No. 23-3624 (consolidated with 23-3627)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, et. al.,
Plaintiffs-Appellants,
v.
BUREAU OF LAND MANAGEMENT, et. al.,
Defendants-Appellees,
CONOCOPHILLIPS ALASKA, INC., et. al.,
Intervenor-Defendants-Appellees.
SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC, et. al.,
Plaintiffs-Appellants,
v.
BUREAU OF LAND MANAGEMENT, et. al.,
Defendants-Appellees,
CONOCOPHILLIPS ALASKA, INC., et. al.,
Intervenor-Defendants-Appellees.

On Appeal from the United States District Court for the District of Alaska
Case Nos. 3:23-cv-00058 & 3:23-cv-00061 (Hon. Sharon L. Gleason)

ALASKA CONGRESSIONAL DELEGATION'S AND ALASKA STATE LEGISLATURE'S *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS' AND INTERVENOR-DEFENDANTS' ANSWERING BRIEFS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiae United States Senator Dan Sullivan, United States Senator Lisa Murkowski, United States Representative Mary Sattler Peltola, and the Alaska State Legislature (collectively "Alaska Elected Officials Amici") are a bipartisan coalition of the elected leaders of the people of Alaska in State and Federal Government.[1] As the representatives of all Alaskans, they have a strong interest in providing relevant briefing on the proper interpretation of the Alaska-specific statutes at issue here, and the public interests at stake in the Willow Project.

In February 2023, the Alaska State Legislature unanimously passed a resolution supporting oil and gas leasing and development within the National Petroleum Reserve in Alaska and noting that further delay in approval or construction of the Willow Project would undermine the benefits of the project to the state and the Nation and be contrary to the public interest.

In doing so, they joined the bipartisan Alaska Congressional Delegation's strong conviction that the economic and energy security benefits of Willow were in the best of interests of Alaskans and the Nation.

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[1] Amici file this brief pursuant to Fed. R. App. P. 29. This brief was authored by counsel. No party or person contributed money that was intended to fund preparing the brief.

The broad and bipartisan support among Alaska's leaders stems from the simple fact that Alaska would not exist, and cannot thrive without the responsible development of its resources. The Alaska Congressional Delegation and Alaska State Legislature stand together with countless Alaskans and local leaders on the North Slope and file this brief to demonstrate that the approval of the Willow Project by BLM, and the district court's decision, were faithful to the federal statutes at issue here.

INTRODUCTION

The Alaska Congressional Delegation and Alaska State Legislature file this brief because (1) Alaska's leaders in the federal and state governments have a special interest in ensuring that the federal laws which define the federal government's relationship with the State of Alaska are properly carried out according to the will of Congress, and (2) the vacatur sought by Appellants would cause needless disruption and inequitable harm to Alaska and many diverse groups of Alaskans. All parties have consented to the filing of this brief.

ARGUMENT

I. BLM's reasoned decision making struck the proper balance required by the unique federal statutory scheme governing Alaskan development.

The Appellants' briefs misconstrue the Alaska-specific statutes at issue, upsetting the balance these statutes strike between resource development, environmental protection, and furthering subsistence uses and Alaska Native self-determination.

Congress has long made clear that the public has an important interest in safe and environmentally responsible oil and gas development on public lands.[2] Ensuring affordable energy has influenced U.S. energy, national security, and economic policy for decades.[3] For Alaska's North Slope, Congress determined in the Trans-

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[2] *See, e.g., California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961) ("The public does not benefit from resources that remain undeveloped, and the Secretary must administer the [Mineral Leasing Act] so as to provide some incentive for development."); Outer Continental Shelf Lands Act, 43 U.S.C. § 1332(3) ("the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs").

[3] *See, e.g.,* Energy Policy and Conservation Act, 42 U.S.C. § 6231(a) (1975) ("The Congress finds that the storage of substantial quantities of petroleum products will diminish the vulnerability of the United States to the effects of a severe energy supply interruption, and provide limited protection from the short-term consequences of interruptions in supplies of petroleum products."); Energy Policy Act of 2005, Pub. L. No. 109-58, § 961, 119 Stat. 594, 889 (2005) ("The Secretary shall carry out research, development, demonstration, and commercial application programs in fossil energy, including activities under this subtitle, with the goal of improving the efficiency, effectiveness, and environmental performance of fossil energy production, upgrading, conversion, and consumption. Such programs take

Alaska Pipeline Authorization Act of 1973 that the national interest is advanced by bringing North Slope oil to market.[4] Specifically, Congress declared "that the crude oil on the North Slope of Alaska is an important part of the Nation's oil resources, and that the benefits of such crude oil should be equitably shared, directly or indirectly, by all regions of the country."[5]

To help meet these objectives, Congress, in 1980, mandated for the National Petroleum Reserve-Alaska ("NPR-A"), that the Secretary "conduct an *expeditious* program of competitive leasing of oil and gas in the Reserve in accordance with this Act."[6] Over forty years later, further delay of the carefully considered and analyzed Willow Project thwarts this clear Congressional mandate.

