No. 23-251

In the Supreme Court of the United States

BRIGITH DAYANA GOMEZ BARCO, ET AL., PETITIONERS

v.

DIANE WITTE, FIELD OFFICE DIRECTOR, NEW ORLEANS DISTRICT, IMMIGRATION AND CUSTOMS ENFORCEMENT AND REMOVAL OPERATIONS, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
SAMUEL P. GO
NICOLE P. GRANT
DHRUMAN Y. SAMPAT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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QUESTION PRESENTED

Whether the Equal Access to Justice Act's limited waiver of the United States' sovereign immunity in "civil action[s]," 28 U.S.C. 2412(d)(1)(A), unambiguously and unequivocally encompasses petitions for writs of habeas corpus challenging immigration detention.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 65 F.4th 782. In *Gomez Barco*, the decision of the district court denying attorney's fees and other expenses (Pet. App. 7a-8a) is unreported. In *Castro Balza*, the decision of the district court denying attorney's fees and other expenses (Pet. 30a-31a) is not published in the Federal Supplement but is available at 2021 WL 5144401.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2023. A petition for rehearing was denied on July 10, 2023 (Pet. App. 54a-55a). The petition for a writ of certiorari was filed on September 13, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1231(a) of Title 8 governs the detention of noncitizens during and beyond the "removal period." 8 U.S.C. 1231(a)(2) and (6).[1] In general, the removal period is a 90-day period that begins when a removal order becomes "administratively final" or when certain other criteria are satisfied. 8 U.S.C. 1231(a)(1)(B)(i); see 8 U.S.C. 1231(a)(1)(A) and (B). Section 1231(a)(2) provides that the Secretary of Homeland Security "shall detain" a noncitizen "[d]uring the removal period." 8 U.S.C. 1231(a)(2).[2] Section 1231(a)(6) further provides that the Secretary "may" detain a noncitizen "beyond the removal period" if the noncitizen is inadmissible, removable under certain provisions of law, "a risk to the community," or "unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6).

"Although the statute does not specify a time limit on how long DHS may detain an alien" under Section 1231(a)(6), this Court in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), "'read an implicit limitation' into the statute 'in light of the Constitution's demands,'" and "held that an alien may be detained only for 'a period reasonably necessary to bring about that alien's removal from the United States.'" *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2281 (2021) (quoting *Zadvydas*, 533 U.S. at 689). Under *Zadvydas*, "a period reasonably necessary to bring about the alien's removal from the United States

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

[2] Section 1231 refers to the Attorney General, but Congress transferred the enforcement of Section 1231 to the Secretary of Homeland Security. *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2280 n.1 (2021).

is presumptively six months." *Id.* at 2281-2282. "After that point, if the alien 'provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,' the Government must either rebut that showing or release the alien." *Id.* at 2282 (quoting *Zadvydas*, 533 U.S. at 701); see 8 C.F.R. 241.13 (setting out the *Zadvydas* procedures).

2. a. Petitioner in the first of these two cases that were consolidated in the court of appeals, Brigith Dayana Gomez Barco, is a native and citizen of Venezuela. Pet. App. 9a. In 2017, she was admitted to the United States on a temporary nonimmigrant visa. *Id.* at 10a. In 2018, following a jury trial, she was convicted on one count of conspiring to transmit an interstate extortionate communication, in violation of 18 U.S.C. 371; three counts of transmitting an interstate extortionate communication, in violation of 18 U.S.C. 875(d); and one count of traveling in interstate commerce in aid of racketeering, in violation of 18 U.S.C. 1952(a)(3). 21-30637 C.A. ROA 126-128. Gomez Barco was sentenced to a term of imprisonment of 20 months and 15 days. *Id.* at 129.

In June 2019, the Department of Homeland Security (DHS) served Gomez Barco with a notice to appear for removal proceedings, charging that she was subject to removal for remaining in the United States for a time longer than permitted. 21-30637 C.A. ROA 102-103; see 8 U.S.C. 1227(a)(1)(B). In July 2019, after Gomez Barco finished serving her federal term of imprisonment, DHS took her into custody. 21-30637 C.A. ROA 19.

