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# PREVIEW

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# CIVIL PROCEDURE

## Article III “Arising Under” Jurisdiction: Evading Federal Jurisdiction by Amending a Complaint After Removal to Delete Federal Claims

### CASE AT A GLANCE

This appeal from the Eighth Circuit addresses whether a federal district court may decline to hear state claims after a defendant removes litigation to federal court and the plaintiff then amends its complaint to eliminate originally pleaded federal claims.

*Royal Canin U.S.A., Inc. v. Wullschleger*  
Docket No. 23-677

Argument Date: **October 7, 2024** From: **The Eighth Circuit**

By **Linda S. Mullenix**  
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### Issue

May a federal court adjudicate state claims after a defendant removes a case to federal court and, after removal, the plaintiff amends its complaint to eliminate the federal claims on which the removal was based?

### Facts

Anastasia Wullschleger and Geraldine Brewer bought pet food that is manufactured and marketed by Royal Canin and the Nestlé Purina PetCare Company. The companies marketed these products as “prescription pet food” addressing certain pet conditions. The pet owners needed to pay for and obtain a veterinarian’s prescription to purchase these prescription pet food products, a process that mimics obtaining human prescription products.

The pet owners sued the pet food companies in a class action filed in Missouri state court. The lawsuit alleged several theories: that the companies and veterinarians agreed to impose bogus prescription requirements, reduce competition among pet food sellers, condition consumers to purchase prescription pet foods, and misrepresent the efficacy of prescription pet food to prevent or treat certain harmful conditions.

Because the companies marketed and sold these products as “prescription” pet food, they charged higher prices than for ordinary pet food. The pet owners contended that they purchased the pet food on their understanding that these prescription products included medicine that had undergone federal Food and Drug Administration (FDA) testing, and that these special foods would treat their pets’ illnesses. The plaintiffs, on behalf of a class of prescription pet food consumers, alleged that they paid defendants much more for their products than for ordinary pet foods.

The plaintiffs brought their lawsuit alleging claims under Missouri antitrust law, the Missouri Merchandising Practices Act, and an unjust enrichment common-law claim. They contended that the food prescriptions were bogus. They alleged that the plaintiffs’ marketing misrepresented the efficacy and testing of the prescription pet food and the need to acquire a prescription for purchase. The plaintiffs asserted that there was no legal requirement to require such prescriptions and there was no FDA review of the products’ safety or efficacy. Moreover, the plaintiffs contended that consumers could buy pet food with the same ingredients without a prescription.

After the plaintiffs filed their lawsuit, the defendant pet food companies removed the entire lawsuit to federal court, invoking the court's federal question jurisdiction. The defendants' basis for the removal was the plaintiffs' reliance on the federal Food, Drug, and Cosmetic Act (FDCA) governing the branding and misbranding of consumer drugs and violations of FDA regulations. The plaintiffs then moved to remand the case back to Missouri state court, where they originally filed their lawsuit. The district court granted the plaintiffs' request, sending the entire case back to state court.

The pet food companies appealed this remand decision. The Eighth Circuit agreed with the defendants that the remand was unjustified, applying the multifactor balancing test for federal court Article III "arising under" subject matter jurisdiction set forth in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.* See 545 U.S. 3008 (2005). The court found that the plaintiffs' complaint was federal enough to support federal court jurisdiction, including numerous references to FDCA violations. The Eighth Circuit reversed the district court's remand order and sent the case back to the federal court.

Back in federal court the plaintiffs next amended their complaint as of right under Federal Rule of Civil Procedure 15(a). They deleted references to federal law, omitted their request for an injunction, removed the antitrust and unjust enrichment claims but added new civil conspiracy allegations to support defendants' joint and several liability for violation of the Missouri merchandising statute. The amended complaint retained the claim under the Missouri Merchandising Practices Act.

After amending their complaint, the plaintiffs again petitioned the court to remand the case back to state court and filed a motion for "declination of supplemental jurisdiction." This time the court denied the remand. The court indicated that the amended complaint put at issue whether a prescription was required for purchase, which required examination of federal law. Because the court found good federal question jurisdiction, it did not address the question of supplemental jurisdiction over the lawsuit's state claims. The court then dismissed all claims under Federal Rule of Civil Procedure 12 motions, and the plaintiffs appealed to the Eighth Circuit.

