No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL., RESPONDENTS

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR *AMICUS CURIAE* VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Veterans of Foreign Wars of the United States (VFW), a Congressionally chartered veterans service organization established in 1899 with over 1.7 million members, is the nation's largest organization of war veterans and its oldest major veterans' organization. The VFW was instrumental in establishing the Veterans Administration, creating the World War II GI Bill and the Post-9/11 GI Bill, and developing the national cemetery system. Of particular relevance here, since 2002, the VFW annually places a floral memorial on each of the 17 sailors' gravesites on the anniversary of the terrorist attack against the USS *Cole*. The tribute takes place each year at 13 separate cemeteries in eight states across the nation.

[1] Pursuant to this Court's Rule 37.6, *amicus* Veterans of Foreign Wars affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. As required by Rule 37.3(a), this brief is accompanied by the written consent of all parties because petitioner and respondents have filed blanket consents with this Court.

INTRODUCTION

On the morning of October 12, 2000, the USS *Cole* entered the Aden harbor in Yemen for what was intended to be a routine stop. As sailors began refueling and lining up on deck for lunch, a small motorized boat with Al-Qaeda suicide bombers left shore in the direction of the *Cole*. The boat sailed up to the *Cole*'s port side and, without warning, exploded with the force of 700 pounds of C4.

The blast tore open the side of the *Cole*, and triggered flooding that took 96 hours to get under control. But the true loss was the 17 United States sailors who were killed, and the additional 42 who were injured, by the attack. Amid the chaos, the survivors held their composure and maintained the rules of engagement—holding their fire against a second unknown vessel in the harbor.

This atrocity was the deadliest attack on a United States Naval vessel since 1987. It led to multiple lawsuits in which American courts expressly found that the Republic of Sudan (Sudan) helped Al-Qaeda injure and kill Americans. The present action is one such case. It was brought against Sudan by *Cole* sailors wounded in the Al-Qaeda bombing and their spouses (the *Cole* Victims).

The *Cole* Victims sued Sudan under the Foreign Sovereign Immunities Act (FSIA). Although Sudan participated in prior litigation by other *Cole* victims, it failed to appear in this case—notwithstanding dutiful efforts by the *Cole* Victims to provide notice as required by the FSIA. Indeed, on at least five separate occasions, the *Cole* Victims arranged for service by mail or notice of the legal proceedings to the head of the ministry of foreign affairs at the Sudanese embassy in Washington, D.C.

As required, the *Cole* Victims initially proceeded under 28 U.S.C. 1608(a)(3), which authorizes service "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official

language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The Sudanese embassy accepted the mail containing the complaint, summons, and notice of lawsuit, signing the receipt for return to the clerk. And shortly after the initial service packet was delivered, an official from the Sudanese embassy met with an attorney for the *Cole* Victims to discuss a potential resolution of the case.

After an evidentiary hearing prescribed by the FSIA, the court entered a default judgment against Sudan. But when the *Cole* Victims went to collect that judgment out of Sudanese assets frozen by the United States, Sudan finally appeared and asked the court to vacate the judgment that the *Cole* Victims spent years to obtain, arguing that 28 U.S.C. 1608(a)(3) does not permit Sudan to be served with a lawsuit via mail to its embassy in Washington, D.C. The decision below rejected Sudan's position. Now, this Court will decide whether Sudan will be able to hide its body count by misconstruing our laws.

SUMMARY OF ARGUMENT

In this case, the *Cole* Victims seek compensation for their losses from Sudan, a 25-year state sponsor of terrorism that provided Osama bin Laden with financing, a safe haven, access to its banking system, and organizational support. It is precisely for cases like this one that Congress created—and then steadily expanded—the terrorism exception to the FSIA.

Sudan waited until a default judgment was entered against it to make an appearance in this case. It argued, as it does in this Court, that the default judgment must be vacated because the service packet was sent to Sudan's foreign minister at the Sudanese embassy in the United

States, rather than the Sudanese foreign ministry in Sudan. The Second Circuit rejected this argument, reasoning that Section 1608(a)(3) did not specify a location to which the mailing must be sent, JA 178, and dismissing any concern that mail service via an embassy would violate international law, JA 182.

