Nos. 22-842, 23-411

IN THE

Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO,

Respondent.

VIVEK H. MURTHY, SURGEON GENERAL, ET AL.,

Petitioners,

v.

MISSOURI, ET AL.,

Respondents.

On Writs of Certiorari
To the United States Courts of Appeals
For the Second and Fifth Circuits

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA's mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. IMLA regularly files *amicus curiae* briefs in cases, like these, that raise issues of concern to its members.

Speech plays an important and proper role in the everyday work of local governments. Clear guidance on the boundaries of permissible governmental speech will help ensure that public officials can express and implement their policy views, as their functions require, without offending the First Amendment. IMLA submits this brief to aid the Court's understanding of how local governments use and express their own speech, and to offer factors—based on IMLA members' own experiences—that should inform the rule that emerges from these cases.

SUMMARY OF ARGUMENT

Government speech can articulate policy, shape policy, and effectuate policy. It plays a critical role in our representative system of government, especially at the local level. Speech is the means by which local

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, other than *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

officials express their views on issues of concern to their communities. It provides citizens with the information they need to evaluate their officials' performance and judge it at the ballot box. And it can be the mechanism by which local public officials endeavor to influence private parties in service of public policy goals.

Governmental efforts to persuade do not infringe the First Amendment so long as they do not threaten the exercise of state power to stifle protected speech. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Attempts to convince are lawful; attempts to coerce are not. Since *Bantam Books*, the courts of appeals have used a variety of factors or tests to identify impermissible coercion, but the lines they have drawn are blurry in practice and fail to give public officials, including local officials, adequate guidance.

As the Court weighs how to distinguish permissible speech from impermissible coercion, *amicus* urges the Court to weave into its test two important threads from the caselaw. First, this Court should clarify that the relevant inquiry is *objective*, asking whether a reasonable person would view the government's speech as coercion. Second, the Court should clarify that government speech is not inherently coercive simply because the speaker *possesses* regulatory or enforcement authority, if the exercise of that authority is not threatened to inhibit or compel speech. *Amicus* takes no position on how those factors play out in these cases. What matters most is the enunciation of a clear and well-functioning test that permits local officials to perform

their civic duties consistent with the First Amendment.

ARGUMENT

I. Government Speech Plays A Vital Role In Expressing The Viewpoints Of Democratically Elected And Appointed Local Officials

A. The First Amendment protects "the freedom of speech." U.S. Const. amend. I. In doing so, it prevents the government from regulating private speech; it "does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Government officials, no less than private citizens, have the right to express their own views. The government can "speak for itself." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000). It can do so forcefully, on all matters of public concern. And there is no requirement that it do so neutrally, without privileging one view over another. "[W]hen the government speaks for itself, the First Amendment does not demand airtime for all views." *Shurtleff v. City of Boston*, 596 U.S. 243, 247–48 (2022). Traditional First Amendment rules that limit content- and viewpoint-based discrimination therefore do not apply to government speech. Simply put, the government can "say what it wishes," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and can select the views it wants to espouse, *Pleasant Grove*, 555 U.S. at 468.

This makes good sense. After all, "the government must be able to 'promote a program' or 'espouse a policy' in order to function." *Shurtleff*, 596 U.S. at 248 (quoting *Walker v. Tex. Div., Sons of*

Confederate Veterans, Inc., 576 U.S. 200, 208 (2015)). The federal government was permitted to speak out in favor of the war effort during World War II by encouraging enlistment and the purchase of war bonds, and was not required to "balance" that message by simultaneously promoting speech opposing such efforts. *Matal v. Tam*, 582 U.S. 218, 234–35 (2017). Likewise, a local government may urge constituents to recycle without also giving equal airtime to the "local trash disposal enterprise demanding the contrary," and may publicly support a vaccination program without also providing a platform "to voice the perspective of those who oppose this type of immunization." *Walker*, 576 U.S. at 207–08. The government can speak in other ways, too. For example, it can pick and choose certain projects to fund, even if that means it is advancing one set of views over another. *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (rejecting the idea that "the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals" even though "the program in advancing those goals necessarily discourages alternative goals").

B. The fact that public officials can and do express particular views does not improperly skew public discourse. It is the very essence of representative democracy. Elected public officials campaign by expressing particular viewpoints and are elected based on those platforms; the public expects its representatives to continue to advocate for those positions and to advance new ones as new challenges arise. Elected officials also appoint other

officers who can fulfill the voters' remit on issues of public concern.

