

**U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law**

**Written Testimony of
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on behalf of
The Brennan Center for Justice at NYU School of Law**

**Submitted for the
Hearing on H.R. 3764, “The Civil Access to Justice Act of 2009”
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The Brennan Center for Justice at NYU School of Law² thanks Chairman Cohen and the Subcommittee on Commercial and Administrative Law for holding this hearing and for permitting me to testify in support of The Civil Access to Justice Act of 2009, H.R. 3764. This legislation would reauthorize and revitalize the Legal Services Corporation (“LSC”), the cornerstone of our national commitment to equal justice, and provide urgently needed relief to the most vulnerable among us.

One of our nation’s proudest traditions is that of “equal justice for all.” Yet, the unfortunate and persistent truth is that too many Americans are at a great disadvantage in the courts because they cannot afford to pay for attorneys on the private market to help them in civil cases. By most estimates, 80 percent of the legal needs of low-income people go unmet.³ The current recession, with its accompanying foreclosure epidemic, has made matters much worse by pushing more families into poverty and by creating expanded legal need for those homeowners facing foreclosure.

In the face of this challenge, nearly one million individuals receive help each year from a legal services program that works extraordinarily well. LSC-funded programs closed 889,155 cases in 2008, helping those individuals save their homes from eviction or foreclosure, resolve child custody disputes, gain protection from domestic violence, defend against scams that prey upon the poor, and resolve other life-changing legal problems.⁴

By reauthorizing and strengthening LSC, the Civil Access to Justice Act would ensure that our legal aid program can serve more individuals more effectively. By setting authorized LSC funding at the level it had reached in 1981 (adjusted for inflation) – the last time that LSC was able to provide a minimum level of access for people in need across the country – the Act would lay the groundwork for helping significantly more people. By also restoring the balance on restricted activities achieved in the original LSC Act, the bill would enable clients of LSC-funded programs to obtain more efficient and effective assistance. Finally, the bill would improve oversight and governance of LSC and thus strengthen the legal aid infrastructure.

I. AS THE JUSTICE GAP WIDENS, MORE NEED LEGAL HELP

As growing numbers of people slip into poverty and homelessness during the current recession, the need to revitalize our nation’s civil legal aid system is more urgent than ever. At the same time that needs are rising, non-LSC sources of funding are drying up. Therefore, it is especially critical that Congress act now to reinforce our legal aid system.

A. The Recession Has Increased the Need for Legal Aid.

Notwithstanding the clear benefits, the overwhelming majority of people who need legal aid are unable to obtain it, due, in large part, to funding shortages. Every year, almost one million cases are turned away by LSC-funded offices due to funding shortages.⁵ Study after study finds that 80 percent of the civil legal needs of low-income people go unmet.⁶ This “justice gap” keeps families in poverty and threatens the stability of our court system.

The recession has made matters worse. Nearly 54 million people were income-eligible for federally funded legal aid in 2008, up from about 51 million just one year before.⁷ In harsh economic times, civil legal conflicts increase in number and intensity, as do the adverse consequences of leaving them unresolved or resolving them unfavorably. These are just some of the areas in which need is on the rise:

- *Foreclosure and Eviction.* In the first quarter of 2010, foreclosure filings were reported on 932,234 properties, a 16 percent increase from the same period last year; today, one in every 138 housing units in the U.S. is in some stage of foreclosure.⁸ Experts expect that the foreclosure rate will not level out until 2013,⁹ and homeowners will continue to need help negotiating livable solutions. Civil legal aid lawyers help negotiate loan modifications, make sure the foreclosure process is followed properly, defend against predatory lending violations, and assist the large number of tenants who face eviction due to foreclosures against their landlords.¹⁰
- *Domestic Violence.* Organizations that provide support for victims of domestic violence have reported more requests for help amid the recession.