This Court should affirm the Second Circuit's determination that 28 U.S.C. 1608(a)(3) authorizes service by return mail sent to, and accepted, by a foreign minister at his or her country's United States embassy. As the *Cole* Victims explain in their merits brief, that conclusion is the only one consistent with the statute's plain text.

Amicus files this brief to emphasize that the contrary position advanced by Sudan would seriously undermine Congress's desire to broaden the availability of redress in cases like this one. And contrary to the assertion of Sudan, astonishingly endorsed by the United States, its position is not required to comply with international law or principles of reciprocity.

There is no rule of customary international law categorically barring mail service on an embassy, as demonstrated by the State Department's own regulations authorizing that method when "otherwise appropriate." 22 C.F.R. 93.1(c)(2). And applying the statute as written presents no risk to the reciprocity afforded to American embassies. Any nation is free to emulate the United States and refuse to accept mail service by instructing its embassy not to sign for registered mail.

The *Cole* Victims did exactly what 28 U.S.C. 1608(a)(3) requires; there is no basis to retroactively impose an additional hurdle and unwind eight years of litigation. This Court should affirm.

ARGUMENT

I. American military service members who are attacked while bravely facing the grave danger posed by state-sponsored terrorism deserve to hold nations like Sudan accountable in U.S. courts.

1. Members of the armed forces are the front line of America's defenses against terrorism. Indeed, the United States military is presently involved in counterterrorism operations in some 138 countries around the world. Niall McCarthy, *U.S. Special Operations Forces Deployed to 70% of the World's Countries in 2016*, Forbes (Feb. 7, 2017).[2] As a result, service members are often victims of terrorism themselves, as tragically illustrated by the *Cole* bombing. Despite that danger, they continue to serve bravely and with distinction, not for material gain, but for love of country and dedication to protecting all Americans.

In general, it is rare for military members injured in service to have legal recourse for the harm inflicted on them by enemies of the United States. Where Congress has provided for such redress, as through the state-sponsored terrorism exception to the FSIA, it is of the utmost importance that the courts adhere to Congressional intent and afford the remedies Congress has mandated.

Beginning in December 1979, the United States has maintained a list of foreign nations designated as state sponsors of terrorism. See 22 U.S.C. 2656f. A nation is designated a terror sponsor if it is "determined by the Secretary of State to have repeatedly provided support for actions of international terrorism." U.S. Dep't of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm.

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[2] https://www.forbes.com/sites/niallmccarthy/2017/02/07/u-s-special-operations-forces-deployed-to-70-of-the-worlds-countries-in-2016-infographic/#2d30cfb57343.

In the almost 40 years since, only eight nations have ever been placed on the list: Syria, Iraq, Libya, South Yemen, Cuba, Iran, North Korea, and Sudan. At present, the list includes four nations, one of which is Sudan. *Ibid.* ("Currently there are four countries designated under these authorities: the Democratic People's Republic of Korea (North Korea), Iran, Sudan, and Syria."). Indeed, Sudan has been continuously listed as a terror sponsor for the past 25 years. See *ibid.*

2. Like many other service members and their families, the *Cole* Victims have suffered immeasurable harm as a result of Sudan's sponsorship of terrorism. Their rights were finally vindicated when they successfully used the FSIA to hold Sudan accountable for its role in the *Cole* bombing.

In this lawsuit, the *Cole* Victims provided sufficient evidence to persuade a federal district judge "that Sudan provided material support to Al Qaeda such that the terrorist organization could attack the Cole." JA 103. Specifically, the court found that "Sudan provided Bin Laden's fledgling terrorist group with a sanctuary," JA 97; that "Bin Laden established several joint business ventures with the Sudanese regime[,]" which "provided income to Al Qaeda, as well as cover for the procurement of explosives, weapons, and technical equipment, and for the travel of Al Qaeda operatives;" JA 97, and that "Sudan allowed its banking institutions to be used by Al Qaeda to launder money," JA 98.

