No. 93645-5

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Division III
State of Washington

NO. 336492

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

In re the Custody of
L.Z., Child

Esmeralda Rodriguez,
Appellant,

and

Luis Daniel Zavala,
Respondent.

BRIEF OF *AMICUS CURIAE* CHILD JUSTICE, INC.

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I. INTRODUCTION

This case demonstrates the need for the courts to protect the youngest victims of domestic violence: the children. As set forth herein, exposure to a violent parent can produce pronounced emotional, behavioral, and cognitive effects that often engender harmful physical manifestations in young children. These effects include, but are not limited to: terror, anxiety, developmental delay and learning disability, regressive behavior, frequent illness, lethargy, aversion to touch, separation anxiety, and inability to sleep or sleep fraught with nightmares. A child does not need to be physically struck, or even witness the violence, to be traumatized. To protect these children, children must be included in protection orders, even in instances when the child is not physically present for the violent event.

The respondent, Luis Zavala, has repeatedly and violently attacked appellant, Esmerelda Rodriguez, and threatened to kill her and kidnap or kill their 2 year old son, L.Z. At the court hearing that is the subject of this appeal, Ms. Rodriguez described how, at 2:00 a.m. in the morning, in violation of two prior protection orders, Mr. Zavala:

- Banged on the door of her home;
- forced his way into Ms. Rodriguez's home;
- stated that he wanted to take L.Z.;

- grabbed Ms. Rodriguez's neck and told her "everything was going to end there";
- choked Ms. Rodriguez until she believed that he was going to kill her and she stabbed him in self-defense, and
- was arrested after Ms. Rodriguez's daughter called 911.

Ms. Rodriquez testified that she was frightened, and scared for the safety of her children. She sought protection for herself, L.Z. – whom Mr. Zavala threatened to take that evening – and her other three children, whom Mr. Zavala had also threatened repeatedly. The court, however, failed to adequately protect Ms. Rodriguez and L.Z. The trial judge refused Ms. Rodriquez's request to include L.Z., her youngest child and the only child that Ms. Rodriguez shares with her abuser. The judge did so on the mistaken belief that the two-year old could not be harmed by this violent encounter because he slept through this particular episode. Based on this misapprehension, the court erroneously concluded that L.Z. could not have been harmed and thus need not be included in the protective order.

Exclusion of children from protective orders is, sadly, an all too common and confounding practice in the court system. Young children are consistently left out of these orders despite a scientific consensus that domestic violence exposes those children to staggering health and safety

consequences. Courts either disregard that data or defer to a parent, notwithstanding that parent's violent history or the child's compromised health and safety. This practice must be reversed, as it strips children of their right to be protected from an unsafe environment.

Here, the trial court deprived Ms. Rodriguez's most vulnerable child of his right to protection. Respectfully, this Court must correct this critical error and amend the order so that L.Z. is protected from further harm.

II. IDENTITY AND INTEREST OF THE AMICI

The Identity and Interest of Amicus Child Justice, Inc. is fully set forth in the Motion for Leave to File Brief of Amici Curiae filed herewith. Child Justice, Inc. is a national non-profit organization that advocates for children's rights when the courts fail to protect them in cases of abuse and family violence.

III. STATEMENT OF THE CASE

Appellant Esmeralda Rodriguez has endured a substantial history of domestic violence inflicted against her by respondent Luis Zavala (CP 1-7). Ms. Rodriguez is the mother of four children, aged seventeen, fifteen, eleven, and two. (CP 2). The youngest, L.Z., is the only child that Ms. Rodriguez and Mr. Zavala share. (RP 6).

In the early morning hours of June 14, 2015, Mr. Zavala violated a preexisting protective order when he banged on Ms. Rodriguez's window, said he wanted to see L.Z., screamed demands that she let him inside, and threatened to break in through the window if she did not comply. (CP 5; RP at 5:20-23). Worried that her children would be frightened, Ms. Rodriguez cracked the back door open and repeatedly asked that Mr. Zavala leave. (CP 5). Mr. Zavala disregarded those pleas and forcibly entered the home. (CP 5). He stated that he wanted to pick up L.Z. and take him with him. (RP at 7:9-15). Mr. Zavala was either drunk or had not slept. (RP at 7:14-19).

