

No. 18-1150

In the Supreme Court of the United States

STATE OF GEORGIA, *et al.*,

Petitioners,

v.

PUBLIC.RESOURCE.ORG, INC.,

Respondent.

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

**BRIEF OF THE SOFTWARE & INFORMATION
INDUSTRY ASSOCIATION AS *AMICUS
CURIAE* SUPPORTING PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital information industries. The 700-plus software companies, search engine providers, data and analytics firms, information service companies, and digital publishers that constitute SIIA's membership serve nearly every segment of society, including business, education, government, healthcare, and consumers.¹

SIIA is a leading advocate of strong intellectual property protection that appropriately balances the legitimate interests of copyright owners and users. SIIA has regularly filed *amicus* briefs in intellectual property cases presenting issues of importance to its members. See, e.g., *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429 (2016); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013).

Many of SIIA's members must decide, on a regular basis, whether to invest their capital and employees' time and effort in creating informational works. They therefore have a substantial interest in clear and predictable standards for copyright protection, so that they can be sure that such investments are protected. The decision below creates considerable uncertainty and will therefore have the inevitable ef-

¹ No party or counsel for a party authored this brief in whole or in part, and no one other than *amicus curiae*, its members, or its counsel funded the preparation or submission of this brief. See Sup. Ct. R. 37.6. Counsel for petitioners and respondent received timely notice of this filing, and all parties have consented to the filing of the brief.

fect of discouraging investment in works that should be protected by the copyright law. SIIA therefore has a strong interest in review, and reversal, of that ruling by this Court.

SUMMARY OF ARGUMENT

The government edicts doctrine holds “that ‘the law,’ whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright.” *Veeck v. S. Bldg. Code Congress Int’l, Inc.*, 293 F.3d 791, 796 (5th Cir. 2002) (en banc). This Court developed the doctrine in a trio of nineteenth-century cases, and has not had occasion to revisit it since 1888. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888).

But this case involves works that everyone agrees are *not* “the law:” non-binding annotations prepared by a private company and included in the print version of Georgia’s statutory compilation, the Official Code of Georgia Annotated (OCGA). Pet. App. 4a. The Eleventh Circuit panel nonetheless held that these works are not protected by the copyright law.

To reach that result, the Eleventh Circuit purported to “resort to first principles,” Pet. App. 3a, creating a new approach to government edicts that runs counter to that of every other court of appeals to have considered the issue. Rather than asking whether the work in question is binding law, the Eleventh Circuit’s inquiry asks whether the work is “sufficiently law-*like* so as to be properly regarded as a sovereign work” for which “the People are the ultimate authors.” *Id.* at 4a (emphasis added).

This Court should grant certiorari to review this conclusion, for two principal reasons.

First, the Eleventh Circuit’s approach further destabilizes an already conflicted area of copyright law, disincentivizing investment in law-related works of authorship. The purpose of copyright law is to promote the creation and dissemination of informational works by “assur[ing] contributors to the store of knowledge a fair return for their labors.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985). But when those “assur[ances]” are clouded by doctrinal uncertainty, content creators like *amicus*’s members are deterred from creating useful works, for fear that their investments of time and money will go unprotected. By unsettling expectations and increasing uncertainty over the availability of copyright for law-related works, the decision below significantly undermines the goals of copyright law.

Second, and relatedly, this is not a one-off case. Many States publish their official statutory codes through third-party firms, and many of those code books include annotations drafted by the commercial publishers. The question of copyright for non-binding annotations appearing in a State’s official statute books affects States (and publishers) from Alaska to Alabama—making the unpredictability introduced by the decision below all the more significant. This Court should grant review.

ARGUMENT

I. The Eleventh Circuit’s Ruling Intensifies The Already-Existing Uncertainty Regarding The Scope Of The Government Edicts Doctrine, Discouraging Investment In Useful Works.

The Eleventh Circuit broke from the other courts of appeals that have addressed the scope of the government edicts doctrine, creating a wholly new and unpredictable approach to copyright for law-adjacent works of authorship. The resulting uncertainty inevitably will deter investment in the creation of useful law-related works—the exact opposite of the purpose of the copyright law.²

A. Predictability is critical to achieving the purposes of copyright law.

This Court has explained time and again that the fundamental purpose of copyright law is to expand the store of knowledge—and to promote the availability of creative and other informational works—by incentivizing investment in authorship: “The immediate effect of our copyright law is to secure a fair return for an author’s creative labor,” with “the ultimate aim[], by this incentive, to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (quotation marks omitted); accord, e.g., *Eldred*

² Importantly, this case does not involve any claim of copyright regarding the Georgia code provisions themselves. And the statutes are available to anyone, without charge, via a state website maintained by the private publisher (and annotator) of the official code volumes. See State of Georgia, *Georgia Law*, <https://georgia.gov/popular-topic/georgia-law>.

v. *Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (“[C]opyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.”) (quotation marks and emphasis omitted).

