UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LUCILLE S. TAYLOR,

Plaintiff,

v.

DENNIS M. BARNES, in his official capacity as President of the State Bar of Michigan Board of Commissioners; ROBERT J. BUCHANAN, in his official capacity as President-Elect of the State Bar of Michigan Board of Commissioners; DANA M. WARNEZ, in her official capacity as Vice President of the State Bar of Michigan Board of Commissioners; JAMES W. HEATH, in his official capacity as Secretary of the State Bar of Michigan Board of Commissioners; and DANIEL D. QUICK, in his official capacity as Treasurer of the State Bar of Michigan Board of Commissioners;

Defendants.
_____/

Case No. 1:19-cv-00670

Hon. Robert J. Jonker

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Ms. Taylor's response to Defendants' summary-judgment motion is notable for what it does not do. She does not contest that her claims fail as a matter of law under *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990). She passes over that *Lathrop* long predated *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and therefore was unaffected by *Abood*'s overruling in *Janus v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448 (2018). She fails to rebut that SBM's[1] nonexpressive activities, such as the Client Protection Fund, have nothing to do with the First Amendment. And she does not explain why the Supreme Court's rejection of the state interests supporting mandatory union agency fees in *Janus* carries over to the fundamentally different state interests served by integrated bars.

The arguments Taylor does make in response to Defendants' motion do not hold water. Taylor persists in asking this Court to ignore directly controlling Supreme Court precedents. The parallels she draws between lawyers and union members do not exist. And her arguments that SBM's limited speech is not government speech disregard SBM's background and purposes, not to mention the Michigan Supreme Court's ongoing control. This Court should follow *Lathrop* and *Keller* and enter judgment in favor of Defendants.

[1] This brief uses the terms defined in Defendants' initial brief, R.20, as well as the record citation format employed therein.

REPLY ARGUMENT

I. *Lathrop* and *Keller* directly control this case and mandate summary judgment in Defendants' favor

Taylor does not dispute that her free-association and compelled-speech claims fail as a matter of law under *Lathrop* and *Keller*. That concession is fatal to her case. The Supreme Court's "decisions remain binding precedent until [the Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252–53 (1998). This "vertical" form of "*stare decisis* is absolute, as it must be in a hierarchical system with 'one supreme Court.'" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (quoting U. S. Const., Art III, § 1). Indeed, "the state courts and the other federal courts have *a constitutional obligation* to follow a precedent of th[e Supreme] Court unless and until it is overruled by th[at] Court." *Id.* (emphasis added).

Taylor says that this well-established rule is an "anomaly" from a single Supreme Court decision, *Agostini v. Felton*, 521 U.S. 203 (1997), and that it applies only in the context of the law-of-the-case doctrine. Resp. Br. at 2, PageID.236. Not so. The rule that only the Supreme Court has the prerogative to overrule its decisions long predated *Agostini*. *E.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). The Supreme

Court and lower federal courts have regularly applied it since. *E.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (summarily reversing when the lower court failed to follow the rule); *Grutter v. Bollinger*, 288 F.3d 732, 743 (6th Cir. 2002) (en banc) (applying the rule), *aff'd*, 539 U.S. 306 (2003).

Every court considering post-*Janus* challenges to integrated bars like Taylor's has applied this rule and declined to hold that *Janus* implicitly overruled *Lathrop* or *Keller*. *Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257, at *1 (7th Cir. Dec. 23, 2019) ("The district court, in its thorough and well-reasoned order, correctly held that the appellants' claims are foreclosed by *Keller*."), *cert. denied*, No. 19-831, 2020 WL 2814314 (U.S. June 1, 2020); *Fleck v. Wetch*, 937 F.3d 1112, 1114–15, 1118 (8th Cir. 2019) ("[A]s *Janus* did not overrule *Keller* . . . *Janus* does not alter our prior decision [affirming dismissal] . . . ."), *cert. denied*, 140 S. Ct. 1294 (2020); *McDonald v. Sorrels*, No. 19-CV-00219, 2020 WL 3261061, at *5 (W.D. Tex. May 29, 2020) ("*Janus* did not disturb the binding holdings of *Lathrop* or *Keller*."); *Boudreaux v. La. State Bar Ass'n*, No. 19-CV-11962, 2020 WL 137276, at *24 (E.D. La. Jan. 13, 2020) ("The Court must, therefore, apply *Lathrop* and *Keller* . . . ."); *Schell v. Gurich*, 409 F. Supp. 3d 1290, 1298 (W.D. Okla. 2019) (declining "to speculate as to whether the Supreme Court might reach some different result if it were to revisit either *Lathrop* or *Keller*"); *Gruber v. Or. State Bar*, No. 18-CV-1591, 2019 WL 2251826, at *9 (D. Or. Apr. 1, 2019) ("[T]his court . . . must apply *Keller* to the cases at bar.").

