UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CARMEN CARDONA, Claimant-Appellant, v. ERIC K. SHINSEKI, Secretary of Veterans Affairs, Respondent-Appellee, and BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES, Intervenor-Appellee.	)	Vet. App. No. 11-3083

MOTION OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES FOR ACCESS TO THE RECORD BEFORE THE AGENCY

Pursuant to Rule 27 of the Rules of Practice and Procedure for this Court, the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") respectfully moves for an order requiring that claimant-appellant Carmen Cardona and/or respondent-appellee Eric K. Shinseki ("Secretary") provide the House the Record Before the Agency pertinent to Ms. Cardona's claim in this matter ("RBA"). Despite this Court's May 23, 2012 Order granting the House's motion to intervene in this matter, neither Ms. Cardona nor the Secretary has provided the RBA, and late last week both adopted final positions that they would not do so absent a court order. In the absence of the RBA, the House is significantly hindered in its ability to draft its brief in this matter.

Ms. Cardona and the Secretary oppose this motion and plan to file opposition papers.

Oral argument is not requested.

BACKGROUND

I. Ms. Cardona's Opening Brief.

On April 19, 2012, Ms. Cardona filed her opening brief in this action. *See* Appellant's Principal Br. (Apr. 19, 2012) ("Cardona Brief"). That brief acknowledges that two federal statutory provisions independently bar Ms. Cardona's claim for additional disability benefits, but argues that both provisions violate her equal protection rights, among other constitutional provisions. *See id.* at 1, 2 ("[T]he VA is barred from recognizing Ms. Cardona's marriage [for purposes of providing her the additional benefits] under 38 U.S.C. § 101(31) [("Section 101")] . . . and DOMA [1 U.S.C. § 7; ("DOMA Section 3")] . . . .").

Ms. Cardona's brief cites extensively to the RBA. *See* Cardona Br. at 1-4, 9-10 (citing dozens of pages culled from RBA that, judging at least by Ms. Cardona's citations, consists of several hundred pages or more). Ms. Cardona does so to establish both the facts[1] and the procedural history[2] necessary to present her claim in this Court. *See id.*

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[1] As to the facts, Ms. Cardona argues that the RBA establishes that she is "married under the laws of Connecticut." Cardona Br. at 2. Ms. Cardona further argues that the RBA establishes that she "applied for and was granted service-connected disability benefits for carpal tunnel syndrome," that her "combined disability evaluation for VA compensation benefits is currently 80 percent," that she subsequently "applied for additional disability benefits for her dependent spouse," and that "the VA Regional Office (VARO) in Hartford, Connecticut denied her claim for service-connected disability benefits for her dependent wife [possibly in light of the challenged statutes, though Ms. Cardona's brief does not make clear whether additional reasons barred the grant of the additional benefits]." *Id.* at 1-2.

[2] As to the procedural history, Ms. Cardona cites to the RBA as establishing that she previously appealed to the Board of Veterans' Appeals, filed at least one motion, and

II. The House's Intervention.

On May 21, 2012—approximately one month after Ms. Cardona filed her opening brief—the House filed its unopposed motion to intervene in this action. *See* Unopposed Mot. of [House] for Leave to Intervene (May 21, 2012) ("House Intervention Motion"). The House explained that, inasmuch as the Secretary had "abruptly abdicated his responsibility to defend DOMA Section 3 and 38 U.S.C. § 101(31) against Ms. Cardona's equal protection claims," *id.* at 1, "[g]ranting the House's motion to intervene will ensure that the Court receives the full benefit of the adversary process on an important constitutional issue," *id.* at 2.

On May 23, 2012, this Court granted the House's motion. *See* Judge's Stamp Order Granting the Unopposed Mot. of [House] for Leave to Intervene (May 23, 2012) ("Intervention Order").

The House's brief currently is due on July 11, 2012. *See* Order at 2 (May 30, 2012); Judge's Stamp Order Granting [Secretary]'s Unopposed Mot. for an Extension of Time . . . . (June 4, 2012). The House, however, has not been able to draft its brief because Ms. Cardona and the Secretary have refused to provide the RBA, on which this action is based.

The House contacted Ms. Cardona, through her counsel, twice in an effort to obtain the RBA. In the first telephone call, during the week of June 11, 2012, the House explained its need for the RBA and also expressed willingness to work with Ms. Cardona to address any privacy concerns that she might have. Ms. Cardona agreed to get back to the House; when, after a week, she had not done so, the House again contacted her (on

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did not prevail before that body. *See* Cardona Br. at 2-3. According to Ms. Cardona, the RBA further establishes that the Board of Veterans' Appeals "confirmed the VARO's denial of disability allowance benefits based on . . . 38 U.S.C. § 101(31)." *Id.* at 3. Finally, Ms. Cardona argues that the RBA establishes that her appeals both to the Board of Veterans' Appeals and to this Court were timely. *See id.* at 2-3.

