No. 19-6156

In the Supreme Court of the United States

October Term 2019

RANDY ETHAN HALPRIN,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Institutions Division,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR ALLOWING THE WRIT

Based on Texas's Brief in Opposition ("BIO"), these facts and points of law are undisputed: (1) the judge who presided over Petitioner Randy Halprin's capital murder trial and sentenced him to death was biased against him because Petitioner is Jewish, or, in the judge's words, a "goddamn kike"; (2) the judge violated a constitutional and statutory duty to recuse himself; (3) the judge concealed his bias; (4) the judge was cloaked in the "presumption of honesty and integrity" this Court recognizes "in those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); (5) no publicly known source of information about the judge indicated he was anti-Semitic; (6) Petitioner learned the judge was anti-Semitic by interviewing one of his former campaign workers, after she was identified in a 2018 newspaper article; (7) the Constitution requires that Petitioner's conviction be vacated regardless of the evidence presented at trial; (8) if Petitioner's meritorious judicial bias claim is deemed "second or successive" under 28 U.S.C. § 2244(b)(2), federal habeas review is unavailable because "the facts underlying the claim" do not suggest Petitioner is innocent, as required by § 2244(b)(2)(B)(ii); (9) this Court has repeatedly held the statutory "phrase 'second or successive petition' is a term of art given substance in our prior habeas corpus cases," *Slack v. McDaniel*, 529 U.S. 473, 486 (2000), and not only in the text itself, *Panetti v. Quarterman*, 551 U.S. 930, 943-944 (2007); (10) in *Magwood v. Patterson*, 561 U.S. 320, 335 n.11 (2010), this Court said it was not reconsidering *Slack* or *Panetti* and called "unfounded" the suggestion that *Panetti* was in doubt; (11) this Court has repeatedly held the Antiterrorism and Effective Death Penalty Act ("AEDPA"), did not "'displace courts'

traditional equitable authority.'" *McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013) (quoting *Holland v. Florida*, 560 U.S. 631, 646 (2010)).

These uncontested points undermine Texas's textual argument. The State's effort to distinguish Petitioner's judicial bias claim from the competence-for-execution claim in *Panetti* manages to founder on both the things the cases have in common, and their stark differences: allowing a previously unavailable claim that does not question a verdict to proceed while excluding a claim that automatically invalidates the verdict creates anomalies and perverse effects *Panetti* sought to avoid. Texas also fails to acknowledge that other "claims that implicate fairness" require inquiry into the reliability of the verdict, but judicial bias does not. Finally, Texas cites readily distinguishable cases for propositions they do not support, while it fails to reckon with the conflict between the Fifth Circuit's non-analysis and the abuse-of-the-writ analyses of the Eleventh and Eighth Circuits, which are consistent with this Court's concerns in *Panetti*.

A. The Brief in Opposition Does Not Address the Narrow Question Presented by Petitioner's Case

For three reasons, Texas presents the overbroad question whether "late-discovered claims that implicate fairness" are subject to the restrictions of 28 U.S.C. § 2244(b)(2)(B). BIO 11. First, the phrase "late-discovered" papers over the undisputed, purposeful concealment of the judge's religious bigotry in this case.[1]

[1] Texas says it contests the timing of Petitioner's claim, BIO 11 n.4, but it did not do so before the District Court. In the Fifth Circuit, Texas relied upon the District Court's finding that Petitioner's claim was available at the time of trial in 2003, Opp. Mot. Auth. at 24 (citing App. 15), a finding the Fifth Circuit declined to endorse. App. at 6. Now, Texas says the claim was not discoverable until 2006, based on evidence that, when he was a

Second, Texas invokes all fairness-protection rules to gloss over the violation of Petitioner's religious liberty. Otherwise, this case will remind this Court of Texas's previous "disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017).

Third, Texas invokes all "fairness claims" in service of its contention that allowing Petitioner's claim would negate the force of § 2244(b)(2)(B)(ii)'s innocence requirement, BIO 12-14, and to suggest that Petitioner seeks a rule for all claims concealed by state action, especially claims based on *Brady v. Maryland*, 373 U.S. 83 (1963). BIO 24-26. Petitioner shares and addresses, here and in the Petition, the concern that any ruling in his favor should not "undermine—if not render superfluous—the exceptions to dismissal set forth in § 2244(b)(2)." *Magwood*, 561 U.S. at 335.

