No. 16-273

In the

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

G. G., BY HER NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATION FOR MARRIAGE AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether this Court should retain the *Auer v. Robbins* doctrine despite the objections of multiple Justices who have recently recognized that it is constitutionally problematic and urged that it be reconsidered and overruled?

2. Whether, if *Auer* is retained, deference should extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

3. Whether, with or without deference to the agency, the Department of Education's specific interpretation of Title IX and 34 C.F.R. § 106.33, which provides that a funding recipient providing sex-separated facilities must "generally treat transgender students consistent with their gender identity," should be given effect?

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INTEREST OF AMICI CURIAE[1]

The National Organization for Marriage ("NOM") is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. NOM's leading role in those efforts has necessarily meant that the organization has been involved in many public debates about what constitutes being male and being female. NOM has been involved in a variety of efforts to overturn regulatory and legislative actions seeking to substitute "gender identity" for biological sex in determining who may access gender-specific facilities such as restrooms, showers and locker rooms. For example, NOM urged its members to support a referendum in California and a ballot initiative in Washington State on these very matters. Because of its advocacy and public education activities surrounding gender-identity issues, NOM has been the recipient of scientific reports on sexuality and gender, as well as scores of anecdotal examples of threats to privacy and safety that have occurred in the wake of the adoption of policies that eliminate gender-specific access to intimate facilities such as restrooms, showers, and locker rooms. NOM believes that such evidence should be of concern to this Court..

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

authority in our national life, including the fundamental separation of powers principles implicated by this case. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing similar separation of powers issues, including *United States v. Texas*, 136 S.Ct. 2271 (2016); *Zubik v. Burwell*, 136 S.Ct. 1557 (2016); *U.S. Dep't of Trans. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225 (2015); and *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1213 (2015).

SUMMARY OF ARGUMENT

The doctrine of deference to an agency's interpretation of its own regulations, first announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and solidified in *Auer v. Robbins*, 519 U.S. 452 (1997), has proved to be a violation of core separation of powers principles. It exacerbates the problem of unconstitutionally delegating lawmaking powers to unelected executive officials, already at the constitutional breaking point under step two of the *Chevron* doctrine, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). It also deprives the judiciary of its authority to interpret the laws, an authority that has been recognized for over two hundred years. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). Several members of this Court have acknowledged in recent years the constitutional problems with the *Auer* deference doctrine, and this case is a good vehicle to reconsider and overrule the doctrine.

Even if this Court is not yet prepared to overrule *Auer*, it should at the very least review the confusing array of cases applying the doctrine and bring some much needed limiting principle and clarity to it.

Finally, because the change in policy at issue in this case—unilaterally imposed by a low-level executive official to which the court below gave "controlling weight"—has triggered significant threats to privacy and safety in school districts across the country, this Court should take this case rather than waiting for further "percolation." The privacy implications themselves highlight the separation of powers problems with *Auer* deference, as it is unimaginable that a politically accountable body such as Congress (as opposed to an unelected and unaccountable low-level bureaucrat) would dare enact a law with the privacy concerns of their constituents that are implicated here.

ARGUMENT

I. The Fourth Circuit's Decision Illustrates How Significantly the *Auer* Doctrine Has Undermined the Constitution's Separation of Powers.

Title IX of the Education Amendments of 1972 (Title IX) provides that "[n]o person . . . shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under an education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). At the time and for nearly forty years since Title IX was adopted, no one understood the law to prohibit single-sex bathrooms, showers, locker rooms and other intimate facilities. Indeed, the statute expressly provided that "nothing contained [in it] shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different

sexes." 20 U.S.C. § 1686. The Department of Education's implementing regulations confirmed this common-sense understanding of what the statute and its express exception required and did not require: "A recipient may provide separate toilet, locker room, and shower facilities *on the basis of sex*, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." 34 C.F.R. §106.33 (emphasis added).

