No. 21-35220

In the United States Court of Appeals for the Ninth Circuit

WILBUR SLOCKISH, HEREDITARY CHIEF OF THE KLICKITAT/CASCADE TRIBE; CAROL LOGAN; CASCADE GEOGRAPHIC SOCIETY; MOUNT HOOD SACRED LANDS PRESERVATION ALLIANCE,
Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF TRANSPORTATION, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
Case No. 3:08-cv-01169
Hon. Marco A. Hernández

BRIEF *AMICI CURIAE* OF THE JEWISH COALITION FOR RELIGIOUS LIBERTY, THE SIKH COALITION, THE AMERICAN ISLAMIC CONGRESS, AND PROTECT THE FIRST FOUNDATION IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTEREST OF AMICI CURIAE[1]

Amici are organizations deeply committed to defending the rights of religious communities. *Amici* believe it is especially important to defend the religious liberty of minority faiths and religious communities like the Yakama Nation and Grande Ronde Tribes—because the religious liberties of minority and majority groups rise and fall together.

The Jewish Coalition for Religious Liberty is an association of American Jews concerned with the current state of religious liberty jurisprudence. It aims to protect the ability of all Americans to practice their faith freely and to foster cooperation between Jews and other faith communities. Its founders have joined *amicus* briefs in the Supreme Court of the United States and lower federal courts, submitted op-eds to prominent news outlets, and established an extensive volunteer network to promote religious liberty for all.

The Sikh Coalition works to defend civil rights and liberties for all people, promote community empowerment and civic engagement within

[1] All parties consent to this *amicus* brief. No party's counsel authored any part of this brief. No party, party's counsel, or person other than *amici* contributed money to the brief's preparation or submission.

the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination, and educate the broader community about Sikhism to promote cultural understanding and create bridges across communities. Ensuring religious liberty for all people is a cornerstone of the Sikh Coalition's work.

The American Islamic Congress, founded in the wake of the September 11, 2001, terrorist attacks, seeks to combat intolerance and facilitate understanding both among Muslims and through interfaith initiatives. With the motto "Passionate about Moderation," the American Islamic Congress promotes coexistence, human rights, and religious liberty through programming and advocacy in the courts.

Protect the First Foundation (PT1) is a nonprofit, nonpartisan organization that advocates for First Amendment rights in all applicable arenas. PT1 thus advocates on behalf of people from across the ideological spectrum, people of all religions and no religion, and people who may not even agree with the organization's views.

As organizations committed to protecting the ability of all religious believers to vindicate their religious freedom rights in court, *amici* have

an interest in the correct development and application of mootness doctrine as applied to religious free exercise claims. *Amici* submit this brief to highlight errors in the panel's decision and call attention to the decision's far-reaching, adverse implications for minority religious groups.

INTRODUCTION AND SUMMARY OF ARGUMENT

Violating a string of federal protections designed to ensure religious liberty for minority religions, Appellees widened U.S. Highway 26 and destroyed Plaintiffs' 0.74-acre sacred site. *See* Opening Br. of Pls. 7–28, ECF 20. After a lengthy appeal, the panel held that it was powerless to grant any effective relief—as the site had already been destroyed—and consequently dismissed the Plaintiffs' appeal as moot. Op. 5. For four reasons, that decision was egregiously wrong, contrary to Circuit precedent, and should be reversed by the panel or the en banc Court.

First, the panel failed to properly consider all suitable remedies available under the Religious Freedom Restoration Act (RFRA). In the process, it ignored how, when the government cannot grant a religious claimant's ideal accommodation, it bears the burden of proving that there are *no* possible remedies. This obligation is especially important when considering the rights of non-mainstream religions, as a court's failure to

fully appreciate the nuances of a religion will prevent the Court from adopting a suitable, albeit imperfect, remedy.

Second, the panel violated Circuit precedent in creating a double standard for religious and non-religious claims. This Court has long rejected any suggestion that, when a harm imposed by the government is completed, a plaintiff's claim suddenly becomes moot. The panel's decision violates that precedent and, in so doing, deprives religious plaintiffs of judicial protection even as it remains available for secular claims.

Third, the panel's decision deferred to the government's *ipse dixit* that no other remedies were possible despite clearly established Circuit precedent requiring the government to prove that no other relief is available. If left standing, the panel decision would gut RFRA, turning it from a landmark "super statute"—passed to provide robust remedies for religious believers like plaintiffs who are prevented from exercising their faith—to a statute only occasionally able to protect religious belief. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020). That result would be untenable.