While this is true at all levels of government, the representative nature of our system is particularly salient at the local level. Each member of the U.S. House of Representatives represents, on average, more than 760,000 voters. *See* Cong. Res. Serv., *Apportionment and Redistricting Process for the U.S. House of Representatives*, at 2 (Nov. 22, 2021). Public officials in cities and towns across the country enjoy a much closer relationship with their constituents. The town of Middletown, Connecticut, for instance, has a 12-member city council that represents a population of about 48,000 citizens, or about 4,000 voters per member. Further, local governments, as creatures of the states, are vested with the solemn responsibility to protect the health, safety, and welfare of their citizens. Their powers to do so are broad. And their actions touch on every facet of the day-to-day lives of the populace, ranging from education to law enforcement to public health. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). Given the range of public services provided, the importance of those services to the everyday lives of citizens, and the closeness between elected local officials and their voters, it is no surprise that "the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 575 n.18 (1985) (Powell, J., dissenting) (citing The Federalist Nos. 17 & 46).

As articulated by this Court, the government speech doctrine thus serves twin interests. It permits

public officials themselves to contribute to the marketplace of ideas by taking and advocating for certain positions. And it enhances our system of self-government by letting voters choose and monitor their representatives based on their publicly-stated views. When local officials speak, they are doing so on behalf of their voters and are accountable to them. And "it is the democratic electoral process that first and foremost provides a check on government speech." *Walker*, 576 U.S. at 207. Any legal regime on government speech must recognize these vital interests.

II. Local Governments Regularly Seek To Influence Private Speech And Doing So Does Not Infringe The First Amendment Rights Of Private Citizens Absent Threats Or Coercion

While local governments may speak out on topics of public concern with particular viewpoints, and seek to persuade or influence private conduct, they may not leverage government power to coerce private conduct or expression. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). When government coerces private actors to suppress disfavored speech, it risks violating a central First Amendment principle of viewpoint neutrality, stifling debate on important issues, and chilling private speech. *See Rosenberger*, 515 U.S. at 828 ("In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional." (citations omitted)); *Walker*, 576 U.S. at 207 ("[T]he Free Speech Clause helps produce informed opinions among members of the public, who

are then able to influence the choices of a government[.]"). The tension is between these core First Amendment principles and the government's own ability to express its views.

To resolve this tension, the courts of appeals distinguish "between attempts to convince and attempts to coerce" when the government advocates that a private intermediary take some action that may burden a third-party's speech. *See Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam). "[T]he first [is] permitted by the First Amendment, the latter forbidden by it." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015).[2]

A. As the courts of appeals have regularly held, local governments may seek to persuade private actors to speak without crossing the line into coercive behavior.

The Second Circuit, for example, found permissible government speech where the head of the human resources administration in New York City, using department letterhead, "urg[ed] various department stores not to carry" a satirical boardgame that the official viewed as disparaging welfare recipients. *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 35 (2d Cir. 1983). The administrator

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[2] This brief takes no position on the related, but distinct, question of when government action directly targeting the intermediary runs afoul of the *intermediary's* First Amendment rights. *See NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022), *cert. granted NetChoice, LLC v. Paxton*, No. 22-555, 2023 WL 6319650 (U.S. Sept. 29, 2023).

took no further steps to investigate or follow-up on the letter, and his agency lacked any authority to regulate the department stores. Because the official's letter "was nothing more than a well-reasoned and sincere entreaty in support of his own political perspective," the court rejected the game's creators' First Amendment claim even though the department stores stopped selling the game. *Id.* at 38.

Likewise, the Third Circuit held that an official in a small Pennsylvania town had permissibly written a letter to Citibank that "politely but firmly" urged the company to remove from its land two billboards, which the town felt were unsightly. *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 86 (3d Cir. 1984). Even after the bank complied, the Third Circuit rejected a First Amendment claim from the company who owned and advertised on the billboards. The court reasoned that although the letter mentioned that the city council was considering an ordinance to ban such billboards and expressed its hope that a "courteous request" to Citibank "might prove more effective and less costly than seeking legal remedies," *id.* at 86 n.2, the court believed that the letter and additional correspondence were "devoid . . . of any enforceable threats," and "amounted to nothing more than a collective expression of the local community's distaste for the billboards," *id.* at 89.

