No. 19-14551

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Kelvin Leon Jones, et al.,

Plaintiffs-Appellees,

v.

Ron DeSantis, in his official capacity as Governor of the State of Florida, et al.

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Florida, Case No. 4:19-cv-300-RH/MJF

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION TO EXPEDITE APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the NAACP Legal Defense and Educational Fund, Inc., the American Civil Liberties Union Foundation, Inc., the American Civil Liberties Union Foundation of Florida, Inc., the Brennan Center for Justice at NYU School of Law, the Campaign Legal Center, the Southern Poverty Law Center, Paul Weiss Rifkind Wharton & Garrison LLP, Brazil & Dunn LLP, the League of Women Voters of Florida, the Florida State Conference of Branches and Youth Units of the NAACP, and the Orange County Branch of the NAACP state that they have no parent corporations, nor have they issued shares or debt securities to the public. The organizations are not subsidiaries or affiliates of any publicly owned corporation, and no publicly held corporation holds ten percent of their stock. I hereby certify that the disclosure of interested parties submitted by Defendants-Appellants Governor of Florida and Secretary of State of Florida is complete and correct except for the following corrected or additional interested persons or entities:

1. Bryant, Curtis – *Plaintiff/Appellee*
2. Defend, Educate, Empower – *not an organization in this action*
3. Jones, Kelvin Leon – *Plaintiff/Appellee*
4. Miller, Jermaine – *Plaintiff/Appellee*

5. Oats, Anthrone – *Witness*

6. Paul Smith – *Attorney for Plaintiffs/Appellees*

7. Paul Weiss Rifkind Wharton & Garrison LLP – *Attorneys for Plaintiffs/Appellees*

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Plaintiffs-Appellees ("Plaintiffs")[1] in this consolidated action oppose Defendants-Appellants Governor Ron DeSantis and Secretary of State Laurel M. Lee's (collectively, "State Defendants") Motion to Expedite Appeal.

INTRODUCTION

The district court issued its preliminary injunction on October 18, 2019. That same day, Defendant Governor Ron DeSantis issued a statement publicly agreeing with it: "Today's ruling affirms the Governor's consistent position that convicted felons should be held responsible for paying applicable restitution, fees and fines while also recognizing the need to provide an avenue for individuals to pay back their debts as a result of true financial hardship." Lawrence Mower, *Being poor shouldn't stop Florida felons from voting, judge rules in Amendment 4 case*, Tampa Bay Times (Oct. 18, 2019), https://www.tampabay.com/florida-politics/buzz/2019/10/19/being-poor-shouldnt-stop-florida-felons-from-voting-judge-rules-in-amendment-4-case/. Municipal elections were held under the preliminary injunction throughout November 2019 and as recently as December 3, 2019. *Dates for Local Elections, 2019*, Fla. Dep't of State, https://dos.elections.myflorida.com/calendar/ (last visited Dec. 9, 2019).

After nearly a month, State Defendants filed their Notice of Appeal on

[1] There are four separate groups of Plaintiffs in the consolidated action: the *Gruver*, *Raysor*, *McCoy*, and *Jones*/*Mendez* Plaintiffs.

November 15. Nearly three weeks later, State Defendants filed this Motion to Expedite Appeal on December 5, proposing a breakneck briefing and argument schedule to compensate for their unexplained and unwarranted delay. ("Motion to Expedite" or "Motion"). On December 9, this Court issued a briefing notice requiring State Defendants' brief to be filed on or before December 30 pursuant to Eleventh Circuit Rule 31-1. To the extent State Defendants' Motion to Expedite is still before the Court, their proposed schedule unnecessarily burdens this Court and is prejudicial to Plaintiffs—who must complete fact discovery over the upcoming holidays and into January 2020 and prepare for a swiftly approaching trial that begins on April 6, 2020. ECF 203.[2] Moreover, the proposed schedule has the potential to generate damaging uncertainty regarding the State's upcoming March 2020 primary election and municipal elections and February 18, 2020 voter registration deadline. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (declining to permit a change in voting procedures about a month (thirty-three days) before an imminent election due to "inadequate time to resolve the factual disputes . . . "); *see also Election Dates for 2020*, Fla. Dep't of State, https://dos.myflorida.com/elections/for-voters/election-dates/ (last visited Dec. 9, 2019).

