Case No. F081470

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DAVE MEZA, *Plaintiff and Appellant*,
v.
PACIFIC BELL TELEPHONE COMPANY, *Defendant and Respondent.*

ON APPEAL FROM THE SUPERIOR COURT OF KERN COUNTY, CASE NO. BCV-15-101572
THE HONORABLE STEPHEN D. SCHUETT

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE AS AMICI CURIAE IN SUPPORT OF RESPONDENT PACIFIC BELL TELEPHONE COMPANY

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INTRODUCTION

Labor Code section 226, subdivision (a) requires employers to supply their employees with wage statements containing specific information, including (as relevant here) hourly pay rates, hours worked, and the beginning and end dates of the pay period covered by the statement.[1] As mandated by section 226(a), Plaintiff David Meza received a wage statement that reflected a bonus payment Meza had received from his employer, Pacific Bell Telephone Company ("Pacific Bell"). Meza does not dispute that his paycheck set out his bonus, nor does he allege that he was confused or otherwise misled about any material detail of his bonus pay. But he says Pacific Bell violated section 226(a) anyway, for two reasons.

First, Meza alleged that Pacific Bell violated section 226(a)(9) by reporting as a lump sum after-the-fact adjustments to employees' overtime pay based on monthly, quarterly, or annual incentive bonuses. Pacific Bell should have reported the incentive bonuses, he contended,

[1] In the interest of brevity, we refer to Labor Code section 226, subdivision (a)(6) and (9) throughout this brief respectively as "section 226(a)(6)" and "section 226(a)(9)" in text, and "§ 226(a)(6)" and "§ 226(a)(9)" in citations.

by providing an "hourly rate in effect during the pay period" with a "corresponding number of hours worked at" that rate. *Second*, he asserted that semimonthly wage statements provided to Pacific Bell employees that contain overtime true-up amounts based on nondiscretionary bonus pay do not comply with section 226(a)(6) because those statements include the pay-period start and end dates in which those amounts were paid, and not retroactive dates during which the bonuses were earned.

Both of Meza's arguments are foreclosed by the statute's text, not to mention common sense, and the Superior Court correctly rejected them. Section 226(a)(9) requires that wage statements include "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." But bonus payments are not based on an hourly rate, so there is no "applicable hourly rate" that corresponds to the bonus. The same is true for the overtime true-up. Nor is there any practical reason why any employee would want her bonus amount restated in that format. Doing so would erroneously and misleadingly suggest that the bonus payment *was* based on an hourly rate.

Section 226(a)(6), meanwhile, requires the statement to reflect "the inclusive dates of the period for which the employee is paid." Meza's wage statement set forth his bonus during the period in which it was paid; it complied with section 226(a)(6) on its face. This part of the statement is expressly intended to show when a particular portion of an employee's wage is *paid*. Thus, it would again be misleading if the statement instead reflected a different time period, *i.e.* when the wage was *earned*.

Adding the information Meza requests would make wage statements more confusing and thus undermine the purpose of section 226(a) to ensure that such statements accurately inform employees of the details of their pay. All Meza would accomplish is to make it easier to bring meritless class actions against employers operating in California. It is unsurprising, then, that accepting Meza's theories would result in significant adverse practical consequences. Meza's expansive interpretation of the Labor Code, which reaches well beyond the plain meaning of its text, would do nothing at all to better inform employees, but would present serious challenges for employers

attempting to comply with California's already detailed and complex labor laws.

If the rules Meza seeks were enacted legislatively, then employers would have notice of their obligations, and an opportunity to comply with them. But what Meza wants is retroactive, judicially created rules that give neither notice nor opportunity to comply—yet simultaneously result in substantial damages. That sort of regime is obviously unfair to any employer, but it is all but impossible for national employers who are already subject to a vast patchwork of wage-statement regulations around the nation. And it would create perverse incentives for employers to stop bonus programs to avoid these issues altogether, ultimately harming employees. Meza's broad reading of the substantive provisions at issue would only further encourage the already sizable subset of PAGA litigation that is less about remedying real harms to employees than about generating attorneys' fees.