The D.C. Circuit used similar reasoning in a case involving federal officials. Concerned with what he viewed as a "serious problem of pornography in American society," President Reagan directed the attorney general to establish a commission on pornography to study the issue and make

recommendations. *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1012 (D.C. Cir. 1991). As part of its efforts, the commission sent a letter to twenty-three corporations, providing each company with "an opportunity to respond to the allegations" made at a hearing that the company sold pornography. *Id.* at 1013. In response, the corporate owner of the 7-Eleven chain of convenience stores stated that it would stop selling certain adult magazines. The D.C. Circuit rejected the First Amendment claim brought by the magazine publishers because the letter "contained no threat to prosecute, nor intimation of intent to proscribe the distribution of the publications." *Id.* at 1015. Mere criticism was not enough. "If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized." *Id.* at 1016.

Several courts have found no constitutional violations even where local officials use forceful language in criticizing a private party's speech. The Ninth Circuit, for instance, found no First Amendment violation where a city had criticized a group's "hateful" speech and "urged television stations not to air" its advertisements that were critical of homosexuality. *Am. Fam. Ass'n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1119, 1125 (9th Cir. 2002). In so holding, the Ninth Circuit "agree[d] with the host of other circuits that recognize that public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction." *Id.* at 1125. More recently, the

Tenth Circuit rejected a First Amendment claim challenging a mayor's public statement "encourag[ing] local businesses to be attentive to the types of events they accept and the groups that they invite to our great city." *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1157 (10th Cir. 2021). The court held such speech permissible, even where the letter referenced a particular hotel and stated the city would not provide resources or support for an upcoming event the hotel was hosting put on by an anti-immigration group. While the hotel in fact canceled the event, the court stressed that the mayor's statement had disclaimed any authority to regulate the hotel, did not name the group, "contain[ed] no threat," and "only expresse[d] the City's views on the need for private businesses to pay attention to the types of events they accept and groups they invite." *Id.* at 1165.

B. At the same time, local governments may not coerce private parties in ways that seek to punish speech. When the government expressly or implicitly threatens to retaliate against or punish disfavored speakers, its conduct goes too far. Cases in the courts of appeals are again instructive.

The Second Circuit, for example, has repeatedly held that a local official "who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights." *Okwedy*, 333 F.3d at 344. In *Okwedy*, the borough president of Staten Island, New York, faxed a letter on City of New York letterhead to a billboard company expressing distaste for the content on two billboards that "denounce[d] homosexuality as an abomination." *Id.* at 340. The letter invoked the president's capacity

as president, spoke of the substantial revenue the company received from its billboards, and directed the company to call his legal counsel. The company took down the billboards. On those facts, the Second Circuit held that the company "could reasonably have believed that [the president] intended to use his official power to retaliate against it if it did not respond positively to his entreaties," notwithstanding the fact that the president lacked "direct regulatory control over billboards." *Id.* at 344.

Likewise, the Seventh Circuit has held that the "First Amendment forbids a public official to attempt to suppress the protected speech of private persons by threatening that legal sanctions will at his urging be imposed unless there is compliance with his demands." *Backpage.com*, 807 F.3d at 231. There, the sheriff of Cook County, Illinois, "embarked on a campaign intended to crush Backpage," an online forum for classified ads that included an "adult" section. *Id.* at 230. The sheriff's efforts included sending a letter, on sheriff stationery, to Visa and MasterCard in which he demanded that the credit card companies "immediately cease and desist from allowing your credit cards to be used to place ads on websites like Backpage.com." *Id.* at 231. The letter proceeded to accuse the companies of playing a "central role" in the exploitation of women and girls, cited federal criminal statutes, and requested "[w]ithin the next week" the contact information of a person at the credit card companies that the sheriff "can work with . . . on this issue." *Id.* at 232. While acknowledging that the sheriff had the right to "express his distaste for Backpage," the court held that he went too far in threatening prosecution for

the credit card companies in his attempt to "squelch" Backpage's speech. *Id.* at 234–35.

III. Local Government Officials Need Concrete Guidance On How To Reconcile These Important Principles

Drawing the line between lawful government persuasion and unlawful coercion is critical to protecting the free speech rights of both government officials and private citizens. Each case will necessarily involve a fact-sensitive inquiry that respects the competing values at stake and the specific circumstances. But local officials who regularly confront these issues need guidance in order to fulfill their public responsibilities, serve constituents, and respect constitutional rights. Although officials at all levels would benefit from clear guidance, the need is especially acute for local officials, who often face unique challenges compared to their state and federal counterparts, including fewer resources and generally smaller staffs.