The court also found that Sudan engaged in activities that provided organizational and logistical support to Al-Qaeda. JA 99-100. "Each year from 1997 to 2000, Sudan served as a meeting place, safe haven, and training hub for Al Qaeda and other terrorist groups. . . ." JA 99. And "Sudan provided Al Qaeda members with Sudanese diplo-

matic passports, diplomatic pouches, and regular Sudanese travel documentation that facilitated the movement of Al Qaeda operatives in and out of the country." JA 100.

Sudan now asks this Court to vacate the judgment that the *Cole* Victims spent years to obtain. Were this Court to accept the position of Sudan, the *Cole* Victims would be required to re-file their lawsuit and litigate the case from scratch. That is not only fundamentally inequitable, but also at odds with the manifest objective of Congress in amending the FSIA.

II. Congress unquestionably intended the FSIA to make terror sponsoring nations like Sudan accountable in U.S. courts to American victims.

1. In the lead-up to the original 1976 enactment of the FSIA, survivors of terrorism urged a "terrorist" exception to foreign sovereign immunity, to no avail. See *Price* v. *Socialist People's Libyan Arab Jamhariya*, 294 F.3d 82, 89 (D.C. Cir. 2002) (citing Alan Gerson & Jerry Adler, *The Price of Terror* at 212-26 (2001)). The political climate changed, however, after the horrific mass attacks on civilians of the 1980s and 1990s, often carried out with the help of foreign states.

For example, in December, 1988, agents of the Libyan government planted a bomb that destroyed Pan Am Flight 103 in mid-air over Lockerbie, Scotland, killing all 243 passengers and 16 crew (along with 11 more innocent people on the ground). *Lockerbie Bombing: Investigation Vow on Anniversary*, BBC News (Dec. 21, 2013), https://www.bbc.com/news/uk-scotland-south-scotland-25479717. The family members of those murdered on Pan Am 103 joined the voices of those lobbying Congress to hold terror states accountable and made a powerful impact. Ilana A. Drescher, *Seeking Justice for America's Forgotten Victims: Reforming the Foreign Sovereign Immunities Act*

Exception, 15 N.Y.U. J. Legis. & Pub. Pol'y 791, 821-22 (2012).

2. In 1996, Congress finally gave Americans harmed by these atrocities a means of redress. It enacted a terrorism exception to the FSIA allowing suits in federal courts against "countries responsible for terrorist acts where Americans and/or their loved ones suffer[ed] injury or death at the hands" of those nations or their officials. 239 H.R. Rep. No. 104-383, at 62 (1995); see former 28 U.S.C. 1605(a)(7).

Congress recognized the amendment was necessary because the problem had metastasized.

> State sponsors of terrorism consider terrorism a legitimate instrument of achieving their foreign policy goals. They have become better at hiding their material support for their surrogates, which includes the provision of safe havens, funding, training, supplying weaponry, medical assistance, false travel documentation, and the like. . . .

239 H.R. Rep. No. 104-383, at 62 (1995). By empowering victims to sue, Congress intended to "give American citizens an important economic and financial weapon against these outlaw states." *Ibid.*

The original exception was narrow. It withdrew sovereign immunity only in actions seeking money damages for personal injury or death resulting from specified acts of states or their officials. See former 28 U.S.C. 1605(a)(7). And it applied only to nations formally designated by the Secretary of State as terror sponsors.[3]

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[3] A non-listed state could, however, be sued for assisting in a terror attack that resulted in its designation as a state sponsor of terrorism. *Ibid.*; see also 50 App. U.S.C. 2405(j); 22 U.S.C. 2371(a).

Most limiting of all, the exception created no independent right of action. It operated as a "pass-through," conferring jurisdiction on federal courts to hear claims rooted in state law. *First Nat. City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983) (the FSIA "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality") (citing H.R. Rep. No. 94-1487, at 12 (1976)); *Liu* v. *Republic of China*, 892 F.2d 1419, 1425 (9th Cir. 1989) ("The FSIA does not create a federal rule of liability to be applied in an action involving a foreign state").

