

OPEN SEASON ON REGULATIONS: *LOPER BRIGHT* AND THE DEMISE OF *CHEVRON*

By Matthew F. Kadish, Esq. and
Karina Pantoja, Esq.

Frantz Ward LLP
Cleveland, Ohio

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INTRODUCTION

Congress frequently delegates decision-making authority to administrative agencies, enabling them to develop and implement rules within their areas of expertise. Estimates place the number of delegations of authority currently in the Internal Revenue Code alone between hundreds¹ to thousands.²

Proponents of Congressional delegation maintain that administrative agencies are best suited to develop and implement rules within their areas of expertise.³ Critics argue that Congressional delegation is an easy political cop-out, allowing Congress to claim credit for the benefits of their expenditures, while shifting blame for the costs to the administrative agencies who have to fill in the details.⁴ They also argue delegation overpowers organized special interests (who need only lobby an administrative agency) which has caused a bloated administrative bureaucracy.⁵

For over 40 years, courts have given enormous deference to agency regulations under the Supreme Court's decision in *Chevron*.⁶ Last year, the Supreme Court

overruled *Chevron* in *Loper Bright*⁷, signaling a major shift away from broad deference to administrative regulations generally, which is especially important for the Treasury Department and Internal Revenue Service (IRS), which have historically been afforded especially significant deference by courts.

The impact of *Loper Bright* is still unravelling, but there clearly will be an increase in challenges to Treasury regulations.⁸ Courts will be frequently asked to determine whether regulations are valid under the new *Loper Bright* tests, and in the meantime, the new uncertain landscape offers a brave new world of uncertainty, risks, and opportunity for planners and for taxpayers in controversy (audit, appeals, litigation, etc.) with the IRS.

HISTORY

Since the early days of our country, Congress has delegated decision-making authority to the Executive branch.⁹ In 1933, Congress passed two laws granting President Franklin Roosevelt sweeping powers to fight the Great Depression: the Agricultural Adjustment Act (allowing the President to increase agricultural prices) and the National Industrial Recovery Act ("NIRA" - giving the President broad power to regulate industries).

In 1935, the Supreme Court struck down the two statutes, with Justice Benjamin Cardozo in particular calling the NIRA "delegation running riot."¹⁰ However, for about the next 40 years, the Supreme Court remained silent on delegation, during which time Congress increasingly continued to delegate regulatory authority to the Executive Branch.

When the Supreme Court finally revisited Congressional delegation (in its 1984 decision in *Chevron*) it opened the floodgates even further, after which delegation increased exponentially.

THE APA, *CHEVRON* AND THE BROAD AUTHORITY OF THE IRS

Under the Administrative Procedures Act (“APA”), courts review agency actions to ensure they are not arbitrary, capricious, or contrary to law.¹¹ The APA requires the agency to follow notice and comment procedures before promulgating or repealing legislative rules (rules that carry the force of law; the same procedures do not apply to interpretive rules; the IRS contends most Treasury Regulations are interpretive).¹²

In the tax area, Congress has delegated broad regulatory powers to the Treasury Department to issue interpretive regulations: “Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.”¹³

In *Chevron*, the Supreme Court established a two-step framework for evaluating the validity of agency regulations.¹⁴ Step One asked whether the statute is ambiguous, based on the plain language of the statute. In practice, courts almost always found some level of ambiguity, allowing them to proceed to step two. Step Two asks

each whether the agency’s interpretation is reasonable. Similarly, courts almost always upheld agency interpretations as reasonable, particularly Treasury Regulations, because of the complexity of tax law: “[W]hen the context is a provision of the Internal Revenue Code, a Treasury Regulation interpreting the words is nearly always appropriate.”¹⁵

Courts even deferred to Treasury Regulations issued after unsuccessful litigation.¹⁶ Before 2009, the IRS had lost a series of cases regarding the student work exemption as it applied to residents at teaching hospitals. To address the losses, the IRS issued prospective regulations¹⁷ intended to overturn the result of the court cases. The IRS then denied the taxpayer’s large refund claims. The Mayo Foundation challenged the regulation, but the Supreme Court upheld it under the *Chevron* test.

LOPER BRIGHT

For the first time since 1984, in 2024 the Supreme Court revisited the *Chevron* doctrine in *Loper Bright*.¹⁸

Loper Bright involved the National Marine Fisheries Service’s (NMFS) regulation issued under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). A group of herring fishing vessel operators challenged NMFS’s authority to require onboard observers to monitor their fishing practices, at the expense of the operators. The District Court upheld the NMFS regulation, applying the *Chevron* doctrine—hardly surprising since as discussed earlier, under *Chevron*, courts almost always upheld regulations. On appeal, the D.C. Circuit predictably upheld the District Court’s holding. The fishing

vessel operators sought review from the Supreme Court, which granted certiorari.

