No. 09-709

IN THE

# Supreme Court of the United States

JEFFREY J. REED,
*Petitioner*,
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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### STATEMENT OF THE CASE

The Petitioner, Jeffrey Reed, is employed by AM General in a bargaining unit represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (UAW). "The collective bargaining agreement between UAW and AM General includes a union security provision under which all AM General employees must either become UAW members or pay the union an agency fee equal to the amount of membership dues." Pet. App. 2a. "UAW and AM General also are parties to a letter agreement that allows any employee with a *bona fide* religious objection to joining or supporting a labor union to satisfy his union security obligation by making a payment equal to full membership dues to one of three

charities mutually designated by UAW and AM General." *Ibid.*

The Petitioner brought suit against the UAW alleging that the religious objection accommodation provided for in the letter agreement violates the prohibition of religious discrimination contained in Title VII of the Civil Rights Act of 1964. Pet. App. 4a. The Sixth Circuit affirmed the district court's summary judgment in favor of the UAW on the ground that the Petitioner had failed to make out a prima facie case of religious discrimination. *Id.* at 7a. In this regard, the court explained that the Petitioner's claim failed because he had not shown "any adverse employment action." *Id.* at 8a.

The Petitioner began working at AM General in May 2002. Pet. App. 3a. For the first two and a half years of his employment, the Petitioner was a member of the UAW paying the membership dues required by the UAW Constitution. *Ibid.* In October 2004, the Petitioner resigned his union membership and filed an objection to financially supporting any union activities beyond those that are germane to collective bargaining. *Ibid.* In response, the "UAW notified [the Petitioner] that it would treat him as an objecting non-member and directed AM General to deduct from [the Petitioner's] pay an agency fee consisting only of that portion of the union dues not used for [nongermane] expenditures." *Ibid.*

Five months after he became an "objecting non-member," the Petitioner notified the UAW that "he had religious objections to supporting the union in any amount," even the reduced agency fee charged to him as an objecting non-member. Pet. App. 3a. After receiving confirmation that the Petitioner "held *bona fide*, personal convictions against supporting the union, UAW granted [the Petitioner's] request to be treated as a religious objector" and instructed him to pay an "amount [equal to] full union dues . . . to one

of the three charities selected by UAW and AM General." *Ibid.*

The Petitioner's sole basis for claiming that he has been discriminated against on account of his religious beliefs is that the UAW handled his objection to financially supporting union activities that are not germane to collective bargaining differently than his objection to financially supporting any union activities, including those that are germane to collective bargaining. Consistent with the line of cases following this Court's decision in *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988), the UAW and AM General responded to the Petitioner's objection to paying an agency fee equal to full dues by reducing the fee charged to him to reflect union expenditures that are not germane to collective bargaining. And, consistent with Section 19 of the National Labor Relations Act and numerous decisions applying the religious accommodation provisions of Title VII, the UAW and AM General responded to the Petitioner's objection to paying any amount to the union by instructing him to pay an amount equal to dues to a charity.

## REASONS FOR DENYING THE WRIT

### I. The Sixth Circuit Decision Does Not Conflict With Other Circuits

The Petition for Certiorari rests primarily on the assertion that the circuits are "divided over what type of adverse action can be required" to make out a prima facie case of religious discrimination. Pet. 11. *See id.* at 10-21. The Petitioner maintains that some circuits, including the court below, require a showing of "discharge or discipline," while others require "something less . . . than discharge or discipline." *Id.* at 12, 14. There is no such division among the circuits.

The Petitioner's attempt to establish a conflict among the circuits rests on nothing more than the fact that some opin-

ions use the phrase "discharge or discipline" to describe the showing of "adverse employment action" uniformly required by all circuits as an element of establishing a prima facie case of religious discrimination. The phrase "discharge or discipline" is most commonly employed in cases where the adverse employment action has in fact taken that form. No court has ever held that an employee failed to establish a prima facie case of religious discrimination because he showed only that he suffered the kind of material harm courts characterize as an "adverse employment action" but did not show "discharge or discipline." The court below expressly stated that it was *not* dismissing the Petitioner's claim on that ground.

