DOCKET NO. A06-0865

State of Minnesota

In Court of Appeals

Timothy C. Kinley,

Appellant

vs.

Barbara A. Kinley,
n/k/a Barbara A. Peck,

Respondent

APPEAL FROM THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT
CASE NO. F1-96-163

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

I. Does a court order enjoining a parent from discussing "inappropriate" religious ideas with his children violate the religion clauses of the First Amendment, where the order provides no guidance concerning what is and what is not an "inappropriate" religious idea?

The district court refused to dissolve an injunction restraining the Appellant from discussing "inappropriate" religious ideas with his children.

Most apposite cases:

Prince v. Massachusetts, 321 U.S. 158 (1944)
Wisconsin v. Yoder, 406 U.S. 205 (1972)
Grayned v. City of Rockford, 408 U.S. 104 (1972)
Flaherty v. Keystone Oaks School District, 247 F. Supp. 698 (W.D. Pa. 2003)
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II. Does a court order enjoining a parent from teaching his children lessons from the Bible, without similarly enjoining the teaching of non-Christian religions, violate the religion clauses of the First Amendment?

The district court refused to dissolve an injunction restraining the Appellant from teaching his children lessons from the Bible.

Most apposite cases:

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)
Larson v. Valente, 456 U.S. 228 (1982)
Epperson v. Arkansas, 393 U.S. 97 (1968)

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III. Was the district court's order refusing to vacate an injunction against the expression of "inappropriate" and/or Bible-based ideas an abuse of discretion?

The district court refused to vacate an injunction against the expression of "inappropriate" and/or Bible-based ideas.

Most apposite cases:

M.G.M. Liquor Warehouse International v. Forsland, 371 N.W. 2d 75 (Minn. App. 1985)
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STATEMENT OF THE CASE

This case originates from the district court of Ramsey County, in the Second Judicial District, from an order issued by the Hon. Gary Bastian, Judge of District Court denying Appellant's motion to modify and vacate the provisions of an order previously issued by Judge Joann Smith of the same court restraining him from discussing "inappropriate" religious ideas and from telling his children stories from the Bible.

STATEMENT OF THE FACTS

The marriage of the parties was dissolved by a Judgment and Decree entered on December 9, 1997. Physical custody of the parties' three minor children was awarded to the Respondent, subject to Appellant's right to reasonable visitation. (A-2, A-56.)

The dissolution was acrimonious. At the time the judgment was entered, there was an Order for Protection against the Appellant, which had been issued on July 25, 1997, on the basis of testimony that he had subjected two of his children to risk of harm by holding them up on the balcony to his apartment at a time when he was angry. (A-56.) In 1999 the Respondent obtained a harassment restraining order, on her own behalf, against the Appellant on the basis that he had "stalked" her. (A-57.) A second Order for Protection was entered in December, 2001, on the basis of testimony that the Appellant had

shaken and raised his voice to one of his children. (A-56.) The court ordered supervised parenting time for the Appellant. (A-57.)

In 2002, the Appellant filed a pro-se motion for reversal of custody or, in the alternative, unsupervised parenting time. (A-57.) The Respondent countered with a motion to modify the legal custody of the children, which had been joint, to make an award of sole legal custody to her, and to restrain the Appellant from discussing "inappropriate" religious ideas in the children's presence and from telling them stories or teaching them lessons from the Bible. (A-57.)

On April 15, 2002 the district court issued a finding that the Appellant had talked to the children about the legal process, asking them what they had told other people about the balcony incident; that he had "spoken ill" about the Petitioner in front of the children; and that such conduct was detrimental to the children's emotional health. (A-8.)

The court also issued a finding that "The children should also have the right to be able to stop the Respondent from forcing them to hear bible stories and do Bible studies when they think that these intimidate them or make them uncomfortable in the situation when they are visiting" the Appellant. (A-8.) Although styled a "finding," the foregoing was really not so much a finding as a conclusion of law. No finding was made that the Appellant had discussed religious ideas with the children or told them stories from the Bible, or even that

he planned or intended to do so at some time in the future. Nor was there any finding that the telling of religious stories or the discussion of religious ideas endangered the children's health or safety or impaired their emotional development in any way. Moreover, there was not even a finding that a restriction on Appellant's religious freedoms was in the children's best interests.

The 2002 Order imposed a variety of restrictions on the Appellant's exercise of parenting time with this children, among which was the following:

> It is ORDERED that the [Appellant] is prohibited from discussing inappropriate religious ideas with the children and/or forcing them to complete Bible lessons or listen to religious stories whenever the children do not want to do so, as part of their safety plan.

