NO DATE FOR ORAL ARGUMENT HAS BEEN SET

No. 23-7041

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
ex rel. MARK J. O'CONNOR AND SARA F. LEIBMAN,
Plaintiffs-Appellants,

v.

U.S. CELLULAR CORPORATION, USCC WIRELESS INVESTMENT, INC.; TELEPHONE AND DATA SYSTEMS, INC.; KING STREET WIRELESS, LP; KING STREET, INC.; ADVANTAGE SPECTRUM, LP; FREQUENCY ADVANTAGE, LP; NONESUCH, INC.; ALLISON CRYOR DINARDO; SUNSHINE SPECTRUM, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Columbia, No. 20-cv-2070, Hon. Tanya S. Chutkan

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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STATEMENT REGARDING PERMISSION TO FILE

Amicus curiae is authorized to represent that all parties to this appeal have consented to the filing of this brief. Pursuant to Circuit Rule 29(d), *amicus curiae* certifies that it is aware of no other non-governmental *amicus curiae* planning to file a brief in this matter.

Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus curiae* certifies that:

Parties and Amici Curiae. The parties are listed in the briefs of Defendants-Appellees. In addition, the Chamber of Commerce of the United States of America is filing this brief as amicus curiae in support of Defendants-Appellees.

Rulings Under Review. References to the rulings at issue appear in the briefs of Defendants-Appellees.

Related Cases. Related cases are discussed in the briefs of Defendants-Appellees.

Dated: December 15, 2023

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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GLOSSARY

FCA	False Claims Act
FCC	Federal Communications Commission
SEC	Securities and Exchange Commission

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

False Claims Act cases touch on nearly every sector of the economy, including banking, defense, education, healthcare, and technology, and exact a substantial toll on the economy. Given the combination of the FCA's draconian liability provisions—treble damages plus per-claim penalties—and enormous litigation costs, even meritless cases can be used to extract substantial settlements. Companies can spend hundreds of thousands or even millions of dollars fielding discovery demands in a single case that will end without recovery for the government. As a result,

cases involving the proper application of the FCA, including the public disclosure bar, are of particular concern to *amicus* and its members.

STATUTES AND REGULATIONS

Relevant statutes and regulations are contained in Appellees' briefs.

INTRODUCTION

The FCA's public disclosure bar is intended to encourage suits by "whistle-blowing insiders with genuinely valuable information," while "discourag[ing]" litigation by "opportunistic plaintiffs who have no significant information to contribute of their own." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294 (2010) (quoting *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)). Mark O'Connor and Sara Leibman are not "whistle-blowing insiders with genuinely valuable information," *id.*—their complaint relies entirely on information that was already readily accessible to the public and the government. So, while Relators claim "[t]his is not the sort of case Congress wanted dismissed" (Op. Br. 35), the opposite is true. This is a prime example of the "downright harmful" *qui tam* suits that Congress enacted the public disclosure bar to prevent. *Graham Cnty.*, 559 U.S. at 298.

As the district court correctly held, the alleged fraud on which Relators base their claims was publicly disclosed in multiple documents that Appellees filed as part of administrative proceedings before the FCC and SEC. Those public filings trigger the public disclosure bar under any plausible reading of the bar's plain text. Relators, therefore, offer several implausible readings that distort the statutory text. But no other court has interpreted the public disclosure bar as narrowly as Relators advocate, and this Court should not be the first.[1]

Relators first argue that prong (i) of the bar—which includes "administrative hearing[s] in which the Government or its agent is a party," 31 U.S.C. § 3730(e)(4)(A)(i)—is limited to *adversarial* hearings in which the government is a *litigant*, two restrictions that appear nowhere in the text and are contrary to the relevant terms' ordinary meanings. Relators then argue that prong (ii) of the bar—which includes any "other Federal report, hearing, audit, or investigation," *id.* § 3730(e)(4)(A)(ii)—cannot include *any* administrative hearing in which the government is

[1] Appellees ably explain why the district court was correct to reject Relators' arguments that Appellees' public filings did not disclose the relevant alleged fraud and that Relators qualify as "original sources." To avoid duplication, this brief addresses only the legal question of the public disclosure bar's scope.

not a party, an argument that nullifies the key statutory phrase "other Federal." Finally, Relators argue that documents filed with and stored by the government cannot qualify as "Federal reports" unless they were *authored* by the government, an argument that cannot be reconciled with the Supreme Court's and this Court's plain-text interpretation of the statutory term "report."[2]