Fourth, the panel erred by finding that it lacked authority to craft a case-specific remedy as required by RFRA. In so doing, the panel created a precedent that hinders RFRA's ability to protect the very people it was designed to help—religious minorities like plaintiffs.

The en banc Court should grant the petition to correct these myriad errors and, in so doing, vindicate plaintiffs' fundamental right to exercise their religion.

ARGUMENT

I. The panel's narrow view of the remedies available under RFRA would disadvantage religious minorities.

The panel's decision adopts a meager view of the remedies available under RFRA—concluding that, because plaintiffs' ideal remedy *might* implicate safety, the case is moot and there is nothing the Court can do. *See* Op. 4. Unless rehearing is granted, that incorrect view will disadvantage religious minorities who may seek to practice their religion in ways unfamiliar to most judges.

1. When it comes to mootness, plaintiffs need not "have asked for the precise form of relief that the district court may ultimately grant." *Nw. Env't Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988). It is the government's burden to rule out *any* possibility of relief—and it is

impossible to do so without developing a record on what accommodations could satisfy plaintiffs' beliefs.

The panel's approach to remedies is thus ill-suited for a religious-liberty case. In many faith traditions, commandments and other religious practices are not all or nothing. For example, Muslims ideally gather for weekly prayers at mosque, but when many mosques were shuttered due to COVID-19, some imams led group prayers in homes. *See* Hannan Adely, *Can't go to mosque during Ramadan during COVID? Families make 'mini-mosques' at home*, USA TODAY (May 20, 2020, 2:30 PM), https://perma.cc/R59N-3CJQ. Other faith groups held drive-in worship services with sermons preached over the radio. *See* Andrew R. Chow, *'Come As You Are in the Family Car.' Drive-In Church Services Are Taking Off During the Coronavirus Pandemic*, TIME (Mar. 28, 2020, 9:30 AM), https://perma.cc/HSS9-FTQ2.

2. When a religious claimant's ideal accommodation is off the table—whether because the request is infeasible or because it would conflict with a compelling government interest—the government and courts must explore all other suitable alternatives. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728–31 (2014). And this inquiry must consider

whether any compromise accommodation would still satisfy the claimant's beliefs. *See id.*

For example, suppose a Jewish prison inmate wishes to celebrate the weekly Sabbath and annual Passover rituals by drinking red wine, but a district court finds that the prison has a compelling security interest in not providing alcohol to prisoners. Under the panel's approach, because the prisoner's requested relief is unavailable, no effective relief can be granted. But under RFRA, the analysis does not stop there. The court must consider whether some other accommodation—perhaps grape juice or nonalcoholic wine—could at least partially meet the prisoner's religious needs. *See Sample v. Lappin*, 479 F. Supp. 2d 120, 125 (D.D.C. 2007) (holding that the Bureau of Prisons had a compelling interest under RFRA in controlling alcohol consumption in prisons but that the government would need to prove that its denial of any accommodation was the least restrictive means); Prison Legal News, *BOP Agrees to Provide Wine to Prisoner for Religious Rituals* (Feb. 15, 2009), https://perma.cc/A8KX-VXHD (noting that although the plaintiff had sought a low-alcohol-content wine, BOP agreed to settle the case by providing nonalcoholic red wine).

Or suppose a Muslim or Sikh member of the armed forces seeks to grow a full-length beard in keeping with his faith. The armed forces should seek to fully accommodate these service members' religious beliefs, but if compelling safety interests preclude growing a full-length beard, military officials should consider other accommodations such as rolling and tying the beard or allowing shorter beards. *See* Defs.' Notice of Army's Action, *Singh v. Carter*, No. 1:16-cv-00399-BAH (D.D.C. Mar. 31, 2016), ECF No. 26, https://perma.cc/T2JN-YUWR.

These examples highlight both the flexibility that courts should employ in addressing religious claims and the need to rigorously examine the potential religious accommodations available.

These concerns are all the more prevalent when it comes to non-Western and Indigenous faiths. In contrast to mainstream religions, which "already enjoy de facto protection" through their ability to influence the political sphere, Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L. Q. 919, 925 (2004), many minority faiths must turn to the courts for protection. But in doing so, these groups face a significant obstacle: explaining the nature of their beliefs and injuries to a judiciary that is mostly drawn from mainstream faith communities.