Texas cites a case that explains why Petitioner's argument based on *Panetti* does not touch *Brady* claims. In *Brown v. Muniz*, 889 F.3d 661 (9th Cir. 2018), *cert. denied sub nom.*, *Brown v. Hatton*, 139 S. Ct. 841 (2019)), the court held that applying § 2244(b)(2) to *Brady* claims does not implicate the concerns expressed in *Panetti* because *both* AEDPA's exceptions to the successor bar track the elements of the claim. 889 F.3d at 668-671. The court recognized that § 2244(b)(2)(B)(ii) "elevates the 'reasonable probability' standard for *Brady* materiality to a more demanding 'clear and convincing evidence' standard." *Id.* at 675.

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prosecutor, Judge Cunningham discriminated against Black prospective jurors, as was standard practice under the notoriously racist district attorney Henry Wade. BIO 11 n.4. Petitioner's evidence showed the trial prosecutor knew Cunningham for 23 years before the trial; they grew up in the same neighborhood, where the DA also lived, and they both worked for and revered Wade. *See* Pet. 6-9. The same evidence suggests the prosecutor knew about and concealed his knowledge of Judge Cunningham's bigotry.

Regarding *Magwood*'s concern about diluting the statutory exceptions to the successor bar, Petitioner does not ignore the difference between his judicial bias claim and the claim brought under *Ford v. Wainwright*, 477 U.S. 399 (1986), in *Panetti*, as Texas suggests. BIO 16-17. Petitioner stresses both commonalities and differences. Here and in *Panetti*, the factual predicate for the claims was not available at the time of the first habeas petition due to state-action.[2] That common condition satisfies Congress's requirement (adopted from this Court's cases) that something external to the petitioner prevented presentation of the claim in the first petition. 28 U.S.C. § 2244(b)(2)(B)(i); *McCleskey v. Zant*, 499 U.S. 467, 488-490 (1991).

Petitioner's claim and Panetti's also have in common that the constitutional law governing their claims does not require an inquiry into whether the verdict was correct. That is why "the factual predicate for the claim" raised in both cases cannot "be sufficient to establish by clear and convincing evidence" that the petitioner was wrongly convicted, as required by Congress's modified codification of this Court's miscarriage-of-justice standard.[3]

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[2] Texas wrongly asserts that *Ford* claims are "inherently unsuited to consideration in an initial petition." BIO 19. In *Panetti*, Texas rightly said *Ford* claims "*as a general matter*, are not ripe until after the time has run to file a first federal habeas petition," 551 U.S. at 943 (emphasis added), because of something *extrinsic* to the legal claim: "States—at the urging of the federal courts—usually delay[ed] setting execution dates" until after the conclusion of federal habeas review. *Panetti*, Suppl. Brief of Resp. 2007 WL 1090395, at *6. Some States do not delay, however. *See* Va. Code § 53.1-232.1(i) (requiring that execution date be set within 60 days of conclusion of state habeas review).

[3] Contrary to Texas's claim, BIO 20, the legislative history of AEDPA shows the 104th Congress considered Judge Henry Friendly's views. BIO 20. *See Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 30–31 (1995); *Taking Back Our Streets Act of 1995: Hearing on H.R. 3 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. 145, 188 (1995). *See also Hearing on S. 623*, at 3; *id.* at 23;

Allowing Petitioner's claim does not weaken the statutory exceptions any more than *Panetti* did. Indeed, because Petitioner's claim challenges the verdict, it is closer to Congress's concern than was the claim in *Panetti*. Allowing Petitioner's claim simply recognizes that the statutory exceptions fail to account for all constitutional claims, something suggested by this Court in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-645 (1998).

Petitioner stresses the distinction that *Panetti* allows federal habeas courts to intervene in state cases even though *Ford* claims do not challenge the validity of a conviction or death sentences. *Ford*, 477 U.S. at 425 (Powell, J., concurring). "Since fundamental fairness is the central concern of the writ of habeas corpus," *Strickland v. Washington*, 466 U.S. 668, 697 (1984), it would be anomalous for this Court to allow federal habeas review of a *Ford* claim

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id. at 24; *id.* at 61. *See also* Charles Doyle, Am. L. Div., Cong. Research Serv., 96-499 A, *Antiterrorism and Effective Death Penalty Act of 1996: A Summary*, 5 n.19 (1996).

Texas also fails to recognize that this Court's agreement with Judge Friendly's views on the relationship between fairness and reliability helped shaped the standards for assessing constitutional error in cases like *Strickland v. Washington*, 466 U.S. 668 (1984), and *United States v. Bagley*, 473 U.S. 667 (1985). That influence explains why "the factual predicate" for most fair-trial claims can give rise to a claim of innocence, and therefore be reviewable under § 2244(b)(2)(B)(ii). *See generally* Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the Maharal of Prague*, 90 Mich. L. Rev. 604 (1991); Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas after* Martinez, 55 Wm. & Mary L. Rev. 2071 (2014). This Court's agreement with Justice Harlan's view of judicial bias explains why Petitioner's claim cannot be reviewed under § 2244(b)(2)(B)(ii).

