IN THE SUPREME COURT OF OHIO

CITY OF COLUMBUS,	:	**Case No. 2007-0391**
Appellee,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
vs.	:	
	:	
REBECCA KIM,	:	Court of Appeals Case No. 05AP-1334
Appellant.	:	

MERIT BRIEF OF APPELLEE

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STATEMENT OF FACTS

The State presented testimony from Joseph Berardi who testified that on May 13, 2004 he was in his yard mowing the grass when he heard Appellant's dog barking. Tr., 8. Appellant's dog engaged in non-stop, continuous barking from approximately 4:30 PM until sometime before 6:00 PM. Tr., 9, 13. Joseph was still able to hear the constant barking while he was inside his home even though his windows were closed, his air conditioner was running, and he was holding a conversation with another person. Tr., 12.

The State supported this evidence with testimony by Dr. Urham, a veterinarian, who stated that when he arrived at the Berardis' home he immediately noticed the sounds of a lawn mower running and a dog barking. Tr., 45. He was at the Berardis' residence for approximately one hour and there was no break in the barking at any time. Tr., 47, 49. Finally, the State presented evidence from Christine Berardi, Joseph Berardi's wife, that when she arrived at home on May 13, 2004, she immediately noticed the sounds of the lawn mower and Appellant's barking dog. Tr., 63. Consistent with the testimony of Joseph and Dr. Urham, Christine testified that while inside her home, with the windows closed and the air conditioner running she could still hear Appellant's dog constantly barking. Tr., 63.

ARGUMENT

The Eleventh District Court of Appeals erred as a matter of law in finding that an anti-noise ordinance was unconstitutional because it improperly interpreted the ordinance to be subjective and lacking in scientifically quantifiable standards. This Honorable Court has previously rejected both of those arguments. Therefore the Eleventh District Court of Appeals decision is contrary to established and binding precedent, and must be reversed.

Proposition of Law I

In reviewing anti-noise ordinances, the courts must presume the ordinance to be constitutional and indulge every reasonable interpretation in favor of its constitutionality. Thus, an anti-noise ordinance is only unconstitutionally vague if there is no reasonable construction that can be afforded to it.

This Court must resolve whether CCC § 2327.14 is unconstitutionally vague on its face and as-applied. Typically, when a court considers a vagueness challenge that does not implicate First Amendment rights, the first step is to determine whether a particular challenger's conduct fell within the proscriptions of the statute, and if so to end its inquiry. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982), 455 U.S. 489, 494-495. The instant case involves the noise created by an owned animal, and therefore does not implicate any First Amendment rights. *Nicchia v. New York* (1920), 254 U.S. 228, 230, ("Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the State without depriving their owners of any federal right."). However, because the instant case is raised upon certification of conflict, this Court must resolve both the facial and as-applied challenges in order to resolve the conflicting opinions of the District Courts of Appeals.

In order to determine whether the ordinance is constitutional, this Court has previously stated that the appropriate standard of review is highly deferential to the enactment:

> It is axiomatic that all legislative enactments enjoy a presumption of constitutionality. Similarly uncontroverted is the legal principle that the courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional. Specifically, as to challenges to a statute based upon its alleged vagueness, the United States Supreme Court has stated, "* * * [I]f this general class of offenses [to which the statute applies] can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." Thus, we are obligated to indulge every reasonable interpretation favoring the ordinance in order to sustain it.

State v. Dorso (1983), 4 Ohio St.3d 60, 61, 446 N.E.2d 449 (internal citations omitted, alterations sic), see also *State v. Anderson* (1991), 57 Ohio St.3d 168, 171, 566 N.E.2d 1224. After applying the presumption of constitutionality, the challenger bears the heavy burden of proving beyond a reasonable doubt that the ordinance is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Anderson*, at 171, quoting, *Cincinnati v. Coates* (1971), 402 U.S. 611, 614. Further to prove as-applied unconstitutionality, the challenger must "prove, beyond a reasonable doubt, that the statute was so unclear that he could not reasonably understand that it prohibited the acts in which he engaged." *Id.*, quoting *U.S. v. Harriss* (1954), 347 U.S. 612, 617, see also, *Graynard v. Rockford* (1972), 408 U.S. 104, 108-109 and *Connally v General Construction Co.* (1926), 269 U.S. 385, 391.

