No. 22-564

In the

Supreme Court of the United States

JUAN CARLOS SALAZAR,

Petitioner,

v.

JUAN RENE MOLINA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The court of appeals held that a deputy sheriff – who made the split-second decision to deploy his taser on a suspect that committed a felony by attempting to evade arrest by flight in a highly dangerous manner and ultimately exited his vehicle at night in the open – was entitled to qualified immunity. Specifically, the court of appeals held that it was reasonable for the deputy sheriff to fear that the suspect still sought to escape and that the suspect was a threat to his or others' safety. Finally, the court of appeals determined that there is no Fifth Circuit or Supreme Court excessive-force precedent clearly establishing law that every reasonable officer would know immediately – based on a similar level of force in similarly threatening circumstances, within a blink of an eye, in the middle of a high-speed chase – to overcome the deputy sheriff's entitlement to qualified immunity.

The Petition presents the following questions:

Question 1: Whether the Court should grant the Petition and review Petitioner's assertion that the court of appeals erred in granting qualified immunity.

Question 2: Whether the Court should review Petitioner's arguments that a circuit split exists and limit the review to only a suspect's attempted surrender, therefore eroding the *Graham* factors evaluation of the totality of the circumstances that may indicate that the suspect is still a threat.

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STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

Zapata County, Texas is a small community situated along the United States border with Mexico. "Over 1,000 square miles make up Zapata County, 60 of those square miles are waterfront – just like any border town, it's divided by land or the Rio Grande."[1] "Zapata has a population of over 14,000 people; however, it's a small community that has been experiencing some big crimes recently." *Id.* In an almost everyday occurrence, law enforcement in the area is involved in vehicle pursuits, drug busts and illegal border crossings. *Id.*

On March 1, 2014, at approximately 2:00 a.m., Zapata County Chief Deputy Sheriff Raymundo Del Bosque observed an individual, later identified as Petitioner Juan Carlos Salazar, traveling at a speed higher than the posted speed limit. ROA.2448-2451, 2466-2467. Chief Del Bosque unsuccessfully attempted to stop the vehicle and requested assistance from other law enforcement officers related to the attempted traffic stop. *Id.*

Respondent Zapata County Deputy Sheriff Juan Rene Molina responded to Chief Del Bosque's request for assistance. *Id.* at ROA.2466-2467, 2448-

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[1] Zapata County; a small community with big crime; Laredo KGNS-TV; Story by Lisely Garza, August 22, 2022; https://www.msn.com/en-us/news/us/zapata-county-a-small-community-with-big-crime/ar-AA10XoES.

2451 at 2:46. Respondent's dashcam video captures the entire high-speed car chase. ROA.2448-2451. The patrol video demonstrates that the area of this dangerous pursuit consisted of a dark residential neighborhood. ROA 2448-2451 at 4:18-4:23 and 4:25-4:28. Petitioner traveled in excess of 70 miles per hour on these dark, narrow residential streets. Pet. App. 2a. Although several private citizens were in their vehicles with headlights activated traveling in the neighborhood, Petitioner continued to drive at an extremely high rate of speed through the heavily populated area in an attempt to flee from the traffic stop. ROA.2448-2451 at 4:53-6:06.

During the pursuit, Petitioner: (1) disregarded numerous residential street stop signs (at a minimum shown at ROA.2448-2451 at 5:00; 5:05; 5:16; 5:27; 5:50); (2) left the residential street, driving over the curb, onto private property (ROA.2448-2451 at 5:31-5:32); and (3) encountered a private citizen's vehicle with headlights activated in front of a residence (ROA.2448-2451 at 5:42). Besides these dangerous situations, a dog cut across the path of Respondent's patrol vehicle which could have resulted in a deadly crash if he had hit it. (ROA.2448-2451 at 5:43)

After attempting to flee for approximately five minutes, Petitioner stopped his vehicle abruptly and quickly exited the vehicle upon seeing two vehicles pull in front of his path, blocking his way forward. ROA.2448-2451 at 6:07. As shown in the video, Petitioner dropped to his knees and raised his hands. ROA.2448-2451 at 6:08. Petitioner then lowered himself to the ground, putting his hands above his

head, and crossing his feet. ROA.2448-2451 at 6:10. Petitioner uncrossed his feet and raised his head up two seconds before Respondent got to him. ROA.2448-2451 at 6:11. An unknown individual wearing civilian clothing is seen exiting an unknown truck approaching Petitioner at the scene of the continued pursuit. ROA.2593, 2448-24512 at 6:10-6:14.