In a 6-3 opinion, the Court overruled *Chevron*, declaring “The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron* is overruled.”¹⁹

Under *Loper Bright*, a Court applies a two-step analysis to determine the validity of the regulation. At Step One, the court analyzes the type and extent of the delegation, and whether the delegation was constitutionally permissible.²⁰ At Step Two, the court analyzes whether the regulation is valid based on the delegation provided.

LOPER BRIGHT—STEP ONE: ANALYZE DELEGATION

Historically (i.e., pre *Loper Bright*), under the judicially created Nondelegation Doctrine, for a delegation to be constitutionally permissible, Congress must provide an “intelligible principle” to guide agency implementation of any delegated authority.²¹ Pre-*Loper Bright*, this proved to be a low bar.²²

We will need time (and future cases) to tell us what delegations courts now consider constitutionally permissible. Despite the traditionally low bar set to-date, some members of the current Supreme Court have signaled interest in a more robust Nondelegation Doctrine, and *Loper Bright* may be an early step in that direction.²³

Beyond determining constitutionality of the delegation, *Loper Bright* says courts

first must determine whether a delegation has occurred and, if so, the nature and scope of that delegation. *Loper Bright* suggests the courts will defer more to “purpose” grants as delegations, such as via the use of words like “appropriate” or “reasonable” which “leaves agencies with flexibility.”²⁴ Delegation to further a stated “purpose” or prevent a specified “abuse” presumably qualify as well.²⁵

One key example in the tax area: It is unclear whether I.R.C. § 7805—which grants the Treasury expansive authority to “prescribe all needful rules and regulations for the enforcement of this title”—constitutes a sufficiently defined delegation to merit judicial deference under *Loper Bright*.

Examples of a delegation that is specific in scope but not in policy includes I.R.C. §§ 197(e)(4)(D), which authorizes the Treasury to issue regulations excluding certain rights “with a fixed duration of less than 15 years” from the definition of a § 197 intangible.

By contrast, anti-abuse regulations often rest on broader grants of authority, where the statute sets out a general purpose, such as preventing tax avoidance, without clearly delineating the regulatory boundaries.

LOPER BRIGHT—STEP TWO: VALIDITY

At Step Two, the court tests the validity of the challenged regulation. The standard of review depends on whether the Congressional delegation was constitutionally valid.

If so, the court applies a “reasoned decision making” standard.²⁶

If not, the court uses its “independent judgment” to find the “single best meaning” applying rules of statutory construction. That test provides little or no inherent deference to the regulation, as it is essentially the agency’s interpretation of the statute. A court can choose to view the agency’s interpretation of a statute as a persuasive authority. *Loper Bright* says agencies have “the power to persuade, if lacking power to control.”²⁷ This echoes *Skidmore* deference²⁸ under which courts have considered (but are not bound by) an agency’s interpretation of a statute, particularly when the interpretation is based on specialized experience. Courts also are more likely to afford extra weight when the regulation or interpretation was issued contemporaneously with the statute’s enactment and has remained consistent over time.²⁹ The unstated negative implication is that courts are less likely to find a regulation persuasive if it is recent, reactive or has frequently changed, as in *Mayo*.

Even prior to the repeal of *Chevron*, courts gave less deference to regulations where the agency interpretation is of a question of “deep economic and political significance.”³⁰ Under this Major Questions Doctrine, courts assess whether the issue at hand qualifies as a “major question” by considering several factors: the number of people affected by the regulation, the financial stakes involved, the degree of public controversy, and whether Congress has repeatedly failed to legislate on the issue. In such cases, court defer less to the agency unless Congress has clearly and specifically delegated power to the agency on that exact issue.

Notably, *Loper Bright* does not carve out

any special considerations for Treasury regulations. Some have argued that tax regulations should receive greater deference due to Congress’s consistent and explicit delegations of authority in the Internal Revenue Code.³¹ Additionally, the highly technical and arcane nature of tax law has historically caused courts to defer to the expertise of the Treasury Department. On the other hand, some decisions, including *Mayo*³², have suggested tax regulations are subject to the same administrative law standards as other agency actions. Time will tell how much “tax exceptionalism” will survive now that *Loper Bright* has supplanted the *Chevron* test.

RETROACTIVITY OF *CHEVRON* REPEAL

Under *Loper Bright*, regulations previously upheld by the Supreme Court under *Chevron* remain in force under the principle of *stare decisis*. Those regulations cannot be re-challenged simply because the interpretive standard has changed.

