No. 18-1684

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATE OF SOUTH CAROLINA,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of South Carolina

REPLY BRIEF FOR APPELLANTS

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SUMMARY OF ARGUMENT

South Carolina's theory of the case relies on the incorrect assumption that the Department of Energy (DOE) has decided to leave plutonium in South Carolina permanently. DOE has done no such thing. Instead, it has decided to stop working on the mixed-oxide fuel fabrication (MOX) facility while DOE evaluates its options for the defense plutonium's ultimate disposition. Far from abandoning the disposition of plutonium currently stored within South Carolina, the Department has committed to pursuing more efficient means of removing plutonium. Congress expressly permitted the Secretary of Energy to take that step so long as he gives Congress his commitment to remove the defense plutonium from South Carolina and identifies a cheaper alternative way to do so. The Secretary's exercise of that authority does not amount to a decision to leave plutonium in South Carolina indefinitely.

Because the Department has never suggested that it will leave the plutonium in South Carolina, the State can identify no injury that would provide standing to challenge the actual decision at issue—the determination to halt work on the MOX Facility. On the current schedule, DOE would not complete construction of the MOX Facility until 2048 at the earliest, and only at that point would the project begin processing plutonium. An order that requires the government to spend additional taxpayer money on the MOX project, instead of pursuing more efficient alternatives, does not redress any imminent injury to South Carolina. On the contrary, by pursuing

alternatives, DOE may be able to remove the plutonium well before it would be possible to do so using the MOX Facility.

Even assuming that the State could demonstrate standing, it is quite wrong to insist that DOE was required to complete review of its alternative options under the National Environmental Policy Act (NEPA) before halting construction. The State similarly errs in urging that the Secretary of Energy's commitments to Congress failed to satisfy the requirements of the 2018 National Defense Authorization Act. *See* National Defense Authorization Act for Fiscal Year 2018 (NDAA), Pub. L. No. 115-91, § 3121, 131 Stat. 1283, 1892–93 (2017). The contents of that submission are not subject to judicial review. And in any event, the submission carefully tracked each element required by the NDAA.

Finally, the balance of the equities should have precluded issuance of an injunction. The injunction costs the taxpayer $1.2 million a day, spent on a project that is already more than $10 billion overbudget and would not be completed for at least thirty years. South Carolina's asserted interests—like harm to the State from becoming a permanent repository of plutonium—rest on the mistaken assumption that DOE will store plutonium in South Carolina permanently. Far from suffering irreparable harm, South Carolina has not even established the prerequisites for standing.

ARGUMENT

I. South Carolina has failed to demonstrate standing or a likelihood of success on the merits.

A. The Department of Energy has not decided to store plutonium in South Carolina indefinitely.

Underlying the State's arguments regarding standing and the merits is the mistaken premise that the Department of Energy's May 10 Letter constitutes a "decision to terminate the MOX Project," leaving the Savannah River Site (SRS) as "the repository for defense plutonium indefinitely." Appellee's Br. 26; *see, e.g.*, *id.* at 14 ("Here, the State is challenging DOE's decision to terminate the MOX Facility and leave the State as the indefinite repository of defense plutonium without first conducting the required NEPA analyses.").

The Department has not decided that South Carolina will be the permanent repository for defense plutonium. To the contrary, the Secretary of Energy has committed to removing plutonium from South Carolina. *See* Letter from Secretary Rick Perry to the Honorable William "Mac" Thornberry 1 (May 10 Letter) [JA 54]. In addition, pursuant to an express directive from Congress, DOE identified an alternative option for removing plutonium from South Carolina. That option, if implemented, could lead to a faster removal of plutonium from South Carolina. The State does not dispute that on the current schedule, the MOX project would not be expected to remove *any* plutonium from South Carolina for at least thirty years. *See* Appellants' Br. 17, 25–26 (citing Raines Decl. ¶ 8 [JA 576]) (explaining that the MOX

project would only begin processing plutonium in 2048). The point of pursuing other options is not only to avoid an ill-advised expenditure of additional funds on a failed project, but also to find a more expeditious means of removing the plutonium from South Carolina.

