IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CATHOLIC BENEFITS ASSOCIATION LCA; THE CATHOLIC INSURANCE COMPANY Plaintiffs, v. SYLVIA M. BURWELL, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY Defendants.	Civil Case No. 5:14-cv-00685-R

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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The Departments' response brief (cited as "RB") begins with the same arguments this Court rejected in *CBA I*. *See* Opening Brief ("OB") at 1, citing *Catholic Benefits Ass'n v. Sebelius*, 2014 WL 2522357, at *8 (W.D. Okla. June 4, 2014) ("*CBA I*"). They contend there is no substantial burden because the accommodation is really an "opt out." And because CBA members are already "effectively exempt," the CBA's real motive, the Departments suggest, is to interfere with their employees' access to CASC services. To this, the Departments add their contention that *Hobby Lobby*[1] defeats the CBA's case. But their brief studiously avoids *Hobby Lobby*'s account of what constitutes a substantial burden.

Because the CBA has shown a substantial burden, the Departments are subject to strict scrutiny, the most demanding test known to constitutional law. Their CASC Mandate is presumptively invalid: unless the Departments prove their case, they lose.

The Departments have not made their case. They pin their hopes on a strained interpretation of Justice Kennedy's concurring opinion, claiming that a single ambiguous phrase displaces the Tenth Circuit's compelling interest analysis. They leave most of the CBA's arguments unanswered. When they do engage the CBA's brief, it is often to assert that they are due such deference that the underlying facts are irrelevant.

I. The CASC Mandate violates the Religious Freedom Restoration Act.

A. The accommodation substantially burdens CBA members' religious exercise.

The CBA's opening brief explains why this Court's holding in *CBA I* still applies. The four Catholic archbishops on the CBA's Ethics Committee have concluded that the augmented accommodation still requires Catholic employers to violate their faith, OB at 6;

[1] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (*"HL II"*).

Am. Verified Compl. ("AVC") ¶ 91, and *Hobby Lobby* confirms that this Court was right to respect the CBA's considered judgment on this "difficult and important question of religion and moral philosophy." OB at 1, 8-10 (quoting *HL II* at 2778).

In response, the Departments replay the same arguments this Court rejected in *CBA I*. They continue to "downplay the importance of executing ESBA Form 700 [and, under the augmentation, the 'notice,'] as well as maintain that any burden imposed by the challenged regulation is indirect and too attenuated to be substantial." *CBA I* at *8; *compare* RB at 11, *with CBA I* RB at 16. The Departments still rely on reasoning in *Notre Dame* and *Kaemmerling*, copied in *Michigan Catholic Conference*. *Compare* RB at 11-14, *with CBA I* RB at 15-18. While they contend their augmented accommodation is a game-changer, RB at 1, they never explain why sending a notice to a different addressee that produces identical effects should alter Catholic moral analysis or this Court's burden analysis.

The Departments' only present one new substantial burden argument: "*Hobby Lobby* confirms the validity of the regulatory accommodations, and its reasoning cannot be reconciled with plaintiffs' position." RB at 8. This argument fails for three reasons: (1) the "accommodation" is not the "opt out" they claim it is; (2) the Departments fail to take into account what *Hobby Lobby* says about substantial burdens; and (3) the arguments for and against the accommodation were not before the Court in *Hobby Lobby*.

1. The "accommodation" is not an exemption. Repeating "opt out" 44 times in their brief, as the Departments do, does not make it so. Even they recognize that their exemption (reserved for houses of worship) and their accommodation (available to other religious

employers[2]) are not the same. Their rhetoric is subtle: the first is "entirely exempt," while the second, with its triggered effects, is only "effectively exempt." RB at 1. By contending that "effectively exempt" is good enough, the Departments "tell the plaintiffs their beliefs are flawed. For good reason, [the Supreme Court has] repeatedly refused to take such a step." *See HL II* at 2778 (rejecting attenuated burden argument). It is as if a prison told Jewish prisoners they should be happy with a diet that is "effectively Kosher."