Texas also falsely claims Judge Friendly excluded from the innocence requirement "a list of claim-specific exceptions to his proposed standard" that did not include a claim like Petitioner's. BIO 20. Judge Friendly excepted "lines of decision," that included "cases where the [collateral] attack concerns the very basis of the criminal process," and cases "where a denial of constitutional rights is claimed on the basis of facts which 'are *dehors* the record and their effect on the judgment was not open to consideration and review on appeal.'" Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 154, 152 (1970) (quoting *Waley v. Johnston*, 316 U.S. 101, 104-105 (1942)).

but exclude review of a claim that shows bias that "'poisons public confidence' in the judicial process," and undermines the legitimacy of "'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'" *Buck*, 137 S. Ct. at 778. Petitioner has shown bias "cause[d] fundamental unfairness" and "undermin[ed] the systemic requirements of a fair and open judicial process."[4] *Weaver v. Massachussetts*, 137 S. Ct. 1899, 1911 (2017).

As noted above, Texas does not dispute the circumstances leading to the discovery of Judge Cunningham's anti-Semitic bias, and the State merely hints in the margin that it disputes whether Petitioner satisfies § 2244(b)(2)(B)(i). With regard to § 2244(b)(2)(B)(ii)'s innocence requirement, Texas admits that "[j]udicial bias claims remain rare," BIO 18, so its concern about this case swallowing the rule is overblown. Also, Texas fails to explain why this Court would authorize a second federal review for a claim brought under *Ford*, which does not challenge the validity of a judgment, while barring a claim that is so central to the entire process that it requires automatic reversal.

The other cases that Texas claims raised "late-discovered structural-error claims," BIO 14-15, either did not involve structural errors that require automatic reversal, *Leal Garcia v. Quarterman*, 573 F.3d 214 (5th Cir. 2009) (denying successive petition raising violation of Vienna Convention on Consular Relations), or involve claims which were not late-discovered because they were adjudicated in a prior federal petition. *In re Webster*, 605

[4] Contrary to Texas's claim that Petitioner's "argument could be made for any potentially late-discovered claim," BIO 16, Petitioner asserts a claim the State concedes is rare, BIO 18, and that is cognizable only if it is not an abuse of the writ and requires automatic reversal.

F.3d 256 (5th Cir. 2010) (denying successive intellectual-disability claim that had been adjudicated in initial habeas proceedings); *Pizzuto v. Blades*, 673 F.3d 1003 (9th Cir. 2012) (denying successive petition raising judicial bias claim where petitioner added evidence to claim raised in first petition).

Texas also fails to cite cases where courts have treated a claim like Petitioner's—i.e. one involving a concealed, undisputed claim of bias—as "successive" under § 2244(b)(2)(B). BIO 17-18. There is nothing in the unpublished *United States v. Orr*, 643 Fed. App'x 680 (10th Cir. 2016), to suggest the petitioner relied upon extra-record evidence of bias. *Outlaw v. Sternes*, 233 F.3d 453 (7th Cir. 2000), dismissed a claim based on evidence the judge was indicted for taking bribes from criminal defendants two years before initial habeas petition was filed. The only case Texas cites that is similar to Petitioner's is *Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995), in which the claim was held not to be abusive.

B. Halprin Does Not Ask the Question Texas Poses Because This Court Has Answered It

Texas asks whether "late-discovered claims that do not implicate innocence [are] exempt from 28 U.S.C. § 2244(b)(2)(B)." BIO at i. This Court said in *Panetti*, the answer to that question is "sometimes." *See Magwood v. Patterson*, *supra*, 561 U.S. at 335 n.11 ("[t]hree times we have held" § 2244(b) does not apply "to every application filed by a prisoner in custody pursuant to a state-court judgment if the prisoner challenged the *same* state-court judgment once before"; citing *Panetti* as an example) (emphasis in original).

Texas argues the Fifth Circuit was correct to reject Petitioner's claim because, "[b]ased on the plain language of the statute, Halprin's petition is successive," BIO 15, and this Court,

in *Magwood*, adopted a text-based approach and "its rationale stand[s]." BIO 13. But *Magwood* said "it is well settled that the phrase ['second or successive'] does not simply 'refe[r] to all § 2254 applications filed second or successively in time.'" 561 U.S. at 332 (quoting *Panetti*).

