No. 23A78

IN THE
Supreme Court of the United States

EPIC GAMES, INC.,

Applicant,

v.

APPLE INC.,

Respondent.

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT ON APPLICATION TO VACATE THE NINTH CIRCUIT'S STAY OF ITS MANDATE AND STAY OF PERMANENT INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE THE NINTH CIRCUIT'S STAY OF ITS MANDATE OR STAY PENDING APPEAL

CHRISTINE A. VARNEY
GARY A. BORNSTEIN
ANTONY L. RYAN
YONATAN EVEN
CRAVATH, SWAINE & MOORE LLP
825 EIGHTH AVENUE
NEW YORK, NY 10019-7475
(212) 474-1000

PAUL J. RIEHLE
FAEGRE DRINKER BIDDLE & REATH LLP
FOUR EMBARCADERO CENTER
SAN FRANCISCO, CA 94111-4180
(415) 591-7500

THOMAS C. GOLDSTEIN
Counsel of Record
4323 HAWTHORNE ST., NW
WASHINGTON, DC 20016
(202) 674-7594
TOM@TOMGOLDSTEIN.NET

Counsel for Applicant

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Epic states that it has no parent corporation and that Tencent Holdings Ltd. owns more than 10% of Epic stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

TO THE HONORABLE ELENA KAGAN, AS CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

INTRODUCTION

Judge Smith's opinion makes clear that the Ninth Circuit stayed its mandate in this case only because Apple had barely satisfied that court's requirement that an applicant articulate non-frivolous arguments. The Ninth Circuit's exceedingly lax standard is confirmed by its own precedent and its practice of staying its mandate five times more frequently than almost any other circuit. Apple ignores all that; its argument that the court applies a more rigorous standard is based only on the word "substantial" in Federal Rule of Appellate Procedure 41(d), in the abstract, without any consideration of the Ninth Circuit's actual practice. Apple's argument lacks merit, but it is also irrelevant. Even on Apple's understanding of the Ninth Circuit's standard, this Court should grant Epic's Application for either of two independent reasons, which relate separately to the two different stays the Ninth Circuit entered in this case. *First*, and most obviously, Apple makes no attempt to defend the stay of the injunction pending appeal. That initial stay, from 2021, rests on a preliminary reading of California law that the Ninth Circuit has since rejected on the merits and that Apple has since abandoned. Whatever the formal status of the appellate mandate, the antecedent stay of the injunction indisputably rests on a pure error of law, and must be vacated. *Second*, Apple does not dispute that there is no reasonable prospect that this Court will grant certiorari and reverse in this case; it merely contends (contrary to Judge Smith's opinion) that its forthcoming petition will raise a "substantial question." Apple thus does not even attempt to satisfy the standard set by this Court's precedents for staying the appellate mandate.

ARGUMENT

Epic's Application included two separate requests. But Apple has responded to only one. Epic challenged the Ninth Circuit's stay of its appellate mandate on the ground that the court of appeals applies a legal standard that is too lax. Epic separately challenged the Ninth Circuit's stay of the district court's injunction pending appeal on the ground that it rests on a legal basis that the court of appeals subsequently rejected and Apple abandoned. Apple does defend the stay of the mandate, although its arguments are either meritless or reinforce Epic's submission. *See* Parts II and III, *infra*. But even more striking, Apple has no response to the argument that this Court obviously should vacate the stay of the injunction that was granted pending appeal. *See* Part I, *infra*. We therefore begin with that straightforward point.

I. Apple Does Not Dispute that This Court Should Vacate the Stay Pending Appeal, Wholly Apart from Whether the Court of Appeals Was Correct To Stay Its Mandate.

The district court held that Apple's "anti-steering" rules, which prevent app developers from directing consumers to less-expensive ways to purchase digital goods, violate California's Unfair Competition Law (the "UCL"). The district court therefore enjoined Apple from enforcing these rules, and Apple appealed to the Ninth Circuit. A motions panel granted Apple a stay of the injunction pending appeal, reasoning that Apple had raised a substantial argument that, under the UCL, it could not be held liable as a matter of law. *See* Appendix D at 67a-68a. The stay pending appeal thus related ***only*** to Apple's liability under California law; the order granting the stay raised no issue regarding the scope of the injunction. App. 2.

