No. _____

In The Supreme Court of the United States

RUSSELL DEAN ALFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves two federal statutes that criminalize conduct in settings where conduct often doubles as political expression: places where the President, Vice President, or another Secret Service protectee is present (18 U.S.C. § 1752(a)(2)), and the Capitol Buildings and Grounds (40 U.S.C. § 5104(e)(2)(D)). Each defines a crime with the same actus reus: "engag[ing] in disorderly or disruptive conduct . . . ." The court of appeals, reasoning that "almost no conduct is always and innately disruptive or disorderly," Pet. App. 11a, held that almost any conduct—even mere physical presence—may qualify as disorderly or disruptive, depending on the context. Mr. Alford presents this question:

In § 1752(a)(2)'s and § 5104(e)(2)(D)'s prohibitions against "disorderly or disruptive" conduct, do "disorderly" and "disruptive" narrow the types of conduct criminalized, or do those adjectives refer only to conduct's effect under the circumstances, so that even mere presence may violate the statutes?

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Russell Dean Alford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The D.C. Circuit's opinion affirming Mr. Alford's convictions and sentence is reported at 89 F.4th 943 and is included in Appendix A. Pet. App. 1a. The district court's judgment is unreported.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. It affirmed Mr. Alford's convictions and sentence on January 5, 2024. Pet. App. 1a–18a. This petition is timely under Supreme Court Rules 13.1 and 13.3, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1752(a)(2) of United States Code Title 18 defines the offense of disorderly or disruptive conduct in a restricted building or grounds:

> (a) Whoever
>
> . . .
>
> (2) knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engages in

> disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions
>
> . . .
>
> or attempts or conspires to do so, shall be punished as provided in subsection (b).

Section 5104(e)(2)(D) of United States Code Title 40 defines the offense of disorderly or disruptive conduct in the Capitol Building or Grounds:

> (e) Capitol Grounds and Buildings security.—
>
> . . .
>
> (2) Violent entry and disorderly conduct.—An individual or group of individuals may not willfully and knowingly—
>
> . . .
>
> (D) utter loud, threatening, or abusive language, or engage in disorderly or disruptive conduct, at any place in the Grounds or in any of the Capitol Buildings with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress . . . .

INTRODUCTION

The crowds inside the Capitol Building on January 6, 2021, included many people whose conduct was disorderly or disruptive. But many others who went into the Capitol were *just there*. Russell Alford entered through an open door, went a short distance inside, stood silently against a wall for about ten minutes, then headed for an exit when police told the crowd to leave. And while that was sufficient to convict

him of offenses prohibiting trespassing and demonstrating in the Capitol, the courts below held his mere presence also sufficed to prove he "engage[d] in disorderly or disruptive conduct" in violation of 18 U.S.C. § 1752(a)(2) and 40 U.S.C. § 5104(e)(2)(D). The court of appeals interpreted those offenses' identically worded conduct elements to depend on context as much as on conduct. And under that interpretation, it held, even a person silently present in the Capitol on January 6 could be guilty of engaging in disorderly or disruptive conduct.

It is "cardinal principle of statutory construction that [courts] must 'give effect, if possible, to every clause and word of a statute.'" *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (opinion of O'Connor, J., for the Court) (quoting *United States v. Menasche,* 348 U.S. 528, 538–39 (1955)). The courts below held that even mere presence could constitute disorderly or disruptive conduct because of that conduct's effect: protesters' presence in the Capitol disrupted the Electoral College vote certification. And the court of appeals disagreed that its interpretation effectively reads the words "disorderly or disruptive" out of the statutes. But it is difficult to see what work those words do under that interpretation. It's not clear that § 1752(a)(2) or § 5104(e)(2)(D) would sweep any more broadly if the adjectives were simply deleted.

These interpretational questions are important and extend well beyond cases arising from January 6. Both statutes cover settings where conduct often is political expression—places where the President, Vice President, or another Secret Service protectee is present (§ 1752), and the Capitol Buildings and Grounds (§ 5104). The D.C. Circuit's context-dependent interpretation of "disorderly or disruptive conduct"

gives police, prosecutors, and courts broad authority to make case-by-case judgments about conduct in settings for political activity, and at the same time leaves citizens in those settings to guess at the types of conduct that are prohibited. Certiorari is warranted because the questions decided by the court of appeals have not been settled by this Court, but should be.