All too often, the judiciary has failed to grasp the extent of infringements on Indigenous and other minority faiths' free-exercise rights and the ways by which courts can provide redress. *See* Stephanie Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294 (2021); Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 773 (1997) (chronicling "a continuing failure by legal institutions to understand and respect Native American religious beliefs and practices"). As Judge Fletcher has correctly noted, a court that "misunderstands the nature of [Indigenous] religious belief and practice" will be unable to grasp the extent of the alleged injury. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1096 (9th Cir. 2008) (Fletcher, J., dissenting). By the same token, such misunderstanding will also limit the court's view of possible relief to cure the injury. The Court should either reverse course or consider this case en banc to prevent that error from repeating itself.

II. The panel decision conflicts with this Court's mootness jurisprudence, creating a double standard for religious claims.

The panel's understanding of mootness (*see* Op. 4–5) is also wrong and conflicts with a long line of Ninth Circuit authority.

1. The conflict with settled Ninth Circuit authority is highlighted by the fact that two magistrate judges and two district court judges within this Circuit rejected the government's mootness argument before it reached the panel. Recognizing federal courts' broad and flexible equitable powers to remedy statutory violations, all four judges concluded that, "[e]ven if ODOT's dismissal removed the ultimate mode of redress from the court's arsenal, . . . the remaining defendants may still provide some other form of effective relief." 1-ER-47–48; *see also, e.g.*, 1-ER-91–92 (finding that given plaintiffs' "broad request for various forms of equitable relief," the court "could craft some relief that would mitigate [their] injury and improve their access to the site and ability to exercise their religion"). They had it right.

The panel's contrary decision conflicts with a long line of Ninth Circuit cases—many of which the magistrate and district court judges cited. *See, e.g.*, 1-ER-46–48, 91–92. Until now, it has been settled Ninth Circuit

law that a case does not become moot simply because the challenged action was completed, or land rights were transferred to a third party.

For instance, courts have kept cases alive even when the harm the plaintiffs tried to prevent occurred anyway. For example, in *Cantrell v. City of Long Beach*, birdwatchers sued to stop a city from leveling a naval base where several bird species nested. 241 F.3d 674, 678 (9th Cir. 2001). After the birdwatchers failed to get a preliminary injunction, the city demolished the base and cut down trees. *Id.* at 676. The panel reversed the district court's ruling that the demolition mooted the case. It explained that, while the demolition could not be undone, the city could still, for example, create new nesting and foraging areas on the land or make use of other nearby land. *Id.* at 678–79.

Likewise, in *Neighbors of Cuddy Mountain v. Alexander*, the panel held that a suit challenging a timber sale wasn't moot even though the trees had been logged. 303 F.3d 1059, 1066 (9th Cir. 2002). Although the court could not restore the trees, it could order the Forest Service to study the effects of the timber sale on species viability, change future timber plans, or create artificial habitats for the wildlife. *Id.*

This court has also rejected mootness claims when the land in question was transferred. In *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Department of Energy*, environmental groups sued to stop the Department of Energy from selling land to an oil company. 232 F.3d 1300, 1305 (9th Cir. 2000). But before the case could be decided, the sale went through. *Id.* Even so, the panel reversed the district court's dismissal on mootness grounds, explaining that the court could rescind the sale if plaintiffs won. *Id.* Neither the government's inability to use the land nor the fact that the government would need to return $3.5 billion stopped the court from ensuring a remedy. *Id.* at 1304.

Similarly, this Court has held that not even the government's completion of a project moots a case. In *West v. Secretary of Department of Transportation*, a *pro se* litigant challenged the Federal Highway Administration's failure to conduct environmental review for a highway expansion project. 206 F.3d 920, 923–25 (9th Cir. 2000). By the time the case reached this Court, the highway had already been expanded and traffic had resumed at the busy intersection. *Id.* at 926. But that was not enough to render the case moot. *Id.* Although the plaintiff did not ask for reme-

diation, *see id.* at 931 (Thomas, J., dissenting), the Court noted that several types of remediation, such as ordering use restrictions or structural changes, were "well within the range of available remedies." *Id.* at 926 n.5. And if necessary, the Court explained, it could order the government to tear down the busy interchange—"however cumbersome or costly it might be." *Id.*

2. Many of the remedies discussed in these cases are readily available here. For example, the court could simply rescind the easement to the extent necessary to ensure compliance with federal law. *See, e.g.*, *Tinoqui-Chalola*, 232 F.3d at 1304–05 (holding that the district court could rescind a property sale to ensure compliance with the Endangered Species Act); *see also* Pet. 9–11 (collecting cases).

Or, as in *Cantrell*, the court could order the government to replant trees and rebuild the altar either outside the guardrail or, if necessary, slightly farther in from the highway but just outside the state's right-of-way. *Cantrell*, 241 F.3d at 678–79 (holding that the city could create new nesting and foraging areas on the bulldozed land or could make use of "other nearby lands"); *see* 5-ER-961–63 (map showing the right-of-way).

