Nos. 18-575 & 18-581

IN THE
# Supreme Court of the United States

YPF S.A.

AND

ARGENTINE REPUBLIC,
*Petitioners*,
v.

PETERSEN ENERGÍA INVERSORA, S.A.U.
AND PETERSEN ENERGÍA, S.A.U.,
*Respondents*.

**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENTS


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## QUESTION PRESENTED

Whether the Second Circuit correctly held that the "commercial activities" exception to sovereign immunity in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2), applies in this case where the "gravamen" of plaintiffs' lawsuit is purely commercial activity – namely, petitioners' breach of a commercial obligation (to make a tender offer to shareholders) in a commercial contract (the bylaws of a private, for-profit corporation).

## RULE 29.6 STATEMENTS

Pursuant to this Court's Rule 29.6, respondents Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U. state the following:

Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U. are non-governmental corporate entities.

Petersen Energía Inversora, S.A.U. is a Spanish corporation wholly owned by Petersen Energía Inversora Holdings, S.A.U., a Spanish corporation that in turn is wholly owned by Petersen Energía Inversora, S.A., a privately held Argentine corporation.

Petersen Energía, S.A.U. is a Spanish corporation wholly owned by Petersen Inversiones Spain, S.A.U., a Spanish corporation that in turn is wholly owned by Petersen Energía Inversora, S.A., a privately held Argentine corporation.

No public corporation owns 10% or more of the stock of either respondent.

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## INTRODUCTION

In 1993, Argentina decided to convert petitioner YPF S.A. ("YPF" or "the Company"), its former state-owned oil company, into a private, for-profit corporation through a public offering of YPF's shares on the New York Stock Exchange. Petitioners recognized that potential investors were concerned that the Argentine government might reacquire control of YPF and destroy the value of YPF's public shares by running the company to serve national, rather than shareholders', interests. The success of the privatization thus depended on petitioners' commitment to explicit contractual protections for investors. To induce those investors to purchase YPF's shares, petitioners amended YPF's bylaws – a contract between the Company and its shareholders – to provide that, if the Argentine government ever reacquired a controlling interest in the Company, Argentina and YPF would make a tender offer for the shares of any remaining shareholders at a price set by formula in the bylaws. The bylaws provision specifically provided that, for purposes of this contractual protection, it made no difference *how* Argentina acquired its controlling interest. Assured by these contractual commitments, investors, including plaintiffs, bought billions of dollars in YPF shares.

Investors' concerns were well founded: Argentina retook control of YPF in the spring of 2012 by expropriating 51% of YPF's outstanding shares from YPF's then-majority shareholder, Repsol YPF S.A. ("Repsol"), and then exercising the rights associated with that 51% stake to take over control of the Company's operations. Critically, Argentina did *not* expropriate the shares of the remaining 49% shareholders, which would have triggered a duty under Argentine law to provide compensation. Argentina and YPF also did

not otherwise alter YPF's status as a for-profit, private company, or abrogate the bylaws, which remain in effect. Rather, after reacquiring a controlling stake in YPF, and stepping into Repsol's shoes as majority shareholder, Argentina simply announced that it and YPF would not honor their contractual obligation under the bylaws to make a tender offer to plaintiffs and the owners of the remaining 49% of YPF's shares. As a result, the value of the stranded shares dropped precipitously, and plaintiffs were effectively wiped out.

Under this Court's longstanding decisions, whether a lawsuit is "based upon" commercial activity turns on the "gravamen" of the complaint – *i.e.*, "the . . . acts that actually injured" the plaintiffs." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015). Other "activities [that] *led* to the conduct that eventually injured" the plaintiffs, the Court has long held, are not the acts a claim is "based upon" for purposes of the Foreign Sovereign Immunities Act of 1976 ("FSIA"). *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993) (emphasis added).

Applying that well-worn standard, the district court (then-Chief Judge Preska) held that the claims of Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U. (collectively, "Petersen" or "plaintiffs") could proceed against both defendants, finding that the "gravamen" of plaintiffs' complaint is classic commercial conduct, not sovereign acts. In a thorough and well-reasoned opinion, a panel of the Second Circuit (Judges Winter, Calabresi, and Chin) unanimously affirmed. *See* App.[1] 20a ("The gravamen of Petersen's claim is that Argentina denied Petersen the benefit of

[1] References to "App." are to the appendix filed in No. 18-581.

the bargain promised by YPF's bylaws when Argentina repudiated its obligation to tender for Petersen's shares."). The court of appeals then denied rehearing *en banc* without dissent. In short, every judge that has reviewed plaintiffs' allegations has concluded that they fall squarely within the FSIA's commercial-activities exception.

Petitioners urge the Court to grant review to address whether the commercial-activities exception applies where the "gravamen" of plaintiffs' claim challenges sovereign and commercial conduct that is "inextricably intertwined." YPF Pet. i; Argentina Pet. i. But as the courts below agreed, sovereign activity (expropriation) does not form *any part* of the "gravamen" of plaintiffs' claims. What injured plaintiffs was petitioners' refusal to tender for *plaintiffs*' shares, not Argentina's expropriation of *Repsol's* shares. *See* App. 28a. Thus, this case does not even raise the question presented by the petitions.

Nor does this case deepen any supposed circuit split between the D.C. and Ninth Circuits. Tellingly, the Second Circuit did not cite either of the cases that petitioners invoke, and petitioners cite no other court that has recognized any such split. Moreover, far from disagreeing with the D.C. Circuit, the decision below relied on the D.C. Circuit's holding that a breach of contract by a foreign government is commercial activity under the FSIA, *even when* it follows an "initial expropriation." *de Csepel v. Republic of Hungary*, 714 F.3d 591, 599-600 (D.C. Cir. 2013) (cited at App. 15a, 20a). There is no split. Rather, there is agreement among the circuits that the commercial-activities exception applies if (as is true here) it is the contract breach rather than the expropriation that "actually injured" the plaintiffs.