State Defendants' motion lacks the requisite good cause to expedite review, 11th Cir. R. 27-1, IOP 3, for three reasons. *First*, State Defendants cannot be granted

[2] Documents filed with the district court are cited as "ECF __."

the extraordinary relief of an expedited appeal to remedy the delay that they caused. Here, the district court issued its preliminary injunction Order on October 18 in an effort to provide State Defendants ample time to obtain appellate review should they choose to do so before the March 2020 Florida presidential preference primary election deadlines. *See* ECF 212 at 2 ("The schedule that led to issuance of the October 18 [preliminary injunction] order was established to provide sufficient time for an appeal to and ruling by the United States Court of Appeals for the Eleventh Circuit before the March 2020 presidential primary."). Instead, State Defendants waited a month and a half from the entry of the Order before seeking expedited briefing; State Defendants should not be rewarded—and Plaintiffs burdened—for their own unexplained delay.

Second, State Defendants' proposed expedited schedule serves no public interest. State Defendants suggest that they seek an expedited decision to provide certainty to voters, but their expedited schedule would upend the procedures they themselves have used since Florida's Senate Bill 7066 (2019) ("SB7066") was enacted and would guarantee confusion by demanding a ruling from this Court shortly before the March 2020 presidential primary and municipal elections and *after* the February 18, 2020 registration deadline.

Third, State Defendants are not prejudiced by a more realistic schedule. The limited injunction entered by the district court simply requires them not to interfere

with the seventeen individual Plaintiffs' voting rights given their inability to pay outstanding financial obligations before voting. It also requires State Defendants to process voter registrations, and unless or until a new procedure is put in place, to provide due process, including procedures to assess ability to pay legal financial obligations from felony convictions ("LFOs")—before removal if there is credible and reliable evidence that any voter is ineligible to vote. Accordingly, State Defendants' Motion to Expedite Appeal should be denied.

BACKGROUND

On October 18, 2019, the district court granted a preliminary injunction order ("Order") in favor of seventeen individual Plaintiffs against Defendants Secretary of State and Supervisors of Elections ("SOEs") of the counties where the seventeen individual Plaintiffs reside. ECF 207. The district court *did not* enter the Order against Defendant Governor and Defendant SOE of Orange County. *Id.* at 53-55. The district court held that Plaintiffs are likely to prevail on at least one of their claims that provisions in SB7066 unconstitutionally discriminate against Plaintiffs in violation of the Equal Protection Clause of the Fourteenth Amendment. Specifically, the district court held, "Florida cannot deny restoration of a felon's right to vote solely because the felon does not have the financial resources to pay" outstanding LFOs. *Id.* at 30. The district court did not rule on various other claims raised by Plaintiffs, including the Twenty-Fourth Amendment claim. The district

court also has not ruled on the additional claims Plaintiffs brought in their individual amended complaints filed after the district court's Order on the preliminary injunction motion.

The district court's Order outlines limited relief under Plaintiffs' Fourteenth Amendment claim: Defendant Secretary of State and certain Defendants SOEs are enjoined from preventing the seventeen Plaintiffs from registering or voting because of their inability to pay LFOs. *Id.* at 19-20. Municipal elections were held in November and on December 3, 2019 without incident and without concerns now raised by State Defendants. *Dates for Local Elections, 2019*, Fla. Dep't of State, https://dos.elections.myflorida.com/calendar/ (last visited Dec. 9, 2019).

Discovery is well underway in this case with fact and expert discovery concluding on January 27 and March 2, 2020, respectively. A two-week trial on all claims collectively brought by Plaintiffs is set to begin on April 6, 2020. ECF 203.