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into consideration the following objectives . . . . (4) Decreasing the dependence of the United States on foreign energy supplies. (5) Improving United States energy security."); Energy Independence and Security Act of 2007, Pub. L. No. 110-140, preamble., 121 Stat. 1492 (2007) (providing that the purpose of the Act is "[t]o move the United States toward greater energy independence and security").

[4] 43 U.S.C. § 1652(a) ("The purpose of this chapter is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto.").

[5] Pub. L. 93–153, Title IV, §410, Nov. 16, 1973, 87 Stat. 594.

[6] Naval Petroleum Reserves Production Act, Pub. L. No. 96-514, 94 Stat. 2964 (1980) (codified at 42 U.S.C. § 6506a) (emphasis added); 42 U.S.C. § 6506a(k)(1)(A) ("To encourage the greatest ultimate recovery of oil or gas or in the interest of conservation, the Secretary may waive, suspend, or reduce the rental fees or minimum royalty, or reduce the royalty on an entire leasehold (including on any

Appellants, however, ignore the overriding purpose of the Naval Petroleum Reserves Production Act, and seek judicial intervention to mandate that lands Congress designated for resource development in the NPR-A instead be managed as a *de facto* conservation unit. They are wrong. As discussed in depth by Intervenor-Defendant Arctic Slope Regional Corporation ("ASRC"), BLM dutifully complied with the Naval Petroleum Reserves Production Act's "maximum protection" of the Teshekpuk Lake Special Area while striking a reasoned balance between that protection and the expeditious development envisioned by the Act.[7] This balance is shown by the significant mitigation measures incorporated into Alternative E.[8]

Relatedly, BLM properly struck the balance drawn by the Alaska National Interest Lands Conservation Act ("ANILCA") between subsistence uses and resource development. The due consideration of subsistence uses is powerfully demonstrated by the sixteen-point list of subsistence-benefitting changes compiled

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lease operated pursuant to a unit agreement) . . . ."); *see generally ConocoPhillips Alaska, Inc. v. AOGCC*, Case No. 3:22-cv-00121-SLG at 2-3 (D. Alaska Mar. 8, 2023) (citing N. Alaska Env't Ctr. v. Norton, 361 F. Supp. 2d 1069, 1072 (D. Alaska 2005) (discussing how the Naval Petroleum Reserves Production Act recognizes the NPR-A "as a potential source for oil and gas exploration and production while simultaneously assuring that environmental concerns would not be overlooked")).

[7] Arctic Slope Regional Corporation's Opening Brief at 29-32, Doc. 108.1 ("ASRC Brief").

[8] North Slope Borough's Response Brief at 22, Doc. 109.1 ("NSB Brief") (listing Alternative E's smaller footprint, reduction in oil production and greenhouse gas emissions, 40% less infrastructure within the TSLA, and the relocation of infrastructure as protection related changes).

by the Kuukpik Corporation, the Alaska Native village corporation for Nuiqsut, the village closest to the future Willow site.[9] Further, as detailed by ConocoPhillips, the many environmentally protective conditions and stipulations in place for the Willow Project have led the local leaders of Nuiqsut to now commit to work closely with ConocoPhillips and BLM.[10]

Finally, Congress has also made clear in the Alaska Statehood Act, Alaska Native Claims Settlement Act ("ANCSA"), and ANILCA, that certain lands, like those designated by Congress for oil development in the NPR-A, would be managed to generate economic opportunities and revenue for Alaska's socio-economic wellbeing, the viability of state and local governments, and the economic self-sufficiency of Alaska Natives, while development would be precluded on other lands for the purpose of environmental protection.[11] In approving Willow, BLM has

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[9] Intervenor-Appellee Kuukpik Corporation's Answering Brief at 12, 41-42, Doc. 111.1 ("Kuukpik Brief").

[10] ConocoPhillips Brief at 11, 66.

