

Attorney for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EFRAIN PEREZ AGUSTIN,

Petitioner,

v.

Christopher J. Larose,
Warden, Otay Mesa Detention Center;
Gregory J. Archambeault, Field
Office Director, U.S. Immigration and
Customs Enforcement;
Todd M. Lyons, Acting Director,
U.S. Immigration and Customs Enforcement;
Kristi Noem, Secretary of United States
Department of Homeland Security;
Pam Bondi, Attorney General of the
United States, in their official capacities,

Respondents.

)
)Case No.3:25-cv-02323-BEN-DEB

**FIRST AMENDED
PETITION FOR WRIT OF
HABEAS CORPUS**

Expedited Hearing Requested

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INTRODUCTION

1. PETITIONER/PLAINTIFF, Efrain Perez Agustin (“Petitioner” or “Mr. Perez”), by and through his undersigned counsel, hereby petitions this Honorable Court to issue a writ of habeas corpus to release him on bond from his continued detention in the custody of the United States Department of Homeland Security, Immigration and Customs Enforcement (“DHS-ICE”) as his continued detention is a violation of due process, and constitutes an unlawful detention. In support of this petition, petitioner states by and through counsel as follows:

JURISDICTION

2. This action arises under the Constitution, the Immigration & Nationality Act of 1990, as amended (“INA”), 8 U.S.C. §1101 et seq., and the Administrative Procedure Act (“APA”), 5 U.S.C. §701 et seq. This Court has habeas jurisdiction pursuant to 28 U.S.C. §2241, Art. 1, §9, Cl. 2 of the United States Constitution (the “Suspension Clause”); and the common law. This Court may also exercise jurisdiction pursuant to 28 U.S.C. §1331 and may grant relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201 et seq., and the All Writs Act, 28 U.S.C. §1651.

3. On May 11, 2005, Congress passed the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. The REAL ID Act divested federal district courts of

1 jurisdiction to review final orders of deportation, exclusion and/or removal.

2 However, federal district courts still retain jurisdiction through habeas corpus
3 over the detention of aliens.
4

5 VENUE

- 6
- 7 4. Venue lies in the United States District Court for the Southern District of
8 California, the judicial district of confinement, as the petitioner is physically
9 being held in custody at the Otay Mesa Detention Facility located in Otay
10 Mesa, CA. This is in accordance with the decision of the United States
11 Supreme Court in Rumsfeld v. Padilla, 124 S.Ct. 2711, 2725 (2004)
12 (“Whenever a §2241 habeas petitioner seeks to challenge his present physical
13 custody within the United States, he should name his warden as respondent and
14 file the petition in the district of confinement”).
15
16
17

18 REQUIREMENTS OF 28 U.S.C. § 2243

- 19
- 20 5. The Court must grant the petition for writ of habeas corpus or issue an order to
21 show cause (OSC) to the respondents “forthwith,” unless the petitioner is not
22 entitled to relief. 28 U.S.C. § 2243. If an order to show cause is issued, the
23 Court must require respondents to file a return “within *three days* unless for
24 good cause additional time, not exceeding twenty days, is allowed.” *Id.*
25 (emphasis added).
26
27
- 28 6. Courts have long recognized the significance of the habeas statute in protecting

1 individuals from unlawful detention. The Great Writ has been referred to as
2 “perhaps the most important writ known to the constitutional law of England,
3 affording as it does a *swift* and imperative remedy in all cases of illegal restraint
4 or confinement.” Fay v. Noia, 372 U.S. 391, 400 (1963) (emphasis added).
5

