NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 22-5036 and 22-5037

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH, et al.,
Plaintiffs/Appellees,

v.

DEBRA A. HAALAND, in her official capacity as Secretary of the Interior, et al.,
Defendants/Appellees,

AMERICAN PETROLEUM INSTITUTE and STATE OF LOUISIANA,
Intervenor-Defendants/Appellants.

Appeal from the United States District Court for the District of Columbia
No. 1:21-cv-02317 (Hon. Rudolph Contreras)

BRIEF FOR AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court (except for the amicus filing this brief) are listed in the Brief for Appellant American Petroleum Institute.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant American Petroleum Institute.

C. Related Cases

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ *Eric Grant*
Eric Grant

RULE 26.1 DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (Chamber) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Insofar as relevant to this litigation, the Chamber's general nature and purpose is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including by regularly filing amicus curiae briefs in cases that raise issues of concern to the nation's business community.

RULE 29(d) CERTIFICATION

Pursuant to Circuit Rule 29(d), amicus Chamber of Commerce of the United States of America (Chamber) certifies that a separate brief is necessary because the Chamber has a unique perspective — broadly representing the Nation's business community — and expertise on issues raised in this appeal, and it seeks to address those issues for which that perspective and expertise is most relevant. The Chamber respectfully submits that a separate brief is required to offer this unique perspective and expertise.

/s/ *Eric Grant*
Eric Grant

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* Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY

APA	Administrative Procedure Act
API	Intervenor-Defendant/Appellant American Petroleum Institute
Chevron	Amicus Curiae Chevron U.S.A. Inc.
EIS	Environmental Impact Statement
GHG	greenhouse gas(es)
Interior	U.S. Department of the Interior
Louisiana	Intervenor-Defendant/Appellant State of Louisiana
NEPA	National Environmental Policy Act
OCSLA	Outer Continental Shelf Lands Act

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.*

SUMMARY OF ARGUMENT

1. The Supreme Court has emphasized that inherent in NEPA and its implementing regulations is a "rule of reason." Under this rule, the scope of an agency's analysis in an EIS is determined by the *usefulness* of any new potential information to the decisionmaking process. Thus, an agency is not required to undertake analysis that would fail to provide useful information. Quantifying foreign GHG emissions at the present stage of the OCSLA process would not provide useful information, and therefore NEPA's rule of reason did not require Interior to do so.

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* Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus curiae states that no counsel for any party authored this brief in whole or in part, and no entity or person — aside from amicus curiae, its members, or its counsel — made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

First, quantifying foreign emissions would be premature. The preliminary activities authorized by Lease Sale 257 extract no oil or gas, meaning that they themselves will generate no non-local emissions. Congress designed OCSLA's four-stage framework to forestall premature litigation about environmental effects, and demanding NEPA analysis of those very effects is likewise premature and contrary to the rule of reason. Although emissions could conceivably be *estimated* at this exploratory stage, piling estimates upon estimates would yield only what this Court has recognized as results that are "too speculative to be useful." NEPA does not require such non-useful results.

Second, quantifying foreign emissions would not meaningfully assist Interior in making the substantive decision at issue here. The first of NEPA's two purposes is satisfied if the agency has "*considered* relevant environmental information." Lease Sale 257 was approved by a political appointee of an Administration that has promised "to organize and deploy the full capacity of its agencies to combat the climate crisis." It is not credible to think that Interior failed to "consider" the GHG emission-related impacts of Lease Sale 257. Of course Interior considered such impacts, and it nonetheless approved the sale. The additional paperwork demanded by the district court would not be useful to Interior.

Third, quantifying foreign emissions would not meaningfully inform the public. The second of NEPA's two purposes is satisfied if "the public has been informed

regarding the decision-making process" so that it may play a role therein. But no reasonably interested member of the public needs a quantitative analysis of foreign emissions to make up his or her mind about Lease Sale 257. In truth, no one's view of opening more than 80 million acres of the Gulf of Mexico for oil and gas development actually turns on the fine-grained estimates of foreign emissions demanded by the district court. In this context, those estimates would not be useful.

2. If the Court reaches the issue whether to vacate Lease Sale 257, it must consider the "disruptive consequences" of vacatur. Intervenors have cogently explained the harms to successful bidders and to Gulf states, but the disruptive consequences extend much further — to the Nation's economy and to its energy security. Vacatur would disrupt the mineral development in federal waters that drives growth, creates jobs, reduces consumer costs, funds state budgets, as well as bolstering America's energy security by reducing our dependence on foreign oil and fossil fuels.