[11] *See, e.g., Sturgeon v. Frost* (*Sturgeon II*), 139 S. Ct. 1066, 1075-1076 (2019) (discussing the balance in ANILCA between "sufficient protection for the national interest in the scenic, natural, cultural and environmental values" and "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people"); FSEIS, Vol. 1 at 302 ("The desire to develop oil and gas resources on the North Slope was a major factor in passage of the ANCSA and creation of ANCSA Native corporations"); *see also ConocoPhillips Alaska, Inc v. Alaska Oil and Gas Conservation Commission*, 2023 U.S. Dist. LEXIS 39110 at *2-3 (D. Alaska Mar. 8, 2023) (citing *N. Alaska Env't Ctr. v. Norton*, 361 F. Supp. 2d 1069, 1072 (D. Alaska 2005) (discussing how the Naval Petroleum Reserves Production Act recognizes the NPR-A "as a potential source for oil and gas exploration and

executed this statutory scheme by engaging in robust NEPA processes – spanning decades – and then selecting an alternative which allows for the responsible development of these lands while protecting subsistence uses and surface values. Respect for this balance is necessary for Alaska to exist and for the Alaska Natives living on the North Slope to continue their traditional way of life and pursue both beneficial development and self-determination as promised to them in ANCSA and ANILCA.

In short, Alaska's Native leaders, elected Federal and State representatives, a broad coalition of Alaska economic, business, and labor organizations, and nearly every entity affected by the Willow Project on the North Slope, strongly object to Appellants' attempt to overturn the Congressional mandate set forth in the Naval Petroleum Reserves Production Act, which allows for an "expeditious program" that results in the responsible development of the NPR-A.[12]

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production while simultaneously assuring that environmental concerns would not be overlooked")).

[12] *See* Alaska Congressional Delegation's and Alaska State Legislature *Amicus Curiae* Brief in Support of Defendants' and Intervenor-Defendants' Opposition to Plaintiffs' Emergency Motions for Injunction Pending Appeal at 10-12, Doc. 25.1 ("Alaska Elected Officials Amici Brief") (detailing the broad support for the Willow Project).

II. The Willow Project is Important for this Nation's True Energy Security.

Alaska Elected Officials Amici have continuously stressed the importance of the Willow Project to this Nation's energy security. In response, *amici curiae* members of congress ("Congressional Amici") argue, counterintuitively, that the Nation's supply of energy is more secure if the substantial resources within this petroleum reserve are kept in the ground.[13] This tortured version of "energy security" does not withstand scrutiny.

In reality, the more domestic resources this Nation is able to access, the more secure its supply of energy will be. This was true decades ago and remains true today. Recent events, most notably the severe energy disruptions immediately following Russia's invasion of Ukraine, demonstrate the continuing relevance of true energy security to this Nation and its people. Indeed, in response to rising oil prices caused by the Russian invasion, the Biden Administration depleted nearly half of the Strategic Petroleum Reserve to limit rising fuel prices, leaving the stockpile at its lowest levels since the early 1980s. Congressional Amici suggest that Congressional intent to ensure energy security is a thing of the past;[14] in reality, it is alive and well.[15]

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[13] Brief of *Amici Curiae* Members of Congress in Support of Plaintiffs-Appellants and Reversal at 10, Doc. 65.2 ("Congressional Amici Brief").

[14] *Id.*

[15] See, e.g., Energy Policy and Conservation Act, 42 U.S.C. § 6231(a); Energy Policy Act of 2005, Pub. L. No. 109-58, § 961, 119 Stat. 594, 889 (2005) ("The

Congressional Amici attempt to shoehorn a very different point into the concept of energy security, namely, they believe that this project exacerbates the "climate crisis" to such a degree that its negatives outweigh its benefits.[16]

What Congressional Amici fail to acknowledge is that BLM's thorough evaluation of the project concluded that shutting down Willow will not meaningfully lower global greenhouse gas emissions.[17] Instead, all cancelling Willow will accomplish is the transfer of the massive benefits of resource development – energy security, jobs, economic development, and revenue for governments – away from Alaskans and the Nation and, in large part, to foreign oil producing countries. As BLM found in the FSEIS, shutting down Willow will simply lead to substitute energy from other sources, notably imported oil, and only .5% of the substitute energy will be electricity from renewable sources.[18]

Secretary shall carry out . . . programs in fossil energy [and] take into consideration the following objectives . . . . (4) Decreasing the dependence of the United States on foreign energy supplies. (5) Improving United States energy security."); Energy Independence and Security Act of 2007, Pub. L. No. 110-140, preamble., 121 Stat. 1492 (2007) (providing that the purpose of the Act is "To move the United States toward greater energy independence and security").