Petitioners' commercial behavior here forms part of a now well-documented pattern of Argentina shirking its obligations to international investors and then resisting and delaying investors' efforts to obtain compensation in federal court. The petitions here – which have yet further delayed plaintiffs' ability to vindicate their clear contractual rights – are part of those same regrettable tactics and should be denied.

## STATEMENT

**A.** Argentina created YPF in 1922 as the country's state oil producer. For more than seven decades, YPF operated as a state enterprise designed to further Argentina political and social objectives." App. 79a (¶ 11). Then, in 1993, Argentina decided to transform YPF into a "*sociedad anónima*" – the equivalent of a private corporation under U.S. law – and to raise capital in the international financial markets through an initial public offering ("IPO"). *See* App. 79a-80a (¶¶ 12-13).

Because YPF had long been run only for Argentina's benefit, enticing private investment required Argentina and YPF to assure prospective investors that YPF would be run for the benefit of its shareholders. Argentina and YPF did that through contractual protections. Prior to the 1993 IPO, Argentina and YPF added two provisions to YPF's bylaws providing that, if Argentina should ever retake control of YPF for any reason and "by any means," shareholders would be given an opportunity to protect their investment by divesting from the company at a market-based price undiminished by the economic effects of a takeover. App. 159a (Bylaws § 28(A)); *see also* App. 81a-82a (¶¶ 15-16). The first new provision – Section 7 – provides that any party acquiring 15% or more of YPF's capital stock must also extend a tender offer to

*all* shareholders at a price defined in the bylaws. *See* App. 118a-130a (Bylaws § 7(d)-(g)). The second new provision – Section 28 – explicitly applied the tender-offer requirement to takeovers of 49% or more of the Company *by Argentina* and stated that the provision applied to takeovers accomplished "by any means or instrument." App. 159a (Bylaws § 28(A)).[2]

Argentina marketed these contract terms aggressively following its conversion of YPF into a private company, and, "[b]y all accounts, Argentina's marketing efforts worked." App. 6a. Argentina raised billions of dollars through YPF's IPO from investors that bought YPF stock in reliance on Argentina's and YPF's contractual promises. *See* App. 80a (¶ 13).

Following the IPO, YPF's majority shareholder was a Spanish company called Repsol YPF S.A. *See* App. 77a (¶ 6). Petersen acquired a 25% stake in YPF through a series of purchases from Repsol between 2008 and 2011. *See* App. 87a-88a (¶¶ 27-28). (One of those purchases triggered the Section 7 tender-offer requirement, which respondents honored. *See* App. 88a (¶ 28).) From the IPO through 2011, YPF was a successful commercial enterprise, operated by professional management for the benefit of its shareholders.

**B.** On April 16, 2012, the contingency set forth in the bylaws' tender-offer provision came to pass: Argentina retook control of YPF. It did so by announcing the expropriation from Repsol of 51% of the stock of the Company. *See* App. 172a. That announcement was followed shortly by legislation effecting the expropriation from Repsol under Argentine law. *See* App. 181a (Art. 7).

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[2] There is no dispute that YPF's bylaws constitute a "contract governing the relationship among YPF, Argentina (in its capacity as a shareholder), and other YPF shareholders." App. 4a.

Argentina's 51% acquisition of YPF stock triggered its obligations under Sections 7 and 28 of the bylaws to offer to buy the remaining 49% of YPF's stock in a tender offer (and YPF's obligation to enforce that commitment). Nothing in Argentina's announcement of the expropriation mentioned or had anything to do with – much less "overrode," Argentina Pet. 8-9 – the bylaws' tender-offer provisions. Rather, the legislation provided that YPF "shall continue to operate as [a] publicly traded corporation[]" subject to the normal rules governing such firms. App. 184a (Art. 15). Indeed, the legislation addressed only the specific block of shares at issue – shares owned by Repsol constituting 51% of YPF's capital stock – and did not purport to expropriate the remaining 49%.[3]

Nonetheless, on April 17, 2012, the day after taking control of YPF, Argentina announced that it had no intention of honoring (or allowing YPF to honor) its contractual commitment. One Argentine government official (who at that point also served as a YPF officer) announced that only "fools" would "think that the State has to be stupid and buy everyone according to YPF's own law, respecting its by-law." App. 93a (¶ 38 n.1).

**C.** Petersen sued Argentina and YPF for breach of contract and anticipatory breach (*i.e.*, repudiation) in 2015. Petitioners moved to dismiss, arguing, among other things, that they were immune from suit under the FSIA. The district court denied the motion to

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[3] Nor did Argentina purport to expropriate the remaining shareholders' contractual entitlement to a tender offer. Argentine law sets forth a specific expropriation process, *see* App. 7a-10a ("(1) the Argentine Congress must declare a public use for the property to be expropriated and (2) the owner of the property must be compensated"), and that process was never begun with respect to those rights.

dismiss in relevant part (and in almost all other parts) on the grounds that Petersen's lawsuit fell within the FSIA's commercial-activities exception. App. 34a-71a. A panel of the Second Circuit (Winter, Calabresi, and Chin, JJ.) unanimously affirmed. App. 1a-30a.

In assessing whether Petersen's lawsuit was "based upon" "commercial activity," 28 U.S.C. § 1605(a)(2), the panel relied upon this Court's leading decisions defining those statutory terms. Citing *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), the panel explained that a lawsuit is "'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." App. 14a (quoting *Sachs*, 136 S. Ct. at 396). To identify the "gravamen" of a lawsuit, "[t]he Supreme Court has instructed us to 'zero[] in on the core of [the plaintiffs'] suit: the . . . acts that actually injured them.'" *Id.* (quoting *Sachs*, 136 S. Ct. at 396) (alterations in original).