For all of these reasons, as well as those presented in Pacific Bell's brief, this Court should affirm the Superior Court's orders as to section 226(a).

ARGUMENT

I. The Superior Court Correctly Construed California Labor Code Section 226(a).

As relevant here, California Labor Code section 226 directs that "[a]n employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee … an accurate itemized statement in writing showing" various information listed in the statute. (Cal. Lab. Code, § 226(a).) The claims in this case concern two requirements imposed by section 226(a): that the wage statement show "the inclusive dates of the period for which the employee is paid" (*id.* § 226(a)(6)), and that the statement must reflect "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee" (*id.* § 226(a)(9)). The Superior Court's opinions faithfully construed this text and rejected Meza's atextual and nonsensical construction of the statute. Those decisions should be affirmed.

1. Meza contends that section 226(a)(9) requires Pacific Bell to report overtime adjustments based on its payment of quarterly bonuses in an hourly-rate-and-hours-worked format. The Superior Court correctly rejected this argument, holding that such true-ups need not

include hours and rates for previous periods. The statutory text compels that result.

Section 226(a)(9) instructs that wage statements must reflect "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." By its terms, this provision requires wages earned at an hourly rate to be reflected according to that rate, and the corresponding hours worked. But it obviously *does not* require wages that are *not* earned at an hourly rate to be reported at an hourly rate—otherwise, the wage statement would be required to provide useless, confusing, and misleading information.

The facts of this case demonstrate why Meza's reading of the statute is both atextual and contrary to common sense. It is undisputed that the lump-sum payments coded as "OVERTIME TRUE-UP PMT" in Meza's wage statements were based on incentive bonus compensation, not an hourly wage. The payments in question represent additional compensation associated with overtime hours worked in *earlier* pay periods, triggered by Pacific Bell's payment of variable incentive awards (i.e., bonuses), which retroactively affects the base pay rate that must

be used in calculating overtime pay under California law. (See AA 1274-75.) They thus do not derive from an "applicable hourly rate[] in effect during the pay period" covered by the wage statement. Nor is there any "corresponding number of hours worked" by the employee at any such a rate during the relevant pay period. The Superior Court correctly held that there is no requirement in the Labor Code that wages that *do not* derive from payment of an hourly rate must nevertheless be stated in terms of an hourly rate, particularly when those wages were paid for work *outside* the relevant work period. (See AA 1396-97.)

The familiar maxim that statutes should be read according to the plain meaning of the text suffices to resolve this issue. (See *Olson v. Automobile Club of So. Cal.* (2008) 42 Cal.4th 1142, 1147 ["Statutory interpretation begins with an analysis of the statutory language," and "[i]f the statute's text evinces an unmistakable plain meaning, [the court] need go no further," quotation omitted.].) And following the text is particularly appropriate here, where the alleged violations can often be entirely technical, and yet the statutory penalties are exorbitant. One federal court recently awarded a huge judgment in a wage-

statement case based on a conclusion that a company wrote the wrong thing on pay stubs, without any finding of the kind of substantial harm that one would expect to precede such a large award. (See *Magadia v. Wal-Mart Associates, Inc.* (N.D.Cal. 2019) 384 F.Supp.3d 1058, 1099-1102, app. pending, No. 19-16184 [awarding more than $101 million in section 226(a) case based on conclusion that wage statement should have included retroactive dates and overtime rate for bonus payment overtime true-up].) A decision from this Court applying the text as written would provide critical guidance to both state and federal courts applying section 226(a). Courts should always apply statutes as written, but the potential for such outsized, arbitrary awards raises the stakes: this Court should ensure that such awards do not rest on rules never approved by the Legislature, which ultimately end up hurting employees. (See *infra* § III.)