The Copyright Clause itself makes this intent plain, acknowledging that “securing for limited Times to Authors * * * the exclusive Right to their respective Writings” will “promote the Progress of Science.” U.S. Const. art. I, § 8, cl. 8.³ “The economic philosophy behind” the Copyright Clause is thus “the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

Given this background, it is critical that economic actors be able to know in advance whether contemplated investments in authorship will be protected. Without clear assurances that they will receive “a fair return for their labors,” potential “contributors to the store of knowledge” will make the rational choice not to invest in making those contributions at all. *Harper & Row*, 471 U.S. at 546. After all, “[a]s Jeremy Bentham told us over a century ago, secure expectations of return are a sine qua non of enterprise.” Carol M. Rose, *Servitudes, Security, and Assent*, 55 S. Cal. L. Rev. 1403, 1403 (1982) (citing Jeremy Bentham, *The Theory of Legislation* 109-122 (Charles K. Ogden ed. 1931) (1840)).

³ “[T]he accepted view is that ‘science’ originally was used in the sense of general knowledge rather than the modern sense of physical or biological science.” 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.03[A][2] (2018).

Therefore, as this Court has explained, “it is *peculiarly important* that the boundaries of copyright law be demarcated as clearly as possible,” precisely because “copyright law ultimately serves the purpose of enriching the general public through access to creative works.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (emphasis added); *cf. Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (describing “Congress’[s] paramount goal in revising the [Copyright] Act of enhancing predictability and certainty of copyright ownership”); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994) (In matters regarding “property rights, * * * predictability and stability are of prime importance.”).

Unpredictability in the scope of copyright protections is thus at odds with “[t]he primary objective of copyright[:] * * * [t]o promote the Progress of Science and useful Arts.” *Fogerty*, 510 U.S. at 527 (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)).

B. The decision below expands the substantial uncertainty regarding the scope of copyright protection.

The Eleventh Circuit’s decision adds further uncertainty to the government edicts doctrine, an already confused area of copyright law.

Even before the Eleventh Circuit’s ruling, the “straightforward general rule” that “judicial decisions and statutes are in the public domain * * * has proven difficult to apply when the material in question does not fall neatly into the categories of statutes or judicial opinions.” *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 38 (1st

Cir. 2003). Indeed, “appellate courts have reached arguably inconsistent results in such cases.” *Ibid.*

The Second and Ninth Circuits, for example, utilize tests that focus on “(1) whether the entity or individual who created the work needs an economic incentive to create or has a proprietary interest in creating the work and (2) whether the public needs notice of this particular work to have notice of the law.” *Cty. of Suffolk v. First Am. Real Estate Sols.*, 261 F.3d 179, 194 (2d Cir. 2001); accord *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 518-519 (9th Cir. 1997) (considering “economic incentive[s]” and “the due process requirement of free access to the law”).

The en banc Fifth Circuit rejected that approach (over a six-judge dissent), endorsing instead a bright-line rule that only “‘the law,’ whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law.” *Veeck*, 293 F.3d at 800; see also *id.* at 803 (asserting “the basic proposition” that “copyright protection may not be asserted for *the text of* ‘the law.’”) (emphasis added); accord Pet. App. 60a-65a (district court decision below, holding that OCGA annotations are copyrightable because they “do[] not have the force of law.”). Cf. *Bldg. Officials & Code Admin. v. Code Tech., Inc.*, 628 F.2d 730, 734-735 (1st Cir. 1980) (focusing on due process and the “metaphorical concept of citizen authorship,” but declining to take a definitive position).

Separately from this line of cases, the first Justice Harlan (in his capacity as Circuit Justice) wrote a decision for an early Sixth Circuit panel that is flatly irreconcilable with the Eleventh Circuit’s decision below. See *Howell v. Miller*, 91 F. 129 (6th Cir. 1898).

