No. 109PA22-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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DUSTIN MICHAEL MCKINNEY, GEORGE JERMEY MCKINNEY, and JAMES ROBERT TATE,

Plaintiffs-Appellees,

STATE OF NORTH CAROLINA,

Intervenor-Appellee,

v.

GASTON COUNTY BOARD OF EDUCATION,

Defendant-Appellant.

From Wake County
No. COA 22-261
No. 21 CVS 7438

AMICI CURIAE BRIEF OF AMERICAN TORT REFORM ASSOCIATION AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that represent companies doing business in North Carolina and their insurers. Over the past two decades, *amici* have become alarmed as state legislatures consider reviving time-barred claims. While this case arises in the context of childhood sexual abuse, legislation of this type, if left unchecked by courts, will undoubtedly spread to other cases involving sympathetic plaintiffs or causes, jeopardizing the predictability and reliability of the civil justice system. Accordingly, *amici* have a substantial interest in ensuring that North Carolina law continues to adhere to traditional constitutional principles recognizing that legislative revival of time-barred claims, as in the SAFE Child Act, violates due process by impairing vested rights.

The American Tort Reform Association ("ATRA") is a broad coalition of businesses, municipalities, associations, and professional firms that have pooled their resources to promote fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues.

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[1] No counsel for a party authored this brief in whole or in part; and no party, party's counsel, or other person or entity—other than *amici curiae*, their members, or their counsel—contributed money intended to fund the preparation or submission of this brief.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 63% of the U.S. property-casualty insurance market and write 75% of the general liability insurance premiums in the State of North Carolina. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus* briefs in significant cases before federal and state courts, including this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

North Carolina, like many jurisdictions, has long held that a "statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail" because "it takes away vested rights of defendants." *Wilkes County v. Forester*, 204 N.C. 163, 170, 167 S.E. 691, 695 (1933). The provision of the SAFE Child Act, S.L. 2019-245, § 4.2(b), purporting to create a two-year window to revive any time-barred civil action for injuries stemming from child sexual abuse, is precisely this type of prohibited law. In many cases, including here, plaintiffs have used the revival period to assert claims alleging organizations, long ago, were negligent when hiring or supervising employees and volunteers. This Court has

made clear that such laws are unconstitutional and that expired claims "cannot be resuscitated." *Wilkes County*, 204 N.C. at 170, 167 S.E. at 695. A plurality of the Court of Appeals strayed from this binding precedent.

That the SAFE Child Act implicates claims of sympathetic plaintiffs, as in this case, should not affect the Court's established vested-rights analysis. Tort law, by its very nature, deals with horrible situations—accidents resulting in serious injuries that have a dramatic impact on a person's life, products that allegedly cause a person's death, and diseases that may have been contracted through exposure to toxic substances, for example. Statutes of limitations exist in these situations, and for all civil actions, because these limits are "fundamental to a well-ordered judicial system." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980).

Altering North Carolina's constitutional analysis to permit the SAFE Child Act's purported claims-revival would significantly undermine due process and the finality statutes of limitations provide, not just in the context of this case, but in any type of civil action. The Court of Appeals' ruling, if upheld, would permit the General Assembly to reopen the courthouse doors to stale claims in which witnesses and records are no longer available. Allowing such retroactive lawmaking also frustrates the ability of organizations to properly evaluate liability risks and subjects them to a risk of indefinite liability.

In addition, the Court of Appeals' ruling moves North Carolina outside the legal mainstream. The "great preponderance" of state appellate courts have long rejected legislation purporting to revive time-barred claims. *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996); *see also Aurora Pub. Sch. v. A.S.*, 531 P.3d 1036, 1050 (Colo. 2023); *Mitchell v. Roberts*, 469 P.3d 901, 903 (Utah 2020).

For these reasons, this Court should reverse the Court of Appeals.

ARGUMENT

I. REVIVING TIME-BARRED CLAIMS UNDERMINES NORTH CAROLINA'S CIVIL JUSTICE SYSTEM

The SAFE Child Act's claims-revival provision defies the fundamental purpose of statutes of limitations "to require that litigation be initiated within the prescribed time or not at all." *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957), *superseded by statute on other grounds as recognized in Black v. Littlejohn*, 312 N.C. 626, 630-31, 325 S.E.2d 469, 473 (1985). While "[s]tatutes of limitations are primarily designed to assure fairness to defendants," *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965), they are essential to a fair and well-ordered civil justice system overall. This is because some period is needed to balance an individual's ability to bring a lawsuit with the ability to mount a fair defense and to protect courts from stale claims. By requiring "diligent prosecution of known claims," statutes of limitations "prevent the problems inherent in litigating claims in which evidence has been lost, memories have faded, and

witnesses have disappeared." *Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 538, 766 S.E.2d 283, 286 (2014) (cleaned up).