Mr. Zavala cornered Ms. Rodriguez in the kitchen and began to choke her. (CP 5). He continued to choke Ms. Rodriguez and while doing so, told her he would finish what he started. (CP 5). Terrified for her life, and because she did not want Mr. Zavala to remove L.Z. from her home, Ms. Rodriguez managed to reach for a knife, stabbed Mr. Zavala in the stomach, and screamed for her daughter to call 911. (CP 5; RP at 7:9-8:9).

This was not the first time Mr. Zavala had threatened Ms. Rodriguez and her children. To the contrary:

- When Ms. Rodriguez was pregnant with L.Z., Mr. Zavala – while on drugs – pushed her to the floor (CP 5);
- Mr. Zavala put a pillow over Ms. Rodriguez's head, preventing her from breathing and attempting to suffocate her (CP 5);

- Mr. Zavala told Ms. Rodriguez that everything that has gone wrong with him is her fault (CP 5);

- Mr. Zavala threatened that "he is going to do something to [Ms. Rodriguez's] daughter that is so terrible it is going to make [her] want to kill [herself]" (CP 6);

- Mr. Zavala threatened to kidnap L.Z. and Ms. Rodriguez would never see him again (CP 6); and

- Mr. Zavala took a knife and told Ms. Rodriguez that he would cut her into tiny pieces. (CP 6).

On June 16, 2015, Ms. Rodriguez filed for a protection order against Mr. Zavala, intending for that order to protect herself and all four of her children. (CP 1-7). She cited the June 14th incident and testified as to additional occurrences when Mr. Zavala either accosted Ms. Rodriguez or directly threatened the safety of her children. (CP 1-7). Based on this information, the trial court issued a temporary protection order that did include all four children. (CP 10-14).

At a second hearing on June 26, 2015, Mr. Zavala admitted he violated the protection order. (RP at 4:3-4). Ms. Rodriguez recounted the June 14 break-in and the violent events that transpired. (RP 1-12). Among other things, she told the Court Mr. Zavala demanded to see L.Z. and threatened to "take him with him." (RP at 5:2-23; 7:9-12). Ms. Rodriguez explained that she stabbed Mr. Zavala because he was choking her neck and because she "did not want him to go and grab [L.Z.] and take the boy.

He look[ed] like he was either drunk or . . . [had] not been sleeping all night long or something was wrong with him." (RP at 7:9-19).

Despite Mr. Zavala's violent behavior and threats to forcibly to take L.Z. from the home, the trial court issued an order that excluded L.Z. (RP at 12:11-14). The trial court erroneously concluded that because L.Z. was sleeping in another room during this episode, he "wasn't involved in any of this" and was "not threatened in any manner." (RP at 10:20-11:12; 12: 11-14).

Ultimately, the trial court issued a protection order that excluded L.Z. and also refused to grant Ms. Rodriguez custody over him. (RP at 10:20-11:12; 12: 11-14). The judge specifically addressed Mr. Zavala and stated, "I'm not preventing you from visiting [L.Z.]." (RP at 11:7).

This appeal followed.

IV. ISSUES ADDRESSED BY *AMICI*

Should the trial court be reversed when it declined to include a two-year old boy, L.Z., in an order granting protection to the boy's mother and her other children based on the court's conclusion that the child was not "threatened in any manner" when L.Z. was present in the home (albeit asleep) when his father banged on the door at 2 a.m., threatened his mother, forced his way inside, threatened to take L.Z. forcibly from the

home, grabbed his mother by the throat and choked her, resulting in his mother stabbing his father and his father's arrest?