Justice Harlan concluded that Howell, the compiler of a Michigan statutory compilation, “was entitled to have copyrighted his volumes of Annotated Statutes, and that such copyright covers all in his books that may fairly be deemed the result of his labors”—not the statutes themselves, that is, but any “marginal references, notes, memoranda, table of contents, indexes, and digests of judicial decisions prepared by him from original sources of information; also such headnotes as are clearly the results of his labors.” *Id.* at 138.

The court did not “perceive any difficulty in holding that [Howell’s] copyright would embrace all such matters, for they constitute no part of that which is public property”—even though the Michigan legislature had specifically enshrined Howell’s compilation “as evidence of the existing laws [of Michigan], with like effect as if published under and by the authority of the state.” *Howell*, 91 F. at 131, 138 (quoting Mich. Sess. Laws 1883, p. 8).

The standard adopted by the Eleventh Circuit constitutes a wholly new approach to the scope of copyright protection for law-adjacent works. Stating that the question involves “profound and difficult issues” with “important considerations of public policy * * * at stake on either side,” the court “resort[ed] to first principles” in fashioning a novel standard for copyrightability. Pet. App. 2a-4a. In the Eleventh Circuit’s view, the “ultimate inquiry is whether a work is authored by the People, meaning whether it represents an articulation of the sovereign will.” *Id.* at 3a. That is, even if a work is not in fact “the law,” the Eleventh Circuit’s approach assesses whether that work “is sufficiently law-*like* so as to be properly regarded as a sovereign work.” *Id.* at 4a (emphasis

added); see also *id.* at 25a (question is whether work is “sufficiently like the law” or “similar enough to the law”); *id.* at 26a (“so enmeshed with [the] law as to be inextricable”).

In undertaking that inquiry, the panel looked to three factors: whether the work in question, like the law, (1) “is written by particular public officials who are entrusted with the exercise of legislative power;” (2) “is, by nature, authoritative;” and (3) “is created through certain, prescribed processes.” Pet. App. 25a-26a. The court then held that the annotations in the OCGA do in fact “represent a direct exercise of sovereign power” (Pet. App. 51a)—notwithstanding that they (1) were written by a private company, several levels of delegation removed from the legislature (*id.* at 6a-7a); (2) are undisputedly *not* the law of the State of Georgia (*ibid.* (quoting O.C.G.A. § 1-1-7)); and (3) are not enacted through the legislative process (*id.* at 47a). See generally Pet. 24-32.

The Eleventh Circuit’s decision seriously destabilizes copyright law on three levels.

First, by rejecting the approaches of every court of appeals to have considered the issue and creating instead a novel approach from whole cloth, the ruling adds a new dimension to the existing conflict on the proper scope of copyright for law-adjacent works. See pp. 6-8, *supra*; Pet. 16-22 (discussing differing approaches); *id.* at 22-24 (explaining that the OCGA annotations would be copyrightable in other circuits).

“[T]he creation of a circuit split [is] particularly troublesome in the realm of copyright,” *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (en banc), in light of “[t]he purpose of Congress to have national uniformity in patent and copy-

right laws,” *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 n.7 (1964).

Second, the Eleventh Circuit’s newly devised analytical framework is itself nebulous and indeterminate. Deciding whether a work lacking legal force is nevertheless “sufficiently *like* the law” that it may be “deemed the product of the direct exercise of sovereign authority” (Pet. App. 25a (emphasis added)) is necessarily a vague undertaking. Even the panel below recognized that “[b]asing the inquiry on whether a work is similar enough to the law as to be attributable to the People * * * does little to diminish the difficulty of applying [that] rule in the unique circumstances presented here.” *Ibid.* The uncertainty is amplified by the fact that this very case arguably should have been decided in favor of copyrightability even under the Eleventh Circuit’s three-factor inquiry. See p. 9, *supra*.

Third, the Eleventh Circuit’s decision appears to be in strong tension—if not outright conflict—with this Court’s foundational precedents on the government edicts doctrine. In *Callaghan v. Myers*, the Court held that the official reporter of decisions for the Supreme Court of Illinois—appointed to that position by the court under statutory authority (128 U.S. at 645-646)—could hold a copyright in the headnotes and other parts of the official reports that he, rather than the judges, had produced:

[A]lthough there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges, * * * yet there is no ground of public policy on which a reporter who prepares a volume of law reports, of the character of those in this case, can, in the absence of a prohibitory

statute, be debarred from obtaining a copyright for the volume, which will cover the matter which is the result of his intellectual labor.