Even Justice Thomas, in his dissent from the denial of certiorari in *Jarchow v. State Bar of Wisconsin*, No. 19-831, 2020 WL 2814314 (U.S. June 1, 2020) (mem.), acknowledged the rule's application to all *Janus*-based challenges to integrated bars: "[A]ny challenge to our precedents will be dismissed for failure to state a claim . . . . *Short of a constitutional amendment, only we can rectify our own erroneous constitutional decisions.*" 2020 WL 2814314, at *2 (Thomas, J., dissenting from denial of certiorari) (emphasis added).

Taylor acknowledges none of these cases. Instead, citing no law, she asserts that "[i]t does not matter that *Lathrop* and *Keller* where [sic] cases specifically on integrated bars and the First Amendment while *Janus* was not" because *Janus* announced a new "First Amendment legal standard." Resp. Br. at 2, PageID.236. This assertion suffers from numerous flaws. To start, the Supreme Court has already recognized that *Keller* "fits comfortably within the [exacting scrutiny] framework" that the Court applied in *Janus* and its precursors. *Harris v. Quinn*, 134 S. Ct. 2618, 2643–44 (2014). In other words, the Court's application of exacting scrutiny did *not* "call [*Keller*] into question." *Id.* at 2643.

What's more, the distinction Taylor draws has no basis in law or fact. Take, for example, *United States v. Hatter*, 532 U.S. 557 (2001), in which the Supreme Court overruled *Evans v. Gore*, 253 U.S. 245 (1920). *Evans* held that the Constitution's Compensation Clause barred the application to a federal Article III judge of an income tax enacted after the judge's appointment. 253 U.S. at 264. Five years later, in *Miles v. Graham*, 268 U.S. 501 (1925), the Supreme Court extended

Evans to taxes enacted before a judge was appointed. 268 U.S. at 509. A short time after that, the Court explicitly overruled *Miles*. *O'Malley v. Woodrough*, 307 U.S. 277, 282–83 (1939). Although that decision's reinterpretation of the Compensation Clause's requirements implicitly "repudiated *Evans*' reasoning," *Hatter*, 532 U.S. at 570, the Court did not *explicitly* overrule *Evans*.

Decades later, in *Hatter*, several federal judges sued the Government, alleging that the extension of Social Security and Medicare taxes to federal employees *after* the judges took the bench violated the Compensation Clause. *Id.* at 560–61. So, the judges' claims were governed by *Evans*, insofar as it remained good law, and the court of appeals applied it to the case. *Id.* at 567. Notwithstanding its ultimate decision to overrule *Evans*, the Supreme Court observed that "[t]he Court of Appeals was *correct* in applying *Evans* . . . , given that 'it is this Court's prerogative alone to overrule one of its precedents.'" *Id.* (emphasis added) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

Taylor's dissertation on the Supreme Court's shopping-center protest cases does not support a different result. Resp. Br. at 3–8, PageID.237–242. In its opinion in *Hudgens v. NLRB*, 501 F.2d 161, 167 (5th Cir. 1974), the Fifth Circuit decided a statutory question, not a constitutional one. 501 F.2d at 167 ("[W]e agree that the rule suggested by amicus, although having its genesis in the constitutional issues raised in *Lloyd*, isolates the factors relevant to determining when private property rights of a shopping center owner should be required to yield to *the section 7 rights* of labor picketers." (emphasis added)), *vacated*, 424 U.S. 507.

Moreover, in deciding that question, the Fifth Circuit effectively applied the First Amendment standard announced in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), as it was subsequently interpreted by the Supreme Court in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). *Compare Lloyd*, 407 U.S. at 563 (describing *Logan Valley* as being limited to picketing (a) that is directly related to the use to which a shopping center is put and (b) occurring when the store was in the center of a large private enclave so the pickets had no reasonable alternative means to convey their message), *with Hudgens*, 501 F.2d at 167 (considering the relationship between the picketing and the normal functions of the mall and the availability of alternatives to picketing in the mall). What's more, as Justice White noted in his *Hudgens* concurrence, *Logan Valley* was *not* directly controlling precedent in *Hudgens*: "[o]n its face, *Logan Valley* d[id] not cover the facts of" *Hudgens*, and "[t]he First Amendment question in [*Hudgens*] was left open in *Logan Valley*." *Hudgens v. NLRB*, 424 U.S. 507, 525 (1976) (White, J., concurring in the result); *accord id.* at 523 (Powell, J., concurring) (agreeing that "the present case can be distinguished narrowly from *Logan Valley*"). In other words, the Fifth Circuit had no obligation to apply *Logan Valley* rather than *Lloyd* (even though, as noted, it effectively did).