As to the meaning of "commercial activity," the panel quoted the standard this Court announced in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), that a foreign state "engages in 'commercial activity . . . only where it acts "in the manner of a private player within" the market' or, put differently, 'where it exercises "only those powers that can also be exercised by private citizens," as distinct from those "powers peculiar to sovereigns."'" App. 15a (quoting 507 U.S. at 360) (alteration in original).

The panel then applied those settled principles to the facts. As to identifying what Petersen's lawsuit is "based upon," the panel held that Petersen's lawsuit was "'based on' Argentina's breach of a commercial obligation" – namely, the obligation, once it had taken control of YPF, "to make a tender offer for the remainder of YPF's outstanding shares." App. 20a. "The

gravamen of Petersen's claim is that Argentina denied Petersen the benefit of the bargain promised by YPF's bylaws when Argentina repudiated its obligation to tender for Petersen's shares." *Id.*

The panel explained that Petersen's claim did *not* challenge (or seek to undo) Argentina's expropriation of the 51% stake owned by Repsol because, simply, Argentina "did not expropriate anything from Petersen." App. 28a. "Instead, Petersen wants a court to award it the benefit of the bargain that Argentina and YPF struck with each shareholder who purchased YPF shares on the open market." *Id.* "The 'gravamen' of Petersen's lawsuit is thus the defendants' repudiation of a contract . . . . Sovereigns are not immune from such lawsuits under the FSIA." *Id.* (quoting *Sachs*, 136 S. Ct. at 396, and citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-15 (1992)).

As to whether that alleged contractual breach was "commercial activity," the panel held that the bylaws' tender-offer "obligation and Argentina's subsequent repudiation of it were indisputably commercial in nature in that they are 'the *type* of actions by which a private party engages in trade and traffic or commerce.'" App. 20a (quoting *Weltover*, 504 U.S. at 614); *see also* App. 26a ("YPF's obligation to enforce the tender offer provision . . . is commercial in nature"). "Indeed, . . . the bylaws impose similar obligations on others who seek to acquire large ownership stakes in YPF, and the record shows that those commercial actors, including Petersen, conducted tender offers when so required." App. 20a. "Moreover, as the district court correctly observed, the commercial contractual obligations at issue here could just as easily have been triggered by Argentina's acquisition of a controlling stake in YPF in open-market transactions." App. 21a (alteration omitted).

The Second Circuit then addressed and rejected petitioners' argument that plaintiffs' claim necessarily challenged the expropriation. App. 21a-23a. Petitioners' argument rested on the assertion that the expropriation legislation impliedly abrogated the tender-offer requirement because it commanded "that Argentina acquire *exactly* 51% ownership in YPF" and no more. App. 21a-22a. That premise, the court of appeals held, is unsupported by the record. *See* App. 24a (finding "no basis in the record for concluding that Argentina could not have complied with both the YPF Expropriation Law and the bylaws' tender offer requirements"). Nothing in the law itself purported to override the bylaws. To the contrary, the law expressly stated that "YPF would continue its normal commercial activities after the expropriation" of 51% of the company's shares from Repsol. App. 23a (citing language of the expropriation legislation). And petitioners' own experts pointedly declined to opine that the legislation overrode the bylaws. *See* App. 22a (noting that there was "no statement in [petitioners'] expert's opinion that the law compelled Argentina to acquire *exactly* 51% ownership in YPF and no greater ownership position").

"At bottom," the court concluded, the expropriation legislation directed at Repsol's shares did not expressly or impliedly direct petitioners not to make a tender offer for *Petersen's* shares: "the YPF Expropriation Law does not prohibit a post-expropriation tender offer under YPF's bylaws; indeed it says absolutely nothing about Argentina's acquisition of additional YPF shares in a subsequent market transaction." App. 23a.

**D.** Argentina and YPF each petitioned the Second Circuit for rehearing and rehearing *en banc*. The court of appeals denied those petitions without dissent and without requesting a response. *See* App. 72a.

## REASONS FOR DENYING THE PETITIONS

### I. THIS CASE DOES NOT IMPLICATE THE QUESTION PRESENTED BY THE PETITIONS

Both petitions ask this Court to grant certiorari to decide whether claims based upon commercial conduct that is "inextricably intertwined" with sovereign conduct fall within the FSIA's commercial-activities exception. But this case does not present that question. Both lower courts ruled against petitioners on the antecedent question whether the commercial activity upon which plaintiffs' claims are based (failure to make a tender offer) is "inseparable from" sovereign conduct (expropriation of Repsol's shares). YPF Pet. 12-13; Argentina Pet. 17; *see supra* pp. 7-9. The Court cannot reach the question presented because petitioners do not properly challenge the lower courts' holding on that antecedent question, which is fact-bound and clearly correct in any event.

#### A. The Court Cannot Reach the Question Presented Because Petitioners Do Not Challenge the Second Circuit's Antecedent Determination That Plaintiffs' Contract Claims Are "Based Upon" Purely Commercial Conduct

**1.** The FSIA confers federal jurisdiction over claims "based upon" "commercial activity" of foreign governments or their instrumentalities. 28 U.S.C. § 1605(a)(2). Thus, as relevant here, the FSIA required the panel below to answer two questions: (1) What acts were plaintiffs' complaint "based upon"? And (2) were those acts "commercial"? The panel correctly answered both questions by engaging in a straightforward application of this Court's well-worn FSIA precedents.

As this Court reiterated just three Terms ago, longstanding FSIA precedent instructs that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015). The "gravamen" of a lawsuit is defined by the specific "acts that actually injured" the plaintiffs – not the entire course of conduct that may have "'preceded their commission.'" *Id.* (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993)).