DOE has never contested that NEPA analysis would be appropriate before "a decision can be made that renders the State as the indefinite, permanent repository for MOXable plutonium." Appellee's Br. 28. But DOE has made no such decision, and South Carolina does not point to any document that remotely suggests that DOE intends to make South Carolina the permanent repository. The determination at issue in this case simply identifies an alternative option for removing plutonium.

The Department's actions confirm that the agency has not decided to leave plutonium in South Carolina, but rather is continuing to study available options. There is no dispute that DOE is actively pursuing the "dilute and dispose" process that is currently underway for other plutonium at the Savannah River Site. A delay while the Secretary considers alternatives to a project that is more than $10 billion over budget—another fact the State does not contest—is hardly a decision to leave plutonium in South Carolina permanently.

South Carolina misses the point when it urges that DOE does not have "legal authorization or approval" for dilute and dispose and that the method remains under study. Appellee's Br. 28–30. The relevant point here is that DOE has not finally decided to make South Carolina the permanent repository for defense plutonium, but

instead is moving in the opposite direction by analyzing its options for disposition of the plutonium. To that end, DOE is studying the dilute and dispose alternative and is considering whether to pursue that disposition method, perhaps in combination with other methods.

Nor does the decision to halt work on the MOX Facility preclude DOE from determining that the best available alternative would be to resume construction. The evidence before the district court showed at most that halting the project would lead to a delay in resuming construction, should DOE decide to do so. Appellants' Br. 30. South Carolina argues that the district court "primarily relied on evidence and testimony presented by the federal government showing that the May 10 decision and the Full Stop Work Order were for terminating the MOX Facility." Appellee's Br. 42 (emphasis omitted). But the reference to "termination" of the MOX project says nothing about whether project work could be resumed if Congress or the agency chose to pursue that course. *See* PI Order 12, 30 [JA 1023, 1041] (citing Raines Decl. ¶¶ 10, 18–20 [JA 577, 580–81]). Moreover, as the government's declaration explained, DOE has no immediate plans to reverse the progress that has been made on the Facility or to make physical changes to the Facility, except for changes needed to preserve the structure, for at least six months and most likely longer. Appellants' Br. 30 (citing Raines Dec. ¶ 20 [JA 581]). In any event, nothing about the plans for the MOX project could conceivably suggest that DOE is abandoning its efforts to remove plutonium from South Carolina.

B. South Carolina lacks standing.

South Carolina has failed to demonstrate the prerequisites for standing because it is not injured by DOE's decision to halt work on the MOX Facility while it considers alternative means of plutonium disposition.

The State misses the point when it suggests that it has a cognizable interest in preventing harm that might result from the storage of plutonium in South Carolina. *See* Appellee's Br. 13–14. The relevant point is that the agency action at issue—halting construction of the MOX Facility—does not threaten any interest that the State may have. The State does not dispute that there will be no increase in plutonium storage whatsoever for at least thirty years based on the agency action at issue here, which halts construction of a project that was not expected to be completed until 2048. *See* Appellants' Br. 4. And as explained in our opening brief, *id.* at 17–18, it is entirely speculative that the MOX Facility could be completed on that schedule, or completed at all at a cost acceptable to Congress. By comparison, under DOE's plan, MOX construction would cease, but the Secretary of Energy has (1) made a political commitment to remove the plutonium from South Carolina, and (2) identified proven, alternative methods that could do so much more cheaply. There is no basis for concluding that halting construction of the MOX Facility would harm South Carolina's interests.

