No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALVIN PORTERIE, JR.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant challenging a prior state conviction under the Armed Career Criminal Act must produce actual state court decisions showing non-generic application of a facially overbroad statute—as the Fifth Circuit alone requires—or whether the statutory text suffices to demonstrate overbreadth—as every other circuit holds?

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The opinion of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction and sentence can be found at *United States v. Porterie*, No. 22-30457, 2025 WL 457999 (5th Cir. Feb. 11, 2025) (unpublished), and is set forth at Pet. App. 003. The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing *en banc* can be found at Pet. App. 001.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides in relevant part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years * * *.
>
> (2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another * * *.

INTRODUCTION

A defendant's federal sentence should not depend on the publishing practices of state courts. Yet that is precisely what the Fifth Circuit's outlier rule requires. Standing alone among the federal courts of appeals, the Fifth Circuit demands that defendants produce "actual cases" proving that state statutes mean what their text plainly says—even when the statutory language unambiguously criminalizes conduct beyond the federal generic offense.

Under *Borden v. United States*, 593 U.S. 420 (2021), general intent crimes that can be committed recklessly or negligently cannot qualify as violent felonies under the Armed Career Criminal Act's elements clause because they do not require the "active employment of force" that the elements clause demands. Petitioner had a prior conviction under Louisiana's aggravated battery statute, which is a general intent crime that can be committed recklessly or negligently. Nonetheless, the Fifth Circuit upheld Petitioner's ACCA-enhanced sentence, reasoning that he failed to produce sufficient "actual cases" proving Louisiana courts have applied the statute to reckless conduct.

This ruling perpetuates a circuit split that has festered for years. Every other circuit to address the issue has rejected the Fifth Circuit's approach, holding that facial overbreadth demonstrated by statutory text is sufficient to establish that a state offense is non-generic. The split affects thousands of defendants nationwide and creates arbitrary results based on the happenstance of geographic prosecution and the vagaries of state court publishing practices.

The conflict also reflects a fundamental disagreement about basic principles of statutory interpretation. When a statute's text is unambiguous, courts typically look no further—they do not require extrinsic evidence that the statute means what it says. Yet the Fifth Circuit's rule flips this principle on its head, requiring defendants to prove through "actual cases" that facially overbroad statutes have been applied as written.

This untenable split creates a nationwide inconsistency in the application of federal criminal law that begs the Court's intervention. Defendants face wildly different outcomes based solely on which circuit hears their case, not on the merits of their claims. Meanwhile, the Fifth Circuit's rule imposes a near insurmountable burden on defendants by forcing them to find published decisions in an era where most criminal cases end in plea agreements and many state court decisions are neither published nor easily accessible.

The question presented goes to the heart of the categorical approach this Court established in *Arthur Taylor v. United States*, 495 U.S. 575 (1990), and refined in subsequent decisions. It affects not only the ACCA but also immigration law, the federal sentencing guidelines, and other federal statutes that employ categorical analysis. The time has come to resolve this important question of federal law and restore uniformity to an area that affects thousands of cases each year.

STATEMENT OF THE CASE

A. Factual and Procedural Background

On October 27, 2021, Alvin Porterie, Jr. was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). ROA.9. After pleading guilty, he faced sentencing under the Armed Career Criminal Act (ACCA), which elevates the statutory sentencing range to 15 years to life imprisonment for defendants with three prior convictions for violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1).

Porterie's ACCA enhancement rested on five Louisiana convictions, all over a decade old: a 2006 conviction for aggravated battery under La. R.S. 14:34, a 1993 conviction for cocaine distribution, and three 1994 cocaine distribution convictions. The district court imposed the 15-year mandatory minimum sentence. ROA 198-99. Porterie did not object to the ACCA enhancement in the district court.

B. The Fifth Circuit Panel Proceedings

After initially filing an *Anders* brief, counsel was directed to address (1) whether Porterie's Louisiana aggravated battery conviction under La. R.S. 14:34 constitutes a "violent felony" under the ACCA's elements clause as interpreted by *Borden v. United States*, 593 U.S. 420 (2021), given that it is a general intent crime that can be committed recklessly or negligently, and (2) whether his three October 11, 1994 cocaine distribution convictions count as a single ACCA predicate under *Wooden v. United States*, 595 U.S. 360 (2022), because they occurred in one uninterrupted string of events.