June 20, 2012), again through her counsel. This time, Ms. Cardona stated definitively that she would not provide any portion of the RBA, including those portions expressly referenced in her opening brief, no matter the possibility of any accommodations that the House might be willing to make. (For example, the parties might have negotiated an agreed protective order). According to Ms. Cardona, the House should litigate this case, as a party, without knowledge of its facts or procedural history, other than as asserted in her brief.

The House also contacted the Secretary, also through counsel. In conversations beginning on May 11, 2012, prior to this Court's grant of intervention, and continuing again on June 20, 2012 after Ms. Cardona's refusal to provide the RBA, the Secretary acknowledged the House's role first as a presumptive party and then as an actual party in the case, but stated that the Privacy Act of 1974, 5 U.S.C. § 552a, nonetheless bars production of the RBA. The Secretary acknowledged that that act does not apply to the production of information to "either House of Congress," 5 U.S.C. § 552a(b)(9), but nonetheless refused to honor a request to release the RBA from the General Counsel of the House, who represents the Bipartisan Legal Advisory Group, which speaks for the House in this litigation. *See, e.g.*, House Intervention Mot. at 2 n.2; *id.* at 8 & nn.5-6.

ARGUMENT

I. The House Requires and is Entitled to Access to the RBA to Defend Section 101 and DOMA Section 3 against Ms. Cardona's Equal Protection Claims.

The Executive Branch's refusal to perform its constitutional function of defending federal statutes has forced the House to discharge that responsibility, and, in order for the House to do so, it must know the record that it is defending.

Perhaps the first means by which the government may defend any statute (and, particularly, by which the House may defend Section 101 and DOMA Section 3) is by exposing a Court's lack of jurisdiction to consider such a challenge, including because

the claimant lacks standing to advance that claim. The House cannot evaluate whether Ms. Cardona has standing to bring her challenge without knowing, for example, whether, but for Section 101 and DOMA Section 3, she would be entitled to the additional benefits that she demands. *See, e.g.*, *Hyatt v. Peake*, 22 Vet. App. 211, 213 (2008) ("This Court, although an Article I court created by statute, has adopted the jurisdictional restrictions of the Article III case or controversy rubric. To satisfy the irreducible constitutional minimum of standing, a litigant . . . . must have suffered an injury in fact that is both concrete and particularized[;] . . . . there must be a causal relationship between the injury and the conduct of the defendant[; and] . . . . it must be likely that the injury will be redressed by a favorable decision." (quotation marks and citations omitted)), *aff'd sub nom. Hyatt v. Shinseki*, 566 F.3d 1364 (Fed. Cir. 2009); *cf.* Cardona Br. at 2 (not stating basis, or bases, on which VA initially denied her claim for additional benefits). In apparent recognition of this principle, Ms. Cardona devotes the first several pages of her opening brief, replete with citations to dozens of RBA pages, to an effort to establish that standing. *See id.* at 1-4 (asserting injury, initial resort to lower levels of administrative process, and timely appeal). To defend Section 101 and DOMA Section 3, the House must be able independently to evaluate Ms. Cardona's assertions on these threshold issues.

Nor is it any answer to hope that the Executive Branch alone will provide an adequate check on Ms. Cardona's desire to achieve additional benefits through the invalidation of Section 101 and DOMA Section 3. The Executive Branch has long since not only abandoned its duty to defend Section 101 and DOMA Section 3 but has affirmatively attacked them in court. House Intervention Mot. at 4-8, 13 n.8. The vehemence of the Executive Branch on this issue is such that it has refused not only to defend those statutes against equal protection challenges (as acknowledged in the Attorney General's letters of February 23, 2011 and February 17, 2012), but it has

refused to raise even standing and other subject matter jurisdiction arguments, leaving the House to do so. *See, e.g.*, Consol. Br. in Supp. of [House]'s Cross-Mot. for Summ. J. . . . at 14-15, 16-25, *Bishop v. United States*, No. 4:04-cv-848 (N.D. Okla. Oct. 19, 2011) (ECF No. 215) (where Executive Branch refused to do so, House left to argue standing and statutory preclusions); *cf.* [House]'s Mot. for Denial of Voluntary Dismissal of Appeal . . . at 13-17, *Torres-Barragan v. Holder*, No. 10-55768 (9th Cir. Mar. 15, 2012) (ECF No. 52-1) (where plaintiff denied certain immigration status in consequence of DOMA Section 3 and appealed that issue to Ninth Circuit, Executive Branch stipulates dismissal to avoid judicial review of DOMA Section 3); Order, *Lui v. Holder*, 2:11-cv-1267 (C.D. Cal. Sept. 28, 2011) (ECF No. 38) (where House prevailed in DOMA Section 3 case at district court level—such that House could not itself appeal DOMA Section 3 issue to Ninth Circuit and eventually to Supreme Court—Executive Branch refuses to appeal its loss on that issue).