6 PARTIES

- 7
- 8 7. Petitioner, Efrain Perez Agustin, is a native and citizen of Guatemala who has
9 been held in continuing detention by DHS-ICE since June 19, 2025. He is
10 currently detained at the Otay Mesa Detention Center in Otay Mesa, CA.
11
- 12 8. Respondent, Christopher J. Larose is sued in his official capacity as the Warden
13 of the Otay Mesa Detention Center in Otay Mesa, CA. The warden has chief
14 executive authority over the administration of the Otay Mesa Detention Facility.
15 In this capacity, he has direct responsibility over the confinement of Efrain
16 Perez Agustin.
17
- 18 9. Respondent, Gregory J. Archambeault, is sued in his official capacity as the
19 Director of the San Diego Field Office of U.S. Immigration and Customs
20 Enforcement. Respondent Archambeault is a legal custodian of Petitioner and
21 has authority to release him.
22
- 23 10. Respondent, Todd M. Lyons, is sued in his official capacity as the Acting
24 Director of U.S. Immigration and Customs Enforcement. Respondent Lyons is
25 a legal custodian of Petitioner and has authority to release him.
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11. Respondent, Kristi Noem, is sued in her official capacity as the Secretary of the U.S. Department of Homeland Security (DHS). In this capacity, Respondent Noem is responsible for the implementation and enforcement of the Immigration and Nationality Act, and oversees U.S. Immigration and Customs Enforcement, the component agency responsible for Petitioner's continued detention. Respondent Noem is a legal custodian of Petitioner.

12. Respondent, Pam Bondi, is sued in her official capacity as the Attorney General of the United States and the senior official of the U.S. Department of Justice (DOJ). In that capacity, she has the authority to adjudicate removal cases and to oversee the Executive Office for Immigration Review (EOIR), which administers the immigration courts and the BIA. Respondent Bondi is a legal custodian of Petitioner.

LEGAL FRAMEWORK

13. This case revolves around DHS's continued detention of individuals post an individualized bond hearing granting bond by the Immigration Judge. 8 CFR § 1003.6 allows DHS to invoke a regulatory automatic stay single handedly **overruling** an Immigration Judge's order on bond. 8 CFR § 1003.6 provides:

"Automatic stay in certain cases. In any case in which [the U.S. Department of Homeland Security ("DHS")] has determined that an alien should not be released or has set a bond of \$10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon DHS's filing of a notice of intent to

1 appeal the custody redetermination (Form EOIR-43) with the
2 immigration court within one business day of the order, and, except as
3 otherwise provided in 8 CFR 1003.6(c), shall remain in abeyance
4 pending decision of the appeal by the Board. The decision whether or
not to file Form EOIR-43 is subject to the discretion of the Secretary.”

5 14. Some background to the automatic stay provision is helpful. Following an
6 iterative process and consideration of criticism that the automatic stay
7 provision (in its interim rule form) would be invoked absent factual
8 foundation or appropriate individualized case review, the Department of
9 Justice (“DOJ”) issued its final rule, as quoted above. Speaking to these
10 concerns, the Federal Register at 71 Fed. Reg. 57874, 57878 (Oct. 2, 2006)
11 states:
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13
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15 “To preserve the automatic stay, the attorney for DHS shall file with the
16 notice of appeal a certification by a senior legal official that— (i) The
17 official has approved the filing of the notice of appeal according to review
18 procedures established by DHS; and (ii) The official is satisfied that the
19 contentions justifying the continued detention of the alien have evidentiary
20 support, and the legal arguments are warranted by existing law or by a non-
21 frivolous argument for the extension, modification, or reversal of existing
precedent or the establishment of new precedent.”¹

22 ¹ On October 2, 2006, DOJ published the final rule in the Federal Register (Vol. 71, No. 190) and set forth the
23 following context for changes implemented to the final rule following public comment on the interim rule:
24 First, in order to allay possible concerns that in some cases the automatic stay might be invoked by low-level
25 employees of DHS without supervisory review, or might be invoked without an adequate factual or legal basis, this
26 rule makes two changes in the process for invoking the automatic stay. The final rule provides that the decision to
27 file the Form EOIR-43 (which must be done within one business day of the immigration judge’s custody decision)
28 will be subject to the discretion of the Secretary. Under the provisions of the automatic stay rule which are not
changed by this final rule, the automatic stay will lapse 10 business days after the issuance of the immigration
judge’s decision unless DHS files within that time a notice of appeal with the Board presenting DHS’s arguments for
reversal or modification of the immigration judge’s custody decision. This rule adds a new requirement that, in
order to preserve the automatic stay, a senior legal official of DHS must certify that the official has approved the
filing of the notice of appeal to the Board and that there is factual and legal support justifying the continued
detention of the alien.