On the second Eighth Circuit appeal on the merits of the dismissal, the court *sua sponte* questioned whether the district court retained subject matter jurisdiction over the plaintiffs' state law claims. A unanimous

panel reversed, holding that there was no valid federal question jurisdiction. The court held that the amended complaint superseded the original complaint, rendering the original complaint without legal effect. Construing the facts alleged in the plaintiff's amended complaint, the Eighth Circuit concluded that the plaintiffs' civil conspiracy claim, and the Missouri statutory marketing claim, did not necessarily raise a substantial federal issue applying the *Grable* test. The panel rejected supplemental jurisdiction over the state claims because without original jurisdiction the supplemental jurisdiction statute, 28 U.S. Code § 1367, did not apply.

The plaintiffs' claims, the Eighth Circuit opined, were based on the theory that the manufacturers misled the pet owners to believe that they needed a prescription to purchase the pet food. There was nothing federal about this theory. Because the appellate court found that there was no valid federal question jurisdiction, the court further concluded that the district court lacked the basis to assert supplemental jurisdiction over the state claims in the lawsuit.

The Eighth Circuit acknowledged prior precedents held that an amended complaint deleting a federal question does not divest district courts of jurisdiction in removal cases, but stated it was not bound by precedent because that principle was inconsistent with a 1926 Eighth Circuit decision. *Highway Construction Co. v. McClelland*, 15 F.2d 187 (8th Cir. 1926). The Eighth Circuit deflected forum manipulation concerns, indicating that courts had means to prevent forum manipulation. Displaced from federal court, the defendant manufacturers have appealed to the Supreme Court.

## Case Analysis

The pet food companies' appeal involves four interrelated procedural issues: (1) federal question jurisdiction, (2) removal jurisdiction, (3) post-removal amendment of a complaint, and (4) supplemental jurisdiction. The Federal Rules of Civil Procedure and several fundamental principles interact to govern these aspects of litigation.

Courts have long recognized that a plaintiff is the master of its complaint. A plaintiff may file a lawsuit in federal or state court seeking relief for violations of federal and state law. A defendant sued in state court has the right to remove the entire case to federal court, including all state and federal claims. On removal, the defendant carries the burden of establishing that the court has valid federal jurisdiction. Plaintiffs have the right after

removal to amend their complaint to remove federal claims. Depending on the removal court's jurisdictional finding, the court may retain the entire case, remand the entire case, dismiss the federal claims, and/or retain or dismiss the state claims under supplemental jurisdiction principles.

The nub of the pet food companies' appeal is whether the Missouri federal court had valid subject matter jurisdiction on removal and the effect of the plaintiffs' subsequent amendment of its complaint to excise its federal claims. A plaintiff may choose to sue in federal or state court. If a plaintiff files in federal court initially, the plaintiff must establish valid federal subject matter jurisdiction. However, if a plaintiff files in state court and the defendant removes the case to federal court, the defendant carries the burden of demonstrating valid subject matter jurisdiction. In this lawsuit, the pet companies had the burden upon removal to establish lawful subject matter jurisdiction.

Article III of the Constitution vests judicial power in the Supreme Court and the lower federal courts. Article III § 2 sets forth the scope of federal court subject matter jurisdiction providing for both federal question jurisdiction and diversity jurisdiction. Congress also has enacted various statutes conferring federal court jurisdiction over specialized areas of law such as patents and copyright, bankruptcy, and admiralty jurisdiction.

In 1875, Congress enacted the current federal question jurisdiction statute codified at 28 U.S.C. § 1331, which provides that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, and treaties of the United States." This language, derived from Article III § 2, is known as the courts' "arising under" federal jurisdiction. Since the late 19th century, federal courts have grappled with the meaning of the federal courts' "arising under" jurisdiction. The Supreme Court has addressed the issue of "arising under" jurisdiction several times, and this appeal returns this problem once again for the Court's reconsideration.