Neither remedy unambiguously implicates highway safety, and the latter remedy avoids the easement entirely.

Likewise, just as the *West* court could order structural changes or even tear down a busy highway interchange to remedy a statutory violation, *West*, 206 F.3d at 926, similar remedies could be provided here. For example, plaintiffs ask that the embankment be removed to allow access to the sacred land that it now covers. 5-ER-948–49. Alternatively, plaintiffs ask that the guardrail be taken down in some small areas to allow for access onto the land where the sacred site once was. 5-ER-924. Any of these forms of relief would be enough to keep this case alive.

In short, compared to the wide-ranging remedies this Court has repeatedly sanctioned in other cases, the remedies sought here are modest. The government may argue that many of these precedents dealt with environmental violations, but RFRA is federal law. The panel's decision thus suggests either that it is watering down longstanding mootness doctrine in this Circuit or that the bar for finding a case moot is somehow lower in religious-freedom or sacred-site cases. Such a holding would raise significant First Amendment issues. Either way, reversal or, if necessary, en banc rehearing is warranted.

III. The panel decision improperly defers to the Government's untested assertion that any possible relief would implicate highway safety.

The panel decision also erred (at 4) by deferring to the government's untested assertion that any possible relief would raise safety concerns and unavoidably require ODOT's blessing. That error too calls for reversal or, if necessary, this Court's en banc review, for several reasons.

First, such deference conflicts with this Court's mootness precedents, which make clear that it is the defendant's burden to *show* that relief "is no longer a possibility." *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1011 (9th Cir. 2018) (quoting *Timbisha Shoshone Tribe v. U.S. Dep't of Interior*, 824 F.3d 807, 812 (9th Cir. 2016)). The government's contested assertion that the highway extension was implemented for safety purposes hardly meets the government's burden to prove that there is *no possibility* of effective relief—least of all on appeal without any evidentiary hearing or district court fact-finding.

Second, the panel's unquestioning deference conflicts with RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA), echoing the lower courts' error in *Holt v. Hobbs*, 574 U.S. 352, 364 (2015).

In *Holt*, the lower courts thought themselves "bound to defer to the Department's assertion that allowing [the] petitioner to grow [a 1/2-inch] beard" would undermine the Government's interest in "suppressing contraband." *Id.* But "RLUIPA, like RFRA," does "not permit such unquestioning deference." *Id.*; *see also id.* at 357–58 (noting that RLUIPA "mirrors" RFRA with "'the same standard'" (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006))). Even in the deferential prison context, it was wrong to defer to government officials' "mere say-so" that "they could not accommodate petitioner's request." *Id.* at 369. Rather, "it is the obligation of the *courts* to consider whether exceptions are required under the test set forth by Congress." *O Centro*, 546 U.S. at 434 (emphasis added).

The panel's decision here repeats the same error. In holding that all remedies are barred by ODOT's easement, the panel simply deferred to the government's environmental assessment, which broadly stated that the project was undertaken with highway safety in mind. Op. 4. The panel neither questioned that assessment nor explained why the assessment precluded the specific forms of relief plaintiffs seek. *Id.* RFRA, however, "demands much more." *Holt*, 574 U.S. at 369.

Third, when further fact-finding is needed to hold the government to its burden, this Court has remanded to the district court to do so—even if the Court thinks the controversy may be moot. *See W. Oil & Gas Ass'n v. Sonoma Cnty.*, 905 F.2d 1287, 1291–92 (9th Cir. 1990) (remanding to the district court because, while the record suggested "that the controversy . . . may be moot, we cannot be certain because the relevant facts [we]re not adequately developed in the record before us"). Indeed, this is a common practice across circuits. *See, e.g.*, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 536 (4th Cir. 2014) (remanding for "factual development" and "possibly additional jurisdictional discovery" to determine whether the government had direct control over one of the parties); *Restoration Risk Retention Grp., Inc. v. Gutierrez*, 880 F.3d 339, 349 (7th Cir. 2018) (remanding to determine whether a legislative amendment had rendered an issue moot).

Thus, even if the easement here trumped plaintiffs' RFRA rights (it does not), the Court should at a minimum remand for further fact-finding to determine whether any accommodations would *in fact* implicate highway safety. Under RFRA, the Court cannot simply defer.

IV. The panel decision improperly ignores RFRA's broad grant of authority to redress government interference with religious practice.