To help address this concern, *amicus* urges the Court to clarify two important aspects of the doctrine. First, the Court should confirm that the relevant inquiry is an objective one. Second, the Court should clarify the relevance of an official's regulatory or enforcement authority. Simply being a law enforcement agency or having regulatory authority is not enough to make a public official's speech coercive.

A. An objective standard centers on how a reasonable person would respond to the public official's speech. An action is not coercive if a reasonable person would not interpret it that way, no matter how it was subjectively received. *Bantam*

Books itself stressed that the State's notices to bookstores were "reasonably understood" as coercive. 372 U.S. at 68. Courts of appeals, too, have coalesced around an objective test, even if they have not always said so expressly. *See Missouri v. Biden*, 83 F.4th 350, 397 (5th Cir. 2023) (coercive conduct "includes threats of adverse consequences—even if those threats are not verbalized and never materialize—so long as a *reasonable person* would construe a government's message as alluding to some form of punishment" (emphasis added)); *Backpage.com*, 807 F.3d at 236 (considering whether "letter to the credit card companies could *reasonably* be interpreted as an implied threat" (emphasis added)); *Hammerhead*, 707 F.2d at 39 ("Where comments of a government official can *reasonably* be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim can be stated." (emphasis added)).

This approach aligns with ordinary First Amendment jurisprudence, which recognizes that an objective standard "better instructs public officials as to their obligations under the First Amendment" because liability will not turn on how a particular plaintiff happens to react. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) (holding that the relevant inquiry for claims alleging First Amendment retaliation is whether the government official took some retaliatory action that would "deter 'a person of ordinary firmness' from the exercise of First Amendment rights"). And an objective approach makes good sense

here, where it is critical to give officials clearer boundaries when engaging in government speech.

Under this framework, the factors the courts of appeals have considered—such as word choice, tone, and the presence of regulatory or enforcement authority—may still be relevant. *See Nat'l Rifle Ass'n of Am. v. Vullo*, 49 F.4th 700, 715 (2d Cir. 2022) (outlining these factors). And "whether the speech was perceived as a threat" would provide some evidence as to how a reasonable recipient might react. *Id.* In *Bantam Books*, for instance, this Court considered relevant the bookstore owner's testimony that his "'cooperation' was given to avoid becoming involved in a 'court proceeding' with a 'duly authorized organization.'" 372 U.S. at 63; *see also id.* at 68 (citing this "uncontroverted testimony"). Conversely, in *R.C. Maxwell Co.*, the Third Circuit considered it relevant that the company executive who ordered the billboards removed reported that his conduct was "entirely voluntary" and "denied having felt coerced or intimidated by" the local government's letters urging him to act. 735 F.2d at 89. But such evidence is just one consideration in answering how a reasonable person would interpret the official's speech, and is not dispositive of that inquiry. *See Constantine*, 411 F.3d at 500 (in the retaliation context, noting that while a plaintiff's "actual response" to the retaliation provides "some evidence" as to whether the retaliatory conduct would chill "a person of ordinary firmness" from the exercise of First Amendment rights, it was "not dispositive").

Nor should the analysis turn on whether a third party was simply "*influenced* by the officials' demands," *Biden*, 83 F.4th at 383 (emphasis added).

As explained above, the government may permissibly seek to "influence[]" others—that is the very goal of advocacy, including governmental advocacy. *See supra* Part I. A third party may take action in response to government speech for a variety of reasons, including "reputational concerns," *Biden*, 83 F.4th at 380, not to mention a change of heart—not just out of "fears of liability in a court of law," *see Kennedy v. Warren*, 66 F.4th 1199, 1211 (9th Cir. 2023) (holding senator's letter to Amazon amounted to an attempt to convince, rather than coerce, notwithstanding the fact the company made changes); *see supra* Part II.A (collecting cases where courts find government speech permissible notwithstanding fact that targets in fact changed behavior). The relevant question is whether a reaction was prompted by a reasonable fear of retaliation—not whether there was any reaction at all.