Neither is it accurate for the Departments to state that the accommodation only requires Group II members to tell the government they object to providing CASC services. RB at 11. Whether it is a form sent to a TPA or a notice to HHS, the government admits the effects are the same. OB at 11, n.15. Furthermore, the Supreme Court recognizes that an act that is "innocent in itself" can become immoral when it has the "effect of enabling or facilitating the commission of an immoral act by another." *HL II* at 2778.

For example, in the late 1990s, Germany allowed abortions only if the woman could present a certificate from an approved counseling center. Some Catholic priests provided such counseling, hoping to persuade the women to keep their children. When Pope John Paul II saw that this counseling—however good in itself—became the legal predicate for the "killing of innocent human beings," he urged German bishops to stop the practice.[3]

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[2] The CBA's Group III members are currently entitled to injunctive relief under *Hobby Lobby v. Sebelius,* 723 F.3d 1114 (10th Cir. 2013) (*"HL I"*) and *HL II*. As noted in CBA's opening brief, OB at 5, 17, the Departments' proposed rule would extend the accommodation to certain closely held for-profit companies. Accordingly, the CBA requests that this Court enter an injunction that covers all CBA members subject to the accommodation, not just Group II members.

[3] *See Eternal Word Television Network, Inc. v. Sec'y of HHS*, 756 F.3d 1339, 1343 (11th Cir. 2014) (*"EWTN")* (Pryor, J., specially concurring); Brief of 67 Catholic Theologians and Ethicists as Amici, pp. 14-16, *Little Sisters of the Poor v. Burwell*, Case No. 13-1540 (10th Cir. Mar. 3, 2014),

Common sense commends the same result. *Pulling a literal trigger* is itself an innocent act. But the act has a different character when the trigger is part of a loaded gun aimed at another.

And so it is with the original or augmented accommodation: the Departments' "accommodation" still requires CBA members to trigger a "mechanism" designed to deliver CASC services. OB at 9-12. Before and after the augmentation, the Departments hijack an "accommodated" employer's plan instead of advancing their interests independently. The Departments do not contest the long list of cascading effects that the CBA has shown follow from participation in the accommodation. For example (*see* OB at 10-12):

- The form or notice "is an instrument under which the plan is operated." Form 700 (Aug. 2014).
- The form or notice result in the TPA becoming "the plan administrator . . . for any contraceptive services required to be covered. . . ." 29 C.F.R. § 2510.3-16(b).
- The form or notice triggers a TPA's or insurer's duty to "provide . . . written notice of the availability of separate payments for contraceptive services. . . ." 26 C.F.R. § 54.9815-2713AT(b)(2).
- The form or notice allows the government to offer TPAs 110% reimbursement for providing CASC services. 45 C.F.R. § 156.50(d)(3).
- The accommodation forces religious employers to communicate with their TPA on an ongoing basis so that the TPA has a current list of employees and beneficiaries for the TPA to notify about the availability of free CASC services.[4]
- The accommodation forces a religious employer to find a replacement TPA that will provide CASC services if its first TPA objects to doing so. 26 C.F.R. § 54.9815-2713A(b)(2); 29 C.F.R. § 2590.715.2713A(b)(2).

2. The Departments ignore Hobby Lobby*'s substantial burden analysis.* The Departments' brief painstakingly avoids Section IV of *Hobby Lobby*, which addresses the substantial burden test.

available at http://www.becketfund.org/wp-content/uploads/2014/03/2014-03-03-67-Theologians-CA10-Amicus-LSP-v-Sebelius.pdf.

[4] An employer, in the ordinary course, informs its TPA each time a new employee joins the plan. Under the accommodation, each update results in more CBA member employees receiving CASC coverage.