The judgment of the district court should be reversed.

ARGUMENT

I. NEPA's "rule of reason" did not require Interior to quantify foreign emissions at the present stage of the OCSLA process.

"NEPA's purpose is not to generate paperwork — even excellent paperwork." *Department of Transportation v. Public Citizen*, 541 U.S. 752, 768 (2004) (quoting 40 C.F.R § 1500.1(c) (2003)). Rather, in this Court's phrasing, "the Supreme Court has *emphasized* that 'inherent in NEPA and its implementing regulations is a "rule

of reason."'" *Mayo v. Reynolds*, 875 F.3d 11, 20 (D.C. Cir. 2017) (emphasis added) (quoting *Public Citizen*, 541 U.S. at 767); *accord Indian River County v. U.S. Department of Transportation*, 945 F.3d 515, 533 (D.C. Cir. 2019) (reiterating the word "emphasized"). This rule-of-reason standard "ensures that agencies determine whether *and to what extent* to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Mayo*, 875 F.3d at 20 (emphasis added) (quoting *Public Citizen*, 541 U.S. at 767). "Necessarily, then, '[w]here the preparation of an EIS would serve "no purpose" in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS.'" *Id.* (quoting same). The same is necessarily true for the *extent* of the analysis in any EIS that is prepared: no rule of reason would require an agency to undertake analysis that would serve no purpose, including analysis that would provide information that is useful neither to the decisionmaker nor to the public.

In the circumstances of Lease Sale 257, "the underlying policies behind NEPA and Congress' intent [in OCSLA], as informed by the 'rule of reason,'" *Public Citizen*, 541 U.S. at 768, make clear that quantifying foreign GHG emissions would not provide useful information to Interior or to the public, for three reasons.

A. Quantifying foreign emissions is premature.

Intervenors have shown that Plaintiffs' claims are not ripe. *See* API Brief at 20–26. But even if those claims (barely) surmount the ripeness hurdle, it cannot be

gainsaid that the various "ancillary activities" identified by the district court as being authorized by Lease Sale 257 — "[g]eological and geophysical (G&G) explorations and development G&G activities," JA __–__ [Opinion at 16–17] — *extract no oil or gas*. But without extraction, there is no consumption; and without consumption, there are no non-local emissions. Consequently, the "adverse environmental effects" of the *worldwide emissions* targeted by Plaintiffs and the district court "will flow, if at all, only from the latter stages of OCS exploration and production" subsequent to leasing. *Secretary of Interior v. California*, 464 U.S. 312, 341 (1984). Given that Congress designed OCSLA's four-stage framework precisely to "forestall premature litigation regarding [such] adverse environmental effects," *id.*, demanding NEPA analysis of those very effects is likewise premature and contrary to the rule of reason.

Plaintiffs might respond that they make only the modest demand that Interior "*estimate* foreign emissions." JA __ [Opinion at 31] (emphasis added) (quoting Plaintiffs' opposition brief). But at the present stage of the OCSLA process, this adds yet another estimate on top of a series of estimates: (1) an estimate of how much of the 80.8 million acres made available for leasing will actually be leased; (2) an estimate of on how much of the leased acreage will any exploration activities actually be authorized; (3) an estimate of on how much of that (reduced) acreage will development and production actually be authorized; and (4) an estimate of how much oil and gas will actually be extracted from that (further reduced) acreage. In short, the

district court has demanded that Interior start with an estimate-of-an-estimate-of-an-estimate-of-an-estimate and generate therefrom yet another estimate of resulting foreign emissions.

This Court has recognized that some kinds of quantitative analysis in an EIS, although conceivable, are "too speculative to be useful." *Sierra Club v. U.S. Department of Energy*, 867 F.3d 189, 202 (D.C. Cir. 2017) (*FLEX*). Relying on *FLEX* and 40 C.F.R. § 1502.22 (2019), Intervenors have shown why the quantitative analysis demanded by the district court qualifies as too speculative to be useful. *See* API Brief at 35–39; Louisiana Brief at 19–21. Under the rule-of-reason standard, the required "extent" of an EIS turns on "the *usefulness* of any new potential information to the decisionmaking process." *Mayo*, 875 F.3d at 20 (emphasis added). Therefore, not only is the demanded analysis not required by the governing regulations, it also contravenes the rule of reason.

