12-1381

No. _____

In The

Supreme Court of the United States

PAUL BARDOS,

Petitioner,

vs.

TWENTY-NINE PALMS ENTERPRISES CORPORATION, a Tribal corporation,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Absent express federal authorization, the State of California lacks jurisdiction to regulate the licensing of contractors on the tribal trust land of the Twenty-Nine Palms Band of Mission Indians. Neither Public Law 280 nor any other federal law authorizes California to so regulate. May a tribal corporation nonetheless act as a private attorney general by suing a non-Indian contractor in state court for disgorgement under California Business & Professions Code § 7031(b), for being unlicensed while constructing improvements on tribal trust land in connection with a tribal gaming enterprise?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14(b), the following list identifies all of the parties appearing here and before the California Court of Appeal.

The petitioner here and defendant-appellant at the court of appeal is Paul Bardos.

The respondent here and plaintiff-respondent at the court of appeal is Twenty-Nine Palms Enterprises Corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The California Court of Appeal, Fourth District, Division Two's opinion issued on October 11, 2012, the subject of this petition, is reported at 210 Cal.App.4th 1435, 149 Cal.Rptr.3d 52. (Appendix ["App."] 1-37.) The Supreme Court of California's February 20, 2013 denial of petition for review was not published in the official reports. (App. 44.)

The California superior court's judgment entered July 02, 2010 was not made part of the official reports. (App. 40-43.)

BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered on July 2, 2010. Pet. App. 40. A timely appeal was made to the California Court of Appeal, Fourth District, Division Two. The Court of Appeal issued its opinion on October 11, 2012. Pet. App. 1, 210 Cal.App.4th 1435, 149 Cal.Rptr.3d 52. Initially, the opinion was ordered to not be published in the official reports, but upon request of respondent, the Court of Appeal ordered the opinion published on November 8, 2012. Pet. App. 38. Petitioner then petitioned the California Supreme Court for a writ of review, which was denied on February 20, 2013. Pet. App. 44.

Jurisdiction is conferred on this Court under 28 U.S.C. § 1257(a) to review judgments rendered by the highest court of a state "where any title, right,

privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." This Court can review judgments of a lower state court if the state court of last resort has denied discretionary review. *Gonzalez* v. *Thaler*, ___ U.S. ___, 132 S.Ct. 641, 181 L.Ed.2d 619, 639-640 (2012).

STATUTE INVOLVED IN THE CASE

Respondent sued petitioner for disgorgement under California Business & Professions Code § 7031, which reads, in pertinent part, as follows:

> (a) Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person, except that this prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029.

> (b) Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract.

STATEMENT OF THE CASE

This case presents an interesting and recurring issue involving the interplay of state court jurisdiction, federal preemption, and choice of law principles in non-criminal actions brought by Native American plaintiffs against non-Indian defendants. In many of these cases, a tribal court has concurrent jurisdiction. In this case, the Tribe specifically chose a state court to try to take advantage of state regulatory sanctions that would otherwise be invalid on its reservation, thereby presenting an extreme illustration of how the system can be abused. It also illustrates the confusion over this issue.

In this case, the Twenty-Nine Palms Band of Mission Indians (the "Tribe") asked petitioner Paul Bardos to submit a bid to perform construction work on the Tribe's casino. Mr. Bardos had a duly licensed corporation able to perform this work, but the Tribe wanted Bardos to conceal his identity from another general contractor working at the casino. Mr. Bardos submitted a bid using the fictitious business name, Cadmus Construction Company ("Cadmus"), and

underbid the other contractor. After satisfactorily performing the work (no construction defects have been alleged) and being paid, Cadmus was sued in the California Superior Court by the Tribe's corporation, respondent Twenty-Nine Palms Enterprises Corporation ("29 Palms") seeking disgorgement of over $750,000 under Business and Professions Code section 7031 because Cadmus did not have a contractor's license under the fictitious business name.

