IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

MCCOMB CHILDREN'S CLINIC, LTD., Plaintiff, v. XAVIER BECERRA, in his official Capacity as Secretary of the United States Department of Health and Human Services, *et al*., Defendants.	Case No. 5:24-cv-00048-LG-ASH

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18116, prohibits recipients of Federal financial assistance from excluding any individual from any health program or activity, denying any individual benefits of any health program or activity, or subjecting any individual to discrimination under any health program or activity, on the basis of race, color, national origin, sex, age, or disability.

After the Department of Health and Human Services ("HHS") promulgated a rule in May 2024 implementing Section 1557, Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024) (codifying 45 C.F.R. pt. 92) (the "Rule" or the "2024 Rule"), Plaintiff McComb Children's Clinic ("MCC") brought this action against HHS. Compl., ECF No 1. MCC seeks prospective declaratory and injunctive relief that would preclude HHS from taking enforcement action against MCC if MCC discriminates against its patients on the basis of their gender identity. *Id.*, Prayer for Relief. In other words, the relief MCC seeks would prevent HHS from taking enforcement action under Section 1557 if MCC were to, for example, deny a patient medically necessary care that MCC typically provides—whether for a sore throat, a broken bone,

or an ear infection—because the patient's gender identity differs from their sex assigned at birth. *Id*. MCC claims that it is entitled to that relief because Section 1557 permits covered entities to engage in that type of sex discrimination. *See id.* ¶ 260.

But this case provides no basis to reach the merits of that question. If MCC were to subject an individual to discrimination on the basis of gender identity, MCC is already protected from HHS enforcement by the court's judgment in *Neese v. Becerra.* Final Judgment at 1, *Neese v. Becerra*, No. 2:21-cv-00163-Z ("*Neese*") (N.D. Tex. Nov. 22, 2022), ECF No. 71 ("*Neese* Final Judgment"). There, the court certified a class of "[a]ll health-care providers subject to Section 1557 of the [ACA,]" Order at 1, *Neese* (N.D. Tex. Nov. 22, 2022), ECF No. 70 ("*Neese* Class Cert. Order")—which includes MCC—and entered a declaratory judgment in favor of MCC stating that "Section 1557 of the ACA does not prohibit discrimination on account of . . . gender identity," *Neese* Final Judgment at 1. And MCC does not claim that HHS has engaged in any enforcement against it that is inconsistent with the *Neese* judgment. The *Neese* class-wide judgment thus precludes MCC from showing that it faced a certainly impending or significant risk of enforcement action by HHS at the time the Complaint in this case was filed. As a result, MCC cannot demonstrate standing, and this Court lacks subject matter jurisdiction.

If that were not enough, dismissal without prejudice is independently warranted as a matter of equitable discretion to prevent duplicative litigation. In suits challenging an agency's regulation, a district court may dismiss a suit without prejudice "if the same issue is pending in litigation elsewhere." *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967). And ample other pending lawsuits would justify such a dismissal here. *See, e.g.*, *Tennessee v. Becerra*, No. 1:24-cv-00161-LG-BWR ("*Tennessee*") (S.D. Miss. July 3, 2024); *Texas v. Becerra*, No. 6:24-cv-00211-JDK ("*Texas*") (E.D. Tex. Aug. 30, 2024). Indeed, nationwide preliminary injunctions issued in two of those cases provide yet additional protection to MCC against any enforcement by HHS of the 2024 Rule's interpretation of Section 1557 as encompassing discrimination on the basis of gender identity.

BACKGROUND

I. *Neese v. Becerra*

In 2021, HHS notified the public that it "will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include . . . discrimination on the basis of gender identity." *Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972*, 86 Fed. Reg. 27,984, 27,985 (May 25, 2021). After HHS issued that notice, two health care providers filed a putative class action complaint against HHS demanding declaratory and injunctive relief. Compl., *Neese* (N.D. Tex. Aug. 25, 2021), ECF No. 1. In late 2022, the *Neese* court certified the following class under Federal Rule of Civil Procedure 23(b)(2): "All health-care providers subject to Section 1557 of the Affordable Care Act." *Neese* Class Cert. Order at 1. The *Neese* court then entered a judgment for the class against HHS, declaring that "Section 1557 of the ACA does not prohibit discrimination on account of . . . gender identity." *Neese* Final Judgment at 1.