STATEMENT OF THE CASE

Russell Alford was charged with four federal offenses for entering the Capitol Building on January 6, 2021: unlawfully entering or remaining in a restricted area, in violation of 18 U.S.C. § 1752(a)(1); disorderly or disruptive conduct in a restricted area, in violation of § 1752(a)(2); disorderly or disruptive conduct in the Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D); and parading, demonstrating, or picketing in the Capitol Building, in violation of § 5104(e)(2)(G). He went to trial, where evidence showed that he traveled from Alabama to Washington, D.C., to attend then-President Trump's January 6 rally at the Ellipse. After Mr. Trump finished speaking, Mr. Alford walked toward the Capitol, where large crowds had gathered. He walked into the Capitol through the Upper House Door on the east side after a person inside the building forced it open. Mr. Alford walked a short distance inside and stood silently against a wall for about ten minutes before police arrived to clear the hallway.

At the close of the evidence, Mr. Alford moved for judgment of acquittal on the disorderly-or-disruptive-conduct counts, arguing that there was insufficient evidence that he engaged in such conduct. The district court denied the motion, holding that

mere presence in the Capitol on January 6 constituted disorderly or disruptive conduct. *See* Pet. App. 4a–5a. Mr. Alford was convicted on all four counts and was sentenced to a one-year prison term.

He appealed to the D.C. Circuit, which affirmed his convictions and sentence. The court held that § 1752(a)(2) and § 5104(e)(2)(D) use "disorderly conduct" as a term of art for "the modern successor to the common-law offense of breach of the peace," which "carries that [common-law] history with it." *Id.* at 7a. By contrast, it wrote, "'disruptive conduct' is not a term of art and has only its plain meaning." *Id.* at 10a. Nevertheless, the court held that neither term refers to the nature of the proscribed conduct, because "almost no conduct is always and innately disruptive or disorderly." *Id.* at 11a. Instead, it construed both adjectives to require "a context-sensitive inquiry," *id.* at 10a, that looks to conduct's effect, *see id.* at 8a–11a.

Based on its interpretation of the statutes, the court of appeals held the evidence was sufficient to support Mr. Alford's convictions for engaging in disorderly or disruptive conduct. It acknowledged that "during Alford's brief time within the Capitol, he was neither violent nor destructive," Pet. App. 2a, and "his conduct does not rise to the level of culpability of many of his compatriots," *id.* at 15a. But the fact he was there was enough, the court held. It agreed with the district court that Mr. Alford's mere presence could be both disorderly conduct, *id.* at 14–15 ("unauthorized presence in the Capitol"), and disruptive conduct, *id.* at 14 ("presence in the Capitol").

REASONS FOR GRANTING THE PETITION

The Court should grant review because this case presents an important question of federal statutory interpretation, and the D.C. Circuit's reading of § 1752(a)(2) and § 5104(e)(2)(D) establishes a slippery and counter-textual standard for criminalizing conduct in settings for political activity. As construed below, the adjectives "disorderly" and "disruptive" do no work to limit the statutes' reach; practically any conduct can suffice if the offenses' other elements are satisfied. A law with that effect might well be able to pass First and Fifth Amendment muster, but in both statutes here, Congress expressly specified *disorderly or disruptive* conduct when it could simply have said "conduct" if that were its true meaning. Whether the lower courts correctly interpreted the statutes is an important question, and this Court should decide it.

I. The text of 18 U.S.C. § 1752(a)(2) and 40 U.S.C. § 5104(e)(2)(D) suggests that each contemplates conduct that is disorderly or disruptive by its nature, not solely by its effect.

The disorderly-or-disruptive-conduct laws, § 1752(a)(2) and § 5104(e)(2)(D), were enacted within a matter of years, *see* Pet. App. 10a & n.4 (citing Act of Oct. 20, 1967, Pub. L. No. 90-108, 81 Stat. 275, 276; Act of Jan. 2, 1971, Pub. L. No. 91-644, § 18, 84 Stat. 1880, 1891–92), and each defines an offense with an actus reus of "engag[ing] in disorderly or disruptive conduct . . . ." Throughout this case, neither the government nor either court below disputed that the provisions' identical phrases have identical meanings. The two offenses carry different penalties: a violation of § 5104(e)(2)(D) is punishable by up to six months' imprisonment, 40 U.S.C. § 5109(b),

while the maximum prison term for a violation of § 1752(a)(2) is one year, § 1752(b)(2). But that distinction can be explained by differences between their other elements. As the next sections explain, § 1752(a)(2) requires proof that harm resulted from the offending conduct; § 5104(e)(2)(D) does not.