2. Meza also alleges that Pacific Bell violated section 226(a)(6) because its semimonthly wage statements reflected the pay period during which Pacific Bell made bonus payments, rather than the period during which the employee worked the relevant overtime hours. (See AA 1488.) But it is undisputed that Pacific Bell provides semimonthly

wage statements that reflect the associated pay-period dates in accordance with the ordinary semimonthly pay schedule—it reflects a wage payment during the period when it was paid. (See, e.g., AA 1160.) And as the Superior Court correctly held, "the language of section 226(a)(6) is unambiguous and the dates that are required on the wage statement to comply with the statutory language is that 'for which the employee is *paid*.'" (AA 1488 [emphasis added].) The statute nowhere mentions an obligation to report "when compensation is *earned*." (AA 1489 [emphasis added].) That is, Meza would have this Court replace the word "paid" in section 226(a)(6) with the word "earned."

There is no basis for Meza's atextual reading. The Legislature's "explicit decision to use one word over another in drafting a statute is material." (*SEC v. McCarthy* (9th Cir. 2003) 322 F.3d 650, 656.) "If the statutory language is unambiguous," this Court "presume[s] the Legislature meant what it said, and the plain meaning of the statute controls." (*Mikolsy v. Regents of University of Cal.* (2008) 44 Cal.4th

876, 888.) Here, the Superior Court correctly concluded that the plain language of the statute required rejecting Meza's reinterpretation.

And while the statutory text is enough to resolve this case, it is worth noting that Meza's construction has absolutely nothing to recommend it. The portion of the wage statement about which Meza complains is by its terms supposed to inform employees of the total amount paid during a particular pay period. Yet under Meza's reading, an employee who presumes that the statement reflects how much her employer paid her during that period would be wrong—the information would instead reflect *other* dates on which she was *not* paid. That would certainly be confusing, but it could be even more harmful than that—it could result, for example, in an employee misreporting income on tax forms. The only possible reason to press for that rule is to conjure up a meritless class action, at the expense of providing accurate information to employees.

II. Meza's Expansive, Atextual Interpretations Of The Labor Code Would Expose Employers To Serious Compliance Burdens

For the reasons already explained, Meza's reading would needlessly confuse employees. His interpretations run counter to the

whole point of section 226(a), which is to accurately inform employees about the details of their earnings. What is more, Meza's reading would impose entirely unwarranted burdens on employers operating in California that should be squarely rejected.

A. Employers Need Sufficient Notice To Comply With The Patchwork of State Wage-Statement Laws

Meza's interpretation of section 226(a) would impute requirements into the Labor Code that the Legislature never adopted, presenting significant practical problems for California employers—especially for national employers with employees in both California and many other states, who are expected to comply with the widely varied requirements in each of those jurisdictions. It would be one thing if the bizarre wage-statement rules Meza presses here were adopted legislatively. Then, employers would be allowed to participate in the legislative process, would have notice of these requirements after they were enacted, and would have time to prepare compliance. What Meza is asking for, though, is new requirements by judicial fiat, which are necessarily retroactive, and thus provide neither notice nor any opportunity to comply and no chance to avoid outsized damages awards.

Such notice is especially important because state wage-statement requirements take many forms, making compliance especially difficult for national employers. The vast majority of States and many municipalities require the issuance of wage statements, but some do not. (See 4 Employment Coordinator Compensation, ch. 37 (Westlaw Mar. 2021 update).) States that do require wage statements disagree about how often they must be provided. (See, e.g., Cal. Labor Code, § 226(a) ["semimonthly or at the time of each payment of wages"]; Conn. Gen. Stat. Ann., § 31-13a, subd. (a) ["[w]ith each wage payment"]; Kan. Stat. Ann., § 44-320 ["[u]pon the request of the employee"]; Mo. Rev. Stat., § 290.080 ["at least once a month"].)