This Court and the United States Supreme Court have repeatedly held that, "Condemned to the use of words, *we can never expect mathematical certainty from our language*." *Graynard*, 408 U.S. at 108-109 (emphasis added). The *Graynard* Court found that although an ordinance was "marked by 'flexibility and reasonable breadth rather than meticulous specificity,'" it was "clear what the ordinance as a whole prohibit[ed]." *Id.*, 408 U.S. at 110 (internal citation omitted), quoting *Esteban v. Central Missouri State College* (8th Cir. 1969), 415 F.2d 1007, *cert. denied* (1970), 369 U.S. 965. Similarly, this Court has stated that, "Occasional doubt or confusion about the applicability of a statute does not render the statute vague on its face." *Anderson*, 57 Ohio St.3d at 174, n.2. Thus, if it is clear what the statute as a whole prohibits while taking into account the intrinsic vagaries of human language, the statute is not unconstitutionally vague.

In the instant conflict, the Eleventh District Court of Appeals abrogated its duty to interpret the ordinances in favor of finding them constitutional. In doing so, the Eleventh District ignored established precedent from this Honorable Court by interpreting the ordinance 1) as subjective in nature and 2) as deficient because it was not scientifically exact. By contrast, the Tenth District Court of Appeals correctly followed this Court's longstanding precedent and determined that the same language 1) required proof against an objective "reasonable person" standard and 2) did not require scientifically quantifiable standards. For these reasons, this Court should affirm the judgment of the Tenth District Court of Appeals.

Proposition of Law II

> **When reviewing an anti-noise ordinance, courts must adopt a reasonable person standard—unless explicitly stated otherwise by the ordinance—consistent with *State v. Dorso*. Further, the Constitution does not require that an anti-noise ordinance contain scientifically quantifiable standards.**

The noise ordinance in question was sufficiently definite to give a person of ordinary intelligence notice of what conduct is prohibited. In relevant part, the ordinance prohibits the harboring of an animal that "howls, barks, or emits audible sounds that are unreasonably loud or disturbing which are of such character, intensity, and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to the life and health of any individual." CCC § 2347.14. As interpreted by the Tenth District Court of Appeals, the anti-noise ordinance in question is constitutional because 1) it is limited to an objective standard (the noise must be "unreasonably loud or disturbing"), 2) it contains specific factors to gauge the noise by ("character, intensity, and duration"), and 3), it is limited to a specific geographic region (the "neighborhood" in which the noises occur). *State v. Kim*, Tenth Dist. No. 05AP-1334, 2006-Ohio-6985, ¶12. By contrast, the Eleventh District Court of Appeals, reviewing identical language, concluded that the

ordinance contained a subjective standard of proof, and thus the specific limiting criteria were insufficient. *State v. Ferraiolo* (2000), 140 Ohio App.3d 585, 586-587, 748 N.E.2d 584.

This Court has previously ruled that anti-noise ordinances are to be construed to contain objective standards, and the Court has ruled that the mere inclusion of non-quantifiable standards does not create unconstitutional vagueness. For these reasons, the Eleventh District Court of Appeals erred in departing from established precedent by interpreting the statute in a fashion that would make it unconstitutional.

A. The Eleventh District Court of Appeals failed to construe the ordinances to incorporate an objective "reasonable person" standard consistent with *State v. Dorso*, and should therefore be overruled.

The Eleventh District Court of Appeals abrogated its duty to "indulge every reasonable interpretation favoring the ordinance in order to sustain it." *Dorso*, at 61. Rather than find the ordinance in question to contain an objective standard—as required by this Court's precedent in *Dorso*—the *Ferraiolo* Court instead found the ordinance was subjective. A finding that an anti-noise ordinance contains a subjective standard of proof would mandate a finding that the statute is unconstitutionally vague. *Coates*, 402 U.S. at 613. By ignoring the *Dorso* precedent and its obligation to give ordinances a constitutional construction where possible, the Eleventh District Court of Appeals improperly construed the anti-noise ordinance to be unconstitutional.