On August 9, 2019, an immigration judge ordered Gomez Barco's removal to Venezuela. 21-30637 C.A. ROA 104. Because Gomez Barco waived appeal, the removal order became administratively final on that date. *Id.* at 100, 104; see 8 C.F.R. 1241.1(b).

b. After Gomez Barco's removal order became administratively final, she remained in DHS custody under Section 1231(a). 21-30637 C.A. ROA 109-118. In April 2020, while she was detained under Section 1231(a)(6), Gomez Barco filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Western District of Louisiana. 21-30637 C.A. ROA 9-52. In her petition, she contended that she was not likely to be removed in the reasonably foreseeable future and that she was entitled to immediate release under *Zadvydas*. *Id.* at 30-31, 51.

A magistrate judge recommended that Gomez Barco's habeas petition be granted. Pet. App. 20a-29a. The magistrate judge determined that Gomez Barco had "provided good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future," *id.* at 26a, in light of "ever-worsening diplomatic relations" between the United States and Venezuela and "the suspension of all travel" between the two countries "due to the coronavirus," *id.* at 23a (citation omitted). The magistrate judge noted that the government had submitted declarations stating that it was "in possession" of a "valid travel document" for Gomez Barco and that it believed Gomez Barco would be removed "once travel restrictions due to COVID-19" were "lifted," which the government expected to happen in October 2020. *Id.* at 26a (citations omitted). But in the magistrate judge's view, "[n]either [the] belief that [Gomez Barco] will be removed, nor the information provided by [the government], satisf[ied] the government's burden to rebut [Gomez Barco's] showing that she will not be removed in the foreseeable future." *Id.* at 27a.

In objecting to the magistrate judge's recommendation, the government filed an additional declaration

stating that Venezuela had announced the reopening of its airports and that Gomez Barco's removal had been scheduled for April 9, 2021. 21-30637 C.A. ROA 457-458; see *id.* at 497 (providing a further update that the government was attempting to effectuate Gomez Barco's removal via a "charter flight to depart before January 31, 2021").

In December 2020, the district court adopted the magistrate judge's recommendation, granted Gomez Barco's habeas petition, and ordered her immediate release. Pet. App. 18a-19a. The court found "the additional information provided by the [government] still insufficient to rebut [Gomez Barco's] showing that there is no significant likelihood that she will be removed to Venezuela in the reasonably foreseeable future." *Id.* at 18a. On May 2, 2021, Gomez Barco was removed from the United States to Venezuela. See Gov't C.A. Br. 27; Gomez Barco C.A. Reply Br. 7.

c. In March 2021, Gomez Barco filed a motion under the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325, which provides in pertinent part that "a court shall award to a prevailing party * * * fees and other expenses * * * in any civil action * * * brought by or against the United States * * * unless the court finds that the position of the United States was substantially justified," 28 U.S.C. 2412(d)(1)(A); see 21-30637 C.A. ROA 510-530. In her motion, Gomez Barco sought an award of $16,002 in attorney's fees and $2375 in other expenses as the prevailing party in her habeas action. 21-30637 C.A. ROA 512.

The magistrate judge determined that Gomez Barco's motion should be denied. Pet. App. 9a-17a. The magistrate judge observed that "the EAJA is a limited waiver of sovereign immunity" whose "terms must be construed

strictly." *Id.* at 11a. The magistrate judge then found the statute ambiguous on whether Gomez Barco's habeas action qualified as a "civil action." *Id.* at 17a. The magistrate judge therefore concluded that "strict construction of the waiver of sovereign immunity dictates that EAJA fees are not available to" Gomez Barco. *Ibid.*

The district court agreed with the magistrate judge's determination that Gomez Barco's motion should be denied, but on "alternate grounds." Pet. App. 7a; see *id.* at 7a-8a. The court found that "neither the Government's conduct nor its position in th[e] [habeas] litigation lacked a reasonable basis in law and fact, particularly given the novel and difficult circumstances involved in th[e] case, e.g., a rapidly evolving global pandemic coupled with civil conflict in the would-be country of removal." *Id.* at 8a. The court therefore determined that Gomez Barco was ineligible for attorney's fees or other expenses because "the Government's position was substantially justified." *Ibid.*

3. a. Petitioner in the second case, Sybreg Valentina Castro Balza, is a native and citizen of Venezuela. Pet. App. 41a. In 2017, she was admitted to the United States on a temporary nonimmigrant visa. *Ibid.* In May 2019, following a guilty plea, she was convicted on one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371. Pet. App. 41a. Castro Balza was sentenced to 18 months of imprisonment. *Ibid.*

On August 21, 2019, DHS served Castro Balza with a notice to appear for removal proceedings, charging that she was subject to removal for remaining in the United States for a time longer than permitted and for having been convicted of a crime involving moral turpitude. 21-30748 C.A. ROA 57; see 8 U.S.C. 1227(a)(1)(B) and (2)(A)(i). On August 30, 2019, after completing her

federal term of imprisonment, Castro Balza was transferred to DHS custody. 21-30748 C.A. ROA 57-58.