This case is thus quite different from *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002), on which South Carolina relies. In that case, the Governor of South Carolina

contended that the Department failed to conduct the appropriate NEPA review for its plans to store surplus plutonium in South Carolina for up to fifty years, and the Governor sought an injunction barring "DOE from shipping . . . plutonium to SRS until the DOE has fulfilled its NEPA obligations." *Id.* at 442, 445. The Court concluded that the Governor satisfied the injury-in-fact requirement because the State was "essentially a neighboring landowner" at risk of environmental damage from "uninformed shipment of plutonium into South Carolina and [DOE's] proposed storage of such plutonium." *Id.* at 444–45. Here, by contrast, DOE is simply seeking to halt work on the MOX Facility while it considers alternatives, raising no plausible, much less imminent, risk of environmental damage to South Carolina.

South Carolina errs by arguing that its asserted procedural injury provides standing. Even when asserting a procedural injury, the plaintiff must still have "concrete interests affected." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992); *see Hodges*, 300 F.3d at 444 (explaining that a procedural injury only gives rise to standing "if the procedures in question are designed to protect some threatened concrete interest" that "is the ultimate basis of" standing). The redressability element of standing is relaxed only insofar as plaintiffs need not show that they would "be successful in persuading the [agency] to avoid impairment of [their] concrete interests." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). They must still show that the challenged agency action would injure them, for the injury requirement "is a hard floor of Article III jurisdiction." *Id.* at 497. Thus, here, South Carolina need not

show that a NEPA analysis would cause DOE to change its decision, but it does need to show that a different DOE decision would remedy its asserted substantive injury. It cannot do so, and therefore lacks standing.

C. South Carolina is unlikely to succeed on the merits.

1. DOE did not violate NEPA.

South Carolina's allegation that DOE violated NEPA is similarly premised on its mistaken view that DOE has decided to make South Carolina the permanent repository for plutonium. Accordingly, the State's brief advances various arguments to establish that such a decision would require NEPA analysis. *See, e.g.*, Appellee's Br. 19–23 (noting that NEPA review would be required before making a final decision on a "proposal" that might significantly affect the environment (citing 10 C.F.R. § 1021.210(a)); *id.* at 23–25 (identifying times the United States has noted environmental risks associated with plutonium storage).

There is no dispute that DOE would need to perform NEPA analysis before deciding to make South Carolina the permanent repository for plutonium. But that is not the agency action at issue here. As explained, DOE has only decided to halt construction of the MOX Facility while it considers alternatives, including by conducting any required environmental review under NEPA of alternative options. And the Department is considering various methods of plutonium disposition, not whether disposition is appropriate at all.

The State does not dispute that DOE has performed the appropriate environmental review for storage of plutonium at SRS until 2046. *See* Appellants' Br. at 29. Particularly in light of that long time frame, South Carolina could not show that halting construction is itself a decision which might significantly affect the quality of the environment, or that it constitutes a "substantial" or "significant" change in circumstances requiring the preparation of a supplemental environmental impact statement. *Cf.* 10 C.F.R. § 1021.314(a). To the contrary, the State acknowledges that the United States may undertake a project following a NEPA analysis and then "subsequently abandon[]" it "for any number of reasons without any additional NEPA compliance." Appellee's Br. 28 n.10. *A fortiori*, the United States may halt a project's construction pending evaluation of alternatives without additional NEPA compliance. This case only differs, in South Carolina's view, because abandoning the MOX Facility would "leave plutonium [in the State] without a disposition pathway." *Id.* DOE has not made a decision, in law or in effect, to do that. And South Carolina has not identified any case in which NEPA review was required before the United States could cease construction of a project while conducting NEPA review of alternatives.

As this Court has explained, NEPA regulations "and our own caselaw make clear that agency action prior to completing a sufficient environmental study violates NEPA only when it actually damages the environment or limit[s] the choice of reasonable alternatives." *National Audubon Soc'y v. Department of Navy*, 422 F.3d 174,

203 (4th Cir. 2005) (quotation marks omitted; alteration in original). The State references these limitations, but merely asserts, without establishing, that the action at issue here would "(1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives." Appellee's Br. 22, 30 (quoting 40 C.F.R. § 1506.1(a)); *see* 10 C.F.R. § 1021.211. South Carolina does not contend that a halt in construction of the MOX Facility will actually harm the environment. And as explained above, halting construction would not limit the choice of reasonable alternatives. Neither the Secretary's waiver under the NDAA nor the challenged stop-work orders prevent DOE from resuming MOX construction, in the unlikely event that such construction is deemed the proper course of action. While South Carolina may have established that the halt in construction could make the project even more costly, it is the decades of delay and billions of dollars of cost overruns that have already occurred, rather than the comparatively modest costs of restarting the project, that limit the choice of reasonable alternatives.