The facts of *Sachs* illustrate its holding. The plaintiff, who sued for injuries suffered in a train accident in Austria, argued that her claim was "based upon" commercial conduct in the United States – namely, her purchase of a Eurail pass from a Massachusetts travel agent. *See Sachs*, 136 S. Ct. at 396. The Court (per Chief Justice Roberts) unanimously rejected that argument, holding that the "gravamen" of her claim was the railroad's conduct in Europe, where the conduct giving rise to her injury occurred, not the prior ticket sale in the United States.

The "gravamen" principle articulated in *Sachs* was not novel: it followed this Court's longstanding decisions in *Nelson* and *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), both of which stand for the proposition that the conduct giving rise to the harm – and not additional acts to which that conduct can be linked back – governs the FSIA inquiry.

In *Nelson*, the plaintiff sued the Saudi government for injuries sustained when the plaintiff was abducted and tortured by government officials during a period of employment by a government-owned hospital. *See* 507 U.S. at 352-53. The Court began "by identifying the particular conduct on which the Nelsons' action is 'based' for purposes of" the FSIA. *Id.* at 356. In doing

so, the Court concluded that, while the hospital's commercial recruitment and hiring of the plaintiff may have been commercial activities, those acts merely "*led* to the conduct that eventually injured the Nelsons" and "are not the basis for the Nelsons' suit." *Id.* at 358 (emphasis added); *see id.* ("arguably commercial activities that preceded the[] commission [of the tortious acts]" did not constitute basis for plaintiffs' suit); *see also Sachs*, 136 S. Ct. at 396 ("*Nelson* . . . teaches that an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit.").

In *Weltover*, the same approach of focusing on the "particular conduct" at issue meant that Argentina's breach of a bond-repayment agreement was commercial conduct subject to the FSIA exception. *See* 504 U.S. at 615-17. That was so even though the breach was accomplished "[p]ursuant to a Presidential Decree," *id.* at 610, and, per Argentina, was intended "to address a domestic credit crisis," *id.* at 616; *cf.* Argentina Pet. 29 (YPF nationalized "to avert an escalating domestic energy crisis"). Those considerations were not relevant to the FSIA inquiry, the Court held, because the *nature* of a contract breach is commercial, whatever the *purpose* of the breach may be. *See* 504 U.S. at 617 ("[I]t is irrelevant *why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so."); *accord* 28 U.S.C. § 1603(d) ("The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.").

**2.** The Second Circuit expressly recited this Court's teachings in *Sachs* and its progenitors. *See* App. 14a ("The Supreme Court has instructed us to

'zero[] in on the core of [the plaintiffs'] suit: the . . . acts that actually injured them.'") (quoting *Sachs*, 136 S. Ct. at 396) (alterations in original). It then applied those teachings to the facts of this particular case, holding that the "gravamen" of this lawsuit – the "act[] that actually injured" Petersen – "is that Argentina denied Petersen the benefit of the bargain promised by YPF's bylaws when Argentina repudiated its obligation to tender for Petersen's shares." App. 20a; *see also* App. 26a-27a (applying similar reasoning to YPF).

As the Second Circuit further held, Petersen's lawsuit is *not* "based upon" any sovereign act of expropriation, even in part.[4] While the expropriation triggered the tender-offer obligation (much in the same way the ticket sale in *Sachs* was a but-for cause of Sachs's injuries), the expropriation was not the particular conduct that harmed Petersen. *See* App. 28a (noting that petitioners "did not expropriate anything from Petersen"). Rather, the act that harmed plaintiffs – and that forms the basis of their lawsuit – is petitioners' breach of YPF's bylaws, which was separate from, and not a necessary consequence of, the expropriation of Repsol's shares. That conduct – the breach of company bylaws by a majority shareholder – is plainly ordinary commercial activity. *See* App. 20a (citing *Weltover*, 504 U.S. at 614).

The decision below broke no new legal ground in reaching the foregoing conclusions. Rather, the Second Circuit applied settled FSIA law to determine that the "gravamen" of the complaint in this particular

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[4] This is therefore not a "case where a claim consists of both commercial and sovereign elements," *Nelson*, 507 U.S. at 358 n.4, and the court below had no occasion to address the application of the commercial-activities exception to such a case.

case is purely commercial activity – not commercial activity that is "intertwined" with sovereign activity – because Argentina's expropriation legislation did not override YPF's bylaws or command petitioners to ignore the bylaws' tender-offer requirement.[5]

The petitions do not seek review of that antecedent conclusion. *See*, *e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001) ("As a general rule, . . . we do not decide issues outside the questions presented by the petition for certiorari."). Indeed, Argentina goes so far as to disclaim any request for review of that determination. *See* Argentina Pet. 19 n.5 ("this Court need not address any factual disputes as to the meaning of the Expropriation Law"). Thus, as the case comes to this Court, the petitions do not genuinely raise the question presented. That alone is ample grounds to deny the petitions.[6]

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[5] Petitioners and their *amici* repeatedly mischaracterize the Second Circuit's rulings in their effort to manufacture a cert-worthy issue. In particular, the panel below never remotely held that "every government action that impinges upon contractual rights falls within the commercial activity exception." YPF Pet. 15. Nor did the panel hold that the FSIA "subject[s] sovereigns to suit for harms flowing from expropriative acts." United Mexican States Br. 6; *see also id.* at 10 (incorrectly asserting the ruling below permits a challenge to "any sovereign act (like expropriation) that is alleged to occur in a commercial setting or that has commercial consequences"). As the Second Circuit held, plaintiffs' harm does not flow from the expropriation but rather from the separate and independent refusal to tender for their shares.

[6] The assertion by *amicus* United Mexican States (at 13) that "it is not disputed that Argentina's alleged breach flows directly from its expropriation" is inaccurate. Both lower courts agreed with Petersen that petitioners' breach does *not* flow from the expropriation, and petitioners have not challenged that ruling in their petitions.

