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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

CERTIFICATION FROM THE U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

LISA BRANSON AND CHERIE BURKE,
Plaintiffs/Appellants,

v.

WASHINGTON FINE WINE & SPIRITS, LLC,
Defendant/Respondent.

AMICI CURIAE BRIEF BY WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL WOMEN'S LAW CENTER, LEGAL VOICE, FAIR WORK CENTER AND WORKING WASHINGTON, AND THE SEATTLE UNIVERSITY SCHOOL OF LAW WORKERS' RIGHTS CLINIC

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The Washington Employment Lawyers Association ("WELA") is an organization of approximately 200 lawyers in Washington. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life. WELA's members frequently represent employees who have experienced gender discrimination, including unfair pay disparity. WELA members have an interest in ensuring that employees who apply for jobs have transparency into salaries in order to ensure that all Washington employees are paid fairly.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization that fights for gender justice in the courts, in public policy, and in our society. NWLC works across the issues that are central to the lives of women and girls—especially women of color, LGBTQ people, and low-income women and families. Since 1972, NWLC has worked to advance

workplace justice, income security, educational opportunities, and health and reproductive rights. NWLC has participated as counsel or amicus curiae in a range of cases in state and federal courts across the United States to secure equal treatment and opportunity, including in cases addressing sex discrimination in the workplace, such as pay discrimination. NWLC is committed to advocating for workers' rights and closing the racial and gender wage gaps that particularly harm women and people of color.

Legal Voice is a regional non-profit public interest legal organization dedicated to advancing gender justice and liberation across the Pacific Northwest. In pursuit of its mission, Legal Voice uses a combination of litigation, legislative advocacy, and community education to advance economic justice, eradicate gender discrimination, ensure access to health care, protect reproductive freedom, and end gender-based violence. Legal Voice's work includes decades of advocacy in the courts and in the Washington Legislature to promote economic justice,

including pay equity and workplace discrimination. Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country.

Fair Work Center and Working Washington ("FWC/WW") are statewide, nonprofit, nonpartisan organizations dedicated to building worker power and to assisting low-wage workers in understanding and enforcing their workplace rights. Fair Work Center is one of the only legal services providers in Washington dedicated to supporting low wage workers in advocating for their rights to just and equitable workplaces. It has supported workers through direct representation in court, support for small claims court actions, and through advocacy with federal, state, and local enforcement agencies. Fair Work Center's clients often have limited English proficiency and are subject to pay inequities based on their race, gender identities, or other protected characteristics. Working Washington has successfully advocated for the passage of numerous state and local laws which improve

wages and working conditions for low-wage workers. Working Washington's fast-food strikers sparked the fight that won Seattle's first-in-the-nation $15 minimum wage, and it supported workers in their successful bid to win expanded workplace protections for domestic and gig workers.

The Seattle University School of Law Workers' Rights Clinic ("Workers' Rights Clinic") works in partnership with community organizations in Washington to level the playing field between employers and low-wage workers by providing advice and representation to workers who would not otherwise find representation. The Workers' Rights Clinic is part of the Seattle University's Ronald A. Peterson Law Clinic in which upper-level law students provide free legal services to vulnerable workers. The Workers' Rights Clinic focuses on the enforcement of workplace standards, such as minimum wage. The Workers' Rights Clinic has a special interest in cases where the enforcement of minimum standards and pay equity rules serve to

disadvantage vulnerable workers. To that end, the Workers' Rights Clinic provides policy advocacy, issue research, and academic scholarship related to workplace standards and their effect on vulnerable workers. Specifically, Professor Elizabeth Ford's scholarship focuses on the making the minimum standards enforcement process more equitable especially for women, people of color, and immigrant workers. In addition, the Workers' Rights Clinic has advocated successfully for legislative and regulatory changes to make Washington's administrative minimum standards enforcement process more effective for Washington's low wage and marginalized workers.

II. INTRODUCTION AND STATEMENT OF THE CASE

In Washington, women working full time, year-round typically are paid only 79 cents for every dollar paid to a man—

even lower than the national average of 83 cents on the dollar.[1] For women of color in Washington, the gaps are particularly stark, with Black women being paid 63 cents, Latina women being paid 51 cents, Native American and Alaska Native women being paid 58 cents, and Native Hawaiian and other Pacific Islander women being paid 52 cents, respectively, for every dollar paid to a white, non-Hispanic man.[2]

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[1] NWLC, *The Wage Gap by State for Women Overall* (2024), https://nwlc.org/wp-content/uploads/2024/09/Wage-Gap-State-by-State-Women-Overall-9.20.24v2.pdf.

