No. 14-30

IN THE

Supreme Court of the United States

THYSSENKRUPP WAUPACA, INC.,
doing business as WAUPACA FOUNDRY, INC.,
Petitioner,

v.

RYAN DEKEYSER,
et al., on behalf of themselves
and others similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AS *AMICI CURIAE* OF THE AMERICAN FOUNDRY SOCIETY, NFIB SMALL BUSINESS LEGAL CENTER AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The U.S. Court of Appeals for the Seventh Circuit noted that clothes changing and showering are compensable acts under the Fair Labor Standards Act (FLSA) if they are: a.) required by law; b.) required by the employer; or c.) required by the "nature of the work."

Having dispensed with the first two possibilities, the Seventh Circuit then reversed and remanded the case on the basis that the issue of whether the "nature of the work" required clothes changing and showering should be resolved at trial.

To get to this point, the Court came to two antecedent conclusions: first, the Seventh Circuit held that no negative inference can be drawn from the absence of an Occupational Safety and Health Administration (OSHA) standard; second, the Court observed that there was a "sharp dispute" in the evidence as to the health effects of chemical exposure to respirable crystalline silica at Waupaca's foundries, and "the impact that showering and changing clothes would have on Waupaca workers."

The Seventh Circuit relied on a "sharp dispute" in evidence as to whether changing clothes and showering "actually reduced health risks" rather than asking if there was any genuine dispute as to whether changing clothes and showering at Waupaca (rather than anywhere else) reduced health risks. *DeKeyser v. Thyssankrupp Waupaca, Inc.*, 735 F.3d

568, 571 (7th Cir. 2013) *reh'g en banc denied* (2014). No such evidence was put forth.

The issue presented in this case is not whether showering and changing clothes could have an impact upon the health of Waupaca's workers. The issue presented in this case is whether showering and clothes changing at the workplace – as opposed to anywhere else – are required by the nature of the work for health reasons.

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INTEREST OF THE *AMICI CURIAE*

Three *amici curiae*, the American Foundry Society, the National Federation of Independent Business Small Business Legal Center, and the National Association of Manufacturers (collectively, amici) submit this brief.[1]

The American Foundry Society (AFS) is the primary trade and technical association in North America with more than 7,000 members representing over 2,000 metalcasting firms, their suppliers, and customers. The organization exists to provide knowledge and services that strengthen the metalcasting industry for the ultimate benefit of its employees, customers, and society. AFS provides leadership in the areas of environmental, safety, and industrial hygiene, research, marketing, management and human resources for the metalcasting industry.

Metal castings are the foundation for over 90% of all other manufacturing, and metalcasters have

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[1] Pursuant to Rule 37.6, *amici* state that this brief was authored in whole by counsel for the American Foundry Society, the National Federation of Independent Business Small Business Legal Center and the National Association of Manufacturers. This brief was not authored in any part by counsel for a party to this matter. No person or entity, other than the *amici curiae*, their members, and their counsel, made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk. Counsel of record for both parties received notice at least 10 days prior to the due date of amici curiae's intention to file this brief.

been a vital building block for every nation's economic wealth. The industry is dominated by small businesses, with over 80% of U.S. metalcasters employing 100 workers or less. The U.S. metalcasting industry produces $34 billion in product and employs over 200,000 people nationwide. About 20% of the foundry industry is unionized.

The National Federation of Independent Business ("NFIB") is the leading small business association representing small and independent businesses. A non-profit, non-partisan organization founded in 1943, NFIB represents the consensus views of its members in the District of Columbia and all 50 state capitals.

The mission of NFIB is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB also gives its members a power in the marketplace. By pooling the purchasing power of its members, NFIB provides its members timely information designed to help small businesses grow and succeed. The NFIB Small Business Legal Center is a 501(c)(3) public interest law firm whose goals are to advocate for small business in the courts and to serve as the legal resource for small business owners nationwide. NFIB represents 350,000 businesses nationwide.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, provides the largest

economic impact of any major sector, and accounts for two-thirds of private sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Therefore, this brief collectively represents a large segment of working Americans.

