

No. 12A338

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**In the Supreme Court of the United States**

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JON HUSTED, OHIO SECRETARY OF STATE; MIKE DEWINE,  
OHIO ATTORNEY GENERAL, DEFENDANT-APPELLANTS,

NATIONAL GUARD ASSOCIATION OF THE UNITED STATES, ET AL.  
INTERVENOR DEFENDANTS-APPELLANTS,

v.

OBAMA FOR AMERICA; DEMOCRATIC NATIONAL COMMITTEE;  
OHIO DEMOCRATIC PARTY, PLAINTIFFS-APPELLEES.

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**AMICUS BRIEF OF THE STATES OF MICHIGAN, ALABAMA, ARIZONA, COLORADO,  
GEORGIA, IDAHO, KANSAS, MAINE, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA,  
TEXAS, UTAH, VIRGINIA, AND WISCONSIN  
IN SUPPORT OF OHIO'S EMERGENCY APPLICATION SEEKING TO STAY THE DECISION  
OF THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**To the Honorable Elena Kagan, Associate Justice of the Supreme Court of  
the United States and Circuit Justice for the Sixth Circuit**

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## INTRODUCTION

The Constitution vests exclusively in the states the power to set time, place, and manner requirements for voting, subject only to an act of Congress. Exercising that authority, state legislatures and officials experiment with new processes that expand citizens' opportunity to vote and ensure orderly and effective operations on Election Day. Ohio exercised such authority here, then revised its new practice in response to problems. The Sixth Circuit's rejection of Ohio's revision impinges on state sovereignty in three important ways.

First, the decision seriously undermines state innovation by applying heightened scrutiny under *Anderson/Burdick* for the modification of processes that a state has instituted to make voting easier. The Sixth Circuit has created a one-way ratchet. And the lesson is clear. A state legislature should think twice about expanding the ability to vote because, once instituted, the ability to refine that new opportunity is limited and subject to the second guessing of the federal courts. This Court has affirmed that the rational-basis standard applies when evaluating revisions to an election procedure that the Constitution does not require. That test leaves to democratically-elected representatives the decisions whether and how to expand opportunities for voting.

Second, the Sixth Circuit failed to adequately respect the Ohio legislature's determination that it is a burden to require election officials to respond to in-person voters on the Saturday, Sunday, and Monday before Election Day. At the same time, the Sixth Circuit overstated the inconvenience of eliminating those three days

for non-military voters; after all, Ohio has provided 23 *other* days for in-person, absentee balloting, not to mention the numerous days for mailing absentee ballots and the opportunity to vote in person on Election Day. The Constitution expects states—not the federal courts—to micromanage elections processes like these.

Third, the Sixth Circuit’s analysis disregards the special status of military voters. For more than a century, states have treated military personnel differently for purposes of election processes. It is not irrational for Ohio to have done so here given the personal sacrifice and special circumstances of those who put themselves in harm’s way to protect our country’s freedom.

For all these reasons, the *amici* states respectfully request that the Court grant Ohio a stay.

## **INTERESTS OF THE *AMICUS CURIAE***

The states have the primary responsibility for conducting elections. And the standard by which the federal courts evaluate the execution of this constitutional duty is uniquely important to states and their sovereignty. The general trend for election processes has been an expansion of opportunities for voters to exercise their rights. Indeed, Ohio has been one of the leaders in this area.

All states have an intense interest in the Sixth Circuit's injunction of Ohio election law and the court's rejection of state sovereignty in the area of election processes. And the questions presented raise issues of national jurisprudential significance: whether there is an unconstitutional burden placed on voters who have more than ample opportunities to vote, and whether the unique status of our men and women serving in the military justifies special voting opportunities. The states have a vital interest in these issues.

### **THIS COURT SHOULD IMMEDIATELY GRANT OHIO'S MOTION TO STAY THE EFFECT OF THE SIXTH CIRCUIT'S DECISION**

#### **I. Rational basis is the proper standard for reviewing a revision to a non-constitutionally-required process expanding the ability to vote.**

States and their legislatures “prescribe[]” “[t]he Time, Places, and Manner of holding Elections for Senators and Representatives.” U.S. Const. art. I, § 4, cl. 1. The Constitution vests only Congress with the authority to alter those state regulations, not the federal courts. *Id.* Significantly, this Court has described this

authority as a “broad power” regarding time, place, and manner restrictions, a power which is “matched by state control over the election process for state offices.” *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (citation omitted)); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