Texas claims Petitioner is asking this Court to adopt a rule "that it rejected nine years ago" in *Magwood*. BIO 13. But *Magwood* said *Panetti*'s holding as to applications attacking a previously challenged judgment was not called "into doubt." 561 U.S. at 335 n.11. *Magwood* concerned only whether § 2244(b)(2) applies to an application challenging a "new judgment." 561 U.S. at 336. The three concurring Justices did not join the opinion as to Part IV-B, *id.* at 343, in which two Justices rejected "abuse of the writ principles," including the "fair opportunity" rule. *Id.* at 337-38.

Lower courts have not read *Magwood* in the way Texas does. The Tenth Circuit has read *Magwood* to suggest that *Panetti*'s "fair opportunity" rule not only remains viable, but that such a view has been endorsed by seven justices of this Court. *See Ochoa v. Workman*, 669 F.3d 1130, 1147 (10th Cir. 2012) (Hartz, J., concurring). Other circuits have similarly applied the analysis articulated in *Panetti*, which rejected the purely textual approach Texas advances. *See, e.g., Scott v. United States*, 890 F.3d 1239, 1248 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 842 (2019) (holding that *Panetti* and *Magwood* mandated a three-factor test to analyze whether a claim is second or successive: "(1) the implications for habeas practice if the Court found it lacked jurisdiction over Panetti's claim; (2) the purposes of AEDPA; and (3) the pre-AEDPA abuse-of-the-writ doctrine."); *Askew v. Bradshaw*, 636 Fed. App'x 342, 347 (6th Cir. 2016) (holding that *Magwood* required two-part test to determine if petition

was second or successive: 1) Whether the petitioner is challenging the same state-court judgment as he did in an earlier habeas application; 2) "[I]f the petitioner is challenging the same state-court judgment that he already challenged or could have challenged in a previous federal habeas application, the district court must consult abuse-of-the-writ principles, as modified by AEDPA, to ascertain whether or not the petitioner's claims must meet the stringent requirements of 28 U.S.C. § 2244(b).").[5]

Indeed, in another case currently pending before this Court, Texas has acknowledged that *Magwood* does not foreclose the "fair opportunity" rule. In its Brief for Respondent in *Banister v. Davis*, No. 18-6943, Texas argued that the "general rule" treating post-judgment applications as second or successive "may not apply to post-judgment applications if the judgment did not adjudicate—and could not have adjudicated—the claim." Br. at 19. Texas interpreted this Court's cases as holding that a second-in-time application is not "second or successive" when "something prevented the prisoner from obtaining an adjudication of his habeas claim in an earlier application" and believed that *Magwood* was in accord with this principle. *Ibid.*

Contrary to the State's suggestion in this case, Petitioner does not dispute that "[l]ate-discovered judicial bias claims have historically been subject to the abuse-of-the-writ

[5] Texas understandably fails to acknowledge that the Fifth Circuit also has in the past, allowed "that 'a later petition is successive when it: 1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes an abuse of the writ.' *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998)." App. 5. The State's inability to acknowledge a statement in the opinion it defends, because that statement is inconsistent with the State's argument about the holding of *Panetti*, speaks to the need for review in this Court.

doctrine." BIO 22. Petitioner asks only that the doctrine—which has promoted comity, finality, and federalism for nearly a century—be applied to him. Contrary to the State's claim that it "is unaware of any court that has exempted judicial bias claims from the abuse-of-the-writ bar," and that "Halprin cites none," BIO 23, both Texas and Petitioner cite *Porter*, *supra*, and *Walker v. Lockhart,* 763 F.2d 942, 961 (8th Cir. 1985) (*en banc*), in which the courts held that newly discovered judicial bias claims were not barred as abusive.[6] BIO 23.

C. Texas Abandons its "Plain Text" Approach and Fails to Address the Impact of the Fifth Circuit's Decision on *Panetti*'s Purposive and Historical Concerns

Texas does not believe in its "plain text" argument enough to maintain it. Rather the State turns to attempting to address some of the purposive and historical analysis that *Panetti* mandated, BIO 15-22, but fails.

Panetti singled out as "particularly" important the concern that § 2244(b)(2)'s exception for only those newly discovered claims that implicate innocence created a risk of foreclosing "'any federal review of ... unexhausted claims,'" 551 U.S. at 946 (quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005)). Texas does not share this concern and does not address it.

[6] Texas apparently tried to pound the square peg of its position into the round hole created by *Panetti*. *Compare* BIO 23 ("The Director is unaware of any court that has exempted judicial bias claims from the abuse-of-the-writ bar"), *with Panetti*, 551 U.S. at 947 ("'[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ") (quoting *Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir.1994)) (emphasis added).