1 15. Past experience shows that DHS has invoked the automatic stay in **only a**
2 **select number of custody cases**. For example, the EOIR statistics indicate
3 that, in FY 2004, the immigration judges conducted some 33,000 custody
4 hearings and the Board adjudicated 1,373 custody appeals. Yet, DHS sought
5 an automatic stay only with respect to 273 aliens in FY 2004—and only 43
6 aliens in FY 2005. 71 Fed. Reg. 57874, 57878 (Oct. 2, 2006).

9 16. Lastly, the Government issued a memorandum on July 8, 2025, to all ICE
10 employees, titled “Interim Guidance Regarding Detention Authority for
11 Applications for Admission.” In the memo, the Government provides in
12 relevant part:
13
14

15 “Effective immediately, it is the position of DHS that [applicants for
16 admission under section 235(a)(1) of the Immigration and Nationality Act]
17 are subject to detention under INA § 212(b) and may not be released from
18 ICE custody except by INA § 212(d)(4) parole. These aliens are also
19 ineligible for a custody redetermination hearing (“bond hearing”) before
20 an immigration judge and may not be released for the duration of their
21 removal proceedings absent a parole by DHS. For custody purposes, these
22 aliens are not treated in the same manner that “arriving aliens” have
23 historically been treated.”

24 17. This memorandum appears to explain DHS’s position regarding refusing to
25 release individuals granted a bond.

26 STATEMENT OF FACTS

27 18. In the case at hand, Efrain Perez Agustin is a 55 year-old, native and citizen of
28 Guatemala, and initially entered this country in or about 1994; over 31 years

1 ago. He was never apprehended by border agents and entered the U.S. without
2 inspection.
3

4 19. Having resided in the U.S. for over 31 years; he has extensive family ties
5 including his U.S. Citizen son, Rafael Perez Sanchez (17 y/o). He has worked
6 as a handyman for many years, and has strong ties to the community in Los
7 Angeles, CA.
8

9
10 20. He was encountered by agents of ICE during a Los Angeles-area operation at
11 Home Depot on June 19, 2025 aka "the Los Angeles ICE Raids". Mr. Perez
12 currently has pending removal proceedings pursuant to 8 CFR § 1240.
13

14 21. While his removal proceedings are pending, the Immigration Judge ("IJ")
15 granted a bond of \$7,500 pursuant to 8 USC § 1226(a)(2)(A) on August 8, 2025.
16

17 **See Order of Immigration Judge, Exhibit A.** On August 8, 2025, The
18 Department of Homeland Security filed a form EOIR-43: Notice of ICE intent
19 to Appeal Custody Redetermination; effectively automatically staying the
20 Immigration Judge's decision pursuant to 8 CFR § 1003.6 signed by Naleen D.
21 Martinez ICE Counsel; notably without certification by a senior legal official.
22

23 **See EOIR-43, Exhibit A.** As detailed *supra*, this provides a stay of the
24 Immigration Judge's bond order that lasts through appeal to the Board of
25 Immigration Appeals that lapses should no appeal be filed within 10 business
26 days. *See* 8 CFR § 1003.6.
27
28

1 22. Under this administration, it appears the use of an EOIR-43 and appealing the
2 Immigration Judge is intended to keep the alien detained until their deportation
3 or they give up and sign their removal given these were rarely invoked;
4 according to the 2005 statistics listed in the federal register.
5

6
7 23. On September 3, 2025, Petitioner was notified a late appeal was filed on August
8 25, 2025 with a motion to equitably toll the filing deadline. **See BIA Receipt,**
9 **DHS's Motion, and IJ Bond Memorandum, Exhibit A.** The automatic stay
10 should have lapsed due to the government's late filing.
11