This case, therefore, is just the latest in which opportunistic relators have sought to "interpret[] the public disclosure bar in a way inconsistent with a plain reading of its text." *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 410 (2011). The Supreme Court and this Court have consistently rejected such attempts, and this Court should do so again here. Adopting Relators' atextual limitations on the public disclosure bar's scope would not protect the ability of genuine whistleblowers to bring valuable fraud claims; it would merely encourage "the 'opportunistic' litigation that the public disclosure bar is designed to

[2] Relators also briefly incorporate these arguments into their brief in their other pending appeal, No. 23-7044. *See* Op. Br. 58–59, *O'Connor*, No. 23-7044 (D.C. Cir. Oct. 2, 2023). The Court need not reach these issues in that appeal, but if it does, it should reject Relators' arguments there as well.

discourage." *Id.* at 413. This Court should affirm the district court's decision dismissing Relators' claims.

ARGUMENT

I. The Public Disclosure Bar Ensures That Only True Whistleblowers Act as Relators.

Because the FCA is meant to "promot[e] [lawsuits] which the government is not equipped to bring on its own," its *qui tam* provisions are designed for "whistle-blowing insiders with genuinely valuable information." *Springfield Terminal*, 14 F.3d at 649, 651; *accord Graham Cnty.*, 559 U.S. at 294–95.[3] Conversely, "overly generous *qui tam* provisions present the danger of parasitic exploitation of the public coffers," *Springfield Terminal*, 14 F.3d at 649, because "opportunistic lawsuits based solely on information already known to the government" do not "supplement . . . government enforcement," *U.S. ex rel. Doe v. Staples, Inc.*, 773 F.3d 83, 84 (D.C. Cir. 2014); *see U.S. ex rel. Findley v. FPC-*

[3] Although the 2010 FCA amendments overruled *Graham County*'s holding that the public disclosure bar applies to state and local proceedings, *see* 559 U.S. at 283 n.1, the amendments had no effect on the remainder of *Graham County*. *See, e.g.*, *U.S. ex rel. Silbersher v. Allergan, Inc.*, 46 F.4th 991, 997 (9th Cir. 2022) (relying on *Graham County* to interpret post-2010 FCA); *U.S. ex rel. Scott v. Pac. Architects & Eng'rs (PAE), Inc.*, 2020 WL 224504, at *5 (D.D.C. Jan. 15, 2020) (same).

Boron Emps.' Club, 105 F.3d 675, 685 (D.C. Cir. 1997) ("Once the information is in the public domain, there is less need for a financial incentive to spur individuals into exposing frauds."). Such litigation merely imposes deadweight costs on the public, courts, defendants, and the government through lawsuits that "the government is capable of pursuing" but "presumably has chosen not to pursue." *Springfield Terminal*, 14 F.3d at 651, 654.

Hence the public disclosure bar, Congress's attempt to preclude *qui tam* "suits that it deemed unmeritorious or downright harmful." *Graham Cnty.*, 559 U.S. at 298. The bar's provisions "strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Id.* at 295. They enact a "broad" and "wide-reaching" prohibition on *qui tam* suits based on information disclosed in "the news media" or in various federal "report[s], hearing[s], audit[s], or investigation[s]." *Schindler Elevator*, 563 U.S. at 407–08 (quotation marks omitted); *see* 31 U.S.C. § 3730(e)(4)(A).[4] The "sole 'touchstone' in the statutory text is 'public disclosure.'" *Schindler Elevator*, 563 U.S. at

[4] The 2010 FCA amendments did not affect *Schindler Elevator*'s holdings. *Allergan*, 46 F.4th at 998–99.

410 (quotation marks omitted). When "the quantum of information already in the public sphere was sufficient to set government investigators on the trail of fraud," the public disclosure bar applies. *Doe*, 773 F.3d at 87 (cleaned up).

At the same time, Congress enacted an exception to the public disclosure bar that "preserve[s] the rights of the most deserving *qui tam* plaintiffs: those whistle-blowers who qualify as original sources," *Graham Cnty.*, 559 U.S. at 301, defined as relators who voluntarily disclosed the information before it was made public or who have independent knowledge of the information and can materially add to the public disclosure, 31 U.S.C. § 3730(e)(4)(A)–(B). If a relator voluntarily disclosed the information to the government before it was made public, then the relator's action will not be parasitic. And relators who have independent knowledge of the publicly disclosed information and can add materially to it may be able to aid the government even when some information has been publicly disclosed. But where a relator lacks "independent knowledge of the information on which the allegations are based," then the relator's action has no value and "is barred." *Springfield Terminal*, 14 F.3d at 651 (quotation marks omitted); *see U.S. ex rel. Oliver*

v. Philip Morris USA Inc., 826 F.3d 466, 476 (D.C. Cir. 2016) (holding original source's knowledge cannot be "dependent on public disclosure" (cleaned up)).