Id. at 647 (citing *Banks*, 128 U.S. at 244); see also *id.* at 650 (affirming “[t]he general proposition that the reporter of a volume of law reports can obtain a copyright for it as an author, and that such copyright will cover the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published”). Cf. *Wheaton*, 33 U.S. (8 Pet.) at 668 (“[N]o reporter has or can have any copyright in *the written opinions* delivered by this court[.]”) (emphasis added).

The headnotes authored by the official reporter in *Callaghan* are directly analogous to the case summaries published in the OCGA. Compare, *e.g.*, 41 *Illinois Reports* 9-10 (1868) (headnotes in one of the volumes at issue in *Callaghan*), available at <https://tinyurl.com/yycmener>, with Pet. 9 n.2 (reproducing case summary annotation from OCGA). The Eleventh Circuit’s rejection of copyright for the latter simply cannot be squared with this Court’s approval of protection for the former—and for that reason the scope of the government edicts doctrine is rendered completely uncertain, both within and outside the Eleventh Circuit.⁴

⁴ The court of appeals attempted to square this circle by characterizing the *Callaghan* reporter’s work as “essentially administrative and clerical.” Pet. App. 36a. But as the comparison between the *Illinois Reports* and the OCGA reveals, the headnotes protected in *Callaghan* are essentially identical in form and purpose to the case summaries published in the OCGA.

C. Deterring investment is the predictable result.

In view of this uncertainty, content producers like SIIA’s members will necessarily be discouraged from investing in the production of law-adjacent works, for fear that the copyrights in those works will be invalidated by the courts. As *amicus*’s members can attest, producing a multi-volume annotated state code requires “a tremendous amount of work” (Pet. App. 69a), and no rational economic actor will make that investment of time and money unless it can be assured that a court will not simply proclaim its non-binding work product “part and parcel of the law” (Pet. App. 26a) and subject to limitless copying.

Georgia itself provides a perfect illustration of the predictable results. Without the monetary incentives secured by an enforceable exclusive license, Lexis will surely not continue to make the “significant investment” required to develop annotations for the OCGA. Pet. 33 (quoting C.A. Dkt. 38-1, at ¶ 30); see Pet. App. 72a (allowing copying of OCGA annotations would “destroy[]” Lexis’s incentives to create them, because Lexis’s “sole revenue to recoup the costs of preparation of the annotations is through hard copy sales and licensing online access to the O.C.G.A.”).⁵

⁵ Lexis also maintains the online version of the Georgia Code, which is available to the public at no charge. See note 2, *supra*.

This is to say nothing of the “significant investment” already sunk into the preparation of the current volumes of the OCGA—in reasonable reliance on, among other things, the Copyright Office’s assurances that it will “register annotations that summarize or comment upon legal materials * * * unless the annotations themselves have the force of law” (U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*

Going forward, the people of Georgia will thus be left without the benefit provided by the current arrangement between Lexis and the State: access to high-quality, reliable exposition of Georgia law at a reasonable price. See Pet. App. 7a (noting that the price of the complete set of the print OCGA is capped at \$404, while a competing unofficial annotation of the Georgia Code costs \$2,570—more than six times as much). If “a full understanding of the laws of Georgia necessarily includes an understanding of the contents of the annotations” (Pet. App. 41a), invalidating copyrights is hardly the solution, since to do so removes the incentive to produce those annotations in the first place.⁶

§ 313.6(C)(2) (3d ed. 2017))—which Lexis will now be unable to recoup. See Pet. App. 71a (observing that people will be “less likely to pay for annotations when they are available for free online”). Cf. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 127 (1978) (government action “may so frustrate distinct investment-backed expectations as to amount to a ‘taking’”); *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 713-715 (2010) (discussing judicial takings).

⁶ The possibility that the State might pay Lexis or a similar firm directly to develop annotations is a poor substitute for the incentives provided by copyright. As this Court has explained, “the economic philosophy” underlying the whole of copyright law “is the conviction that the encouragement of individual effort by personal gain is *the best* way to advance the public welfare through the talents of authors.” *Mazer*, 347 U.S. at 219 (emphasis added). To take one relevant example, West’s regional case reporter system first rose to prominence precisely because West (equipped with copyright) had economic incentives to produce a timely product that was useful to the bar and the public, while official state court reporters (having no such incentives) took years to publish their reports. See John H. Langbein et al., *History of the Common Law: The Development of Anglo-American Legal Institutions* 833-835 (2009).