3. Several months later, however, another horrific attack spurred Congress to further broaden the liability of terror states. The destruction of a passenger bus in Gaza—when an Iran-sponsored suicide bomber rammed it with a van full of explosives—led to passage of the Flatow Amendment. Joseph Keller, *The Flatow Amendment and State-Sponsored Terrorism*, 28 Seattle U. L. Rev. 1029, 1031 (2005). Named for an American student who perished in the bombing, the Amendment allowed noneconomic damages (including pain and suffering and solatium), and punitive damages against state sponsors of terror. Flatow Amendment, Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (1996) (codified at 28 U.S.C. 1605).

Some courts initially construed the Flatow Amendment to establish a cause of action, based on language authorizing suit if a U.S. government official would be liable for the same acts. *Cronin* v. *Islamic Republic of Iran*, 238 F. Supp. 2d 222, 231 (D.D.C. 2002); *Regier* v. *Islamic Republic of Iran*, 281 F. Supp. 2d 87, 98-99 (D.D.C. 2003) (following *Cronin*); *Kilburn* v. *Republic of Iran*, 277 F. Supp. 2d 24, 36-37 (D.D.C. 2003) (same). But in 2004, the District of Columbia Circuit held that neither the Flatow Amendment nor any other part of the FSIA provided an independent right to sue a foreign government. *Cicippio-*

Puleo v. *Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004).

4. In 2008, Congress stepped in to unequivocally grant a private right of action against state sponsors of terrorism. 28 U.S.C. 1605A(c). The new statute also extended damages to foreseeable property losses, and facilitated enforcement of judgments by allowing attachment of defendants' property at the outset of litigation. *Id.* § 1605A(d), (g). Congress made clear its intent to afford terror victims full recompense for their injuries through civil remedies against the sponsoring states.

III. Having failed to convince courts that the FSIA's terrorism exception violates U.S. and international law, Sudan now asks this Court to gut the exception by misreading the statute's procedural rules.

Sudan and other designated terror states have repeatedly attempted to convince U.S. courts that the FSIA's state-sponsored terrorism exception is unconstitutional and/or violates international law. See, *e.g.*, *Owens* v. *Republic of Sudan*, 531 F.3d 884, 893 (D.C. Cir. 2008) (rejecting Sudan's argument that statutory terms "repeatedly," "support," and "acts of international terrorism" are unconstitutionally vague); *Wyatt* v. *Syrian Arab Republic*, 266 F. App'x 1, 2 (D.C. Cir. 2008) (provision authorizing designation of state sponsors of terrorism does not violate international law); *Simon* v. *Republic of Iraq*, 529 F.3d 1187, 1197 (D.C. Cir. 2008), *rev'd sub nom Republic of Iraq* v. *Beaty*, 556 U.S. 848 (2009) (suits under FSIA's terrorism exception do not present non-justiciable political question); *Gates* v. *Syrian Arab Republic*, 646 F. Supp. 2d 79 (D.D.C. 2009) (suits under terrorism exception do not present non-justiciable political question, violate the U.N. Charter by treating sovereign states unequally, or violate the separation of powers); *Wultz* v. *Islamic Republic of Iran*, No. 08-cv-1460 (RCL), 2010 WL 4190277, at *3

(D.D.C. Oct. 20, 2010) (same); *Wyatt* v. *Syrian Arab Republic*, 736 F. Supp. 2d 106, 113 (D.D.C. 2010) (rejecting separation-of-powers challenge to terrorism exception as not properly directed to judicial action but only to subsequent executive or legislative action to reopen judgment).

Having failed in their substantive challenges, they are now asking the courts to gut the state-sponsored terrorism exception by erecting a procedural hurdle Congress clearly did not intend to impose. The Second Circuit correctly declined the invitation, as should this Court.