II. The Public Disclosure Bar Applies to Relators' Claims.

The district court correctly dismissed Relators' complaint under the public disclosure bar. As the district court held, Appellees' FCC and SEC filings trigger the bar under prong (i)—for information disclosed "in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party"—and prong (ii)—for information disclosed "in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation." 31 U.S.C. § 3730(e)(4)(A)(i)–(ii).

These conclusions follow from the "ordinary meaning" of the statutory text, which the Supreme Court has held controls the interpretation of the public disclosure bar. *Schindler Elevator*, 563 U.S. at 407–08, 416. In contrast, Relators improperly ask this Court to "interpret[] the public disclosure bar in a way inconsistent with a plain reading of its text." *Id.* at 410. The Court should reject Relators' atextual arguments and affirm the district court's judgment.

First, FCC auctions and licensing proceedings like those in which Appellees made their filings are "administrative hearing[s] in which the Government or its agent is a party." 31 U.S.C. § 3730(e)(4)(A)(i). This Court has held that, in the public disclosure bar, the term "'hearing' is roughly synonymous with 'proceeding'"—including "informal, 'paper' proceedings." *Springfield Terminal*, 14 F.3d at 652; *see Hearing*, Black's Law Dictionary (11th ed. 2019) (defining "hearing" to include "[a]ny setting in which an affected person presents arguments to a decision-maker"). An FCC auction is undoubtedly a federal administrative "proceeding," so it is a "hearing" under the public disclosure bar. *Springfield Terminal*, 14 F.3d at 652.

Relators argue otherwise, claiming that FCC auctions are not "hearings" because they are not "*adversarial* proceeding[s]." Op. Br. 47. But nothing in prong (i)'s text limits the covered "administrative hearing[s]" to *adversarial* hearings. 31 U.S.C. § 3730(e)(4)(A)(i). And this Court rejected any such limitation in *Springfield Terminal* by holding that "hearing" under prong (i) simply means "proceeding." 14 F.3d at 652. *Springfield Terminal* also rejected Relators' argument that FCC auctions are not "hearings" because they can be decided solely on papers.

Op. Br. 47. As the Court explained, prong (i)'s term "hearing" includes "informal, 'paper' proceedings" in addition to the oral hearings Relators wrongly claim are required. 14 F.3d at 652. Although *Springfield Terminal* was decided before the 2010 FCA amendments added the requirement that the government must be a "party" to the "hearing" for prong (i) to apply, that addition did not change the definition of *hearing*, which must be consistent throughout the public disclosure bar. *See Allergan*, 46 F.4th at 997 ("[N]othing about the changes made to the public disclosure bar in 2010 suggests that 'hearing,' as defined in the current version of the public disclosure bar, has a different meaning.").

Relators next argue that the government is not a "party" to FCC auctions (Op. Br. 47), but they waived that argument by not raising it below.[5] Relators' argument is also incorrect. The ordinary meaning of "party" is not limited to "litigants." *Id.* The very dictionary definition Relators cite provides that "party" also includes any "person who takes part in a legal . . . proceeding" and "anyone who is both directly interested in a lawsuit and has a right to control the proceedings." *Party*, Black's

[5] That is why the district court did not address the "party" requirement. *Id.* The court had no cause to address an argument that Relators did not make.

Law Dictionary (11th ed. 2019). The government has the right to initiate and control FCC auctions and licensing proceedings; it takes part in those proceedings; and it—unlike a neutral "federal judge" in a "civil case" (Op. Br. 48)—has direct financial and policy interests in determining who will receive FCC licenses and how much the government will be paid. That makes it a "party" to FCC auctions.