In placing this duty in the states, rather than the federal government or the courts, the Constitution enables states to consider and implement creative, novel efforts to widen the ability of citizens to vote. The placing of this authority, and for granting this variety, is part of the Constitution’s genius. Under this vision, consistent with the Tenth Amendment, the states have retained the power to regulate elections. *Gregory v. Ashcroft*, 501 U.S. 452, 461-462 (1991) (citing, *inter alia*, *Oregon v. Mitchell*, 400 U.S. 112, 201 (1970)(Harlan, J.)). This experimentation, particularly where it has expanded citizens’ ability to exercise the franchise, should be rewarded, and not subject to heightened or exacting standards that will hamstring the ability of state legislatures to continue to refine these processes when necessary. When the federal courts step in and frustrate state refinements to a new process, that intervention discourages innovation and expansion of the franchise. That is the lesson the Sixth Circuit has now taught Ohio.

State legislatures and local election boards make their decisions regarding early voting and absentee voting (by mail, in person, or both) for a variety of reasons, including budgetary constraints; personnel constraints; administrative

concerns; popular demand; voter turnout; and precinct size. All these considerations go to ensuring a fair, efficient, and reliable election. See *Timmons*, 520 U.S. at 364-65 (“States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.”) It is precisely such local concerns that the Tenth Amendment—and the Court’s election-regulation jurisprudence—protects. See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 439-40 (1992).

The states in this circuit have exercised their constitutional prerogatives in different ways. Michigan, for example, allows mail-in absentee voting with an excuse. Mich. Comp. Laws § 168.758. Kentucky allows mail-in absentee voting with an excuse, and machine voting for voters with a valid excuse during the 12 business days immediately preceding Election Day. Ky. Rev. Stat. Ann. § 117.085. Tennessee allows in-person voting prior to Election Day (ending five days before Election Day), and absentee voting by mail is only available with an excuse. Tenn. Code Ann. § 2-6-103 and § 2-6-201. Ohio is one of the country’s leaders in early voting, allowing voters to appear in person to vote beginning 35 days in advance of election day. In his directive to local election officials, Secretary of State Jon Husted provided uniform hours for the in-person absentee balloting, giving voters 23 days starting on October 2, 2012, to vote, keeping offices open on one day to 9 pm, and for two weeks to 7 pm. August 15, 2012 Directive 2012-35. This does not even include the time in which Ohio voters have an opportunity to vote by mailing in absentee-

ballots in response to the six million applications that were sent to Ohio registered voters.

The rational-basis test is the proper standard for evaluating Ohio's decision to give election clerks and workers an opportunity to prepare for Election Day. The rational-basis test is what this Court applied in determining whether there was a violation of the Elections Clause for failing to allow prisoners access to absentee balloting. See *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969) (rejecting an Equal Protection Clause challenge to Illinois's absentee-ballot law, which allowed only four categories of citizens to vote by absentee ballot). The Sixth Circuit rejected this conclusion, determining that there was evidence that Ohio voters would be "precluded" from voting without the "additional three days of in-person voting." Slip op., p. 11. The court concluded that the burden was not an inability to vote (given Ohio's liberal rules for both in-person and mailed absentee ballots), but voters' *reliance* on the ability to vote in person on the Saturday, Sunday, and Monday before an election. The Sixth Circuit's approach inhibits a state's ability to revise an expanded-voting rule once implemented.

This Court has never interpreted the Fourteenth Amendment to impose a one-way ratchet on states and their powers to regulate elections. To the contrary, in *McDonald*, the Court rejected the proposition that a state must extend a voting mechanism to all if it once extends it to some. See *McDonald*, 394 U.S. at 802. Any other result would undermine states' flexibility and the principles of federalism. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)

(“Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

In specific, the Sixth Circuit’s decision to apply this heightened standard from *Anderson/Burdick* cannot be squared with this Court’s decision in *McDonald*. This Court in *McDonald* rejected the prisoners’ claim that their exclusion from the opportunity to file absentee ballots was unconstitutional where it had been extended to four other groups, including the incapacitated, those with religious observances, and poll watchers. *McDonald*, 394 U.S. at 803. The Court applied standard equal-protection analysis, determining that the distinctions in Illinois law bore a rational interest to a legitimate state end. *Id.* at 808. There was no right “to receive absentee ballots,” and the extension of this opportunity to others did not then “deny [the prisoners] the exercise of the franchise.” *Id.* at 807. The same is true here. Ohio’s decision to revise a non-required opportunity—particularly where the contraction as here is a slight one—should be no different than expanding an opportunity to only some in the electorate.