This is because *Hobby Lobby* confirms this Court's approach in *CBA I*. OB at 1, 8-9. The Departments' response does exactly what the Supreme Court forbids: it "dodges the question that RFRA presents . . . and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted [by four Catholic archbishops and CBA members] is reasonable)." OB at 9 (quoting *HL II* at 2778).

Just as the Departments ignore the relevant section of *Hobby Lobby*, they also ignore *every substantive decision* in a CASC Mandate case since *Hobby Lobby*—each of which has granted injunctive relief from the accommodation. *See* OB at 4 n.7 (collecting cases).[5] These include the Eleventh Circuit's post-*Hobby Lobby* decision, where Judge Pryor explains why the Sixth and Seventh Circuits' decisions, which play a central role in the Departments' argument, are "wholly unpersuasive" and "[r]ubbish." *EWTN*, 756 F.3d at 1347 (Pryor, J., specially concurring); and *Ave Maria Univ. v. Burwell*, 2014 WL 5471048, at *4 (M.D. Fla. 2014), the first court to address whether the augmented accommodation changes the substantial burden analysis, which concluded that "this distinction [between the first and second accommodation] is not so significant to warrant departure" from the Eleventh Circuit's *EWTN* decision.

3. The accommodation was not before the Court in Hobby Lobby.The Departments state that the "existence" of the accommodation "was crucial to the Court's reasoning" in *Hobby Lobby*, RB at 1, but they go too far when they claim *Hobby Lobby* "confirms the validity of the regulatory accommodations," *id.* at 8. The Court did no such thing. *See* OB at 4 n.6. The

[5] The Departments err by claiming support from the Sixth Circuit's denial of plaintiffs' petition for rehearing *en banc*. RB at 13 n.4; *Robertson Oil Co. v. Phillips Petro. Co.*, 14 F.3d 373, 388 (8th Cir. 1993) ("Denial of a petition for *en banc* review has no precedential value . . . .").

accommodation was "never suggested in the parties' presentations" and was "not criticized with a specific objection that has been considered in detail by the courts in this litigation." *HL II* at 2803 n.27 (Ginsburg, J., dissenting), 2786 (Kennedy, J., concurring). The Court appropriately "refus[ed] to decide a case that [was] not before us here." *Id.* at 2782 n.40.

Whatever the Court may have meant by "effectively exempt[]," *id.* at 2763, *Hobby Lobby* does not displace the careful study that has been given to the accommodation in the dozens of cases that have granted religious employers relief from the accommodation.[6] Courts "are not bound to follow [the Supreme Court's] dicta" on an issue that "was not fully debated" by the Court. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368-69 (2013).

B. The Departments have not proven a compelling government interest.

Because the CASC Mandate substantially burdens CBA members' religious practices, it is subject to strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). Therefore, the Mandate is "presumptively invalid, and the [Departments must bear] the burden to rebut that presumption." *United States v. Stevens*, 559 U.S. 460, 468 (2010).

As the CBA explained in its opening brief, the Departments' compelling interest argument fails every test ever devised by the Supreme Court. OB at 13-18. The Departments seek to override CBA members' religious freedom based on "broadly formulated" interests, even as they exempt "tens of millions" from the same mandate. *Id.* at 14. Contraceptives are so widely used that any "marginal" gain won by coercing CBA members would be "modest"

[6] *See* The Becket Fund for Religious Liberty, *HHS Mandate Information Central*, http://www.becketfund.org/hhsinformationcentral/ (listing 33 injunctions granted in non-profit cases challenging the Mandate).

and "hardly . . . a compelling state interest." *Id.* at 14-15. The IOM Report commissioned by HHS does not establish a direct causal link between free CASC services and fewer unintended pregnancies or better health for women. *Id.* at 15-16. Congress has repeatedly refused to pass a contraception mandate, just as it refused to "fix" the mandate after *Hobby Lobby*. *Id.* at 16-17, 5. No court has ever recognized an *executive agency's* policy agenda as a compelling *government* interest under such circumstances. To do so here would be deeply corrosive of our constitutional structure and the liberty guaranteed by the First Amendment. *See* OB at 16-17 (citing Tr. of Oral Argument at 56:19-57:4, *HL II* (Kennedy, J.)).