The instant case offers an opportunity for the Court to resolve, as a question of law, whether certain activities are compensable under the Fair Labor Standards Act (FLSA) that can be performed at the work place, or at a worker's own home, making the location where the activity is performed irrelevant to the primary work or the health of the workers performing the act.

The issue presented in this case is of critical importance to foundries throughout the nation. It is also critical to any manufacturer and any other small business that offers an amenity intended to improve hygiene or comfort, but which is voluntary and not required by law, by the employer, or by the nature of the work. Manufacturers and other small businesses need a standard that makes it clear that an employer's support for an employee's voluntary activities should not be viewed as evidence that the activity is required by the nature of the work.

A clear standard is important to small businesses as they often lack the ability of larger organizations to parse the language of complicated legal standards before making decisions that could

expose them to significant liability. Employers represented by amici also crave a standard that can be applied and resolved as a matter of law and one where district courts will not spontaneously mandate health and safety practices, especially after OSHA has evaluated and rejected such a mandate following the rigors of traditional rulemaking.

SUMMARY OF ARGUMENT

The Seventh Circuit has declined to enunciate a standard that may be prescribed to non-union employers as a matter of law. The Seventh Circuit proposes that the question of whether an activity is required by the nature of the work can be resolved only after the presentation of conflicting evidence. The unfortunate result of this opinion is that it leaves well-intentioned foundries without clear directions and subjects them to costly and disruptive pre-trial and trial procedures. Amici propose that the nature of the work in a foundry, and what is required by the nature of that work, is a well settled fact prior to the institution of litigation. Moreover, where safety- and health-related activities are concerned, the requirements of the nature of the work present a misplaced inquiry. Rather, safety and health are the province of law.

The Seventh Circuit held that no inference can be made by the silence of OSHA. *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 735 F.3d 568, 571 (7th Cir. 2013) *reh'g en banc denied* (2014). While this may be true as a principle of law, it does not apply in this case. Here, OSHA has evaluated the question of whether to implement a standard requiring worksite change of clothes and worksite

showering. *Occupational Exposure to Respirable Crystalline Silica*, 78 Fed. Reg. 56,273, 56,422 (proposed Sept. 12, 2013). OSHA specifically rejected the proposition that such practices should be required under its proposed crystalline silica standard. By contrast, OSHA adopted clothes changing and showering requirements in workplace safety and health standards addressing the hazards of exposure to lead (29 C.F.R. § 1910.1025(i)(2)-(3)), and other standards discussed below, providing further support for the conclusion that its action in the case of crystalline silica was not silence, but the outcome of a deliberative process, and therefore supportive of a negative inference.

This Court should overrule the Seventh Circuit's approach and offer a clear standard for district courts to apply as a matter of law. Further, courts should be circumspect in creating safety requirements in the patent wake of a specific agency decision not to issue such mandates, after carefully conforming to the bounds of traditional agency rulemaking.

ARGUMENT

Under the Fair Labor Standards Act, employers shall pay employees a minimum hourly wage for all "hours worked." 29 U.S.C. §§ 206, 207.

In this matter, the Seventh Circuit applied, but did not explicitly adopt, a tri-partite test for the definition of compensable work, stating that clothes changing and showering are compensable if they are: 1.) required by law; 2.) required by the employer; or 3.) required by the nature of the work. *DeKeyser v.*

Thyssenkrupp Waupaca, Inc., 735 F.3d 568, 571 (7th Cir. 2013) *reh'g en banc denied* (2014).

A. Preliminary and Postliminary Activities Are Only Compensable If They Are Integral to the Primary Task of the Employee

Amici are not aware of any cases where a court has thus far had the opportunity to apply the "required by the nature of the work" test to hygiene, safety, or health related activities voluntarily performed on-site. Courts have applied the first two elements of the tripartite test to determine the compensability of safety and health activities, and in fact courts have often found that the activity at issue was indeed required, either by law or by the employer.