After catching up to Petitioner and stopping his patrol vehicle, Respondent immediately exited his patrol vehicle still in pursuit of Petitioner and approached Petitioner as demonstrated on the patrol video. ROA 2448-2451 at 6:13-6:14. Within a split-second, Respondent deployed his electronic control device, the Taser. ROA.2448-2451 at 6:14. It was reasonable for Respondent to question the sincerity of the surrender because he had no reason to trust that Petitioner would not suddenly attempt to do him harm and in fact perceived that he may further attempt to escape as there were unknown individuals present. *Escobar v. Montee*, 895 F.3d 387, 395 (5th Cir. 2018). Respondent was also aware of Intel reports where sometimes drug loads are followed by cartel members and that the cartel members take care of their own to protect the drug loads. ROA.2593.

The patrol video undisputedly demonstrates that Petitioner was momentarily immobilized by the Taser for only six (6) seconds and there was no further deployment of the Taser. ROA.2448-2451 at 6:14-6:20. Respondent was then able to approach Petitioner's other side by walking from the left side of Petitioner's body, around the bottom of his feet, to Petitioner's right side. ROA.2448-2451 at 6:22-6:32. Respondent

holstered the Taser and secured Petitioner with handcuffs. ROA.2448-2451 at 6:32-6:47. Petitioner was lifted from the ground within less than a minute from originally exiting his vehicle. ROA.2448-2451 at 7:04-7:08.

II. PROCEDURAL HISTORY.

Four years after the alleged incident of March 1, 2014, Petitioner filed his First Amended Complaint suing Respondent, Zapata County, a Texas Parks and Wildlife game warden and numerous employees of the Zapata County Sheriff's Office. Pet. App. 24a. All of the defendants other than Respondent were dismissed by the district court and are no longer parties in this litigation. As relevant to this Petition, Petitioner sued Respondent alleging that Respondent's "use of the taser constituted excessive force and therefore violated his Fourth Amendment right against unreasonable seizures." *Id*. at 3.a. Respondent moved for summary judgment based on qualified immunity. The district court denied the motion, and Respondent filed an interlocutory appeal. *Id*. at 4a.

The court of appeals reversed. As it explained, in order for Petitioner to overcome Respondent's entitlement to qualified immunity, he must show: "(A) that [Respondent] violated his constitutional rights and (B) that the right at issue was 'clearly established' at the time of the alleged misconduct." *Id*. (citing *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019).

As noted by the court of appeals, Petitioner concedes that Respondent had the right to arrest (seize) him after his high-speed flight but that Respondent used excessive force. *Id.* The proper legal inquiry "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 5a (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). As the entire high-speed car chase was captured on a dashcam video, the court of appeals applied this Court's precedent and

> "viewed the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 381 (2007); *see also Betts v. Brennan*, 22 F.4th 577, 582 (5th Cir. 2022) ("[W]e assign greater weight, even at the summary judgment stage, to the video recording taken at the scene." (quotation omitted)); *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) ("A court of appeals need not rely on the plaintiff 's description of the facts where the record discredits that description but should instead consider the facts in the light depicted by the videotape." (quotation omitted)).

Id. at 2a.

Agreeing with the district court's analysis of the first *Graham* factor, the court of appeals determined that based on the "severity of the crime at issue" – "leading law enforcement in a high-speed chase through a heavily populated area is a serious crime that puts at risk not only the lives of Plaintiff and the officers but also those of the general public[]" – weighs against a finding of excessive force. *Id*. at 6a.

When evaluating the second *Graham* factor, – whether the suspect poses an immediate threat to the safety of the officers or others – the court of appeals determined that Petitioner's position neither comports with common sense nor its precedent. *Id*. 7a. Here, the genuineness of a purported surrender is in question based on the now-cornered Petitioner's dangerous and/or evasive behavior putting officers and bystanders in harm's way during his continued attempts to evade arrest. *Id*. Such a ploy is "especially true when a suspect is unrestrained, in close proximity to the officers, and potentially in possession of a weapon." *Id*. Thus, the second *Graham* factor favored dismissal for Respondent. *Id*. at 10a.

The court of appeals determined that the third *Graham* factor – whether he is actively resisting arrest or attempting to evade arrest by flight – supports the reasonableness of Respondent's use of the taser based on Petitioner's quick exit from his vehicle without awaiting a command and looking towards an open area. *Id*. at 11a. ("If anything, these facts made it just as reasonable for Molina to fear that Salazar still sought to escape as it was for Molina to fear that Salazar was a threat to his or others' safety.")