In short, this Court should decline Taylor's invitation to hold that *Janus* implicitly overruled *Lathrop* and *Keller*. Given Taylor's concession that her claims fail under those controlling precedents, this Court need not go further and should enter judgment in favor of Defendants without further analysis.

II. *Harris* supports the conclusion that *Keller* survived *Janus*

Notwithstanding *Harris*'s explicit recognition that *Keller* "fits comfortably within the [exacting scrutiny] framework," 134 S. Ct. at 2643, Taylor asserts that *Harris* somehow cuts against Defendants because "[i]t would wait until *Janus* for a higher level of scrutiny to be applied to free speech matters" and *Harris* "directly connects attorneys subject to integrated bars to the public employees who would get their rights upheld in *Janus*," Resp. Br. at 10–11, PageID.244–245. But *Janus* applied the same level of scrutiny as *Harris*. 138 S. Ct. at 2465. Moreover, *Harris* is devoid of anything connecting attorneys to public employees. Quite the opposite, the *Harris* Court explained why, given the unique state interests justifying the integrated bar *in contrast to those justifying agency fees*, its decision did not "call [*Keller*] into question." 134 S. Ct. at 2643–44.

III. Labor unions and integrated bars are materially different

Taylor makes an array of assertions regarding the purported equivalence of lawyers paying bar dues and public employees compelled to pay "fair share fees" to unions to fund collective-bargaining activities. That equivalence is false.

A. Labor unions serve private interests; SBM serves the public interest

Taylor attempts to rebut the distinction between the *interests* that unions (private) and SBM (public) serve by noting that unions *speak* on matters of public concern. Resp. Br. at 23–24, PageID.257–258. That argument misses the point. When unions speak—even if that speech touches matters of public concern—they do so to advance their members' *private* interests. By contrast, when SBM speaks, it

speaks to advance the *public* interest and not to represent the private interests of any individual lawyer. Defs.' Br. at 25–26, PageID.211–212.

B. SBM's primary activities are nonexpressive

In response to the reality that SBM's primary activities are nonexpressive, Defs.' Br. at 16–20, PageID.202–206, Taylor's sole rejoinder is that "[i]t would seem odd that an organization by and for lawyers is considered nonexpressive when it is a profession that operates almost entirely by using language to advocate," Resp. Br. at 24, PageID.258. It's true, of course, that the legal profession uses written and oral expression. But the fact that a profession engages in an activity doesn't mean that its regulator does so too. The Securities and Exchange Commission doesn't offer or sell stock. The Federal Aviation Administration doesn't build or fly planes. The inconvenient truth is that the vast majority of SBM's activities are nonexpressive, and the mandatory association and exaction of dues to support those activities does not impinge on the First Amendment. Defs.' Br. at 15–20, 37, PageID.201–206, 223.

C. SBM speaks on less controversial issues related to the legal profession and the administration of justice

Acknowledging that unions speak on controversial political issues, Taylor asserts that SBM's speech is the same because any debate can become controversial. Resp. Br. at 25, PageID.259. Taylor also says that she need not identify an SBM position with which she disagrees because she has brought a facial challenge. *Id.* at 26, PageID.260. But her inability to articulate any disagreement

shows that SBM's limited expressive activities are far more anodyne than those of unions.

Instead, Taylor notes that the *Michigan Bar Journal*—a publication "intended to address the educational and ethical standards *of the bar*," JSMF ¶ 27(n), PageID.89 (emphasis added)—recently published an issue organized around legal issues affecting the LGBTQA community. But two features of the *Michigan Bar Journal* materially distinguish it from SBM's public-policy advocacy. To begin, the *Michigan Bar Journal* is directed toward not the public but SBM's members themselves. *Id.* SBM necessarily must have the ability to communicate with its members. *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (recognizing that "government has to say something" to govern (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting))).