On November 15, 2019, State Defendants appealed the Order, four weeks after the district court issued it. ECF 219. State Defendants then unnecessarily waited almost an additional three weeks to move to expedite the appeal on December 5, 2019. State Defendants are the only Defendants lodging this appeal on only one of numerous claims still before the district court and seek review on an extremely accelerated schedule, requesting that briefing and argument be completed within ten

weeks of their Motion.[3]

ARGUMENT

I. State Defendants Should Not Be Granted Extraordinary Relief to Remedy Their Own Delay

State Defendants' actions belie their claims that the expedited schedule they request is needed or in the public interest. As the district court explained, its "October 18 order was established to provide sufficient time for an appeal to and ruling by the United States Court of Appeals for the Eleventh Circuit before the March 2020 presidential primary." ECF 212 at 2. The district court set a briefing schedule "with a goal of providing enough time for diligent consideration of the issues in this court and on appeal *and for unhurried implementation of the ultimate decision by state elections officials*." ECF 91 at 3 (emphasis added); ECF 100 at 1 (quoting July 23, 2019 order); ECF 107 (August 15, 2019 order setting preliminary briefing schedule). Yet, State Defendants wasted, without any explanation, the additional time the district court gave them to accommodate a potential appeal. *See* ECF 212 at 2 ("[A] party who wished to appeal—and to obtain an expedited Eleventh Circuit ruling—surely would have done so by now."). During that time, they indicated to the public and Plaintiffs that they would *not* seek an appeal of the district court's limited ruling. *See* Gray Rohrer & Steven Lemongello, *Amendment*

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[3] None of the ten SOE Defendants joined the State Defendants in their appeal.

4: Judge blocks law requiring fees be paid before ex-felons can vote, Orlando Sentinel (Oct. 18, 2019) (quoting Defendant Secretary of State Lee as stating her office "will comply [with the Order] and provide guidance to local supervisors of elections"), https://www.orlandosentinel.com/politics/os-ne-amendment-4-law-blocked-20191018-uypmjnjfqfh5na4wblyjm6pweu-story.html; ECF 212 at 3 (quoting Governor's statement). Indeed, the district court indicated in a November 1, 2019 order that it no longer expected an appeal given the delay and the Governor's statement. *See* ECF 212 at 3-4. State Defendants did not correct that assumption until the filing of their appeal two weeks later.

State Defendants waited twenty-eight days after the issuance of the preliminary-injunction Order to file their notice of appeal, an additional twelve days to file the request to stay, and an additional eight days to file their request for expedited review. Now, seven weeks (forty-eight days) after the Order's issuance, State Defendants' proposed expedited briefing schedule seeks a decision from this Court *in the middle of* the March 2020 primary election cycle—*after* absentee ballots have been distributed beginning on February 2, 2020, likely *after* the February 18, 2020 registration deadline, and, at best, just before early voting gets underway in early March 2020. *See Election Dates for 2020*, Fla. Dep't of State, https://dos.myflorida.com/elections/for-voters/election-dates/ (last visited Dec. 9, 2019).

Indeed, State Defendants' dilatory actions stand in stark contrast to those of other parties in the cases that they cite to support expedited review. *See* Motion at 8-9. In *Duke v. Cleland*, for example, appellants waited *a single day* after a district court denied their motion for an injunction pending appeal to move for expedited review, which was filed three days after the notice of appeal. 954 F.2d 1526, 1528 (11th Cir. 1992); *see also Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001) (expedited appeal reversing grant of preliminary injunction thirty-five days after district court issued its order).

Under the circumstances, State Defendants have relinquished any interest in expedited review. The U.S. Supreme Court's decision in *Morland v. Sprecher*, 443 U.S. 709 (1979) (per curiam), is instructive. There, the Court weighed various factors including the fact that the *Morland* petitioners "waited two weeks after the District Court entered its injunction before filing a notice of appeal, and then waited another week before proposing that the appeal be accorded special scheduling treatment . . ." and concluded that the "petitioners have effectively relinquished whatever right they might otherwise have had to expedited consideration." *Id.* at 710. Given that a three-week delay in requesting expedited review, among other factors, was unjustified in *Morland*, the nearly seven weeks here is certainly beyond the pale. This Court should not reward State Defendants' delay by granting their Motion.