The Fifth Circuit panel acknowledged that Louisiana aggravated battery is a general intent crime and that "reckless or negligent states of mind can satisfy Louisiana's general intent standard." Pet. App. 010 (citing *United States v. Garner*, 28 F.4th 678, 683 (5th Cir. 2022)). Under *Borden*, crimes with a *mens rea* of recklessness cannot qualify as violent felonies under the ACCA's elements clause because they do not require the "active employment of force against another person." 593 U.S. at 445. The panel did not dispute this principle. Instead, it held that Porterie was required to produce "actual cases" demonstrating that Louisiana courts have applied the aggravated battery statute to defendants who acted only recklessly. Pet. App. 011-012. Finding Porterie's proffered state cases insufficient to meet the "actual case" standard from *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc), the panel affirmed Porterie's sentence without reaching his *Wooden* argument regarding the cocaine convictions. Pet. App. 013-016.

C. The Petition for Rehearing *En Banc*

Porterie filed a petition for rehearing *en banc*, arguing that the "actual case" requirement should not apply to the ACCA's elements clause and that *Castillo-Rivera*'s interpretation of *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) conflicts with this Court's precedent and the approach of every other circuit. The petition highlighted that this Court's recent decision in *United States v. Justin Taylor*, 596 U.S. 845 (2022), explicitly rejected requiring defendants to present empirical evidence about prosecutorial practices when interpreting elements clauses.

The Fifth Circuit denied rehearing *en banc* without recorded dissent. Pet. App. 001-002.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE IRRECONCILABLY SPLIT ON A FUNDAMENTAL QUESTION OF FEDERAL CRIMINAL LAW

The circuits are deeply and intractably divided on whether defendants must produce "actual cases" showing state court application of facially overbroad statutes when challenging prior convictions under categorical analysis. The Fifth Circuit stands alone in requiring such evidence, while every other circuit to address the question has rejected this nearly insurmountable burden.

A. The Fifth Circuit's Outlier Position

The Fifth Circuit's rule originated in *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc), a closely divided *en banc* decision which held that defendants must point to "actual cases" showing state courts have applied statutes in a non-generic manner—even when the statute's text is facially broader than the federal generic offense. *Id.* at 223. Under this rule, "without supporting state case law, interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability.'" *Id.*

The decision below exemplifies how this rule operates in practice. Despite acknowledging that Louisiana's general intent standard can clearly be satisfied by recklessness—and that reckless offenses cannot qualify under *Borden*—the panel affirmed Petitioner's ACCA sentence because he could not produce adequate "actual cases" proving Louisiana courts have convicted defendants of aggravated battery based on reckless conduct. Pet. App. 011-016.

B. Every Other Circuit Rejects the Fifth Circuit's Approach

The Fifth Circuit's position has been explicitly rejected by every other circuit to confront the issue. As the Fourth Circuit accurately observed in *Gordon v. Barr*, 965 F.3d 252 (4th Cir. 2020), "when the state, through plain statutory language, has defined the reach of a state statute to include conduct that the federal offense does not, the categorical analysis is complete." *Id.* at 260. The burden does not shift to the defendant to "find a case" applying the statute in the manner its text plainly authorizes. *Id.*

Gordon was convicted of "willful discharge of 'any firearm'" under Virginia law. *Id.* at 254. He argued this didn't qualify as a federal firearm offense because Virginia's statute included "antique firearms" excluded from the federal definition. *Id.* The Fourth Circuit agreed without requiring Gordon to identify an actual prosecution involving an antique firearm. *Id.* The Fourth Circuit noted that this approach "is in accord with analyses conducted by our sister circuits"—though not with the Fifth Circuit. *See id.* at 260-61 & n.9 (collecting cases and contrasting them with *Castillo-Rivera*).

The *en banc* Ninth Circuit put it even more bluntly: "Where . . . a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." *United States v. Grisel*, 488

F.3d 844 (9th Cir. 2007) (en banc) (citation omitted), *abrogated on other grounds by United States v. Stitt*, 586 U.S. 27 (2018).

The First, Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits have also all aligned with this common-sense approach. *See Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (First Circuit holding that where the statutory language "clearly does apply more broadly than the federally defined offense," then the statute is non-generic); *Hylton v. Sessions*, 897 F.3d 57, 63-64 (2d Cir. 2018) (a defendant need not point to actual examples "when the statutory language itself . . . creates the realistic probability"); *Singh v. Attorney General*, 839 F.3d 273, 286 n.10 (3d Cir. 2016) (The Third Circuit holding that the "realistic probability" test comes into play only when "the relevant elements" of the state crime and the generic definition are "identical"); *Mendieta-Robles v. Gonzales*, 226 F. App'x 564, 572 (6th Cir. 2007) (unpublished) (refusing to "ignore the clear language" of the state statute); *Van Cannon v. United States*, 890 F.3d 656, 663 (7th Cir. 2018) (if the state statute "covers a broader swath of conduct," the offense is nongeneric); *United States v. Titties*, 852 F.3d 1257, 1274-75 & n.23 (10th Cir. 2017) (Tenth Circuit finding "no persuasive reason why we should ignore [the] plain language to pretend the statute is narrower than it is" when no example case exists); *Ramos v. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) ("*Duenas-Alvarez* does not require [an actual case] showing when the statutory language itself . . . creates the 'realistic probability'").