Even if the Executive Branch were willing to perform its constitutional function in connection with Section 101 and DOMA Section 3 (which, clearly, it is not), the House now is a "party-appellee" to this litigation, Intervention Order; House Intervention Mot. at 1, and thereby entitled and empowered fully to litigate any issues pertinent to the defense of the challenged statutes. *See, e.g.*, Vet. App. R. 10(d) ("**Access of Parties or Representatives to Original Record.** After a Notice of Appeal has been filed, the Secretary shall permit a party or a representative of a party to inspect and to copy, subject to reasonable regulation by the Secretary, any original material in the record before the agency that is not subject to a protective order." (emphasis in original)); *Int'l Union v. Scofield*, 382 U.S. 205, 215 (1965) ("The rights typically secured to an intervenor in a reviewing court [include] to participate in designating the record, to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, [and] to petition for rehearing in the appellate court or to [the

Supreme] Court for certiorari."); *Butler v. Office of Pers. Mgmt.*, 168 Fed. App'x 439, 441 (Fed. Cir. 2006) ("Permissive intervenors have the same rights and duties as parties, except they do not have an independent right to a hearing; and they may participate only on the issues affecting them."); *Mason v. Shinseki*, Slip Op., No. 08–2969, 2011 WL 1334420 (Table), at *1 (Ct. Vet. App. Apr. 8, 2011), attached as Ex. 1 ("[U]nless court provides otherwise, 'intervenor is treated as if he were an original party and has equal standing with the original parties.'" (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1920 (2d ed. 2000))).[3]

Ms. Cardona and the Secretary, on the other hand, seek to reduce the House's status to that of *amicus curiae*. This Court granted the House's unopposed motion to appear not in that role but as a "party." Intervention Order; House Intervention Mot. at 1. (This is the same role in which the House has appeared in every other Section 101 and DOMA Section 3 litigation since the Executive Branch abandoned its responsibility to defend first the latter statute and then the former. *See* House Intervention Mot. at 8-9 & n.7). The House is a "party-appellee," Intervention Order; House Intervention Mot. at 1;

[3] *See also, e.g.*, *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1246 (11th Cir. 2006) ("Once a court grants intervention, whether of right or by permission, the 'intervenor is treated as if [it] were an original party and has equal standing with the original parties.'" (quoting *Marcaida v. Rascoe*, 569 F.2d 828, 831 (5th Cir. 1978) (per curiam))); *Montcalm Publ'g Corp. v. Commonwealth of Va.*, 199 F.3d 168, 172 (4th Cir. 1999) ("[O]ur holding accords with the general rule that the intervenor is treated as if he were an original party." (quotation marks omitted)); *Sw. Pa. Growth Alliance v. Browner*, 121 F.3d 106, 122 (3d Cir. 1997) ("[W]e hold that when a principal party adopts by reference an argument that an intervenor fully briefs, the intervenor may argue the question just as if the principal party had fully briefed the issue itself."); *Beauregard, Inc. v. Sword Servs. LLC*, 107 F.3d 351, 354 n.9 (5th Cir. 1997) ("An intervenor is generally treated as an original party to an action." (citing *United Steelworkers of Am. v. Jones & Lamson Mach. Co.*, 854 F.2d 629, 630 (2d Cir. 1988))); *Alvarado v. J.C. Penney Co., Inc.*, 997 F.2d 803, 805 (10th Cir. 1993) ("We agree that '[w]hen a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party.'" (quoting *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985))).

it is not an *amicus curiae*, nor even an "amici-plus." *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 991 (2d Cir. 1984) (distinguishing intervenors from entities with mere "amici-plus status").