This Court has recognized the principle that preliminary and postliminary activities are compensable if they are integral and indispensable to the employee's principal activities. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). An activity is deemed integral and indispensable to work when it: 1) is necessary to the principal work performed and 2) primarily benefits the employer. The Second Circuit provides helpful definitions for an activity that is "integral and indispensable" to a principle activity:

> "Indispensable" is not synonymous with "integral." "Indispensable" means "necessary." See Webster's Third New Int'l Dictionary (Unabridged) 1152, 1510-

> 11 (1986). "Integral" means, *inter alia*, "essential to completeness"; "organically joined or linked"; "composed of constituent parts making a whole." *Id*. at 1173.

Gorman v. Consolidated Edison Corp., 488 F.3d 586, 592-93 (2d Cir. 2007). The Ninth Circuit also adopted this analysis, stating that the Second Circuit "astutely recognized that there is a difference between an indispensable activity and an integral activity. That an activity is indispensable does not necessarily mean that the activity is integral to the principal work performed." *Bamonte v. City of Mesa*, 598 F.3d 1217, 1232 (9th Cir. 2010).

In the instant case, evidence of the hygienic or health benefits derived from clothes changing and showering is inapposite to the legal inquiry here. The parties have put no evidence into contest that the activity of showering and changing clothes at work, rather than at home, is in any way integral or indispensable to the primary tasks they perform at a foundry.

The Seventh Circuit did not appear to apply the analysis of whether the activity of clothes changing or showering at work is integral to the primary work. This variation between the circuits creates an ambiguity for well-intentioned employers. On that basis, amici support a petition for a writ of certiorari.

B. Activities Are Compensable When They Primarily Inure to the Benefit of the Employer

Workplace activities are compensable when they inure primarily to the benefit of the employer. The Supreme Court defined "the statutory workweek" to include "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemmons Pottery Co.*, 328 U.S. 680, 690-91 (1946) *superseded by statute*, Fair Labor Standards Act Amendments of 1949, Pub. L. No. 81-393, 63 Stat. 910, *as recognized in IBP Inc. v. Alvarez*, 546 U.S. 21 (2005); see also *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). In *Anderson,* the court defined "work" as physical or mental exertion, whether burdensome or not, which is controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. *Anderson*, 328 U.S. at 691. Thus, elemental to compensability is the question of who is the beneficiary of the activity.

In the instant case, the voluntary activities of clothes changing or showering at work, rather than at home, inure primarily to the benefit of the employee. The record shows that some of the Waupaca facilities also provided saunas for employee use. Amici believe this fact is difficult to overlook: applying the logic of the claimants, the fact that an employer provides a facility is probative that the employer requires its use. But this would lead to an absurd result in the context of a sauna. But the converse is equally untenable: the Seventh Circuit

offered no logical means of discerning between changing and showering facilities on one hand and saunas on the other.

The Seventh Circuit did not appear to inquire as to whether changing clothes and showering at work inures to the benefit of the employer; other circuits have done so, as discussed here. This variation between the circuits creates an ambiguity for well-intentioned employers. On that basis, amici support a petition for a writ of certiorari.

C. Most Foundries Do Not Require Clothes Changing Or Showering And Many Do Not Even Have Showers Or Clothes Changing Facilities

The Seventh Circuit is unique in suggesting that voluntary activities, even if health related, should be subjected to the third prong of the tripartite test; that is, whether they are required by the nature of the work.

The question of whether activities are required by the nature of the work is evidenced by the widespread and historical practice of the industry. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012). In *Smithkline*, this Court recognized that the industry's "decades-long practice of classifying pharmaceutical detailers as exempt employees," together with the fact that the DOL "never initiated any enforcement actions with respect to detailers," was critically telling. *Id*. at 2168.