Even the Eighth Circuit, which at the time of *Castillo-Rivera* seemed to share the Fifth Circuit's view, *see generally Mowlana v. Lynch*, 803 F.3d 923, 925 (8th Cir.

2015), has clarified its position and aligned itself with the majority. *See Gonzalez v. Wilkinson*, 990 F.3d 654, 657-61 (8th Cir. 2021) (Rejecting the need for defendants to provide evidence regarding how the state applied a statute when the language of the statute covers the conduct because "the Supreme Court's opinion in *Duenas-Alvarez* makes no reference to the state's enforcement practices or to how often prohibited conduct is prosecuted").

C. The Split Creates Arbitrary Results and Is Acknowledged and Entrenched

This one-versus-all circuit split creates profound and systemic unfairness. Defendants face wildly different outcomes based solely on geography rather than legal merit. A defendant convicted under the same Louisiana statute would have his ACCA enhancement vacated in the Fourth Circuit but upheld in the Fifth Circuit—not because the law differs, but because of conflicting judicial interpretations of *Duenas-Alvarez*. Had Porterie been charged with possessing this firearm outside of the Fifth Circuit, he would not be serving a 15-year mandatory minimum sentence.

The arbitrary nature of these results is particularly stark given that the underlying legal question is often identical. State statutes with facially overbroad language present the same interpretive issue regardless of which circuit reviews them. Yet the Fifth Circuit's outlier approach means defendants in Texas, Louisiana, and Mississippi face enhanced sentences that would be vacated elsewhere.

This is not a subtle disagreement susceptible to harmonization. The circuits have explicitly acknowledged their differences and show no signs of converging. The Second Circuit specifically noted that "[o]ther circuits have registered nearly

unanimous disagreement with the approach" taken by the Fifth Circuit. *Hylton*, 897 F.3d at 65. The Fifth Circuit has repeatedly reaffirmed *Castillo-Rivera* despite sharp criticism from its own judges, and the denial of the *en banc* petition in this case without recorded dissent demonstrates that the Fifth Circuit does not intend to revisit its outlier position. [1]

Meanwhile, the practical impact continues to grow. The categorical approach applies not only to the ACCA but also to immigration law, the federal sentencing guidelines, and numerous other federal statutes. Each application of the conflicting approaches deepens the split and multiplies the injustice to defendants unlucky enough to be prosecuted in the Fifth Circuit. Only this Court can resolve this fundamental disagreement about the scope of *Duenas-Alvarez* and restore uniformity to federal criminal law.

II. THE FIFTH CIRCUIT'S "ACTUAL CASE" REQUIREMENT CONTRADICTS THIS COURT'S PRECEDENT AND SOUND PRINCIPLES OF STATUTORY INTERPRETATION

The Fifth Circuit's approach is not merely an outlier position—it is fundamentally wrong. The "actual case" requirement contradicts this Court's precedent, violates basic principles of statutory interpretation, and creates an unjust burden that Congress never intended.

[1] Even within the Fifth Circuit, the excessively strict interpretation of *Duenas-Alvarez* is controversial. *Castillo-Rivera*, 853 F.3d at 239-41 (Dennis, J., dissenting) & 243-44 (Higginson, J., concurring in part and dissenting in part) ("Although I have applied the 'realistic probability' test announced in *Duenas-Alvarez*, I agree with Judge Dennis's dissenting opinion that this added showing is unnecessary when a state statute is facially broader than its federal analog."); *Alexis v. Barr*, 960 F.3d 722, 731-34 (5th Cir. 2020) (Graves, Jr., J., concurring) ("the realistic probability test and 'actual case' requirement are simply illogical and unfair…") & 734-36 (Dennis, J., dissenting).

A. This Court's Recent Decision in *Justin Taylor* Forecloses the Fifth Circuit's Approach

This Court's decision in *United States v. Justin Taylor*, 596 U.S. 845 (2022), definitively rejected the type of empirical inquiry the Fifth Circuit demands. In *Justin Taylor*, the government argued that defendants must present evidence about prosecutorial practices to prove a statute's scope. This Court's response was unequivocal:

> Put aside the oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits. Put aside, too, the practical challenges such a burden would present in a world where most cases end in plea agreements, and not all of those cases make their way into easily accessible commercial databases.