Ordinarily, the California contractor's license law would have no effect on contractors working on tribal projects on tribally-owned reservation lands, especially if those projects involve Class III gaming governed by tribal-state compacts entered into under the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. Undeterred by this, 29 Palms filed suit in state court, acting as a private attorney general in seeking disgorgement of the money it had paid for construction performed by Bardos.[1]

Petitioner objects to the use of Business & Professions Code § 7031 by the state court in this context. The use of this disgorgement sanction is nothing

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[1] It is appropriate to describe 29 Palms as acting in a "private attorney general" capacity because the primary purpose of the disgorgement remedy is not compensation for individual damages, but protection of the public through deterrence and stronger encouragement of contractors to secure licenses. See *Alatriste* v. *Cesar's Exterior Designs, Inc.*, 183 Cal.App.4th 656, 667-669, 108 Cal.Rptr.3d 277 (2010).

more than thinly concealed regulation.[2] Although it takes the form of a private civil lawsuit, this proceeding shares with regulation the attributes of state action (judicial enforcement) and control over conduct (the statute having no purpose other than deterrence and encouraging individuals to secure state licenses). See *Alatriste* v. *Cesar's Exterior Designs, Inc.*, *supra*, 183 Cal.App.4th at pp. 667-669.

ARGUMENT

I. California has no Jurisdiction to Regulate Licensing of Contractors on Tribal Trust Land

As a general matter, states may not regulate conduct by non-Indians on reservation trust lands unless Congress has expressly granted that authority or unless state interests in regulation strongly

[2] Business & Professions Code § 7031(b) permits disgorgement from an unlicensed contractor as a regulatory deterrent without regard to equity, fairness, or justice. *WSS Industrial Construction, Inc.* v. *Great West Contractors, Inc.*, 162 Cal.App.4th 581, 587, 76 Cal.Rptr.3d 8 (2008). It is not designed to compensate the plaintiff for any perceived wrong; its sole purpose is deterrence. While the action occurs in a civil suit between two private parties, the sanction is enforced by the Superior Court, an arm of the State. It is in every way an instrument of regulation. And ordinarily such regulation would be unenforceable, even against a non-Indian, because it is preempted by federal law and is not within P.L. 280's grant of state jurisdiction.

outweigh competing federal and tribal interests. See, e.g., *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) [denying state authority to regulate non-Indian hunting and fishing on tribal lands]; *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue,* 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982) [denying state authority to tax a contractor's receipts for building a reservation school]. The strong limitations on state regulatory power have two sources: federal preemption and broader federal protection of tribal sovereignty. See generally Nell Jessup Newton et al., Cohen's Handbook of Federal Indian Law (2012) § 6.03[2][a] ("Cohen's Handbook").

No federal statute grants California jurisdiction to regulate the licensing of contractors who work on tribal casino projects. Public Law 280, 28 U.S.C. § 1360, ("P.L. 280") grants certain states, including California, criminal jurisdiction and limited civil jurisdiction to resolve civil disputes between individual Indians and private individuals within reservations, but does not grant any general civil regulatory authority. *Bryan* v. *Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); *Middletown Rancheria of Pomo Indians* v. *Workers' Compensation Appeals Board*, 60 Cal.App.4th 1340, 1349-1351, 71 Cal.App.2d 105 (1998). In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), this Court refined the test used today in determining which state laws may be enforced through P.L. 280, and which may not.

Criminal laws that are "prohibitory" may be enforced, but civil laws that are "regulatory" may not. 480 U.S. at pp. 209-210. The test is: "[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation." *Id.* at p. 209. The mere fact that the state enforces the regulation with a criminal penalty does not, in itself, transform a civil/regulatory law into a criminal one. *Id.* at p. 211.

Thus, in *Cabazon*, California sought to apply two Penal Code statutes to bingo games conducted on reservations for profit. The statutes did not entirely prohibit the playing of bingo, but permitted it when operated and staffed by members of designated charitable organizations who may not be paid for their services. 480 U.S. at p. 205. This Court found the statutes to be civil/regulatory and unenforceable on the reservations even though they carried criminal penalties, noting that "California does not prohibit all forms of gambling[ ]" (*id.* at p. 210), and concluding that "California regulates rather than prohibits gambling in general and bingo in particular." *Id.* at p. 211, fn. omitted. Contracting is not forbidden in California, but a license is required for most (but not all) construction contracting. See, e.g., Cal. Bus. & Prof. Code, §§ 7048 [no license required for jobs under $500], 7044 [no license required for owner/builder

projects]. As the California Contractors Licensing Board states in the opening line of its own website, "The Contractors State License Board (CSLB) protects consumers by licensing and regulating California's construction industry." http://www.cslb.ca.gov.