State Defendants' reliance on this Court's decision in *Hand v. Scott* is also

misplaced. Motion at 8. In *Hand*, this Court found the State Executive Clemency Board was irreparably harmed because that preliminary injunction order prohibited the Board from "applying its own laws . . . ." 888 F.3d 1206, 1214 (11th Cir. 2018) (citation omitted). State Defendants here, however, can effectuate SB7066 by continuing to accept all registration applications that are facially sufficient in order to identify applicants who are incarcerated or on parole or probation, as they have done. The Order does nothing to change that practice. Equally important, this Court favored a stay of the preliminary injunction order in *Hand* because it permitted the Board to continue offering discretionary pardons, thereby allowing the Board to continue restoring voting rights for people with felony convictions. Here, State Defendants seek to deny individual Plaintiffs' right to vote.

II. State Defendants' Proposed Expedited Schedule Does Not Serve the Public Interest

An "injunction's cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005); *see also Obama for America v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012) ("[T]he public interest . . . favors permitting as many qualified voters to vote as possible."); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358, 1368 (N.D. Ga. 2004), *aff'd*, 408 F.3d 1349 (11th Cir. 2005) (holding that the loss of the opportunity to register and vote causes irreparable harm because "no monetary award can remedy" this loss). Here, State Defendants'

proposed schedule does not serve the public interest for three reasons. First, a decision in this appeal will not provide the certainty that State Defendants seek due to the outstanding claims that were not resolved by the Order. Second, a decision by this Court in February or March 2020 would be more disruptive and confusing to voters. Third, the existence of a pending class certification motion does nothing to change these facts.

Regardless of the outcome, nothing about the instant appeal brings finality to the case scheduled for trial, beginning on April 6, 2020. At trial, the district court will consider other claims brought by Plaintiffs, including claims under the First, Eighth, Nineteenth, and Twenty-Fourth Amendments; claims under the National Voter Registration Act; and additional claims under the Fourteenth Amendment. The Order grants narrow relief on only one of Plaintiffs' claims, permitting them to register and vote in upcoming elections. The district court expressly declined to rule on Plaintiffs' Twenty-Fourth Amendment claim. ECF 207 at 40-43. Other claims will also receive final adjudication soon after trial, including those that were not presented in the preliminary injunction motion. After trial has closed and a final order is issued, an expedited appeal will serve to provide a final resolution and minimize voter confusion. Indeed, that is why the district court set an expedited trial schedule—to bring finality and clarity to all of the claims in this case. *See* Tr. of Hr'g at 4:25-5:2 (Dec. 3, 2019) ("We had tried to set a schedule that would allow

resolution in the district court and then time for an appeal. The defense, for whatever reason, decided to introduce a month – or 40 days – of delay into the process."). The certainty and prompt resolution of this case that State Defendants purport to seek will not be possible until all claims are adjudicated at trial. On the other hand, an expedited appeal after trial could provide the certainty Defendants seek prior to the November 2020 elections and do so in an orderly manner.

Second, regarding the single claim that the district court ruled on in its Order, if State Defendants sought to ensure a ruling that could be implemented before key election deadlines affecting the seventeen individual Plaintiffs, they should have filed an appeal immediately following entry of the Order. If appellate review—let alone expedited appellate review—would remove the uncertainty that "casts doubt on the electoral process and the outcomes it produces," Motion at 7, State Defendants would and should have sought appellate review on an expedited basis immediately following entry of the Order.