The National Domestic Abuse Hotline, headquartered in Austin, Texas, documented a 21 percent increase in calls from the third quarter of 2007 to the same period in 2008.¹¹

- *Unemployment.* In March 2010, the overall unemployment rate was 9.7 percent, up from 8.6 percent in March 2009 and 4.4 percent in March 2007.¹² There were 182,261 initial claims for unemployment insurance filed in January 2010.¹³ More than 25 percent of employees applying for unemployment benefits today have their claims challenged – a record high.¹⁴ For those who have lost their jobs, a legal aid lawyer can be the difference between receiving properly owed benefits and slipping further into poverty.
- *Food Stamps.* From 2007 to 2009, the number of people receiving Food Stamps jumped to 33.7 million from 26.5 million.¹⁵ As applications rise, so too does the number of people who need legal help making their way through the process in order to feed their families.

B. Shortfalls in State Budgets and IOLTA Revenue Make the Federal Role More Important Than Ever.

Since the creation of LSC, the federal government has funded legal services in partnership with state and local governments, the private bar, local charities and other donors. The federal role is all the more critical now as state-based sources of revenue decline. After LSC grants, state-administered Interest on Lawyer Trust Account (IOLTA) programs are the largest source of revenue for civil legal aid programs across the country. In 2007, IOLTA income reached an all-time high of \$371.2 million nationally.¹⁶ And in 2008, IOLTA revenue accounted for almost 13 percent of the funding for the nonprofit civil legal aid programs that also receive LSC funds.¹⁷

The tremendous decline in interest rates has meant that IOLTA revenue has plummeted. Nationally, IOLTA income fell to \$284 million in 2008, a 25 percent drop in income from 2007.¹⁸ IOLTA income fell another 32 percent in 2009, to about \$92 million, spelling grant declines for legal services programs for years to come.¹⁹ Funding shortfalls resulting in layoffs, salary reductions, and office closures are being reported by legal services programs across the country. Here are the just some of the reports:²⁰

- *Arizona.* The sum of IOLTA grants awarded to legal aid programs dropped from \$2.4 million to \$896,000 in 2008, from \$2.4 million in 2006. As a result, IOLTA funding was able to support only 10 organizations in 2008, as compared to 24 in 2007.²¹ Phoenix-based, LSC-funded Community Legal Services has had to lay off 11 percent of its work force and the number of applicants it must turn away has doubled.²² Anticipating a \$100,000 drop in IOLTA income in 2009, and further losses in 2010, LSC-funded Southern Arizona Legal Aid imposed a hiring freeze and has left nine staff positions –

including six attorney positions – unfilled. The organization has also scaled back its services, offering direct representation in fewer cases.²³

- *California.* Statewide, IOLTA revenue shrunk to an estimated \$7 million in 2009, down from \$22 million in 2008.²⁴ At LSC-funded Bay Area Legal Aid, an expected 50 percent cut in IOLTA funding would mean three layoffs.²⁵
- *Georgia.* The total IOLTA contribution to LSC-funded Georgia Legal Services Program in 2010 was \$1.4 million, half of the prior year’s \$2.8 million. Program officials expect another IOLTA drop of 50 percent in 2010-2011.²⁶
- *Massachusetts.* The Massachusetts Legal Assistance Corporation (MLAC), the largest funding source for civil legal aid in the state, cut its funding for legal services by 54 percent from 2008 to 2009. This was prompted by a cut of \$1.5 million in state funding for MLAC and a \$10 million drop in IOLTA revenue.²⁷ Subsequently, it was expected that client services statewide would fall by at least 18 percent, leaving approximately 20,000 low-income individuals and families without the legal help they need.²⁸
- *New York.* IOLA funding for the state’s civil legal services programs has dropped precipitously, from \$32 million in 2008 to less than \$8 million in 2009 (a 75 percent decline), to an estimated \$6.5 million for 2010.²⁹ Additionally, state appropriations for civil legal services for the poor fell from \$15.3 million in FY 2007-2008 to an estimated \$7.3 million in FY 2008-2009.³⁰ For FY 2010-2011, the state’s chief judge set aside \$15 million from the judiciary’s budget to fund civil legal services, over the Governor’s objection,³¹ but even that additional funding would not cover recent funding losses and increased need.
- *North Carolina.* To stay afloat, LSC-funded Legal Aid of North Carolina has been forced to cut 20 part-time attorney positions and freeze contributions to staffs’ retirement plans.³²