Of course, even if *Anderson/Burdick* applies, the result should not change. Ohio’s proposed revision to election laws here—like that in *McDonald*—represent the kind of election refashioning that would be at the low end of the balancing inquiry, which is effectively the same as rational-basis review anyway. The key lesson of *McDonald* is that rational-basis review should be applied to Ohio’s revision

regardless of whether a court applies traditional equal-protection analysis or a balancing inquiry.

The Sixth Circuit's decision has significant implications for the other states in the circuit and for other states more generally. There are more than 30 states, including Ohio, that allow for early voting. See National Conference of State Legislatures, "Absent and Early Voting," Updated September 4, 2012.<sup>1</sup> In fact, there are at least seven other states that allow for early voting that took precisely the same action as Ohio did here: to end early voting on the Friday before the election. See A.R.S. § 16-542; C.R.S.A. § 1-8-208; O.C.G.A. § 21-2-385(d)(1); N.R.S. § 293.3568; Tx. Stat. Ann. § 85.001; Ut. Stat. Ann. § 20A-3-601, Wi. Stat. Ann. § 6.86.<sup>2</sup> The Sixth Circuit's decision calls into question these limitations.

The point is an obvious one: states that experiment with processes that make it easier for voters to cast their vote will be unable to pull those opportunities back due to cost, the burden on election officials, or any other consideration. Cf. *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527, 535 (1982) ("We . . . reject [ ] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede. We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment."). That is exactly what happened here. Ohio determined that

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<sup>1</sup> The schematic containing this information may be found at the following website: <http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx#a> (last visited on October 10, 2012).

<sup>2</sup> The State of Florida ends early voting on the Saturday before Election Day. See Fla. Stat. 101.657(1)(d).

allowing voting for all citizens on the three days preceding the election was a “burden on local boards of elections” when those boards should be preparing for holding the election itself. Slip op., p. 12. The Sixth Circuit brushed this claim aside, stating that there is no evidence that “this election will be more onerous than the numerous other elections that have been successfully administered[.]” Slip op., p. 13. And the court determined that the reduction in days was an unjustified burden on voters.

If this is the rule by which the federal courts will review these kinds of revisions, the suggestion is that the more than 30 states that have created early voting opportunities will only be able to reduce the number of days where there is a determination by a federal court that the state had a significant justification. Ironically, in the other states in the circuit (like Michigan and Kentucky) that do not allow excuseless, in-person early voting, the legislatures will have to think carefully before creating new, excuseless in-person voting or other election mechanisms because any change will be locked in by the Equal Protection Clause and some undefined sense of voters’ “reliance.”<sup>3</sup> That cannot be the rule. If the Tenth Amendment and this Court’s election-regulation cases mean anything, they

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<sup>3</sup> The Sixth Circuit’s ruling may also require invalidation of *excuse*-based absentee voter laws. Fifteen states currently require voters to provide an excuse to cast a vote before Election Day, rather than opening up absentee voting to the general public at large. Ala. Code § 17-11-3; Conn. Gen. Stat. § 9-135; Del. Code Ann. tit. 15, § 5502; Ky. Rev. Stat. Ann. §§ 117.075, 117.077, 117.085; Mass. Ann. Laws ch. 54, §§ 86, 91A; Mich. Comp. Laws §§ 168.758, 168.759; Minn. Stat. § 203B.02; Miss. Code Ann. § 23-15-713; Mo. Rev. Stat. § 115.277; N.H. Rev. Stat. Ann. 657:1; N.Y. Election Law § 8-400; 25 Pa. Cons. Stat. § 3302; R.I. Gen. Laws § 17-20-2; S.C. Code Ann. § 7-15-320; Va. Code Ann. § 24.2-700.

mean that states must be able to make changes to their election regulations as the times and local conditions require.

**II. Ohio did not place a burden (much less a significant one) on citizens' ability to vote.**

The Sixth Circuit agreed with the district court that Ohio's elimination of weekend voting and evening hours, including the three days before the election, meant that thousands of voters "will not be able to exercise their right to cast a vote." Slip op., p. 12. As a consequence, the Court then applied a heightened review standard from *Anderson/Burdick* because it determined that the fundamental right to vote had been improperly burdened by the revision to Ohio's early voting schedule.

But this is the central error of the Sixth Circuit's analysis. There was no burden. The withdrawal of an additional opportunity to vote early among many, none of which was constitutionally required, does not create a burden. And it certainly does not disenfranchise any voter. It is a legal and logical *non sequitur* to say, as did the Sixth Circuit, that 100,000 Ohio voters who voted in person during the three days preceding the last Election Day will "be *precluded*" from voting after Ohio's change. Slip op., p. 11 (emphasis added). What about the 23 days of in-person, pre-election voting? What about mailing in an absentee ballot? And, for at least some substantial portion of those 100,000 voters, what about Election Day? It cannot be presumed that simply because voters chose to vote early during the last election, they will be unable to vote in person on Election Day for this election.