On November 21, 2019, an immigration judge ordered Castro Balza's removal to Venezuela. 21-30748 C.A. ROA 58. Because Castro Balza waived appeal, the removal order became administratively final on that date. *Ibid.*; see 8 C.F.R. 1241.1(b).

b. Castro Balza remained in DHS custody under Section 1231(a). 21-30748 C.A. ROA 124. In July 2020, while she was detained under Section 1231(a)(6), she filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Western District of Louisiana. 21-30748 C.A. ROA 8-25. In her petition, Castro Balza contended that her removal was not "reasonably foreseeable in the near future" and that she was entitled to immediate release under *Zadvydas*. *Id.* at 18; see *id.* at 23.

The magistrate judge recommended that Castro Balza's habeas petition be granted. Pet. App. 40a-53a. As in Gomez Barco's case, the magistrate judge determined that Castro Balza had "provided good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future," *id.* at 49a, and that the government had not "satisf[ied] [its] burden to rebut [that] showing," *id.* at 50a. Over the government's objection, 21-30748 C.A. ROA 203-212, the district court adopted the magistrate judge's recommendation, granted Castro Balza's habeas petition, and ordered her immediate release, Pet. App. 38a-39a.

c. In January 2021, Castro Balza filed an EAJA motion seeking an award of $22,555 in attorney's fees and $2271 in costs and other expenses as the prevailing party in her habeas action. 21-30748 C.A. ROA 262; see *id.* at 260-280, 328-335. As in Gomez Barco's case, the

magistrate judge determined that the motion should be denied because the habeas action did not clearly qualify as a "civil action[]" under the EAJA. Pet. App. 36a; see *id.* at 32a-37a. Also as in Gomez Barco's case, the district court denied the motion on "alternate grounds," finding that "the Government's position was substantially justified" in light of "the novel and difficult circumstances involved in th[e] case including the evolving COVID-19 pandemic and civil conflict in Venezuela." *Id.* at 30a-31a.

4. The court of appeals consolidated Gomez Barco's and Castro Balza's cases and affirmed the denials of their EAJA motions. Pet. App. 1a-6a. The court explained that the EAJA's "limited waiver of sovereign immunity, allowing for the imposition of attorney's fees and costs against the United States in specific civil actions," must be "strictly construed in favor of the sovereign." *Id.* at 4a. The court then determined that "a habeas corpus proceeding is neither a wholly criminal nor a wholly civil action, but rather a hybrid action that is unique, a category unto itself." *Id.* at 6a (citation omitted). The court therefore concluded that the EAJA does not "expressly and unequivocally waive[] the United States' sovereign immunity regarding attorney's fees in immigration habeas corpus actions." *Id.* at 5a.

ARGUMENT

Petitioners contend (Pet. 7) that their habeas proceedings challenging their immigration detention qualified as "civil actions" under the EAJA. The court of appeals correctly rejected that contention. Petitioners also contend (Pet. 10-19) that the circuits are divided over the proper interpretation of the phrase "civil action" in the EAJA. But the shallow and recent disagreement between three courts of appeals that petitioners

identify does not warrant this Court's review. In any event, these cases would be poor vehicles for further review because, as the district court found, both petitioners would be ineligible for an award of attorney's fees and other expenses under the EAJA even if the question presented were resolved in their favor. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly affirmed the denial of petitioners' EAJA motions. Pet. App. 5a-6a. "The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity." *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991). "Any such waiver must be strictly construed in favor of the United States." *Ibid.*; see *FAA* v. *Cooper*, 566 U.S. 284, 291 (2012) ("For the same reason that [this Court] refuse[s] to enforce a waiver that is not unambiguously expressed in the statute, [this Court] also construe[s] any ambiguities in the scope of a waiver in favor of the sovereign.").

The EAJA provision at issue here authorizes an award of attorney's fees and other expenses "to a prevailing party * * * in any civil action * * * brought by or against the United States * * * unless the court finds that the position of the United States was substantially justified." 28 U.S.C. 2412(d)(1)(A). Petitioners were the prevailing parties in habeas proceedings challenging their immigration detention. Pet. App. 18a-19a, 38a-39a. The court of appeals correctly determined, however, that petitioners are ineligible for attorney's fees and other expenses under the EAJA because their habeas proceedings did not qualify as "civil actions." *Id.* at 5a.