A. Section 1752(a)(2) includes a separate element that is concerned with conduct's effect.

"Statutory interpretation, as we always say, begins with the text . . . ." *Ross v. Blake*, 578 U.S. 632, 638 (2016) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). Section 1752(a)(2)'s text prescribes a mental-state element, a conduct element, and—separate from the conduct element—a harm (or effect) element:

- "knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions" (mental state);
- "engag[ing] in disorderly or disruptive conduct" (conduct); and
- "such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions" (harm).

The statute also limits its proscription to "any restricted building or grounds," defined in § 1752(c)(1) as places where the President, Vice President, or another Secret Service protectee is present, or the site of "an event designated as a special event of national significance," § 1752(c)(1)(C).

Congress's inclusion of a separate element focused on conduct's disruptive effect is a strong textual indication that the actus reus focuses elsewhere—not on the conduct's effect, but its nature. The harm element even refers back to the antecedent requirement of *disorderly or disruptive* conduct, requiring that "***such*** *conduct*, in fact,

impedes or disrupts the orderly conduct of Government business or official functions," § 1752(a)(2). But the D.C. Circuit's interpretation of the conduct element is effects-focused: conduct "is disorderly if, viewed in the circumstances in which it takes place, it is likely to endanger public safety or create a public disturbance," Pet. App. 10a, and is disruptive if it "caus[es] or tend[s] to cause disruption," *id.* (quoting 1 Webster's Third New Int'l Dictionary 656 (1966)).

It is hard to see how that interpretation does not make the words "disorderly" and "disruptive" "entirely redundant," contrary to the interpretive canon against surplusage. *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (quoting *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.)); *see also City of Chicago v. Fulton*, 592 U.S. 154, 159 (2021) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion))). That canon vindicates the "cardinal principle of statutory construction that [courts] must 'give effect, if possible, to every clause and word of a statute.'" *Williams*, 529 U.S. at 404 (quoting *Menasche,* 348 U.S. at 538–39).

An effects-focused interpretation of the phrase "disorderly or disruptive conduct," however, collapses the conduct element into the harm element by giving the adjectives no apparent force. Deleting them altogether, so that the actus reus would be engaging in "conduct," *simpliciter*, would not obviously enlarge the statute's scope any more than the interpretation by the court of appeals already does, underscoring the adjectives' superfluity under that interpretation. Any conduct that, "in fact,

impedes or disrupts the orderly conduct of Government business or official functions," § 1752(a)(2), should readily qualify as "disorderly" and "disruptive" conduct as the court of appeals construed those terms.

The court of appeals directly confronted, but rejected, the argument that "focusing on the likely effect of an action yields surplusage in § 1752(a)(2)":

> An action can have a disruptive effect and yet not succeed in hindering a governmental proceeding. For instance, someone clicking a pen repeatedly during a Senate hearing may be acting disruptively, but if the hearing nonetheless proceeds smoothly, the clicking will not have "in fact, impede[ed] or disrupt[ed] the orderly conduct of Government business." In that scenario, § 1752(a)(2)'s *actus reus* and its harm element both carry independent meaning even without restricting the *actus reus* to inherently disruptive conduct.

Pet. App. 12a. But that answer turns the question on its head: it explains how conduct might meet that court's interpretation of "disorderly or disruptive" yet fail to satisfy the offense's harm element. It *does not*, however, show that conduct might satisfy the harm element without satisfying the actus reus as the court of appeals construed it—and, therefore, it does not show the adjectives "disorderly" and "disruptive" to be anything but meaningless surplusage.

B. Section 5104(e)(2)(D) describes the nature of prohibited acts.

The court of appeals did not construe §§ 1752(a)(2) and 5104(e)(2)(D) separately from one another, but there are differences between the two that merit separate discussion. The latter provision defines an offense consisting of a mens rea element and a conduct element:

- "willfully and knowingly" and "with the intent to impede, disrupt, or disturb the orderly conduct of" certain congressional business (mental state); and

- "utter[ing] loud, threatening, or abusive language, or engag[ing] in disorderly or disruptive conduct" (conduct).

Section 5104(e)(2)(D), like § 1752(a)(2), also contains a place limitation: "any place in the Grounds or in any of the Capitol Buildings . . . ."

Notably, § 5104(e)(2)(D) is unlike § 1752(a)(2) because the former has no distinct harm- or effect-focused element that militates against defining "disorderly or disruptive conduct" by its effect under the circumstances. Instead, a different feature of that statute undercuts the D.C. Circuit's reading of § 5104(e)(2)(D).