They also impose varied requirements regarding the form the statements must take. For example, some States allow electronic statements (see, e.g., Ariz. Rev. Stat., § 23-351, subd. (E)), while some allow electronic statements only if the employee has access to a printer (see Iowa Code Ann., § 91A.6, subd. (4); Ky. Rev. Stat. Ann., § 337.070; Minn. Stat. Ann., § 181.032, subd. (a)). Other States require paper

statements. (See, e.g., N.M. Stat., § 50-4-2, subd. (B).[2]) Yet another set of States leaves the choice to the employee, but even then there is variation: Some require employers to provide electronic statements by default but allow their employees to opt *out of* electronic statements (Minn. Stat. Ann., § 181.032, subd. (c)), while others require employers to provide paper statements by default but allow their employees to opt *into* electronic statements (Haw. Rev. Stat., § 388-7, subd. (4)).

States also impose widely varying requirements concerning the contents of wage statements. For example, Arizona requires only that the employer list the employee's earnings and payroll deductions. (Ariz. Rev. Stat., § 23-351, subd. (E), (F); see Idaho Code Ann., § 45-609 [similar].) Alaska, by contrast, requires wage statements to list 11 categories of pay-related information. (Alaska Admin. Code, tit. 8, § 15.160, subd. (h).) There is considerable variation among States between these extremes. (See, e.g., Cal. Labor Code, § 226 [nine

[2] Moreover, where paper wage statements are provided, jurisdictions disagree about the form they must take. In Delaware, for example, an employer must in certain cases provide the statement "on a separate slip." (Del. Code Ann., tit. 19, § 1108, subd. (4).) But in Wyoming, the employer must provide the statements on a "detachable part of the check." (Wyo. Stat. Ann., § 27-4-101, subd. (b).)

requirements]; D.C. Code, § 32-1008 [seven requirements, including "[a]ny other information . . . prescribe[d] by regulation"]; Colo. Rev. Stat., § 8-4-103, subd. (4) [six requirements]; Conn. Gen. Stat. Ann., § 31-13a [five requirements]; Ind. Code Ann., § 22-2-2-8, subd. (a) [three requirements].)

Given this patchwork of varied state provisions, it is crucial that state laws provide clear notice of wage-statement requirements before an employer may be exposed to large penalties for non-compliance. It is difficult enough for national employers to keep track of and comply with the multiplicity of state laws where the statutes are interpreted according to their plain terms. Expanding state labor laws to create legal obligations not evident on their face makes the task impossible. And again, hewing to the text is all the more important here because of the steep monetary penalties that result from even an inadvertent failure to comply with the Labor Code's requirements. Although statutory damages under section 226 may be awarded only for knowing and intentional violations, courts have held that a plaintiff may recover PAGA penalties absent any such showing—and even absent any

tangible harm to the plaintiff. (See *Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773, 788.)

B. Meza's Interpretation Of Section 226(a)(9) Produces Significant Compliance Problems And Disincentivizes Bonus Pay

Meza's proposed interpretation of section 226(a)(9) raises more specific and troubling compliance concerns. Meza reads section 226(a)(9) to require employers to somehow manipulate retroactive overtime pay owed if the employer chooses to issue discretionary bonuses—amounts that are calculated according to a complex formula—into a format reflecting an "hourly rate[] in effect during the pay period and the corresponding number of hours worked … by the employee." (Cal. Lab. Code, § 226(a)(9).) As the Superior Court in this case recognized, the overtime adjustment is a complex calculation that does not represent a straight-line relationship between an hourly wage and hours worked. (See AA 1395.)

Given these compliance challenges, Meza's proposed rule would simply discourage employers from paying discretionary bonuses that trigger overtime true-up payments they have no means of adequately reporting. That absurd outcome obviously does not benefit California

employees, and thus perversely undermines the main employee-protective purpose the Labor Code is meant to further. The Superior Court correctly rejected a statutory construction that harms California employees.

III. Meza's Position Invites Frivolous Litigation That Harms California Employers and Employees

Beyond its obvious doctrinal flaws, if accepted, Meza's suggestion that this Court construe section 226(a) broadly and impose confiscatory penalties for what are, at most, purely technical violations would have significant adverse practical consequences, further encouraging lawyer-driven lawsuits in an area of the law that is already rife with abuse.