What constitutes "arising under" jurisdiction has contributed to at least three interpretative theories. The oldest theory, known as the "original ingredient theory," posits that federal courts have jurisdiction over a plaintiff's cause of action ("the original cause") if it is based in part on federal law. See *Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738, 6 L.Ed. 204 (1824).

In *Osborn*, Chief Justice John Marshall held that the bank's congressional charter authorized federal court jurisdiction in all cases in which the bank was a party.

The second and most expansive formulation of the *Osborn* theory, articulated by Justice Felix Frankfurter, posits there is federal question jurisdiction whenever there is a potential federal question in the case. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (J. Frankfurter, dissenting). *Osborn* authorizes federal question jurisdiction "whenever there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question." In *Lincoln Mills*, the Court took an expansive view of *Osborn* and interpreted the federal National Labor Relations Act as authorizing federal courts to develop a common law of labor relations.

In contrast to the expansive *Osborn* and *Lincoln Mills*, other Supreme Court decisions have eschewed such broad constructions, rejecting the "original ingredient" and "litigation provoking" formulations. See e.g., *T.B. Harms v. Eliscu*, 339 F.2d 823 (2d Cir. 1964) (rejecting Justice Marshall's broad "original ingredient" theory). Thus, Justice Oliver Wendell Holmes set forth a third "creation test" that defined the standard for statutory "arising under" jurisdiction as: "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916).

Justice Holmes's creation test dominated the federal question jurisdictional landscape, but it engendered difficult and competing applications. In 1921, the Supreme Court held that a state lawsuit concerning a title company's investment in federally issued bonds arose under federal law, even though the action was state created. The Court indicated that where it appears that a plaintiff's right to relief depends on the construction of the Constitution or federal law, the federal claim is not merely colorable, and the district court has jurisdiction. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

The Court cabined the *Smith* holding in a state lawsuit brought under the Kentucky Employer's Liability Act, alleging that a plaintiff's injuries resulted from the defendant's failure to comply with the federal Safety Appliance Act. Although the plaintiff argued that the lawsuit implicated a federal regulatory statute, the Court refused to find valid federal jurisdiction by mere reference to federal regulatory standards. *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934).

The federal courts have variously applied the competing *Smith* and *Moore* precedents. In 1986, the Court revisited the “arising under” jurisdiction problem in litigation removed to Ohio federal court where a plaintiff pleaded state claims under Missouri law and misbranding violations of the FDCA. In a 5–4 decision relying on the *Moore* precedent, the Court concluded there was no valid jurisdiction when a complaint alleged a federal statute as an element of a state cause of action, but where Congress determined that there be no private, federal cause of action for a statutory violation. *Merrell Dow Pharmaceutical Inc. v. Thompson*, 478 U.S. 804 (1986). Justice William J. Brennan argued in dissent that the Court’s *Smith* precedent was still good law and should have controlled the case to confer valid federal jurisdiction.

In 2012, the Court determined to resolve the circuit court split concerning application of the *Smith* and *Moore* precedents and in doing so set forth a new test for “arising under” jurisdiction. See *Grable & Sons Metal Prods., Inc v. Darue*, 545 U.S. 308 (2005). In a state quiet title action, a Michigan state plaintiff alleged that the Internal Revenue Service (IRS) failed to provide proper notice under IRS regulations prior to selling his property to satisfy a tax delinquency. The IRS removed the case to federal court and the Court determined that the national interest in providing a federal forum for tax litigation was sufficiently substantial to support an assertion of federal question jurisdiction on removal of the case. The Court articulated a four-part test asking (1) does a state law claim necessarily raise a stated federal issue, (2) is the issue actually disputed, (3) is the issue substantial, and (4) may the federal forum entertain the action without disturbing any congressionally approved balance of federal and state responsibilities?