### A. The Sixth Circuit Held There Was No Adverse Employment Action

The district court dismissed the Petitioner's complaint based on that court's conclusion that the UAW was "entitled to summary judgment because plaintiff has failed to establish a prima facie case of religious discrimination." Pet. App. 63a. The Sixth Circuit's opinion affirming that ruling uses the phrase "discharge or discipline" to describe the adverse employment action element of a prima facie case of religious discrimination.[1] *Id.* at 6a-7a. But the Sixth Circuit makes clear that it was *not* addressing the "question of whether 'discharge or discipline' should be understood to include any adverse employment action" and that it was *not* holding that "a plaintiff can[not] proceed on a showing of an employment action that is 'adverse' but is not a form of 'discharge of discipline.'" *Id.* at 8a. Instead, the court expressly held that the Petitioner had not established a

[1] The first two elements of a prima facie case in support of a religious accommodation claim require the plaintiff to show "(1) he holds a sincere religious belief that conflicts with an employment requirement; and (2) he has informed the employer about the conflict." Pet. App. 6a.

prima facie case because he had not shown "an adverse employment action." *Ibid.*

The Sixth Circuit was very clear that its affirmance of summary judgment was based on the Petitioner's failure to show "a *materially* adverse change in the terms or conditions of his employment." Pet. App. 9a. In this regard, the court explained that, to establish a prima facie case of religious discrimination, it is necessary for the plaintiff to show that he "has suffered some independent harm caused by a conflict between his employment obligation and his religion." *Id.* at 7a.

Consistent with the opinion in this case, the Sixth Circuit has explained that the circuit's requirement that a plaintiff satisfy the so-called "discharge or discipline" element of the prima facie case is consistent with requirements in all circuits that an "adverse employment action need[s to] be shown to sustain a prima facie case." *Goldmeier v. Allstate Insurance Co.*, 337 F.3d 629, 637 (6th Cir. 2003).[2] Thus, as occurred in this case, Sixth Circuit opinions use both the phrases "discharge or discipline" and "adverse employment action" in describing the harm element of a prima facie case of religious discrimination and reach the same result whichever language they use. *See*, *e.g.*, *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007) (same result reached using "discharge and discipline" language as third element of prima facie case for failure to accommodate claim as court reached using "adverse employment action" language to decide whether the same conduct was "disparate treatment").

**B. There Is No Split Among The Circuits**

The phrase "discharge or discipline" is frequently used

[2] In *Goldmeier* the Sixth Circuit affirmed the district court's finding that the "Goldmeiers had not suffered an adverse employment action and therefore failed to make out a prima facie case of religious discrimination. 337 F.3d at 633.

interchangeably with the phrase "adverse employment action" in describing the elements of a prima facie case of religious discrimination. For instance, in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), this Court used the phrase "disciplined for failure to comply with the conflicting employment requirement" interchangeably with the phrase "suffered a detriment . . . from the conflict" in describing the prima facie case test applied by the Second Circuit. *Id.* at 65-66.[3] When the courts use the phrase "discharge or discipline," they do so as a shorthand description of the required showing of "detriment" or "adverse employment action."

Nothing demonstrates this so clearly as the opinions from the Second, Eighth and Ninth Circuits – circuits that the Petitioner maintains "allow a showing of adverse action by something less than discharge or discipline," Pet. 14 – that describe the harm element of a prima face case by using the words "discharge" or "discipline." In the Second Circuit decisions cited by Petitioner as evidence that the Second Circuit requires "something less (sometimes much

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[3]Contrary to the assertion made by the Petitioner here, the petitioners in *Ansonia*, did *not* challenge the lower court's articulation of "the elements of a prima facie case for religious accommodation." Pet. 10. Rather, the *Ansonia* petitioners argued, "Because Philbrook is neither required to choose between his employment status and his religion, nor required to forego a benefit to which he would otherwise be entitled because of his religion, he has not established a case of discrimination based on religion." Pet. Br. 8, *Ansonia*, 479 U.S. 60 (No. 85-495). In arguing that "Philbrook failed to meet the first and third prongs of the three-prong test applied by the court of appeals," the *Ansonia* petitioners expressly stated that they were "not arguing that because Philbrook has not been discharged, Title VII is inapplicable." Pet's. Reply Br. 5-6, n.5, *Ansonia*, 479 U.S. 60 (No. 85-495). The Court found it unnecessary to address whether the court below had correctly applied the three-prong test for a prima facie case, since "the defendant here failed to persuade the District Court to dismiss the action for want of a prima facie case, and the case was fully tried on the merits." *Ansonia*, 479 U.S. at 67.

less) than discharge and discipline," the court actually says plaintiffs must show they "were *disciplined* for failure to comply with the conflicting employment requirement." *Knight v. Connecticut Department of Public Health*, 275 F.3d 156, 167 (2d Cir. 2001)(emphasis added); *Bowles v. New York City Transit Auth.*, 285 Fed. Appx. 812 (2d Cir. 2008). In *Bowles*, the court, after announcing that a showing of "discipline" was required, found that the plaintiff did not satisfy the prima facie case because he did not show an "adverse employment action." *Bowles*, 285 Fed. Appx. at 815. In another case, the Eighth Circuit states that the prima facie case requires a showing of "discipline" but then used the term interchangeably with "adverse employment action," ultimately finding that the prima facie case was not met because the plaintiff's discharge was based on absences used for reasons other than religious observances. *See Jones v. TEK Industries, Inc.*, 319 F.3d 355, 359 (8th Cir. 2003).