[2] NWLC, *The Wage Gap by State for Black Women Overall* (2024), https://nwlc.org/wp-content/uploads/2023/10/Wage-Gap-State-by-State-Black-Women-3.1.24.pdf; NWLC, *The Wage Gap by State for Latinas Overall* (2024), https://nwlc.org/wp-content/uploads/2023/10/Wage-Gap-State-by-State-Latina-Women-3.1.24.pdf; NWLC, *The Wage Gap by State for Native Women Overall* (2024), https://nwlc.org/wp-content/uploads/2023/10/Wage-Gap-State-by-State-Native-Women-3.1.24.pdf; NWLC, *The Wage Gap by State for Native Hawaiian and other Pacific Islander Women Overall* (2024), https://nwlc.org/wp-content/uploads/2023/10/Wage-Gap-State-by-State-NHOPI-Women-3.1.24.pdf.

In 2022, in accordance with its long history of enacting laws enshrining workers' rights and protections against discrimination, Washington amended section 110 of the Equal Pay and Opportunities Act ("EPOA"), RCW Ch. 49.58, to require employers with fifteen or more employees to include pay range information and a general description of benefits in all job postings. RCW 49.58.110 ("Section 110"). In so doing, Washington became a national leader as only the third state at the time to adopt a pay range transparency law. Currently, fourteen states, the District of Columbia, and six localities have passed some form of pay range transparency law.[3]

[3] This total includes laws that require pay information in job postings and those that require pay information at some point in the hiring process. NWLC, *Pay Range Transparency Is Critical for Driving Pay Equity* (2024), https://nwlc.org/wp-content/uploads/2024/03/Pay-Range-Transparency-2024v2.pdf. This fact sheet has not been updated to reflect that in 2024, one state (Maryland) updated its existing law and four states (Massachusetts, Minnesota, New Jersey, and Vermont) enacted

Section 110's purpose is to address the wage gap by correcting the imbalance in information and bargaining power between employers and job applicants and by incentivizing employers to examine their compensation practices to ensure fair pay. It allows job applicants who encounter a non-compliant posting to file a complaint with the Department of Labor & Industry or pursue a civil action in court, either of which could result in the employer being liable for damages and costs; in the

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new laws to require pay range information in job postings. 2024 Md. Laws ch. 272, https://mgaleg.maryland.gov/2024RS/Chapters_noln/CH_272_sb0525t.pdf; 2024 Mass. Acts ch. 141, https://malegislature.gov/Laws/SessionLaws/Acts/2024/Chapter141; 2024 Minn. Laws ch. 110, art. 7, § 2, https://www.revisor.mn.gov/laws/2024/0/Session+Law/Chapter/110/2024-08-09%2008:02:04+00:00/pdf; 2024 N.J. Laws ch. 91, https://pub.njleg.state.nj.us/Bills/2024/AL24/91_.PDF; 2024 Vt. Acts & Resolves no. 155, https://legislature.vermont.gov/Documents/2024/Docs/ACTS/ACT155/ACT155%20As%20Enacted.pdf.

case of an agency complaint, it allows for additional civil penalties to the agency. RCW 49.58.110(4), .060, .070.

The United States District Court for the Western District of Washington certified the following question regarding the proper interpretation of Section 110 and the burden of proof for a violation of the statute: "What must a Plaintiff prove to be deemed a 'job applicant' within the meaning of RCW 49.58.110(4)? For example, must they prove that they are a 'bona fide' applicant?" Order Certifying Question to Wash. State Sup. Ct. 2, Aug. 20, 2024, Case No. 2:24-cv-00589-JHC (ECF No. 44).

Plaintiffs contend that, for the purposes of relief under the statute, "job applicant" means "an individual who applied to a job posting." Opening Br. of Plaintiffs/Appellants ("Opening Br.") at 59. Defendant proposes that a "job applicant" under Section 110 includes only a person "who actually applied for the job with a good faith or bona fide interest in obtaining the posted job."

Answering Br. of Defendant/Respondent ("Resp. Br.") at 62. Defendant also asks the Court to find that "such a job applicant only suffers injury-in-fact sufficient to pursue a claim for relief if they establish a form of concrete and particularized harm that is something more than the time lost submitting an application." Resp. Br. at 62.