1. To affirm the Second Circuit, this Court need look no further than the plain language of 28 U.S.C. 1608(a)(3). As clearly explained by the *Cole* Victims in their brief, the decision below adopted the only faithful reading of the relevant statutory text.

Amicus will not repeat those arguments here. The simple fact is, the *Cole* Victims followed the FSIA's service provision to the letter. It would be profoundly unfair to deny them relief for failing to comply with a requirement not found in the statute and never announced by any court until seven years after service was made. See *Kumar* v. *Republic of Sudan*, 880 F.3d 144 (4th Cir. 2018).

If required to return to square one, the *Cole* Victims will face formidable challenges. In the *Kumar* litigation, other *Cole* victims have, since the issuance of Fourth Circuit's order, already expended eight months attempting to serve Sudan at its foreign ministry in Khartoum under the provisions of 28 U.S.C. 1608(a)(3) (the signed return receipt was never returned) and then under 28 U.S.C. 1608(a)(4). *Kumar* v. *Republic of Sudan*, No. 2:10-cv-00171-RGD-TEM (E.D. Va. Sept. 12, 2018), ECF No. 213 at 1-5. The district court has repeatedly enlarged the time to perfect service. *Ibid.* Yet no end of Sudan's delays is in sight. In the meantime, the *Kumar* plaintiffs have paid

nearly $40,000 in additional fees to the State Department to serve process under subsection (a)(4). *Id.* at 4.

That level of administrative expense is a non-trivial obstacle when the prospects for ultimately collecting any judgment are highly uncertain and necessarily will involve years of delay. The *Cole* Victims commenced this litigation eight years ago, secured a default judgment six and a half years ago, and have yet to see a penny of relief. JA 1, 8. Despite its awareness of this suit and post-service meeting with an attorney for the *Cole* Victims, Sudan chose not to appear in the case until after turnover orders had issued against its assets—more than three years after the litigation began. JA 88, 172, 174; C.A. Dkt. 104, Ex. A, ¶¶ 2-4. Even if service could be effectuated sometime in the future, repeating substantive proceedings in the district court would add years of further delay.

2. In support of its atextual reading of 28 U.S.C. 1608(a)(3), Sudan advances two baseless arguments—neither of which is grounded in the statute's plain language, and both of which are endorsed in this Court by Libya, Saudi Arabia, the United Arab Emirates, and Austria. Of course, "the positions of that select group of nations are hardly surprising, because each of those nations faces the threat of significant litigation in the United States for involvement either in the Holocaust or in more recent acts of terrorism." Red Br. 45 n. 14 (citations omitted).

What is surprising, however, is the fact that the United States has filed a brief in support of Sudan. It is shocking and deeply dismaying that our government would stand with the nation that facilitated the *Cole* bombing, and against the surviving American sailors and their families—and that it would do so employing arguments that contradict the FSIA's plain language. In any event, both of the arguments endorsed by the United States are wrong:

a. First, the United States agrees with Sudan that *any* service of a summons and complaint on a foreign state's embassy in the U.S. would be a violation of international law; specifically the "mission inviolability" principle. U.S. Br. 20-24. But it is hard to understand how the United States can seriously advocate such a position when the State Department—as expressly authorized by its own regulations—has itself served private lawsuits against foreign states via mailing to their Washington, D.C. embassies since the FSIA was enacted.

Those regulations permit the relevant State Department employee to obtain from the clerk of court "the required copies of the notice of suit and of the summons and complaint . . . and any required translations," 22 C.F.R. 93.1(b), and "promptly cause one copy of each such document and translation . . . to be delivered . . . [i]f the foreign state so requests *or if otherwise appropriate* to the embassy of the foreign state in the District of Columbia," 22 C.F.R. 93.1(c)(2) (emphasis added).