Rehearing is particularly appropriate here because the panel decision neuters the power of federal courts to craft case-specific remedies when faced with clear violations of RFRA. Indeed, a review of RFRA's text and purpose highlights the broad power that Congress bestowed upon courts to protect people of faith. The panel's decision contravenes this purposeful grant of authority and, if allowed to stand, will harm the very people RFRA sought to protect.

1. Congress enacted RFRA to ensure broad protection of religious believers' right to exercise their faith. Recognizing that many believers were "largely . . . without recourse" after the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), Congress sought to restore (and even potentially to expand) the rights and remedies that predated *Smith*. Religious Freedom Restoration Act of 1993, 139 Cong. Rec. H2356-03 (1993) (statement of Rep. Hamilton Fish). *See also Burwell,* 573 U.S. at 695 n.3 (noting that RFRA "provide[s] even broader protection for religious liberty than was available" before *Smith*). In the words of then-Representative Chuck Schumer, RFRA's lead sponsor in

the House, RFRA was designed to ensure "maximum religious freedom." 139 Cong. Rec. H2356-03 (statement of Rep. Chuck Schumer).

The statute's text confirms that RFRA was meant to provide significant protections to religious claimants. RFRA requires the federal government to make the "exceptionally demanding" showing that its action is the least restrictive means of furthering a compelling interest whenever it substantially burdens religious belief. *Burwell*, 573 U.S. at 728; *see* 42 U.S.C. § 2000bb-1(b). If the government cannot satisfy that demanding test, RFRA subjects it to robust remedies.

The Act authorizes courts to award any "appropriate relief." *Id.* § 2000bb-1(c). As the Supreme Court recently made clear, that language is "'open-ended' on its face." *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020). Although what relief is "appropriate" may depend on context, it includes damages against individual officials, *id.* at 491–93, and has always been understood to include federal courts' traditional authority to issue injunctions and provide other equitable remedies.

2. By providing for equitable remedies in RFRA, Congress invoked a longstanding body of law on federal courts' equitable powers. The Supreme Court has taught that those powers are "'characterized by a

practical flexibility in shaping . . . remedies and . . . adjusting and reconciling public and private needs.'" *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 12 (1971) (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 299–300 (1955)); *accord United States v. Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222, 228 (9th Cir. 1978) ("[T]he Supreme Court repeatedly has recognized the power of the equity court to mold the necessary decrees to give effect to congressional policy."). Courts can thus enjoin governmental actors not only to prevent future violations but to "undo the effects of past violations." Douglas Laycock, *Modern American Remedies: Cases and Materials* 238–39 (1st ed. 1985).

What's more, federal courts' already broad equitable powers assume an "even broader and more flexible character" in cases implicating the public interest, as this Court held in *Northwest Environmental Defense Center v. Bonneville Power Administration*, 477 F.3d 668, 680 (9th Cir. 2007) (cleaned up). And the public interest, of course, is always implicated in cases like this one alleging harms to religious liberty. *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018).

3. In contrast with the panel's cramped understanding of district courts' equitable authority, other courts applying RFRA and its twin statute, RLUIPA, seem entirely unfazed by the broad authority Congress has given them. Whether by blocking federal enforcement of criminal drug laws, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432 (2006), or affirmatively requiring a state prison system to spend hundreds of thousands of dollars providing kosher meals to prisoners, *United States v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1341, 1345 (11th Cir. 2016), the broad authority to craft appropriate relief has been essentially taken for granted.

Given this storied history of courts around the country—including the Supreme Court—crafting appropriate remedies, the panel's conclusion (at 4–5) that the district court lacks the authority to order the government to replace a one-and-a-half-foot stone altar, replant trees, or remove an embankment is puzzling. Limited remedies of that nature, if anything, pale in comparison with the more sweeping remedies that have been awarded elsewhere with no suggestion that the remedy is beyond the federal courts' equitable authority.

The panel decision here thus flouts RFRA's text and Supreme Court precedent. In holding that courts are powerless to address the government's violation of multiple statutes and the Constitution because some remedies *might* (in the government's view) implicate a state agency's right-of-way, *see* Op. 4–5, the panel got things exactly backwards. Decisions like *Bonneville* teach that where, as here, federal courts are faced with government activity that so clearly burdens religious rights, the federal equity power should be at its apex.

CONCLUSION

The panel should either revisit its decision, or the Court should grant en banc rehearing and reverse.[2]

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this *amicus* brief contains 4,191 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font. I certify that this brief is an *amicus* brief and complies with the word limit of Cir. R. 29-2(c)(2).

February 22, 2022

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