As a matter of legal interpretation and public policy, amici respectfully urge this Court to reject Defendant's interpretation that a job applicant must be somehow adjudged "bona fide" to qualify for relief under the law. As Plaintiffs explain in their opening brief, Defendant's interpretation contravenes the plain meaning of the statutory text in light of Washington principles of statutory interpretation. Opening Br. at 19-34. But introducing such a requirement would also undermine the purpose of the law—to address gender and racial pay inequity—and potentially introduce absurd results and loopholes that would permit evasion of compliance.

III. ARGUMENT

A. Washington courts favor a liberal interpretation of labor and employment statutes, including fair pay laws.

Amici agree with Plaintiffs' argument that the plain text of Section 110 precludes Defendants' interpretation that a "job applicant" must be "bona fide." Opening Br. at 19-34. But even if this Court looks beyond the plain language, it should adopt the Plaintiffs' reading of the statute because that reading is most consistent with Washington's strong public policy favoring robust worker protections. When faced with competing legal rules in employee pay cases, this Court has adopted the rule that "ultimately provides greater protection for workers" because that "is more in tune with other Washington case law addressing employee rights." *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 583, 397 P.3d 120 (2017). *Brady* fits in a long line of cases in which this Court has recognized Washington's history as a national leader on employee rights and protections. *See*

Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (noting Washington's "long and proud history of being a pioneer in the protection of employee rights.").

For more than half a century, this Court has emphasized the importance of liberally construing Washington's labor protections under Title 49 in favor of workers, consistent with the remedial purpose of those statutes. *Brady,* 188 Wn.2d at 583-84 (citing *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002)); *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998) (citing *Brandt v. Impero*, 1 Wn. App. 678, 682, 463 P.2d 197 (1969)) (noting that Washington's legislative scheme governing withholding of wages "must be liberally construed to advance the Legislature's intent to protect employee wages and assure payment").

Washington's EPOA, also part of Title 49, similarly has a remedial purpose to protect workers. Indeed, the EPOA's findings

and intent provision states that the law's purpose is to remedy pay disparities that have persisted "despite existing equal pay laws." RCW 49.58.005.[4] The Legislature explained its intent to remedy these persistent pay disparities by updating the existing EPOA to add two complementary provisions: (1) a prohibition on asking applicants for their salary history, and (2) a requirement that employers "provide wage and salary information to applicants and employees." RCW 49.58.005(4). Accordingly, in Section 110 the Legislature created a clear and easy-to-understand requirement that employers "disclose in each posting for each job opening the wage scale or salary range." RCW 49.58.110(1). The Court should interpret the statute to further rather than frustrate that broad remedial purpose, as Defendant's interpretation would do. *See infra* Section C.

[4] Relatedly, the Legislature found that lower starting salaries for women have resulted in lower pay, "less family income, and more children and families in poverty." RCW 49.58.005(3)(c).

B. This Court should construe the pay range transparency law broadly in furtherance of its purpose to improve pay equity for women.

Longstanding gender and racial wage gaps cost women—especially women of color—thousands of dollars every year, amounting to hundreds of thousands of dollars over the course of a lifetime.[5] For women and their families, this means lost income that could have gone towards rent, child care, emergency savings, or retirement; and for the economy as a whole, it means lower spending, investment, and economic growth.[6] The causes of the wage gap are complex and intersecting, but a growing body of research suggests that hiring processes and negotiating pay are important inflection points where a lack of information

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[5] Sarah Javaid, NWLC, *The Wage Gap Robs Women Working Full Time, Year-Round of Hundreds of Thousands of Dollars Over a Lifetime* (2024), https://nwlc.org/wp-content/uploads/2024/03/EPD-FS-2024-3.1.24v2.pdf.

[6] Rose Khattar, Ctr. For Am. Progress, *Closing the Gender Pay Gap* (2024), https://www.americanprogress.org/article/playbook-for-the-advancement-of-women-in-the-economy/closing-the-gender-pay-gap/.

and bargaining power can create unique disadvantages for job applicants who are women of color.

Pay secrecy is an example of a phenomenon known as "information asymmetry," in which only one side of a negotiation has access to material information about a decision: namely, in the employer-employee/applicant context, information about the pay for a particular position.[7] This asymmetry in pay information can logically contribute to racial and gender pay gaps because, when an applicant does not know how much an employer is willing to pay, the applicant is likely to enter pay negotiations with prior pay as their main reference point. Indeed, employers commonly *require* candidates to provide information about their previous job's salary during the pay negotiation

[7] Stephanie Bornstein, *The Enforcement Value of Disclosure*, 72 DUKE L. REV. 1771, 1778, 1783 (2023).

process.[8] Using one's prior pay as a reference point, however, perpetuates sex-based pay disparities because women are typically paid less than their male counterparts, across industries and in nearly every occupation. Past earnings may be deflated due to myriad circumstances, often with gender-based implications, including: workplace discrimination; working fewer hours due to caregiving responsibilities; being laid off; or working in women-dominated occupations or sectors that experience lower wages industry-wide.[9] Using prior pay to set pay going forward will inevitably reproduce those disparities.