Finally, the court of appeals noted that even if Petitioner could show a violation of his Fourth Amendment rights, Respondent was still entitled to qualified immunity because Petitioner failed to show a violation of clearly established law – the four cases argued by Petitioner: (1) "involved far less-threatening circumstances than here;" and (2) "involved far more force than was deployed here." *Id.* at 21a.

Therefore, the court of appeals reversed the judgment of the district court denying Respondent's summary judgment motion based on qualified immunity and rendered judgment for Respondent. *Id.* at 22a.

ARGUMENT

I. THE FIFTH CIRCUIT COURT OF APPEAL REACHED THE CORRECT CONCLUSION

The Fifth Circuit's holding follows this Court's well-established qualified immunity case law and does not create a split with other decisions. The court of appeals' fact-intensive analysis is sound, and it does not conflict with the law in any other court of appeals. The court of appeals simply held that Respondent was entitled to qualified immunity because Petitioner failed to establish a constitutional violation. Further, Respondent was entitled to qualified immunity as Petitioner failed to identify any existing precedent squarely governing the specific

facts at issue that would provide Respondent notice that the specific use of force was unlawful.

A. The Decision Below Comports with this Court's Precedents.

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009)(quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727 (1982)). Such a high standard serves to protect "all but the plainly incompetent or those who knowingly violate the law." *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018); *see also, City of Tahlequah, Oklahoma v. Bond*, 142 S.Ct. 9, 11 (2021)(*per curiam*)(quoting *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092 (1986)).

"A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Rivas-Villegas v. Cortesluna*, 142 S.Ct. 4, 7 (2021) (*per curiam*)(quoting *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S.Ct. 305 (2015) (*per curiam*) (internal quotation marks omitted). "In other words, existing law must have placed the constitutionality of the officer's conduct beyond debate." *Wesby*, 138 S. Ct. at 589 (citation omitted); *Rivas-Villegas*, 142 S.Ct. at 7-8.

This Court has "repeatedly told courts not to define clearly established law at too high a level of generality." *City of Tahlequah*, 142 S.Ct. at 11. "It is not enough that a rule be suggested by then-existing precedent; the 'rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id.* (quoting *Wesby*, 138 S.Ct., at 590). "[S]pecificity is especially important in the Fourth Amendment context, where ... it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Rivas-Villegas*, 142 S.Ct. at 8 (quoting *Mullenix*, 577 U.S. at 12, 136 S.Ct. 305 (alterations and internal quotation marks omitted). Therefore, courts' inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* (*Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, (2004) (*per curiam*) (internal quotation marks omitted)).

As the Fifth Circuit noted, the panel nor Petitioner identified a single precedent finding a Fourth Amendment violation under similar circumstances. "By citing no factually similar Supreme Court cases, [Petitioner] effectively concedes that Supreme Court precedent offers him no help." Pet. App. 15a.

> [Petitioner] infers a rule that an officer violates clearly established law if he uses intermediate force before negotiating when a suspect is restrained, subdued, and not fleeing. This rule, even if correct,

> wouldn't apply here because [Petitioner] wasn't restrained when he was tased. Just as importantly, positing this kind of general rule is insufficient to show clearly established law. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (*per curiam*)("[O]fficers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." (quotation omitted)).

Pet. App. 17a-18a.

In reviewing the Fifth Circuit tasing cases cited by Petitioner, the panel determined that all four of the cases "share two characteristics that make them materially different from this case[:]" (1) "they all involved far less-threatening circumstances than here—in none of them was the plaintiff suspected of a dangerous felony, and in two of them the plaintiff was suspected of no crime at all[;]"[2] and (2) they all "involved far more force than was deployed here—so much force, in fact, that it killed two of the arrestees." Pet. App. 21a.

Petitioner failed to identify an excessive-force case where officers used a similar level of force in similarly threatening circumstances in order to overcome Respondent's entitlement to qualified immunity.

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[2] "Nor had the plaintiff just attempted to flee from officers." Pet. App. 21a.

Petitioner incorrectly asserts that the Courts of Appeals disagree whether past flight is sufficient for an officer to reasonably doubt a suspect's surrender. The case before the Court is not based on a past flight but rather a continued, on-going high-speed pursuit where the now-cornered suspect (Petitioner) immediately exited his vehicle "without a command and looked toward an open area" – Petitioner was unrestrained, in close proximity to the officers, and potentially in possession of a weapon. Pet. App. 7a, 11a. Furthermore, with the presence of unknown persons at the stop and intelligence of how cartels operate, it was reasonable for Respondent to fear the threat of others coming to aide Petitioner. Respondent was forced to make "the split-second decision to deploy his taser [as Petitioner] had just committed a dangerous felony and was unrestrained at night in the open." *Id*. at 11a.