AFS conducted a survey of its members and received 109 responses. This survey was conducted in August, 2014 and is thus not a part of the district court's record. In the foundry industries, crystalline silica is an environmental factor in each of these workplaces, yet 98 percent of responding foundries do not require showering. In fact, 58 percent of the responding foundries have less than ten showers at their facility. Because 52 percent of responding foundries have more than 100 employees, but only 42 percent have 10 or more showers available, amici conclude that a substantial fraction of the industry does not have sufficient facilities for changing or showering for an entire shift to proceed through with any efficiency. Insufficient facilities in such a large fraction of the industry presents a strong argument that it is neither indispensable nor integral, nor has the industry traditionally viewed it as required by the nature of the work.

If the district court ultimately finds that on-site clothes changing and showering are required by the nature of the work at Waupaca for the purposes of evaluating compensability that will also have the effect of a judicially created safety mandate, which has traditionally been a regulatory and statutory function. Thus, under the Seventh Circuit's decision, a trial court could assume for itself the rulemaking authority that Congress delegated to OSHA and require an entire industry to construct and implement facilities for changing and showering even though OSHA has not imposed this requirement and in fact has deliberately rejected it.

This problem illustrates why voluntary safety and health related activities are unique. The Seventh

Circuit's analysis should be addressed by this Court as a matter of law.

D. OSHA Has Decided That Changing And Showering Are Not Required At The Worksite For Crystalline Silica But Has Decided That Changing And Showering Are Required Under Other Standards

The Seventh Circuit stated that no negative inference can be drawn from an agency's silence. *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 735 F.3d 568, 571 (7th Cir. 2013) *reh'g en banc denied* (2014). Irrespective of whether this is a correct statement of law, amici do not believe it is necessary to challenge this premise because it is not applicable to this case. OSHA has not been silent on this issue.

OSHA has expressly required employers to develop on-site clothes changing and showering facilities when the nature of the work requires it for safety and health reasons. In the context of workplace lead exposure, OSHA has specifically implemented a requirement that an employer provide clean change rooms and that employers require employees to shower at the end of the work shift in instances where lead exposure is above the permissible exposure limit (PEL). 29 C.F.R. § 1025(i)(2)-(3). It is noteworthy that this requirement is only imposed upon an employer when the PEL is exceeded, and not by the mere presence of lead in a workplace.

For environmental exposure to lead below the PEL, OSHA does not require changing and showering, but this does not constitute silence.

In fact, OSHA has made a deliberate decision to require employers to make showers available to employees exposed to lead, 29 C.F.R. § 1910.1025 (but only when exposure exceeds the PEL), cadmium, 29 C.F.R. § 1910.1027 (only when exposure exceeds the PEL); and MDA, 29 C.F.R. § 1910.1050 (again, only when exposure exceeds the action level). Change rooms and washing facilities, but not showers, are required under the chromium standard, 29 C.F.R. § 1910.1026 (but only when exposed above the PEL). There are a number of materials, the exposure to which has not prompted OSHA to incorporate a shower facility requirement into its standard, including benzene, 29 C.F.R. § 1910.1028; blood borne pathogens, 29 C.F.R. § 1910.1030, ethylene oxide, 29 C.F.R. § 1910.1047; and 1,3 butadiene 29 C.F.R. § 1910.1051.

The fact that OSHA did incorporate these requirements into the final lead standard and the other above-referenced standards when the PEL is exceeded, but has elected not to require changing and showering as a part of the crystalline silica standard, does indeed permit the Court to make a negative inference.

E. In The Specific Context Of Respirable Crystalline Silica, OSHA Was Not Silent, Having Considered Changing And Showering Facility Requirements And Expressly Rejecting Them

Also, in the specific context of crystalline silica, while the silica standard does not require changing and showering (above or below the PEL), OSHA has hardly been silent.

