929 (1955) ("Generally, an agent is one who has authority to act for another in contractual dealings with third persons[.]");*Young v. Neill et al.*, 190 Or 161, 174, 220 P2d 89,

adhered to on reh'g, 190 Or 161, 225 P2d 66 (1950) ("An agency may be implied from attending circumstances and the apparent relations and conduct of the parties.").

Here, Ms. Richardson took on responsibilities purportedly as an agent for the commissioners with whom she had earlier spoken when she emailed the third commissioner regarding a vote on the release of the document at issue (requiring a quorum of commissioners). When the third commissioner responded to that email substantively, there was shared communication, *i.e.*, a deliberation, among a quorum of commissioners toward a decision.

The Court of Appeals rightly concluded that the trial court erred. Further proceedings should ensue with this foundation established.

C. ***Members of a governing body "meet" under ORS 192.630(2) when they use email, telephone calls, text messages, and conversations through intermediaries to deliberate.***

The Court of Appeals' dissent and Defendants and their *amici* reason that the Legislature was purposely redundant in defining a "meeting" and in defining what type of gathering violates the OPML in ORS 192.630(2). However, their view does not reconcile the guiding and over-riding legislative intent—to inform the public of the existence of all quorum-based deliberations, decisions, and relevant information. ORS 192.620. The way the Legislature sought to accomplish

that goal was by requiring that advance public notice be given of meetings, that meetings be held in locations open to the public, and that agendas and minutes be prepared for public availability.

If this Court determines that "convening" does require contemporaneous assembly applying to formal meeting, it should interpret ORS 192.630(2) more broadly, as the Court of Appeals did, to be consistent with the Legislature's intent of keeping deliberations of governing bodies open to the public.

Defendants' logic is circular. If "Meetings" are only formal meetings, because they require a "convening" of members, and "meet" can only refer to "meetings" then how can the OPML be enforced without more definitions which are all absent from the OPML? Even Defendants concede that a non-agendaed, non-recorded, face-to-face quorum, where deliberations and/or decisions occur, is contrary to the OPML. Defendants' problem is that they offer no Legislative definition or guidance as to what "informal" quorum encounters must comply with the OPML. In these instances, despite the stated policy of open meetings, all sorts of discussion and action on public business could transpire at "informal meetings" without an accurate record and the opportunity for public observation.

As described by the Court of Appeals, ORS 192.630(2) is directed toward "meetings" regardless of whether how they occur. Where, among a quorum

of members, there are discussions toward a decision of a governing body, the public has a right to know about those deliberations. Accordingly, the trial court was wrong to strike that allegation and the Court of Appeals' decision should be affirmed.

D. ***Defendants' proposed rule of law is too narrow and would be ineffective at keeping the public informed.***

Defendants propose that the Court should clarify that a quorum of a governing body may meet for the purpose of "information gathering" but not for "deliberating." Defendants concede that a "meeting" may occur through electronic means, but suggest that such an electronic meeting must be "contemporaneous." Petitioners on Review's Brief on the Merits, pp. 41-43. While Defendants contend that such a standard is "clear" and "objective," a simple example shows how it is neither, not to mention the introduction of a new integral term nowhere found in the OPML.

What does "contemporaneous" mean? What are its bounds? If the governing body creates a phone tree, by which each member calls the next and explains the views of each member ahead of him or her on the list, is that not a contemporaneous discussion? If group emails are responded to but hours apart, is that no longer a contemporaneous deliberation? These questions are not answered by Defendants' proposed interpretation of the OPML. The Legislature's response is clear:

deliberations must occur in public, and members of governing bodies may not make decisions in private. Defendant's "bright line" becomes quite fuzzy when the question becomes not whether communication is shared among a quorum but whether enough time has passed between serial or proxied communications to negate a "contemporaneous" discussion. Such communications are volitional by the members.

Additionally, the distinction between information gathering and deliberating, as suggested by Defendants, is too narrow. Deliberating must mean something more than taking a vote or "expressing a final position." Petitioners on Review's Brief on the Merits, p. 42. The OPML requires that the public be "aware of the deliberations and decisions of governing bodies *and the information upon which such decisions were made*." ORS 192.620 (emphasis added). Defendants' proposal is a substantial amendment to the existing Law.

E. ***The risk of inadvertent violations is small.***

Defendants' and their aligned *amici* are concerned that the Court of Appeals' ruling "creates the potential that well-intended public officials could unknowingly and unwittingly violate the OPML." Petitioners on Review's Brief on the Merits, p. 44. The ONPA understands that many citizens volunteer on local boards and commissions. Respectfully, the ONPA contends that such a risk to those volunteers is low and that it is easily avoidable if the OPML's policies are kept at

the forefront. (As to paid officials who have regular access to counsel, Defendants' arguments have even less rationale.)

The term deliberate, as described above, encompasses the concept of action. Members of a governing body quorum must undertake some participatory act, engage in a conversation or hit "send" on an electronic message to be engaged in deliberation. Where there is a third-party intermediary (in this case, Ms. Richardson, the County Administrator), members should be careful as to how they carry, report and act on the message, as they have since 1973. The Law requires this.

IV. CONCLUSION

Defendants and their supporting *amici* seek an OPML bright line. In government administration and decision-making, there are fewer bright lines and more judgment calls to be made. In this case, the facts are undisputed that three county commissioners voluntarily participated in a quorum process to discuss public business. Perhaps Commissioner Handy was to be deliberately excluded, perhaps the three commissioners and Ms. Richardson failed to focus on the OPML in their haste to deal with the document at issue. Yet, the OPML requires consideration of its policies any time a governing body begins the communications process which does or could include a quorum.

For the reasons described above, the Court should interpret the definitions of "meeting" and "meet" consistently with the policy of the OPML, that decisions of a governing body be arrived at openly. Accordingly, it should determine that the trial court erred in striking Plaintiff's claim regarding violation of the OPML and affirm the decision of the Court of Appeals. Many aspects of the OPML neither suggest nor mandate bright lines. Rather, the OPML requires the bright light of open government.

Dated: May 19, 2016. BALL JANIK, LLP

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CERTIFICATE OF COMPLIANCE

I certify that (1) **BRIEF ON THE MERITS-ON BEHALF OF AMICI CURIAE (OREGON NEWSPAPER PUBLISHERS ASSOCIATION ET AL.)** complies with the word count limitation in ORAP 5.05(2)(b), and (2) the word count of this brief, as described in ORAP 5.05(2)(a), is 4,111 words.

I certify that the size of type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing **BRIEF ON THE MERITS-ON BEHALF OF AMICI CURIAE (OREGON NEWSPAPER PUBLISHERS ASSOCIATION ET AL.)** by electronic filing to:

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I further certify that on May 19, 2016 I served the foregoing **BRIEF ON THE MERITS-ON BEHALF OF AMICI CURIAE (OREGON NEWSPAPER PUBLISHERS ASSOCIATION ET AL.)** on the following parties at the addresses below by electronic mail, as well as served the same on May 19, 2016:

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CERTIFICATE OF FILING

I further certify that on May 19, 2016, I caused to be filed electronically the foregoing **BRIEF ON THE MERITS-ON BEHALF OF AMICI CURIAE (OREGON NEWSPAPER PUBLISHERS ASSOCIATION ET AL.)** with the Appellate Court Administrator through the Oregon Appellate Courts' e-Filing system.

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