In the Ninth Circuit, the court variously describes the third element of the prima facie case. In *Proctor v. Consolidated Freightways*, 795 F.2d 1472, 1475 (9th Cir. 1986), and in the later unpublished decision in *Hussein v. Raban Supply Co.*, 1996 U.S. App. LEXIS 5249, *4 (9th Cir. 1996), the court stated that the prima facie case required evidence that the plaintiff was "discharged" even though other circuit decisions before and since have stated that the required showing includes "threat of discharge (or of other adverse employment action)." *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 614 n. 5 (9th Cir. 1988); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 405 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). As the Ninth Circuit explained, "we have occasionally used language implying that the employer must *discharge* the employee" but "we have never in fact required that the employee's penalty for observing his or her faith be so drastic." *EEOC v. Townley Engineering, & Mfg. Co.*, 859 F.2d at 614 n.5.

The Petitioner and his amici have not cited a single case in which a religious accommodation claim was dismissed because the plaintiff suffered an adverse employment action that took some form other than discharge and discipline. Indeed, as the Petitioner candidly admits, Pet. 12-13, in each of the cited cases that employ the phrase "discharge" or "discharge or disciplined," the plaintiff did establish a prima facie case by showing that he was either discharged or otherwise denied employment.[4] Like the decision below, the cited cases finding that a plaintiff has not established a prima facie case do so on the grounds that the plaintiff has not shown an "adverse employment action."[5]

The long and the short of the matter is that this Court

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[4] *Morrissette-Brown v. Mobile Infirmary Medical Center*, 506 F.3d 1317, 1320, n.1 (11th Cir. 2007)(plaintiff placed on personal leave of absence before employment terminated as voluntary resignation based on failure to return to work); *Beadle v. Hillsborough County Sheriff's Dept.*, 29 F.3d 589 (11th Cir. 1994)(plaintiff discharged); *Thomas v. National Association of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000)(plaintiff discharged); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989)(plaintiff not hired); *Weber v. Roadway Express*, 199 F.3d 270 (5th Cir. 2000)(plaintiff truck driver stopped receiving driving assignments); *EEOC v. Firestone Fibers & Textile Co.*, 515 F.3d 307 (4th Cir. 2008)(plaintiff discharged); *Chalmers v. Tulon Co.*, 101 F.3d 1012 (4th Cir. 1996)(plaintiff discharged; prima facie case not proven because plaintiff did not meet the notice requirement of the prima facie case); *Shelton v. University of Med. & Dentistry*, 223 F.3d 220 (3d Cir. 2000)(plaintiff discharged).

[5] *Cruzan v. Special School District #1*, 294 F.3d 981 (8th Cir. 2002)(employer's decision to allow transgendered employees to use women's restroom not an adverse employment action); *Bowles*, 285 Fed. Appx. at 814 (2d Cir. 2008)(unpublished decision)(comments by supervisor that plaintiff should seek a job in the private sector if he wanted week-ends off not an adverse employment action). *See also Lawson v. Washington*, 296 F.3d 799, 805 (9th Cir. 2002)(no adverse employment action where plaintiff quit and was not constructively discharged and statements by employer did not involve threat "imposing discipline on him for refusing to comply").

"reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). And, while the Petitioner attempts to manufacture a circuit conflict out of the various formulations that have been used in describing the adverse employment action element of a prima facie case of religious discrimination, he cannot point to a single judgment in a religious accommodation case that rests on a distinction between an "adverse employment action" requirement and any "requirement that an employee be discharged or disciplined as a condition of asserting a religious accommodation claim." Pet. 12.

## II. The Sixth Circuit Correctly Applied The Criteria For A Prima Facie Case

Tacitly admitting that there is no conflict among the circuits with regard to the "adverse employment action" element of a prima facie case of religious discrimination, the Petitioner argues that "a religious accommodation case against a labor union" should be subject to different standards than a religious accommodation case against an employer. Pet. 21.