In *Dorso*, this Court considered a similarly worded anti-noise ordinance. The Court adopted a construction of the ordinance that would make it constitutional, and in a well-reasoned opinion stated:

> [W]e adopt the approach taken by our counterpart in *State* v. *Chaplinsky*, and subsequently endorsed by the United States Supreme Court in *Chaplinsky v. New Hampshire*. In appraising the constitutionality of a statute which criminalized directing "offensive, derisive or annoying" words to another, the New Hampshire court interpreted the statute so as to obviate any potential ambiguities. . . .

> Following the persuasive lead of the *Chaplinsky* tribunals, we construe the Cincinnati ordinance at issue to prohibit the playing of music . . . in a manner which could be anticipated to offend the reasonable person, *i.e.*, the individual of common sensibilities. Specifically, we find the ordinance to proscribe the transmission of sounds which disrupt the reasonable conduct of basic human activities, *e.g.*, conversation or sleep. *Our construction of the ordinance does not permit the imposition of criminal liability upon a party whose conduct disturbs only the hypersensitive. Thus, the standard hereby adopted vitiates the claimed vagueness of the ordinance.*

Dorso, at 63-64 (internal citations omitted, emphasis added), citing *State v. Chaplinsky* (NH 1941), 91 N.H. 310, 18 A.2d 754. Similarly, the Eighth District Court of Appeals, relying on *Dorso*, interpreted language prohibiting the use of audio systems at such "a volume as to disturb the quiet, comfort or repose of other persons" as constitutional. *Cleveland v. Vento*, Eighth District No. 79913, 2002-Ohio-2613, ¶20, quoting CCO § 683.01. The Eighth District concluded: "The ordinance at issue in *Dorso* is similar to C.C.O. 683.01 in that neither objectively defines at what level noise becomes objectionable. By extending the *Dorso* decision to the case at hand, we determine that C.C.O. 683.01 permits a person of ordinary intelligence fair notice of the proscribed conduct." *Id.* Relying upon the standard set forth in *Dorso*, and following the lead of the *Vento* Court, the Tenth District Court of Appeals correctly interpreted the prohibition on "unreasonably loud or disturbing" sounds to require an objective standard of proof, while the Eleventh District Court of Appeals incorrectly imputed a subjective standard to the ordinance.

This Court should reject the Eleventh District Court of Appeals' interpretation of the ordinances in question. Rather than attempt to interpret the ordinance with an objective and constitutional burden of proof—as required by *Dorso*—the Eleventh District did the opposite. The Eleventh District ignored the presumed objectiveness of anti-noise ordinances, and instead construed the ordinance to find it unconstitutional. This type of interpretation was recently

rejected by the United States Court of Appeals for the Sixth Judicial Circuit, which found that in Ohio it is reasonable to interpret anti-noise statutes to contain an objective standard. *Gaughan v. City of Cleveland*, (6th Cir. 2007), 2007 U.S. App. LEXIS 281, *11-12. In *Gaughan*, the Sixth Circuit interpreted whether the phrase "disturb the quiet, comfort or repose" was unconstitutionally vague, and found that "Given that the Ohio courts imported a reasonable person standard to a very similar sound ordinance, the Ohio courts would also likely import a reasonable person standard to § 683.01(a)." *Gaughan*, 2007 U.S. App. LEXIS 281 at *14-15. Although *Gaughan* refers to this as "importing" a reasonable person standard, it is clear under *Dorso* that this is merely the fulfillment of a reviewing court's duty to adopt any reasonable construction in favor of constitutionality.