First, the Fifth Circuit correctly determined that Respondent's conduct "was comparatively modest and not grossly disproportionate to the threat [he] could have reasonably perceived." Pet. App. 11a. The Fifth Circuit's analysis properly followed *Graham* in determining whether Respondent used excessive force as such a review depends on "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (1989).

In regards to the severity of the crime, it is undisputed that "leading law enforcement in a highspeed chase through a heavily populated area is a serious crime that puts at risk not only the lives of Plaintiff and the officers but also those of the general public." Pet. App. 6a. Further, Petitioner's argument is misplaced by attempting to limit the Court's review to "the immediate circumstances of the surrender itself" rather than viewing any perceived threat from the perspective of Respondent during the ongoing attempt by Petitioner to evade arrest. Pet. 17. As noted by the Fifth Circuit, "cartel activity near the scene and the presence of bystanders made the situation Molina confronted more dangerous" than the cases cited by Petitioner. Pet. App. 10a. Further, Petitioner ignores that the high-speed pursuit was rapidly unfolding and erroneously asserts that the Fifth Circuit's ruling prevents individuals "who have previously evaded arrest" from being afforded "protection from gratuitous force." Pet. 17. As the Fifth Circuit notes,

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 396–97; *see also*, Pet. App. 5a. A 10-second tasing before handcuffing, following Petitioner's abandonment of his vehicle during the dangerous felony high speed pursuit while unrestrained at night in the open, does not constitute gratuitous force. Specifically, "the totality of the force deployed—a 10-second tasing—was comparatively modest and not grossly disproportionate to the threat Respondent could have reasonably perceived." Pet. App. 11a.

Therefore, Petitioner fails to show that the court of appeals erred in granting summary judgment as Respondent's conduct did not amount to an unreasonable seizure under the Fourth Amendment.

B. Petitioner Fails to Demonstrate that there is a Circuit Split.

Petitioner claims that the Sixth and Seventh Circuits' decisions in contrast to the Fifth Circuit's decision here create a circuit split when looking "to the circumstances of an attempted surrender rather than authorizing officers to doubt a surrender's authenticity based solely on a suspect's prior action." Pet. 18. However, such an assertion does not withstand scrutiny and does not present an issue warranting this Court's review. By taking such a limited review based solely on Petitioner's attempt to surrender, Petitioner fails to properly follow *Graham's* direction of "careful attention to the facts and circumstances of each particular case," especially taking into consideration all other circumstances

indicating that the suspect might still be a threat or attempting to evade arrest. *Graham*, 490 U.S. at 396.

In *Ortiz ex rel. Ortiz v. Kazimer*, the Sixth Circuit followed the *Graham* analysis as the Fifth Circuit conducted in this matter. *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848 (2016). *Ortiz* involved neither a continuation of a high-speed pursuit nor the use of a taser. Further, the case did not have video recording. The Sixth Circuit's opinion states that "the gratuitous use of force against a suspect that has surrendered is excessive as a matter of law." *Id.* at 852.The facts are substantially different than those in this matter. In *Ortiz*, the officer's own admission was that it looked like the suspect was surrendering and other eyewitness accounts was that the suspect was not making any effort to resist and was crying out in pain. *Id.* Specifically,

> Eyewitnesses saw a police officer chase down a sixteen-year-old boy with Down syndrome, take him from his mother's arms, slam him against an SUV, then pin his face against the car, all while ignoring pleas from standers-by that he was a harmless teenager. The officer admits that he saw (and felt) the boy surrender and heard him cry out in pain. Yet the officer, eyewitnesses say, kept him pinned down for fifteen minutes while another officer stood by.

Id. at 850.

Similarly, *Tapp v. Banks* does not involve a taser and was not captured by videotape. *Tapp v. Banks*, 1 Fed.Appx. 344 (2001). Following a high-speed pursuit, "Tapp and Banks were … the only witnesses to the next few minutes and to Banks's use of force in taking Tapp into custody. They disagree about the events that followed Tapp's exit from the truck." *Id.* at 346. Tapp testified that "he was hit twelve to fifteen times despite following Banks's instructions to put his face and knees on the ground." *Id.* at 350. Further, the evidence demonstrated that Tapp suffered a fractured patella and underwent surgery to repair his patella. *Id.* at 348. Without video evidence, the Court was required to view the evidence in the light most favorable to Tapp at the summary judgment stage rather than the testimony presented by Banks. *Id.* at 350.