II. The 2024 Rule

HHS published a final rule in the Federal Register on May 6, 2024, implementing Section 1557. 89 Fed. Reg. 37,522. As relevant here, the Rule codifies the principle that discrimination on the basis of sex includes discrimination on the basis of gender identity. 45 C.F.R. § 92.101(a)(2)(iv). In the preamble to the 2024 Rule, HHS noted that, consistent with the *Neese* Final Judgment, the agency is "is not applying the challenged interpretation to members of the *Neese* class[.]" 89 Fed. Reg. at 37,574 n.118.

III. *Tennessee v. Becerra*

On May 30, 2024, fifteen states filed a complaint in this District focused on the 2024 Rule's provisions interpreting Section 1557 to encompass discrimination on the basis of gender identity. Compl. for Injunctive & Declaratory Relief, *Tennessee* (S.D. Miss. May 30, 2024), ECF No. 1. On June 13, 2024, the *Tennessee* plaintiffs filed a motion for a preliminary injunction focusing on the same gender identity discrimination provisions. Pls.' Urgent & Necessitous Mot. for § 705

Relief & Prelim. Inj. & for Expedited Consideration, *Tennessee* (S.D. Miss. June 13, 2024), ECF No. 20; Mem. in Supp. of Pls.' Mot. for § 705 Relief & Prelim. Inj., *Tennessee* (S.D. Miss. June 13, 2024), ECF No. 21. On July 3, 2024, this Court issued an order in *Tennessee* that stayed nationwide the effective date of specified provisions of the 2024 Rule "in so far as [the 2024 Rule] is intended to extend discrimination on the basis of sex to include discrimination on the basis of gender identity." Preliminary Injunction, *Tennessee* (S.D. Miss. July 3, 2024), ECF No. 30. This Court also enjoined Defendants "nationwide from enforcing, relying on, implementing, or otherwise acting pursuant to the [2024 Rule] to the extent that the final rule provides that 'sex' discrimination encompasses gender identity." *Id*. On August 30, 2024, Defendants appealed the *Tennessee* preliminary injunction to the United States Court of Appeals for the Fifth Circuit. Notice of Appeal, *Tennessee* (S.D. Miss. Aug. 30, 2024), ECF No. 42.

IV. *Texas v. Becerra*

On June 10, 2024, two states filed a complaint in the United States District Court for the Eastern District of Texas focused on the 2024 Rule's provisions interpreting Section 1557 to encompass discrimination on the basis of gender identity. Complaint, *Texas*, No. 6:24-cv-00211-JDK (E.D. Tex. June 10, 2024), ECF No. 1. On June 11, 2024, the *Texas* plaintiffs filed a motion for a preliminary injunction focusing on the same gender identity discrimination provisions. *Texas*, No. 6:24-cv-00211-JDK (E.D. Tex. June 11, 2024), ECF No. 2. On July 3, 2024, the *Texas* court issued an order that stayed the effective date of all provisions of the 2024 Rule as to the States of Texas and Montana as well as all covered entities in those states. Memorandum Opinion and Order at 27, *Texas*, No. 6:24-cv-00211-JDK (E.D. Tex. July 3, 2024), ECF No. 18. After cross-motions for reconsideration, on August 30, 2024, the *Texas* court modified its earlier order. Order Modifying Stay, *Texas*, No. 6:24-cv-00211-JDK (E.D. Tex. Aug. 30, 2024), ECF No. 41. The court's modified order stays nationwide the effective date of only certain provisions of the 2024 Rule, including 42 C.F.R. § 92.101(a)(2), which provides that discrimination on the basis of sex includes discrimination on the basis of gender identity. *Id*. at 4.

V. MCC's Allegations and Procedural Background

MCC is a clinic located in McComb, Mississippi, whose primary purpose is to provide healthcare. Compl. ¶¶ 18, 20. On May 13, 2024, MCC initiated this action. *Id.* MCC alleges that it will incur costs to comply with the Rule. *Id.* ¶¶ 220-36. But MCC alleges that it would avoid those costs "if this Court preliminarily enjoins [the Rule] and ultimately issues permanent relief[.]" *Id.* ¶ 236. On June 3, 2024, MCC filed a motion for a preliminary injunction, focusing on its claim that Section 1557's prohibition on discrimination on the basis of sex excludes discrimination on the basis of gender identity. Pls.' Mot. for a Delay of Effective Date & Prelim. Inj., ECF No. 6; Pls.' Mem. in Supp. of Mot. for a Delay of Effective Date & Prelim. Inj., ECF No. 7. MCC's motion for a preliminary injunction remains pending.