It is not surprising that neither Petitioner nor his amici cite a single religious accommodation case so holding. "Read literally, Title VII addresses only the obligation of an 'employer' to accommodate an employee's religious beliefs and observations. However, courts have uniformly imposed upon labor organizations the same duty to provide reasonable accommodation." *EEOC v. Union Independiente de la Autoridad*, 279 F.3d 49, 55 n. 7 (1st Cir. 2002), citing *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 884 (9th Cir. 1981) ("this court has consistently applied the [religious accommodation] provision to unions, on the theory that 'Title VII clearly imposes the same duty not to discriminate on a union as it does the employer'").

This case presents an especially inappropriate vehicle for the creation of an implied labor organization religious accommodation standard different from the standard applied to employers, since the employment practice being challenged here is the product of a collectively bargained agreement for which the employer and the union are equally responsible.

## III. The Sixth Circuit Decision Is Not In Conflict With *Burlington Northern v. White*

Reed erroneously claims that the Sixth Circuit's decision is in conflict with *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006). In *White* the Court held that, in a retaliation case under Title VII, the "adverse action" that serves as the basis for a retaliation claim need not be related to the terms and conditions of the plaintiff's employment. In a retaliation suit, the issue may be whether conduct that does not alter terms or conditions of employment can be sufficient to deter an employee from complaining about unlawful discrimination and whether such conduct should be actionable. The Court in *White* held that it was.

The Sixth Circuit decision in this case does not involve any application of *White*. Here the issue is whether the employer and union need to offer a reasonable accommodation to resolve a conflict between an employee's religious belief and the union security provisions of a collective bargaining agreement. That issue necessarily involves application of terms and conditions of employment. There is no indication in this case that Reed suffered any "adverse action" unrelated to the application of the union security provisions in the CBA and the related Letter Agreement. The Sixth Circuit neither relied on nor distinguished *White* because the holding in that case has nothing to say about the issue before the Sixth Circuit.

## IV. Petitioner Was Provided A Reasonable Accommodation

While the foregoing is sufficient to dispose of the petition for certiorari, we would be remiss if we did not briefly show that both the district judge and the concurring circuit judge were correct in their conclusion that the accommodation accorded the Petitioner was reasonable. Pet. App. 12a-14a, 66a-71a. The accommodation was provided under negotiated provisions of the UAW and AM General Collective Bargaining Agreement which includes "a union security provision under which all AM General employees must either become UAW members or pay the union an agency fee equal to the amount of membership dues." *Id.* at 2a. "UAW and AM General also are parties to a letter agreement that allows any employee with a *bona fide* religious objection to joining or supporting a labor union to satisfy his union security obligation by making a payment equal to full membership dues to one of three charities mutually designated by UAW and AM General." *Ibid.*

The religious accommodation set forth in the UAW/AM General letter agreement is the accommodation expressly mandated by Section 19 of the National Labor Relations Act, 29 U.S.C. § 169, which provides:

> "Any employee who [has bona fide religious] objections to joining or financially supporting labor organizations . . . may be required in a contract between such employee's employer and a labor organization in lieu of period dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund . . . chosen by such employee from a list of at least three such funds, designated in such contract."

This provision was enacted by Congress specifically to harmonize the duty to accommodate employee religious views under Title VII and the right to enforce lawful union securi-

ty provisions under the NLRA.[6] It is a religious accommodation that has been held to satisfy the requirements of Title VII by every circuit court that has considered the question. *See International Association of Machinists & Aerospace Workers v. The Boeing Company*, 833 F.2d 165 (9th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988); *McDaniel v. Essex International, Inc.*, 696 F.2d 34 (6th Cir. 1982); *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981); *Tooley v. Martin-Marietta Corporation*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981).

The Petitioner does not deny that the religious accommodation accorded him by the letter agreement completely eliminates any conflict between his religious beliefs and the requirements of the union security agreement. Rather, the Petitioner's sole basis for challenging this accommodation is that he would prefer to contribute to his chosen charity an amount less than the amount of dues. Petitioner's notion that a reasonable accommodation provided by his employer and union should be disallowed because he prefers another accommodation was rejected by this Court in *Ansonia*, 479 U.S. at 68. Because Title VII "directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation," this Court held in *Ansonia* that an employer is not required to provide a plaintiff's preferred accom-

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[6] "By accommodating the religious beliefs of these persons, the bill would make the National Labor Relations Act consistent with section 701(j) of the Equal Employment Opportunity Act which requires an employer to 'reasonably accommodate . . . . an employee's religious observance or practice without undue hardship.' 42 U.S.C. § 2000e(j). The option of allowing a qualifying individual the right to pay the equivalent of dues to a nonreligious charity clearly constitutes a "reasonable accommodation" to the individual's religious beliefs." 126 Cong. Rec. 2580 (Feb. 11, 1980).

modation and "where the employer has already reasonably accommodated the employee's religious needs, the statutory enquiry is at an end." *Id.*

The Petitioner's challenge is based on the circumstance that prior to lodging a religious objection to providing any financial support to the Union he had lodged an objection to financially supporting UAW activities that were not germane to collective bargaining and, under *Communications Workers v. Beck*, 487 U.S. at 735, was allowed to pay the Union a reduced agency fee. Pet. 21-22.