The Departments contend that none of this matters because Justice Kennedy joined the four dissenting justices in finding that the CASC Mandate "serves the [g]overnment's compelling interest." RB at 14 (quoting *HL II* at 2785-86 (Kennedy, J., concurring)). Because "the Supreme Court has now made clear that the government's interest is compelling," say the Departments, the Tenth Circuit's strict scrutiny analysis is no longer controlling. *Id.* at 14 n.5. The Departments' reading of Kennedy's concurrence is untenable. As for the CBA's substantive arguments, the Departments either ignore them or say they simply do not matter, given the deference they claim their opinions are due.

1. *Justice Kennedy did not abrogate the Tenth Circuit's holding.* The Departments' interpretation of Justice Kennedy's concurrence is untenable. First, as noted above, courts are not bound by Supreme Court dicta on issues that were not fully debated by the Court. This is all the more true where one is considering a concurring or dissenting opinion. Second, Kennedy's concurrence gives only one paragraph to the compelling interest prong. *HL II* at 2785-86. These three sentences give no indication Justice Kennedy measured the accommodation

against *any* of the Court's tests that identify an "interest of the highest order."

Third, even if such a brief treatment could carry weight, the meaning of Justice Kennedy's statement is ambiguous. When he writes that HHS "*makes the case* the mandate serves the Government's compelling interest," *id.* at 2785, "makes the case" could mean "contends" or "establishes." He has used this phrase elsewhere to describe ***and then reject*** a party's argument. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 533-34 (2004) (Kennedy, J.) ("[Petitioner] ***makes the case*** for ambiguity, for the most part, by comparing the present statute with its predecessor. . . . ***That contention is wrong***.").

Fourth, the Departments' reading creates unnecessary tension between Justice Kennedy's concurrence and the Court's opinion—which he signed in full. When Kennedy wishes to note his disagreement with the Court's (or the plurality's) reasoning, he merely "concurs in the judgment."[7] Here, he "join[ed] the Court's opinion"—and not just for his own reasons, but for "others put forth by the Court." *Id.* at 2785, 2787.

In both Supreme Court cases addressing the Affordable Care Act, Kennedy stressed the importance of separation of powers as a bulwark to protect liberty. OB at 16-17. The *Hobby Lobby* opinion that Kennedy joined *without reservation* endorses the Tenth Circuit's reasons for holding that the Departments failed to show that their interests in the CASC Mandate are

[7] For example: *United States v. Comstock*, 560 U.S. 126, 150-51 (2010) (Kennedy, J., concurring in the judgment) (writing separately "to **withhold assent from certain statements and propositions of the Court's opinion**."); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782-83 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("**My views do not allow me to join** the balance of the opinion . . . . **[T]his separate opinion is necessary to set forth my conclusions . . .**"); and *Missouri v. Seibert*, 542 U.S. 600, 618 (2004) (Kennedy, J., concurring in the judgment) ("Although I agree with much in the careful and convincing opinion for the plurality, **my approach does differ in some respects, requiring this separate statement**.").

"of the highest order." OB at 1-2, 13-15. But the Departments contend that Kennedy, without any analysis, brushed all this aside and anointed their interests as compelling. This is a slim reed on which to disregard the Tenth Circuit's considered judgment.