Instead, State Defendants delayed seven weeks and now seek to impose a breakneck schedule that would provide no certainty to voters or ability to implement procedures with any finality. In the meantime, State Defendants have refused to issue guidance to voters about the impact of the Order, fueling voter confusion—confusion that is further exacerbated by the Governor's public statements in support of the order he is now appealing. State Defendants have chosen a path that fails to

serve the public interest and compounds the very voter confusion they purport to rely on in their Motion. Even if this Court adopted Defendants' proposed schedule and proceeded at "warp speed," Tr. of Hr'g at 24:5 (Dec. 3, 2019), it is highly unlikely there would be sufficient time to implement changes in compliance with a final adjudication of the appeal before the 2020 Presidential Preference Primary and municipal elections on March 17, 2020. An extremely rapid ruling from this Court after State Defendants' proposed oral argument date during the week of February 10 would still be issued in the midst of those election cycles. Indeed, such a ruling would likely come after the relevant February 18, 2020 registration deadline. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5.

Even if this Court issued a ruling before the February 18, 2020 registration deadline, there would be insufficient time to issue guidance to voters and to organizations that conduct voter registration about the eligibility status of people affected by SB7066. Plaintiffs and similarly situated individuals and organizations would again be in limbo without any guidance from State and SOE Defendants. To the extent "confusion among the voters about the status of SB-7066 and convicted felon voting eligibility" exists, Motion at 5, State Defendants' proposed schedule exacerbates this confusion before a major voter registration deadline. If the goal is

to "minimize voter doubt in the electoral process and outcome before the upcoming elections," *id.* at 9, State Defendants' proposed schedule is futile and actually undermines that purported goal.

State Defendants are creating an untenable situation. As recognized by the district court, Defendants slow-walked implementation of the preliminary injunction Order, preventing timely resolution of the issue in this case:

> And I guess my question is: Why not get started? I mean, the way [State Defendants] want to do it, if I understand it, you want to stay this, do nothing, tell people it's a crime to even register. You took 40 days to move to stay, almost 30 days to file a notice of appeal; you are jamming up the Eleventh Circuit pretty good. You want a ruling out of the Eleventh Circuit some time before March when the next major election is. But if the Eleventh Circuit goes at warp speed – I don't know how they'd get a ruling done by February, but say they get a ruling done in February – now you want somebody to have to come in and register for the first time after the Eleventh Circuit rules and then go to the Secretary of State and start all over.

Tr. of Hr'g at 23:23-24:11 (Dec. 3, 2019). State Defendants are inappropriately using this appeal as a justification for continued inaction and continued silence in lieu of guidance to voters, thereby causing the very voter confusion that they decry in their Motion. Their Motion does nothing to remedy this situation because they have proposed an expedited schedule so late in an election cycle that it almost certainly guarantees they will be unable to meaningfully comply even if this Court is able to issue a decision in advance of the March 2020 elections. Rather, the Motion is part of a gambit "to run out the clock so that people who are eligible to vote don't get to

vote in the March presidential primary . . . ." *Id.* at 37:23-25. Such a result will erode the public's confidence in Florida elections. *See, e.g.*, *Georgia Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1274 (11th Cir. 2019) (protecting the public confidence in elections is critical to democracy and "public knowledge that legitimate votes were not counted due to no fault of the voters . . . would be harmful to the public's perception of the election's legitimacy." (quoting *Democratic Exec. Comm. of Florida v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019)) (quotations omitted)). Moreover, the impracticability of the schedule is especially glaring given that weeks of voter education and mobilization must *precede* a voter registration deadline and the beginning of early voting. Under these circumstances, the proposed compressed schedule should be rejected.

Finally, State Defendants' attempt to shoehorn *Raysor* Plaintiffs' motion for class certification into their Motion as a reason for an expedited appeal, Motion at 6, should be rejected. Putting aside their incorrect attribution to the motion to certify a subclass to all Plaintiffs-Appellants, the district court has not adjudicated this issue. Thus, no order on class certification exists on appeal before this Court. Tellingly, State Defendants' counsel conceded before the district court that he understood this Court will not address the motion for class certification on this instant appeal. Tr. of Hr'g at 19:12-25, 20:1-14 (Dec. 3, 2019). Yet State Defendants speculate that the district court could potentially expand the Order to apply to a certified class to

support their request for expedited review, Motion at 6-7, even though no class has been certified and no order has issued. The potential class certification was proposed from the beginning in the *Raysor* Plaintiffs' initial complaint. These issues are not ripe and are not on appeal before this Court.[4]