Texas attempts to address the *Panetti*'s concern about unsupported claims in first federal petitions by offering a string of cases that "refute[] by reality" the concern that treating claims of concealed bias as second or successive could lead petitioners to plead "meritless judicial-bias claims in their initial petitions." BIO 17. But in the second case Texas cites, *Pizzuto v. Blades*, *supra*, the petitioner raised a claim of judicial bias in his initial habeas petition. *Pizzuto v. Arave*, 280 F.3d 949, 974-75 (9th Cir. 2002). Pizzuto defaulted his claim by failing to raise it in his initial state habeas petition, even though the judge allegedly expressed his bias to Pizzuto's parents "at the start of the trial." *Id.* at 974.

None of the State's cases involved facts remotely similar to this case, i.e. a case of undisputed bigotry directed towards a capital defendant that was *concealed* by the judge until he was exposed by a third party. Thus, contrary to the State's suggestion that the Fifth Circuit broke no new ground, BIO 21, none of the cases create the incentive to investigate state court judges that the Fifth Circuit created when it held that a claim of judicial bias ripens before the defendant is aware of any facts suggesting bias against him. That specific, and unique, holding denies Texas judges the practical safeguard from intrusive investigations that this Court's presumption of impartiality would afford judges in other jurisdictions. (Texas studiously avoids the implications of this Court's decision in *Withrow*, *supra*.)

Texas claims it is addressing "Halprin's purported comity concerns," BIO 21, while avoiding that Halprin has merely repeated the concerns expressed by the Eleventh Circuit in *Porter*, *supra*. In a case strikingly similar to this one, that court reasoned that a rule like the Fifth Circuit's

> would presume that litigants and counsel cannot rely upon an unbiased judiciary, and that counsel, in discharging their Sixth Amendment obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges before whom they appear. Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process—all to the detriment of the fair administration of justice.

Porter, 49 F.3d at 1489.

Texas argues that if judicial bias claims are "nonsuccessive" petitioners "almost certainly will" file them "when their executions are imminent." BIO 19. Texas fails to explain why subjecting judicial bias claims to the abuse-of-the-writ doctrine, as Halprin requested below, would be less of a deterrent to withholding a meritorious claim than AEDPA. If that were the case, the State would have cited a string of delayed, non-meritorious claims from before AEDPA. It did not. Texas failed with the same argument in *Panetti* when this Court found "last-minute filings that are frivolous and designed to delay executions can be dismissed in the regular course." 551 U.S. at 946.

D. Review is Necessary, Despite the Texas Court's Decision to Authorize a Subsequent State Application and Stay Petitioner's Execution

Texas is wrong when it suggests that the Texas Court of Criminal Appeals' decision remanding his claim to the trial court disposes of any federal concerns.[7] The *Ford* claim in *Panetti* came to federal court after state-court review, 551 U.S. at 948-954, as had every other

[7] In authorizing Petitioner's judicial bias claim, the Texas Court of Criminal Appeals necessarily found that the factual basis of the claim was "not ascertainable through the exercise of due diligence" on or before the date Petitioner filed his previous state habeas application, and he stated a prima facie case on the merits. *See Ex parte Campbell*, 226 S.W.3d 418, 422 (Tex. Crim. App. 2007).

Ford claim considered by federal courts after AEDPA. 551 U.S. at 965 n.3 (Thomas, J., dissenting).

As this Court recognized in *Panetti*, the state court's consideration of a claim is no guarantee that it will reasonably apply this Court's clearly established law, 28 U.S.C. § 2254(d)(1), or reasonably determine the facts, *id.* § 2254(d)(2). *Panetti*, 551 U.S. at 953-954 (holing state court's adjudication unreasonable). If the state courts do so, and the claim returns to federal court, the application of the abuse-of-the-writ doctrine and AEDPA's relitigation bar will address concerns about comity, finality, and federalism.

But the state court's remand order is no guarantee the state court will adjudicate the merits of Petitioner's claim. *See Ex parte Hood*, 304 S.W.3d 397 (Tex. Crim. App. 2010), *overruling Ex parte Hood*, 211 S.W.3d 767 (Tex. Crim. App. 2007) (discussing procedural history in which subsequent application was authorized, a hearing was held, the authorization decision was reversed *sua sponte*); *Smith v. Texas*, 550 U.S. 297, 308-315 (2007) (in which Texas Court of Criminal Appeals first reached merits then found claim defaulted and this Court reversed). Reversal of the judgment below remains essential to allow Halprin a federal forum in which to vindicate his constitutional right.

E. Conclusion

This Court should grant certiorari to resolve the important question presented in the Petition.

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