However, if a regulation was upheld under *Chevron* by a lower federal court (such as a district court or a court of appeals), under the *Golsen* rule³³, the validity of the regulation can still be challenged under the *Loper Bright* either in a different appeals circuit (if appeal properly lies there, based on the residence of the taxpayer), or to the U.S. Supreme Court. For example, a regulation upheld by the Sixth Circuit under *Chevron* could still be challenged in the Ninth Circuit under the *Loper Bright* framework, which requires courts to independently interpret statutory language without deferring to the agency’s

view. It could also be challenged by a taxpayer where appeal lies to the Sixth Circuit; however, the Sixth Circuit would remain bound by its prior opinion, and the challenging party would need to obtain Supreme Court review in order to overturn the regulation.

Notably, relatively few Treasury regulations have been addressed by the Supreme Court or even by the federal courts of appeals. As a result, most existing Treasury regulations remain open to legal challenge under the new interpretive standard. While *Loper Bright* does not automatically invalidate these regulations, it significantly lowers the threshold for litigants to bring successful challenges.

SELECTED AND RELATED DEVELOPMENTS

Cases

Corner Post, Inc. v. Board of Governors of Federal Reserve System, 603 U.S. 799, 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024)

In *Corner Post*, the Supreme Court expanded the timeline for challenging federal regulations. The Court held that the six-year statute of limitations under 28 U.S.C.A. § 2401(a) does not begin when the regulation is promulgated, but rather when the plaintiff is injured by the final agency action. This decision extends the window for taxpayers to challenge longstanding Treasury regulations—regardless of when those regulations were originally issued.

CIC Services, LLC v. Internal Revenue Service, 593 U.S. 209, 141 S. Ct. 1582, 209 L. Ed. 2d 615 (2021)

In a unanimous decision, the Court ruled that the Anti-Injunction Act³⁴ does not apply to suits to block IRS guidance on information return reporting, as it is separate and apart from any tax. As a result, taxpayers can challenge IRS guidance under the APA.

Varian Medical Systems, Inc. and Subsidiaries v. Commissioner of Internal Revenue, 163 T.C. 76, 2024 WL 3936396 (2024)

In *Varian*, the Tax Court invalidated a regulation that sought to conform the effective dates of interrelated tax code amendments. Although the regulation appeared technical and uncontroversial, the court concluded it conflicted with the statute's plain language. As the court noted, "[G]eneral policy concerns . . . and speculation about congressional intent cannot override clear statutory text."

Schwartz v. Commissioner, T.C. Dkt. 12347-20

The Tax Court granted a motion for reconsideration in this pending case involving the application of the hobby loss rules under Treas. Reg. § 1.183-1 et seq. At issue is the validity of Treasury Regulations §§ 1.183-1(d)(1) and 1.183-2(b). A decision is anticipated later this year.

Memorial Hermann Accountable Care Organization v. Commissioner

In *Memorial Hermann Accountable Care Organization v. Commissioner of Internal Revenue*,³⁵ the court affirmed the IRS's denial of tax-exempt status under I.R.C. § 501(c)(4), applying the "substantial non-exempt purpose" test rather than the more lenient "primary purpose" standard set

forth in the regulations. The court found the regulation inconsistent with the statute and applied *Loper Bright* to disregard it. The ruling confirms that IRS regulations that conflict with statutory text may now be set aside without deference.

EXECUTIVE ORDERS

Section 2(a) (“Ensuring Lawful Governance and Implementing the President’s ‘Department of Government Efficiency’ Deregulatory Initiative”) of Executive Order 14219 (February 19, 2025) instructs agencies to identify regulations which are: (i) unconstitutional or which raise serious constitutional difficulties, such as exceeding the scope of the Federal Government by the Constitution; (ii) based on unlawful delegations of legislative power; (iii) based on anything other than the “best reading of the underlying statutory authority or prohibition.” Regulations falling into those categories (as well as 4 others) are put on a list for rescission or modification by the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA).³⁶ An April 9th memo clarifies that agencies should prioritize the repeal of regulations that are unlawful under 10 recent Supreme Court decisions, including *Loper Bright*. In Notice 2025-19, 2025-17 IRB 1418, in addition to its normal request for comments on its annual guidance plan, the IRS asked commentators to connect their recommendations to regulations “potentially described” in Executive Order 14219.³⁷