On August 15, 2024, MCC moved for partial summary judgment. Pl.'s Mot. for Partial Summ. J., ECF No. 27. MCC's motion addresses only part of one of the three claims in its Complaint, i.e., First Claim Part (A), which alleges that Section 1557's prohibition on discrimination on the basis of sex excludes discrimination on the basis of gender identity. Mem. in Supp. of Pl.'s Mot. for Partial Summ. J., ECF No. 28. On August 23, 2024, Defendants moved to stay proceedings in this action until Defendants' appeal of the preliminary injunction in *Tennessee v. Becerra* is finally resolved. Mot. to Stay Proceedings, or, in the Alternative, to Enter a Br. Schedule for Dispositive Mots., ECF No. 29. On September 28, 2024, the Court denied that stay motion and ordered Defendants to respond to the Complaint by September 30. Order Denying Mot. to Stay, ECF No. 34.

LEGAL STANDARDS

"A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison,* 143 F.3d 1006, 1010 (5th Cir. 1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir.1996)). A district court may dismiss an action for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on any one of three separate bases: (a)

the complaint alone; (b) the complaint supplemented by undisputed facts evidenced in the record; or (c) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Den Norske Stats Oljeselskap As v. HeereMack V.O.F.,* 241 F.3d 420, 424 (5th Cir. 2001), *cert. denied,* 534 U.S. 1127 (2002); *Voluntary Purchasing Grps., Inc. v. Reilly,* 889 F.2d 1380, 1384 (5th Cir. 1989). In examining a Rule 12(b)(1) motion, the court is empowered to consider matters of fact which are in dispute. *Williamson v. Tucker,* 645 F.2d 404, 413 (5th Cir. 1981).

The Court "may take judicial notice of prior court proceedings as matters of public record." *In re Deepwater Horizon*, 934 F.3d 434, 440 (5th Cir. 2019); *see also State of Fla. Bd. of Trustees of Internal Imp. Trust Fund v. Charley Toppino & Sons, Inc.*, 514 F.2d 700, 704 (5th Cir. 1975) ("It is not error . . . for a court to take judicial notice of related proceedings and records in cases before that court.").

ARGUMENT

I. MCC Lacks Standing Because it was Already Protected by the *Neese* Declaratory Judgment at the Outset of the Litigation.

Because the *Neese* Final Judgment precludes HHS from enforcing Section 1557 against MCC to "prohibit discrimination on account of . . . gender identity," *Neese* Final Judgment at 1, MCC faced no imminent enforcement of the Rule's codification of that principle at the outset of the litigation. The Court thus lacks jurisdiction over this case.

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (cleaned up). That "bedrock" Article III requirement ensures that the judicial power is invoked only "as a necessity in the determination of real, earnest and vital controversy." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quotation omitted). The case-or controversy inquiry is "especially rigorous when reaching the merits of the dispute would

force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was" unlawful. *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

A plaintiff bringing suit absent any enforcement action taken against it implicates several Article III doctrines. Under the doctrine of standing, a court must ensure that "the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (cleaned up). A plaintiff must, *inter alia*, show it has suffered an injury that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Susan B. Anthony List v. Driehaus* (*SBA List*), 573 U.S. 149, 158 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). An alleged future injury satisfies that requirement only "if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Id.* (quoting *Clapper*, 568 U.S. at 410, 414 n.5). This Court must assess standing "under the facts existing when the [operative] complaint is filed." *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 520 n.3 (5th Cir. 2014); *see also Carney v. Adams*, 592 U.S. 53, 59 (2020) (plaintiff "bears the burden of establishing standing as of the time he brought this lawsuit"). Moreover, "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

MCC alleges injury in the form of compliance costs purportedly associated with provisions of the Rule related to gender identity discrimination. Compl. ¶¶ 220-36. But, as a *Neese* class member, MCC has already obtained a declaratory judgment against HHS, declaring that Section 1557 does not prohibit discrimination on account of gender identity. Insofar as MCC decides to incur compliance costs even though it is already protected from HHS enforcement due to a class-wide declaratory judgment, those costs are not fairly traceable to imminent HHS enforcement of the Rule. *See Clapper*, 568 U.S. at 416 ("Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the

harm respondents seek to avoid is not certainly impending" and "ongoing injuries that respondents are suffering are not fairly traceable to" challenged provision).