Subsequently, the merits panel of the Ninth Circuit unanimously rejected Apple's reading of California law and affirmed the district court's liability determination. *See* Appendix E at 146a-154a. The full court denied rehearing *en banc*. *See* Appendix F at 162a-63a. Apple, in turn, has abandoned all California state law arguments on which the stay was granted. But the court did not lift the stay pending appeal, which by its terms continues until the issuance of the appellate mandate. App. 2.

Apple notably does not argue that if this Court upholds the stay of the mandate then it necessarily must leave the stay pending appeal undisturbed. The two are distinct. They not only rest on different substantive grounds (federal versus California law) but also relate to entirely different parts of the district court's judgment (Apple's current challenge to the scope of the injunction versus its earlier challenge to the finding of liability). The two stays also have distinct consequences. Vacating the stay of the mandate would return the entire case to the district court's jurisdiction. Vacating the stay pending appeal would only allow the district court to implement and administer the injunction.

It is thus no longer disputed that the Ninth Circuit erred in granting a stay of the injunction pending appeal. Apple is unable to articulate any reason why that error is outside this Court's jurisdiction to correct (and it obviously is not), or why it should be left undisturbed. There is accordingly no justification for what Apple recognizes is "a stay that has already been in place for almost two years." Opp. 2. It should be vacated.

II. This Court Should Vacate the Stay of the Mandate, Because Apple Cannot, and Does Not, Dispute that There Is No Reasonable Prospect that This Court Will Grant Certiorari and Reverse.

Apple argues at length that the Ninth Circuit grants a stay of the mandate only in cases that present a "substantial question" (as opposed to every non-frivolous application) and that Apple's own application satisfies the "substantial question" standard. Apple is wrong on both points (*see* Part III-A, *infra*), but it makes no difference. Showing a "substantial question" is not enough. Under this Court's precedents, a stay of the mandate is appropriate only if the applicant shows, *inter alia*, that there is a reasonable prospect that this Court will overturn the appellate decision. Apple does not dispute that either (1) the Ninth Circuit does not apply this Court's standard or (2) that Apple cannot satisfy it. The stay of the mandate accordingly should be vacated.

A. Apple's Arguments Make Clear that This Court Will Not Review and Overturn the Ninth Circuit's Decision, and It Does Not Attempt To Argue Otherwise.

Although Apple asserts that its "forthcoming petition will present substantial questions about whether the injunction at issue exceeds the Article III powers of the federal Judiciary," Opp. 2, what Apple conspicuously does *not* assert is much more important for present purposes. Apple does not argue that this Court would either (1) view this case as an appropriate vehicle to decide those questions or (2) regard them as certworthy. If anything, Apple's arguments reinforce that this Court will inevitably deny Apple's certiorari petition.

First, and most obviously, Apple admits that "the Ninth Circuit said nothing of substance about any of the legal issues Apple intends to ask this Court to decide."

Opp. 20. "This is not a point in the court of appeals' favor," Apple argues, because the fact that "both the lower courts failed to address them shows only that these important federal issues have not been given the careful and adequate consideration they deserve." *Id.* It would be very hard to find a more obvious (if back-handed) concession by a sophisticated litigant represented by experienced counsel that this case is *not* an appropriate vehicle to decide the questions Apple intends to raise. This Court almost never resolves questions that were not decided below—it is a court of review, not first view—including because the court of appeals could reach a different result when it later decides the question expressly.

Second, Apple's arguments reduce to a factual dispute. The Ninth Circuit found that substantial evidence supported the determination that Epic was injured in its capacities as (1) an app developer (because its subsidiaries have apps in the App Store) and (2) the provider of a competing app store. *See* Appendix E at 147a, 154a. But Apple intends to file a petition for certiorari that by its terms depends entirely on the stated premise that Epic's injury is "based on speculative theories of injury to non-parties that were neither advanced nor proven in the district court." Opp. 16-17. So, before this Court can even get to whether Apple raises a legal question that would merit certiorari (because, for example, it presents a circuit conflict), it would have to first reject both the court of appeals' and the district court's understanding of the facts.