(A-10.) A variety of conditions were imposed on restoration of unsupervised parenting time, such as completion of counseling and an anger management program. (A-10.) Finally, the Order provided that "if this Order is violated in any of its term the Court will consider termination of all visitation as an option to the Court." (A-10.)

In August, 2003 the Appellant filed a motion to modify the April, 2002 Order by, *inter alia*, restoring him to unsupervised parenting time with his children and either vacating the restriction on his discussion of Bible stories and "inappropriate" religious ideas or modifying the Order in a way that would not

have a chilling effect on the Appellant's First Amendment rights. (A-13.)

In an Order and Memorandum filed April 19, 2004 the district court observed that "It appears to this Court that [Appellant] may have complied with the requirements of...the Order of April 15, 2002" but the court deferred decision on the issues pending a court services evaluation to determine whether unsupervised parenting time was in the children's best interests at that time. (A-45.)

An evidentiary hearing was held, which took place on March 10, 2005 and April 18, 2005. (A-56.) The Appellant testified that he did not know how to determine what kinds of religious ideas a court might consider "inappropriate," and that as a result he felt constrained to avoid all discussion of religious ideas in the children's presence. (March 10, 2005 Tr.-37, 38.) The only other witness to testify on this particular subject during the hearings was the Appellant's psychologist, and his opinion was that he did not have any concerns about the Appellant's religious beliefs. (April 18, 2005 Tr.-17, 18.) The only documentary evidence submitted to the court on the question whether the Appellant's religious ideas posed any harm to the children came from Dr. Peskay, who opined that they did not.[1] (A-31) Dr. Peskay's sworn affidavit

[1] In his Affidavit in support of his motion, Appellant wrote: "If, after a hearing, it can be shown that some particular religious belief of mine is harmful to the children, then I will gladly refrain from discussing it with them. Failing that,

stated that:

> [I]t is my opinion that there is nothing in [the Appellant's] spiritual belief system, or about Mr. Kinley's religious convictions per se, that could endanger the physical or emotional health, safety or well being of his children. Similarly, it is my opinion that any discussion of Mr. Kinley's religious beliefs and convictions with his children could not cause them to suffer physical or emotional harm or injury, or endanger the health, safety and well being of his children.

(A-31.) No evidence was introduced to show that the Appellant's religious beliefs, or his expression of them, had ever posed a danger to the children, much less that they continued to do so.

The court issued an Order on the parties' respective motions on August 7, 2005. (A-47.) The Order provided for the restoration of unsupervised parenting time at such time as a reunification therapist appointed by the court recommends it and laid out a detailed plan for the reunification process. (A-51 to A-53.)

The August 7, 2005 Order, however, did not address Appellant's motion to vacate the injunction against his discussion of "inappropriate" religious ideas and his telling of Bible stories. Appellant timely filed a motion for amended findings, asking, among other things, that the court rule on that motion. (A-54.)

The district court issued its Order containing amended findings on

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however, I respectfully submit that this court should respect my religious beliefs...." (A-19)

February 17, 2006. That Order provided that "The [Appellant's] motion to remove any limitations placed at prior hearings on his ability to discuss his religious ideas is denied." (A-62.)

The Appellant timely filed this appeal on May 5, 2006. (A-63)

SUMMARY OF THE ARGUMENT

While a court may circumscribe a parent's religious freedoms to some extent in child custody cases, its power to do so is not unbound. A restriction on a parent's free exercise of religion is permissible only if it is necessary, that is, the least drastic means to protect their children from harm. The restriction at issue in this case has not been shown to be necessary to promote the children's best interests. Their interests could have been promoted by less drastic means.

Even if a valid reason for the restriction could be found in this case, restrictions on religious liberty must be narrowly drawn. The order in this case was not narrowly drawn. It reaches both protected and unprotected speech. As such, it is unconstitutionally overbroad in violation of the First Amendment. It is also unconstitutionally vague, in violation of the First and Fourteenth Amendments.

Finally, by selectively prohibiting only the telling of Bible-based stories, without similarly prohibiting the telling of stories from the *Koran*, the *Bhagavad-Gita* or other non-Christian religious tracts, the Order impermissibly engages in viewpoint discrimination in violation of the First Amendment requirement of content-neutrality in the state's treatment of different religions.

For these reasons, the district court's order refusing to vacate an injunction against the expression of "inappropriate" religious ideas and the

telling of Bible stories was an abuse of discretion.