Although cases are often characterized as either "criminal" or "civil," habeas proceedings do not "fit

neatly" within either category. *Obando-Segura* v. *Garland*, 999 F.3d 190, 192 (4th Cir. 2021). Rather, as this Court has recognized, habeas proceedings are "unique." *Harris* v. *Nelson*, 394 U.S. 286, 294 (1969). Since at least Blackstone's day, they have been understood to serve a special role: providing a remedy for "illegal confinement." *Id.* at 291 (quoting 3 William Blackstone, *Commentaries* *131 (William Draper Lewis ed., 1902)). As a result, "[t]he problems presented by [habeas] proceedings are materially different from those dealt with in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure." *Id.* at 301 n.7. And it is often "difficult to believe" that Congress would have "applied the normal [civil] rules without modification to habeas corpus proceedings," given "the special problems and character of such proceedings." *Id.* at 296 (discussing discovery rules).

Accordingly, this Court has previously declined to construe the phrase "civil action" as encompassing habeas proceedings. In *Schlanger* v. *Seamans*, 401 U.S. 487 (1971), the Court considered the scope of 28 U.S.C. 1391(e) (Supp. V 1969), which "provided for nationwide service of process in a 'civil action in which each defendant is an officer or employee of the United States.'" *Schlanger*, 401 U.S. at 490 n.4 (citation omitted). The Court noted that "[t]hough habeas corpus is technically 'civil,' it is not automatically subject to all the rules governing ordinary civil actions." *Ibid.* The Court therefore rejected an "overbroad interpretation" of "the phrase 'civil action'" that would have encompassed habeas proceedings. *Stafford* v. *Briggs*, 444 U.S. 527, 542-543 (1980) (discussing *Schlanger*, *supra*).

There is no sound basis for a different result here. Congress enacted the EAJA nine years after the Court's

decision in *Schlanger* and used the same phrase—"civil action"—that the Court had interpreted not to cover habeas proceedings. § 204(a), 94 Stat. 2328; see *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) (explaining that this Court "normally assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent"). And unlike in *Schlanger*, which did not involve a waiver of sovereign immunity, the question here is not merely whether the phrase "civil action" encompasses habeas proceedings, 28 U.S.C. 2412(d)(1)(A), but rather whether it does so "unequivocally," *Cooper*, 566 U.S. at 290 (citation omitted). In light of this Court's precedent and the "unique" nature of habeas proceedings, *Harris*, 394 U.S. at 294, the court of appeals correctly determined that the answer is no.

2. Petitioners assert (Pet. 10-19) that the courts of appeals are divided over whether habeas proceedings challenging immigration detention qualify as "civil actions" under the EAJA. As petitioners acknowledge (Pet. 10-22), however, only three circuits have squarely addressed that question: the Second, Fourth, and Fifth Circuits. See *Vacchio* v. *Ashcroft*, 404 F.3d 663, 672 (2d Cir. 2005); *Obando-Segura*, 999 F.3d at 192-197; Pet. App. 5a-6a.[3] Of those circuits, only one—the Second

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[3] As petitioners acknowledge (Pet. 20), "[t]he Ninth Circuit has not squarely resolved the question presented." Although the Ninth Circuit in *In re Hill*, 775 F.2d 1037 (1985), characterized a habeas action challenging a "regulatory policy" that prevented certain noncitizens from "enter[ing] the United States" as a "civil action" under the EAJA, *id.* at 1041; see *id.* at 1039, it "did not address whether a habeas action challenging civil immigration *detention* qualifies as a 'civil action,'" Pet. 21. The Tenth Circuit also has not squarely resolved the question presented. Its decision in *Ewing* v. *Rodgers*, 826 F.2d 967 (10th Cir. 1987), held only that "a habeas petition challenging confinement arising from a *criminal* judgment is not a 'civil ac-

Circuit—has held that "a habeas proceeding challenging immigration detention[] constitutes a 'civil action' under the EAJA." *Vacchio*, 404 F.3d at 672. And the Second Circuit reached that conclusion only by invoking "the legislative history of the EAJA" to resolve what the court acknowledged was "ambiguity" in "the term 'civil action.'" *Id.* at 669; see *id.* at 671 n.10 (relying on legislative history to adopt what the court itself recognized was not "the most narrow possible" interpretation of "the term 'civil action'").