Third, Apple effectively waived these arguments below, which is why the Ninth Circuit in turn said nothing about them. There is no dispute that Apple mentioned

Rule 23 in only two sentences. Apple's statement that its "*first* argument on its cross-appeal" addressed Article III standing, Opp. 18, is entirely misleading. The only Article III argument in its opening brief was that Epic lacked standing to assert a violation of California law because "Epic had not proven any injury to itself from the anti-steering provisions." Opp. 6. The Ninth Circuit rejected this argument because it found standing on two different grounds that did not depend on Epic's own apps: Epic's subsidiaries have apps and Epic provides a competing app store. *See* Appendix E at 147a. Apple's current Article III argument, which did not appear in its opening brief at all, is quite different: that through the injunction, Epic is effectively asserting the interests of third-party developers, which violates Article III as a matter of law even if (contrary to the argument in its opening brief) Epic can assert a claim on its own behalf. *See* Opp. 18-20.

Fourth (and it is startling that there are three even better reasons that this Court will inevitably deny certiorari), Apple is unable to even *invoke* any of the established criteria for identifying a legal question that merits this Court's review. It is unable, for example, to identify any circuit conflict implicated by the ruling below. And that is no accident: in its application to the court of appeals, Apple at least *made* that claim, but its argument was so transparently weak, *see* Appendix C at 55a, that it has now abandoned it altogether. So, even if this case were a vehicle to decide the questions Apple intends to present, this Court would not grant certiorari to decide those issues in any event.

B. This Case Perfectly Illustrates Why, Under This Court's Precedent, a Stay of the Mandate Is Appropriate Only if There Is a Reasonable Prospect This Court Will Grant Review and Reverse the Court of Appeals' Ruling.

Apple's argument that a legal question need only be "substantial" to justify a stay of the appellate mandate, *see*, *e.g.*, Opp. 1-2, is wildly overbroad and disconnected from the purpose of a stay. Innumerable appellate cases present substantial issues; that generally is why they are appealed. But that is no justification to block the effectiveness of an appellate decision pending review in this Court. These are cases that even if they raise "substantial questions," it is obvious at the outset that certiorari is *inevitably going to be denied*. The sweeping imposition of stays in such cases causes substantial prejudice to the parties that prevailed on appeal, which are denied the benefit of the ruling for more than half a year. The practice of the Ninth Circuit is a perfect example: that court grants roughly half of all applications to stay its mandate, despite the fact that in roughly a third of those cases the applicant *does not even file* a certiorari petition.

Federal Rule of Appellate Procedure 41 accordingly directs that the appellate mandate will issue shortly after the court of appeals is done with the case. A stay is the exception, and it is imposed only where there is a realistic chance that the appellate ruling is going to be reversed and the applicant would be harmed in the interim.

Apple concedes that this Court will grant a stay of the mandate only if the applicant proves that there is a substantial basis to find that four Justices will vote to grant certiorari and a significant prospect that the Court will reverse. *See* Opp. 12.

But it argues that when the court of appeals considers the identical application in the first instance, the legal issue need only be "substantial." That makes no sense. Why would the standard in the court of appeals be not only significantly more lax, but (even more importantly) also directed at an *entirely different question*? Moreover, this Court almost never considers a stay application that has not first been presented to the court of appeals itself. If this Court is reviewing the court of appeals' own ruling, it would be especially nonsensical for the standards to be radically different.

Not surprisingly, this Court has squarely held that the same legal standard governs both (1) an application to the court of appeals to grant a stay of the mandate and (2) an application to this Court to vacate a stay. *Maggio v. Williams*, 464 U.S. 46, 48 (1983) (per curiam) ("We perceive no reason to apply a different standard in determining whether a stay granted by a Court of Appeals pending disposition of a petition for certiorari to this Court should continue in effect."). Although that was a habeas corpus case, which in other contexts can present "different questions of finality," Opp. 12 n.1, that is a completely irrelevant distinction here. Neither *Maggio* nor any other decision suggests that a different test applies to a stay of the mandate pending certiorari in habeas cases. Federal Rule of Appellate Procedure 41 applies identically to both. Perhaps the Court would give particular weight to the equitable interests on one side of the case (for example, concerns about federalism), but it would not nonsensically apply a completely different inquiry. In particular, there is no reason that a different standard would apply with respect to this Court's *review* of an appellate court's stay of its own mandate.