Statutes of limitations allow judges and juries to evaluate liability when the best evidence is available. They "promote justice by preventing surprises through the revival of claims that have been allowed to slumber." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). The possibility of an unfair trial is heightened when heart-wrenching allegations are involved, as they are here. In addition, statutes of limitations allow businesses and other organizations to accurately gauge their liability exposure and make financial, insurance coverage, and document retention decisions accordingly. They provide "security and stability to human affairs" that is "vital to the welfare of society." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

The fundamental due process issues that arise as a result of reviving time-barred claims are evident in the wake of the 2019 SAFE Child Act, which contains no time constraint at all during its "window." Personal injury lawyers filed hundreds of cases by the time the window closed at the end of 2021, some involving allegations of sexual abuse *eighty* years ago. *See* Derek Lacey, *Eckerd Camps, Henderson County Named in Sexual Assault Case*, Asheville Citizen-Times, Jan. 7, 2022, 2022 WLNR 588624 (reporting plaintiffs' counsel Lisa Lanier indicated that her firm filed 249 revived cases in just one month against Boy Scout

troops, camps, and churches); Karen Chávez, *Child Sexual Abuse Lawsuits Filed as Lookback Window Closes*, Asheville Citizen-Times, Jan. 4, 2022, at A1, 2022 WLNR 199103 (reporting that revived claims include cases alleging conduct as early as 1942).

The sudden barrage of old claims and the challenges of defending them given the passage of time, loss of records, witnesses, and institutional memory, and nature of the allegations involved, is borne mainly by schools, nonprofit organizations, and other entities that provided services to children. For example, in a constitutional challenge to a similar law in Colorado, organizations representing school districts, local governments, and their insurers recounted a revived claim arising in the early 1980s, in which a school district could not "confirm whether the alleged perpetrator had been an employee, let alone whether and to what degree the individual may have interacted with the claimant." Brief of *Amici Curiae* Colorado School Districts Self Insurance Pool, et al., at 5-6, *Aurora Pub. Sch. v. Saupe*, No. 2022SC824 (Colo. filed Jan. 17, 2023).

The implications of permitting the legislature to revive time-barred claims extend beyond the context of childhood sexual abuse. Over time, there will be many other sympathetic plaintiffs, important causes, and unpopular industries and defendants. It is never easy to tell an injured person that their time to sue has ended. *See Shearin*, 246 N.C. at 371, 98 S.E.2d at 514 (recognizing that statutes of

limitations "may operate to bar the maintenance of meritorious causes of action" but that courts need to be mindful that "[h]ard cases must not make bad law" and reject any "urge" to create exceptions) (cleaned up). This is why constitutional safeguards require legislatures to act prospectively, not retrospectively. Allowing revival of time-barred claims here will inevitably lead to future calls to permit claims alleging injuries based on conduct that occurred decades ago to proceed.

Amici have already observed several such attempts. Efforts are underway in states that have revived time-barred childhood sexual abuse claims to expand these provisions. New York subsequently revived claims brought by those who allege injuries from sexual abuse as *adults*. *See* S. 66 (N.Y. 2022). California legislation sought to revive claims involving anything that might be considered "inappropriate conduct, communication, or activity of a sexual nature" decades ago, which would have sparked stale employment litigation and other claims. *See* A.B. 2777 (Cal. 2022) (as amended in Senate June 16, 2022). Vermont almost immediately expanded its 2019 childhood sexual abuse claims-revival law to apply to claims alleging *physical* abuse. *See* S. 99 (Vt. 2021).

Plaintiffs' lawyers and advocacy groups will also seek to revive other types of claims. For example, Maine legislation would have retroactively expanded the state's statute of limitations for product liability claims from six to fifteen years. *See* LD 250 (Maine 2019) (reported "ought not to pass"). Oregon considered a bill

that would have revived time-barred asbestos claims during a two-year window. *See* S.B. 623 (Or. 2011) (died in committee). New York revived certain claims by water suppliers alleging injuries related to an "emerging contaminant." S. 8763A (N.Y. 2022).