Again, the point underlying the court's decision is voter reliance. The claim is that voters have come to rely on the new and expanded opportunity to vote, and once Ohio granted this accommodation, Ohio could not withdraw it without a more probing scrutiny as provided in *Anderson/Burdick*. See slip op., pp. 27-28 (White, J., concurring) (“eleventh-hour changes to remedial voting provisions that have been in effect since 2005 and have been relied on by substantial numbers of voters for the exercise of their franchise are properly considered as a burden in applying *Anderson/Burdick* balancing”).

The practical import of this reasoning is troubling: any state legislature that increases access to voting diminishes its sovereignty over the election process. That is so because the state becomes subject to the federal courts' analysis (as here) to determine whether a state's justification for a revision that modifies this opportunity is sufficiently weighty in light of the burden imposed on the plaintiffs' purported “rights.” *Burdick*, 504 U.S. at 34 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Ohio's modest reduction of three days left non-military voters—the vast majority of voters—with an ample 23 days in which to cast an in-person early ballot, to vote absentee by mail, or vote at the polls. Ohio's important regulatory interest in preparing for and ensuring a fair and efficient election, while accommodating a small number of military voters and their families, is sufficient to justify the minimal inconvenience to non-military voters. To the extent the Sixth Circuit disagreed with the Ohio legislature's prioritizing of election preparation over

in-person early voting, it is the legislature's judgment that is constitutionally significant, because Ohio is ultimately responsible for ensuring a fair and efficient election process. *Timmons*, 520 U.S. at 358 (“States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”). And a court need not agree with a state's legislative choice to find it constitutional, provided the choice is rationally related to, or justified by, a legitimate regulatory interest as it is here.

In sum, exercising its constitutional right to regulate the time, place, and manner of elections, Ohio chose in its sovereign capacity under the Tenth Amendment how to balance voters' needs and the state's burdens. The decision to eliminate these three early-voting days where there were 23 early voting days still remaining was a rational one based on the considerations of the burden on local election officials. The Sixth Circuit should have deferred to that determination.

**III. Ohio's decision to provide special voting opportunities to military personnel is rationally related to the unique role of those who faithfully serve our country and place themselves in harm's way by joining the armed forces.**

“Our Servicemen and women are serving throughout the world as guardians of peace—many of them away from their homes, their friends and their families. They are visible evidence of our determination to meet any threat to the peace with measured strength and high resolve. They are also evidence of a harsh but inescapable truth—that the survival of freedom requires great cost and commitment, and great personal sacrifice.”

President John F. Kennedy, 1963<sup>4</sup>

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<sup>4</sup> Armed Forces Day history, <http://www.defense.gov/afd/history.aspx>.

While purportedly acknowledging the special status America's military men and women hold in our society, and "lauding" Ohio's "commitment to providing as many opportunities as possible for service members and their families to vote early," slip op., p. 16, the Sixth Circuit held just the opposite. The Sixth Circuit found "no relevant distinction" between military voters and other Ohio voters, and that the two groups were "similarly situated" for purposes of the court's equal protection analysis. Slip op., p. 17. And because these groups were "similarly situated," there was no "justification" for Ohio's decision to continue to afford military voters and their families an additional three days of in-person early voting, while denying that same opportunity to ordinary Ohioans. Slip op., p. 17. But the Sixth Circuit got it wrong, and the court's decision undermines the constitutionality of similar accommodations unique to military voters both in Ohio and elsewhere. The states seek to ensure that courts honor special voting accommodations for military personnel.

Congress has gone to great lengths to ensure that military and overseas voters have ample opportunities to vote in federal elections by enacting the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. §§ 1973ff – 1973ff-6, in 1986, amending that act in 2009 by the Military and Overseas Voter Empowerment Act (MOVE Act), Pub. Law 111-84, and adopting the National Defense Authorization Act for Fiscal Year 2010, Pub. Law 111-84. See also R. Michael Alvarez, *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem*, 34 *Fordham Urb. L. J.* 935

(2007); 1 A.L.R. Fed. 2d 251, Validity, Construction, and Application of Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C.A. §§ 1963ff *et seq.* These laws provide special protections to military and overseas voters not available to ordinary voters based on the unique circumstances of military voters. And courts have upheld provisions of UOCAVA over equal-protection challenges. E.g., *Igartua De La Rosa v. U.S.*, 32 F.3d 8 (1st Cir., Puerto Rico 1994), and *Romeu v. Cohen*, 265 F.3d 118 (2nd Cir., 2001). Ohio has incorporated these laws and extended them to state and local elections. See 2010 Am. Sub. H.B. 48 and 2011 Am. Sub. H.B. 224; O.R.C. § 3511.01.<sup>5</sup> Such laws are now in question.