Second, even if the government were not a "party" to FCC auctions under prong (i), FCC auctions are "other Federal . . . hearing[s]" under prong (ii). 31 U.S.C. § 3730(e)(4)(A)(ii). As explained, they are "hearings" because they are "proceedings." *Springfield Terminal*, 14 F.3d at 652; *see also Allergan*, 46 F.4th at 997–98 (holding that patent prosecutions are "hearings" under prong (ii)); *Silbersher v. Valeant Pharms. Int'l, Inc.*, 76 F.4th 843, 853–54 (9th Cir. 2023) (same). And they are "clearly 'Federal'" because they occur in federal "agenc[ies]." *Allergan*, 46 F.4th at 998.

Here too, Relators' contrary argument is at war with the public disclosure bar's plain text. Relators argue that prong (ii) "covers 'Federal . . . hearing[s]' only to the extent they are not criminal, civil, or administrative in nature." Op. Br. 50. That interpretation "would read much of prong (ii)—that which deals with any '*other* Federal . . .

hearing'—seemingly out of existence." *Allergan*, 46 F.4th at 999 (emphasis added). Prong (ii) covers three categories of federal hearings: "congressional," "Government Accountability Office," and "other." 31 U.S.C. § 3730(e)(4)(A)(ii). "The use of the adjective 'other' shows that Congress wanted to ensure that the public disclosure bar applied to Federal reports, hearings, audits, and investigations in addition to those covered elsewhere in the public disclosure bar." *Allergan*, 46 F.4th at 998. But if prong (ii)'s "other" category doesn't include administrative hearings, then it includes effectively nothing. Tellingly, Relators do not explain what they think the "other" category *does* cover; the only example they offer is "congressional hearings." Op. Br. 36. But "congressional . . . hearing[s]" get their own category under prong (ii), 31 U.S.C. § 3730(e)(4)(A)(ii), so "other Federal" must be a "broader category" of hearings "*not from Congress*," *Allergan*, 46 F.4th at 998 (emphasis added). The only plausible candidates for such non-congressional hearings are "administrative hearings." *Id.*

Given the violence that Relators' argument does to prong (ii)'s text, it is not surprising that they cannot cite any case endorsing it. Even *Valeant*, the case on which they rest most of their arguments, held that

"patent prosecutions . . . are qualifying public disclosures under channel (ii), as 'other Federal . . . hearing[s].'" 76 F.4th at 853–54. That would not be true under Relators' interpretation of prong (ii), since patent prosecutions are administrative hearings in which Relators would say the government is not a "party." The fact that no other court has ever narrowed prong (ii) in the artificial way Relators want—including in the most relator-friendly decision they could find—is reason enough to reject their argument.

Even on Relators' own terms, moreover, their argument fails. Relators argue that reading prong (ii) to include administrative hearings in which the government is not a party would render superfluous the phrase "in which the Government or its agent is a party" in prong (i). Op. Br. 49–50. But "[t]he possibility that some hearings might be encompassed by both prongs (i) and (ii)" is not a superfluity problem. *Allergan*, 46 F.4th at 999. Indeed, the Supreme Court has already held that, due to the public disclosure bar's "broad scope," its terms "reflect[] intent to avoid underinclusiveness even at the risk of redundancy." *Schindler Elevator*, 563 U.S. at 408. Relators' argument flips that congressional intent on its head: in their misguided attempt to avoid

(nonexistent) redundancy, Relators would exclude from the public disclosure bar broad swaths of public information unambiguously encompassed by the bar's plain text. The mere possibility of "redundancy" cannot justify "interpreting the public disclosure bar in a way inconsistent with a plain reading of its text." *Id.* at 410; *see Allergan*, 46 F.4th at 999 ("Some potential redundancy in the FCA does not justify reading the 'statutory language in an overly narrow manner.'" (quoting *U.S. ex rel. Bennett v. Biotonik, Inc.*, 876 F.3d 1011, 1019 (9th Cir. 2017))).

Third, and for similar reasons, Appellees' FCC and SEC filings qualify as "other Federal report[s]" under prong (ii). 31 U.S.C. § 3730(e)(4)(A)(ii). That category has a "broad ordinary meaning" that is "consistent with the generally broad scope of the FCA's public disclosure bar." *Schindler Elevator*, 563 U.S. at 408. That broad ordinary meaning forecloses Relators' attempt to limit prong (ii) to "document[s] authored by the Federal Government." Op. Br. 51. Indeed, this Court has already rejected that proposed limitation, holding that documents authored by private parties are federal "reports" if they are required to be provided to the federal government. *Oliver*, 826 F.3d at 474–76. Here, Appellees were required to publicly disclose information to the FCC and SEC, so the

information they provided is a "Federal report" that triggers the public disclosure bar. 31 U.S.C. § 3730(e)(4)(A)(ii).