Since PAGA was enacted in 2004, "it has become common practice for plaintiffs in employment actions to assert a PAGA claim, as the potential civil penalties for violations can be staggering and often greatly outweigh any actual damages." (Matthew J. Goodman, *The Private Attorney General Act: How to Manage the Unmanageable* (2016) 56 Santa Clara L.Rev. 413, 415 [quotation omitted].) The number of PAGA suits filed annually increased by more than 400 percent between 2004 and 2014 (*id.* at p. 415 & fn.7), and the trend shows no signs of slowing down. A record number of PAGA claims—more than 5,700—

were filed with the California Labor and Workforce Development Agency ("LWDA") in 2018, up 15 percent from 2017. (Suzy Lee, *"We've Received A PAGA Notice—Now What?" An Employer's 10-Step Guide* (July 1, 2019).[3]) LWDA anticipates this number will exceed 7,000 per year by 2022. (Cal. Dept. of Industrial Relations, Budget Change Proposal, at p. 7 (2019).[4]) A small group of plaintiffs' lawyers brings a disproportionately large number of these suits. According to one court filing, "over 100 firms have sent 50 or more PAGA Notices to the LWDA since the law was enacted," and five firms have sent more than 500. (Complaint at 35-36, *Cal. Business & Industrial Alliance v. Becerra* (Super. Ct. Orange County, Nov. 28, 2018, No. 30-2018-01035180-C*-JR-CXC).)

The flurry of PAGA lawsuits in recent years includes many cases pressing claims that do not address any real harm to employees, and instead appear designed to extract settlements and collect attorneys' fees. (See, e.g., *Mays v. Wal-Mart Stores, Inc.* (C.D.Cal. 2019) 354

[3] https://www.fisherphillips.com/pp/newsletterarticle-weve-received-a-paga-notice-now-what.pdf?28678.

[4] https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf.

F.Supp.3d 1136, 1144 [alleging paystubs stated employer was "Walmart" instead of legal name "Wal-Mart Stores, Inc."], *affd. in part and revd. in part* (9th Cir. 2019) 804 F.App'x 641, 643; *Clarke v. First Transit, Inc.* (C.D.Cal. Aug. 11, 2010) 2010 WL 11459322, at *2 [alleging paystubs identified employer as "First Transit" instead of legal name "First Transit Transportation, LLC"]; *Jones v. Longs Drug Stores Cal., Inc.* (S.D.Cal. Sept. 13, 2010) 2010 WL 11508656, at *1 [alleging paystubs included last 4 digits of employee's social security number instead of full number and listed employer as "Longs Drug Stores" instead of "Longs Drug Stores California, Inc."].)

PAGA settlements, even those that involve more substantive allegations, often do little to benefit employees but greatly enrich the lawyers who bring the suits. For example, in 2018, Uber settled PAGA claims based on its alleged misclassification of drivers as independent contractors for $7.75 million; under the terms of the settlement, individual drivers will receive "roughly $1 each." (Alexander M. Tait, *The Gang Settles a Labor Classification Suit: The Price-Uber Settlement*

Has Finally Been Approved (Jan. 25, 2018) Lejer[5]; Melissa Daniels, *Calif. Judge OKs $7.75M Uber Driver Deal Over Objections* (Jan. 16, 2018) Law360.[6]) In 2019, Safeway agreed to pay $12 million to settle PAGA claims; plaintiffs' counsel walked away with $4.2 million in fees, while the class of 30,182 cashiers was allotted an average of about $62 each. (See Dorothy Atkins, *Safeway Gets Nod for $12M PAGA Deal Ending Seating Suit* (Oct. 18, 2019) Law360.[7]) Safeway previously settled PAGA claims related to allegedly inaccurate pay stubs for $1.45 million, of which plaintiffs' counsel sought to recover up to $483,333. The workers would receive an average of $23.19. (See Dorothy Atkins, *Safeway's $1.45M PAGA Deal Over Pay Stubs Gets Initial OK* (Aug. 16, 2019) Law360.[8]) In 2018, Target paid $9 million to settle several PAGA suits, $3.9 million of which was allocated to attorneys' fees while 90,000

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[5] https://thelejer.wordpress.com/2018/01/25/the-gang-settles-a-labor-classification-suit-the-price-uber-settlement-has-finally-been-approved/.