2. The Departments fail to show a "direct causal link." When the Departments do note some CBA arguments, it is only to conclusorily dismiss them given Justice Kennedy's (supposed) endorsement and the broad deference the Departments claim their pronouncements are due. For example, the CBA's brief shows that the IOM Report does not meet the Supreme Court's "direct causal link" requirement for a compelling interest. OB at 15-16. The Departments answer that Professor Alvaré's "article is a poor substitute for the scientific studies relied on by the IOM." RB at 16 n.6. But the Departments also dismiss the CBA's review of these scientific studies as "flyspecking." *Id.*

The real problem, according to the Departments, is that the CBA refuses to passively accept the IOM Report's conclusions at face value. It is enough that the IOM *says* that the Mandate will accomplish the Departments' goals. *Id.* at 15-16. IOM "determined" that CASC Services are "necessary," and the IOM is "entitled to deference," full stop. *Id.* at 16 n.6. It simply does not matter that *the IOM Report itself* can do no better than hope that free contraceptives "could" or "might help" advance the Departments' goals. *See* OB at 15 (quoting IOM Report at 109, 108). The Departments' bluster aside, the law is otherwise: such "ambiguous proof will not suffice" to prove up a compelling interest. *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2739 (2011).

3. The Departments cannot explain away the Mandate's exemptions. The Departments also challenge the CBA's charge that the CASC Mandate "leave[s] appreciable damage to [their]

supposedly vital interest[s] unharmed." OB at 14 (quoting *HL I* at 1143 (citation omitted)). "[P]laintiffs' alleged 'exemptions' do not undercut the government's position." RB at 18. But these are not new arguments: this Court, the Tenth Circuit, and the Supreme Court have all concluded these exemptions are real—and they matter. OB at 14 (citing *HL I* at 1143, *HL II* at 2764, 2780); *see also CBA I* at *9. Further, the Departments do not explain how their interests can be compelling when the Mandate is excluded from the "particularly significant protections" even grandfathered plans must comply with. *Id.* (citing *HL II* at 2780).

4. The Departments fail to show Congress shares their interest in the Mandate. Equally toothless is the Departments' attempt to prove that Congress passed the Women's Health Amendment with the CASC Mandate in mind. The Departments quote Senator Mikulski, the amendment's sponsor, who laments high copayments can push women to "avoid getting [the services] in the first place." RB at 17. But the "services" Mikulski was referring to in the floor debate were those directed at preventing "the top killers of women," specifically cardio and vascular disease and breast, ovarian, cervical, and lung cancer. 155 Cong. Rec. S12269. Elsewhere in her speech, Senator Mikulski mentions mammograms and diabetes, *id.*, but nowhere suggests that her bill will would cover contraceptives—let alone abortifacient drugs.

C. The Departments have not satisfied the least restrictive means test.

Even if the Departments could show a compelling interest, they must also satisfy the "exceptionally demanding" least restrictive means test. OB at 18 (quoting *HL II* at 2780). For the reasons stated in the CBA's opening brief, the Departments have not done so. *Id.* at 18-19. Most obviously, the Departments have failed to prove that what the Supreme Court called the "most straightforward" path—providing free CASC services itself—"is not a

viable alternative." *Id.* (quoting *HL II* at 2780). The Departments have also failed to respond to the alternatives the CBA has provided, the same ones it listed in its *CBA I* motion for preliminary injunction. *Compare* OB at 19, *with CBA I* OB (Dkt. 5) at 17-18.

The Departments fail to account for these alternatives not just here, but each time they accuse CBA members of trying to prevent third parties from providing their employees with CASC services. RB at 3, 7, 8, 9; *see also CBA I* RB (Dkt. 29) at 2, 18. This is a tired argument with no basis. The CBA and its members have suggested four ways the government could provide free CASC services without hijacking their plans.[8]

Unable to meet their burden, the Departments claim they need not respond to the CBA's suggested alternative means because they have concluded that these will not be as "seamless" as the accommodation in accomplishing their interests. *Id.* at 21 (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997)).