Finally, Appellant's reliance upon *Spokane v. Fischer* is misplaced. In that case, the Supreme Court of Washington found that "The crux of the ordinance is that it gives to *any* person who feels a dog's frequent or habitual barking is annoying or disturbing the power to make a subjective determination a crime has been committed." *Spokane v. Fischer* (1988), 110 Wn.2d 541, 544, 754 P.2d 1241 (emphasis sic). Since *Dorso*, anti-noise ordinances in Ohio are presumed to rely upon an objective "reasonable person" standard, and therefore the concerns of the *Fischer* Court are not applicable.

Because this Court established an objective standard for anti-noise ordinances, the concerns first raised by the United States Supreme Court in *Coates* have no longer been an issue in Ohio. Yet, the Eleventh District Court of Appeals, contrary to *Dorso*, chose to interpret the ordinance as containing a subjective standard, and therefore found it unconstitutional. This Court should find that the Eleventh District Court of Appeals erred, and that the Tenth District

Court of Appeals applied the appropriate standard. For these reasons, this Honorable Court should find that CCC § 2347.14 is constitutional.

B. The Eleventh District Court of Appeals erred in finding that a statute without scientifically quantifiable standards is unconstitutionally vague because such holdings have previously been rejected by this Court.

The *Ferriaolo* Court also erred in finding that the language of the ordinance under review was constitutionally deficient because it contained the criterion "disturbed," a standard which the Eleventh District found to be unconstitutionally vague. *Ferriaolo,* at 585. Although the Eleventh District did not use the term "quantifiable standards," it is clear that this is what the Court was requiring: "Further guidance *needs to be included* in the statute. For example, *length of time* that a dog is barking could be included, as well as *certain prohibited hours* during a given day. Additionally, perhaps a *certain decibel restriction* could lend further guidance." *Ferraiolo,* 587-588 (emphasis added). Thus, the Eleventh District Court of Appeals was seeking to require scientifically quantifiable standards of the State before an anti-noise regulation could be valid.

This Honorable Court has previously held that such exactitude is not required in anti-noise ordinances. In *Dorso*, this Court unambiguously stated:

> A statute or ordinance is not necessarily void for vagueness, however, merely because it could have been more precisely worded. *The Constitution does not mandate a burdensome specificity.* As the United States Supreme Court observed . . . the "* * * prohibition against excessive vagueness *does not invalidate every statute which a reviewing court believes could have been drafted with greater precision.* Many statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.'" In the case at bar, the challenged ordinance cannot reasonably be described as so indefinite as to be constitutionally repugnant.

Dorso, 4 Ohio St.3d at 62, (internal citation omitted, emphasis added). The ordinance in *Dorso* prohibited the playing of loud music or amplifying sound, among other things, "in such manner as to *disturb the peace and quiet* of the neighborhood, having due regard for the proximity of

places of residence, hospitals or other residential institutions and to any other conditions affected by such noises." *Dorso*, at 60-61 (emphasis added). This is substantially similar to the ordinance in the instant case, which prohibits animal noises that are "unreasonably loud or disturbing which are of such character, intensity, and duration as to *disturb the peace and quiet* of the neighborhood or to be detrimental to the life and health of any individual." CCC § 2347.14 (emphasis added). Although this Court found the word "disturb" to be sufficiently definite, the *Ferraiolo* Court found the same word to be unconstitutionally vague. For this reason alone, the *Ferraiolo* Court erred as a matter of law in ignoring binding precedent, and should therefore be reversed.

Furthermore, the decision of the *Dorso* court is consistent with decisions from the United States Supreme Court, the United States Courts of Appeals and District Court, and other State Court decisions. For example, in 1949, the Supreme Court of the United States stated:

> The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words "loud and raucous." While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden.

