No. 23-861

In the Supreme Court of the United States

NICK FELICIANO, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

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

BRIEF FOR TEXAS, SOUTH CAROLINA, 18 OTHER STATES, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, South Carolina, Alaska, Arizona, Arkansas, Connecticut, Georgia, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Ohio, Oregon, Pennsylvania, Tennessee, Utah, West Virginia, Wisconsin, and the District of Columbia. Amici are home to tens of thousands of reservists who play a vital role in their local communities, as well as across the nation and the globe. Federal law entitles such reservists who serve the federal government as civilians to differential pay while they serve in active duty during a war or national emergency. Because the U.S. Court of Appeals for the Federal Circuit has denied Petitioner Nick Feliciano and other reservists the statutory benefits they have earned, this case implicates Amici's interests.*

SUMMARY OF ARGUMENT

Reservists play a key role in our national defense. Differential pay—that is to say, pay that makes up the difference between a reservist's civilian salary and active-duty pay—gives reservists some financial security while they protect the physical security of all Americans. Yet for several years now, the Federal Circuit has issued a string of opinions denying differential pay to reservists just because they did not serve directly in a contingency operation. That error merits this Court's review.

The court of appeals denied Feliciano and other reservists differential pay because of two interpretive errors. *First*, the court misunderstood the connection

* No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On February 12, 2024, counsel of record for all parties received notice of amici's intention to file this brief.

between 5 U.S.C. §5538 (the differential-pay statute) and 10 U.S.C. §101(a)(13)(B), which it cross-references. Although section 101(a)(13)(B) defines "contingency operation," section 5538(a) merely incorporates by reference "provision[s] of law referred to in section 101(a)(13)(B)." Section 5538(a) thus does not require that a reservist serve in a contingency operation to receive differential pay because the provisions of law referred to in section 101(a)(13)(B) do not. In particular, Feliciano falls under that section's catchall provision, which sweeps in any lawful call or order to active duty during a war or declared national emergency. *Second*, the court erred with respect to the *ejusdem generis* canon. That canon is irrelevant here because the statute is unambiguous. And even if the canon were relevant, the court of appeals misapplied it. The common thread running through the provisions enumerated in section 101(a)(13)(B) is not that they involve service directly in a contingency operation, but rather that they involve augmenting military capabilities in response to a national crisis. Petitioner Feliciano plainly falls within that category.

ARGUMENT

I. This Case Merits Review Because the Question Presented Is Important and Recurring.

Reservists play a key role in protecting our nation. That role has only grown since the September 11, 2001 terrorist attacks changed the face of national security. Recognizing that reservists who also serve the federal government as civilians should not be forced to endure a pay cut when called or ordered to active duty, Congress enacted a differential-pay statute, 5 U.S.C. §5538. But beginning with its decision in *Adams v. Department of Homeland Security*, 3 F.4th 1375 (Fed. Cir. 2021), the Federal Circuit has imposed atextual restrictions on

which reservists can receive the differential pay guaranteed by Congress. And the court has repeatedly refused to revisit *Adams*. *E.g.*, Order Denying Petition for Reh'g En Banc, *Flynn v. Dep't of State*, No. 22-1220 (Fed. Cir. Nov. 1, 2023); Order Denying Petition for Reh'g En Banc, *Feliciano v. Dep't of Transp.*, No. 22-1219 (Fed. Cir. Oct. 27, 2023); *see Flynn v. Dep't of State*, No. 22-1220, 2023 WL 3449169, at *1 (Fed. Cir. May 15, 2023); *Feliciano v. Dep't of Transp.*, No. 22-1219, 2023 WL 3449138, at *2 (Fed. Cir. May 15, 2023). This Court's review is therefore needed to put Federal Circuit precedent back on track.

A. Reservists provide vital services to the States and the entire nation.

Since the founding era, the States and the nation have relied on the services of reservists. These forces have played a critical role in nearly every major American military conflict, ranging from the French and Indian War to the Gulf War. *See* Brief of Amicus Curiae Reserve Organization of America 2.

The modern Reserves were formed in the 20th century. *See* Lawrence Kapp & Barbara Torreon, Cong. Rsch. Serv., RL30802, *Reserve Component Personnel Issues: Questions and Answers* 6 (2021 update), https://crsreports.congress.gov/product/pdf/RL/RL30802 (all websites last visited Mar. 13, 2024). During this period, reservists were activated for service in several major conflicts or emergencies, including the Korean War, the Cuban Missile Crisis, the Vietnam War, and the Gulf War. *See id.* at 7–8.

In recent decades, the States and the nation have increasingly relied upon the service of reservists. Charles Cragin, a former Assistant Secretary of Defense for Reserve Affairs, has observed that

> [t]he role of our Reserve forces is changing in the United States. We have seen their traditional role, which was to serve as manpower replacements in the event of some cataclysmic crisis, utterly transformed. They are no longer serving as the force of last resort, but as vital contributors on a day-to-day basis around the world.

Id. at 7.

Reservists played a particularly prominent role in response to the September 11 terrorist attacks and the subsequent War on Terror. As described by Secretary of Defense Donald Rumsfeld,

> [w]ithin minutes of the September 11 attacks, National Guard and Reservists responded to the call to duty. They flew combat patrols, patrolled the streets, and provided medical assistance, communications, and security at numerous critical sites across the country. Perhaps the National Guard's most visible support to civil authorities was to provide security at America's airports until additional security measures could be established.

Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 801 (2004).

To date, over one million reservists have been voluntarily or involuntarily activated in support of the military operations that followed the September 11 attacks. *See* Cong. Rsch. Serv., RL30802, *supra*, at 8 & n.33. By some accounts, the mobilization of reservists following the September 11 attacks was one of the longest ongoing mobilizations ever. *Id.* at 27.

