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SUPREME COURT
of the
State of Connecticut

SC 20776
KEIRA SPILLANE, ET AL.
v.
NED LAMONT, ET AL.

Brief of the DEFENDANTS-APPELLANTS NED LAMONT, CHARLENE M, RUSSELL-TUCKER, AND MANISHA O. JUTHANI

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Table of contents

Table of authorities

Cases

Statutes

Constitutional Provisions

Argument

Sovereign immunity bars this lawsuit and the trial court erred in concluding otherwise.

First, this court has long held that the exception to sovereign immunity concerning constitutional claims seeking declaratory or injunctive relief can only proceed where plaintiffs are able to "demonstrate a sufficient likelihood of succeeding" on the merits of those constitutional claims by establishing that their claim is "substantial" in character, which effectively amounts to a motion to strike standard. *Markley v. Dep't of Pub. Util. Control,* 301 Conn. 56, 71-72 (2011). The trial court erred in concluding that constitutional claims may proceed where claims are constitutional in "nature." The trial court's formulation of the test undermines the purpose of sovereign immunity by subjecting the state to suit and discovery based solely on a plaintiff's artful pleading and abdicates the court's own constitutional duty to ensure it does not exercise jurisdiction over such claims without the legislature's consent.

Applying that standard, Plaintiffs' free exercise and equal protection claims under the federal Constitution are not substantial because identical challenges to vaccination laws have been rejected for many years, and indeed were already rejected based on the pleadings alone in *We the Patriots USA, Inc. v. Conn. Office of Early Childhood Dev.*, 579 F. Supp. 3d 290 (D. Conn. 2022) ("*WTP*"). Relatedly, Plaintiffs' separate claims under the corresponding provisions of the state constitution have been abandoned. They were not briefed in the trial court and, for good measure, on appeal the Plaintiffs have failed to argue that they are "substantial" under *State v. Geisler,* 222 Conn. 672 (1992). *See, e.g., State v. Nash*, 278 Conn. 620, 624 n.4, 899 A.2d 1

(2006) (declining to review state constitutional claims where "[t]he defendant has not recognized, nor has he applied the six *Geisler* factors"). Lastly, Plaintiff's attempt to invoke the right to education under article eighth, § 1, is not substantial.

Second, the trial court erred in concluding that Conn. Gen. Stat. § 52-571b encompasses Plaintiffs' challenge to Public Act 21-6. The plain text of § 52-571b makes clear that the statute does not apply to legislation. Additionally, the plaintiffs have failed to provide ***any*** argument that § 52-571b cannot apply to legislation because one legislature cannot bind or limit the authority of a succeeding legislature. The trial court's decision turns that standard on its head and effectively concludes that the legislature which passed P.A. 21-6 believed it would be subjected to strict scrutiny analysis and potentially invalidated under a prior statute.

I. Plaintiffs' Constitutional Challenges to Public Act 21-6 All Fail as a Matter of Law Based on the Pleadings and Undisputed Evidence Alone and are Therefore Not "Substantial" and Do Not Come Within the Second Exception to Sovereign Immunity

a. Plaintiffs Concede that this Court's Precedents Require the Second Exception to Sovereign Immunity Operates Just as a Motion to Strike Standard Does

This court has long held that the second exception to sovereign immunity cannot be invoked merely by asserting a constitutional violation. *See, e.g., Upson v. State*, 190 Conn. 622, 626 (1983). In such situations this court "ha[s] imposed specific pleading requirements,"

DaimleyChrysler Corp. v. Law, 284 Conn. 701, 721 (2007), and made clear that a plaintiff must bring a "substantial claim … [in which] the allegations of the complaint and the facts in issue … clearly demonstrate an incursion upon constitutionally protected interests," *Markley*, 301 Conn. at 67-68 (quotations omitted). The exception applies only where plaintiffs can "demonstrate a sufficient likelihood of succeeding," *id.* In order for the proverbial exception to not swallow the rule, such heightened pleading requirements are necessary for the state to benefit from the protections of sovereign immunity. *See, e.g., Textron, Inc. v. Wood*, 167 Conn. 334, 340 (1974).