### B. Petitioners' Contention That Plaintiffs' Claims Are "Inextricably Intertwined" with the Expropriation Is Fact-Bound and Meritless

Petitioners' forfeiture aside, the Second Circuit's antecedent determination that the "gravamen" of plaintiffs' complaint in this case is *purely* commercial activity is fact-bound and does not raise any broader legal question worthy of the Court's review. The relationship between Argentina's expropriation and the bylaws' tender-offer requirement turns on the meaning of a piece of *sui generis* foreign legislation and the meaning of a single company's bylaws. Those questions – which are not even questions of U.S. law, but rather of *Argentine* law – certainly do not have relevance beyond this case and do not warrant certiorari.

We emphasize, moreover, that petitioners' argument that Petersen is engaged in a "frontal attack" (YPF Pet. 1) on Argentina's expropriation is simply not accurate. Plaintiffs do not seek to undo or be paid for the expropriation of Repsol's property. They seek compensation for petitioners' refusal to make the tender offer once Argentina attained control of YPF. The fact that Argentina attained that control by expropriating another shareholder's stock does not affect *plaintiffs'* right to a tender offer under the bylaws' plain terms. *See* App. 18a-19a, 21a ("[A]s the district court correctly observed, '[t]he commercial contractual obligations at issue here could just as easily have been triggered by Argentina's acquisition of a controlling stake in YPF in open-market transactions.'") (quoting App. 47a) (first alteration added).

Both Argentina (at 17-18) and YPF (at 16-17) insist that plaintiffs are necessarily challenging Argentina's

expropriation of Repsol's shares because the Expropriation Law impliedly abrogated the bylaws' tender-offer requirement. In a similar vein, Argentina (at 17) and YPF (at 16) argue that their contract breaches were "a direct product of" or "dictated by" the expropriation. As the Second Circuit concluded, however, that is not accurate as a factual matter: there is "no basis in the record for concluding that Argentina could not have complied with both the YPF Expropriation Law and the bylaws' tender offer requirements." App. 24a; *see* App. 23a ("[T]he YPF Expropriation Law does not prohibit a post-expropriation tender offer under YPF's bylaws; indeed, it says absolutely nothing about Argentina's acquisition of additional YPF shares in a subsequent market transaction."); App. 26a-27a (rejecting "YPF's contention that it was somehow acting as a sovereign" when it failed to abide by its own bylaws). And, as noted, petitioners disclaim any challenge to that conclusion. *See* Argentina Pet. 19 n.5.

Petitioners' suggestion (Argentina Pet. 24-25; YPF Pet. 18) that the decision below "render[ed] the expropriation exception and its carefully-crafted limitations largely meaningless" is off the mark for the same reasons. The FSIA's separate expropriation exception, 28 U.S.C. § 1605(a)(3), permits a plaintiff to sue a foreign government for the expropriation of property in violation of international law. But that is not the nature of plaintiffs' claims in this case.[7] Moreover,

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[7] Notably, all of the expropriation-exception cases cited by petitioners involve the expropriation of *the plaintiff's own property*. Here, Argentina expropriated shares from Repsol, not from Petersen. *See Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1324 (11th Cir. 2003) (suit sought compensation for land expropriated from plaintiff); *de Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1398 (5th Cir. 1985) (suit to collect on

there is no basis in the FSIA to read the expropriation exception as limiting the scope of the separate commercial-activities exception: the FSIA provides that a lawsuit may proceed in federal court if *any* of the statute's exceptions applies. *See* 28 U.S.C. § 1605(a) ("[a] foreign state shall not be immune from the jurisdiction of [state or federal courts] *in any case*" in which any one of six exceptions is met) (emphasis added).

In sum, this Court cannot reach the question presented without first reviewing the Second Circuit's determination that plaintiffs' claims are *not* intertwined with any sovereign activity because the expropriation legislation neither displaced the bylaws' tender-offer requirement nor directed petitioners to violate it. That antecedent determination is not properly challenged, is not cert-worthy, and, in any event, is correct. The conduct for which plaintiffs are seeking relief is the separate and distinct refusal by petitioners to tender for their shares as required by the bylaws. Under settled FSIA law, the Second Circuit correctly held that conduct to be purely commercial and covered by the commercial-activities exception.

## II. THE DECISION BELOW DOES NOT IMPLICATE ANY CIRCUIT SPLIT

Given that the Second Circuit straightforwardly applied this Court's longstanding holdings to the facts of this case, it is unsurprising that the decision below created no circuit split. Every circuit to encounter the

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a dishonored check that the court characterized as a taking allowed by the expropriation exception), *criticized on related grounds by Weltover*, 504 U.S. at 616-17; *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 252, 254 (7th Cir. 1983) ("[t]he basis of this lawsuit is the nationalization of Empacadora," in which plaintiffs alleged the government seized $1.1 million worth of stock).

issue has held that a claim is "based upon" commercial activity if commercial rather than sovereign activity was what injured the plaintiff.[8] There is no disagreement among the circuits on that principle.

The alleged 1-1 circuit split to which the decision below supposedly contributed simply does not exist. Petitioners can point to no other court that has recognized it. The cases cited by petitioners merely reflect the lower courts' application of the well-settled "gravamen" principle to different factual allegations.

### A. The Decision Below Did Not Depart from the Decisions of the D.C. Circuit

It is hard to understand how petitioners can credibly claim that the decision below created a split with the D.C. Circuit when the panel relied repeatedly on that court's holding in *de Csepel* that "a foreign state's repudiation of a contract" is commercial activity under the FSIA because it is "precisely the type of activity in which a 'private player within the market' engages." 714 F.3d at 599 (quoting *Nelson*, 507 U.S. at 360); *see* App. 15a, 20a (citing *de Csepel*).