In *Beck*, this Court held that, while "Section 8(a)(3) of the National Labor Relations Act permits an employer and an exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues and initiation fees as a condition of continued employment," that provision does not "also permit a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment." *Beck*, 487 U.S. at 738. The generally accepted union response to such an objection is an "advance reduction of dues" collected from the objecting employee, which prevents the use of such payments by the union "for purposes to which the employee objects." *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984).

As a result of his subsequent religious objection, the Petitioner "is not paying any money to the union." Pet. 22. Thus, the question of the union "expend[ing] funds . . . collected [from the Petitioner] on activities unrelated to collective bargaining, contract administration, or grievance adjustment" does not arise. *Beck*, 487 U.S. at 738. Because Reed's payment goes entirely to charity with no money going to the UAW, the charity payments do not

implicate any concern of *Beck*, and nothing in that decision requires the employer and union to create a special accommodation for Petitioner.

As Petitioner's request for his preferred accommodation is not justified by *Ansonia* or mandated by *Beck*, he attempts to argue for a reduced payment to charity on the ground that his payment of the full union security amount to charity is discriminatory. To the extent this is an attempt to make a disparate treatment argument under the religious discrimination provisions of Title VII, Petitioner has waived that argument by expressly disavowing any disparate treatment claim in the proceedings below. Pet. App. 11a.

Petitioner's argument also finds no support in *Ansonia*. With respect to the facts before it, this Court in *Ansonia* found that requiring an employee to take unpaid leave for religious observance in excess of the paid leave days allowed under the governing collective bargaining agreement was a reasonable accommodation unless the employee could show that the contractually permitted paid leave was granted on a discriminatory basis, that is

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[7] Because the Court considered the record unclear on this issue, it remanded the case to the Second Circuit for further findings on past and existing practices in the administration of the leave provisions of the collective bargaining agreement. On remand, the Second Circuit affirmed supplemental findings by the district court that the CBA was administered according to its terms. Relying on the language of the Supreme Court's decision, the Second Court held that the conclusion that the accommodation provided was reasonable was compelled based on the supplemental district court's findings:

> "There is no evidence in the remand record to support a finding that leave may be taken pursuant to the 'necessary personal business' provisions of the Agreement for all purposes except religious ones."

*Philbrook v. Ansonia Board of Education*, 925 F.2d 47, 54 (2d Cir. 1991), *cert. denied*, 501 U.S. 1218 (1991).

"when paid leave is provided for all purposes *except* religion." *Ansonia*, 479 U.S. at 71. (emphasis in original).[7] Nothing in the record of this case supports a conclusion that any of the accommodations provided by AM General and the UAW are provided "for all purposes except religion" and therefore discriminatory under *Ansonia*. *Ibid.*

Under the AM General collective bargaining agreement and letter agreement with the UAW, an employee with religious objections to unions or union activities can be accommodated through reduced payments to the union or through full payment to charity, and Petitioner has enjoyed the right to choose among these options throughout his employment as he deems necessary to accommodate his religious beliefs. Pet. App. 56a-57a. There is no evidence that any of these options is being discriminatorily applied. Petitioner pays the exact same amount to charity as 1698 other employees who pay full union dues or agency payments, and he pays less to the union than all 1699 other bargaining unit employees. Pet. App. 69a. Nothing in *Ansonia* requires the employer to create a special accommodation for Petitioner when the uniformly administered accommodation he is receiving fully resolves any conflict between his religious beliefs and the union security provisions of the collective bargaining agreement.

The Petitioner does not contend that there are any decisions holding the accommodation mandated by Section 19 of the National Labor Relations Act to be unreasonable. *See* Pet. 21-22. Rather, the Petitioner merely suggests that the reasonableness of this accommodation is something the Court should settle "[a]t the same time" it addresses the principal question presented by the Petition. *Id.* at 27. However, Petitioner has failed to establish grounds warranting this Court's consideration of either issue.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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