Finally, this Court also should know that in every other Section 101 and/or DOMA Section 3 case in which the House has intervened, it has participated as a full party to the litigation. For example, the House has intervened in several cases in which the constitutional challenge arises in the immigration context. *See* Mot. of the [House] to Intervene . . . . , *Revelis v. Napolitano*, No. 1:11-cv-1991 (N.D. Ill. May 31, 2011) (ECF No. 14); Mot. of the [House] to Intervene . . . . , *Lui v. Holder*, No. 2:11-cv-1267 (C.D. Cal. June 1, 2011) (ECF No. 10); Mot. of the [House] for Leave to Intervene, *Torres-Barragan v. Holder*, No. 10-55768 (9th Cir. June 24, 2011) (ECF No. 31-1); Unopposed Mot. of the [House] for Leave to Intervene, *Blesch v. Holder*, No. 1:12-cv-1578 (E.D.N.Y. May 15, 2012) (ECF No. 9). In those cases, the filings are not publicly available in part because they contain information of an exceptionally private nature for the individual seeking the immigration accommodation. *See, e.g.*, Fed. R. Civ. P. 5(c). Nonetheless, in each case, the House has received a copy of each and every document that it has requested from the Executive Branch. Further, in each case in which it has sought the opportunity, the House has engaged in discovery by, for example, taking depositions and propounding document requests, interrogatories, and requests for admission. *See, e.g.*, *Windsor v. United States*, No. 10-cv-8435 (S.D.N.Y.); *cf.* [House]'s Notice of Appeal, *Golinski v. U.S. Office of Pers. Mgmt.*, No. 3:10-cv-257 (N.D. Cal. Feb. 24, 2012) (ECF No. 188) (in case in which intervenor House did not prevail in defending DOMA Section 3, House appeals that ruling). In other words, in no other case has the claimant or even the Executive Branch been so brazen as to suggest that the House litigate without access to the underlying factual and procedural record.

II. The Secretary's Suggestion that the Privacy Act Bars Production of the RBA to the House is Incorrect.

In refusing to provide the House with the RBA, the Secretary suggested that the Privacy Act, 5 U.S.C. § 552a, excuses his refusal. He is wrong. Even if the Privacy Act ever could excuse production to another party of an RBA or other appellate record (a highly dubious proposition in and of itself),[4] a cursory review of that act reveals that it has no application here. For example, the Privacy Act disclosure restrictions expressly do not apply to disclosures within the "routine use" of the relevant record or, perhaps most fundamentally here, "to either House of Congress." 5 U.S.C. § 552a(b)(3), (9).

First, the Privacy Act restrictions never apply to "a routine use" of the relevant record, 5 U.S.C. § 552a(b)(3), with "routine use" defined to encompass "the use of such record for a purpose which is compatible with the purpose for which it was collected," 5 U.S.C. § 552a(a)(7). The production of a Record Before the Agency to the parties to pertinent litigation is indisputably an act compatible with the purpose for which that record was created, *see, e.g.*, Vet. App. R. 10(d) (quoted above), and, therefore, a use expressly outside the restrictions of the Privacy Act.

Second, the Privacy Act restrictions never apply to disclosures "to either House of Congress." 5 U.S.C. § 552a(b)(9). The House is one of the two Houses of Congress. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). To the extent that the Secretary's confusion is over whether the Bipartisan Legal Advisory Group constitutes the House for purposes of this litigation, it does, as the House previously has explained:

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[4] *Cf.* 5 U.S.C. § 552a(a)(1); 5 U.S.C. § 552(f)(1); 5 U.S.C. § 551(1)(B) (expressly defining "agenc[ies]" for which Privacy Act restrictions apply as excluding "the courts of the United States").

> The House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980[]s . . . . Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of General Counsel.

House Intervention Mot. at 2 n.2 (citations omitted); *see also id.* at 8 & nn.5-6.

Finally and in any event, the Privacy Act restrictions always are inapplicable upon "the order of a court of competent jurisdiction," as is this Court for purposes of deciding this motion. 5 U.S.C. § 552a(b)(11).

CONCLUSION

For all the foregoing reasons, this Court should order Ms. Cardona and/or the Secretary to produce forthwith the RBA to the House.

Respectfully submitted,

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June 26, 2012

[5] The Bipartisan Legal Advisory Group, which speaks for the House in litigation matters, is currently comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of Section 101's and DOMA Section 3's constitutionality in this case.

CERTIFICATE OF SERVICE

I hereby certify that, on June 26, 2012, a copy of the foregoing Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives for Access to the Record Before the Agency was filed electronically via the court's CM/ECF system and served by mail on anyone unable to accept electronic filing. Parties may access this filing through the court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system and by first-class mail, postage prepaid on the following:

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Exhibit 1

Unpublished Disposition
2011 WL 1334420
Only the Westlaw citation is currently available.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Designated for electronic publication only
United States Court of Appeals for Veterans Claims.