V. ARGUMENT

As the appellate brief filed on behalf of Ms. Rodriguez explains, the Domestic Violence Protection Act ("DVPA"), RCW 26.50 *et seq.*, represents a strong public policy of stopping domestic abuse and provides for a valuable tool in those efforts, a protection order. *Danny v. Laidlaw Transit Serv., Inc.*, 165 Wn.2d 200, 209, 193 P.3d 125 (2008) (citing LAWS OF 1991, Ch. 301, § 1). As described below, substantial evidence demonstrates that exposure to an abusive environment critically jeopardizes a child's health and safety. Just because L.Z. was sleeping as the violent events of June 14 transpired does not mean that L.Z.'s health and safety were not threatened. Further, the record shows that L.Z. witnessed the aftermath of the assault because L.Z. was exposed to his mother's injuries and endured the obvious fear this attack created. As such, L.Z. was very much a direct part of not only the events leading up to that evening's domestic violence, but the aftermath of that attack as well.[1]

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[1]Where a parent does not harm a child yet is violent towards his spouse, exposure to that violence causes fear in children that the abused parent will be assaulted again. Washington Courts of Appeal consider the psychological harm invoked when a child fears for a parent as "domestic violence" and as a statutory basis for a protection order. *See, e.g., In re Marriage of Stewart,* 133 Wash. App. 545, 551 (Wash. Ct. App. 2006)

Failure to include L.Z. in the trial court's protection order makes L.Z. vulnerable to continued exposure to an environment that will likely endanger his health and safety. Accordingly, the trial court erred and its decision should be reversed.

A. Exposure to an abusive environment severely jeopardizes a child's health and safety, thus L.Z. must be included in the Order for Protection so that he is shielded from that harm.

1. The pronounced health consequences created by a child's exposure to an abusive environment are well documented.

An overwhelming body of evidence demonstrates that exposure to domestic violence is harmful to a child.[2] While children in an abusive environment may not be physically attacked themselves, exposure to violence by one parent against the other is comparable to the effects of actual, physical child abuse.[3][4] Importantly, "exposure" is not confined to

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(affirming an order of protection including children that were not directly assaulted by a violent parent and finding that those children were still harmed).

[2]*See* William G. Austin & Leslie M. Drozd, *Intimate Partner Violence and Child Custody Evaluation, Part 1: Theoretical Framework, Forensic Model, and Assessment Issues,* 9 J.CHILD CUSTODY 250, 280 (2012); Ellen Pence et al., *Mind the Gap: Accounting for Domestic Abuse in Child Custody Evaluations,* Battered Women's Justice Project, June 2012.

[3]*See* Ellen Pence et al., *Mind the Gap: Accounting for Domestic Abuse in Child Custody Evaluations,* Battered Women's Justice Project, June 2012, at 21 (noting "[s]ignificantly, studies show that children who are *exposed* to domestic violence, but who have not been physically or sexually abused themselves, exhibit levels of emotional and behavioral problems, trauma symptoms, and compromised social and academic development comparable to children who are direct victims of physical and sexual abuse") (emphasis added).

witnessing the abuse; rather, a child is still exposed to domestic abuse if that child hears the violence, is forced to endure the aftermath of that violence, or is otherwise aware of the physical assault inflicted by one parent on the other.[5] Exposure to violence engenders significant emotional, behavioral and cognitive effects in young children that in turn have produced harmful physical manifestations in those children's lives.[6] Those effects include, but are not limited to: terror, anxiety, developmental delay and learning disability, regressive behavior, frequent illness, lethargy, aversion to touch, separation anxiety, and inability to sleep or sleep fraught with nightmares.[7]

Exposure to domestic violence and the harm it inflicts on children may invite blame on the surviving parent for allowing for such exposure to continue. However, data supports the premise that "most women make many efforts to protect themselves and their children, while also searching

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[4] *See* Jeffrey L. Edelson et al., *Assessing Child Exposure to Adult Domestic Violence,* 29 CHILDREN AND YOUTH SERVICES REV. 961, 963 (2007) (noting that "exposure" is commonly defined as "being within sight or sound of the violence" and that there are "compelling arguments to redefine and reassess a child's exposure to violent events in broader terms").