Kovacs v. Cooper (1949), 36 U.S. 77, 80. The United States Circuit Courts of Appeals have adopted the flexible approach of *Kovacs*. For example, in a case that also affirmed the constitutionality of language less definite than that used in the Columbus City Code:

> The regulations warn a citizen against "loud, boisterous, and unusual noise" and against any behavior which is otherwise disruptive to the VA hospital's normal functioning. While the regulations could further particularize the conduct they seek to prohibit, imposing such a burden on the regulations' drafters would make impossible the task of writing criminal statutes broad enough to encompass a panoply of conduct and specific enough to fairly apprise citizens of what behavior is unlawful. See *Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

U.S. v. Williams (6th Cir. 1990), 892 F.2d 1044. Similarly, the Second Circuit Court of Appeals found that:

> [The City] has a legitimate interest in keeping sound from reaching a level that is unreasonably "injurious or annoying or disturbing" in furtherance of what the parties describe as the City's concern for "the comfort, repose, health and safety of anyone within its geographical limits." See *Carew-Reid v. Metropolitan Transp. Auth.*, 903 F.2d 914, 917 (2d Cir. 1990) ("The elimination of excessive noise is a substantial and laudable goal.").

Deegan v. City of Ithaca (2nd Cir. 2006), 444 F.3d 135, 143. The Second Circuit also upheld an ordinance that prohibited "loud or unreasonable noise". *Howard Opera House Assocs. v. Urban Outfitters, Inc.*, (2nd Cir. 2003), 322 F.3d 125, 128. And the Fourth Circuit Court of Appeals has found an ordinance that proscribed the behavior of "any person to willfully *disturb* any neighborhood or business in the City by making or continuing loud and unseemly noises" to be constitutionally definite. *Asquith v. City of Beaufort* (4th Cir. 1998), 139 F.3d 408, 411 (emphasis added). Thus, the United States Circuit Courts of Appeal have agreed that a scientifically quantifiable standard is not necessary. This is consistent with the *Kovacs* Court's opinion that such an argument "merits only passing reference." *Kovacs*, at 80.

Lower courts have also expressed agreement with the principle outlined in *Kovacs*. When reviewing an ordinance that proscribed "unreasonably loud noise," the United States District Court for the Eastern District of Wisconsin noted that "the Supreme Court has indicated that, with respect to noise ordinances, the standard is relatively deferential. The Court has said that while 'the officials implementing [the noise ordinance] will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *Sharkeys, Inc. v. City of Waukesha* (D. Wis. 2003), 265 F. Supp. 2d 984, 992 (alterations sic, internal citations omitted). Sister State Courts of Appeals have also affirmed loud sound restrictions, including those specific to animals. The Supreme Judicial Court of

Maine found an ordinance prohibiting the keeping of a dog that "unnecessarily annoy[ed] or disturb[ed] any person by continued or repeated barking, howling, or other loud or unusual noises anytime day or night" to be constitutionally definite. *Baldwin v. Carter* (Maine S.Ct. 2002), 2002 ME 52, ¶22, 794 A.2d 62. In doing so, the Maine Court adopted the reasoning of the Arizona Court of Appeals in upholding an ordinance stating "no person shall keep a dog within the City limits which is in the habit of barking or howling or disturbing the peace and quiet of any person within the City . . .." *Baldwin*, at ¶11, citing *State v. Singer* (Ariz. Ct. App. 1997), 190 Ariz. 48, 945 P.2d 359, 361-362.

Thus, this Court should reaffirm the proposition that statutes and ordinances using indefinite language such as "loud" or "disturbing" are not unconstitutionally vague. The Eleventh District Court of Appeals requirement of scientifically quantifiable standards is inconsistent with this Court's prior finding that "The Constitution does not mandate a burdensome specificity." *Dorso*, 4 Ohio St. at 62. Accordingly, the Eleventh District Court of Appeals erred as a matter of law.

Proposition of Law III

A person of ordinary intelligence would have understood that the anti-noise ordinance in question would have proscribed the behavior in the instant case, and therefore Appellant cannot succeed on an as-applied challenge.