B. Quantifying foreign emissions would not meaningfully assist Interior.

Intervenors have shown that "Interior lacks the statutory authority to consider non-local emissions when deciding to forego an OCS lease sale," such that NEPA imposes no obligation to quantify such emissions at this stage of the OCSLA process. API Brief at 31; *see also* Louisiana Brief at 10–18. We would add that, in ruling to the contrary, the district court erred in relying on this Court's statement that "NEPA may, within the boundaries set by Congress, authorize the agency to make decisions

based on environmental factors not expressly identified in the agency's underlying statute." JA __ [Opinion at 6] (quoting *Village of Barrington v. STB*, 636 F.3d 650, 665 (D.C. Cir. 2011)). By the statement's own terms, any discretion that an agency might have "to make decisions based on environmental factors not expressly identified" in its organic statute must be exercised "within the boundaries set by Congress." 636 F.3d at 665 (so opining in *upholding* challenged agency action). Here, those boundaries are set by OCSLA, which "does not authorize — much less require — Interior to consider the environmental impact of post-exploration activities such as consuming fossil fuels." *Center for Biological Diversity v. U.S. Department of Interior*, 563 F.3d 466, 485 (D.C. Cir. 2009).

But even if Interior is not strictly forbidden by statute to consider non-local emissions at this stage of the OCSLA process, no rule of reason compels it to generate the foreign emissions-focused paperwork demanded by the district court. It is a bipartisan precept, based on longstanding case law, that the "purpose and function of NEPA is satisfied if [1] Federal agencies have considered relevant environmental information, and [2] the public has been informed regarding the decision-making process." 40 C.F.R. § 1500.1(a) (as amended by previous Administration in 2020); *accord* 87 Fed. Reg. 23,453 (Apr. 20, 2022) (rule by current Administration rescinding some 2020 amendments, but not this one); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (holding that one purpose of an EIS is to "ensure[]

that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts").

Regarding the first of these two points, it is not credible to believe that Interior failed to "consider" the GHG emission-related impacts of Lease Sale 257. Even prior to the current Administration, "Interior quantitatively predicted the American emissions that would occur if the Lease Sale went forward and if it did not." API Brief at 34 (so documenting). Interior analyzed foreign emissions as well, if not in precisely the same quantitative fashion. *See id.* at 35. More recently, the final Record of Decision signed by a political appointee in August of 2021 (seven months into the current Administration) cites President Biden's "Executive Order [14008] on Tackling the Climate Crisis at Home and Abroad." *See* JA __ [AR29788]. But *despite* the GHG emission-related impacts, the current Administration's own Record of Decision concluded that holding Lease Sale 257 "meets the purpose of and need for the proposed action, balances regional and national policy considerations, and includes appropriate measures to minimize potential environmental and socioeconomic impacts." JA __ [AR29790]. Indeed, the current Administration's own Record of Decision approved holding Lease Sale 257 *notwithstanding* Interior's determination in 2018 that the "No Action Alternative is considered environmentally preferable." JA __ [AR29797].

In these circumstances, the additional estimates demanded by the district court would not serve NEPA's purpose and function of helping Interior to "consider" relevant environmental information.

C. Quantifying foreign emissions would not meaningfully inform the public.

The other longstanding purpose and function of NEPA is satisfied if "the public has been informed regarding the decision-making process." 40 C.F.R. § 1500.1(a); *accord Robertson*, 490 U.S. at 349 (Another purpose of an EIS is to "guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision"). The foreign emissions-focused paperwork demanded by the district court would not serve that purpose and would accordingly contravene the rule of reason.

It is unreasonable to think that the public is waiting for Interior's quantitative analysis of foreign emissions if the lease sale did not occur in order to make up its mind about Lease Sale 257. In truth, no one's view of opening more than 80 million acres of the Gulf of Mexico for oil and gas leasing actually turns on the fine-grained estimates of *foreign* emissions demanded by the district court. Rather, anyone who invests minimal effort would know what Plaintiffs know, namely that Lease Sale 257 "will offer over 80 million acres of public waters to the oil and gas industry, making it the largest offshore lease sale in U.S. history," and it "will allow for new fossil fuel extraction over the next 50 years." JA __ [Complaint at 2], ¶ 2.