Under Section 3(8) of the Occupational Safety and Health Act, control measures required by an OSHA health standard, must be "reasonably necessary and appropriate" to address a significant risk of harm. 29 U.S.C. § 652. This Court established that an OSHA standard must be demonstrated to address an actual significant risk. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 615 (1980) (The Benzene decision, vacating the benzene standard). To be reasonably necessary and appropriate, the requirement must be, inter alia, technically and economically feasible. *Id.* This Court has defined the feasibility requirement to mean that an OSHA standard must represent the most cost-effective approach for controlling the hazard in question. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 514 (1981).

Thus, when OSHA implements a new requirement, it first considers, inter alia, whether that requirement: a.) is reasonably necessary; b.) addresses a significant risk; c.) is technically and economically feasible; and d.) represents the most cost-effective approach for controlling a hazard. In fact, OSHA did consider requiring facilities for changing and showering in the context of exposure to respirable crystalline silica and, after applying the factors listed *supra*, decided not to implement such a requirement.

On August 21, 2003, OSHA issued a draft crystalline silica standard. It proposed that, for employees exposed to crystalline silica above the PEL, the employer should provide disposable work clothing or non-disposable clothing and changing

rooms. *Draft Rule for Occupational Exposure to Crystalline Silica in General Industry and Maritime,* at 14 (Aug. 21, 2003). The agency also proposed, in the draft silica rule, that the employer provide clean change rooms and showers for employees exposed above the PEL. *Id.*

When the draft crystalline silica rule was issued in the Fall of 2003 and underwent the small business regulatory review required by the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. § 601 (Mar. 29, 1996, amended by P.L. 11—28, May 25, 2007), the OSHA Office of Regulatory Analysis published separate *Preliminary Initial Regulatory Flexibility Analysis of the Draft Proposed OSHA Standard for Silica Exposure in Construction*, (Oct. 3, 2003).

The draft crystalline silica standard included a provision that proposed to require the employer to provide disposable work clothing or non-disposable clothing and changing rooms, and clean change rooms and showers, but only for exposures above the PEL. *Draft Rule for Occupational Exposure to Crystalline Silica in General Industry and Maritime*, at 14 (Aug. 21, 2003). In its analysis of the draft standard, OSHA stated that it "examined the potential costs associated with providing change rooms" at construction sites and concluded that it did not believe that change rooms and shower facilities would be cost effective. *Preliminary Initial Regulatory Flexibility Analysis of the Draft Proposed OSHA Standard for Silica Exposure in Construction*, at 19.

During that proceeding, the panel received a significant number of comments objecting for the same reasons to the provision that would have required changing rooms and shower facilities in general industry. The Small Business Advocacy Review Panel issued a report on December 19, 2003. Small Business Advocacy Review Panel, *Report of the Small Business Advocacy Review Panel On the Draft OSHA Standards for Silica,* available at http://www.sba.gov/sites/default/files/files/Report_review_panel_standards_for_silica_12_19_2003.pdf (Dec. 19, 2003). The panel consisted of OSHA, the U.S. Small Business Administration (SBA), and the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). In its report, the panel stated that, while some small entity representatives (SERs) provide clothing and hygiene facilities, "others provide neither." *Id*. at 71. (This observation is also dispositive to the question of whether these activities should be deemed required by the nature of the work.) "Some SERs," the Panel found, "stated that these provisions were pointless because silica is not a take-home hazard or a dermal hazard." *Id*. The Panel noted the strong objection to these requirements in general industry and therefore recommended that OSHA "carefully consider the need for these provisions, and how they might be limited." *Id*. at 71-72.