Id. at 857 (citing to J. Turner, *Transparency in Plea Bargaining*, 96 Notre Dame L. Rev. 973, 974, 978-981 (2021)).

The Court continued with what can only be described as a direct repudiation of the Fifth Circuit's approach:

> An even more fundamental and by now familiar problem lurks here. The government's theory cannot be squared with the statute's terms. [The elements clause] doesn't ask whether the crime is *sometimes* or even *usually* associated with * * * force * * *. It asks whether the government must prove, as an *element* of its case, the use, attempted use, or threatened use of force.

Id at 857-58. (emphasis in original).

Justin Taylor made clear that elements clause analysis is textual, not empirical. Where statutory elements do not overlap with federal requirements, "[t]hat ends the inquiry." *Id.* at 859. The Fifth Circuit's demand for "actual cases" directly conflicts with this holding.

B. The "Actual Case" Requirement Misreads *Duenas-Alvarez*

The Fifth Circuit's interpretation of *Duenas-Alvarez* stretches that decision far beyond its original scope. *Duenas-Alvarez* involved a California statute whose text closely resembled the federal generic definition of theft. 549 U.S. at 187, 189. The defendant argued that California's judicial interpretation of aiding and abetting liability was broader than other states', transforming an otherwise generic-looking statute into a non-generic one. *Id.* at 190-91.

In that narrow context—where statutory text matched the generic definition and the defendant sought to prove overbreadth through speculative judicial construction—the Court required proof of "realistic probability" through actual cases. *Id.* at 193. But *Duenas-Alvarez* never suggested this requirement applies when statutory text itself is facially broader than the generic offense.

The Fifth Circuit has inverted *Duenas-Alvarez*'s logic. Instead of preventing defendants from using "legal imagination" to transform generic-looking statutes, it requires defendants to produce "actual cases" proving that facially non-generic statutes mean what they plainly say. This reading contradicts fundamental interpretive principles.

C. The Rule Violates Basic Principles of Statutory Interpretation

When statutory text is unambiguous, the interpretive inquiry ordinarily ends there. *Bedroc Ltd. v. United States*, 541 U.S. 176, 183 (2004). Courts do not require extrinsic evidence to prove that clear language means what it says. Yet the Fifth

Circuit's rule does exactly that, demanding "actual cases" even when state statutes are facially broader than federal generic offenses.

This approach also creates an improper presumption that state statutes conform to federal definitions until proven otherwise—a presumption found nowhere in this Court's categorical approach jurisprudence. The categorical approach asks what juries were "actually required to find" to convict, *Arthur Taylor*, 495 U.S. at 602, not what prosecutors typically charge or courts usually decide.

D. The Categorical Approach Focuses on Elements, Not Enforcement Patterns or Facts

This Court has consistently emphasized that the categorical approach "involves, and involves only, comparing elements." *Mathis v. United States*, 579 U.S. 500, 521 (2016). It "does not care about" facts. *Id.* The approach asks what juries were "actually required to find" to convict, *Arthur Taylor*, 495 U.S. at 602, and examines "the least of the acts criminalized" by statute, not the least culpable acts ever prosecuted, *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013).

Classic examples from this Court's precedent illustrate this text-focused approach. The Massachusetts burglary statute in *Shepard v. United States* was non-generic because it applied to "boats and cars" on its face. 544 U.S. 13, 17 (2005). The Iowa burglary statute in *Mathis* was also non-generic because it facially included "a broader range of places" than generic burglary, including any "land, water, or air vehicle." 579 U.S. at 519. The Kansas drug statute in *Mellouli v. Lynch* did not "relate to" controlled substances because the statute applied to "at least nine substances not included in the federal lists." 575 U.S. 798, 802 (2015).

Notably, none of these cases required examination of state enforcement practices. This Court never demanded proof that Massachusetts had actually prosecuted boat burglars, that Iowa had actually charged vehicle burglary, or that Kansas had actually prosecuted defendants for possessing the nine additional substances. The facial overbreadth evident from the statutory text was sufficient.

The Fifth Circuit's "actual case" requirement fundamentally contradicts this element-focused approach. By demanding proof of how state courts have applied statutes in practice, the rule improperly shifts focus from statutory elements to factual enforcement patterns. This shift violates the basic principle that categorical analysis involves comparing legal definitions, not investigating prosecutorial habits or judicial enforcement trends.