Plaintiffs had no need for Interior's quantitative analysis of foreign emissions to speculate from these facts that Lease Sale 257 "will thus contribute substantially to greenhouse gas pollution that, if not curbed, will exacerbate the climate crisis and burdens on communities in the Gulf of Mexico, which are already suffering from climate warming impacts like rising seas and worsening storms." JA __–__ [Complaint at 2–3], ¶ 3. Other members of the public likewise have no need for Interior's quantitative analysis of foreign emissions to conclude the opposite and to join the current Administration in the view that the authorization of new fossil fuel extraction in the Gulf of Mexico over the next 50 years "address[es] the Nation's demand for domestic energy sources and fosters economic benefits, including employment, labor income, and tax revenues . . . across the United States." JA __ [AR29794].

Our point here is not to take sides in this debate. Our point is that the foreign emissions-focused paperwork demanded by the district court will not meaningfully contribute to the debate. In regulatory and judicial parlance, that paperwork will neither inform the public nor help it play a role in the decisionmaking process. Accordingly, the demanded quantitative analysis of foreign emissions would serve no purpose in light of NEPA's regulatory scheme as a whole.

* * * * *

Another bipartisan and longstanding precept is that "NEPA does not mandate particular results or substantive outcomes." 40 C.F.R. § 1500.1(a) (2022); *accord Robertson*, 490 U.S. at 350. The district court's evident skepticism of the result and outcome reached by Interior here cannot be permitted to overcome the conclusion that no rule of reason would require Interior to prepare a quantitative analysis of foreign emissions in the present circumstances.

II. The "disruptive consequences" of vacatur go beyond the harms to successful bidders and Gulf states and extend to the Nation's economy and energy security.

If (contrary to the foregoing) this Court affirms the district court's holding that NEPA was violated, it must still review the court's holding that "there is insufficient reason to depart from the standard remedy of vacatur in this case." JA __ [Opinion at 67]. This Court has set forth "two factors" that govern whether "to leave agency action in place while the decision is remanded for further explanation," i.e., to remand *without* vacatur. *Standing Rock Sioux Tribe v. U.S. Corps of Engineers*, 985 F.3d 1032, 1051 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1187 (2022). Those are (1) the "seriousness of the order's deficiencies" and (2) the "disruptive consequences" of vacatur. *Id.* (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150 (D.C. Cir. 1993)). We here address the latter.

API has cogently explained how vacatur "would cause disruptive consequences for API's members and undermine OCSLA's sealed-bidding requirement." API Brief

at 44 (section heading). Louisiana has cogently explained how vacatur "would seriously disrupt Louisiana's Coastal Restoration Plan and the ability of all Gulf States to rely on a steady stream of [OCSLA-related] revenues," the practical result of which is "to impede real-world action to address climate-change action based on speculative concern with a climate change analysis." Louisiana Brief at 23. We present a broader view: vacatur will have disruptive consequences to the Nation's economy and energy security.

A. Vacatur would disrupt the mineral development in federal waters that drives growth, creates jobs, reduces consumer costs, and funds state budgets.

The Chamber has long studied the impact of American oil and gas production on the business community and the public at large, and its Global Energy Institute last year reported on "the consequences of a leasing ban on federal lands and waters." U.S. Chamber of Commerce Global Energy Institute, *Federal Lands and Waters Energy Development* 2 (Nov. 2021) (Energy Report), https://bit.ly/3HQRLQ6. Synthesizing the results of multiple third-party studies, the Energy Report emphasizes that leasing and production on federal lands and — as with Lease Sale 257 — in federal waters are key aspects of U.S. economic growth. *See id.* at 1.

During fiscal year 2019, for example, "oil and natural gas development on public lands contributed . . . [n]early $76 billion to the U.S. economy." *Id.* at 2. The development activity also "[s]upported approximately 318,000 jobs" and generated

"$3 billion in revenue" for state funding of "education, health and emergency services, and infrastructure." *Id.* Production on federal lands and in federal waters also has a real-world impact on the prices that consumers pay to commute and to travel and to heat their homes. *See* OnLocation, Inc., *The Consequences of a Leasing and Development Ban on Federal Lands and Waters* (Sept. 2020) (Development Ban), https://bit.ly/3FhoI6D. "All Americans — not just those living in the 34 oil and natural gas-producing states or working at oil and natural gas jobs — directly benefit from increased domestic production." U.S. Department of Energy, U.S. Oil and Natural Gas: *Providing Energy Security and Supporting Our Quality of Life* 5 (Sept. 2020) (Energy Security), https://bit.ly/3K1b7UG.