In addition, states have considered proposals to retroactively permit novel theories of liability. Bills have attempted to allow claims addressing social and political causes by applying today's moral values to conduct that occurred long ago. For instance, a California bill would have revived time-barred actions under the state's unfair competition law alleging that businesses deceived, confused, or misled the public on the risks of climate change or financially supported activities that did so. *See* S.B. 1161 (Cal. 2016) (reported favorably from committee, but died without floor vote). Another California bill proposed a ten-year statute of limitations for torts involving certain human rights abuses that would have applied retroactively to revive claims for events that occurred up to 115 years earlier. *See* A.B. 15 (Cal., as amended Mar. 26, 2015) (claims-revival provision removed and legislation made prospective before enactment).

While most of these bills failed to gain sufficient support for enactment, should this Court allow the SAFE Child Act's claims-revival, more of these types of proposals will predictably result. Calls for discarding statutes of limitations and reviving time-barred claims will also likely become more frequent. Individuals and

businesses in North Carolina will face a risk of indefinite liability. When adopted, these proposals will undermine the ability of judges and juries to accurately and fairly evaluate liability. Cases will become more susceptible to being decided based on sympathy and bias, rather than law and evidence.

II. REVIVING TIME-BARRED CLAIMS CAN CREATE HAVOC IN THE INSURANCE MARKET

As a result of reviver laws like the SAFE Child Act, organizations that provide services to minors have faced increased insurance costs and difficulties obtaining insurance in the future, in addition to their significant new liability exposure for otherwise time-barred claims. *Cf.* Kay Dervishi, *Child Victims Act Leads to Insurance Woes*, City & State, Feb. 10, 2020 (reporting that schools and nonprofits, in the wake of New York's claims-revival law, "have faced increased insurance costs" and "have lost coverage for sexual abuse claims altogether"). But the effect on the insurance market of permitting revival of time-barred claims is far broader. The uncertainty that will be created if the Court finds this approach constitutionally permissible will extend across all forms of insurance.

By assuming and managing risk, insurers play an indispensable role in modern life. But a necessary precondition to "managing" risk is the ability to identify and quantify it to establish reserves sufficient to cover all potential exposure for all covered types of losses. Although access to historical data and sophisticated statistical models allows insurers to perform this complex task with

ever-increasing accuracy and efficiency, the process still depends on a measure of predictability and stability. Insurers must be able to locate a point at which historically-distant events no longer pose a current and future risk—where "the past" is definitively and conclusively past. Without a clear line of demarcation, risk assessments and other basic ordering by organizations, insurers, and other entities become uncertain, unreliable, and even speculative. Because of the risk of a legislative reviver, entities would face the risk of "open-ended liability for an indefinite period of time," defeating the very purpose of having a statute of limitations. *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 240, 515 S.E.2d 445, 449 (1999).

For insurance markets to operate efficiently, stability and predictability are essential. The ability (and apparent willingness) of the legislature to retroactively revive time-barred claims introduces volatility that will place considerable pressure on insurance availability and affordability. As a result of the SAFE Child Act's reviver, for example, insurers will be required to set aside millions of dollars for reserves to cover claims from decades ago, *see* N.C. Gen. Stat. § 58-3-81(a), without ever being able to collect corresponding premiums. Even the mere chance that the legislature could revive stale claims – of any type – in the future raises significant concern. This legislatively created volatility could significantly disrupt the North Carolina insurance market. *See* Am. Property Casualty Ins. Ass'n et al.,

It's Not Just The Weather: The Man-Made Crises Roiling Property Insurance Markets 15 (2022) (observing that when state lawmakers restrict the ability of insurers to "manage their overall exposure in high-risk markets, insurers are forced to reassess their capacity to meet policy obligations and/or consider pursuing other less volatile markets to avoid the threat of insolvency").

III. INVALIDATING THE REVIVAL WINDOW IS CONSISTENT WITH THE MAJORITY APPROACH AMONG STATES

In *Wilkes County*, this Court broadly reviewed cases from North Carolina and other jurisdictions, as well as treatises, and recognized that in "most jurisdictions it is held that after a cause of action has become barred by the statute of limitation, the defendant has a vested right to rely on that statute as a defense, and neither a constitutional convention nor the legislature has power to divest that right and revive the cause of action." 204 N.C. at 169, 167 S.E. at 694. That was an accurate statement of the state of the law when *Wilkes County* was decided in 1933, and it remains so today.[2] Since *Wilkes County*, this Court has consistently

[2] *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1739 (2012) (observing it was "orthodox constitutional theory" that "due process" prohibited retroactive legislation that interfered with vested rights); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231, 237 (1927) (same).