Nor can there be any doubt about the concrete consequences of MCC's declaratory judgment against HHS. As the Supreme Court has explained, "[t]his form of relief conclusively resolves 'the legal rights of the parties.'" *Haaland v. Brackeen*, 599 U.S. 255, 293 (2023) (cleaned up). Declaratory judgments "have preclusive effect on a traditional lawsuit [or an enforcement action] that is imminent." *Id.* (citation omitted)." "After all, the point of a declaratory judgment 'is to establish a binding adjudication that enables the parties to enjoy the benefits of reliance and repose secured by res judicata.'" *Id.* (citation omitted). "[C]laim preclusion is the core idea of the class action: the procedural form exists precisely to liquidate the claims of many common stakeholders through litigation by a representative few of them." William B. Rubenstein, Newberg and Rubenstein on Class Actions § 18:14 (6th ed. 2024). Indeed, then-Judge Scalia noted that a "declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985). MCC has not alleged, nor could it, that HHS has taken a single enforcement action against any *Neese* class member in a manner that is inconsistent with the *Neese* declaratory judgment.

The *Neese* declaratory judgment thus places MCC in the same position as the individual plaintiffs in *California v. Texas*, 593 U.S. 659 (2021), who challenged the ACA's unenforceable requirement to purchase health insurance. The plaintiffs there claimed injury from the requirement in the form of compliance costs—"payments they have made and will make each month to carry the minimum essential coverage that [the ACA] requires." *Id.* at 669. But the Supreme Court found that those compliance costs were insufficient for standing because "the statutory provision, while it tells them to obtain coverage, has no means of enforcement." *Id.* "With the penalty zeroed out, the IRS can no longer seek a penalty from those who fail to comply." *Id.* "Because of this,

there is no possible [future] Government action that is causally connected to plaintiffs' injury—the costs of purchasing health insurance." *Id.* The *California* plaintiffs could "not point[] to any way in which the defendants, the Commissioner of Internal Revenue and the Secretary of Health and Human Services, will act to enforce [the challenged statutory provision]." *Id*. And they could not show "how any other federal employees could do so either." *Id.*

The *Neese* declaratory judgment also places MCC in a similar position as the plaintiffs in *Joint Heirs Fellowship Church v. Akin*, 629 Fed. App'x 627 (5th Cir. 2015). In *Akin*, the plaintiffs challenged provisions of the Texas Election Code enforced by the Texas Ethics Commission, even though the Commission had taken the position that "in light of [Fifth Circuit] precedent, it cannot and does not enforce" the challenged provisions. *Id*. at 630. The Fifth Circuit agreed that its precedents "restrain[ed] the Commission's enforcement of the Election Code" and "[t]here is no evidence that the Commission is failing to apply [the relevant Fifth Circuit] interpretations." *Id*. at 631. It did not matter whether the *Akin* plaintiffs were covered by a permanent injunction entered by the district court in one of the cases that had established one of those precedents. *Id*. "Regardless of the applicability of the injunction, the [plaintiffs] cannot show a credible threat of enforcement by the Commission because of [the Fifth Circuit's] precedents. They clearly apply even if not reduced to an injunction." *Id.* MCC faces an even higher barrier to standing in this case because the *Neese* declaratory judgment is not just a precedential opinion but instead a judgment between the very parties to this case, given MCC's membership in the *Neese* class.

As in *California*, any compliance costs MCC has purportedly incurred or will incur to comply with the Rule's provisions codifying the principle that discrimination on the basis of sex encompasses discrimination on the basis of gender identity does not supply MCC with standing to sue HHS because MCC is already protected by the *Neese* declaratory judgment and thus has faced no imminent enforcement. 593 U.S. at 669-70. Due to the *Neese* Final Judgment, "there is no action—actual or threatened—whatsoever" to prevent. *See id.* at 671. The *Neese* judgment provides MCC with "the benefits of reliance and repose secured by res judicata." *Haaland*, 599

U.S. at 293. Just as "the very existence of the statute" did not establish a credible threat of its enforcement in *Akin*, 629 Fed. App'x at 631, or in *California*, 593 U.S. at 671, the 2024 Rule's language alone does not establish imminent enforcement in the face of a declaratory judgment that already binds the parties in this case. *See Clapper*, 568 U.S. at 417-18 ("the costs [plaintiffs] have incurred to avoid surveillance are simply the product of their fear of surveillance,[] and our decision in *Laird* makes it clear that such a fear is insufficient to create standing.").