No other federal statute authorizes California to regulate contractors working on tribal casino projects. In fact, the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701, et seq., makes it clear that state law may only be applied to tribal gaming-related activities through a compact negotiated between the tribe and the state and approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(3)(C). California's compact with the Tribe in this case does *not* include a term making the state's contractor licensing law applicable to casino-related construction projects. Tribal-State Gaming Compact Between the Twenty-Nine Palms Band of Mission Indians, Oct. 8, 1999, available at http://www.cgcc.ca.gov/?pageID=compacts. In contrast, California did negotiate to obtain assurances that the Tribe would adopt building codes that meet local county standards and that gaming facilities would be inspected prior to occupation to ensure they comply with tribal building codes. *Id.* § 6.4.2.

As noted above, without a federal statute authorizing application of state law, federal Indian law preemption principles bar California from regulating non-Indian contractors engaged in tribal casino projects, unless the state can show that its interests strongly outweigh federal and tribal interests to the contrary. In this case, federal preemptive power has

been asserted, and tribal and federal interests have been articulated through the Indian Gaming Regulatory Act, as implemented through the tribal-state gaming compact, *supra*. Federal law comprehensively regulates tribal gaming, including the application of state laws, through that Act. Even apart from gaming, the United States regulates and exercises a trust responsibility regarding the use of all tribal trust land. See generally, Cohen's Handbook, §§ 5.04[3], 15.06-15.08. As a general matter, federal and tribal interests rest in the tribe's freedom to choose an appropriate contractor and to schedule construction, without the interference of direct state regulation. See *Gartrell Const. Inc.* v. *Aubry*, 940 F.2d 437 (9th Cir. 1991) [holding that state contractor licensing laws may not be applied to construction on federal lands]. Thus, whether a state is under P.L. 280 or not, there is no state authority to apply and enforce contractor licensing regulations to tribal gaming projects.

Federal law does not permit state and tribal governments, let alone individuals, to alter the jurisdictional rules specified in federal Indian law. Only Congress may allow such jurisdiction-altering agreements, as in the Indian Gaming Regulatory Act, *supra*. See *Kennerly* v. *Dist. Ct.*, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971) [invalidating agreement by Tribe to permit Montana state courts to hear claims against individual Indians arising on the reservation]. Thus the Tribe and Bardos could not establish state regulatory jurisdiction over contracting

by referencing such jurisdiction in their construction contract.

II. California May Not Even Have Adjudicative Jurisdiction of this Case Given its Regulatory Nature

If state jurisdiction exists over this suit, it cannot be through P.L. 280, which grants jurisdiction over disputes between individual Indians and private individuals, but does not confer any jurisdiction to resolve disputes in which a tribe is a party. *Bryan* v. *Itasca County*, *supra*, 426 U.S. at pp. 383-385, 389; *Middletown Rancheria of Pomo Indians* v. *Workers' Compensation Appeals Board*, *supra*, 60 Cal.App.4th at pp. 1349, 1350. 29 Palms is a tribal corporation and a self-described "arm of the Tribe." As such, P.L. 280 jurisdiction would not extend to it. *Trudgeon v. Fantasy Springs Casino,* 71 Cal.App.4th 632, 643, 84 Cal.Rptr.2d 65 (1999); *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 725-726 & fn. 5 (9th Cir. 2008).

Apart from P.L. 280, California courts may have inherent jurisdiction over 29 Palms' suit. In several cases where Indian plaintiffs have brought suit against non-Indian defendants, courts have upheld inherent state adjudicative jurisdiction. See *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 887-889, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986) (*Three Tribes II*) [suit by Tribe against non-Indian]; *State* v. *Zaman*, 190 Ariz. 208, 946 P.2d 459, 461 (1997) [suit by state on behalf of individual Indian against