Indeed, *de Csepel* is closely analogous to this case. There, the plaintiffs sued the Hungarian government for violation of a bailment agreement to hold certain artwork. The artwork subject to the breached agreement "was initially expropriated by the Hungarian

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[8] *See*, *e.g.*, *de Csepel v. Republic of Hungary*, 714 F.3d 591, 600 (D.C. Cir. 2013); *Globe Nuclear Servs. & Supply (GNSS), Ltd. v. AO Techsnabexport*, 376 F.3d 282, 286 (4th Cir. 2004); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 853 (5th Cir. 2000); *Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V.*, 899 F.3d 1081, 1092 n.10 (9th Cir. 2018); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 993 (10th Cir. 2007); *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1222 (11th Cir. 2018).

government," 714 F.3d at 600, and Hungary (like petitioners below) argued that claim was sufficiently related to the prior expropriation to remove the case from the commercial-activities exception. But the D.C. Circuit disagreed, holding that the acts giving rise to the plaintiffs' claims were not the prior expropriation, but rather Hungary's subsequent "entering into . . . and later breaching th[e] [bailment] agreements by refusing to return the artwork." *Id.* The same is true in this case.

The D.C. Circuit case relied on by petitioners for their claimed circuit split – *Rong v. Liaoning Province Government*, 452 F.3d 883 (D.C. Cir. 2006) – was never even mentioned by the panel below. And petitioners cited the case in their Second Circuit briefs only once in passing – not for the proposition for which they now say it stands, but merely for the proposition that government expropriation of corporate shares is sovereign conduct. As the treatment of the case below indicates, there is no legal disagreement between the Second Circuit and *Rong*; rather, the case is just factually inapposite because, unlike in *Rong*, there was no government expropriation of Petersen's shares.

In *Rong*, the plaintiff suffered losses when a Chinese province issued a declaration seizing ownership of the plaintiff's portion of a joint venture. *Id.* at 886. The government then used its ownership authority to order the plaintiff dismissed from the management of the venture. *Id.* The plaintiff argued that the commercial-activities exception applied because the government's *operation* of the company post-expropriation was commercial activity. But the D.C. Circuit held that the gravamen of the lawsuit was the government's seizure – "an act that can be taken only by a sovereign." *Id.* at 889; *see id.* at 886-87 (noting that

the plaintiff "sought relief" from the "takeover" of its property). The government's ensuing use of the expropriated shares was not the source of the plaintiff's injury and thus did not "transform" the expropriation into commercial activity. *Id.* at 889.

Here, by contrast, the Second Circuit held that petitioners' breach of YPF's bylaws did *not* "flow" from Argentina's expropriation. *See supra* pp. 7-9. It was not the expropriation of Repsol's shares, but rather petitioners' separate refusal to make a tender offer to the remaining 49% of shareholders, that was the source of plaintiffs' harm. Nothing in *Rong* suggested, much less squarely held, that the commercial-activities exception would not apply in the circumstances of this case. Notably, *de Csepel*, which held that the exception *does* apply in this situation, saw no need to disagree with *Rong*; in fact, it cited *Rong*'s legal analysis approvingly. *See de Csepel*, 714 F.3d at 600.[9]

To the extent anything can be gleaned from *Rong* about that panel's views about a case like this one, it is supportive of the decision below. The *Rong* panel expressly distinguished the situation – present here – of a case containing allegations sounding "in the nature of a corporate dispute between majority and minority shareholders . . . , with the only distinction being that the majority shares were held by the Iranian government and its subsidiaries rather than by a private party." *Rong*, 452 F.3d at 890 (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449-50 (D.C. Cir. 1990)). And the court found it significant that "there was no contractual

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[9] Tellingly, YPF (at 11 n.1) acknowledges that *de Csepel* was "correctly" decided, and instead merely argues that it is factually distinguishable from this case.

relationship between Yang Rong and the Province regarding the Foundation." *Id.*[10]

At bottom, there is no disagreement between the decision below and the decisions of the D.C. Circuit. The claimed circuit split is just a fig leaf for petitioners' request for fact-bound error correction.

**B. There Is No Split Between the Second or D.C. Circuit and the Ninth Circuit**

Petitioners' claim that the decision below deepened a split between the D.C. Circuit and the Ninth Circuit is also wholly unpersuasive. The Ninth Circuit, like the Second and D.C. Circuits, adheres to this Court's instruction that the "gravamen" of the complaint dictates what specific activity a lawsuit is "based upon" under the FSIA. *See*, *e.g.*, *Packsys*, 899 F.3d at 1092 & n.10.

Petitioners rely primarily on *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), but the panel below did not even cite *Siderman*, much less "join[]" (Argentina Pet. 14) its reasoning. In all events, *Siderman* does not bespeak any disagreement

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[10] Both Argentina (at 13) and YPF (at 10) also suggest that *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879 (D.C. Cir. 1988), bolsters their claim of a circuit split. But *Millen* merely states the "particular conduct" test set forth in *Nelson* and *Sachs*: "[W]hen a transaction partakes of both commercial and sovereign elements, jurisdiction under the FSIA will turn on which element the cause of action is based on. Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on a sovereign activity." *Id.* at 885. Nothing in *Millen* is inconsistent with the panel below's conclusion that plaintiffs' claims are "based upon" petitioners' commercial contract breach. *See id.* (claims asserting a foreign government's breach of commercial contracts "fall within the commercial activity exception and, therefore, should not be dismissed on jurisdictional grounds").

among the circuits on the question presented. It is simply another fact-bound application of settled law.