Plaintiffs concede that this standard is akin to a motion to strike when they acknowledge that "[t]he problem in *Markley* [and other of this Court's cases] was that the plaintiff did not allege sufficient facts, that even if taken as true, amounted to a constitutional violation." Pl. Br. at 26-27 (footnote omitted). Defendants ***agree*** that that is why the claims in those cases were barred by sovereign immunity. And it is exactly why the trial court's failure here to apply that standard violates this Court's precedent and was erroneous.

Plaintiffs' reliance on typical cases recognizing the difference between motions to dismiss and motions to strike are misplaced. Those distinctions may exist in a typical civil case between private parties, but they do not apply to constitutional claims against the State. In those cases, subjecting the State to suit and the burdens of litigation implicate broader public concerns about interference with interference with the State's ability to perform its functions. *Horton v. Meskill*, 172 Conn. 615, 624 (1977). That is why this Court imposed the substantial claim requirement to balance those interests.

b. Plaintiffs are Incorrect that the Defendants Improperly Introduced Evidence into the Record

Plaintiffs argue that Defendants improperly seek to convert their motion to dismiss into one for summary judgment by introducing evidence outside the pleadings. Pl. Brief at 28. They are incorrect.

First, in a motion to dismiss the court may consider evidence outside of the pleadings. "If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits; see Practice Book § 10-31 (b); or other evidence, the trial court may dismiss the action without further proceedings." *Conboy v. State*, 292 Conn. 642, 652 (2009) Motions to dismiss based on second exception are no different. In fact, this Court has concluded in at least one case that a constitutional claim was not substantial specifically because undisputed evidence introduced in support of the State's motion to dismiss demonstrate that the claim was meritless. *Barde v. Bd. of Trs.*, 207 Conn. 59, 65-66(1988)

The Defendants were therefore entitled to introduce the Immunization Data. Plaintiffs could have disputed that with counter evidence, but did not do so.[1] Plaintiffs may, of course, argue about the

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[1] It was not necessary to have authenticated the data by affidavit, since it is publicly available and therefore proper subject of judicial notice. *See* Affidavit of Kathy Kudish, Appendix 56 ¶2 (noting this data is publicly available on DPH website); *Casey v. Lamont*, 338 Conn. 479, (2021) (relying on data publicly available). Thus, the data would properly be considered even if Defendants had not authenticated it through sworn testimony. *Conboy,* 292 Conn. at 651-52 (judicially

legal *significance* of that evidence, but, tellingly, they do not dispute the validity of the evidence itself. The evidence was properly before the court on a motion to dismiss, and the court could consider it in determining whether plaintiff's claims were substantial in character under *Barde*.

Plaintiffs also suggest that Defendants improperly added "evidence" into its appendix that was not before the trial court. But that is not true. The State Defendants merely included reference materials establishing "legislative facts" that provide background and that this court may take notice of.[2] *See State v. Edwards*, 314 Conn. 465, 479 (2014)("Legislative facts may be judicially noticed without affording the parties an opportunity to be heard.")(internal citations and quotations omitted).

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noticeable fact may be considered in motion to dismiss attacking jurisdiction).

[2] This would include: (1) the press release by DPH indicating that there were two reported cases of measles, PA at 70, which effectively was before the Court below, since the court had the legislative history of P.A. 21-6, and the legislators referenced the reported cases of measles in the discussion; (2) the CDC Press Release noting the 95% recommended threshold for herd immunity for measles, PA 75, because that is similarly mentioned in the legislative history and in fact conceded in Plaintiff's own Complaint ¶ 42; (3) an article about measles resurgence in the United States, PA 65-69, which is discussed in the legislative history and in published court decision, *e.g. Goe v. Zucker*, 43 F.4th 19, 25-26 and n.5 (2d Cir. 2022); and (4) an article about individuals with religious exemptions often cluster together, making certain individual communities' vaccinate rates especially low, PA 71-74, which similarly is discussed in caselaw. *See Goe*, 43 F.4th at 32 (noting that "low vaccination rates in certain communities" had "fueled" measles outbreak); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 282-93 (2d Cir.) (discussing clustering), *opinion clarified*, 17 F.4th 368 (2d Cir.), *cert. denied*, 142 S. Ct. 552 (2021).