In addition, no one is confused as to whether the *Michigan Bar Journal*'s content has the imprimatur of every SBM member. As Taylor herself notes, the bylines on articles in the *Michigan Bar Journal* do not name SBM as the author but rather the unpaid volunteers who contributed them. Resp. Br. at 26, PageID.260. SBM simply provides the vehicle to publish; it does not author or endorse the content. And as Taylor implicitly admits, SBM does so in a viewpoint-neutral manner, *id.* ("It doesn't matter if . . . alternate viewpoints are presented.")—which, contrary to her assertion, is a distinction of constitutional significance, *see Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233–34 (2000) ("We conclude that the University of Wisconsin may sustain the extracurricular

dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle."). If Taylor disagrees with an article, she is free to submit her own.

D. Michigan's interest in regulating the profession and improving the quality of legal services is far weightier than the interest justifying agency fees

Taylor complains that the Michigan Rules of Professional Conduct merely *encourage* lawyers to "seek improvement of the law, the administration of justice[,] and the quality of service rendered by the legal profession," JSMF ¶ 60, PageID.94–95; MRPC 1.0 cmt., so any organization seeking to advance those goals necessarily must be voluntary, Resp. Br. at 27, PageID.261. But given that lawyers "act . . . 'as assistants to the court in search of a just solution to disputes,' " *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (quoting *Cohen v. Hurley*, 366 U.S. 117, 124 (1961)), and are "essential to the primary governmental function of administering justice," *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975), it is difficult to discern the basis of Taylor's objection. Failing to seek improvement of the law or the administration of justice may not lead to censure from the Michigan Attorney Discipline Board—but why should that preclude Michigan from nonetheless encouraging lawyers to undertake such efforts, as it does through SBM? *See* Defs.' Br. at 28–29, PageID.214–215.

Taylor also asserts, without citation, that "states without integrated bars still fulfill their states' interests in regulating the profession through disciplinary measures." Resp. Br. at 29, PageID.263. Even assuming that were true, reactive discipline—after a lawyer breaches his professional obligations, if at all—is a blunt

instrument for serving the state's broader "interest in regulating the legal profession *and improving the quality of legal services*." *Harris*, 134 S. Ct. at 2643–44 (emphasis added) (quoting *Keller*, 496 U.S. at 14). The voluntary-bar states evidently have weighed their interests differently than Michigan. But that hardly proves that voluntary-bar states have identified a means significantly less restrictive of associational freedoms to achieve the interests that *Michigan* has elected to serve. Defs.' Br. at 39–43, PageID.225–229. It shows only that some states choose to respond *reactively* to bad lawyering while others—including Michigan—choose to act *proactively* to improve the bar and the delivery of legal services.

E. Unlike public employees represented by a union, SBM's members retain their ability to speak their own mind

Taylor last protests that public employees represented by a union have "exactly" the same ability to speak out as SBM's members. Resp. Br. at 29, PageID.263. But a public-employee union's core activity is to act as employees' *exclusive representative* in bargaining with their employer, the government. In other words, those represented by the union have *no right* to directly bargain by expressing their own views to the employer. *See Janus*, 138 S. Ct. at 2478 (recognizing that *Janus*'s holding did not undermine state requirements "that a union serve as exclusive bargaining agent for its employees," which themselves work a "significant impingement on associational freedoms").

By contrast, SBM is "not in any way [Taylor's] exclusive representative in the collective-bargaining sense." JSMF ¶ 47, PageID.93. Taylor and other SBM members are always free to participate directly in the very same exchanges in

which SBM participates and to join other associations that advocate *against* SBM's positions in those discussions. *Id.* ¶¶ 46–48, PageID.93. In fact, SBM encourages, rather than squelches, such speech by members. Defs.' Br. at 30–31, PageID.216–217. Unlike public employees—who receive nothing but a muzzle in return for paying their fair-share fees to a union—SBM members are given platforms for expressing their views to other members, to SBM, to judicial and other government officials, and to the public.

IV. SBM engages in government speech

Finally, Taylor says—as she must—that in addition to bypassing *Keller*, this Court should also hold that SBM engages in private speech. Resp. Br. at 12–23, PageID.246–257. Defendants' initial brief explained that SBM engages in government speech unconstrained by the First Amendment for two independent reasons: (1) SBM is a state agency and part of the government, and (2) the Michigan Supreme Court has set the parameters of SBM's speech and retains full authority over its activities. Defs.' Br. at 31–37, PageID.217–223. Taylor's attempt to discount these reasons fails.