12 24. DHS has refused to accept a bond in this case. To this date, Mr. Perez has been
13 detained for over 80 days pending removal proceedings. His next hearing
14 before the Immigration Judge is scheduled for September 17, 2025.
15

16 25. If released, Mr. Perez would return to his home in Los Angeles, CA and reside
17 with his family; who have promised to provide shelter and take him to all of his
18 future hearing dates.
19
20

21 EXHAUSTION OF REMEDIES

22 26. There is no statutory exhaustion requirement in 28 U.S.C § 2241. However, the
23 Court may require prudential exhaustion. Courts may waive the prudential
24 exhaustion requirement if "administrative remedies are inadequate or not
25 efficacious, pursuit of administrative remedies would be a futile gesture,
26 irreparable injury will result, or the administrative proceedings would be void."
27
28

1 Laing v. Ashcroft, 370 F.3d 994, 1000 (9th Cir. 2004) (quoting S.E.C. v. G.C.
2 George Sec., Inc., 637 F.2d 685, 688 (9th Cir. 1981)). In detention cases,
3
4 appeals to the Board of Immigration Appeals (BIA) can take months or years.
5 Thus, requiring habeas petitioners to appeal to the BIA to prudentially exhaust
6
7 is not efficient, would cause irreparable harm by continuing to deprive a person
8 of their liberty, and/or would be futile.

9
10 27. Petitioner, Efrain Perez Agustin, has exhausted his administrative remedies to
11 the extent required by law, and his only remedy is by way of this judicial action.
12 Despite the fact that Mr. Perez was granted a bond, the Department of
13
14 Homeland Security has automatically stayed the Immigration Judge's decision
15 without due process to the Petitioner. Given an appeal before the BIA is likely
16
17 to exhaust months where Mr. Perez will continue to be deprived of his life and
18 liberty; requiring waiting for DHS to brief the issue and waiting for the BIA to
19
20 decide on the appeal causes irreparable harm to Mr. Perez.

21 28. Additionally, while Mr. Perez is detained, his removal proceedings continue in
22 an expedited manner intended on ordering deportation before release; such that
23
24 he is no longer eligible for a bond post-removal order.

25 29. Further, wherefore any efforts to obtain release from custody from the
26
27 Department of Homeland Security or from the Board of Immigration Appeals
28 would be futile.

30. Lastly, Mr. Perez is currently in removal proceedings, so there is no possibility of removal in the near future until proceedings are completed. The federal district court retains authority to grant release on bond or any other condition of release.

CLAIMS FOR RELIEF

COUNT ONE

Violation of Fifth Amendment Right to Due Process

31. Continued detention, despite a favorable bond ruling, constitutes a violation of the Fifth Amendment's Due Process Clause. The Fifth Amendment's Due Process Clause requires that immigration detention and bond proceedings adhere to fundamental principles of fairness and procedural protections. *See* U.S. Const. amend. V; Mathews v. Diaz, 426 U.S. 67, 78, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976); *see also* Zadvydas, 533 U.S. at 690 (civil detention violates due process unless special, nonpunitive circumstances outweigh an individual's interest in avoiding restraint); Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (due process is flexible, and the protections depend on the situation, considering the private interest at issue, the risk of erroneous deprivation of that interest through the procedures used, and the Government's interest). These protections extend to deportation proceedings. Reno v. Flores, 507 U.S. 292, 306, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

32. Although the Immigration Judge had ordered Petitioner to be released on bond, by filing an EOIR-43, the Government stayed that order without making any showing of dangerousness, flight risk, or any other factor justifying detention. “Simply by fiat—without introducing any proof and without immediate judicial review—the Government effectively overruled the bond decision and kept Petitioner detained.” Mohammed H. v. Trump, 2025 U.S. Dist. LEXIS 117197. Similarly here, the Government has given Petitioner no chance to contest the Government's case for detention. Mathews, 424 U.S. at 348-49 (“The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.”) The government’s invocation of the automatic stay here contorts 8 CFR § 1003.6 into an unfair procedure. Cf. Bridges, 326 U.S. 135, 152-53, 65 S. Ct. 1443, 89 L. Ed. 2103 (administrative rules are designed to afford due process and to serve as “safeguards against essentially unfair procedures”).