This low bar is not what the Supreme Court calls strict scrutiny. "When a ***plausible***, less restrictive alternative is offered . . . , it is the Government's obligation to ***prove*** that the alternative will be ***ineffective*** to achieve its goals." *Playboy Entm't,* 529 U.S. at 816. This standard, and not what appears in the response brief, reflects the Supreme Court's charge that the Departments dispel proffered alternatives with a substantive accounting, such as "statistics" (or at least an account of why the Departments are "unable to provide such statistics"). *HL II* at 2780-81. By suggesting that their burden is otherwise, the Departments continue to "reflect[] a judgment about the importance of religious liberty that was not

[8] To underline the point further, countless CBA member employees and beneficiaries are *currently* eligible for free or subsidized CASC services through Medicaid, Title X, or other government programs. *See* OB at 19 n.27. The CBA and its members have not objected to or attempted to block the government from providing such services.

shared by the Congress that enacted [RFRA]." OB at 18 (quoting *HL II* at 2781).

II. The CASC Mandate violates the Establishment Clause.

The Departments do not engage the CBA's Establishment Clause argument, referring instead to their brief from *CBA I*. RB at 22 (citing *CBA I* RB at 21-23).[9] The Departments do not contest that the CASC Mandate's elaborate religious classification scheme picks religious winners and losers. *See* OB at 19-22. The Establishment Clause squarely bars such state action. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

III. The regulations are "arbitrary, capricious," and "an abuse of discretion."

The Departments have violated the Administrative Procedure Act: (1) Labor claims it can unilaterally rewrite private contracts when Congress says otherwise; (2) HHS asserts a direct link between the Departments' interests and the Mandate when the IOM Report and its sources say otherwise; and (3) the Departments exclude obviously religious employers from their "religious employer" exemption based on unsubstantiated guesswork. OB at 22-24.

Here again, instead of engaging Plaintiffs' arguments, the Departments claim the details simply do not matter because of the deference to which they are due. As they see things, Labor's assertion of power under 29 U.S.C. § 1002(16)(A) "is clearly entitled to deference," RB at 22, *even when* their interpretation renders part of that statute superfluous, *see* OB at 22 (citing *Corley v. United States*, 556 U.S. 303, 304 (2009)).

Likewise, the Departments do not contest CBA's claim that HHS "rubber stamp[ed]" the IOM Report; they simply claim it does not matter. They do not argue that their adoption meets *any* of the standards cited in the CBA's brief, but dismiss these citations as "wholly

[9] The Departments state that the few courts that considered the Establishment Clause claim in this context rejected it. RB 22. None has considered it as presented here.

inapposite." *Id.* at 24 n.10. The Departments lawlessly claim they can adopt the IOM Report without "any sort of 'factual determination.'" *Id.* at 24. This is the definition of "arbitrary and capricious." The APA calls for a "probing, in-depth review" to determine whether an agency has failed to "examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choice made." *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1220-21 (10th Cir. 2009) (citations omitted).

Finally, the Departments defend their cribbed "religious exemption" by asserting that their distinction between churches and other religious nonprofits "must be upheld so long as 'the agency's path may reasonably be discerned.'" *Id.* at 24 n.11 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). But the Departments' problem here is that their "path" *can* "reasonably be discerned," and that path, by the Departments' own testimony, involves mere hunches. *See* OB at 23 (citing AVC ¶ 165; Ex. 8 to AVC at 34:9-24). These three APA violations alone warrant injunctive relief.

IV. The CBA has satisfied the other preliminary injunction factors.

The final section of the Departments' brief is almost word-for-word what they argued in their *CBA I* response brief. *Compare* RB at 25, *with CBA I* RB at 24-25. In the dozens of Mandate cases, no court has ever found that the plaintiffs have failed to satisfy these factors. The Departments have provided this Court with no reason to overturn its decision in *CBA I* that the remaining requirements favor granting an injunction. *See CBA I* at *9.

V. Conclusion

For these reasons, Plaintiffs respectfully request the relief stated in their motion.[10]

[10] The CBA requests relief for future members. OB at 25. The Departments did not object.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

s/ Ian S. Speir
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