Columbus City Code § 2347.14 was not applied in an unconstitutional manner in the instant case because it is sufficiently definite to have provided Appellant with notice that her conduct was proscribed. To demonstrate as-applied unconstitutionality, Appellant must "prove, beyond a reasonable doubt, that the statute was so unclear that he could not reasonably understand that it prohibited the acts in which he engaged." *Anderson*, at 171. Thus, Appellant must demonstrate that the ordinance is vague "not in the sense that it requires a person to

conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.*, quoting, *Coates*, 402 U.S. at 614. Columbus City Code § 2347.14 provides, in relevant part, that no person shall harbor an animal that "howls, barks, or emits audible sounds that are unreasonably loud or disturbing which are of such character, intensity, and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to the life and health of any individual." CCC § 2347.14. Thus, the only question is whether the reasonably intelligent person would understand that the conduct Appellant engaged in was contrary to the terms of the statute.

The evidence presented at trial establishes that the anti-noise ordinance was applied to Appellant in a constitutional manner, and that Appellant's conviction should be affirmed. The State presented testimony from Joseph Berardi who testified that on May 13, 2004 he was in his yard mowing the grass when he heard Appellant's dog barking. Tr., 8. Appellant's dog engaged in non-stop, continuous barking from approximately 4:30 PM until sometime before 6:00 PM. Tr., 9, 13. Joseph was still able to hear the constant barking while he was inside his home even though his windows were closed, his air conditioner was running, and he was holding a conversation with another person. Tr., 12. Thus, the State demonstrated that Appellant's dog was barking at such a level that it could be heard by the operator of a running lawnmower, and that it could also be heard in a closed house with an air conditioner running. A reasonably intelligent person would understand that this barking would be unreasonably loud, and should have taken steps to remedy it. Additionally, the fact that the barking was engaged in for one and a half hours would be understood by a reasonably intelligent person to be of an unreasonable duration. Because an ordinarily intelligent person would understand this behavior to be proscribed, the anti-noise ordinance statute is sufficiently definite.

The State supported this evidence with testimony by Dr. Urham, a veterinarian, who stated that when he arrived at the Berardis' home he immediately noticed the sounds of a lawn mower running and a dog barking. Tr., 45. He was at the Berardis' residence for approximately one hour and there was no break in the barking at any time. Tr., 47, 49. Finally, the State presented evidence from Christine Berardi, Joseph Berardi's wife, that when she arrived at home on May 13, 2004, she immediately noticed the sounds of the lawn mower and Appellant's barking dog. Tr., 63. Consistent with the testimony of Joseph and Dr. Urham, Christine testified that while inside her home, with the windows closed and the air conditioner running she could still hear Appellant's dog constantly barking. Tr., 63.

Appellant cannot demonstrate that a reasonably intelligent person would not understand that allowing a dog to bark non-stop, loud enough to be heard over a lawnmower or while in a sealed house, for an hour and a half would qualify as the emission of "audible sounds that are unreasonably loud or disturbing which are of such character, intensity, and duration as to disturb the peace and quiet of the neighborhood . . .." C.C.C. § 2347.14. Because Appellant cannot prove beyond a reasonable doubt that the ordinance was applied in an unconstitutional manner to her, Appellant's as-applied challenge must fail. Accordingly, this Honorable Court should affirm the judgment of the trial court below.

CONCLUSION

For the foregoing reasons, this Honorable Court should find that the Tenth District Court of Appeals correctly presumed the ordinance to be constitutional and construed the statute in favor of constitutionality, while the Eleventh District Court of Appeals erred in disregarding established precedent. Because the construction of the Tenth District Court of Appeals was reasonable, this Court should find that the ordinance is not facially unconstitutional.

Furthermore, because the activities Appellant engaged in fell within the terms of the ordinance, this Court should find that the ordinance was constitutionally applied. Thus, this Court should affirm the judgment of the Tenth District Court of Appeals in resolving the instant conflict.

Respectfully submitted,

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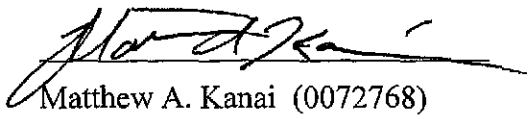
CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Merit Brief of Appellee was sent via regular U.S. Mail to Mark J. Miller, Attorney for Appellant, 555 City Park Avenue, Columbus, Ohio 43215, this 8th day of August, 2007.



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