Apple argues that Federal Rule of Appellate Procedure 41 requires only that the application present a "substantial question," not one that this Court is likely to review and reverse. Opp. 1-2. That is not correct. If it were enough to invoke a "substantial question" in the abstract, then Apple could have secured a stay based on its state law arguments that are all but immune from review in this Court. As five other courts of appeals have concluded, the Rule is correctly read to incorporate the standard announced in this Court's decisions. *See* App. 9-10. Federal Rule of Appellate Procedure 41 thus looks to whether "the *petition* [for certiorari] would present a substantial question and . . . there is *good cause* for a stay." Fed. R. App. P. 41. The Rule by its terms looks to the legal issue from the perspective of ***this*** Court's review. A certiorari petition presents a substantial question and presents good cause for a stay only if there is a reasonable prospect that this Court will grant review and reverse. Otherwise, the only effect of the stay is delay.

The Advisory Committee Note to the Rule thus explains that the "substantial question" standard is intended to "alert the parties to . . . the type of showing that needs to be made. The Supreme Court has established conditions that will be met before it will stay a mandate." Fed. R. App. P. 41 advisory committee's note to 1994 amendment. The obvious point of the Note is that "the type of showing" is the one that must be made under this Court's precedents, because the purpose of the stay is to permit the applicant to seek review here. Apple is correct that the language could have incorporated this Court's precedents even more explicitly, Opp. 13, but on Apple's reading, the Note implausibly has no purpose whatsoever.

Put another way, ask the following basic question after reading Apple's Opposition: *why* should the Ninth Circuit's appellate mandate be stayed? Apple does not dispute that the only realistic outcome is that its certiorari petition is inevitably going to be denied and the appellate mandate will then issue. It obviously makes no sense to impose a seven-month interregnum between the denial of rehearing *en banc* and the denial of certiorari, merely to permit Apple to continue to violate the law. Federal Rule of Appellate Procedure 41 does not exist to grant a losing party "bonus time" before complying with the appellate judgment merely because it has advanced a serious, albeit completely wrong, legal argument. But at bottom, that is Apple's argument.

Moreover, contrary to Apple's suggestion, the Application raises an issue that requires this Court's intervention. Like other provisions of federal law, Federal Rule of Appellate Procedure 41 should be interpreted uniformly. Only this Court can resolve the existing inconsistency. Apple does not dispute either (1) that the Ninth Circuit's interpretation of Rule 41 conflicts with the precedent of five other circuits or (2) that, as a result, the Ninth Circuit stays its mandate *five times* more frequently than all circuits other than the Sixth. The prejudice to prevailing parties in the Ninth Circuit that are denied the benefit of the rulings in their favor is ongoing and pervasive. The fact that the Rule concerns the process for seeking Supreme Court review makes this Court's intervention particularly appropriate.

Just as important, Apple does not dispute that this case is a unique vehicle in which to address the standard for staying an appellate mandate. As discussed, it is

now common ground between the parties that the legal standard is outcome-determinative. In addition, Judge Smith's concurring opinion makes clear that the Ninth Circuit granted a stay based only on its lenient standard. Because the courts of appeals almost always grant or deny stays in summary orders that discuss neither the legal standard nor the facts, there will be few if any other opportunities for this Court to address this question.[1]

III. Apple's Remaining Arguments Against Vacatur Lack Merit.

A. The Ninth Circuit Grants All Non-Frivolous Applications To Stay the Mandate.

As discussed, the dispute over whether the Ninth Circuit grants petitions that raise "substantial" questions that this Court will not review versus all "non-frivolous" petitions makes no difference, because neither standard satisfies this Court's precedents. But the reality is that the Ninth Circuit's standard is far more lax than Apple describes.