c. Even assuming the Truth of the Factual Allegations in Plaintiffs' Amended Complaint, Plaintiffs' Constitutional Claims All Fail as a Matter of Law and Therefore are Not Substantial.

Plaintiffs' claims are deficient for reasons that are legal, not factual, and conclusions of law are not entitled to the presumption of truth. *See Feehan v. Marcone*, 331 Conn. 436, 446 (2019) ("[a] determination regarding a trial court's subject matter jurisdiction is a question of law, particularly when it presents questions of constitutional and statutory interpretation") (emphasis added); *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 588 (1997) (review of pleading sufficiency "does not admit legal conclusions"). Allegations about the plaintiffs and their children, the schools they attend, the sincerity of their religious objections to vaccination are factual allegations entitled to the presumption of truth. But legal conclusions contained in pleadings, such as claims that the repeal is unconstitutional, or violates a particular constitutional provision, or fails rational basis or strict scrutiny, are legal conclusions that are not entitled to the presumption of truth, and thus have no bearing on whether Plaintiffs' claims are substantial in character for purposes of the second exception to sovereign immunity.

As previous explained, Plaintiffs' Equal Protection and Free Exercise claims under the federal constitution are indistinguishable from those raised and rejected—in a motion to dismiss, based upon the pleadings alone—by Judge Arterton in *WTP*, 579 F. Supp. 3d 290. In her decision Judge Arterton cited to several appellate decisions – both

state and federal – that rejected Plaintiff's claims. This renders Plaintiffs' identical claims here insubstantial.[3]

The Plaintiffs argue that "none of the cases relied upon by the Defendants concern a law which repeals an existing religious exemption to vaccine mandates." Pl. Brief at 35. This is inaccurate. First, Defendants cited to New York and California decisions rejecting challenges to those States' repeal of their religious/personal belief exemptions. *F.F. v. New York*, 194 A.D.3d 80, 84-88 (N.Y. App. Div. 3rd Dept.), *cert. denied*, 37 N.Y.3d 1040 (2021), *cert. denied*, 142 S. Ct. 2738 (2022); *Brown v. Smith* 24 Cal. App. 5th 1135, 1144 (2018); *Love v. State Dep't of Educ.*, 29 Cal. App. 5th 980, 996 (2018), *cert. denied,* 2019 Cal. LEXIS 958 (2019); *see also Whitlow*, 203 F. Supp. 3d at 1085-87 (denying motion for preliminary injunction challenging California's repeal of personal belief exemption).

Second, in any event, it is immaterial that P.A. 21-6 repealed an existing religious exemption because the free exercise clause is concerned only with laws that target religion for "***especially harsh*** treatment," *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (emphasis added), and repealing a religious exemption does not treat religious objectors ***more*** harshly but subjects them to the same requirements that everyone else had already been subject to. *FF.*, 194 A.D.3d at 87-88. Indeed, as then-Judge Gorsuch observed:

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[3] The trial court referred to Judge Arterton's decision as "thorough" but did not address the federal decisions, explaining "[t]he validity of the plaintiffs' constitutional claims, however, is not presently before the Court. The only issue before the Court is whether or not it has jurisdiction to adjudicate the State and Federal Constitutional claims as well as the statutory claim discussed in an earlier session of this memorandum." [MOD AT 20-21]

"Surely the granting of a religious accommodation to some in the past doesn't bind the government to provide that accommodation to all in the future, ***especially if experience teaches the accommodation brings with it genuine safety problems that can't be addressed at a reasonable price***. If the rule were otherwise, it would only invite the unwelcome side effect of discouraging [the government] from granting the accommodation in the first place . . . ." *Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014) (emphasis added). That is just what occurred here. The falling vaccination rates prompted the State to phase out the religious exemption. If they were prohibited from doing so, the result would be to deter the State from providing religious accommodations to begin with.