non-Indian] (*Zaman*). However, none of the cases upholding state jurisdiction has involved a tribe or individual Indian acting as a private attorney general, seeking to enforce a state regulatory law that the state could not directly enforce on the reservation. This Court has held that in the case of *tribal* jurisdiction over non-members, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 453, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). A parallel federal Indian law doctrine would be that a state's adjudicative jurisdiction over non-Indian defendants for claims arising on the reservation may not exceed the state's regulatory jurisdiction. In effect, a state court would be estopped from asserting jurisdiction over a private attorney general claim seeking to enforce a regulation that the state could not directly impose. On that basis, the California court would lack jurisdiction over the instant case for disgorgement. Resolving this jurisdictional question, which has never before been addressed, would provide important legal clarification for the individuals and businesses that make construction contracts and other agreements with federally recognized tribes. Other state courts have recognized that it is improper to use state court jurisdiction to circumvent prohibitions on state regulatory power. See, e.g., *Risse* v. *Meeks*, 585 N.W.2d 875 (S.D. 1998) [state court may not hear claim that tribal member's on-reservation failure to maintain a fence caused animals to trespass on off-reservation property, because state may not regulate land-fencing activities on reservation lands]. For

purposes of the remainder of this petition, petitioner assumes, *arguendo*, that the state courts possess jurisdiction over this case.

III. Use of B&P Code § 7031(b) is Impermissible

This is one of those boundary areas where choice of law issues become mingled with and influenced by jurisdictional limits. Even if California courts have jurisdiction over this action arising on reservation trust lands, it does not inevitably follow that state law should be applied. Whether choice of law principles should be used when a state court assumes jurisdiction of a reservation-based case involving Indians, and if so, how to apply such principles, is an issue that is only beginning to come to the forefront. See, e.g., Cohen's Handbook, § 7.06[2]; Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes With Tribal Contacts* (2006) 55 American U. L. Rev. 1627; Pearson, *Departing from the Routine: Application of Indian Tribal Law Under the Federal Tort Claims Act* (2000) 32 Ariz. St. L.J. 695; *Louis v. U.S.A.*, 54 F.Supp.2d 1207, 1209-1211, and fn. 5 (D.N. Mex. 1999); *Cheromiah v. U.S.*, 55 F.Supp.2d 1295, 1302 (1999); *Tempest Recovery Services v. Belone*, 74 P.3d 67, 71 (N.M. 2003). In some cases, when an Indian brings an action in state court, the parties and the court automatically apply state law without analysis. This may occur due to tacit consent, lack of tribal law on the subject of litigation, or the state court's unexamined assumption

that state law is applicable under the circumstances. As noted in the leading treatise on federal Indian law,

> State courts will often choose to apply the law of another jurisdiction to govern a dispute. They do so when another jurisdiction has a more significant relationship with the parties or the transaction or occurrence and the court seeks to defer to the ability of another jurisdiction to regulate events centered there. Application of choice-of-law principles will sometimes lead state and federal courts to apply tribal law to disputes arising in Indian country. Cohen's Handbook, § 7.06[2].

In this case, there are powerful federal and tribal interests in maintaining the autonomy of tribal contracting from state law, regardless of the opportunistic decision the Tribe has made to invoke state law in this case. These interests are reinforced by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., which creates a tribal-state compacting process as the exclusive framework for applying state laws to tribal gaming projects. See § 2710(d)(3)(C). California's interests in public safety were asserted in the negotiation of compact provisions with the Tribe that require the Tribe to establish building codes comparable to local codes and that require inspection of tribal gaming facilities by appropriate experts. Application of state contractor licensing laws was not included in the compact. See Tribal-State Gaming Compact Between the Twenty-Nine Palms Band of Mission Indians, Oct. 8, 1999, § 6.4.2, available at http://www.cgcc.ca.gov/?pageID=compacts. Moreover,

use of the particular state statute in this case invokes the jurisdictional limits imposed by P.L. 280. As noted above, P.L. 280 does not authorize application of the state contractor licensing law because that law is regulatory in nature. Whether conventional state choice-of-law analysis is used, or an analysis focused primarily on federal preemption[3] and P.L. 280 is employed, the use of this type of state law cannot stand.

The California Court of Appeal, citing *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138, 104 S.Ct. 2269, 81 L.Ed.2d 113 (1984) (*Three Tribes I*) and *State* v. *Zaman*, *supra*, in support, held that these issues may not be raised by petitioner because they are sovereign immunity defenses reserved to the Tribe. Pet. App. 1, p. 15.

Three Tribes I and *Zaman* are not apposite. Both of these cases concern actions filed in state court by Indians against non-Indians. In both cases, the non-Indian moved to dismiss based on lack of jurisdiction in the state court. In both cases, the courts found no impediment to jurisdiction under federal law. Neither case considered the choice of law to be used by the state court on remand.