Plaintiffs may plead a lawsuit in state court that contains state and federal claims. Defendants have a right to remove an entire case to federal court. 28 U.S.C. § 1441 *et seq.*, 28 U.S.C. § 1441(c), after removal plaintiff may petition to remand the case to state court. 28 U.S.C. §§ 1446–1447, contending that the federal court lacks proper subject matter jurisdiction. A plaintiff also may amend its complaint to remove federal claims. If the federal court agrees that federal subject matter jurisdiction is lacking, it may dismiss the case entirely, remand the case to state court, or dismiss only the federal claims but retain the state claims under supplemental jurisdictional rules. 28 U.S.C. §§ 1367(a), 1367(c).

## The Parties’ Arguments

The pet food companies’ appeal focuses entirely on two central arguments: (1) the effect of the plaintiffs’ amendment of its complaint after removal to excise their federal claims, and (2) the federal court’s jurisdiction over supplemental state claims. The companies’ argument is straightforward: first, a plaintiff’s post-removal amendment of its complaint removing federal claims does not divest the court’s jurisdiction, and second, the supplemental jurisdiction statute empowers the court to adjudicate state claims even after the plaintiffs’ complaint no longer contains federal claims. The companies contend that the Eighth Circuit’s approach is fundamentally wrong, ignoring the statutory text and interpretive principles governing supplemental jurisdiction.

The pet food companies argue that a plaintiff’s post-removal amendment of its pleadings to eliminate federal claims does not strip a federal court of its jurisdiction over remaining state-based claims, calling this a venerable principle of jurisdiction. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938); *Carnegie Mellon University v. Cohill*, 484 U.S. 343 (1988). In assessing jurisdiction, federal courts look to the original complaint, not the amended complaint. In absence of this principle, the companies contend, plaintiffs could engage in forum manipulation and defeat a defendant’s statutory right to remove a case from state court.

The pet food companies set forth an extensive textual and historical analysis of the supplemental jurisdiction statute Congress enacted in 1990, which the defendants contend codified preexisting principles of supplemental pendent claim and pendent party jurisdiction. Citing the Court’s leading pendent claim precedent, the pet companies assert the Court determined that when a federal claim becomes moot, a district court can nonetheless exercise jurisdiction over remaining state claims. *United Mine Workers of American v. Gibbs*, 383 U.S. 715 (1966). They note that Congress codified other pre-1990 precedents to empower federal judges, in their discretion, to retain supplemental jurisdiction over state claims even when there is no longer a federal question before the court. 28 U.S.C. § 1367(c).

The defendants argue that since congressional enactment of the supplemental jurisdiction statute the Supreme Court and the courts of appeal—including the Eighth Circuit—consistently have ruled that when a defendant removes a case to federal court based generally on a federal claim, a plaintiff’s amendment of the complaint

to eliminate the court's original jurisdiction does not defeat jurisdiction. Thus, "the decision below radically breaks from the statutory text and this longstanding consensus...and permits plaintiffs to engage in aggressive judge and forum shopping."

The pet food companies focus on the supplemental jurisdiction statute Section 1367(c), which sets forth the circumstances in which federal courts may either decline to exercise jurisdiction over remaining state law claims or retain the ability to adjudicate them. They contend that Section 1367's text is unambiguous, and the statute's legislative history supports the conclusion that post-removal amendment does not divest a district court of subject matter jurisdiction or the authority to adjudicate remaining state law claims.

The pet food companies rely on the Court's decision in *Carnegie Mellon University v. Cohill* as a relevant, analogous precedent governing this appeal. In *Cohill*, the plaintiffs filed a state court complaint presenting a federal question, the defendants removed, and then plaintiffs amended their complaint to eliminate the federal question to divest the court's jurisdiction. The Court held that the district court could choose not to continue to exercise jurisdiction but was not compelled to do so. The Court also indicated that a federal judge, in determining whether to remand a case, could consider whether a plaintiff was engaging in manipulative tactics.

The pet food companies argue that the rule concerning post-removal amendments serve as a safeguard against plaintiffs' manipulative judge and forum shopping. In absence of a federal court retaining the ability to adjudicate removed state claims, a plaintiff could plead federal and state claims in state court and then, after removal—if it was unhappy with the presiding federal judge or federal forum—simply amend the complaint to secure a remand back to state court. This type of manipulation, the pet food companies argue, defeats defendants' right of removal.