To start, Taylor does not meaningfully respond to Defendants' argument that SBM, as a public body corporate subject at all times to the Michigan Supreme Court's complete control, is a part of the government. Taylor's sole rejoinder is that her admission on this point does not appear in the Joint Statement of Material Facts. Resp. Br. at 22 n.5, PageID.256. But this Court may take judicial notice of Taylor's and her lawyers' press release containing her admission that SBM is a state agency. *See* Fed. R. Evid. 201(b)(2), (c)(2); *O'Toole v. Northrop Grumman*

Corp., 499 F.3d 1218, 1224–25 (10th Cir. 2007) (district court abused its discretion by failing to judicially notice a fact contained on the opposing party's website). What's more, the Michigan Legislature formed SBM as a public body corporate, and the Michigan Supreme Court exercises ongoing control over all of SBM's activities. SBM is a government entity. Defs.' Br. at 34, PageID.220.

On the second point, Taylor relies on *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997)—a case in which the defendant did *not* argue that it engaged in government speech, 521 U.S. at 482 n.2 (Souter, J., dissenting)—and contends that the government-speech doctrine applies only when the speech at issue advances private financial interests. Resp. Br. at 14–15, PageID.248–249. But it cannot be that speaking to advance important governmental objectives as opposed to private pecuniary ones makes speech less attributable to the government.

Next, Taylor argues that SBM is not politically accountable enough to fall within the government-speech doctrine. Resp. Br. at 18–22, PageID.252–256. She notes that *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), distinguished *Keller* by observing that, there, "the state bar's communicative activities to which the plaintiff's objected were not prescribed by law in their general outline and not developed under official government supervision." Resp. Br. at 18, PageID.252 (quoting 544 U.S. at 562). This argument suffers from several flaws. For one, unlike the California bar in *Keller*, SBM's expression is prescribed by law in its general outline and developed under the supervision of the Michigan Supreme Court. *E.g.*, JSMF Ex. C (Admin. Order No. 2004-01) at 1, PageID.130.

Moreover, as Taylor concedes, the Michigan Supreme Court is politically accountable, Resp. Br. at 22, PageID.256, not to mention the Michigan Legislature. Taylor says that this is irrelevant because the RCSBM reserve only a minor role for the Michigan Supreme Court in appointing members to SBM's Representative Assembly. *Id.* at 21, PageID.255. Taylor ignores that the Michigan Supreme Court promulgated the RCSBM. JSMF ¶ 12, PageID.85–86. If the Michigan Supreme Court determined that the Representative Assembly exceeded appropriate First Amendment limits, it could unilaterally modify the assembly's structure and role or eliminate the assembly altogether.

Taylor also complains that the Michigan Supreme Court doesn't, in fact, exercise adequate control over SBM. Resp. Br. at 21, PageID.255. Not so. The Michigan Supreme Court has promulgated various administrative orders concerning SBM's operations, JSMF ¶ 12, PageID.85–86, and the record is devoid of evidence that the Michigan Supreme Court has abdicated its statutory responsibility under Mich. Comp. Laws § 600.904 to oversee SBM. And *Johanns* "stands for the proposition that when the government determines an overarching message and *retains power* to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes." *Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006) (emphasis added). Even Taylor does not suggest that the Michigan Supreme Court lacks power to regulate SBM's speech, so that speech satisfies the *Johanns* test. *Cf.*

Delano Farms Co. v. Cal. Table Grape Comm'n, 586 F.3d 1219, 1228–30 (9th Cir. 2009) (same with respect to industry group).

Taylor last flags the "potential issue," Resp. Br. at 22, PageID.256, noted but not decided in *Johanns*, regarding attribution of the disputed speech to the objecting party. But just as in *Johanns*, there are no facts in the record to support Taylor's claim. There, the statements at issue were attributed to "America's Beef Producers," and the Court held that that term, "standing alone, is not sufficiently specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of" the statements. 544 U.S. at 566. The same is true here, especially given that SBM's expression is never promulgated or published with an indication that is has come from "any [SBM] member or group of members." JSMF ¶ 41, PageID.92.

For all these reasons, the Court should hold that SBM's speech is government speech, and Taylor's claims both fail for that independent reason.

CONCLUSION

Taylor's claims fail as a matter of law both as a matter of precedent and as a matter of logic. What's more, Taylor's claims independently fail because SBM's speech is government speech. For the reasons stated herein and in Defendants' initial brief, Defendants respectfully request that this Court deny Taylor's motion for summary judgment and enter judgment on the merits in favor of Defendants.

Dated: July 27, 2020

/s/ Andrea J. Bernard

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in the Second Case Management Order (R.13) because it contains 3,990 words, excluding the parts of the brief exempted by LCivR 7.2(b)(i). This brief was prepared using Microsoft Word 2016, and that software was used to generate the word count.

Dated: July 27, 2020

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