[5] *See* Ellen Pence et al., *Mind the Gap: Accounting for Domestic Abuse in Child Custody Evaluations,* Battered Women's Justice Project, June 2012, at 21.

[6] *See A Judge's Guide: Making Child-Centered Decisions in Custody Cases,* American Bar Association Child Custody and Adoption Pro Bono Project 129 (2nd. ed. 2008).

[7] *See A Judge's Guide: Making Child-Centered Decisions in Custody Cases,* American Bar Association Child Custody and Adoption Pro Bono Project 130 (2nd. ed. 2008); *see also* Hon. Victor Reyes, *Custody Decision-Making in Domestic Violence Cases: What Does the Judge Want and Need to See?* (June 18, 2015).

for ways to improve their situation despite tremendous barriers."[8] Ms. Rodriguez sought protection through asking for the court's help to protect her children. The court saw fit to protect three of her children but denied protection to the fourth, most vulnerable child.

Further, the age of a child should not be presumed to discount that child's capability to process domestic violence or suffer the consequences inflicted on his or her physical or mental health.[9] The brain's neural circuits that respond to stress are especially vulnerable during the fetal and early childhood period.[10] Traumatic exposure to domestic violence produces toxic stress that in turn can warp developing brain circuits and stunt a child's ability to cope with stress later in life.[11]

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[8] *In Brief: Battered Women's Protective Strategies*, Nat. Online Resource Center on Violence Against Women (July 2009).

[9] *See* Betsy M. Groves, *Children Who See Too Much: Lessons from the Child Witness to Violence Project* 56 (Beacon Press Books, 2002) (noting "[c]hildren, even in their infancy, show reactions of distress when they are exposed to background anger, defined as adults verbally arguing and yelling" and "[e]ven young children are aware of conflict in the home, and it affects their behavior") (internal citations omitted); *see also* Michael S. Davis, et al., *Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators,* United States Department of Justice, (May 2011); *Excessive Stress Disrupts the Architecture of the Developing Brain,* Harvard University Center on the Developing Child (June 2009) at 4 (noting "[s]cience does not support the claim that infants and young children are too young to be affected by significant stresses that negatively affect their family and caregiving environments").

[10] *Excessive Stress Disrupts the Architecture of the Developing Brain,* Harvard University Center on the Developing Child (June 2009) at 2.

[11] *Excessive Stress Disrupts the Architecture of the Developing Brain,* Harvard University Center on the Developing Child (June 2009) at 2.

Frequent or sustained activation of neural systems designed to respond to stress may contribute to a heightened vulnerability to a range of behavioral and physiological disorders throughout the child's life.[12] The damage created by a child's exposure to domestic violence becomes entrenched so that it propagates a **sustained, long term** harm to the child.[13] Exposure to domestic violence frequently interferes with a child's ability to obtain an adequate amount of high-quality sleep, which coupled with the other effects of exposure to domestic violence can lead to an increased risk of obesity, heart disease, cancer, diabetes, and other medical issues.[14] In the aggregate, children that are exposed to domestic violence suffer from both immediate and longstanding repercussions that can literally cut short a child's life expectancy.[15] Thus, although a young child

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[12] *Excessive Stress Disrupts the Architecture of the Developing Brain,* Harvard University Center on the Developing Child (June 2009) at 2.

[13] *See* Barry Goldstein, *Serious Health Consequences to Children Witnessing Domestic Violence; New Research Requires Changes in Custody Court Practices,* http://www.barrygoldstein.net/important-articles/24-serious-health-consequences-to-children-witnessing-domestic-violence (Feb. 4, 2016) (noting "there is a cumulative adversity so that the more exposure a child suffers the greater the chance of serious medical consequences and the more serious those consequences are likely to be.... when the court or other professionals fail to take sensible actions to safeguard children, or give more consideration to less important factors they are **literally reducing the life expectancy of these children**") (emphasis added).