ARGUMENT

I. A court order enjoining a parent from discussing "inappropriate" religious ideas with his children, where the term "inappropriate" is not defined, violates the First and Fourteenth Amendments.

A. *The court-ordered restrictions in this case have not been shown to be necessary to achieve the state's legitimate interest in protecting children from harm*.

The state has a legitimate interest in regulating in children's best interests to protect them from harm. *Prince v. Massachusetts*, 321 U.S. 158 (1944). That power, however, is not absolute. The individual also has a legitimate interest in the freedom to choose a religion and to exercise that religion. U.S. CONST. AMEND. 1.[2] Those freedoms are not merely interests; they are fundamental rights. *Prince v. Massachusetts, supra* at 164, 165 (rights of parents to "bring up" children religiously are "sacred private interests, basic in a democracy"); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)(rights "of the highest order"); *Johnson v. Robison*, 415 U.S. 361; *Sherbert v. Verner*, 374 U.S. 398 (1963). Because they are fundamental rights, a limitation on a parent's right to direct the upbringing of his own children by imposing limitations on his religious freedoms is subject to strict scrutiny, meaning that it is presumptively

[2] First Amendment protections of speech and religion are applicable to State action by virtue of the Due Process clause of the Fourteenth Amendment. *Cruz V. Beto*, 405 U.S. 319 (1972); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Schneider v. New Jersey*, 308 U.S. 147 (1939). "State action" includes the actions of a state's judicial officers, as well as its legislators. *Shelley v. Kramer*, 334 U.S. 1 (1948).

unconstitutional unless shown to be the least restrictive means of achieving a compelling secular objective. *Wisconsin v. Yoder, supra*.; *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981); *Larson v. Valente*, 456 U.S. 228 (1982); *cf. Employment Division v. Smith*, 494 U.S. 872, 881-82 (1990); *Children's Healthcare Is a Legal Duty, Inc. v. Vladek*, 938 F. Supp. 1466 (D. Minn. 1996); s*ee generally*, McConnell, Michael W., *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990).[3] This is as true for noncustodial parents as it is for custodial parents. An individual does not forfeit his constitutional rights by virtue of having had the label "noncustodial parent" affixed to him. *Pater v. Pater*, 588 N.E. 2d 794, 801 (Ohio 1992); *Zummo v. Zummo*, 574 A. 2d 1130, 1139-40 (Pa. Super. Ct. 1990) *See generally* Mangrum, R. Collin, *Religious Constraints During Visitation: Under What Circumstances Are They Constitutional?* 24 CREIGHTON L. REV. 445 (1991).

For a restriction on a parent's religious freedoms to be "compelling," it must be shown that the involvement of his children in his religion poses a substantial risk of harm to the physical or mental health of the children or to the

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[3] This standard is also reflected in the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488-89 (1993), codified as amended 42 U.S.C. §§2000bb to 2000bb-4 (Supp. V 1993), which requires that state action infringing upon a person's religious freedom serve a "compelling governmental interest" and be "the least restrictive means of furthering that interest.".

public safety or peace. *Wisconsin v. Yoder, supra* at 230. No such showing has been made in the case at bar. Appellant's psychologist testified about the Appellant's religious beliefs and his relationship to his children. His testimony, however, was simply to the effect that he did not believe the Appellant's religious beliefs posed any danger to his children. No evidence was presented to show that the Appellant's religious beliefs are harmful to the children, or even that they conflict with the custodial parent's religious beliefs. Although a finding was made that one of the children is fearful of the Appellant when he becomes angry, no showing was made that the Appellant's religious beliefs or his telling of stories from the Bible had anything to do with that.

The only findings concerning the Appellant's religious beliefs and practices that were made in the April, 2002 Order were that the children's therapist found it difficult to work with the Appellant because he had a tendency to "use bible verses in a way that was self-serving" and that the Appellant had embarrassed the Respondent by describing her as "bad" to members of her church. No evidence was offered to show that this conduct had taken place in the presence of the children, or that it had harmed or posed a substantial risk of harm to the children. Indeed, no finding has ever been made that the Appellant has discussed religious ideas with the children, has told them stories from the Bible, or that such discussions harmed the children or posed a

serious risk of harm to them. There has not even been a finding that any of Appellant's religious beliefs are "inappropriate," much less why.