There are two competing understandings of the Ninth Circuit's practice. One is that the applicant's legal position need only be non-frivolous to justify a stay of the mandate. That is the view of Judge Smith, a deeply respected judge who comes to the question objectively based on his seventeen years' experience adjudicating cases—including countless motions to stay the mandate—in the Ninth Circuit. The other is that the applicant's legal position must be "substantial." That is the current view of Apple, a self-interested litigant that took the opposite position below and whose

[1] Apple's argument that Judge Smith's opinion "goes to the merits of Apple's arguments, not the propriety of staying the mandate," Opp. 16, is nonsensical. The opinion says that it is proper to stay the mandate *only because* the Ninth Circuit grants all non-frivolous applications. Appendix A at 3a.

position is based entirely on its reading of the word "substantial" in Rule 41(d) in this one case. Who to believe?

Apple relies not on any Ninth Circuit Rule or decision or practice, but on the mere fact that the court's form order granting a stay cites Fed. R. App. P. 41(d), without elaboration. Opp. 11. But that citation alone proves nothing. Of course, the Ninth Circuit cites Rule 41(d): that is the Rule providing for a stay of the mandate. The question is how that court *interprets* the Rule.

Epic's Application demonstrated that the court interprets Rule 41 to provide that the legal question raised by the application need only be non-frivolous. We will not detail that extensive showing again. To rebut it, Apple would have to have contended with *six* separate points: (1) Ninth Circuit precedent (which Apple cited in seeking a stay) explains that the court liberally grants a stay of the mandate; (2) Judge Smith (who has seventeen years of experience on the court) explained that the court grants all non-frivolous applications; (3) Apple itself argued below that the Ninth Circuit's standard is "lenient"; (4) the Ninth Circuit grants a stay five times more frequently than the circuits other than the Sixth; (5) a review of the applications that are denied shows them to be overwhelmingly frivolous (and often incomprehensible); and (6) Judge Smith explained that the stay *in this case* was granted only because Apple's application was "technically non-frivolous" even though it cannot withstand the "slightest scrutiny." But, in fact, Apple is unable to articulate *any* response to *any* of those points, which is a sure sign that its argument is non-serious and just a makeweight.

Moreover, by Local Rule, the Ninth Circuit has gone to the trouble of elaborating on the "substantial question" and "good cause" standard by providing that a stay application "will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay." 9th Cir. R. 41-1. Apple notes that the Local Rule does not by its terms say that it will deny *only* those applications. Opp. 14. But that is the only possible point of the Local Rule. Why else would it exist? And as just noted, any doubt over its intended meaning is resolved by Ninth Circuit precedent, Judge Smith's opinion, and the court's actual practice.

B. An Application for This Court To Vacate a Court of Appeals' Stay of Its Mandate Is Not Subject To an Especially Demanding Standard.

This Court has previously reversed a court of appeals' entry of a stay for failure to undertake the required inquiry into whether there is a realistic prospect that this Court will grant certiorari and reverse. *Netherland v. Tuggle*, 515 U.S. 951, 951 (1995) (per curiam). That was a straightforward legal error, and the court of appeals received no special deference. So too here.

Apple's contrary argument (Opp. 9) erroneously relies only on opinions that cite the especially high bar that applies to a request to vacate a *discretionary interlocutory stay* of a case that the court of appeals is still considering and has not even resolved. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring); *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers). In cases like that, the basis for the stay is an often fact-bound judgment about the applicant's prospects on appeal. It is not—as with a stay pending the filing and disposition of a

certiorari petition—that there is a substantial prospect this Court will review and reverse the court of appeals' decisions. The decisions Apple cites thus rely on *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1302 (1976), in which Justice Rehnquist (in chambers) distinguished review of an interlocutory stay from the standard that applies to a stay of a final appellate judgment, in which the first question "is whether four Justices are likely to vote to grant certiorari."