2. The Secretary's letter satisfied the NDAA's requirements.

DOE's certification fully complies with the provisions of the NDAA. The NDAA required the Secretary to submit certain documentation to Congress in order to exercise his waiver authority. There is no dispute that the Secretary made submissions to Congress. South Carolina takes issue, instead, with the contents of the Secretary's submissions to Congress.

As a threshold matter, the adequacy of the Secretary of Energy's submission to Congress is not reviewable. As the D.C. Circuit explained in *Natural Resources Defense Council v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988), the "general presumption of reviewability of agency action" is "inapplicable" when the Executive Branch is "simply reporting back to the source of its delegated power in accordance with the Article I branch's instructions." *Id.* at 318. Whether or not the Executive Branch's report contains "the requisite 'detail'" is a "judgment peculiarly for Congress to make in carrying on its own functions in our constitutional system, not for non-congressional parties to carry on as an ersatz proxy for Congress itself." *Id.* While the Secretary's decision to waive continued construction of the MOX project is final agency action, the NDAA merely requires the Secretary to "submit" a document to Congress, and Congress alone can decide whether that submission is sufficient.

South Carolina suggests that while the reporting requirement at issue in *Hodel* lacked judicially manageable standards, "the (in)adequacy of DOE's commitments and certifications . . . can be judged pursuant to the APA 'arbitrary and capricious' standard." Appellee's Br. 33–34. South Carolina does not explain why the report in *Hodel* could not just as easily have been analyzed under the arbitrary and capricious standard. The issue here, as in *Hodel*, is that it is for Congress to determine the adequacy of the communications it receives from the Executive Branch.

The contents of the required submission underscore the absence of any judicially manageable standard. For instance, the submission was to include the

"commitment of the Secretary to remove plutonium . . . and ensure a sustainable future for the Savannah River Site." NDAA § 3121(b)(1)(A). Whether the Secretary's political commitment is sufficiently firm or serious is not amenable to judicial review. The district court's suggestion that a court can review whether the Secretary's commitment was adequately supported by a plan to remove the plutonium, PI Order 24–25 [JA 1035–36], has no basis in the NDAA. Congress did not call for a final plan to remove plutonium and ensure a sustainable future for the SRS. It called for the Secretary to make a commitment, and the Secretary has done so.

Similarly, the Secretary was to submit the "details" of "any statutory and regulatory changes necessary to complete the alternative option." NDAA § 3121(b)(1)(B)–(C). *Hodel* expressly rejected the argument that courts can determine whether a level of detail is adequate. "[I]t is most logically for the recipient of the report" to determine whether it is "'insufficiently detailed'" and "take what it deems to be the appropriate action." *Hodel*, 865 F.2d at 319. And "[w]hat may seem in the abstract to be reasonable factors to employ under the 'in detail' standard . . . may be inappropriate in the extreme in the context of an on-going process of give and take" between the Secretary and Congress. *Id.* That logic applies with full force in this case.

In any event, the Secretary's submission was plainly adequate to survive any plausibly relevant standard of review. The NDAA has four elements: (1) the Secretary's commitment to remove plutonium from South Carolina; (2) identification of an alternative method for doing so; (3) certification that the remaining lifecycle cost

of the alternative method is "less than approximately half" of the estimated remaining lifecycle cost of the MOX project; and (4) the details of "any statutory or regulatory changes necessary to complete the alternative option." NDAA § 3121(b)(1).