That long-standing understanding of Title IX was recently turned on its head—not by an amendment to the statute adopted by Congress, or by an amendment to the statute's implementing regulations adopted by the Department of Education pursuant to the notice and comment rulemaking process required by the Administrative Procedures Act. Rather, it was turned on its head by an opinion letter issued from deep within the bowels of the Department's bureaucracy. Letter from James A. Ferg-Cadima (Jan. 7, 2015), Pet.App. 121a.[2] The letter defined "sex" to include "gender identity," *id.*, thereby rendering the statutory authority for separate-sex living quarters (and the implementing regulatory authority for separate-sex toilet and shower facilities) meaningless. Worse, the letter was signed, not by the Secretary of Education himself, or by the Assistant Secretary in charge of the Department's Office for Civil Rights, or even by the Principal Deputy Assistant Secretary. It was signed by James Ferg-Cadima, the *Acting* Deputy Assistant Secretary for Policy. Pet.App. 125a. In other words, this fundamental shift in policy and rejection of "common sense

[2] The opinion letter was followed by a second one a week later advancing the same interpretation in response to a request by the plaintiff in this case. See Pet.App. 45a.

[and] decency," *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992), directly contrary to a statutory exemption and express language in the statute's implementing regulation, was manufactured out of whole cloth by a single, relatively low-level, unelected, and unconfirmed bureaucrat at the Department of Education's Office of Civil Rights.[3]

The Fourth Circuit's contention that the district court was required to give "controlling weight" to that unauthoritative letter because of *Auer*, demonstrates just how significantly *Auer* permits unelected bureaucrats in executive agencies to deviate from the Constitution's core separation of powers principles. Allowing

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[3] Acting Deputy Assistant Secretary Ferg-Cadima implies in his letter that his extraordinary re-interpretation of Title IX and its specific exemption for intimate sex-specific facilities is simply reflective of the Government's interpretation of "sex discrimination" as including "gender identity" more broadly. Pet.App. 121a-122a. EEOC and the Department of Justice had recently interpreted "sex discrimination" in Title VII to include "gender identity," for example, Pet.App. 122a n.3, but nothing in those decisions addressed the Title IX exemption for intimate single-sex facilities. Similarly, the "Questions and Answers" posted on the Department of Education's Office of Civil Rights website in 2014 asserted that Title IX's ban on "sex" discrimination extended to gender identity for purposes of single-sex classroom assignments, Pet.App. 121a n.1, 16a n.5, but it did not address intimate facilities covered by the explicit exemption contained in the statute and its implementing regulation. The other source of "authority" cited in Ferg-Cadima's letter—a couple of non-precedential settlement agreements, Pet.App. 124a nn. 4, 5—simply serve to highlight how *ultra vires* this radical change in policy was. Those settlement agreements did not involve notice and comment rule-making, and certainly did not involve a change in the statutory language meeting the bicameralism and presentment requirements of Article I, Section 7 of the Constitution.

one individual—an Acting Deputy Assistant Secretary for Policy, no less—to alter the meaning of an unambiguous term used throughout Title IX and its implementing regulations is wholly inconsistent with the structure of our Constitution. This individual not only lacks legislative authority to alter the clear meaning of the statute, but also lacks interpretive authority, which is a function of the judiciary. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . . ."); *Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is"); *Perez*, 135 S.Ct. at 1213 (Thomas, J., concurring in the judgment) ("Because [the *Auer* deference] doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns"); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part) ("He who writes a law must not adjudge its violation").

Moreover, as Justice Thomas recently recognized, in *Seminole Rock*, the case on which the *Auer* deference doctrine was built, this Court simply "announced—*without citation or explanation*—that an administrative interpretation of an ambiguous regulation was entitled to 'controlling weight.'" *Perez*, 135 S.Ct. at 1213 (Thomas, J., concurring in the judgment) (emphasis added); *see also Decker*, 133 S.Ct. at 1340 (Scalia, J., concurring in part and dissenting in part) ("The first case to apply [*Auer* deference], *Seminole Rock,* offered no justification whatever—just the *ipse dixit* that 'the administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (citation omitted). As a result, several Justices on this Court

have explicitly called for *Auer* to be reconsidered or even overruled. *Perez*, 135 S.Ct. at 1210-11 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1213 (Scalia, J., concurring in the judgment); *Decker*, 133 S.Ct. at 1338 (Roberts, C.J., concurring); *id.* at 1341 (Scalia, J., concurring in part and dissenting in part); *see also Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) ("For while I have in the past uncritically accepted [*Auer* deference], I have become increasingly doubtful of its validity").