held that the General Assembly cannot revive time-barred claims without violating defendants' vested rights.[3]

As several state high courts have recognized, the majority rule among jurisdictions is that a legislature cannot adopt retroactive laws that revive a time-barred claim.[4] These states generally apply a vested-rights analysis that is

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[3] *See, e.g., Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 234, 328 S.E.2d 274, 276 (1985) ("If plaintiff's claim was already barred . . . it could not be revived"); *Jewell v. Price*, 264 N.C. 459, 461, 142 S.E.2d 1, 3 (1965) ("If this action was already barred when it was brought. . . it may not be revived by an act of the legislature. . . ."); *Lester Brothers, Inc. v. Pope Realty & Ins. Co.*, 250 N.C. 565, 568, 109 S.E.2d 263, 266 (1959) ("A retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void.") (citations omitted); *McCrater v. Stone & Webster Eng'g Corp.*, 248 N.C. 707, 710, 104 S.E.2d 858, 860 (1958) (finding expired statute of limitations "could not be enlarged by subsequent statute" because "[a]ny attempt to do so would be to deprive the defendants of vested rights"); *Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E.2d 263, 265 (1949) ("A right or remedy, once barred by a statute of limitations, may not be revived by an Act of the General Assembly.").

[4] *See Johnson v. Garlock, Inc*., 682 So. 2d 25, 28 (Ala. 1996) ("The weight of American authority holds that the bar does create a vested right in the defense."); *Johnson v. Lilly*, 823 S.W.2d 883, 885 (Ark. 1992) ("[W]e have long taken the view, along with a majority of the other states, that the legislature cannot expand a statute of limitation so as to revive a cause of action already barred."); *Frideres v. Schiltz*, 540 N.W.2d 261, 266-67 (Iowa 1995) ("[I]n the majority of jurisdictions, the right to set up the bar of the statute of limitations, after the statute of limitations had run, as a defense to a cause of action, has been held to be a vested right which cannot be taken away by statute, regardless of the nature of the cause of action."); *Dobson v. Quinn Freight Lines, Inc*., 415 A.2d 814, 816-17 (Me. 1980) ("The authorities from other jurisdictions are generally in accord with our conclusion" that there is a substantive right in a statute of limitations after the prescribed time has completely run and barred the action); *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341-42 (Mo. 1993) (constitutional prohibition of legislative revival of a time-barred claim "appears to be the majority view among

consistent with North Carolina law, whether they do so through applying due process safeguards, a remedies clause, a specific state constitutional provision prohibiting retroactive legislation, or another state constitutional provision.[5] Courts have applied these constitutional principles to reject the legislative revival of time-barred claims in a wide range of cases—negligence claims, product liability actions, asbestos claims, and workers' compensation claims, among others.

The supreme courts of Colorado and Utah are the most recent high courts to reaffirm this principle. This June, the Colorado Supreme Court found that the

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jurisdictions with constitutional provisions"); *Kelly*, 678 A.2d at 883 (recognizing the "great preponderance" of state appellate courts reject claims-revival laws); *State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 369-71 (S.D. 1993) ("Most state courts addressing the issue of the retroactivity of statutes have held that legislation which attempts to revive claims which have been previously time-barred impermissibly interferes with vested rights of the defendant, and this violates due process.").

[5] *See, e.g.*, *Garlock*, 682 So. 2d at 27-28; *Lilly*, 823 S.W.2d at 885; *Wiley v. Roof*, 641 So. 2d 66, 68-69 (Fla. 1994); *Doe A. v. Diocese of Dallas*, 917 N.E.2d 475, 484-85 (Ill. 2009); *Frideres*, 540 N.W.2d at 266-67; *Johnson v. Gans Furniture Indus., Inc*., 114 S.W.3d 850, 854-55 (Ky. 2003); *Hall v. Hall*, 516 So. 2d 119, 120 (La. 1987); *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816-17 (Me. 1980); *Doe*, 862 S.W.2d at 341-42; *Givens v. Anchor Packing, Inc*., 466 N.W.2d 771, 773-75 (Neb. 1991); *Gould v. Concord Hosp*., 493 A.2d 1193, 1195-96 (N.H. 1985); *Wright v. Keiser*, 568 P.2d 1262, 1267 (Okla. 1977); *Lewis v. Pennsylvania R. Co*., 69 A. 821, 822-23 (Pa. 1908); *Doe v. Crooks*, 613 S.E.2d 536, 538 (S.C. 2005); *Doese*, 501 N.W.2d at 369-71; *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 696-97 (Tenn. 1974); *Baker Hughes, Inc. v. Keco R. & D., Inc*., 12 S.W.3d 1, 4 (Tex. 1999); *Starnes v. Cayouette*, 419 S.E.2d 669, 674-75 (Va. 1992); *Society Ins. v. Labor & Indus. Review Comm'n*, 786 N.W.2d 385, 399-402 (Wis. 2010).