Lacking any sense of irony, Apple finally argues that this Court should defer to the court of appeals' factual determinations and vacate the stay only if it finds an abuse of discretion. That is exactly Epic's point. Epic is relying on the Ninth Circuit's understanding of the facts—both in the panel opinion and as stressed yet again in Judge Smith's opinion concurring in the stay. It is *Apple* that is asking this Court to uphold the stay by *rejecting* the factual premises of the ruling below. *Compare* Opp. 10 (arguing for "great solicitude" to the panel based on its "intimate familiarity" with the facts) *with*, *inter alia*, Opp. 7-8 ("The panel cited no evidence that the anti-steering provisions have *actually* resulted in past injury or will result in future injury (much less the requisite irreparable harm) to Epic through its subsidiaries or the Epic Games Store, and there is no such evidence in the trial record.") *and id.* at 19 (asserting that there was insufficient evidence to support the finding that the anti-steering rules "*harm* [Epic's] subsidiary"), *and id.* (asserting that there is not enough evidence to prove that Epic is injured as the operator of an App Store). The Ninth Circuit stayed its mandate despite the fact that Apple's arguments reduce to factual disputes only by applying the wrong legal standard. That legal error is a clear

example of an abuse of discretion. *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 701 (9th Cir. 2011).

C. To the Extent Relevant, the Equities Favor Epic, Not Apple.

Apple allows iPhone users to pay for digital goods through third-party websites that charge lower commissions than Apple's massive 30% tax on every transaction. But Apple's "anti-steering" rules forbid app developers from directing consumers to those cheaper alternatives. Every day, Apple thereby misleads millions of iPhone users into over-paying Apple, earning it enormous profits. This conduct has now twice been adjudicated as unlawful, causing irreparable harm to both consumers and app developers. The district court found that the anti-steering rules violate California's Unfair Competition Law. The Ninth Circuit affirmed and denied rehearing *en banc*. So that state law ruling is now final. Necessarily, the equities favor the implementation of the injunction.

Apple argues to the contrary that, "by its terms, the injunction does not even apply to Epic, and thus Epic is not irreparably harmed by maintaining [the] stay" pending appeal. Opp. 2. But again, the district court and court of appeals concluded the opposite. In fact, as they found, Epic is injured every day, for two independent reasons. *First*, Epic's subsidiaries do have apps in the App Store. *Second*, Epic operates its own competing store. If iPhone app developers could direct users to the Epic Games Store, it would make more revenue by processing more transactions.[2]

[2] Apple notes that the Epic Games Store carries apps for PC computers, not iPhones. Opp. 20. But that makes no difference. As Judge Smith explained, numerous "cross-platform" apps allow consumers to use either their PC or iPhones, so purchases of digital goods made on the PC app through the Epic Games Store can be used in the iPhone app.

Apple's argument that consumers could be injured by lifting the injunction is empty. Opp. 23. As Judge Smith explained, the district court found the opposite as a matter of fact. This question is in any event now settled, as a matter of law. The lower courts have finally determined that the anti-steering rules violate the consumer protection provisions of California law. The reason is obvious: the rules' only effect is to prevent consumers from learning about and having easy access to payment methods that Apple has already authorized, and is now just trying to conceal. Apple cannot claim an equitable interest that depends on its *en masse* violations of the law.

CONCLUSION

Epic's Application to vacate either the Stay of the Mandate or the Stay Pending Appeal should be granted.

Respectfully submitted,

CHRISTINE A. VARNEY
GARY A. BORNSTEIN
ANTONY L. RYAN
YONATAN EVEN
CRAVATH, SWAINE & MOORE LLP
825 EIGHTH AVENUE
NEW YORK, NY 10019-7475
(212) 474-1000

PAUL J. RIEHLE
FAEGRE DRINKER BIDDLE
& REATH LLP
FOUR EMBARCADERO CENTER
SAN FRANCISCO, CA 94111-4180
(415) 591-7500

THOMAS C. GOLDSTEIN
Counsel of Record
4323 HAWTHORNE ST., NW
WASHINGTON, DC 20016
(202) 674-7594
TOM@TOMGOLDSTEIN.NET

/s Thomas C. Goldstein

Counsel for Applicant

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