First, the Secretary literally offered the commitments requested in the NDAA. *See* May 10 Letter 1 [JA 54] ("I confirm that the Department is committed to removing plutonium from South Carolina . . . I am also committed to ensuring a sustainable future for the Savannah River Site supporting the Department's many enduring national security missions."). South Carolina argues that this commitment lacks "any factual support" because DOE had not committed to the dilute and dispose alternative. Appellee's Br. 35–36. Even if the Secretary's political commitment required factual support—which it does not—the Secretary offered factual support, namely, that the Department has other tools at its disposal to remove the plutonium.

The NDAA does not require the Secretary to have *decided* to use dilute and dispose, and to have completed the attendant environmental review, before making his commitment. As we explained in our opening brief, that much is clear from the NDAA's second element, which requires only that the Secretary identify an alternative option that could dispose of the plutonium at less than half the cost of completing the MOX Facility and using it to process plutonium. The Secretary has satisfied this element by concluding, based on an independent cost estimate, that the dilute and dispose option would have a lifecycle cost of $19.9 billion, less than half the $49.4

billion remaining lifecycle cost of the MOX program. May 10 Letter 1 [JA 54]. South Carolina provides no response.

South Carolina argues that the two cost estimates were not of "comparable accuracy," as the third element of the NDAA requires. *See* NDAA § 3121(b)(1)(B)(ii). As explained in our opening brief, and as the district court acknowledged, the dilute and dispose analysis was conducted in a manner comparable to Government Accountability Office (GAO) best practices. Appellants' Br. 23; *see* PI Order 26 [JA 1037]. South Carolina contends that Congress therefore required—without clearly saying so—that the MOX project estimate to be conducted in a manner comparable to GAO best practices, rather than by adjusting and extrapolating from a prior cost estimate, as DOE did.

Estimating the MOX project costs consistent with GAO best practices was not feasible within fiscal year 2018—the only year for which funds subject to the NDAA were authorized. The GAO noted shortly before the NDAA's enactment that such an estimate would take three to four years. *See* Appellants' Br. 23–24 (citing GAO, *Plutonium Disposition: Proposed Dilute and Dispose Approach Highlights Need for More Work at the Waste Isolation Pilot Plant* 23 (2017) [JA 427]). South Carolina argues that the impossibility of completing such an estimate within one year "does not mean Congress did not intend to impose such a requirement; it just means that DOE did not meet—and could not have met—this requirement." Appellee's Br. 37–38. Stripping out the double negative, South Carolina argues that Congress "intend[ed] to

impose . . . a requirement . . . that DOE . . . could not have met." *Id.* There is no basis for attributing to Congress the intention to impose such a requirement.

Citing the Senate Report for the 2019 NDAA, South Carolina also argues that the Senate has "refuted" DOE's reading of the NDAA by asking the Comptroller General to determine whether the cost analyses "meet appropriate costing standards for [GAO]." Appellee's Br. 37 (citing S. Rep. No. 115-262, at 414 (2018)). The Senate version of the NDAA, however, would also have prevented DOE from terminating the MOX project. *See* S. Rep. No. 115-262, at 411. In conference committee, the Senate "recede[d]," and the House version—which allowed the Secretary to renew his certification for fiscal year 2019—became law. *See* H.R. Rep. No. 115-874, at 1119 (2018) (Conf. Rep.)).[1]

Finally, the 2018 NDAA required the Secretary to identify "any statutory or regulatory changes necessary to complete the alternative option." NDAA § 3121(b)(1)(C). The Secretary did so. The Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. No. 102–579, 106 Stat. 4777 (1992), contains capacity limits

[1] South Carolina argues that Congress has "effectively rebuffed the May 10 termination decision as the National Defense Authorization Act for Fiscal Year 2019 . . . authorizes continued construction of the MOX Facility." Appellee's Br. 7 n.3. The NDAA for 2019 does not opine on the adequacy of the certification, but merely provides that fiscal year 2019 funding is subject to the same conditions as funding for 2018. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 3119; 132 Stat. 1636, 2292 (2018) (permitting the Secretary of Energy to "waive" continued work on the MOX project "if the Secretary submits to the congressional defense committees the matters specified in section 3121(b)(1) of the National Defense Authorization Act for Fiscal Year 2018").