Vacating a lease sale of more than 80 million acres — recognized by Plaintiffs as "the largest offshore lease sale in U.S. history," JA __ [Complaint at 2], ¶ 2 — represents a de facto "pause" in federal offshore leasing activity. Pausing leasing activity significantly reduces the above-described benefits in both the short term and the long term. In 2022 alone, nationwide job losses under a pause would reach almost one million. *See* Development Ban at 19. A pause through 2025 would generate a "loss of more than $22.7 billion to U.S. GDP," translating into a "loss of more than 154,000" jobs and a loss of "nearly $4 billion in tax revenue." Energy Report at 2. Louisiana alone would lose almost 2% of jobs statewide. *See* Development Ban at 19. If the pause were to continue, production on federal lands and in federal waters

would contribute *nothing* to U.S. GDP by the year 2040. *See* Energy Report at 2; *cf. Superior Oil Co. v. Udall*, 409 F.2d 1115, 1120 (D.C. Cir. 1969) ("[S]teadfast compliance with competitive bidding procedures . . . is an indispensable ingredient to the maintenance of competitive bidding processes which will engender public confidence and that of persons dealing with the Government.").

Importantly, shutting down *supply* by vacating Lease Sale 257 does nothing to reduce *demand* for oil and gas. Domestic supply constraints do not eliminate hydrocarbon production altogether but may instead shift it beyond our borders to jurisdictions that lack America's environmental leadership. *See* Mustafa H. Babiker, *Climate Change Policy, Market Structure, and Carbon Leakage*, 65 J. Int'l Econ. 421, 441 (2005) (detailing how this chain of events "can lead to significant increases in offshore [i.e., international] energy-intensive production associated with relocation").

In light of the foregoing, vacating Lease Sale 257 would have disruptive consequences to the Nation's economy.

B. Vacatur would disrupt the mineral development in federal waters that furthers America's energy security.

Congress significantly amended OCSLA in 1978. Those amendments aimed to "expedite[] exploration and development of [offshore lands] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade." 43 U.S.C. § 1802(1); *see also id.* § 1332(3) (Offshore lands "should be made

available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."). Indeed, Congress resolved to "make [offshore] resources available to meet the Nation's energy needs as rapidly as possible." 43 U.S.C. § 1802(2). The "objective" of OCSLA, therefore, is "the expeditious development of [offshore] resources." *California ex rel. Brown v. Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981).

Accomplishing this objective "makes the United States more secure." Energy Security at 51. The point is a simple one: "As domestic oil and gas production has expanded, America's reliance on foreign energy supplies has declined, dramatically enhancing U.S. energy security." *Id.* at 21. That energy security reduces the likelihood that the country will repeat the shortages of the 1970s, a "history that includes long lines at gasoline pumps and curtailments of natural gas at schools and factories." *Id.* Moreover, our "increased ability to supply energy to allies around the world also enhances U.S. flexibility in dealing with global diplomatic challenges, further strengthening security." *Id.*

To some observers, all of this might have seemed somewhat theoretical when the Energy Security report was written in September of 2020. But the invasion of Ukraine in the spring of 2022 has given energy security a concrete and dramatic importance. As President Biden declared in banning imports of Russian oil and gas, the policy of the Executive Branch — complementing the policy of Congress declared

in OCSLA — is to "reduce our dependence on foreign oil and fossil fuels." The White House, *FACT SHEET: United States Bans Imports of Russian Oil, Liquefied Natural Gas, and Coal* (Mar. 8, 2022), https://bit.ly/39e0Gj1. To that end, domestic "supply must keep up with demand." *Id.* But domestic supply cannot keep up with demand if Interior is prevented from even *beginning* the process of opening up 80 million acres of the Gulf of Mexico to oil and gas exploration and development. That would inevitably decrease production from an area that accounts for 15% of total U.S. crude oil production. *See* U.S. Energy Information Administration, *Oil and petroleum products explained: Offshore oil and gas: In depth*, https://bit.ly/3xnF0J8.

In light of the foregoing, vacating Lease Sale 257 would have disruptive consequences to the Nation's energy security.

CONCLUSION

The judgment of the district court should be reversed.

Dated: June 13, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) this document contains 3,804 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ *Eric Grant*
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