Petitioners contend (Pet. 2, 10) that the disagreement between the decision below and the Second Circuit is "intractable." But when the Second Circuit decided *Vacchio* in 2005, it did not have the benefit of this Court's decision in *Cooper*. In *Cooper*, the Court reiterated that "[l]egislative history cannot supply a waiver [of sovereign immunity] that is not clearly evident from the language of the statute," that "[a]ny ambiguities in the statutory language are to be construed in favor of immunity," and that "[a]mbiguity exists if there is a plausible interpretation of the statute that would not authorize [an award] against the Government." 566 U.S. at 290-291. The Court also clarified that those principles apply not only in determining the existence of a waiver of sovereign immunity, but also in determining its "scope." *Id.* at 291.

When the Second Circuit decided *Vacchio*, it also did not have the benefit of the Fourth and Fifth Circuits' application of the relevant sovereign-immunity principles in *Obando-Segura* and the decision below. Indeed, although petitioners say that there is an "entrenched"

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tion'" under the EAJA. *Id.* at 971 (emphasis added; footnote omitted); see Pet. 22 n.5 (declining to count the Tenth Circuit as "part of the circuit split").

conflict (Pet. 2, 25), no circuit disagreement existed until 2021, when the Fourth Circuit decided *Obando-Segura*. See 999 F.3d at 195 & n.4. And the Fourth and Fifth Circuits' recent decisions—along with this Court's intervening decision in *Cooper*—may well prompt the Second Circuit to reconsider its position in *Vacchio*. The question presented would thus benefit from further percolation, and the existing disagreement in the circuits is too shallow and too recent to warrant this Court's review at this time.

3. In any event, even if the question presented otherwise warranted review, these cases would be poor vehicles in which to address it, because the issue would not be outcome-determinative. Under the EAJA, eligibility for an award of attorney's fees and other expenses requires not only that the claimant was a "prevailing party" in a "civil action * * * brought by or against the United States," but also that the United States' position in that action was not "substantially justified." 28 U.S.C. 2412(d)(1)(A). The "term 'substantially justified' means '"justified in substance or in the main"—that is, justified to a degree that could satisfy a reasonable person.'" *Commissioner, INS* v. *Jean*, 496 U.S. 154, 158 n.6 (1990) (citation omitted). A position is substantially justified if it has a "reasonable basis both in law and fact." *Ibid.* (citation omitted).

In both of these cases, the district court denied petitioners' EAJA motions on the ground that the government's position in the habeas proceedings had been "substantially justified." Pet. App. 8a, 30a. Although the court of appeals did not reach that alternative ground, *id.* at 6a, the district court did not abuse its discretion in finding substantial justification for the government's position, see *Pierce* v. *Underwood*, 487 U.S.

552, 557-563 (1988) (holding that a district court's determination on whether the government's position was substantially justified should be reviewed deferentially under an abuse-of-discretion standard).

The key issue in each petitioner's habeas proceeding was whether there was a "significant likelihood of removal in the reasonably foreseeable future." *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2282 (2021) (quoting *Zadvydas* v. *Davis*, 533 U.S. 678, 701 (2001)). To rebut petitioners' showings that there was no such likelihood, the government submitted declarations informing the district court that Venezuela had issued travel documents for both petitioners and that to the extent those documents had expired, new documents were being requested. See 21-30637 C.A. ROA 100-101, 370-371, 458; 21-30748 C.A. ROA 210-211. The government also submitted declarations informing the court that it expected Venezuela to lift COVID-19-related travel restrictions in the near future—at which point "removal operations to Venezuela" would "resume." 21-30637 C.A. ROA 370; 21-30748 C.A. ROA 210.

In light of the government's submissions, the district court did not abuse its discretion in finding that "neither the Government's conduct nor its position in [each case] lacked a reasonable basis in law and fact, particularly given the novel and difficult circumstances involved"—namely, "the evolving COVID-19 pandemic and civil conflict in Venezuela." Pet. App. 31a; see *id.* at 8a. In fact, Venezuela reopened its airports in November 2020, and Gomez Barco was removed the following May—less than six months after the habeas court ordered her release, and only one month later than the government had at one point anticipated when it was defending its position that there was a significant like-

lihood of her removal in the reasonably foreseeable future. See 21-30637 C.A. ROA 457-458; p. 5, *supra*. Because both petitioners would be ineligible for attorney's fees and other expenses regardless of whether their habeas proceedings qualified as "civil actions" under the EAJA, these cases would not be suitable vehicles for addressing the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
SAMUEL P. GO
NICOLE P. GRANT
DHRUMAN Y. SAMPAT
Attorneys

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