Petitioner also attempts to rely on the Seventh Circuit opinion from *Miller v. Gonzalez*, 761 F.3d 822 (2014). The *Miller* case is substantially different from the facts and video evidence presented in this matter. The incident involving Miller was not recorded by video tape, did not involve a high-speed pursuit chase or the use of a taser. While investigating a stabbing, Gonzalez began looking for the suspect and encountered Miller, a probationer who was driving without a license and seen drinking alcohol while exiting a vehicle at a gas station. *Id.* at 825. Miller took off running during the questioning due to him providing a false identity and being on probation. *Id.* "If Miller is believed, Gonzalez saw him subdued at gunpoint [by another officer], lying motionless and spread-eagled on the ground, and then deliberately

brought down his knee on Miller's jaw with enough force to break it. The officers concede that under Miller's version of events (which we must credit at this point) he demonstrated only "passive resistance," that is, lying with his arms outstretched and obeying every order except for the order to move his hands behind his back." *Id.* at 829. In applying the *Graham* factors, the court of appeals determined that it would not be reasonable under Miller's facts for Gonzalez to use "significant" force, breaking Miller's jaw. *Id.*

Finally, Petitioner relies on *Alicea v. Thomas* by stating that the court of appeals rejected the officers' argument that a suspect's "prior flight cast doubt on the genuineness of his surrender." Pet. 21. In *Alicea*, this matter dealt with locating a burglary suspect after he fled to another residence, hiding in an empty swimming pool. *Alicea v. Thomas*, 815 F.3d 283 (2016). The description of the version of events are drastically different between the officers and Alicea. Alicea contends that one officer assisted the tracking dog into the pool and ordered that it attack him for several minutes. *Id.* at 286. Alicea states that the dog latched onto his right arm with his teeth and refused to obey the order to stop biting. *Id.* Alicea further contends that the other officer pulled him out of the pool and onto the ground, pressing his knee into Alicea's back, punched his backside and ribs and kicked and stomped on his head. *Id.* at 287. "Due to Officer Alvarez's stomping, kicking, and punching, Alicea says he suffered lumps to the back of his head, bruising on his ribs and back, and difficulty breathing after the arrest. From Leo's, [the dog's,] attack, he suffered ripped tendons and muscles, which required

surgery and caused permanent muscle damage, pain, numbness, and scarring." *Id.* Interestingly, the Seventh Circuit in *Alicea* states that:

> At the same time, we have concluded that under certain circumstances, an officer is not required to take an apparent surrender at face value. *Johnson v. Scott,* 576 F.3d 658, 660 (7th Cir.2009). In *Johnson,* we affirmed summary judgment where a police officer, in hot pursuit of a fleeing suspect, released his dog to assist the chase. Not more than one second from the suspect throwing his hands up and saying "I give up," the dog bit and held him as the officer caught up to make the arrest. The officer then struck the suspect to subdue him, because he interpreted the suspect's struggle with the dog as resistance. **We found that the officer's split second decision to use force was reasonable to apprehend a suspect in active flight because "the police are entitled to err on the side of caution when faced with an uncertain or threatening situation**." *Id.* at 659.

Id. at 288-289 (emphasis added). Identical to the other cases cited by Petitioner, *Alecia* did not involve the use of a taser, was not a high-speed pursuit and was not recorded on video.

The distinctions between the court of appeal's ruling here and the decisions Petitioner cites from the Sixth and Seventh Circuits clearly demonstrate that the courts of appeals performed the proper *Graham* analysis by carefully reviewing the particular facts and evidence of each particular case and determining whether the totality of the circumstances justified the seizure under the Fourth Amendment. Thus, this Court' longstanding case precedent under *Graham* demonstrates that the Fifth, Sixth and Seventh Circuits' decisions properly applied the same legal standard and are not in conflict.

CONCLUSION

Petitioner's counsel ask the Court to rely on four cases with vastly different alleged, unrecorded and dissimilar facts to create a catchy new legal doctrine. In attempting to apply such a doctrine, Petitioner's counsel ignores the totality of the factual circumstances facing law enforcement in situations like the one actually before the Court and would now create an even more dangerous encounter for law enforcement doing their best to protect the community they serve. The petition for writ of certiorari should be denied.

Respectfully submitted,

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