In *Siderman*, Argentina's anti-Semitic military government brutally kidnapped and tortured the plaintiffs, a Jewish couple, forced them and their son to flee the country, and then seized their company (called INOSA) and its assets, which included a hotel – all "because of [their] Jewish faith." 965 F.2d at 703. After the seizure, the government operated INOSA and the hotel, keeping the profits for itself. The plaintiffs then sued Argentina in federal court. Argentina initially defaulted, but later sought to vacate the default judgment on the grounds that it was entitled to sovereign immunity.

In assessing whether the commercial-activities exception applied, the Ninth Circuit correctly recognized that, under this Court's precedents, it should identify "[t]he activities that form the basis for the claims" and then determine whether those activities are "of a kind in which a private party might engage." *Id.* at 708-09. Here again, it is hard to see how petitioners can credibly read *Siderman*'s adoption of that well-worn legal standard as disagreeing with the D.C. Circuit when it cited that court's FSIA precedents. *See*, *e.g.*, *id.* at 709 n.10 (citing *Foremost-McKesson*).

Petitioners appear to take issue with *Siderman*'s application of these principles to the facts of that case – in particular, that panel's conclusion that the plaintiffs' claims for economic harm were based upon Argentina's management of INOSA and its operation of the seized hotel, rather than the seizure itself. *See* Argentina Pet. 13; YPF Pet. 12. But disagreement with the Ninth Circuit's application of settled law to the particular – and egregious – facts in a 26-year-old case is certainly no basis to grant certiorari in *this* case – especially when the court below did not even

cite (much less rely on) that decision. We also note that this Court denied Argentina's petition for certiorari in *Siderman*. *Republic of Argentina v. Siderman de Blake*, 507 U.S. 1017 (1993).

*Adler v. Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997), cited by both Argentina (at 13) and YPF (at 12), likewise reflects application of settled law to particular facts, not any circuit disagreement on the proper interpretation of the FSIA. The plaintiffs in *Adler* had signed a contract with Nigerian government officials under which the plaintiffs would receive commission payments for "arranging for the payment" of outstanding government contracts. 107 F.3d at 722. When the officials refused to honor the commission contracts, the plaintiffs sued for breach. Applying the same legal test adopted by the panel below and the D.C. Circuit in *de Csepel*, the Ninth Circuit panel concluded that the suit fell within the commercial-activities exception because it was based upon the formation and breach of a contract that was commercial, not sovereign, in nature. *See id.* at 725 (rejecting contention that contract was "sovereign in nature").[11]

Contrary to petitioners' assertions, neither *Siderman* nor *Adler* held that a lawsuit is "based upon" commercial activity as long as the sovereign conduct is "related to commercial acts." Rather, in both cases,

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[11] Moreover, petitioners fail to note that *Adler* relied on the FSIA's language that the commercial-activities exception applies where a lawsuit is based "upon an act . . . *in connection with* a commercial activity," 28 U.S.C. § 1605(a)(2) (emphasis added). *See Adler* 107 F.3d at 725. The panel below had no need to address the scope of the FSIA's "in connection with" language because it held that plaintiffs' suit was directly "based upon" commercial activity. Thus, even assuming *Adler* could fairly be read as adopting a broader interpretation of the commercial-activities exception, it did so on grounds that are irrelevant to this case.

the Ninth Circuit applied this Court's teachings to hold that the gravamen of the complaint was commercial activity, not sovereign conduct. In short, notwithstanding petitioners' efforts to manufacture one, there is no circuit split for the Court to resolve.

### C. Petitioners' Claim of Lower-Court Confusion Is Unsupported

Argentina (at 31) suggests that further clarification of the line between "commercial" and "sovereign" conduct is required because of confusion in the lower courts. But the cases it cites do not support the existence of any such confusion.

*Azima v. RAK Investment Authority*, 305 F. Supp. 3d 149 (D.D.C. 2018), *appeal pending*, No. 18-7055 (D.C. Cir.), is hardly an illustration of a lower court in need of further guidance. Notwithstanding the court's comment that drawing the line between commercial and sovereign activities can "sometimes" be difficult, *id.* at 162, the court had no difficulty applying this Court's existing decisions. *See id.* at 162-63 ("[i]t is clear to this Court that" the relevant activity is "commercial activity as defined in *Weltover*").

In its unpublished decision in *DRFP L.L.C. v. República Bolivariana de Venezuela*, 706 F. App'x 269 (6th Cir. 2017), the Sixth Circuit likewise found it straightforward under *Weltover* to conclude that a suit alleging Venezuela's "*assumption* of debt and its *refusal to honor* that debt" fell within the commercial-activities exception. *Id.* at 273-74. That was so, the court held, again citing *Weltover*, even where the fact pattern also included "a sovereign act – that is, the issuance of an Attorney General opinion." *Id.* at 274.

As with any rule of law, there may be close cases. But this Court does not sit to review all such cases. And, in any event, this case is not one of them.

## III. ARGENTINA'S INTEREST IN AVOIDING LITIGATION DOES NOT JUSTIFY REVIEW

### A. Foreign Sovereigns Are Not Entitled to a Lower Standard for Certiorari

Given the absence of any circuit split, and the Second Circuit's straightforward application of settled legal principles, the generalized arguments of petitioners and their *amici* that FSIA cases are important because they concern the immunity of foreign sovereigns cannot justify this Court's intervention. This Court does not apply a laxer approach to certiorari in FSIA cases. Where there is no circuit split and the petition merely challenges the application of settled law to particular facts, as is the case here, certiorari is routinely denied – just as it is in other contexts. *See* Sup. Ct. R. 10.[12] Petitioners' own cases (YPF Pet. 21) prove this point: in each case where certiorari was granted, there was a clear and direct split among the circuits. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018) ("The Court granted certiorari to resolve a split among the Courts of Appeals regarding the effect of § 1610(g)."); Pet. for Cert. at 34, *Sachs*, No. 13-1067 (U.S. filed Mar. 5, 2014), 2014 WL 890906 (split between Ninth Circuit's "one element" test and test applied by other circuits); Pet. for Cert. at 14-18, *Republic of Sudan v. Harrison*, 138 S. Ct. 2671 (2018) (U.S. filed Mar. 9, 2017) (No. 16-1094), 2017 WL 957219 (conflict between Second Circuit and D.C.,

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[12] See, in just the last three Terms, *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463 (4th Cir.), *cert. denied*, 139 S. Ct. 209 (2018); *Farhang v. Indian Inst. of Tech.*, 655 F. App'x 569 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1224 (2017); *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98 (2d Cir.), *cert. denied*, 137 S. Ct. 493 (2016).