16 *See* Congressional Amici Brief at 9-12.

17 SER-799 (noting that, if the Willow project does not go forward, approximately 82% of the substitute energy will come from other sources of oil, with 52% specifically from imported oil).

18 *Id.*

Congressional Amici present a false choice. Shutting down Willow will not actually remedy the climate-related harms they allege, while instead harming the Nation's energy security, the numerous Alaska Native groups and local stakeholders relying on the Willow Project, and Alaskans more broadly.

III. The Congressional Intent of the Naval Petroleum Reserves Production Act is Clear.

The transparent intent of the Naval Petroleum Reserves Production Act is to produce petroleum from the NPR-A, while mitigating the adverse effects of that development. Congressional Amici argue that Congress did not actually mean what is said when it directed the Secretary to conduct an "expeditious program" of oil and gas leasing.[19] Instead, Congressional Amici miss the forest for the trees when arguing that Congress' true intent in opening up the petroleum reserve to development was, in fact, potential future environmental protection, and not the expedited development of the petroleum resources.

The strongest indicator of Congress' intent is the words it writes and enacts into law. Section 6506a of the NPRPA first directs the Secretary to conduct an "expeditious program" of oil and gas leasing in (a). In (b), the statute allows "necessary and appropriate" mitigation measures to "mitigate reasonably foreseeable and significantly adverse effects on surface resources" at the discretion

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[19] Congressional Amici Brief at 12-18, Doc. 65.2.

of the Secretary. The clear intent of the Naval Petroleum Reserves Production Act was, first, land should be leased so oil can be produced, and, second, in doing so, the Secretary should use their discretion to mitigate adverse effects as appropriate. The district court and BLM properly recognized this natural and intuitive understanding of the words of Congress in the Naval Petroleum Reserves Production Act.[20]

Amici's argument that the expeditious clause was improperly "infused" into the district court's NEPA analysis is not correct. First, the district court should not be faulted for being aware of unmistakably relevant statutory text. Indeed, as the Ninth Circuit held when previously dealing with NEPA, the NPR-A, and the Naval Petroleum Reserves Production Act, "our task . . . is to give effect to Congressional intent as expressed not only in NEPA, but also in the 1976 and 1980 enactments relating to the Alaska Reserve."[21] The district court plainly did that here.

Congressional Amici's claim that the district court overemphasized Congress' demand for expeditious development ignores the district court's consistent acknowledgment of the "two directives" and "two objectives" of the Naval Petroleum Reserves Production Act.[23] Reviewing the district court's 109-page Decision & Order, the "two directives" of the Naval Petroleum Reserves Production

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[20] Decision & Order at 20, *SILA et. al. v. BLM et. al.*, Case 3:23-cv-00058-SLG, Doc. 166 (D. Alaska, Nov. 9, 2023) ("Decision & Order").

[21] *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006).

[23] Decision & Order at 13, 14, 29, 30.

Act, (1) resource development and (2) mitigation of the adverse effects of that development, take a proper role.[22]

Far from crowding out NEPA principles, the expeditious development clause takes a small role in the district court's methodical analysis. That analysis begins with NEPA's purpose of facilitating reasoned decisionmaking by considering a reasonable range of alternatives, notes the court's own prior narrow remand, examines the relevant purpose and need statement, discusses Ninth Circuit precedent directly relevant to the case, considers the underlying leases, the 50 alternatives examined by BLM, and the protections present within BLM's Preferred Alternative, and concludes that BLM complied with NEPA's requirements.[24] Examined in context, the district court's references to Congress' intent for expeditious development did not diminish NEPA or the mitigation language of the Naval Petroleum Reserves Production Act as Congressional Amici argue. The district court's thorough and informed NEPA analysis should be affirmed.

In short, Appellants and Amici seek to disrupt the balance in the Naval Petroleum Reserves Production Act between development and mitigation of adverse effects, correctly recognized by the district court,[25] and transform the Petroleum

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22 *Id.* at 29.

24 *Id.* at 11-32.

25 *Id.* at 29.

Reserve into a *de facto* conservation unit. In doing so, they contradict not only the congressional mandate to the Secretary, but also the commitments made to Alaska Natives in ANCSA and ANILCA that sufficient land would be open to resource development for their economic self-sufficiency.