In recognition of this phenomenon, several states, including Washington, have banned the practice of asking

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[8] NWLC, *Asking for Salary History Perpetuates Pay Discrimination from Job to Job* (2024), https://nwlc.org/wp-content/uploads/2020/12/Asking-for-Salary-History-2022.pdf.
[9] *See id.*; Robin Bleiweis, Ctr. for Am. Progress, *Why Salary History Bans Matter to Securing Equal Pay* (2021), https://www.americanprogress.org/article/salary-history bans-matter-securing-equal-pay/.

candidates for their salary history, relying on it to set their compensation, or penalizing them for not providing it when asked.[10] These salary history bans help ensure pay-setting decisions are made on the basis of job-related qualifications rather than on irrelevant factors, including past discrimination and structural inequities. But a lack of pay transparency can undermine salary history bans, because without information about what a position pays, applicants must still rely on their previous salary as the best point of reference for an initial offer. This is precisely why Washington has adopted both a salary history ban and a pay range transparency law to maximize the efficacy of both policies.

Pay range transparency laws can help level the playing field for women in pay negotiations by combatting pay secrecy and information asymmetry. Pay negotiations are notoriously

[10] RCW 49.58.100; *see also id.*

unfavorable to women, especially women of color, who still experience more rejection and are paid less than men who negotiate.[11] Research suggests that employers are also more likely to perceive women who negotiate negatively and as too demanding, and to penalize women who attempt to negotiate.[12] Pay range transparency helps correct this issue by requiring employers to publish pay ranges for posted jobs. Providing a pay range upfront avoids putting the onus on the applicant to negotiate and risk backlash. And it provides a clearer starting point and parameters for any negotiation that occurs, which in

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[11] *Id.*; *see also* Morela Hernandez et al., *Bargaining While Black: The Role of Race in Salary Negotiations*, 104 J. APPLIED PSYCH. 581 (2019).

[12] Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORG. BEHAV. HUM. DECISION PROCESSES 84, 99 (2007); *see also* Lisa A. Barron, *Ask and You Shall Receive? Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary*, 56 HUM. RELS. 635, 653 (2003); Morela Hernandez & Derek R. Avery, *Getting the Short End of the Stick: Racial Bias in Salary Negotiations*, MIT SLOAN MGMT. REV. (June 15, 2016).

turn can help mitigate the risk of inequitable negotiation outcomes. For example, research suggests that when job applicants have more information about the conditions for negotiation, gender differences in negotiation outcomes can diminish.[13] And when employers and applicants both have access to sufficient information, pay negotiations can result in wages that are more closely aligned with the worker's economic value.[14]

Beyond the negotiation context, bias and gender and racial stereotypes play a clear role in the wage gap. Numerous studies show that employers are less likely to hire women than men,

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[13] *See* Maria Recalde and Lise Vesterlund, *Gender Differences in Negotiation and Policy for Improvement*, NAT'L BUREAU OF ECON. RESEARCH (working paper no. 28183) (2020), https://www.nber.org/papers/w28183; Andreas Leibbrandt and John A. List, *Do Women Avoid Salary Negotiations? Evidence From A Large-Scale Natural Field Experiment*, NAT'L BUREAU OF ECON. RESEARCH (working paper no. 18511) 11-12 (2012), https://www.nber.org/system/files/working_papers/w18511/w18511.pdf.

[14] *See* Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 988-89 (2011).

particularly for high-wage jobs, and are likely to offer women lower salaries when they are hired.[15] For example, one experiment revealed that when science professors were presented with identical résumés, one with the name John and one with the name Jennifer, they offered the male applicant for a lab manager position a salary of nearly $4,000 more, as well as additional career mentoring, and judged him to be significantly more competent and hirable.[16]

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[15] Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789 (2017); *see also* Jasmine Tucker, NWLC, *The Wage Gap Has Robbed Women of Their Ability to Weather COVID-19* (2021), https://nwlc.org/wp-content/uploads/2021/03/EPD-2021-v1.pdf (showing that a gender wage gap exists in 94 percent of occupations); Inst. for Women's Pol'y Rsch., *Women Earn Less than Men Whether They Work in the Same or Different Occupations* (2024), https://iwpr.org/wp-content/uploads/2024/03/Occupational-Wage-Gap-2024-Fact-Sheet-1.pdf (discussing occupational wage gap for Black women and Latinas).