The practical problems with requiring empirical evidence about enforcement are severe and precisely what this Court warned against in *Justin Taylor*. Most criminal prosecutions end in plea agreements that generate no published opinions. Even when appellate decisions exist, they rarely address the mental state issues relevant to categorical analysis because such issues are typically legally irrelevant under state law. Requiring defendants to locate published decisions addressing hypothetical applications of statutes creates a nearly impossible evidentiary burden that Congress never intended and that undermines the entire purpose of the categorical approach.

III. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE AND WARRANTS IMMEDIATE REVIEW

The circuit split on the "actual case" requirement affects thousands of federal defendants and creates systemic unfairness in the application of federal criminal law. The question's importance extends far beyond the ACCA context, affecting immigration law, the federal sentencing guidelines, and other federal statutes employing categorical analysis.

A. The Circuit Split Affects Thousands of Cases Across Multiple Areas of Federal Law

This case presents an ideal vehicle for resolving a circuit split that has broad implications nationwide. The conflict extends far beyond the ACCA context, affecting virtually every federal statute that employs categorical analysis. The stakes could not be higher: thousands of defendants face dramatically different outcomes based solely on the geographic happenstance of where they are prosecuted.

The scope of this interpretive disagreement is breathtaking. The categorical approach governs not only ACCA cases but also immigration law's "aggravated felony" determinations under 8 U.S.C. § 1101(a)(43), the Sentencing Guidelines' "crime of violence" and "controlled substance offense" definitions under U.S.S.G. § 4B1.2, career offender enhancements under § 4B1.1, and various federal criminal statutes defining "crime of violence" under 18 U.S.C. § 16. Each application of the Fifth Circuit's outlier rule deepens existing inequities and multiplies the injustice.

B. The Fifth Circuit's Rule Imposes an Unfair and Often Impossible Burden

The Fifth Circuit's "actual case" requirement imposes a burden that is both fundamentally unfair and often practically impossible to satisfy. Most criminal prosecutions end in plea agreements that generate no published appellate decisions. *See Betansos v. Barr*, 928 F.3d 1133, 1146-47 (9th Cir. 2019) (finding that "nearly all" criminal cases "are resolved through plea bargains," which "are not published, nor are they readily accessible for review."). State court databases remain incomplete, and many relevant decisions are never published or made easily accessible.[2] Defendants typically have no incentive to contest mental state issues that would be legally irrelevant under state law, making it unlikely that published decisions will address the precise questions relevant to categorical analysis. The result is an arbitrary system where defendants' fates depend not on legal merit but on the publishing practices of state courts and the resources available for exhaustive case research.

The practical consequences of this split grow more severe with each passing day. In this very case, the Fifth Circuit panel expressed frustration with the difficulty of analyzing Louisiana state court decisions containing "sparse reasoning" and being "equivocal"—a candid acknowledgment of the unworkability of its own rule. Pet. App.

[2] As the Eighth Circuit recently explained, defendants often "have no incentive, and likely no ability" to generate reported decisions on issues that, while authorized by statute, become legally irrelevant under state law. *Gonzalez*, 990 F.3d at 661 n.2. The same court recognized that even when states have prosecuted conduct falling outside the federal definition, "it is unclear whether this fact would be documented" in any accessible decision. *Id.*

015-016. If experienced federal judges find the "actual case" requirement difficult to apply, the burden on defendants and their counsel is exponentially worse.

C. The Legal Question Is Cleanly Presented

This case presents the circuit split in its clearest form. The parties agree on all relevant factual and legal premises: Louisiana aggravated battery can be committed recklessly, reckless offenses cannot qualify under *Borden*, and the sole disputed issue is whether the "actual case" requirement applies. This clean presentation allows the Court to address the core interpretive disagreement without becoming mired in factual disputes or tangential legal issues. Should this Court overrule the Fifth Circuit's "actual case" requirement, Porterie's aggravated battery conviction would no longer be a predicate offense under the ACCA, and the case can be remanded for the Fifth Circuit to resolve Porterie's *Wooden* claim.

CONCLUSION

For more than five years, the Fifth Circuit has stood alone in requiring defendants to produce "actual cases" proving that facially overbroad state statutes mean what their text plainly says. This outlier position contradicts this Court's precedent, violates fundamental principles of statutory interpretation, and creates arbitrary results based on geographical luck and state court publishing practices.

The circuit split is acknowledged, entrenched, and affects thousands of cases each year. It creates systemic unfairness in federal criminal law and undermines the uniform administration of justice. The question presented goes to the heart of the

categorical approach and requires this Court's authoritative resolution. The petition for a writ of certiorari should be granted.

Respectfully submitted this June 9, 2025,

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