Fifth, and Seventh Circuits regarding sufficiency of service mailed to government embassy).

Nor is review warranted simply because there is "significant" litigation against foreign states under the commercial-activities exception. The commercial-activities exception reflects Congress's considered judgment that U.S. courts should be available to private parties harmed by the commercial misconduct of foreign sovereigns. The availability of the federal courts is vital to international investors and other parties that do business with foreign governments: "Without the assurance of such fora . . . , private contractors, lenders, and others would not enter into commercial relationships with foreign states or would demand unacceptable terms." Gary Born, *A New Generation of International Adjudication*, 61 Duke L.J. 775, 825 (2012). Allowing foreign sovereigns to invoke this Court's certiorari jurisdiction to contest lower courts' fact-bound application of settled law would undermine, rather than serve, the aims of the FSIA.[13]

### B. The Petitions Are Part of Argentina's Demonstrated Pattern of Abusive Litigation Tactics

Argentina, in particular, is poorly positioned to invoke this Court's discretionary exercise of certiorari jurisdiction given its demonstrated pattern of litigation abuse, of which the current petitions are a part.[14]

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[13] The Second Circuit did not "overlook[]" the availability of investor-state arbitration. Law and Business Professors Br. 15. International investment treaty arbitration does not displace federal-court jurisdiction conferred by the FSIA.

[14] Argentina is currently the controlling shareholder of YPF, so it has effectively filed two petitions.

As has been well documented, Argentina has for years been the world's worst sovereign deadbeat – repeatedly refusing to honor its international commercial obligations. *See*, *e.g.*, *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172, 175 (2d Cir. 2011) (noting "the preeminence of the Republic of Argentina . . . in the sorry history of defaults on sovereign debt"); *NML Capital v. Republic of Argentina*, 621 F.3d 230, 233 (2d Cir. 2010) (noting "Argentina's troubled financial history"); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007) (noting Argentina's "many contributions to the law of foreign insolvency through its numerous defaults on its sovereign obligations"); Elizabeth G. Atkins, *Collateral Damage: An American Judge's Innovative but Misguided Attempt to Resolve the Enforcement Problem of Sovereign Debt*, 28 Geo. J. Legal Ethics 371, 374 (2015) (calling Argentina "notorious in the institutional investment community for its history of defaults"). For example, after committing the "largest and potentially most complex default the world ha[d] ever known" in December 2001, Argentina "dragged its feet" and "largely refused to recognize the interest arrears that its own delay generated." Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 Chi. J. Int'l L. 311, 317, 323 (2005). Fallout from that 2001 default continues to this day.

That is not an isolated case. When Argentina's victims have attempted to call it to account, they have been met by meritless legal arguments and obstructive litigation tactics – all in an effort to delay being held financially accountable for its misconduct. *See*, *e.g.*, *EM Ltd. v. Banco Cent. de la República Argentina*, 800 F.3d 78, 98-99 (2d Cir. 2015) (noting "Argentina's continuing failure to pay the judgments duly entered

against it by the District Court" and expressing regret that "a predictable and unfortunate outcome" of granting sovereign immunity is that Argentina will "continue shirking the debts it has the ability to pay"); *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 238 (2d Cir. 2013) (noting that Argentina produced "no productive proposals" in response to the court's invitation and that Argentina's officials intend "to defy any rulings of this Court . . . with which they disagree"); *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 256 n.9 (2d Cir. 2012) (dismissing a set of appeals that Argentina conceded were "overlapping" and "clogging the dockets"); *EM Ltd.*, 473 F.3d at 466 n.2 (Argentina has a notable history of developing "innovative theories of international law in response to the world community's efforts to collect on defaulted sovereign obligations"); *Aurelius Capital Partners, LP v. Republic of Argentina*, 379 F. App'x 74, 76 (2d Cir. 2010) (reviewing district court order holding Argentina in contempt for failing to produce documents).

The petitions here – which are evidently baseless for the reasons explained above – are emblematic of Argentina's delay tactics. As the Argentine press has reported, the stated goal of petitioners' counsel in filing these petitions is to continue to postpone further proceedings in the district court, which are currently stayed. *See YPF confía en que el fondo Burford perderá el juicio de u$s 3000 millones por la estatización*, El Cronista (Oct. 30, 2018) ("Before this Thursday, the company and the Government of Argentina must file a petition for writ of certiorari, which is a request to prevent the expiration of the stay ordered last week by the Court of Appeals for the Second Circuit . . . . The strategy of the Argentine lawyers is to delay as much as possible the handling of the matter . . . .") (describing public statements made

by YPF's management, translated from Spanish), https://www.cronista.com/economiapolitica/YPF-confia-en-que-el-fondo-Burford-perdera-el-juicio-de-us-3000-millones-por-la-estatizacion-20181029-0073.html.

Petitioners' meritless foreign sovereign immunity defense – which has been rejected by every judge to review it – has already stalled plaintiffs' contract claims at the motion-to-dismiss stage for more than three years. This Court should not sanction petitioners' efforts at further delay, and should promptly deny the petitions.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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