The pet food companies maintain that the Eighth Circuit's decision departed from every other circuit court that has considered these issues and wrongfully postulated that all doubts about federal jurisdiction must be resolved in favor of remand. They contend that the Eighth Circuit's decision departed from nearly a century's worth of federal precedent. Finally, the defendants indicate that the Eighth Circuit is wrong in believing that the problem of judge and forum shopping

can adequately be addressed by aggressive application of Rule 15.

Like ships passing one another in the night—a very foggy night—the pet owners focus on an argument that the pet food companies do not even address: that the Court should overturn its *Grable* decision that articulated a four-part test for arising under jurisdiction. The pet food companies make short shrift of the threshold federal jurisdiction question, instead tacitly assuming the Missouri district court's valid jurisdiction based on the plaintiffs' pleading of federal causes of action in its original complaint. In contrast, the plaintiffs' appellate brief challenges the notion that an original complaint supplies the basis for determining jurisdiction, arguing the amended complaint after removal supersedes the original complaint. The plaintiffs' brief then canvasses at length the entire "arising under" jurisprudential case line, concluding that the Court's most recent articulation of a test in *Grable* should be overruled.

The pet owners' brief is a lengthy attack at the vagueness, indeterminacy, and fuzziness of *Grable's* four requirements for federal question jurisdiction: the need for a substantial federal issue, necessarily raised and actually disputed, that harms the balance of federal and state concerns. The consumers contend that the Eighth Circuit's finding of federal jurisdiction under this test precisely illustrates why the *Grable* test is unworkable and should be discarded. The plaintiffs urge that the Court replace *Grable* with a simple, black-letter rule that can easily be applied to federal question cases. They invoke recent statements from Justices Clarence Thomas and former Justice Antonin Scalia favoring clear black-letter rules over unclear, nebulous balancing tests such as *Grable*. They pointedly argue to the Court: "A good jurisdictional rule paints with clean lines..."

The gist of the plaintiffs' argument is that the Eighth Circuit erred in determining the federal question jurisdiction with reference to their first complaint. Instead, the purchasers contend that an amended complaint supersedes and replaces an original complaint and therefore its amended complaint contained only Missouri law claims that did not arise under federal law. Thus, the Eighth Circuit incorrectly retained jurisdiction after the amended complaint.

Reviewing the various historical theories for interpreting "arising under" jurisdiction, the plaintiffs contend that the Holmes rule in *American Well Works* is the proper approach and subsequent cases that departed from this

rule were poorly reasoned. The plaintiffs contend that the Holmes rule was in force until the “unprincipled departure” in the *Smith* case, which they characterize as the original sin in complicating arising under jurisdiction. The plaintiffs note that the Court essentially ignored the “aberrational” *Smith* decision for decades, citing *Moore* and other decisions.

Nonetheless, the Court followed the *Smith* original sin—some 70 years after—with endorsement of *Smith* in *Grable*. Comparing the current *Grable* test for arising jurisdiction to a Jackson Pollock canvas, the plaintiffs colorfully suggest that the “Court has been flinging paint on the canvas ever since.” In particular, scholars and some judges have “widely acknowledged” the Court’s jurisprudential framework in *Smith* and *Grable* for determining federal question jurisdiction is egregiously unworkable and should be overruled. The reversal rate for courts applying the *Grable* test is “sky high.” As a jurisdictional rule, the pet food consumers assert that *Grable* is calamitous.

The pet food consumers further argue that this case precisely replicates the same procedural posture as the *Merrell Dow* litigation. In both cases, a plaintiff sued in state court with a complaint alleging state claims and violations of misbranding regulations under the FDCA; in both cases, the defendant removed the case to federal court. In *Merrell Dow*, the Court held that there was no valid federal arising under jurisdiction conferred by the presence of an FDCA claim in the lawsuit. The plaintiffs contend that the Eighth Circuit ignored *Merrell Dow* because it was too confused by *Grable*.