The Sixth Circuit concluded that non-deployed military voters and ordinary voters were similarly situated because a non-military voter “could be suddenly called away and prevented from voting on Election Day” the same as a military voter’s sudden deployment. Slip op., p. 17. The court gave as examples “medical emergencies,” “sudden business trips,” and first-responders “suddenly called to serve at a moment’s notice.” *Id.* But the Sixth Circuit’s medical emergency example is unpersuasive since Ohio, like most states, provides for an opportunity to vote in the event of a medical emergency. See O.R.C. § 3509.08. The business trip example is also unpersuasive, in that a person in such a position may independently

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<sup>5</sup> The Sixth Circuit’s ruling also creates constitutional problems for states that have adopted the Uniform Military and Overseas Voting Act (UMOVA). Ten states already have adopted UMOVA, and several others are considering it. See Colo. Rev. Stat. §§ 1-8.3-101 to 1-8.3-119; D.C. Code §§ 1-1061.01 to 1-1061.20; N.C. Gen. Stat. §§ 163-258.1 to 163-258.20; N.D. Cent. Code §§ 16.1-07-18 to 16.1-07-33; Nev. Rev. Stat. §§ 293D.010 to 293D.540; 26 Okl. St. §§ 14-136 to 14-155; Utah Code §§ 20A-16-101 to 20A-16-506; Va. Code §§ 24.2-451 to 24.2-470; see also Cal. A.B. 1805 (signed Sept. 29, 2012); Haw. Act 226, H.B. 461 (signed July 5, 2012).

choose to put the exercise of the right to vote first, and business second. Military voters and their families do not have that choice.

The closest example is that of the first responder suddenly called to action. But even there, military voters are different, since first responders generally serve in the communities in which they live and vote, and therefore would not generally be “suddenly called to serve” outside their community and far away from their polling place. Not so for military voters and their families. They may suddenly be called to serve a state or even a continent away. They are unique in our country. And our laws should reflect their unique service and sacrifice.

It is these very circumstances that make military voters and their families different, distinct from non-military Ohio voters. Other courts have recognized this distinction. See *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp.2d 1305, 1307 (N.D., Fl. 2000) (military voters “do not enjoy the individualism which they serve to defend for all other citizens. How and where they conduct their lives is dictated by the government.”); *Doe v. Walker*, 746 F. Supp.2d 667, 679 (Dist Ct., Md., 2010) (“[U]nlike domestic absentee voters who may request an absentee ballot because it is inconvenient or difficult for them to vote at a polling station, military personnel deployed overseas lack the ability to vote in person.”). Because military and non-military voters are not similarly situated, states have a rational basis for treating military voters differently with respect to accommodating their special circumstances.

Ohio did so in this case by maintaining the ability of military voters and their families to cast in-person absentee ballots through the three days leading up to Election Day, while eliminating that opportunity for non-military Ohio voters. This disparate treatment is constitutional because it is justified by the unique status of military voters and their families. As discussed above, non-military voters have ample opportunities under Ohio law to vote absentee. The Sixth Circuit erred in concluding otherwise.

Finally, the Sixth Circuit's conclusion threatens the validity of other laws, state and federal, that draw distinctions based on military status and discourages states from providing such accommodations. This is the exact opposite of what Congress is requiring or encouraging states to do through UOCAVA and the MOVE Act. The Sixth Circuit rejected these concerns on the basis that they only run to *deployed* military voters who are absent from their voting jurisdictions. Slip op., pp 17-18.

But the deployed versus non-deployed status of a military voter is a red herring, since a non-deployed military voter is not similarly situated to a non-military voter. The states seek to ensure that the status of military personnel, whether deployed or not, is recognized. Their burden is distinct regardless whether they are still in the United States or deployed overseas. The Sixth Circuit's line-drawing will hamper state efforts to stream-line voting processes for military voters and their families by requiring states to offer the same accommodations to all voters, or none at all. And Ohio's legislation survives rational-basis review even if

members of the armed services must be treated identically with all other citizens, because a state legislature is not required to solve a problem in its entirety. *McDonald*, 394 U.S. at 809. It can proceed one step at a time, which is exactly what Ohio tried to accomplish here.

**CONCLUSION**

This Court should grant Ohio's emergency application for stay.

Respectfully submitted,

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