Kenneth B. MASON, Appellant,
v.
Eric K. SHINSEKI, Secretary of Veterans Affairs, Appellee.
Frederick L. Trawick, Intervenor.

No. 08–2969. | April 8, 2011.

Before KASOLD, Chief Judge, and HAGEL and SCHOELEN, Judges.

Opinion

ORDER

PER CURIAM:

***1** The attorney-appellant, Kenneth B. Mason, appeals through counsel a May 22, 2008, Board of Veterans' Appeals (Board) decision that determined "[t]he requirements for payment of attorney fees in the amount of 20[%] of past-due benefits payable to the veteran, in the calculated amount of $53,472.53, have not been met." R. at 5 (citing 38 U.S.C. § 5904 (2002) and 38 C.F.R. § 20.609 (2007)). The appellant and the Secretary agree that the Board erred to the extent that it determined the appellant was ineligible to collect a fee. The Secretary asserts, however, that the matter should be remanded for a determination as to whether the appellant is entitled to the full 20% contingency fee. *See* *Scates v. Principi*, 282 F.3d 1362, 1366 (Fed. Cir2002) (holding that "an attorney with a contingent fee contract for payment of 20 [%] of accrued veterans benefits awarded, discharged by the client before the case is completed, is not automatically entitled to the full [20%] fee. He may receive only a fee that fairly and accurately reflects his contribution and responsibility for the benefits awarded.").

In his reply brief, the appellant argues that "eligibility" to receive a fee was the only issue raised to the Board and therefore reversal is appropriate. He argues that the Board does not have jurisdiction to address the reasonableness of the fee because the 2006 amendment to 38 U.S.C. § 5904(c)(3)(A) divested the Board of original jurisdiction and gave it to the Secretary to make an initial agency determination on reasonableness. He argues that the Board only has appellate jurisdiction to review a decision by the Secretary addressing the reasonableness of the fee and that pursuant to the Secretary's regulation, 38 C.F.R. § 14.636(h)(4)(i) (2008), the veteran and VA's time to seek review has expired.

On March 16, 2011, the Court submitted this case to a panel for consideration and decision and oral argument has been scheduled for Tuesday, May 24, 2011. The Court subsequently received written argument from the self-represented intervenor, Frederick L. Trawick, on April 4, 2011. Mr. Trawick asserts that the attorney-appellant should not be entitled to collect any fee. In the alternative, he argues that the attorney-appellant is not entitled to the full 20% contingency fee because the attorney's work did not result in his favorable past-due benefits award.

Because Mr. Trawick is without the benefit of counsel, the Court will stay this matter for a period of 30 days to permit Mr. Trawick to obtain representation, if he so desires. *See* *Cox v. West*, 13 Vet.App. 461, 462–63 (2000) (applying the Court's procedure set forth in *In re Panel Referrals in Pro Se Cases*, 12 Vet.App. 316 (1999) (en banc) to an intervenor); *Snyder v. West*, 13 Vet.App. 244, 248 (1999) (per curiam order); 7C Charles Allen Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1920, p. 488 (2d ed.2000) (unless court provides otherwise, "intervenor is treated as if he were an original party and has equal standing with the original parties").

***2** Upon consideration of the foregoing, it is

ORDERED that the appeal is stayed for a period of 30 days to permit Mr. Trawick to seek counsel, if he so desires. It is further

ORDERED that the Clerk of the Court request, by means of transmitting a copy of this order to the Director of the Case Evaluation and Placement Component of the Veteran's Consortium Pro Bono Program, that the Director investigate the possibility of appointing particularly qualified counsel to provide direct representation for Mr. Trawick, if he so desires. Failing that, the Court requests that the Director investigate the possibility of appointing a particularly qualified volunteer counsel to act as amicus curiae to present arguments in support of Mr. Trawick's position. It is further

ORDERED that the Clerk of the Court request, by means of transmitting a copy of this order to the Director of the Veterans Consortium Pro Bono Program, that the Director within 30 days from the date of this order file with the Court a response to this order with service on the appellant and the Secretary, notifying the Court whether counsel was found, and, if so, the identity of counsel and the anticipated date counsel will file an appearance. It is further

ORDERED that no later than 7 days after the expiration of the stay in this matter, the Secretary shall file with the Court and serve on the appellant, the intervenor (or his counsel), and amicus curiae, if any, a memorandum of law, not longer than 10 pages in length, addressing the appellant's arguments concerning the Board's jurisdiction to address the reasonableness of the appellant's fee subsequent to the 2006 amendment to 38 U.S.C. § 5904. The Secretary's memorandum of law shall include a discussion as to whether application of the amended statute to this proceeding would have an impermissible retroactive effect.

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