[16] Corinne A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PNAS 16474, 16475 (2012); *see also* Ass'n for Women in Sci., *Creating Equitable STEM*

For mothers, employers' outdated views can further harm their job and salary prospects. In comparing equally qualified women candidates, one study revealed that employers recommended mothers for significantly lower starting salaries, perceived them as less competent, and were less likely to recommend them for hire than non-mothers. The effects for fathers were the opposite—employers recommended fathers for significantly higher pay and perceived them as *more* committed to their jobs than men without children.[17]

Pay range transparency benefits both workers and employers. For workers, the availability of pay range information better enables them to evaluate whether they are being paid

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Workplaces by Addressing Unconscious Bias (n.d.), https://www.awis.org/wp-content/uploads/AWIS-Factsheet-Unconscious-Bias.pdf.

[17] Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIO. 1297, 1332-33 (2007).

fairly in their current jobs.[18] It also gives them important new information that can facilitate coming together to advocate for fair pay in their workplaces.[19] And it holds employers accountable for ensuring they set fair wages by making pay information publicly available (within or outside the company).[20] For employers, public availability of pay range information prompts proactive review and evaluation of compensation practices, which enables them to address any unjustified disparities between employees and create clear, consistent compensation schemes.[21] Promptly identifying and addressing unjustified disparities can also help employers ensure compliance with federal and state anti-discrimination laws and reduce the risk of costly litigation.[22]

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[18] Bornstein, *supra* note 7, at 1783-84.
[19] *See* Eisenberg, *supra* note 14, at 1007.
[20] Bornstein, *supra* note 7, at 1790.
[21] *See* Eisenberg, *supra* note 14, at 1001-05.
[22] *See* Eisenberg, *supra* note 14, at 1018.

C. The proposed "bona fide" requirement introduces potential loopholes and compliance disincentives for employers.

The definition Defendant proposes would only allow claims from job applicants who have a "good faith or bona fide interest" in the position and who can establish an "injury-in-fact" beyond the time spent applying for the job. Answering Br. at 62. This standard embraces the fiction that the pool of potential job applicants consists of a dichotomy between a sincere group with the foresight to know exactly which jobs they want and qualify for and a group of unscrupulous scammers who spend their days exploiting the law. But this is indeed fiction because most job applicants fit neither extremity. For many—the recent graduate casting a wide net in search of their first job, the parent reentering the job market after years of full-time caregiving, or the industrial worker attempting to find their new place after losing their job to automation—the job search is as much an information-gathering process as it is a directed pursuit. This is a

feature, not a bug—it is an integral part of how a job search works and how employers and applicants ultimately find mutually beneficial employment matches. Subjecting plaintiffs to scrutiny on something as murky and individualized as "good faith or bona fide interest" in a job-hunting context would be unfair and inefficient, and would defeat the purpose of the law.

Indeed, the "good faith or bona fide interest" standard introduces a potential loophole for employers to skirt liability entirely. For example, take a scenario where a company posts a job but does not include pay information in violation of the law. While conducting her job search, Applicant A learns of the job, applies, and receives a job offer, but then learns that the pay is lower than expected and turns the offer down. Under Defendant's proposed standard, the company could evade liability by claiming A was never "genuinely interested" in the position, turning a legitimate pay transparency claim into litigation over A's bona fides. The statute's easily enforced,

bright-line rule—did the job posting include pay information or not?—would be replaced by a subjective, difficult-to-substantiate inquiry into the plaintiff's state of mind that would both unduly burden plaintiffs and strain the courts' resources. In addition, the proposed standard opens up a scenario in which the withholding of pay information—*the precise problem the statute was intended to redress*—could theoretically give the employer a defense to liability under the statute, plus an opportunity to punish the applicant for speaking up by forcing her to defend her decision-making in court. This is an outcome the legislature never intended when it sought to provide greater protections for workers. The standard would open the door to absurd results that would entirely defeat the purpose of the law.

IV. CONCLUSION

For the foregoing reasons, WELA, NWLC, Legal Voice, FWC/WW, and the Workers' Rights Clinic urge the Court to adopt

the plain language reading of Section 110 advocated by the job-applicant plaintiffs.

V. RAP 18.17(b) CERTIFICATION

I hereby certify that this brief contains 3,786 words in compliance with RAP 18.17(b) and RAP 18.17(c)(6).

RESPECTFULLY SUBMITTED AND DATED this 30th day of December, 2024.

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