II. CIVIL LEGAL AID MAKES A CRITICAL DIFFERENCE FOR INDIVIDUALS AND COMMUNITIES

Providing legal representation to people in trouble and otherwise unable to afford it has proven to be a success, both for the individuals and families that receive the services, and for our society. The benefits of legal aid reverberate far beyond individual cases. As Congress recognized in the original LSC Act when it stated that “providing legal assistance to those who face an economic barrier to adequate counsel will serve best the ends of justice” and that “for many of our citizens, the availability of legal services has reaffirmed faith in our government and laws.”³³

Legal services lawyers provide a range of services that would otherwise be unavailable to families facing legal problems. In foreclosure cases, for example, lawyers help families stay in their homes or find livable, alternative solutions. In the area of family law, legal services lawyers help victims of domestic violence gain safety through protective and restraining orders and assist parents and other family members fighting for custody of a child. In consumer cases, lawyers protect the elderly and other vulnerable groups from unscrupulous or predatory lenders and help people manage and renegotiate their debt. Where families are hungry or homeless, legal services lawyers help people to appeal wrongful denials of government benefits, allowing for access to the crucial safety net they need.

Having a lawyer makes a measurable difference in a person's case. Studies show that access to a lawyer often provides the critical boost that families need to avoid homelessness, and the key factor that can enable domestic violence survivors to reach safety and obtain financial security.³⁴ Research reveals that a person with legal representation is more than five-times likelier to prevail in court than a self-represented person.³⁵

Legal services programs also serve a critical preventive function, fending off many of the harms that communities experience when representation is unavailable. Thus, by tackling clients' mental health issues, education needs, and family disputes, they contribute to reducing re-arrests of clients with past criminal records. By fighting evictions and foreclosures, they help enable states and localities to reduce the costs associated with maintaining shelters, foster care, and a variety of other services for the homeless. And by helping clients to correct unsafe living and workplace conditions, they help to reduce government expenditures on health care.

III. THE CIVIL ACCESS TO JUSTICE ACT WOULD ENSURE THAT LEGAL SERVICES ARE PROVIDED AS EFFICIENTLY AND EFFECTIVELY AS POSSIBLE

At the inception of LSC, Congress placed some restrictions on the activities of LSC-funded lawyers, but struck a balance that enabled individuals to get essential legal work done.³⁶ For example, Congress banned participation in certain types of cases, including litigation related to military registration, desegregation, and attempts to procure a "non-therapeutic abortion."³⁷ Those restrictions remain in place and are reinforced by this bill. However, in deference to principles of federalism, the original LSC Act did not restrict how state or local government legal aid funds were spent.³⁸ The Act held true to its declaration that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients."³⁹

However, the restrictions imposed in the 1996 appropriations process, and renewed with some modifications since then, marked a clear departure from this balance by sharply curtailing advocacy on behalf of legal services clients. These restrictions cut deeply into low-income people's capacity to secure meaningful access

to the courts, harming them unnecessarily in predatory lending cases, cases arising out of consumer scams, benefits problems, and other civil legal matters. Moreover, the appropriations rider took the extraordinary step of restricting every dollar that an LSC recipient receives from non-LSC sources, including state and local governments, private donors, IOLTA revenue, and other sources. By restricting how state, local and private funds are spent, the appropriations restrictions have squandered precious funds that could have gone toward serving more in need and have intruded on the choices available to state and local governments, as well as private foundations and individual donors, who wish to be partners in innovative efforts to expand access to justice.

The Civil Access to Justice Act would remove the most onerous of the 1996 appropriations restrictions while leaving in place and, in some cases, expanding the restrictions imposed in the original LSC Act. The legislation would restore efficiency to the legal aid system by alleviating the need for state and private funders to establish separate organizations to spend their funds free of the federal chokehold. And it would ensure that low-income individuals are not barred from using legal tools available to every other litigant.

A. The Civil Access to Justice Act Would Make Federal Dollars Go Further By Removing the Restriction on State, Local and Private Funds.

The “poison pill” restriction on non-LSC funds is wholly out of line with the way the federal government treats other non-profit grantees. Many non-profits must strictly account for federal funds, but virtually none are restricted in how they spend their funds from other sources. In 2008, the non-LSC funds restriction tied up more than \$526 million in funding from state and local governments, private donations, and other non-LSC sources.⁴⁰ Nationally, this amounts to nearly 60 percent of the funding at LSC recipients. The federal tail is wagging the dog.