IV. Vacatur of BLM's fundamentally sound decision would cause unnecessary disruption and inequitable harm to Alaskans.

Amici strongly believe that the challenged decisions are lawful. However, if an error is found, vacatur would be an inappropriate equitable remedy due to the grave consequences it would bring for the Alaskans that Amici represent.

Vacatur is not an automatic remedy for agency error, but instead requires balancing the "seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed."[26] The disruptive consequences of continuing to delay this extensively analyzed Project are enormous. As set forth in the Delegation's amicus brief responding to Appellants' initial emergency motions for an injunction pending appeal, this Project has received unprecedented *unanimous* support from Alaska's State and Federal elected leaders because it is unquestionably in the public interest and vital to Alaska, local

[26] *SEIA v. FERC*, No. 20-72788, slip op. at 68 (9th Cir. Sep. 5, 2023) (quoting *Center for Food Safety v. Regan*, 56 F.4th 648, 663 (9th Cir. 2022) (internal quotation marks omitted).

stakeholders, and Alaskans more broadly.[27] In addition to the Nation's energy security benefits, billions of dollars will flow to state and local governments over the life of project, fostering wide ranging socio-economic benefits. And as detailed by ConocoPhillips, ASRC, Kuukpik, and the North Slope Borough, vacatur could end the Project entirely or substantially delay it, causing tremendous economic and subsistence related harms.[28]

As to the seriousness of the agency's errors, vacatur is appropriate when there are "fundamental flaws in the agency's decision [that] make it unlikely that the same rule would be adopted on remand."[29] The Ninth Circuit has recently re-iterated that even serious errors, such as the failure to complete an Environmental Assessment

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[27] Alaska Elected Officials Amici Brief at 10-12; Joint Resolution No. 6, 33rd Legislature at 22-26, Doc. 25.1.

[28] *See* ConocoPhillips Brief at 76 (noting that the consequences of vacatur would be devastating for the future of the project); ASRC Brief at 36-37 (detailing that vacatur risks ending the project outright, and listing the multiple forms of harm from the possible end of the Project, including billions of lost taxes and millions of lost revenue for local stakeholders and the substantial harm to individual ASRC Iñupiat shareholders springing from further Project delay); Kuukpik Brief at 52 (emphasizing that vacatur risks the loss of beneficial mitigation measures important to local stakeholders); NSB Brief at 76-77 (noting that vacatur will endanger revenues which fund important climate mitigation efforts).

[29] *SEIA*, No. 20-72788 at 68 (2023) (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)).

entirely, do not require vacatur in the face of drastic consequences.[30] BLM's decision to allow the Willow Project to move forward is not fundamentally flawed. Instead, it is the logical extension of Congress' mandate for the lands of the NPR-A to be expeditiously developed, the Biden administration's finding that the land allocations in the Integrated Activity Plan struck the proper balance between development, environmental protection, and subsistence,[31] and the product of multiple rounds of reasoned decision making over many years by expert agencies. Any potential error does not necessitate vacatur.

Finally, vacatur, like injunctive relief, is an equitable remedy.[32] ASRC, representing 13,900 Iñupiat shareholders, Kuukpik, the only private landowner near Willow and the representative of the indigenous people of the Colville River Delta, and the North Slope Borough, the local government representing the eight remote Native villages on Alaska's North Slope, have cataloged the imminent and substantial economic and subsistence harms if BLM's ROD and related decisions are vacated.[33] In comparison, many of the harms claimed by Appellants, such as

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30 *Id.* at 69; *see Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (declining to vacate an EPA final rule when vacatur would delay a much needed power plant).

31 BLM_3377_AR516637, AR516652.

32 *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1018 (E.D. Cal. 2013).

33 ASRC Brief at 36-37; Kuukpik Brief at 52; NSB Brief at 76-77.

potentially viewing some infrastructure when camping or travelling in the area, pale in comparison to the immense injustices that such a vacatur would cause for the residents of Alaska's North Slope.[34] Given this great disparity in harm, vacatur would be clearly inequitable.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

DATED at Anchorage, Alaska this 19th day of January, 2024.

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[34] *See, e.g., CBD* Plaintiffs-Appellants Reply in Support of their Emergency Motion Per Circuit Rule 27-3 at 20-21, Doc. 35.1 (detailed the alleged harms to *CBD* members Daniel Ritzman and Josh Oboler).

CERTIFICATE OF SERVICE

I hereby certify on January 19, 2024, I caused to be electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification and electronic service of the same to all counsel of record.

HOLLAND & HART LLP

/s/ Jonathan W. Katchen

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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