In § 1752(a)(2), "engag[ing] in disorderly or disruptive conduct" is the entire actus reus. But in § 5104(e)(2)(D), that element includes alternatives; it may be committed by "utter[ing] loud, threatening, or abusive language, or engag[ing] in disorderly or disruptive conduct," § 5104(e)(2)(D). The actus reus may be "language," or it may be "conduct."[1] But not just any language will suffice; the adjectives "loud," "threatening," and "abusive" make that clear. So, too, it would seem that—contrary to the interpretation adopted below—not just any conduct will suffice.

The adjectives preceding "language" plainly refer to the nature of the language, not to its effect. And that suggests Congress intended the adjectives preceding "conduct" to function similarly, because "[u]nder the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps.'" *Dubin v. United States*, 599 U.S. 110, 124 (2023) (quoting *McDonnell v. United States*, 579 U.S. 550, 568–69

[1] Throughout this case the government and both courts below have relied on § 5104(e)(2)(D)'s conduct prohibition and have agreed that Mr. Alford did not violate the language prohibition.

(2016)). True, "loud," "threatening," and "abusive" *can't* readily be understood to describe effects, so the conclusion that they describe the proscribed language's nature is hard to avoid, whereas "disorderly" and "disruptive" could describe conduct's effect or its nature. But as the Court explained in *Dubin*, the *noscitur a sociis* canon "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.* at 124–25 (quoting *McDonnell*, 579 U.S. at 569).

It bears repeating that neither the government nor the courts below suggested that the phrase "engag[ing] in disorderly or disruptive conduct" means something different in § 5104(e)(2)(D) than it does in § 1752(a)(2), and for good reason. The phrase is practically identical in the two provisions, which Congress enacted within a few years of one another to serve similar functions in similar types of settings. Moreover, in each statute the actus reus is surrounded by other language suggesting that "disorderly" and "disruptive" refer to prohibited conduct's nature instead of its effect.

II. Mere presence ordinarily is not disorderly conduct unless the presence is in defiance of an order to disperse.

Although the court of appeals construed "disorderly conduct" as a term of art that carries a common-law connotation with it, *see supra* p. 5 (citing Pet. App. 7a), "[a]t common law, there was no offense known as 'disorderly conduct,'" 27 C.J.S. *Disorderly Conduct* § 1 (Mar. 2024 Update). The defense has been defined statutorily, and definitions vary across jurisdictions. Disorderly-conduct statutes often specify

acts such as making unreasonable noise;[2] engaging in fighting or other violence;[3] and abusive, obscene, or offensive language or conduct,[4] usually judicially limited to unprotected speech like fighting words or true threats.[5]

Some disorderly-conduct laws also cover mere presence, which (as the court of appeals noted) "can be disorderly" and "may impede the operations of the targeted organization," Pet. App. 9a–10a. But importantly, statutes that prohibit mere presence ordinarily do it *explicitly*, and they limit the prohibition to presence after a warning to leave—most often "refus[ing] to comply with a lawful order of law enforcement to disperse"[6] or the like.[7] The court of appeals cited what might be the quintessential example, a sit-in. Pet. App. 9a. That example just underscores the

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[2] *See, e.g.*, Ark. Code Ann. § 5-71-207(a)(2) (2023); Conn. Gen. Stat. § 53a-182(a)(3) (2023); Ind. Code § 35-45-1-3(a)(2) (2023).

[3] *See, e.g.*, Ariz. Rev. Stat. § 13-2904(A)(1) (2023); Kan. Stat. Ann. § 21-6203(a)(1) (2023); N.J. Stat. Ann. § 2C:33-2(a)(1) (2023).

[4] *See, e.g.*, Ala. Code § 13A-11-7(a)(3) (2023); Colo. Rev. Stat. § 18-9-106(1)(a) (2023); Tex. Penal Code Ann. § 42.01(a)(1)–(2) (2023).

[5] *Robinson v. State*, 615 So. 2d 112, 113 (Ala. Crim. App. 1992) ("[T]he words 'abusive or obscene language' and 'obscene gesture' have been 'interpreted narrowly to apply only to "fighting words."'" (quoting *Swann v. City of Huntsville*, 455 So. 2d 944, 950 (Ala. Crim. App. 1984))); *People ex rel. K.W.*, 317 P.3d 1237, 1241–42 (Colo. App. 2012) (holding that § 18-9-106(1)(a)'s limitation to conduct that "tends to incite an immediate breach of the peace" confines scope to fighting words); *Coggin v. State*, 123 S.W.3d 82, 87 (Tex. Ct. App. 2003) (holding that § 42.01(a)(2)'s limitation to conduct that "tends to incite an immediate breach of the peace" confines scope to fighting words).