Although *Loper Bright* restricts deference to the Executive Branch’s regulations, in an interesting example of political jujitsu, the Trump administration is using it to try to further its agenda of eliminat-

ing federal regulations.³⁸ As noted earlier in this article, the APA requires agencies to follow the notice and comment process not only for promulgation of regulations, but also for repeal of regulations. The President’s April 9th memo cites the APA’s “good cause” exception³⁹ as permitting agencies to forego APA notice and comment rulemaking when that process would be “impracticable, unnecessary, or contrary to the public interest.”⁴⁰

ADDITIONAL PRACTICAL CONSIDERATIONS FOR TAXPAYERS AND PRACTITIONERS

If a regulation appears invalid under *Loper Bright* and the issue relates to a previously filed return, consider filing a protective refund claim. The general statute of limitations is the latter of three years from filing or two years from payment. Note the potential application of the six-year limitation period under 28 U.S.C.A. § 2401(a), though *Corner Post* suggests this may now be more flexible.

If taking a position contrary to regulations, consider filing a Form 8275-R to protect against penalties and the possible impact on financial statements under ASC 740 for uncertain tax positions—especially where positions conflict with published regulations.⁴¹

CONCLUSION

The *Loper Bright* decision has reshaped the administrative law landscape, especially for tax. In overturning the Chevron doctrine, *Loper Bright* expands opportunities for challenge, and may shift how IRS

guidance is issued and enforced. Taxpayers and practitioners should prepare for an era of heightened scrutiny, strategic disclosures, and a potentially unprecedented volume of litigation.

ENDNOTES:

¹See New York State Bar Association Tax Section, Report No. 1508: Comment on Tax Implications of Loper Bright (March 7, 2025) (the “NYSBA Report”) at 3.

²See <https://heinonline.org/HOL/P?h=hein.journals/gwlr64&i=60%5d>.

³ See, e.g., Norris, Embury and Olson, “Proposing a balanced approach to delegation of legislative power,” Niskanen Center (April 29, 2025) available at <https://www.niskanencenter.org/proposing-a-balanced-approach-to-delegation-of-legislative-power>.

⁴See, e.g., Cato Handbook for Congress (Policy Recommendations for the 108th Congress), Cato Institute (2003) at 77 et seq. (available at <https://www.cato.org/site/s/cato.org/files/serials/files/cato-handbook-policymakers/2003/9/hb108-8.pdf>).

⁵Cato Handbook for Congress (Policy Recommendations for the 108th Congress), Cato Institute (2003) at 81-82.

⁶*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (overruled by, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024)).

⁷*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024).

⁸Since *Loper Bright*, more than 40 lawsuits challenging agency regulations have already been filed. Large law firms regulation challenges to surge. See “Leading DC Firms Play Long Game in Life After Chevron Ruling,” Bloomberg Law (Sept. 13, 2024).

⁹See, e.g., Epstein, Delegation of Powers: A Historical and Functional Analysis, 24 Chap. L.Rev. 659 (2021).

¹⁰*A.L.A. Schechter Poultry Corporation v. U.S.*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935).

¹¹5 U.S.C.A. § 706 (1946)

¹²See Internal Revenue Manual 32.1.1.2.6; see also additional discussion at <https://crsreports.congress.gov/product/pdf/IF/IF11604>.

¹³I.R.C. §§ 1502, 7805. See Bettge, Martin and Gerling, Does Transfer Pricing Have a *Loper Bright* Problem? Tax Notes Federal, Vol. 186 at 2383 (March 31, 2025) and Aprill, Unpacking the Most Important Opinion in *Loper Bright*, Yale L.Reg. (Jan 15, 2025), available at <https://www.yalejreg.com/nc/unpacking-the-most-important-paragraph-in-loper-bright-by-ellen-p-aprill>. (“It [I.R.C. § 7805(a)] functions as the authority cited for most tax regulations, although many Internal Revenue Code provisions have their own grant of authority.”); see also NYSBA Report at 27-32.

¹⁴*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (overruled by, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024)).

¹⁵*Mayo Foundation for Medical Educ. and Research v. U.S.*, 568 F.3d 675 (8th Cir. 2009), aff’d, 562 U.S. 44, 131 S. Ct. 704, 178 L. Ed. 2d 588 (2011).

¹⁶*Mayo Foundation for Medical Educ. and Research v. U.S.*, 568 F.3d 675 (8th Cir. 2009), aff’d, 562 U.S. 44, 131 S. Ct. 704, 178 L. Ed. 2d 588 (2011).

¹⁷See, e.g., Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii), treating an employee normal working 40 hours or more per week as a full-time employee, causing their services to be not incident to and for the purpose of pursuing a course of study. The regulation effectively disqualified resident doctors from qualifying for the FICA tax exemption for work incident to a student’s education.