[6] https://www.law360.com/articles/1002461/calif-judge-oks-7-75m-uber-driver-deal-over-objections.

[7] https://www.law360.com/corporate/articles/1211009/safeway-gets-nod-for-12m-paga-deal-ending-seating-suit.

[8] https://www.law360.com/articles/1189549/safeway-s-1-45m-paga-deal-over-pay-stubs-gets-initial-ok.

cashiers were left to share the $1.2 million that remained after attorneys' fees, costs, named plaintiff awards, and the LWDA's share were deducted—an average of about $13 each. (See Dorothy Atkins, *Target's $9M PAGA Deal Ending Seating Suits OK'd* (July 24, 2018) Law360.[9]) Walgreens settled a similar PAGA suit for $15 million in 2019, with class counsel collecting $5.2 million in fees. (See Dorothy Atkins, *Walgreens' $15M PAGA Deal Ending Seating Suit Gets OK'd* (Aug. 6, 2019) Law360.[10])

A full solution to these problems, of course, ultimately rests with the California Legislature. The Legislature took a small step in that direction in 2018 when it passed a bill creating a carve-out barring certain construction-industry workers from bringing PAGA claims, responding to concerns that although "PAGA was a well-intentioned law," "it has, in many cases, become another form of litigation abuse by unscrupulous lawyers." (Sen. Comm. on Labor and Industrial Relations, Analysis of Assem. Bill No. 1654 (2017–2018 Reg. Sess.) June

[9] https://www.law360.com/articles/1066403/target-s-9m-paga-deal-ending-seating-suits-ok-d.

[10] https://www.law360.com/articles/1185801/walgreens-15m-paga-deal-ending-seating-suit-gets-ok-d.

18, 2018, p. 3; *see* Cal. Labor Code, § 2699.6.) But unless and until more comprehensive state-law reforms are adopted, the high risk of abuse in PAGA actions underscores the importance of ensuring that the Labor Code is not interpreted in an atextual and overbroad manner—especially when such a reading would not benefit employees in any way, and would instead seriously risk misleading them, all in the interest of enriching their lawyers.

CONCLUSION

For the reasons stated above, as well as in Pacific Bell's brief, the Superior Court's decisions below should be affirmed as to section 226(a).

Dated: March 24, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

I hereby certify, pursuant to Rule 8.204(c)(1) of the California Rules of Court, the Brief of Chamber of Commerce of the United States in Support of Respondent Pacific Bell Telephone Company contains 3,795 words, not including tables of contents and authorities, the signature block, and this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: March 24, 2021

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PROOF OF SERVICE

I, Heather Welles, declare:

I am employed in the County of Los Angeles, State of California. My business address is O'Melveny & Myers LLP, 400 South Hope Street, 18th Floor, Los Angeles, California 90071. I am over the age of eighteen years and not a party to the action in which this service is made.

On March 24, 2021 I caused to be served the document(s) described as

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submitted by Amici Curiae Chamber of Commerce of the United States of America and California Chamber of Commerce on the interested parties in this action as follows:

☒ (By Electronic Service) Pursuant to California Rules of Court, rules 2.251(a)(2) and 2.251(a)(3), by submitting an electronic version of the document(s) to TrueFiling, through the user interface at www.truefiling.com, I caused the document(s) to be sent to the person(s) listed on the attached service list.

☒ (By U.S. Mail) On the same date, at my said place of business, copy enclosed in a sealed envelope, addressed as shown on the attached service list was placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 24, 2021, at Los Angeles, California.

/s/ *Heather Welles*

Heather Welles

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