[14] *See* Barry Goldstein, *Serious Health Consequences to Children Witnessing Domestic Violence; New Research Requires Changes in Custody Court Practices,* http://www.barrygoldstein.net/important-articles/24-serious-health-consequences-to-children-witnessing-domestic-violence (Feb. 4, 2016).

[15] *See* Barry Goldstein, *Serious Health Consequences to Children Witnessing Domestic Violence; New Research Requires Changes in Custody Court Practices,* http://www.barrygoldstein.net/important-articles/24-serious-health-consequences-to-

may not immediately exhibit external signs of physical harm after exposure to domestic violence, there is no doubt that exposure to domestic violence is inevitably processed by young children and continues to jeopardize that child's healthy and successful development into adulthood.

If the trial court's error is not corrected to include L.Z. in the protection order, L.Z. will remain unprotected from his abusive father. Mr. Zavala is a repeat violent wife batterer with a demonstrated refusal to respect prior court orders and someone who has threatened to murder his children. The fact that the trial court refused to grant custody of L.Z. to Ms. Rodriquez makes it inevitable that Mr. Zavala will be able to access L.Z. When the trial court failed to protect L.Z. in the protective order, it increased the likelihood that L.Z. would be exposed to continued episodes of hostility.

Left uncorrected, the trial court's protection order effectively sanctions this toxic exposure, which in turn could subject L.Z. to extensive negative health consequences. If exposed, L.Z.'s behavioral, emotional, physical, and physiological development may very well become stunted. Those ramifications could persist and harm his health throughout his life. Just like his three older siblings, L.Z. should not to be subjected to that

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children-witnessing-domestic-violence (Feb. 4, 2016); *see also* Rosie Gonzalez & Janice Corbin, *The Cycle of Violence: Domestic Violence and its Effects on Children,* 13 ST. MARY'S L. REV. ON MINORITY ISSUES, 405, 407 (2010).

fate. The trial court's decision should be overturned, and L.Z. should be protected from his father.

B. Because domestic abuse often escalates when the abuser is separated from the abused, failure to include L.Z. in the protection order places his safety in jeopardy. Therefore, he must be included in the protective order.

1. Batterers are unfit custodians and exposure to them increases likelihood of harm to a child.

Empirical data supports the conclusion that because Mr. Zavala is a violent abuser, he is significantly more likely to harm L.Z.[16] Granting Mr. Zavala unrestricted access to L.Z. without visitation safeguards is obviously of concern. Violent fathers are more likely to inflict emotional harm on their children as well, through use of negative parenting practices

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[16] *See* Lundy Bancroft, *The Parenting of Men Who Batter,* 36 CT. REV 44 (2002) (noting "[r]oughly half of batterers repeatedly assault children in the home, a rate about 700% that of non-battering men"); Ellen Pence et al., *Mind the Gap: Accounting for Domestic Abuse in Child Custody Evaluations,* Battered Women's Justice Project, June 2012, at 21)(noting "[t]he weight of research demonstrates that 30% to 60% of children living in homes where domestic violence occurs are also physically or sexually mistreated"); Michael S. Davis, et al., *Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators,* United States Department of Justice, (May 2011, at 2) (recommending "[a]bove all, in the assessment of the child's best interest, evaluators should be aware of the high frequency of child abuse by fathers who abuse their intimate partners."); Michael S. Davis, et al., *Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators,* United States Department of Justice, (May 2011, at 7-8) (noting "[t]he best predictor of future behavior is past behavior… severe past abuse of an intimate partner demonstrates a capacity for violence and is an indicator of risk that the perpetrator may repeat injurious assaults or escalate violence."); *A Judicial Guide to Child Safety in Custody Cases,* National Council of Juvenile and Family Court Judges, Family Violence Department, at 6 (2008) (noting "[s]tudies also support that children are at greater risk of being abused when one parent is abused by the other parent").

that include shaming and directing anger towards the child.[17][18] Further, the fact that Mr. Zavala is legally prohibited from access to Ms. Rodriguez exacerbates the likelihood he will compensate by taking his aggression out on the child that he does have access to.[19]

Sadly, judges may overlook or discard the correlation between "a parent who intimidates, isolates, denigrates, and physically abuses his child's mother *and the harm likely to befall a child who is placed in that parent's custody.*"[20] Mr. Zavala has shoved Ms. Rodriguez to the floor while pregnant, attempted to suffocate her with a pillow, threatened to harm Ms. Rodriguez's daughter in such a horrific manner that Ms.