The restriction on non-LSC funds also undercuts the important function that state and local governments, and private donors, can play in closing the justice gap – the restriction prohibits these local authorities from running their own justice systems in the way that they, and their state and local partners, deem best. In certain states with relatively greater amounts of non-LSC funding, justice planners have created entirely separate organizations and law offices, funded by state and local public funders and private charitable sources, and dedicated performing the categories of work that LSC-funded programs cannot do. But, because the restriction requires this work to be done through a physically separate organization, overhead, personnel, and administrative costs are wasted. Dollars that could finance more services urgently needed by families across the country are eaten up by the costs of running duplicate offices.

To illustrate this problem, consider the example of Oregon, where legal aid programs spend approximately \$300,000 each year on duplicate costs to maintain

physically separate offices throughout much of the state.⁴¹ If the restriction on non-LSC funds were lifted, the redundant costs could be eliminated. The significant savings from ending the dual operating systems would enable the legal services organizations to provide coverage for conventional legal services cases – evictions, domestic violence cases, predatory lending disputes – in underserved, rural parts of the state where access to legal assistance is limited.

Removing the restriction would encourage more private donors to be brought into the system as well. For example, Legal Services NYC has been unable to obtain additional funds from a local foundation due to the restrictions on its representation of immigrants. Legal Services NYC partners with 14 community-based organizations in an innovative “Single Stop Program” that provides legal assistance and social services together at outreach sites in community-based organizations around New York City. This effort, which helps families keep their homes, obtain essential medical care, qualify for emergency food benefits, and more, has been funded by a local anti-poverty foundation. Concerned about the needs of New York’s large immigrant population, the foundation added funding to ensure that legal assistance would be provided regardless of immigration status. Because of the restriction on non-LSC money, however, Legal Services NYC could not seek this added funding from the foundation to expand this successful community-based outreach program.

B. The Bill Would Permit Cases to Be Handled More Efficiently and Effectively by Restoring Access to Necessary Advocacy Tools.

Low-income communities face many types of legal problems that could be addressed more effectively and efficiently were they to have access to certain legal tools available to all other litigants. The Civil Access to Justice Act would revert to the balance achieved in the original LSC Act. Restrictions on political advocacy would be maintained to ensure the integrity of the program. However, families and individuals served by LSC-funded organizations would regain equal footing in court and would be permitted to have a voice in legislative and administrative matters affecting them.

1. Removal of Blanket Class Actions Restriction Would Restore Access to Rare But Necessary Device for Effective Representation.

The Civil Access to Justice Act would remove the blanket class action restriction in the appropriations rider. The limitation in the underlying LSC Act – which requires approval of a project director in accordance with established policies prior to filing such an action – would still apply.⁴²

Class actions provide courts and litigants with an efficient mechanism for adjudicating the similar claims of individuals who comprise a group and ensuring that all similarly situated persons obtain relief when a defendant violates the law. This legal tool also provides access to the courts for individuals who might not have the

resources to bring an individual claim. In some cases, the availability of a class action ensures that essential discovery can take place as to a defendant's unlawful actions.

For poor people in particular, the availability of the class action option is critical for obtaining relief from widespread, illegal practices.⁴³ Access to justice and legal services commissions in Georgia, Hawaii, Missouri, New Hampshire, and North Carolina have concluded that the inability to use the class action mechanism hinders legal services offices from providing the best possible services to their clients.⁴⁴ As the North Carolina Legal Services Planning Council has concluded, challenging some "illegal but widespread practices" without a class action lawsuit is "impossible."⁴⁵

The class action limitation has proven to be an enormous obstacle in efforts to combat predatory lending and consumer frauds that target low-income communities. Legal services programs must litigate against unscrupulous players piecemeal, helping one homeowner at a time instead of a broad class of victims. Here are some recent examples:

- For nearly seven years Neighborhood Legal Services of Los Angeles County (NLS-LA) has been working to rid the community of Discount Health Cards whose promises of savings are illusory and whose attempts to profit from medical provider referrals violates California law. NLS-LA clients Manuela and Juan Zermeno were enticed by television advertisements to sign up with Care Entree, a Discount Health Card company, which automatically deducted more than \$700 from their bank account despite the Zermenos' attempt to cancel the card when the dentists referred to them refused to provide the promised discount. After a successful ruling in the California Court of Appeals in the Zermenos' case,⁴⁶ NLS-LA could be forced to abandon the case because of the LSC restriction on class actions combined with recent changes in California law requiring certain cases to be filed as a class action in order to provide injunctive relief to protect the public from illegal and unfair business practices and consumer scams. If that happens, thousands of low-income uninsured Californians will continue to face pressures to buy Discount Health Cards that give false hope of affordable health care.
- South Brooklyn Legal Services has a substantial foreclosure prevention and anti-predatory lending practice. In its representation of homeowners, it has observed that certain law firms representing lenders churn out dozens of foreclosures at a time, and in the rush, file paperwork that is inadequate. Failing to do their own due diligence, the firms bring foreclosure cases against many properties that should not be foreclosed against in the first place. Often, mortgages have been assigned to a different party than the one bringing the foreclosure action. In other cases, foreclosure is commenced even though the homeowner has entered a trial loan modification period under the federal Home Affordable Modification Program ("HAMP"), during which time foreclosure is prohibited. Addressing the problem that these "foreclosure

mills” pose without a class action is nearly impossible, as is addressing the rampant violations of HAMP. SBLS helps individual clients subject to an improper foreclosure but is unable to help others who do not reach its doors. As a result, the underlying problem of improperly filed foreclosure actions persists.

2. The Bill Would Permit a Limited Voice for Low-Income People in Legislative and Administrative Forums.

The Civil Access to Justice Act would retain the original LSC Act’s restriction on using any LSC or private funds for efforts to lobby administrative or legislative bodies. However, it would permit clients of LSC recipient programs to have a limited voice in legislative and administrative advocacy when funded by state or local government funds.

Legal aid attorneys who see the legal problems faced by low-income communities on a daily basis can potentially play a critical role in alerting legislatures and other government bodies to gaps in regulation and problems in the implementation of laws. The silencing of legal aid attorneys has had dire consequences in the current mortgage crisis.⁴⁷

Attorneys at Maryland Legal Aid Bureau (“LAB”), for example, have witnessed many of the lending abuses that have occurred over the last 10 years, but restrictions on legislative and administrative advocacy have prevented them from actively pursuing reforms.⁴⁸ Under current restrictions, the only way that a legal aid office can participate in lobbying is in response to a written request from a lawmaker.⁴⁹ Because lawmakers are often unaware of this limitation and of the need to make an extra effort to invite the participation of legal services lawyers in legislative discussions, this highly unusual requirement can shut down communication entirely.⁵⁰

In contrast, when LAB has been able to educate lawmakers about the problems faced by its clients – at a lawmaker’s invitation, as required by the restrictions – it has lent a critical voice to the process on behalf of homeowners. In 2008, Maryland’s Legislature dramatically overhauled state laws regarding credit and lending processes.⁵¹ After an invitation, an LAB attorney was able to participate in a state Senate committee workgroup, in which she was the only person representing the interests of borrowers, as opposed to the lending industry. She was able to explain how consumer protection proposals under consideration would be ineffective because they were limited to the most extreme types of loan products and that more wide-ranging consumer protections were necessary. This year, when Maryland’s Governor sought to implement a mandatory settlement conference procedure for foreclosures, LAB once again was the only voice providing expertise and data on what would benefit homeowners in the process.

C. The Civil Access to Justice Act Would Permit Some of the Most Vulnerable Among Us to Obtain Legal Help.

The legislation would also permit some of the most vulnerable people in the legal system to access help. By reforming some of the blanket restrictions based on immigration status and imprisonment, the Civil Access to Justice Act would ameliorate some of the unduly harsh consequences of the 1996 appropriations rider. Some recent examples of the harms of these restrictions include:

- *Haitians Applying for Temporary Protected Status Unable to Obtain Help.* In the wake of the massive earthquake that hit Haiti in January 2010, the Department of Homeland Security announced that the 100,000 to 200,000 Haitians estimated to be in the U.S. without legal documentation would be granted Temporary Protected Status (“TPS”), a form of asylum that would allow them to work in the U.S. for a temporary period of time and send money back to their families in desperate need.⁵² To be granted TPS, individuals are required to fill out forms and pay multiple fees. The process is complicated and often brings up other immigration issues for which individuals need legal advice. But LSC-recipient programs are barred from helping, even with state or local government funds. Many are going without help as they file for TPS, and worse yet, some have been tricked into getting help from scam immigration firms that are rushing into the breach..
- *Unskilled Guest Workers Recruited to Work in U.S. Cut Off From Help When Victimized.* One of the groups hardest hit by the immigrant restriction are those migrant workers here in the U.S. at their employer’s invitation on H-2B visas, a visa category for unskilled, non-agricultural workers performing seasonal or temporary jobs. H-2B visa holders were excluded from legal aid eligibility in 1996.⁵³ Two years ago, Congress eased the restriction slightly and made those H-2B visa holders working in the forestry industry eligible for legal aid.⁵⁴ However, those H-2B workers employed in other industries, such as construction, canning and tourism, remain ineligible.⁵⁵ H-2B workers often perform tasks that risk physical harm and frequently are mistreated by employers.⁵⁶ Many do not speak English and work in geographically isolated areas.⁵⁷ Without access to legal services, they are virtually without recourse when their rights are violated. Employers often take advantage of this fact by misclassifying agricultural workers, who should fall under the relatively more stringent protections of the H-2A visa program, as H-2Bs.⁵⁸ LSC grantee Texas RioGrande Legal Aid describes one case that involved an “illegal guestworker importation scheme” in which a grower and two farm labor contractors used over 400 H-2B workers to harvest and pack onions and watermelons from 2001 to 2007 in south and west Texas to circumvent the protections and benefits of the H-2A program, including access to LSC-funded representation.⁵⁹ TRLA was unable to represent any of the H-2B visa holders even though there was reason to believe that they had been abused at

the hands of their employer and should have been issued visas that would have allowed them LSC representation.⁶⁰

- *Prisoner Representation Restriction Unnecessarily Undercuts Prisoner Reentry Efforts.* This restriction has hampered efforts to resolve civil legal issues, such as those related to debt and child custody, that can help persons in prison prepare for re-entry into their communities. Michigan, for example, has a bold and innovative Prisoner Reentry Initiative – a partnership composed of community groups, faith-based organizations, and legal services providers. An important component of this project is “in-reach” – going into prisons and jails to address the problems confronting men and women prior to release. But, even though this Michigan initiative is primarily funded with state and private money, the Reentry Law Project of LSC-funded Legal Aid of Western Michigan – a key legal player on the team – is barred from representing any incarcerated person in litigation.⁶¹ This restriction applies even though many of the problems facing prisoners would be better addressed during incarceration, so that citizens can move immediately into employment and housing upon release. For example, many prisoners face the loss of custody of their children while incarcerated and would benefit greatly from the help of an attorney as they struggle to maintain family relationships.

IV. CONCLUSION

Never in the three and a half decades since the creation of the Legal Services Corporation has there been a more urgent need to recommit to legal aid for the poor. The Brennan Center urges Congress to pass the Civil Access to Justice Act of 2009 and revitalize the infrastructure of equal justice.

¹ This testimony was prepared with the help of Emily Savner, Research Associate in the Brennan Center’s Justice Program.

² The Brennan Center for Justice is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Center’s Access to Justice Project is one of the few national initiatives dedicated to helping ensure that individuals, families and communities can obtain access to the courts and other public institutions. Through public education, research, counseling and litigation, the Brennan Center works to expand access to civil legal services on the national and state levels and to promote policies that better enable people to resolve their problems in reliance on the rule of law. In recent years, the Brennan Center has published a number of reports related to legal aid for the poor, including Melanca Clark & Maggie Barron, *Foreclosures: A Crisis in Legal Representation* (2009), available at www.brennancenter.org/foreclosures; Rebekah Diller & Emily Savner, *A Call to End Federal Restrictions on Legal Aid for the Poor* (2009), available at www.brennancenter.org/legal_aid_restrictions; and David Udell & Rebekah Diller, *Access to Justice: Opening the Courthouse Door* (2007), available at http://www.brennancenter.org/content/resource/access_to_justice_opening_the_courthouse_door.

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