The current uncertainty in the law—and the resulting disincentive to create law-adjacent works of authorship—is not limited to Georgia, or even to the other states within the Eleventh Circuit. See pp. 14-16, *infra*. Without this Court’s intervention, content creators in any circuit that has not explicitly adopted a different approach run the risk that a court will be swayed by the Eleventh Circuit’s novel interpretation of the government edicts doctrine. What’s more, even copyright or license-holders located in the Second, Fifth, or Ninth Circuits could see their copyrights invalidated, so long as they are amenable to suit on the issue in the courts of the Eleventh Circuit, and therefore potentially subject to that court’s novel approach.

In short, by injecting an amorphous new “first principles” approach (Pet. App. 3a) into the already-confused government edicts doctrine, the Eleventh Circuit’s decision disserves “copyright law[s] * * * purpose of enriching the general public through access to creative works.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016) (quotation marks omitted). And, because the purpose of copyright law is to increase the store of knowledge through economic incentives for authorship, “it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.” *Fogerty*, 510 U.S. at 527. This Court should grant review to provide that much-needed clarity.

II. Code-Publishing Arrangements Like Georgia’s Are Common.

Both courts below seemed to believe that their decisions would have little impact beyond the particular facts of this case. As the district court put it, “this is an unusual case because most official codes are not

annotated and most annotated codes are not official.” Pet. App. 62a; see also *id.* at 25a (describing the difficulty of applying the government edicts doctrine “in the unique circumstances presented here”); *id.* at 41a (asserting that annotations’ presence in an official code book makes them “authoritative in a way that annotations ordinarily are not”).

Respectfully, that premise is incorrect. By *amicus*’s count, the official statute books of at least **twenty-one States** (plus the District of Columbia and Puerto Rico) are annotated volumes produced by private companies under an arrangement with the state legislature.⁷ Many of these code books, like the OCGA, “use the state emblem on the[ir] cover[s],” and are thus literally “stamp[ed] * * * with the state’s imprimatur.” Pet. App. 42a; *e.g.*, Ark. Code Ann.; Del. Code Ann.; Miss. Code Ann.

In some cases, as in Georgia, copyrights in these annotated volumes are held by the State directly and licensed back to the publisher. *E.g.*, Ala. Code, copyright page (copyright by “State of Alabama”). In oth-

⁷ Those jurisdictions are Alabama (Ala. Code); Alaska (Alaska Stat.); Arkansas (Ark. Code Ann.); Delaware (Del. Code Ann.); Georgia (O.C.G.A.); Idaho (Idaho Code); Kentucky (Ky. Rev. Stat. Ann., Certified Version); Maine (Me. Rev. Stat. Ann.); Maryland (Md. Code Ann.); Mississippi (Miss. Code Ann.); New Hampshire (N.H. Rev. Stat. Ann.); North Carolina (N.C. Gen. Stat.); North Dakota (N.D. Cent. Code); Rhode Island (R.I. Gen. Laws); South Carolina (S.C. Code Ann.); South Dakota (S.D. Codified Laws); Tennessee (Tenn. Code Ann.); Utah (Utah Code Ann.); Vermont (Vt. Stat. Ann.); Virginia (Va. Code Ann.); Wyoming (Wyo. Stat. Ann.); the District of Columbia (D.C. Code); and Puerto Rico (P.R. Laws Ann.). Cf. *The Bluebook: A Uniform System of Citation* tbl. T.1, at 248-306 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015) (listing the publishers of state codes).

ers, the copyright is held by the publisher directly. *E.g.* N.C. Gen. Stat., copyright page (copyright by “Matthew Bender & Company, Inc.”). But regardless of their minor differences, every one of these state codes implicates the same question presented here: the copyrightability of legal annotations that are not “the law,” yet appear in a State’s official statute book.

The Eleventh Circuit’s decision thus calls into question the copyrights covering annotations in each one of these state codes, endangering protection for the “tremendous amount of work” that went into preparing those annotations. Pet. App. 69a. And it reduces incentives for publishers to collaborate with each of these twenty-one state legislatures to produce annotated official codes in the first place—with the ultimate result that the citizens of those States will have less ready access to detailed explications of state law.⁸

This case is thus far more than a mere curiosity, cabined to a peculiar arrangement between one state government and its code publisher. Rather, the decision below affects both commercial reliance interests and the public availability of high-quality legal analysis in jurisdictions spanning the country. This Court should grant certiorari to clarify when copyright protection is available for law-adjacent works.

⁸ Publishers of *unofficial* state codes must set their prices quite high in order to recoup the substantial costs of producing detailed annotations, as the demand for such codes is low. See Pet. App. 7a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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