Although Plaintiffs have brought claims under the parallel free exercise and equal protection provisions of the state constitution, Plaintiffs abandoned any arguments below that those provisions provide broader protections than the federal Constitution in the context of school vaccination. Clerk Appendix 35-61. And, for good measure, the Plaintiffs have failed to brief *Geisler* on appeal despite the Defendants having argued that the *Geisler* factors weigh in Defendants' favor. D Brief at 36-43. Thus, this Court must assume for purposes of this appeal that the State constitutional rights are coextensive with the federal ones. And since the federal claims are insubstantial, so too are the state claims.

Plaintiffs' education claim under the state constitution is also not substantial. Under long standing precedents – including the *Campbell* case – claims brought under the state educational clause are not substantial unless they are "disciplinary" or "an infringement of equal educational opportunity." *Campbell v. Board of Education*, 193 Conn. at 105. Indeed, P.A. 21-6 requires that all students without medical exemptions be treated equally. The vaccination requirements

are merely a condition of enrollment.[4] Perhaps more importantly, Plaintiffs' view of the education clause – if adopted – would restrict the legislatures authority with respect to a whole host of its enumerated powers.[5] It would also render the free exercise clauses superfluous in the context of public education, because Plaintiffs would then be able to use the education clause to secure religious accommodations above and beyond what the free exercises clauses provide. This Court has never interpreted article eighth, § 1, that way. The education clause simply does not apply to a claim for religious entitlement to a religious objection from a generally applicable school vaccination law.

Plaintiffs do not seriously grapple with these arguments, but instead argue that "Defendants have forced Plaintiffs into a Hobson's choice" of either contravening their religious beliefs, or of not attending school. Pl. Br. at 29. But it is not a "Hobson's choice," which is effectively no actual choice at all. As the Second Circuit observed, "[a]lthough individuals who object to receiving the vaccines on religious grounds have a hard choice to make, they do have a choice." *We the Patriots USA, Inc.*, 17 F.4th at 293-94. And again, if this Court were to interpret the education clause as requiring the State to provide religious accommodations whenever parents felt their religious beliefs compelled them not to comply with a school requirement—whether it be vaccinations, curriculum choices, co-ed schools, or anything else—

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[4] Indeed, the text of this provision merely states that "There shall always be free public elementary and secondary schools in the state." Conn. Constitution Art. VIII § 1.

[5] In this respect, it bears noting that the education clause specifically provides that "the general assembly shall implement this principle by appropriate legislation." Conn. Constitution, Art. Eighth § 1.

that would permit any parent, "by virtue of his [religious] beliefs, to become a law unto himself" in the context of public education. *Employment Div. v. Smith*, 494 U.S. at 885.

II. Plaintiffs' Statutory Challenge to P.A. 21-6 Under § 52-571b Does Not Come within the Statutory Waiver of Sovereign Immunity Contained in § 52-571b(c) because that Statute Does Not, and Cannot, Apply to Legislation.

The Defendants have argued throughout this case that C.G.S. § 52-571 does not apply to legislation – and is therefore not a waiver of sovereign immunity by legislation -- because (1) the plain text indicates that it does not, and (2) to do so would violate the rule that one legislature cannot bind another, as well as the doctrine of repeal by implication.