B. *Promotion of these children's best interests could have been achieved by less drastic means*.

The state's interest in protecting these children from harm could have been achieved by less drastic means than imposing a ban on the discussion of religious ideas and the telling of Bible stories or delegating to the Appellant's children the power to dictate the content of the Appellant's speech. If the concern was the Appellant might attempt to use passages from the Bible to disparage or vilify the Respondent to the children, the court could simply have entered an order prohibiting the Appellant from disparaging or vilifying the Respondent to the children.

C. *The order prohibiting the discussion of "inappropriate" religious ideas is overbroad and void for vagueness under the First and Fourteenth Amendments*.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). The First Amendment does not permit overbroad regulations of speech that touch, or that potentially could touch, constitutionally protected speech. *Gooding v. Wilson*, 405 U.S. 518 (1971). If a regulation of speech is overbroad, it matters not whether a party has yet been affected by the regulation; if it is broad enough that it could reach protected

speech, the potential chilling effect on speech is sufficient, in itself, to confer standing to challenge it. *Broadrick v. Oklahoma*, 412 U.S. 601, 612 (1973); *Members of City Council v. Taxpayers for Vincent*, 46 U.S. 789, 801 (1984).

In this case, the court's ban on the discussion of "inappropriate" religious ideas not only *could* chill protected speech; it *did* chill protected speech. The Appellant testified that he had found it necessary to refrain from *all* religious discussions in the presence of his children because he was unsure what religious ideas are "inappropriate." (March 10, 2005 Tr.-37, 38.) The ban on discussion of inappropriate religious ideas did not define the term or restrict its application to instances in which the Appellant might attempt to apply a Biblical passage in a way that is derogatory to the Respondent. Nor did the Order limit its ban to those religious ideas that might cause the children to become afraid of the Appellant. In fact, no guidance whatsoever was provided for determining whether a particular religious idea is "appropriate" or "inappropriate."

The term *inappropriate* means "not suitable or proper." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 2d ed. The First Amendment protects speech even if it is distasteful or generally believed to bring evil consequences. *Virginia v. Black*, 538 U.S. 343 (2003). Distasteful speech and speech generally believed to bring evil consequences are not suitable or proper in many contexts. Accordingly, the court's prohibition

against "inappropriate" religious ideas is unconstitutionally overbroad because it reaches protected speech.

The ban on the discussion of "inappropriate" religious ideas is also unconstitutionally void for vagueness. A state-imposed restriction on individual speech or conduct must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This is part of the "fundamental fairness" that is required of States under the Due Process Clause of the Fourteenth Amendment, and it is also a requirement of the First Amendment, which is applicable to states by virtue of the Due Process clause. *Ibid*.

A ban on "inappropriate" religious speech does not give a person of ordinary intelligence any clue whatsoever as to what is prohibited. To a Quaker, it would be inappropriate to teach children that war is sometimes justifiable or that redemption can come through confession of one's sins to a person to whom God has delegated a special authority. Similarly, if an individual is Catholic, it would be inappropriate to tell children that salvation is achieved through works rather than grace. To a Jewish individual, it would be inappropriate to tell a child that male children do not need to be circumcised. To a Unitarian, the concept that God might punish a person by sending him to hell

is an inappropriate religious idea. To a Hindu individual, discussions about the preparation of hamburgers for human consumption would involve inappropriate religious ideas.

To avoid chilling speech, the terms of a restriction on speech must be specific and capable of objective measurement. *Fitts v. Kolb*, 779 F. Supp. 1502 (D.S.C. 1991). A prohibition against "offensive" speech does not satisfy that requirement. *ACLU v. Reno*, 929 F. Supp. 824, *affirmed* 521 U.S. 844 (1996); *Pritikin v. Thurman*, 311 F. Supp. 1400 (S.D. Fla. 1970); *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278 (S.D. NY 1992); *Dambrot v. Central Michigan University*, 55 F. 3d 177 (6th Cir. 1995). Nor do prohibitions against "immoral," "intolerant," "violent" or "insulting" speech. *American Book Sellers Association v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Bair v. Shippensburg University*, 280 F. Supp. 22d 357 (M.D. Pa. 2003); *Video Software Dealers Association v. Webster,* 773 F. Supp. 1275, *affirmed* 968 F. 2d 684 (W.D. Mo. 1991); *Baughman v. Freienmuth*, 478 F. 2d 1345 (4th Cir. 1973.)

Prohibitions against "harmful" speech are also unconstitutionally vague. *Texas v. Johnson*, 491 U.S. 397 (1989); *Crawford v. Lungren*, 96 F. 3d 380 (9th Cir. 1991); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994); *Lighthawk v. Robertson*, 812 F. Supp. 1095 (W.D. Wash. 1993).