33. Here, DHS’s application of the automatic stay violates substantive and procedural due process rights by allowing DHS to unilaterally override an immigration judge's bond decision; 8 C.F.R. 1003.19(i)(2) depriving individuals of a meaningful opportunity to challenge their detention.

34. Under the circumstances of this case, invoking the automatic stay violated Petitioner's substantive and procedural due process rights. Mr. Perez has been

1 granted a legal pathway to release by a neutral adjudicator (the IJ). The IJ took
2 into account the entirety of the evidence submitted, and decided that Petitioner
3 was not a risk of flight nor a danger to society. ICE's unilateral refusal to honor
4 that order is arbitrary and unjust, and renders the IJ's order meaningless.
5

6
7 35. For those reasons, petitioner's continued detention is a violation of his 5th
8 Amendment due process rights.
9

10 **COUNT TWO**

11 **The Government failed to comply with the requirements set out under 8**
12 **C.F.R. § 1003.6(c)(1) and the automatic stay should have lapsed**

13 36. As addressed supra, DHS must file with the notice of appeal a certification by a
14 senior legal official that— (i) The official has approved the filing of the notice
15 of appeal according to review procedures established by DHS; and (ii) The
16 official is satisfied that the contentions justifying the continued detention of the
17 alien have evidentiary support, and the legal arguments are warranted by
18 existing law or by a non-frivolous argument for the extension, modification, or
19 reversal of existing precedent or the establishment of new precedent. 71 Fed.
20 Reg. 57874, 57878 (Oct. 2, 2006). The addition of this requirement according
21 to the Federal Register is to avoid the abuse of this section by a lower-level
22 officer.
23

24 37. Here, in its haste to deny release to all individuals granted a bond, DHS in this
25 case has not made any individualized determination as to whether to invoke the
26
27
28

1 automatic stay provision as articulated by § 1003.6(c)(1). Additionally, DHS's
2 notice has failed to comply with its own standards and lacks the certification
3 required by a supervising legal official pursuant to 8 C.F.R. § 1003.6(c)(1).
4

5 38. Additionally, the government's failure to file an appeal before the 10 business
6 days had elapsed on August 22, 2025 should make such automatic stay of the
7 IJ's order invalid.
8

9 39. Accordingly, DHS should accept the bond and release the petitioner.
10

11 COUNT THREE

12 **The Government's application of the automatic stay is *ultra vires*, exceeding**
13 **authority conferred by Congress.**

14 40. Under the principle of *ultra vires*, an agency regulation is invalid if it exceeds
15 the authority granted to the agency by Congress. The statutory framework of the
16 INA, specifically 8 USCS § 1226, grants immigration judges discretionary
17 authority to determine whether an individual may be released on bond.
18

19 However, 8 C.F.R. 1003.19(i)(2) allows DHS to impose an automatic stay on an
20 immigration judge's bond decision, effectively nullifying the judge's discretion.
21

22 This regulation transforms a discretionary decision into a mandatory detention
23 imposed by DHS, which is contrary to the express intent of Congress. Courts
24 have similarly held that 8 C.F.R. 1003.19(i)(2) exceeds the statutory authority
25 granted to the Attorney General under the INA because it undermined the
26 discretionary authority of immigration judges. Anicasio v. Kramer, 2025 U.S.
27
28

1 Dist. LEXIS 157236. Similarly, another court found the regulation ultra vires
2 because it eliminated the discretionary authority of immigration judges, thereby
3 exceeding the authority granted to DHS under 8 U.S.C. 1226(a). Zabadi v.
4 Chertoff, 2005 U.S. Dist. LEXIS 50670.
5