III. State Defendants Will Not Be Prejudiced by a More Realistic Briefing Schedule

State Defendants will not be prejudiced if their proposed compressed schedule is denied. State Defendants have previously represented that they agree with the Order. On the same day that the district court issued its Order, Defendant Governor issued a statement publicly agreeing with the Order: "Today's ruling affirms the Governor's consistent position that convicted felons should be held responsible for paying applicable restitution, fees and fines while also recognizing the need to provide an avenue for individuals to pay back their debts as a result of true financial hardship." Lawrence Mower, *Being Poor shouldn't stop Florida felons from voting, judge rules in Amendment 4 case*, Tampa Bay Times (Oct. 18, 2019), https://www.tampabay.com/florida-politics/buzz/2019/10/19/being-poor-shouldnt-

[4] Contrary to State Defendants' asserted issues to be raised on this appeal, the district court declined to rule on Plaintiffs' Twenty-Fourth Amendment claim in its Order. *Compare* Civil Appeal Statement, *Jones v. DeSantis*, No. 19-14551 (Dec. 3, 2019), *with* ECF 207 at 40-43 ("A definitive ruling on whether the Florida fees are taxes within the meaning of the Twenty-Fourth Amendment need not be made at this time because it will not affect the ruling on the preliminary-injunction motion of these specific plaintiffs.").

stop-florida-felons-from-voting-judge-rules-in-amendment-4-case/; *accord* Tr. of Hr'g at 6:8-13; *id.* at 7:14-21 (Dec. 3, 2019). The Governor also reaffirmed the State's duty to develop a constitutional procedure for providing access to the right to vote for people who are unable to pay outstanding LFOs, stating he "will consider options put forward on addressing a pathway for those who are indigent and unable to address their outstanding financial obligations." Mower, *supra* at 15. These statements directly contradict positions State Defendants have taken in their filings and the need for an appeal, let alone an expedited appeal. *See, e.g.*, ECF 132 at 21-24.

Moreover, State Defendants have never articulated how they would be prejudiced by a more realistic briefing schedule since they have outlined no explanation for how they would even implement a decision from this Court mere days before the Presidential Preference Primary and other municipal elections on March 17, 2020. By contrast, State Defendants' proposed schedule unnecessarily burdens this Court and is prejudicial to Plaintiffs—who must already complete discovery over the holidays into January 2020 and prepare for a swiftly approaching trial at the beginning of April.

Plaintiffs believe that an expedited schedule is unnecessary because a more realistic schedule will allow for any relief to State Defendants to be provided before the next election in which they could reasonably implement any order from this

Court. Moreover, an expedited appeal after the April 2020 trial would also allow for finality on all issues presented in this case prior to the November 2020 elections.

However, if this Court grants an expedited schedule in this partial appeal—and it should not—Plaintiffs should not be prejudiced by Defendants' delay. Defendants could have filed their opening brief by now, but they have not. They now propose 28 days for Plaintiffs to file a response brief (in addition to responding to their impending stay motion). Given the upcoming holidays, ongoing discovery that ends in January, and preparation for trial, Plaintiffs request that a responsive brief be due no earlier than February 7. Defendants' proposed schedule will only create voter confusion, but to the extent the Court accommodates this schedule, it should do so in a manner that allows Plaintiffs adequate briefing time to address the critical legal issues raised in this appeal.

CONCLUSION

For all the above reasons, State Defendants have not carried their burden of showing entitlement to this extraordinary relief. Accordingly, this Court should deny their Motion to Expedite Appeal.

Dated: December 9, 2019

Respectfully submitted,

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I hereby certify that on December 9, 2019, I served a true and correct copy of the foregoing document via electronic notice by the CM/ECF system on all counsel or parties of record.

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