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[3] This Court has indicated that state law that infringes on the sovereignty rights of the Tribe is pre-empted. *Three Tribes II*, *supra*, 476 U.S. at pp. 889-890; also see Gardina, Article: *Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts* (2010) 35 Am. Indian L. Rev. 1, 32-37.

Assuming *arguendo* that the California Superior Court had jurisdiction to hear this case, petitioner still objects to the law used by the California court. This issue was addressed briefly in *Three Tribes II*.

In *Three Tribes I*, an action by a tribe against a non-Indian contractor over allegedly defective construction, the Supreme Court explained that federal law permitted the state court to hear the suit. Nonetheless, it remanded the case back to the North Dakota Supreme Court to reconsider whether there was a separate state law basis for declining jurisdiction.

On remand, the North Dakota Supreme Court held that there was indeed a separate state law basis. Specifically, the North Dakota Supreme Court ruled that under a state statute, the Tribe could not "avail itself of state court jurisdiction unless it consented to waive its sovereign immunity and to have any civil disputes in state court to which it is a party adjudicated under state law."[4] *Three Tribes II*, *supra*, 476 U.S. at p. 878.

This Court considered these conditions to be "an unacceptably high price to tribal sovereignty and

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[4] The state laws imposed would have included "the determination of parentage of children, termination of parental rights, commitments by county courts, guardianship, marriage contracts, and obligations for the support of spouse, children, or other dependents." The Court considered these subjects of traditional tribal control. 476 U.S. at p. 889.

thus operate[ed] to effectively bar the Tribe from the courts." (P. 889.) This Court held that the state statute was preempted to the extent it attempted to "disclaim pre-existing jurisdiction over suits by tribal plaintiffs against non-Indians for which there is no other forum" if tribes did not consent to the state's conditions. (P. 883.)[5] The Court found the requirement that tribes agree to use state law a "potentially severe intrusion on the Indians' ability to govern themselves according to their own laws" (p. 889) that "simply cannot be reconciled with Congress' jealous regard for Indian self-governance." (P. 890.)[6]

The Supreme Court clearly drew a distinction between the threshold jurisdictional issue, i.e., whether jurisdiction was permissible, which is now well-settled law on the facts of *Three Tribes I*, and the conditions North Dakota required to consent to jurisdiction. This Court implied that the Tribe would not ordinarily be subject to state law just because state courts had jurisdiction to hear a case involving a tribe and a non-Indian. Put differently, it is the distinction between a state's adjudicative jurisdiction

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[5] A state has a pre-existing jurisdiction when it "allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country" (476 U.S. at p. 889), in that the jurisdiction pre-existed the grant of jurisdiction under P.L. 280.

[6] "[T]ribal immunity does not extend to protection from the normal processes of the state court in which it has filed suit[,]" such as discovery proceedings and proceedings to ensure a fair trial. 476 U.S. at p. 889.

and legislative or regulatory jurisdiction. See discussion in Gardina, Article: *Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts*, *supra*, 35 Am. Indian L. Rev. 1 at p. 7; cf. *Nevada* v. *Hicks*, 533 U.S. 353, 357-359, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2010). For example, in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), the Court upheld the adjudicative jurisdiction of a Kansas state court to hear a class action brought by plaintiffs residing in all 50 states seeking interest on overdue royalty payments from gas leases in various states. However, the Kansas court had applied Kansas law to every claim and the Court found that this was sufficiently arbitrary and unfair as to exceed constitutional limits under the due process clause. 472 U.S. at pp. 814-822. Thus, while the Kansas court had adjudicative jurisdiction, the State of Kansas did not have regulatory jurisdiction over all the different claims. Similarly, the California Superior Court may have adjudicative jurisdiction to hear this case, but lacks regulatory jurisdiction needed to order disgorgement under California Business and Professions Code section 7031.

Obviously, the Tribe, being a sovereign, could decide to enact a tribal law requiring contractors on tribal territory to possess a valid California contractor's license. Alternatively, it could have negotiated in its tribal-state gaming compact to have California enforce its contractor licensing law directly. The Tribe has not pursued either of these options as a general

tribal policy. This lawsuit was a one-time, after-the-fact effort to recover construction costs from a contractor they had duped.

CONCLUSION

Review should be granted.

Respectfully submitted,

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