[6] Ala. Code § 13A-11-7(a)(6) (2023).

[7] Ky. Rev. Stat. Ann. § 525.060(1)(c) (2023) ("[r]efus[ing] to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency"); N.C. Gen. Stat. § 14-288.4(a)(4) (2023) ("[r]efus[ing] to vacate any building or facility of any public or private educational institution in obedience to any [order of a public official]").

point, though, because the disruptive value of a sit-in does not derive from protesters' merely showing up, but from their remaining in defiance of orders to disperse.

III. Congress could have enacted statutes that would cover any conduct with disorderly or disruptive effects, but it did not.

The upshot of the court of appeals' reading of § 1752(a)(2) and § 5104(e)(2)(D) is that *any* conduct can be "disorderly or disruptive" if the offenses' other elements are satisfied. But if that is a law's intent, a legislature can easily accomplish it in the text simply by eliminating the adjectives.[8] Indeed, that was true of the state statute in *Garner v. Louisiana*, 368 U.S. 157 (1961), which the court of appeals cited as authority for its conclusion that "disorderly conduct" is a phrase that "focus[es] . . . on the defendants' conduct 'in the circumstances of the[] case[]'" instead of on the nature of the conduct. Pet. App. 9a. Any act with disruptive effect could violate the Louisiana statute because that was how the State Legislature wrote it, criminalizing "[c]ommi[tting] . . . *any* . . . *act* in such a manner as to unreasonably disturb or alarm the public." *Garner*, 368 U.S. at 165 (emphasis added).

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[8] *See, e.g.*, Iowa Code § 723.4(1)(d) (2023) ("A person commits a simple misdemeanor when the person . . . [w]ithout lawful authority or color of authority . . . disturbs any lawful assembly or meeting of persons ***by conduct*** *intended to disrupt the meeting or assembly*." (emphasis added)); Ark. Code Ann. § 5-71-207(a)(4) (2023) ("A person commits the offense of disorderly conduct if, with the purpose to cause . . . or recklessly creating a risk of public inconvenience, annoyance, or alarm, he or she . . . ***[d]isrupts or disturbs*** *any lawful assembly or meeting* of persons" (emphasis added)); N.C. Gen. Stat. § 14-288.4(a)(8) (2023) ("Disorderly conduct is a public disturbance intentionally caused by any person who . . . ***[e]ngages in conduct*** *with the intent to impede, disrupt, disturb, or interfere with the orderly administration* of any funeral, memorial service, or family processional" (emphasis added)).

Congress could have done the same in § 1752(a)(2) and § 5104(e)(2)(D) but didn't. It *did* criminalize the conduct that the court of appeals identified as Mr. Alford's disorderly and disruptive conduct, "his unauthorized presence in the Capitol," Pet. App. 2a—but in subsection (a)***(1)*** (prohibiting "knowingly enter[ing] or remain[ing] in any restricted building or grounds without lawful authority to do so"). The text of subsection (a)(1)'s trespass prohibition makes plain Congress's intent for that provision to cover mere physical presence; subsection (a)(2)'s prohibition against disorderly or disruptive conduct conspicuously does not.

IV. The question presented is important and should be decided by this Court, and this case is a good vehicle.

By their nature, statutes criminalizing disorderly or disruptive conduct carry the potential for arbitrary and discriminatory enforcement.[9] Sections 1752(a)(2) and 5104(e)(2)(D) bring that potential into the policing of conduct in settings for political activity, where the specter of arbitrary enforcement is especially concerning. And the D.C. Circuit's interpretation of those provisions risks diluting objective standards that could limit the discretion afforded to police and prosecutors.

This Court should grant review because questions about the conduct required to violate §§ 1752(a)(2) and 5104(e)(2)(D) are important. And this case is an excellent vehicle because the issue is cleanly presented: both the district court and the court of

[9] *See, e.g.*, Rachel Moran, *Doing Away with Disorderly Conduct*, 63 B.C. L. Rev. 65, 90–103 (2022); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 Cal. L. Rev. 1637, 1641–44 (2021); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 591–634 (1997).

appeals found the evidence sufficient specifically because they held both laws may be violated by mere presence. That interpretation tests the limits of the statutory text and fails to put to rest the questions presented here. Both laws regulate citizens' conduct in political spaces, and their proper interpretation is a question that has not been, but should be, settled by this Court.

CONCLUSION

For the foregoing reasons, Mr. Alford prays that this Court grant a writ of certiorari to the D.C. Circuit Court of Appeals.

Respectfully submitted this, the 4th day of April, 2024.

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