B. In addition, the Court should make clear that the presence or lawful exercise of regulatory or enforcement authority does not itself establish that speech is coercive. Some courts have suggested that advocacy may be "inherently coercive" if offered by a law enforcement officer or "by an executive official with unilateral power that could be wielded in an unfair way." *Kennedy*, 66 F.4th at 1210. The Fifth Circuit relied on such reasoning in one of the decisions below, finding that requests by the FBI were inherently coercive because they "came with the backing of clear authority" and because the FBI possesses certain tools it *could* use to force a reaction, even if those tools were not used in this case. *Biden*, 83 F.4th at 388–89.

The Court should reject this absolutist approach, which would strike a direct blow to local governments.[3] As explained above, local governments have a dual role of expressing viewpoints and engaging in legitimate regulation of conduct. *See supra* Part I. If governmental actors were judged to speak coercively whenever they have some investigative or enforcement authority, the government speech doctrine would be eviscerated and local government agencies would be hamstrung in their ability to do their jobs. This risk is particularly pronounced when it comes to executive branch agencies, including local law enforcement. Like the FBI, police and sheriff's departments possess "clear authority" and investigative tools, and under an absolutist rule they would risk liability any time they seek to persuade a private party to take some action.

That is not the law. This Court said as much in *Bantam Books*, which made clear that police need not "renounce all informal contacts with persons suspected of violating valid laws . . . . Where such consultation is genuinely undertaken with the purpose of aiding the [violator] to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms." 372 U.S. at 71–72; *see also State Cinema of Pittsfield, Inc. v. Ryan*, 422 F.2d 1400, 1402 (1st Cir. 1970) (police and prosecutors can make "good

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[3] *Amicus* takes no position on whether, under the facts of this case, this Court might find that the FBI's communications were coercive on other grounds.

faith attempt[s] . . . to enforce state law," even in an "informal manner").

A contrary rule would seriously jeopardize critical law enforcement and public safety efforts, which regularly involve advocacy and informal contacts with private parties. For instance, a local police department investigating a possible threat may liaise with third parties, requesting that certain speech occur (or not occur) for public safety reasons. A mayor may urge citizens stay home from rallies with the potential to turn violent. *See, e.g.*, John Beauge, *Williamsport Mayor Urges Boycott of Planned National Socialist Movement Rally*, PennLive (Mar. 10, 2020), https://www.pennlive.com/news/2020/03/williamsport-mayor-urges-boycott-of-planned-national-socialist-movement-rally.html (local mayor urging local residents to stay away from a neo-Nazi organization's rally and instead attend a city-hosted community event). A police department may speak to members of the media, helping journalists understand how their work can impact agency operations and officer safety while covering a critical incident, potentially reducing risks to the investigation while still protecting the media's right to report on ongoing events. Or it may urge social media companies to raise awareness about the risks of counterfeit drugs in an effort to combat the opioid crisis. *See* Lacretia Wimbley, *AG Report: Social Media is a Major Vessel for the Illicit Distribution of Fentanyl*, Colo. Pub. Radio News (Mar. 8, 2023), https://www.cpr.org/2023/03/08/ag-report-social-media-is-a-major-vessel-for-the-illicit-distribution-of-fentanyl/ (reporting on state and local efforts to encourage social media companies "to prevent and

respond to illicit drug activity" occurring on their platforms). Any test should preserve local officers' ability to take such steps for the protection of their constituents.

That is not to say, of course, that the existence of such authority lacks relevance. This Court has rightly observed that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around" to the official's stance. *Bantam Books*, 372 U.S. at 68. The courts of appeals, too, have recognized the particularly coercive effect of a local sheriff "writing in his official capacity," and "invoking the legal obligations of financial institutions to cooperate with law enforcement." *Backpage.com*, 807 F.3d at 236 (quotation omitted).

But requests by executive-branch officials, even vigorous ones, should not invariably lead to a finding of coercion. Rather, as explained above, the key question is whether a reasonable, similarly-situated listener would understand the public official to be threatening some sort of enforcement action if the listener does not comply with the official's request. *See supra* Part III.A. This approach takes into account how a reasonable recipient might view law enforcement speech, but it does not treat the mere presence of regulatory or enforcement authority alone as decisive. As such, it protects the government's ability to speak and act in situations where that authority matters most—to protect the public safety and well-being of the communities they serve.

CONCLUSION

For the foregoing reasons, the Court should reaffirm the important role that government speech plays in our representative structure and make clear that local public officials do not transgress the First Amendment absent threats that are reasonably interpreted as coercive.

Respectfully submitted,

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