Child Sexual Abuse Accountability Act could not create a new claim for conduct predating the legislation and for which any previously available claims would be time-barred. *Aurora Pub. Sch. v. A.S.*, 531 P.3d 1036, 1050 (Colo. 2023). There, the court recognized that "where the statute of limitations has run and a claim is barred, the right to plead it as a defense is a vested right which cannot be taken away or impaired by any subsequent legislation." *Id*. at 1048-49 (cleaned up). The constitutional bar on retroactively altering vested rights, the court observed, "ensures that people have notice of the consequences of their actions before they act—a foundational component of due process." *Id*. at 1050. While the court was sympathetic to the legislature's desire to "right the wrongs of past decades," it recognized that there is no "public policy exception" to the constitutional prohibition on reviving time-barred claims. *Id*. at 1049.

Three years earlier, the Utah Supreme Court applied similar reasoning to invalidate a law reviving time-barred claims under a vested-rights analysis after the state legislature permitted such claims against perpetrators of childhood sexual abuse. *See Mitchell*, 469 P.3d at 901. There too, the court "appreciated the moral impulse" underlying the claims-revival provision and expressed "enormous sympathy for victims of child sex abuse," but it maintained that the issue was "not a matter of policy" but one of basic protection for defendants. *Id.* at 914. The court unanimously held that the principle that the legislature "vitiates a 'vested' right" in

violation of due process by retroactively reviving a time-barred claim is "well-rooted," "confirmed by the extensive historical material," and has been repeatedly reaffirmed for "over a century." *Id*. at 903, 904, 913.

In comparison, about one-third of states have found that legislation reviving time-barred claims is generally permissible. These states, unlike North Carolina, typically follow the approach taken under the U.S. Constitution.[6] The U.S. Supreme Court has recognized, however, that state constitutions can provide greater safeguards than the U.S. Constitution. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 312-13 (1945). Many states do so. In fact, when the Connecticut Supreme Court ruled that its constitutional law favored the minority federal approach, it recognized North Carolina among those states that "have rejected the United States Supreme Court's approach to this issue . . . and held, as a matter of state

[6] A recent example is the Vermont Supreme Court, which adopted the federal approach. *See A.B. v. S.U.*, 298 A.3d 573 (Vt. 2023). Other courts recently upholding revivers include a plurality decision of a Louisiana intermediate appellate court, which took an outlier approach to vested rights, *see Doe v. Soc'y of the Roman Catholic Church of the Diocese of Lafayette*, No. 22-120, 2023 La. App. LEXIS 1365 (La. Ct. App. Aug. 17, 2023), and an intermediate appellate court in New York, which applies a unique test for evaluating the permissibility of reviving time-barred claims, *see PB-36 Doe v. Niagara Falls City Sch. Dist*., 182 N.Y.S.3d 850 (N.Y. App. Div. 2023). Maine's Supreme Judicial Court is currently considering a ruling upholding a reviver law where, as here, precedent firmly supports reversal. *See Dupuis v. Roman Catholic Bishop of Portland, Maine*, pending appeal (Me. No. BCD-23-122) (oral argument held Nov. 9, 2023), https://www.courts.maine.gov/news/dupuis/index.html.

constitutional law, that the retroactive expansion of the statute of limitations, which revives an otherwise time-lapsed claim, is an incursion on a vested property right that amounts to a per se violation of substantive due process." *Doe v. Hartford Roman Catholic Diocesan Corp*., 119 A.3d 462, 512 (Conn. 2015) (citing *Colony Hill Condo. Ass'n v. Colony Co.*, 70 N.C. App. 390, 394, 320 S.E.2d 273 (1984)).

This Court has consistently emphasized the importance of statutes of limitations in providing the fairness, predictability, and finality needed "to afford security against stale demands." *King by and through Small v. Albemarle Hosp.*, 370 N.C. 467, 470, 809 S.E.2d 847, 849 (2018) (cleaned up). For such interests to have meaning, there must be robust constitutional protections. That is not the case if this Court permits the revival of claims extending back any period of time.

CONCLUSION

For these reasons, this Court should reverse the Court of Appeals.

Respectfully submitted,

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