On appeal the Plaintiffs argue that the plain text of § 52-571b "is clear and unambiguous" in its waiver of sovereign immunity. Pl. Brief at 17-18. Critically, however, at no time do the Plaintiffs dispute on appeal the alternative ground for dismissal *that one legislature cannot bind another*. So, even if the Plaintiffs were correct that the legislature waived its sovereign immunity – which it did not – Plaintiffs still could not avail itself of the statute because the legislature that passed P.A. 21-6 was not bound by §52-571b. This court therefore can end its analysis without deciding whether the plaint text of the statute waives sovereign immunity as argued here by the Plaintiffs.[6]

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[6] The Plaintiffs also argue that this court has "already found that § 52-571b applies to legislation," Pl. Brief at 17, and the Attorney General's Formal Opinion supports their claims, *id.* at 20-22. Neither

III. The Plain Text of § 52-571b, Which Must be Strictly Construed, Does Not Encompass Legislation, and Plaintiff's Reliance on the Legislative History is Both Inappropriate and Without Merit.

Because §52-571b creates a statutory cause of action that would not otherwise exist it must be strictly construed. *Ecker v. W. Hartford,* 205 Conn. 219, 233 (1987). That is to say, unless the text *clearly* encompasses legislation, the statute must be interpreted as *not* applying to legislation. And the text does not.

Section 52-571b(a) provides that "[t]he state or any political subdivision of the state" shall not burden the exercise of religion unless the state can satisfy strict scrutiny. And section (f) provides that

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is correct. The single case cited by the Plaintiffs in support of this first argument does not involve legislation. With respect to the AG opinion, contrary to Plaintiffs' argument, there is no inconsistency between the State Defendants' position in this case that the requirements of § 52-571b do not apply in the first instance to P.A. 21-6 § 1, and the Office of the Attorney General's Opinion No. 2019-01 (May 6, 2019) ("Opinion 19-01"), which opined that there were no statutory or constitutional barriers to repealing the religious exemption. Although Opinion 19-01 did address whether a repeal would satisfy strict scrutiny under § 52-571b(b), it also stated a repeal would not "create any necessary conflict with § 52-571b in the first instance" (p. 5), and went on to expressly cite the doctrine of repeal by implication for the proposition that, "[t]o the extent there was any tension between the two legislative actions, the later one would prevail." (p. 5 n.5). That is just what the State Defendants argued in their memorandum of law to the trial court. And it is the Defendants' argument on appeal.

"'state or any political subdivision of the state' includes any agency, board, commission, department, officer or employee of the state or any political subdivision of the state…." The General Assembly and its legislation are not within this definition.

The legislature's actions in drafting this statute without including itself must be strictly construed. And it cannot be said that the legislature is unaware of its ability to use the term "includes *but is not limited to*" in statutes. *Denunzio v. Denunzio*, 320 Conn. 178, 194 (2016); *Rutter v. Janis*, 334 Conn. 722, 734 (2020)("It is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so.")(citations omitted). This court must presume that the legislature carefully crafted the language in a way that excludes application to legislation. For 52-571b to apply the entity that allegedly does the violating must be a political subdivision of the state. And under subsection (f) the legislature defined that language to exclude the general assembly and legislation.

The Plaintiffs have very little to say about the plain text. They state simply that the list in (f) should not be exhaustive because if the legislature wanted it to be exhaustive, they would have said it "means" rather than "includes." But the same could have been said about the factors to be considered by the probate courts in *Denunzio*, Yet this Court held that it did not apply: "Under the doctrine of *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—we presume that when the legislature expresses items as part of a group or series, an item that was not included was deliberately excluded." *Denunzio v. Denunzio*, 320 Conn. 178, 194 (2016) (citation omitted).

Moreover, Plaintiffs' argument overlooks the fact that § 52-571b must be strictly construed because it creates a statutory action that did not

otherwise exist. *Ecker,* 205 Conn. at 233. The court cannot expand its coverage, as plaintiffs are suggesting, through interpretive methods, beyond what it explicitly applies to. Plaintiffs' argument also overlooks the doctrine that the expression of one means the exclusion of another, and that that doctrine is especially appropriate given that the legislature often says including but not limited to when it wants to convey *non exhaustive lists.*

Rather than addressing these numerous problems, Plaintiffs skip straight to the legislative history. But because, as plaintiffs admit, "[t]he plain language of § 52-571b is clear and unambiguous," Pl. Br. at 17, it is inappropriate *to even consider the legislative history*. Conn. Gen. Stat. § 1-2z. It is doubly inappropriate to consider it in the context of a sovereign immunity analysis under § 52-571b, where both the statute itself and the waiver provision in (c) must be strictly construed. *Envirotest Sys. Corp. v. Comm'r of Motor Vehicles*, 293 Conn. 382, 390 (2009) ("we cannot consult extratextual sources because we must interpret any uncertainty as to the existence of a waiver as preserving sovereign immunity").