Appellant is not aware of any Minnesota case in which the specific issue whether the term "inappropriate" is unconstitutionally vague has been raised. In every other jurisdiction where this question has been addressed, however, the answer has always been an unequivocal "yes." *See, e.g., Flaherty v. Keystone Oaks School District*, 247 F. Supp. 698 (W. D Pa. 2003); *Craig v. Hocker*, 405 F. Supp. 656 (D.C. Nev. 1975); *Video Software Dealers Association v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

II. A court order enjoining a parent from telling his children stories from the Bible, without at the same enjoining the teaching of non-Christian religions, violates the content-neutrality requirement of the First Amendment.

Content-based regulation of religious speech is presumptively invalid under the First Amendment. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Cohen v. California*, 403 U.S. 15 (1971). It is rarely permitted. *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803 (2000). Any regulation of speech that is not content-neutral may be upheld only if it is shown that the regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that interest. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002). This is particularly true where, as here, the regulation involves a prior restraint on speech. *Nebraska Press Association v. Stuart*, 427 U.S. 539

(1976); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *In re Halkin*, 598 F. 2d 176 (D.C. Cir. 1979). A content-based prior restraint on speech is presumptively invalid and is subject to strict scrutiny under the First Amendment. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). This is true whether the speech occurs in public or in private. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995).

The United States Supreme Court, in *Larson v. Valente*, 456 U.S. 228, 224 (1982) held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." In *Epperson v. Arkansas*, 393 U.S. 97, 104, 106 (1968), the Court stated that "[t]he First Amendment mandates governmental neutrality between religion and religion....[T]he State may not adopt programs or practices...which...oppose any religion" and held that "This prohibition is absolute." At the very least, any governmental preference for some religions over others must meet strict scrutiny in adjudging its constitutionality. *Larson v. Valente*, *supra* at 246; *Children's Health Care Is a Legal Duty*, *supra*.

Protection from offensive or distasteful religious views is not a legitimate state interest sufficient to overcome the presumptive invalidity of a restraint on religious speech. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). The First Amendment protects *all* religious ideas, regardless of how strange, irrational or

immoral they may seem to others. *Turner v. Unification Church*, 473 F. Supp. 367 (D.C. RI 1978).

In the case at bar, the district court prohibited the Appellant from engaging in Bible studies or telling the children stories from the Bible. No prohibition was imposed against studies of the *Koran*, the *Bhagavad-Gita* or the religious tracts of other religions. No explanation was given for the preference of non-Christian religions over Bible-based religions, or for the hostility toward Christian denominations in particular. Indeed, it does not appear that any rational basis for singling out the religious tract of Christian faiths exists, much less that such discrimination is necessary to serve any compelling governmental interest. *Rohman v. City of Portland*, 909 F. Supp. 767 (1995)(prohibition against preaching the Gospel violates the First Amendment.)

III. The district court's order refusing to vacate an injunction against the expression of "inappropriate" and/or Bible-based ideas was an abuse of discretion.

The standard of review of a denial of a party's motion to vacate a judicially-imposed restraint on an individual's conduct or speech, or a denial of a party's motion to modify such a restraint, is whether the district court abused its discretion by disregarding facts or applicable law. *M.G.M. Liquor Warehouse International v. Forsland*, 371 N.W. 2d 75, 77 (Minn. App. 1985). In the case at bar, the district court disregarded the facts that there had been no

showing that the Appellant had discussed or planned to discuss inappropriate religious ideas with the children, and that there had been showing that his telling of stories from the Bible harmed the children in any specific way. The district court also disregarded applicable law, namely, the First Amendment of the United States Constitution. The denial of Appellant's motion to vacate the portions of the April, 2002 Order restraining him from engaging in religious speech with his children was, therefore, an abuse of discretion.

CONCLUSION

To the extent the Order in this case enjoined the Appellant from discussing "inappropriate" religious ideas, it is unconstitutionally overbroad and vague, in violation of the First and Fourteenth Amendments of the United States Constitution. To the extent the Order prohibits the Appellant from telling stories from the Bible, it violates the content-neutrality requirement of the First Amendment. Since these provisions are constitutionally impermissible and, moreover, no showing of any continuing need for them has been made, the district court's refusal to vacate them was an abuse of discretion.

Accordingly, the district court's Order denying Appellant's motion to modify the April, 2002 Order should be reversed and remanded with instructions to enter an order vacating the prohibitions against the Appellant's discussion of religious ideas and telling of stories from the Bible.

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Respectfully submitted,

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