6
7 41. Similar to the petitioners in Anicasio and Zabadi, this court should find that
8 DHS's imposition of the automatic stay invalidates an Immigration Judge's
9 decision without any justification. DHS is showing its willingness to abuse this
10 statute without even following the regulations set out in 8 C.F.R. § 1003.6(c)(1)
11 thus allowing deprivation of liberty without factual foundation or appropriate
12 individualized case review.
13
14

15 42. Finally, the automatic stay provision does not impose strict time limits for the
16 resolution of the appeal by the BIA, which can result in prolonged detention
17 without a final decision. This creates a substantial risk of erroneous deprivation
18 of liberty, as detainees remain in custody based solely on ICE's invocation of
19 the stay, often without any substantive review of the underlying bond decision.
20
21 Bezmen v. Ashcroft, 245 F. Supp. 2d 446, Ashley v. Ridge, 288 F. Supp. 2d
22 662, Mohammed H. v. Trump, 2025 U.S. Dist. LEXIS 88471.
23
24

25 43. While ICE has the right to appeal the IJ's bond decision to the BIA, such an
26 appeal should not automatically stay the IJ's order. The Attorney General's
27 discretionary authority over bond decisions is not absolute and is subject to
28

1 judicial review for constitutional claims and legal errors. Perez v. Napolitano,
2 2016 U.S. Dist. LEXIS 63667, 8 USCS § 1226. In this case, even if the Bond
3 were appealed and sustained, the case would return back to the Immigration
4 Judge to enter a new decision based on the Board of Immigration Appeals'
5 decision.
6
7

8 44. At that point, Mr. Perez would retain the right to pursue all legal remedies
9 available to him, which could eventually take him back to the Board of
10 Immigration Appeals, or the Ninth Circuit. Keeping him in detention at the
11 Otay Mesa Detention facility during this entire time would "effectively punish
12 Mr. Perez for pursuing applicable legal remedies." Leslie v. Attorney General
13 of the United States, 678 F.3d 265, 271 (3d Cir. 2012).
14
15
16

17 45. Here, ICEs continued detention of Petitioner without bond, despite the IJs
18 determination, constitutes an unlawful deprivation of liberty and creates the risk
19 of unlawful prolonged detention.
20

21 PRAYER FOR RELIEF

22 Wherefore, Petitioner respectfully requests this Court to grant the following:
23

- 24 (1) Assume jurisdiction over this matter;
25 (2) Issue an Order to Show Cause ordering Respondents to show cause
26 why this Petition should not be granted within *three* days;
27
28

(3) Declare that Mr. Perez is being detained pursuant to 8 USC § 1226(a) per order of the Immigration Judge;

(4) Declare that Mr. Perez's detention violates the Due Process Clause of the Fifth Amendment;

(5) Issue an order to ICE to accept payment of the bond amount set by the immigration judge;

(6) Issue a Writ of Habeas Corpus ordering Respondents to immediately release Petitioner upon payment of the bond amount set by the immigration judge;

(7) Award Petitioner attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. §2412, and on any other basis justified under law; and

(8) Grant any further relief this Court deems just and proper.

Grant any other and further relief that this Honorable Court deems just and proper.

Respectfully submitted,

Efrain Perez Agustin

By his attorney:

Dated: 09/12/2025 Signed: /s/ Mitchell H. Shen

MITCHELL H. SHEN, ESQ.

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VERIFICATION OF COMPLAINT

I, Mitchell H. Shen, Esq., state under penalty of perjury that I am the attorney for the petitioner Efrain Perez Agustin in the foregoing petition, and declare the facts alleged here to be true, except those made on information and belief, which I believe to be true, and further state that the sources of my information and belief are documents and information provided to me by the petitioner and his associates and family members.

Los Angeles, CA

Signed: /s/ Mitchell H. Shen

Dated: 09/12/2025

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via Certified Mail / Return

Receipt to:

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Date: 09/12/2025

Signature: /s/ Mitchell H. Shen
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| Exhibit | Document | Page(s) |
|---------|------------------------------------------------------|---------|
| A | 1. Order of the Immigration Judge Granting Bond..... | 1-2 |
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