According to the plaintiffs, applying the *Grable* standards, the amended complaint fails to satisfy the four tests for federal question jurisdiction. Whether the Court decides to retain the *Grable* framework or not, the pet food consumers ask the Court to nonetheless apply the *Merrell Dow* precedent and hold there is no valid federal court jurisdiction, and to return the case to state court. They contend that the plain text of Sections 1367 and 1331 compel affirmance of the Eighth Circuit’s decision, and there is no federal jurisdiction no matter which complaint controls.

The plaintiffs interpret the supplemental jurisdiction statute differently than the defendants, arguing that Section 1367’s text makes clear that a current amended pleading controls the jurisdictional inquiry and not the original complaint. They attack the pet food companies’ parsing of the supplemental jurisdiction statute, counterarguing that a plain reading of the text supports

the plaintiffs’ understanding of federal jurisdiction, an argument directed at the Court’s textualist members. They contend that the Court should disregard appeals to the statute’s predecessor pre-enactment cases as well as to atextual references to the statute’s legislative history, which references have proved controversial in other cases.

Finally, in a compendium of miscellaneous arguments, the pet food consumers suggest that the doctrine of *stare decisis* cannot save *Grable* because its reasoning is unpersuasive and the standard unworkable. They argue that *Cohill*’s policy-based concern over the possibility of forum manipulation does not justify upholding federal court jurisdiction. They note there is little reason to believe that forum manipulation occurs in the removal and amendment context and that case citations that mention this concern are “ill-considered dicta.” Appealing to judicial efficiency policy concerns, the pet food consumers ask the Court to observe that the “jurisdictional skirmishes have consumed more than five years of judicial resources for a case that remains at the starting gate.”

## Significance

The pet food companies, and on behalf of all potential business associations and corporations that might be sued in state court, have a substantial stake in the Court’s disposition of this appeal. It is a well-recognized principle that plaintiffs have the initial choice of forum in choosing where they will bring a lawsuit. It is common for plaintiffs to sue in local state courts where they may have advantages of a local jury pool and possibly local favorable judges. To counterbalance the plaintiff’s strategic advantages in state court, federal law provides defendants a right to remove a state case to federal court. A primary reason for this removal right is to guard defendants against unfair local state bias or prejudice.

The importance of this appeal to business communities is evidenced by the amici briefs filed by the allies of corporate America: the Chamber of Commerce of the United States of America, the State Chambers of Commerce, and the Defense Research Institute Center for Law and Public Policy. In common, they inform the Court that, on behalf of American businesses, they have an interest in preservation of correct federal subject matter jurisdictional principles on removal. They point out that defendants often face attempts by opposing parties to defeat jurisdiction after removal by tactics such as those used by the plaintiffs in this case. They suggest

that they have an interest in clear and manageable rules that discourage gamesmanship and avoids duplicative proceedings that increase time and expense of business defendants.

The amici argue that the Eighth Circuit’s decision misapplied longstanding principles of federal jurisdiction, encouraged gamesmanship, and undermined the defendant’s right of removal. They recommend that the Court reverse the Eighth Circuit’s decision. With the petitioner, they contend that when a case is removed to federal court based on a federal claim, an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction. Because the district court in this case retained Article III jurisdiction, supplemental jurisdiction over the state claims remained secure.

Tennessee, joined by 21 other states, filed an amicus brief supporting the respondents, as did Missouri, also on behalf of allied states. The states urge the Court to consider an interpretation of the federal question and supplemental jurisdiction statutes that “respects the role of state courts as the ultimate expositors of state law, rather than one that facilitates continued federal-court jurisdiction over pure state law cases.” The states counsel against an expansive reading of 28 U.S.C. §§ 1331 and 1367 that would permit federal courts to retain removed cases involving only state-law questions.

The Center for Litigation and Courts filed an amicus brief alleging no interest in the outcome of the case, but rather to point out that the Eighth Circuit’s ruling on the timing of the jurisdictional assessment was incorrect. Thus, the removal statute fixes the time of jurisdictional assessment at the time of removal, which does not shift every time a complaint is amended. The Court can reaffirm this rule based solely on the statute without recourse to arguments employing loaded terms such as forum manipulation, gamesmanship, or right of removal.

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