In any event, the legislative history Plaintiffs cite does not support their position. Pl. Brief at 19-20. They rely mostly on passing references by legislators to "law" and "the state," which plaintiffs conclude must encompass legislation. But use of particular words in passing is no reliable indication that the legislature wanted the statute to be subject to legislation, particularly where those broad terms never made it into the *actual statute*.

Plaintiffs also rely on discussions about whether §52-571b would apply to drug laws, which are statutes. Setting aside that the discussion began with the legislator indicating he was "not sure" about how it would apply, even if the statute could be used as a defense to a particular drug ***prosecution***, that is not the same as using § 52-571b

to invalidate the actual statute that makes the drug a crime, which is what Plaintiffs are doing in this case. It would not be inconsistent to believe that §52-571b could be used to stop a discretionary decision to bring a drug prosecution. On the other hand, when discussing examples of § 52-571b's applications, the legislators frequently discussed ordinances, rather than actual statutes. If anything, then, the legislative history supports the defendants' interpretation of the text, not the plaintiffs'.

a. Plaintiffs do not contest that subjecting P.A. 21-6 to heightened scrutiny and potential invalidation under § 52-571b would violate the constitutional principle that one legislature cannot bind another.

In their brief Plaintiffs fail to dispute this important principle of democracy. It is dispositive, for two reasons. First, it requires the court to construe the text of § 52-571b as not applying to legislation because that would create a constitutional violation, and the legislature is always presumed not to enact unconstitutional statutes. *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 155 (2008).

Second, and alternatively, the fact that one legislature cannot bind another makes the plain text irrelevant, because even if the text could be interpreted as indicating an intent to apply to subsequent legislation, it would not matter and that text would be ineffective, as the various federal courts have held. *See Appellants' Brief, pages 48-52.*

b. Plaintiffs' argument that § 52-571b(c) waives immunity for its other constitutional challenges to P.A. 21-6 is both unpreserved and without merit. (p. 15-16)

On appeal Plaintiffs now argue that § 52-571b(c) waives sovereign immunity not merely for their claim under the statute, but for their constitutional challenges as well. Plaintiffs never raised that argument before the trial court and are precluded from doing so now.

In any event, § 52-571b(c) plainly does not waive sovereign immunity for constitutional claims. Again, waivers must be strictly construed. *Ecker v. W. Hartford*, 205 Conn. 219, 233 (1987). Any doubt about scope of the waiver must be construed as preserving sovereign immunity. *Envirotest Sys. Corp. v. Comm'r of Motor Vehicles*, 293 Conn. 382, 390 (2009). And the claim must clearly come within scope of the waiver.

Clearly, the waiver only waives immunity for claims brought under § 52-571b. It does not waive immunity for standalone free-exercise claims.

IV. Conclusion

The Court should reverse the trial court's decision and dismiss Plaintiffs' case in its entirety.

Respectfully submitted,

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Certification

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2A, that on June 5, 2023:

(1) a copy of the brief has been sent electronically to each counsel of record listed below in compliance with § 62-7, except for counsel of record exempt from electronic filing pursuant to § 60-8, to whom a paper copy was sent;

(2) the brief being filed with the appellate clerk is a true copy of the brief that was submitted electronically pursuant to subsection (f) of this section;

(3) the brief has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law, unless the brief is filed pursuant to § 79a-6;

(4) the e-brief contains 4,138 words;

(5) the brief complies with all provisions of this rule; and (6) no deviations from this rule were requested/approved.

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