for the Waste Isolation Pilot Plant (WIPP) in New Mexico. *See id.* § 7(a)(3); *see also* DOE, *Report of the Plutonium Disposition Working Group: Analysis of Surplus Weapon-Grade Plutonium Disposition Options* 33 (Apr. 2014) [JA 616] ("Disposal of the entire 34 [metric tons] of material in WIPP would require amendment of the WIPP Land Withdrawal Act as well as federal and state regulatory actions."). The Secretary brought this to Congress's attention: he explained that the Department "will work with the State of New Mexico to address the capacity issues related to the receipt of the full 34 metric tons at WIPP." May 10 Letter 2 [JA 55]. Specifically, rather than amending the Act, he proposed "more accurately calculating the volumes disposed of at WIPP," and explained that a "proposed permit modification to implement this new approach was discussed with stakeholders" and submitted to the New Mexico Environment Department. *Id.*

South Carolina argues that DOE needed to identify that the WIPP Land Withdrawal Act would require amendment to complete dilute and dispose. But under DOE's approach, the statute would *not* require amendment. All that is needed is a permit modification, as DOE noted to Congress pursuant to the NDAA.

The State also suggests that DOE needed to tell Congress about 50 U.S.C. § 2566. That statute requires the Secretary to remove certain plutonium (equal to the amount previously transferred to SRS during specified dates) from South Carolina by January 1, 2022, "[i]f the MOX production objective is not achieved as of January 1, 2014." *Id.* § 2566(c). Congress was fully aware that DOE would not be able to remove

such plutonium from South Carolina within four years, regardless of the option chosen. When Congress asked DOE to identify statutory changes "necessary to complete the alternative option," it meant statutory barriers to completing the alternative option, and not section 2566.

II. The balance of harms and the public interest independently require reversal.

There is no question that the taxpayer suffers irreparable harm while the injunction is in place. DOE is spending an average of $1.2 million per day continuing construction and project support activities of the MOX Facility. *See* PI Order 31 [JA 1042]. South Carolina contests that figure only by claiming that it reflects "invoices rather than actual payments." Appellee's Br. 43 n.20. The United States is of course obligated to pay legitimate invoices for expenses its contractors incur on its projects. And in any event, the 2018 NDAA authorized DOE to spend $340,000,000 on construction at the Facility. *See* NDAA § 4701.

South Carolina speculates that the funds used this year "would be needed regardless of whether the current facility is used for the MOX Project or some other future purpose." Appellee's Br. 43 n.20. That speculation is contradicted by record evidence, which explains that continued construction of the Facility would increase the costs of construction if the Facility is repurposed. Raines Decl. ¶ 21 [JA 581–82].

As discussed, the harm to South Carolina from stopping construction and project support activities at the MOX Facility is inadequate to provide a basis for

standing, much less for irreparable harm. The State asserts without support that halting work on the project is the "event horizon" for terminating the MOX Project. Appellee's Br. 40; *see supra* p. 5. Beyond that, the State advances several other harms or considerations that accrue only if (1) DOE has decided to terminate the MOX Facility and leave plutonium in South Carolina indefinitely, and (2) it has done so in violation of NEPA and the NDAA. *See id.* at 41 (risk to the environment), 43 (unlawful use of taxpayer money), 44 (compliance with the law), 45 (congressional intent). That is not the case.

Once DOE makes a final determination regarding the means of disposition for some or all of the plutonium in South Carolina, the State will have every opportunity to challenge that decision and ensure that DOE complied with NEPA, if it has standing to do so. But that decision has not been reached, and the United States should not be forced to waste millions of dollars in the meantime.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,558 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Andrew A. Rohrbach
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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Andrew A. Rohrbach
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