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[17] *See* Ellen Pence et al., *Mind the Gap: Accounting for Domestic Abuse in Child Custody Evaluations,* Battered Women's Justice Project, June 2012; *see also* Lundy Bancroft, *The Parenting of Men Who Batter,* 36 CT. REV 44 (2002) (noting "[b]atterers tend to be enraged and retaliatory for an extended period after a relationship ends, contributing to volatility in their behavior, and they sometimes increase their targeting of the children as a way to frighten or upset the mother because the separation causes a loss of access to avenues to abuse the mother directly....Even **court-ordered visitations** can leave children vulnerable to ongoing abuse by the batterer. ") (emphasis added).

[18] The Court must also consider the likelihood of harm to L.Z. in the event Mr. Zavala succeeds in murdering L.Z.'s mother. As the facts demonstrate, Mr. Zavala has already attempted to strangle and suffocate Ms. Rodriguez. Empirical data supports the fact that "prior non-fatal strangulation [is] associated with greater than six-fold odds of becoming attempted homicide, and over seven-fold odds of becoming a completed homicide." *See* Glass, Nancy, et. al, *Non-fatal Strangulation is an Important Risk Factor for Homicide of Women,* 35 J. EMERGENCY MED. 329 (June 2004).

[19] *See* Gabrielle Davis, et al., *The Dangers of Presumptive Joint Physical Custody,* Battered Women's Justice Project, May 2010, at 13 (noting "[b]atterers generally continue their abuse and violence, and, if they lack access to the primary victim, children often become the main conduit for violence").

[20] *See* Allen M. Bailey, *Prioritizing Child Safety as the Prime Best-Interest Factor,* 47 FAM. L. Q. 35, 48 (Spring 2013).

Rodriguez would want to kill herself, threatened to pull a knife on Ms. Rodriguez and mutilate her body into multiple pieces, threatened to kidnap L.Z. so that he would never see his mother again, and threatened to kill not only Ms. Rodriguez, but every single one of her children.

When the trial court failed to include L.Z. in its protection order, it gave an abusive parent with violent tendencies access to an unprotected child. The court had the ability to protect the child, and to provide Mr. Zavala with residential time, by making provisions for a safe visitation schedule.[21] For all of the reasons set forth in Ms. Rodriquez's appellate brief, that decision was legally incorrect. That decision subjects a young child to continued exposure to domestic violence and to the devastating health and safety consequences inherent within that exposure, when a child's safety must be a court's highest priority.[22]

Accordingly, the trial court's protection order must be amended so that L.Z. is adequately and rightfully protected from his father.

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[21] RCW 26.50.060(d): "On the same basis as is provided in chapter 26.09 RCW, the court *shall* make residential provision with regard to minor children of the parties." Emphasis added.

[22] *See* Peter Salem & Billie Lee Dunford-Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals,* 46 FAM. CT. REV. 437, 443 (July 2008) (noting "[t]here is no doubt that we must place safety first...").

VI. CONCLUSION

This case illustrates the jeopardy to a child's health and well-being created when a court does not understand the emotional and physical toll that can result from domestic violence. Exposure to a violent parent likely engenders critical and long-lasting ramifications to a child's health and safety. Failure to protect L.Z. from his violent father risks substantial emotional and physical harm to L.Z. Courts must not disregard a child's right to be protected from a harmful environment. The trial court's decision should accordingly be overturned.

Dated: February 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2016, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated:

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