It is time for *Auer* to be overruled and the Constitution's mandate that "All legislative Powers herein granted shall be vested in" Congress, not unelected agency officials, to be restored. The egregiousness of this case presents this Court with the ideal opportunity to consider that corrective step.

II. At the Very Least, Certiorari Is Warranted to Clear Up Confusion Among the Lower Courts and Cabin the More Far-Reaching Applications of *Auer* Such as the Near-Total Deference Demanded By the Fourth Circuit in this Case.

As it was conceived, *Auer* deference requires courts to give judicial deference to an agency's interpretation of its own regulation, but only so long as the agency's interpretation is not "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (quoting *Seminole Rock*, 325 U.S. at 414). For over seventy years this Court has struggled to clearly articulate and consistently apply the scope of this caveat to its deference doctrine, resulting in widespread confusion among the lower courts about the doctrine's application.

Indeed, this Court has itself employed various articulations of the *Auer* deference standard. *See generally Perez*, 135 S.Ct. at 1213-14 (Thomas, J., concurring in the judgment). When the doctrine first appeared in *Seminole Rock*, for example, this Court took a mechanical approach, simply asserting that "an [administrative] interpretation of an administrative regulation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-14; *cf. Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 210-11 (2011) (affirming that deference will be applied to formal and informal interpretations alike). But in *Auer*, this Court noted that deference might not be appropriate if the interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 461-62. In some cases, this Court has held that the agency's intent at the time the regulation was promulgated was a necessary consideration in the *Seminole Rock* deference analysis. *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); *Gonzales v. Oregon*, 546 U.S. 243, 257-58 (2006). But in others, this Court has granted deference to an agency's interpretation that was inconsistent with a previous interpretation of the same regulation. *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 170–171 (2007); *see also Auer*, 519 U.S. at 461-62 (affording deference without reference to the agency's intent at the time the regulation was promulgated). In still others, this Court has given deference to an agency's interpretation of *another* agency's regulations, thereby undermining the rationale for deference in the first place, namely, that an agency is interpreting its own handiwork. *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 696–699 (1991).

The variations in the doctrine's application have naturally caused its application among the lower courts to be incoherent and disjointed, leading to disagreements about the amount of deference owed, the nature (whether formal or informal) of agency interpretations to which deference is owed, etc., thus resulting in conclusions that are in conflict with one another and with decisions of this Court. A clear example is seen in the confusion surrounding whether *Auer* deference extends to an agency's interpretation that is expressed in a format which lacks the force of law. *Compare Talk Am., Inc.*, 564 U.S. at 59, *and D.L. ex rel. K.L. v. Baltimore Bd. of Sch. Comm'rs*, 706 F.3d 256, 259 (4th Cir. 2013), *with Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 140 (1st Cir. 2013).

This confusion in part stems from this Court's decisions in *Christensen v. Harris County*, 529 U.S. 576 (2000), and *United States v. Mead Corp.*, 533 U.S. 218 (2001), in which this Court held that *Chevron* deference should not be granted to an agency's interpretation of a statute that is expressed in a format which lacks the force of law. Although these holdings limited the nature of an agency's interpretation of a *statute* to formal interpretations, they did not explicitly affect the nature of interpretations of agency *regulations*, creating a doctrinal inconsistency between *Chevron* and *Auer* because, "[i]n practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes. *Decker,* 133 S.Ct. at 1339-40 (Scalia, J., concurring in part and dissenting in part).

With these holdings muddling the scope of *Auer*, the First, Seventh and Eleventh Circuits have rendered rulings that seemingly apply the limitation

made in *Christensen*, resulting in those circuits declining to extend *Auer* deference to informal interpretations of regulations which lack the force of law. *See e.g. Sun Capital Partners III, LP*, 724 F.3d at 140; *United States v. Lachman*, 387 F.3d 42, 54 (1st Cir. 2004) ("While this is not a situation involving the interpretation of a statute, the same requirements of public accessibility and formality are applicable in the context of agency interpretations of regulations"); *Keys v. Barnhart*, 347 F.3d 990, 993–94 (7th Cir. 2003); *Arriaga v. Florida Pac. Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002).