From the inception of the FSIA, the State Department has found it "otherwise appropriate" to serve the embassies of foreign states in Washington, D.C. See, *e.g.*, *Jackson* v. *People's Republic of China*, 550 F. Supp. 869, 873 (N.D. Ala. 1982) (State Department served the embassy of China in Washington, D.C., and service was effective despite embassy's subsequent return of the documents to the Department); *Int'l Ass'n of Machinists & Aerospace Workers* v. *OPEC,* 477 F. Supp. 553, 560 (C.D. Cal. 1979) (Department served the embassies of Algeria and Qatar in Washington, D.C.); *Tomanek* v. *Phil.*, Civ. No. 505885-5 (Cal. Super. Ct., March 20, 1978) (Department served the Embassy of the Philippines in Washington, D.C.).

To be clear, 22 C.F.R. 93.1 does not constitute a diplomatic exception to a general principle against mail service

on embassies. The regulation requires the State Department to include a note warning the foreign state that "under United States law, questions of jurisdiction and of state immunity must be addressed to the court and not to the Department of State" and that "it is advisable to consult with an attorney in the United States." 22 C.F.R. 93.1(d). Thus, State Department transmittal expressly disclaims diplomatic discretion over U.S. court proceedings and enables the enforcement of domestic law.

This purpose squarely contradicts the "duty to abstain from exercising any sovereign rights, in particular law enforcement rights" that, in the view of the United States, lies at the heart of "mission inviolability." U.S. Br. 21 (citing Eileen Denza, *Diplomatic Law* 110 (4th ed. 2016)). That the State Department nonetheless authorizes this method of service demonstrates that mail delivery must not constitute a violation of sovereign premises—which comports with common sense: embassies receive mail as a routine matter. Sudan objects not to the *act* of mail delivery—as it would to the entry of a process server or law enforcement official into embassy grounds—but to the contents of the mail at issue.[4]

In sum, if the State Department genuinely believed that mail service upon an embassy were a breach of the mission inviolability principle, it would not engage in the practice at all. Accordingly, this purported principle of international law cannot be used to interpret into existence a requirement not present in the text. The government's

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[4] Every service packet under 28 U.S.C. 1608(a)(3) must include a Notice of Suit explaining the nature of the suit, the relief sought, and the foreign state's obligation to respond under domestic law. 22 C.F.R. 93.2(a), Annex, items 4-5, 7-9. There is thus no reason to view mail service on an embassy as any less permissible under subsection (a)(3) than under subsection (a)(4).

attempt to do so—at the expense of our nation's veterans—is as disappointing as it is incorrect.

b. Second, the United States argues that affirming the decision below would undermine its attempts to obtain reciprocal respect for U.S. embassies abroad. But as the *Cole* Victims explain, the United States does not accept process in *any* manner contemplated by Section 1608(a)(3). In other words, it is true that the United States will not accept mail service via any of its embassies abroad. Department of Justice, *Service of Process on the United States Government* (Nov. 4, 2016), https://www.justice.gov/civil/page/file/1036571/download. But it is *also true* that the United States will not accept mail service via the State Department (i.e., our "foreign ministry") in Washington, D.C. *Ibid.*

The upshot is quite simple: The Second Circuit is correct that a nation's right to avoid 28 U.S.C. 1608(a)(3) service by refusing to sign for registered mail satisfies any concerns about comity and reciprocity. Just as Sudan has refused to sign and accept service of process by *Cole* victims at its foreign ministry in Khartoum, it could have refused to accept service at its U.S. embassy—rather than accept service and meet with a lawyer for the *Cole* Victims. JA 88, 172; C.A. Dkt. 104, Ex. A, ¶¶ 2-4.

But if the Second Circuit was wrong, then *any interpretation* of Section 1608(a)(3) that allows service to be made—including the one offered by Sudan and the United States—would constitute an affront to comity and threaten reciprocal treatment of America abroad.

Put simply, Sudan and the U.S. have a problem with the statute drafted by Congress—not with its faithful application by the Second Circuit.

CONCLUSION

The United States government's willingness to disregard the needs of injured service members and the families of dead veterans is a profound disappointment. Service members and their families are more than willing to set aside their own personal welfare for the needs of the country. But there is no reason they should be required to do so here. The decision below should be affirmed.

Respectfully submitted.

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