¹⁸*Loper Bright Enterprises v. Raimondo*,

603 U.S. 369, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024).

¹⁹*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024).

²⁰Despite the Supreme Court's language in *Loper Bright*, some post-*Loper Bright* courts have already skipped a full analysis of Step One (permissibility of the delegation) and directly applied their independent judgment to invalidate Regulations. See *In re MCP No. 185*, 124 F.4th 993 (6th Cir. 2025) (paying almost no attention to extent of delegation in striking down FCC's "net neutrality" regulations); see also *Memorial Hermann Accountable Care Organization v. Commissioner of Internal Revenue*, 120 F.4th 215 (5th Cir. 2024) (rejecting taxpayer's reliance on regulations for its tax-exempt status, ignoring delegation and stating simply that under *Loper Bright*, "we no longer are required to provide 'Chevron deference' to the Treasury's interpretation of § 501(c)(4), (although we can certainly consider it.)" and *Varian Medical Systems, Inc. and Subsidiaries v. Commissioner of Internal Revenue*, 163 T.C. 76, 2024 WL 3936396 (2024).

²¹For a thorough discussion with citations, see *Delegation of Legislative Power*, <https://law.justia.com/constitution/us/article-1/04-delegation-legislative-power.html>.

²²Commentators have noted that there must be a limit, though. For example, a statute that authorized the Secretary of the Treasury to "determine the tax liability of every U.S. taxpayer, based on principles and rules that, in the Secretary's sole judgment, are appropriate and necessary to fund the government" would almost certainly fail constitutional scrutiny. It lacks any intelligible principle to constrain the agency's discretion, effectively turning over legislative power to the executive in violation of the separation of powers. See NYSBA Report at 19, n.72.

²³See *Gundy v. United States*, 588 U.S. 128, 135, 139 S. Ct. 2116, 204 L. Ed. 2d 522 (2019) (Justice Alito concurring, and Justice Gorsuch and Chief Justice Roberts dissenting); see also NYSBA Report at 22-

25. See also Brodeur, "Nondelegation Doctrine Comes Up Before the Supreme Court, Part 2," Tax Notes Federal (June 9, 2025) (discussing the Supreme Court's upcoming decision in *FCC v. Consumers' Research*).

²⁴*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 395, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024).

²⁵See NYSBA Report at 42-45.

²⁶Commentators have suggested this may mimic *Chevron* deference. See Grewal, *Tax Regulations After Loper Bright*, 2024 Mich. St. L.Rev. (forthcoming 2025) and Merrill, *The Demise of Deference—and the Rise of Delegation to Interpret?* 130 Harv. L.Rev. 227, 259 (2024).

²⁷*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 388, 144 S. Ct. 2244, 2259, 219 L. Ed. 2d 832 (2024).

²⁸See *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

²⁹*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 370, 144 S. Ct. 2244, 2247, 219 L. Ed. 2d 832 (2024).

³⁰*King v. Burwell*, 576 U.S. 473, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015). The "major question" doctrine was sometimes referred to as "Chevron step zero." See NYSBA Report at 46.

³¹For an excellent discussion, see the NYSBA Report at 11-18 and at 64-67.

³²See *Mayo Foundation for Medical Educ. and Research v. U.S.*, 562 U.S. 44, 131 S. Ct. 704, 178 L. Ed. 2d 588 (2011).

³³*Golsen v. Commissioner of Internal Revenue*, 54 T.C. 742, 1970 WL 2191 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971).

³⁴I.R.C. § 7421(a).

³⁵*Memorial Hermann Accountable Care Organization v. Commissioner of Internal Revenue*, 120 F.4th 215 (5th Cir. 2024).

³⁶The Office of Management and Budget's Office of Information and Regulatory Affairs, had largely been sidelined by the Biden Administration. See Sapire, "A Finale for OIRA Tax Review," 180 Tax Notes Federal 349 (July 17, 2023).

³⁷See Sapire, "Tax Deregulation 2.0

Heats Up,” 187 Tax Notes Federal 2227 (June 23, 2025).

³⁸See Executive Order 14192 “Unleashing Prosperity Through Deregulation” (January 31, 2025), requiring, among other things, repeal of 10 regulations for each new one.

³⁹5 U.S.C.A. § 553(b)(4)(B).

⁴⁰See Parillo and Rifaat, “Will Treasury and IRS Be Forced to Disown Regs Under Trump Memo?,” 187 Tax Notes Federal 581 (April 21, 2025).

⁴¹See <https://nsacoop.org/events/loper-bright-supreme-court-case-implications-tax-regulations>.

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