These rulings are in conflict with other decisions of this Court, and with decisions of the Second, Fourth, Ninth and Federal Circuits. *See e.g. Talk Am., Inc.*, 564 U.S. at 59 (reaffirming that the Court "defer[s] to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[s]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question'") (citation omitted); *D.L. ex rel. K.L.*, 706 F.3d at 259 ("We grant *Auer* deference even when the agency interpreting its regulation issues its interpretation through an informal process, such as an opinion letter"); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 207 (2d Cir. 2009) ("[W]e will generally defer to an agency's interpretation of its own regulations, including one presented in an *amicus* brief, so long as the interpretation is not plainly erroneous or inconsistent with law"); *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006) ("[T]he *Christensen* court did not overrule *Auer;* indeed, it cited *Auer* as the test for an agency's interpretation of an ambiguous regulation"); *Am. Signature, Inc. v. United*

States, 598 F.3d 816, 827 (Fed. Cir. 2010) ("But where the agency is not advancing its litigating position, deference may be afforded an agency's position articulated in its brief ").

The uncertainty over whether deference is owed to informal agency interpretations is just one of many examples of the confusion existing among the lower courts, but is of particular importance in the present case. Had this school been located in the First, Seventh, or Eleventh Circuit, the district court's ruling would have been affirmed due to the patently informal interpretation in an opinion letter at issue here.

The confusion among the lower courts alone warrants this Court's review. *See* Sup. Ct. R. 10(a). Even if the Court is not yet prepared to overrule *Auer*, the doctrine needs to be cabined and clarified so that it can be more consistently and faithfully applied. Any doctrine that can allow a provision in a statute and its implementing regulations specifically allowing intimate facilities to be open only to members of one sex to be interpreted by agency fiat as requiring access to those same facilities by members of the opposite sex is simply too malleable to be useful, or constitutionally valid.

III. Law-Making Power Should Be Vested Solely In Congress Because Its Members Are Directly Accountable To the People, Who Have Serious Concerns About Privacy and Safety.

In its decision below, the Fourth Circuit stated:

> In a case such as this, where there is no constitutional challenge to the regulation or agency

> interpretation, the weighing of privacy interests or safety concerns—fundamentally questions of policy—is a task committed to the agency, not to the courts.

Pet.App. 26a-27a. While the Fourth Circuit was certainly correct in noting that such fundamental questions of policy as are at issue here are not tasks committed to the courts, it was only half right. Neither are they committed to the Chief Executive, much less to an executive agency (or, more precisely for this case, to an unelected acting official of that agency working several layers down in the executive bureaucracy). After all, the President's constitutional duty is to "take care that the laws"—the policy judgments of Congress—"be faithfully executed," Art. II, § 3, not to re-write those policy judgments to pursue their opposite.

This case is a perfect example of why our nation's Founders determined to vest the legislative power in Congress, not in unaccountable executive agencies. It is *Congress*, not an unelected *acting* deputy assistant secretary for policy in the office of civil rights at the Department of Education, which is directly accountable to the people, and it is members of Congress who have to face the people's wrath at the next election if they enact a policy that fails to give due regard to the significant privacy and safety concerns triggered by Mr. Ferg-Cadima's "interpretation" of Title IX. Those concerns are real, not imaginary, and they are already playing out in schools and public facilities across the country.

Earlier this year in Seattle, for example, a man citing transgender bathroom laws was able to gain access to the women's locker room at a public swimming

pool where little girls were changing for swim practice. Mariana Barillas, *Man Allowed to Use Women's Locker Room at Swimming Pool Without Citing Gender Identity*, The Daily Signal (Feb. 26, 2016), available at http://dailysignal.com/2016/02/23/ man-allowed-to-use-womens-locker-room-at-swimming-pool-without-citing-gender-identity/. Not only did the man begin to undress in front of the girls, but when asked to leave by staff, he replied: "the law has changed and I have a right to be here." *Id.*