When OSHA issued its proposed workplace standard for exposure to respirable crystalline silica on September 12, 2013, it adopted the small business panel recommendation on this issue. *Occupational Exposure to Respirable Crystalline Silica*, 78 Fed. Reg. 56,273, 56,422 (proposed Sept. 12, 2013). In its Notice of Proposed Rulemaking, OSHA

revised the proposed rule, this time eliminating the requirement for clothes changing or showering even in instances where the PEL is exceeded. *Id*. at 56,422. OSHA stated that, for the proposed rule, "OSHA removed the requirement for hygiene facilities, which has resulted in the elimination of compliance costs for change rooms, shower facilities, lunch rooms, and hygiene-specific housekeeping requirements." *Id*. at 56,422. OSHA additionally "restricted the provision for protective clothing (or, alternatively, any other means to remove excessive silica dust from work clothing) to situations where there is the potential for employees' work clothing to become grossly contaminated with finely divided material containing crystalline silica." *Id.*

This is currently a proposed rule that has undergone the full comment, hearing, and post-hearing rulemaking process. Because OSHA has not yet published the final rule, the question of clothes changing and showering facilities could concededly change in the final rule, unlikely though that might be. This fact also demonstrates that the activities in question either are or are not required by law, and not by the nature of the work. Moreover, this further validates the proposition that this issue is better settled through agency rulemaking than by juries.

Thus, it is clear that on the date the new standard was proposed, September 12, 2013, OSHA was no longer silent on the issue, but had made an official determination that it was not necessary for employers to make changing rooms and shower facilities available to individuals who had been

exposed to respirable crystalline silica during their work shifts.

In exercising its congressionally-delegated authority to adopt a workplace health standard for a toxic chemical under Section 6(b)(5) of the Occupational Safety and Health Act. OSHA was directed to adopt, subject to the constraints of technical and economic feasibility, the most cost-effective requirements needed to eliminate or materially reduce "significant risks of harm." 29 U.S.C. § 655. The fact that OSHA did not adopt a requirement for clothes changing and showering facilities in the proposed crystalline silica standard is evidence that OSHA concluded that those measures were not necessary to address a significant risk of harm to employees. In contrast, OSHA did adopt clothes changing and showering requirements in workplace safety and health standards addressing the hazards of exposure to lead (29 C.F.R. § 1910.1025(i)(2)-(3)), chromium, (29 C.F.R. § 1910.1026(i)(1)-(3)) and the other standards discussed supra, but only when exposures exceed the PEL.

In the instant case, the district court correctly found that plaintiffs principally focused upon worker exposure to silica dust as the primary risk that would warrant on-site clothes changing and showering in Waupaca's foundry setting. *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 08-C-488, 2012 WL 2952360 (E.D. Wis.) *order clarified*, 08-C-488, 2012 WL 3880886 (E.D. Wis. 2012) *rev'd and remanded*, 735 F.3d 568 (7th Cir. 2013). From OSHA's specific and deliberate consideration of whether changing and showering should be required, and its express

conclusion that it should not be required, amici do not agree with the Seventh Circuit's characterization of the agency's position as "silence." If anything, OSHA's elimination of a clothes changing and showering requirement in its proposed rulemaking should be properly characterized as an express, deliberate decision by the agency that these activities are not "reasonably necessary" to address a "significant risk."

This point is significant. OSHA's affirmative withdrawal of clothes changing and showering requirements does more than serve as a mere refutation of the Seventh Circuit's premise that silence does not permit a negative inference. The Seventh Circuit's decision would permit trial courts to implement a safety and health requirement where OSHA has specifically and carefully examined the question through notice and comment rulemaking and has concluded that such a requirement would exceed its statutory bounds.

CONCLUSION

The Court should not leave a case this clear-cut to the lower courts to decipher. The Court should grant Petitioner's petition for a writ of certiorari in order to conclude that when an employer voluntarily provides hygiene facilities for employees that provision does not rise to the level of being "required by the nature of the work," especially in light of express regulatory utterances by OSHA stating that these activities are only required in excess of specific PELs and not at all in the context of respirable crystalline silica. The question is therefore disposable as a matter of law. Amici move

this Court to grant the petition now in order that the Court may correctly state the standard by which trial courts should address these claims so that foundries, other manufacturers, and small businesses generally can further the interests of the FLSA with greater predictability and reliability.

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