Although "[c]redible threats obviously include situations in which the statute has already been enforced against a plaintiff," MCC has not and cannot show a single instance when HHS enforced Section 1557 against it (or any *Neese* class member) for violating Section 1557's prohibition on gender identity discrimination since entry of the *Neese* Final Judgment. *See Akin*, 629 Fed. App'x at 631. "Article III requires a plaintiff to first answer a basic question: 'What's it to you?,'" *FDA v. All. for Hippocratic Medicine*, 602 U.S. 367, 379 (2024) (quoting A. Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 882 (1983)), and because the *Neese* Final Judgment prevents HHS from enforcing the gender identity discrimination provision codified in the 2024 Rule against MCC, MCC has no "'personal stake' in [a] dispute" over that codification here, *id.* (quoting *TransUnion*, 594 U.S. at 423).

Nor can MCC rely on speculation that the Fifth Circuit will reverse the district court's decision in *Neese* on jurisdictional grounds, rendering the *Neese* judgment without legal effect on the parties in this action. "The party invoking the jurisdiction of the court cannot rely on events that unfold[] after the filing of the complaint to establish its standing." *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005). And "[i]t is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in [a] case." *Clapper*, 568 U.S. at 413-14 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 159-60 (1990)).

Citing the *Neese* court's memorandum opinion, this Court has emphasized that the *Neese* court "held that HHS's Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984

(May 25, 2021), was unlawful and unenforceable." ECF No. 34 at 2. But the *Neese* class and Defendants are bound by the relief ordered in the *judgment*, "not though the . . . opinion *explaining* the exercise of [the court's] power." *Haaland*, 599 U.S. at 294 (citation omitted). And the *Neese* declaratory judgment does not merely declare that the 2021 Notice was invalidly promulgated, but also declares that "Section 1557 of the ACA does not prohibit discrimination on account of . . . gender identity," *Neese* Final Judgment at 1.

Because MCC cannot establish standing to challenge the 2024 Rule, the Court lacks subject matter jurisdiction. This case thus should be dismissed in its entirety.

II. The Court Should Exercise its Discretion to Dismiss This Action Without Prejudice Because the Same Issues are Pending in *Tennessee v. Becerra* and Other Cases.

When faced with "a multiplicity" of suits challenging an agency's regulation, a district court may dismiss a suit without prejudice "if the same issue is pending in litigation elsewhere." *Abbott Labs.*, 387 U.S. at 155. The plain text of the APA confirms "the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," 5 U.S.C. § 702(1), and "[i]t is the province of equity to prevent annoyance through a multiplicity of suits," *Aleograph Co. v. Elec. Rsch. Prods., Inc.*, 82 F.2d 625, 626 (5th Cir. 1936).

There is no doubt that the same issue is pending in this suit, in the *Tennessee* action, in the *Texas* action, and in other actions as well.[1] Indeed, MCC argues that, in the *Tennessee* action, this Court "has already ruled on [the] central issue" in this case. Pl. MCC's Opp'n to Defs.' Mot. to Stay at 6, ECF No. 31. The Court should thus exercise its discretion to dismiss this case without prejudice. *See Pontchartrain Partners, LLC v. Tierra de Los Lagos, LLC*, 48 F.4th 603 (5th Cir. 2022) (even when plaintiff's "suit was technically the first to be filed" court may dismiss it as duplicative); *see also Chamber of Com. of U.S. v. FTC*, --- F. Supp. 3d ---, 2024 WL 1954139, at *4 (E.D. Tex. May 3, 2024) (dismissal of a case may be warranted where "judicial effort would be

[1] Provisions of the 2024 Rule have been challenged in ample other lawsuits. *Florida v. HHS*, No. 8:24-cv-1080 (M.D. Fla.); *Cath. Benefits Assoc. v. Becerra*, No. 3:23-cv-203 (D.N.D.); *Missouri v. Becerra*, No. 4:24-cv-00937 (E.D. Mo.).

substantially duplicated were the two cases to proceed in parallel"); *Boston All. of Gay, Lesbian, Bisexual & Transgender Youth v. HHS*, 557 F. Supp. 3d 224, 232 (D. Mass. 2021) (exercising equitable discretion to "decline[] to address Plaintiffs' challenges to" regulatory provisions "[i]n light of the nationwide injunctions issued by sister courts").

CONCLUSION

For the foregoing reasons, the Court should dismiss this action without prejudice.

Dated: September 30, 2024

Respectfully submitted,

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