III. Relators' Atextual Restrictions on the Public Disclosure Bar Would Encourage Abusive *Qui Tam* Suits.

For the reasons above, enforcing the public disclosure bar to dismiss Relators' claims would follow the bar's plain text and honor Congress's intent to avoid "parasitic exploitation of the public coffers." *Springfield Terminal*, 14 F.3d at 649. The atextual limitations that Relators ask this Court to adopt, in contrast, would open the floodgates to the very "downright harmful" lawsuits that the public disclosure bar exists to prevent. *Graham Cnty.*, 559 U.S. at 298.

Unless the public disclosure bar and other important textual limits on the FCA's reach are faithfully enforced, the FCA's generous remedies will encourage relators to bring opportunistic and parasitic *qui tam* suits. The FCA authorizes private citizens who have suffered no injury to bring actions for treble damages and per-claim penalties of $13,508–$27,018—remedies that "are essentially punitive in nature." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784 (2000). If the United States intervenes and pursues the action, a relator keeps 15 to 25 percent of any recovery, as well as attorneys' fees and costs; if the United States declines

to intervene, a relator keeps up to 30 percent of any recovery, as well as attorneys' fees and costs. 31 U.S.C. § 3730(d)(1)–(2).

These incentives have created an explosion in *qui tam* litigation, with 652 new cases filed in fiscal year 2022 alone.[6] Most *qui tam* cases, however, are meritless lawsuits in which the government declines to intervene. The government intervenes in a small minority of *qui tam* actions, but the vast majority of the over $72 billion obtained under the FCA since 1986 has come from that small subset of intervened cases. DOJ Fraud Statistics, at 3. The much larger universe of declined cases has produced just 6.5 percent of the total recovery. *Id.*

Despite adding little to no value, meritless and improper *qui tam* actions impose enormous financial costs. Many of *amicus*'s members are in the ever-growing set of industries where businesses interact with the government and therefore invest substantial resources in efforts to ensure compliance and avoid FCA exposure. Meritless and parasitic litigation only adds to those costs. Even if an opportunistic relator has done nothing more than take public information and put it in a

[6] U.S. Dep't of Justice, Fraud Statistics – Overview (Oct. 1 1986 – Sept. 30, 2022), https://www.justice.gov/d9/press-releases/attachments/2023/02/07/fy2022_statistics_0.pdf ("DOJ Fraud Statistics").

complaint, defendants face tremendous pressures to settle because the costs of litigating are so high and the potential downside so great. *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359–60 (11th Cir. 2006). Nor are defendants the only ones who pay the price when relators sue based on public information. Government resources are finite too. In cases that should be dismissed under the public disclosure bar, the government was already in the position of being able to file suit based on the public information before the would-be relator copied that information and placed it in a complaint. Every *qui tam* action, even declined suits, requires government monitoring and, if it gets past the pleading stage, government involvement in discovery. And the more resources the government must devote to parasitic, declined *qui tam* suits, the fewer resources are available to investigate other, potentially meritorious matters.

The public disclosure bar, therefore, is a critical bulwark against the costs imposed by improper *qui tam* suits. A failure to respect the balance struck by the public disclosure bar's plain text would harm businesses and burden the courts with meritless litigation. And all for no purpose: Relators' proposed restrictions to the public disclosure bar are not necessary to protect genuine whistleblowers who add useful

information. As explained above, Congress built that protection into the bar's "original source" exception, 31 U.S.C. § 3730(e)(4), which already "preserve[s] the rights of the most deserving *qui tam* plaintiffs," *Graham Cnty.*, 559 U.S. at 301. When a relator is not an original source, enforcing the public disclosure bar is extremely unlikely to leave actual fraud unpunished. There is, therefore, no reason to narrow the public disclosure bar "in a way inconsistent with a plain reading of its text." *Schindler Elevator*, 563 U.S. at 410. The only relators who would benefit from Relators' arguments are precisely those whom Congress meant to bar from bringing *qui tam* suits.

CONCLUSION

The Court should affirm the judgment of the district court.

Respectfully submitted,

/s/ Jeffrey S. Bucholtz

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December 15, 2023

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,585 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word ProPlus 365.

Dated: December 15, 2023

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2023, I electronically filed the foregoing amicus brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Jeffrey S. Bucholtz
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