In November of 2015, a Virginia man was arrested and charged with three counts of peeping after filming two women and a minor. *Man Dressed as Woman Arrested for Spying into Mall Bathroom Stall, Police Say*, NBC Washington (Nov. 18, 2015), available at http://www.nbcwashington.com/news/ local/Man-Dressed-as-Woman-Arrested-for-Spying-Into-Mall-Bathroom-Stall-Police-Say-351232041. html. The man had dressed as woman to gain access to the women's restroom within the mall. *Id.*

These are not isolated incidents, but are indicated of similar incidents happening across the country wherever transgender policies are put in place that allow men claiming to be women to access women's restrooms and showers. In Washington State, a woman who had suffered sexual abuse as a child was fired from her job for declining to go along with the YMCA's recent policy mandating that women's locker rooms and showers be open to men. The fact that the policy re-awakened her old trauma was of no moment. C. Mitchell Shaw, *Rape Victim: Transgender Agenda Creates "Rape Culture,"* The New American (July 1, 2016), available at http://www.thenewamerican.com/culture/faith-and-morals/item/23541-rape-

victim-transgender-agenda-creates-rape-culture; *see also, e.g.,* Warner T. Huston, *Top Twenty-Five Stories Proving Target's Pro-Transgender Bathroom Policy is Dangerous to Women and Children*, Breitbart News Networks (Apr. 23, 20116), available at http://www.breitbart.com/big-government/2016/04/23/twenty-stories-proving-targets-pro-transgender-bathroom-policy-danger-women-children/ (illustrating a multitude of instances confirming the privacy and safety concerns of many individuals are valid). Similar incidents are also happening in parts of neighboring Canada that have reinterpreted "sex" to include "gender identity." Shortly after Ontario, Canada passed its "gender identity" bill, for example, a man claiming to be transgender gained access to women's shelters where he sexually assaulted several women. Peter Baklinski, *Sexual Predator Jailed After Claiming to be 'Transgender' to Assault Women in Shelter*, Life Site (Mar. 4, 2014), available at http://linkis.com/www.lifesitenews.com/12D80.

As noted above, members of Congress, as the directly-elected representatives of the people, are undoubtedly much more sensitive to these privacy and safety concerns than was Mr. Ferg-Cadima and his colleagues in the unelected office of civil rights. Legislative proposals to expand Title IX's ban on sex discrimination to encompass "sexual orientation" and/or "gender identity" issues have been introduced with some regularity over the past several decades, *see e.g.* Equality Act of 1974, H.R. 14752, 93rd Cong. (1974); Equality Act, S. 1858, 114th Cong. (1st Sess. 2015); Real Education for Healthy Youth Act of 2015, H.R. 1706 114th Cong.(1st Sess. 2015); Tyler Clementi Higher Education Anti-Harassment Act of 2015, S. 773, 1114th Cong. (1st Sess. 2015), but rarely have

such proposals even made it to a hearing, much less to a floor vote. *See* Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong. (1994); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong., (2013). Not one has been enacted, and even those bills which were introduced did not dare to revoke the statutory and regulatory exemption for same-sex living quarters and intimate facilities that Mr. Ferg-Cadima's opinion letter has accomplished by diktat.

The radical policy proposal at issue here, advanced by a mere opinion letter that contravenes the express terms of the statute and its implementing regulations, poses such a significant threat to privacy that it simply should not be allowed to stand. This Court's intervention is therefore warranted.

CONCLUSION

The radical re-writing, by a relatively low-level, unelected bureaucrat, of the statutory and regulatory exemption for same-sex intimate facilities from the general Title IX prohibition of sex discrimination that gave rise to this case, contravenes the Constitution's Article I requirement that the legislative powers are vested in Congress, as well as the Article III mandate that the judicial power, including the authority to interpret the laws, is vested in the courts. That the *Auer* deference doctrine relied on by the court below can even plausibly sanction such a breach of core separation of powers principles demonstrates the need to revisit, and ultimately overrule, that doctrine. Because

this case presents an appropriate vehicle for that reconsideration, and because the collateral threat to privacy and safety that are implicated is profoundly important, certiorari is warranted.

September 2016 Respectfully submitted,

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