But the role of the Reserves is not limited to just military operations. Thousands of reservists were activated in response to the COVID-19 pandemic. *Id.* at 9. In South

Carolina, for example, reservists and members of the South Carolina National Guard played a critical role in assisting overwhelmed healthcare providers during the pandemic. *See South Carolina National Guard to help hospitals due to coronavirus surge*, WLTX (Sept. 3, 2021), https://perma.cc/FRT2-3KGX. Similar stories from around the country demonstrate the valiant service of individual reservists during that difficult period. *See, e.g.*, *U.S. Army Reserve COVID-19 Response*, DVIDS, https://perma.cc/3P84-ZLJM.

B. Differential pay assists reservists and the States.

In recognition of their service and to induce further service, Congress has passed several laws that extend benefits to reservists, including 5 U.S.C. §5538. That law was "written to ensure that federal employees in the National Guard and Reserves do not suffer a loss of income when they are called to active military duty." Brief of Members of Cong. as Amici Curiae, *Adams v. Dep't of Homeland Sec.*, No. 21-1134, 2022 WL 845883, at *4 (U.S. Mar. 18, 2022). Section 5538 "requires the government to pay Guard members and reservists 'differential pay' while on active duty, i.e., the difference between their military pay and what they would have been paid in their federal civilian employment during their time on active duty." *Id.*; *see* 5 U.S.C. §5538(a). The law is particularly significant because "[t]he federal government employs more reserve component members than any other employer in the United States." Comm'n on the Nat'l Guard & Rsrvs., *Final Report to Congress and the Secretary of Defense* 41 (Jan. 31, 2008), https://perma.cc/3S3Z-KKUW.

Congress is not alone in taking this type of action. Texas, for example, provides a form of differential pay to

state employees who are called to active duty to serve in a reserve component of the United States Armed Forces. *See, e.g.*, Tex. Gov't Code §661.9041(a) ("The administrative head of a state agency shall grant sufficient emergency leave as differential pay to a state employee on unpaid military leave if the employee's military pay is less than the employee's state gross pay."). And in 2003, the Governor of New Jersey signed an executive order providing that "[d]uring active duty for the duration of their activation, [] State employees shall be entitled to receive a salary equal to the differential between the employee's State salary and the employee's military base pay." Governor James E. McGreevey, Executive Order #50 (2003), https://nj.gov/infobank/circular/eom50.htm.

Differential pay is critical to reservists and their families. Approximately 40% of reservists have children. *See* U.S. Dep't of Def., *2022 Demographics: Profile of the Military Community* at 179, http://tinyurl.com/dod2022report. In Texas, for example, there are 98,482 National Guard reservists, over 40,000 of whom are married, and 63,614 relevant children. *See* Mil. State Pol'y Source, *Texas*, https://statepolicy.militaryonesource.mil/state/TX. In South Carolina, there are 24,443 National Guard and reserve members and a corresponding 11,261 spouses and 16,591 children. *See* Mil. State Pol'y Source, *South Carolina*, https://statepolicy.militaryonesource.mil/state/SC.

Reservists have frequently experienced financial losses when activated. *See* Cong. Rsch. Serv., RL30802, *supra*, at 27. These losses are often attributable to the difference in pay between their military and civilian roles. *Id.* Differential pay thus provides some level of financial security to reservist families. After all, "[t]he most significant ramifications of large-scale

mobilizations of reservists occur in the reservists' work and family life. The family lives of millions of Americans are disrupted when loved ones are called to duty." Andrew P. Sparks, *From the Desert to the Courtroom: The Uniformed Services Employment and Reemployment Rights Act*, 61 HASTINGS L.J. 773, 782 (2010).

Differential pay also assists in reservist recruitment. In recent years, several reserve components have seen decreases in personnel. *See* U.S. Dep't of Def., *2022 Demographics: Profile of the Military Community*, *supra*, at 65. This decline can be attributed to several factors, but wage competition is a significant component. For example, the National Guard faces stiff competition from private companies. *See* Doug G. Ware, *National Guard Struggles to Attract Recruits as Private Sector Offers Tough Competition for Talent*, STARS AND STRIPES (Jun. 21, 2023), https://perma.cc/G9L7-VNVM. Last year, one officer commented that "[t]his is the most challenging recruiting environment the Department of Defense has ever faced." *Id.*

The Federal Circuit's decisions in this case and others like it can only make this tough situation even more challenging for recruiters. Knowing that they will receive differential pay allows reservists to plan for their financial futures and have confidence that they can continue to provide for themselves and their families if called or ordered to active duty. The Federal Circuit, however, has created considerable uncertainty about which reservists will receive differential pay and for what periods. Resolving that uncertainty merits this Court's review.

II. This Case Merits Review Because the Court of Appeals Made Two Interpretive Errors.

Review is especially appropriate here because not only is the Federal Circuit's decision important, it is also plainly wrong. Section 5538 provides that differential pay is available to those "call[ed] or order[ed] to active duty under . . . a provision of law referred to in section 101(a)(13)(B) of title 10." 5 U.S.C. §5538(a). Section 101(a)(13), in turn, defines "contingency operation" to include, among other things, "a military operation" that results in a call or order to active duty under any "provision of law during a war or during a national emergency declared by the President or Congress." 10 U.S.C. §101(a)(13)(B). Petitioner Feliciano was called to active duty during a declared national emergency. Cert. Pet. 8–9, 20. Because Feliciano satisfied the criteria of section 101(a)(13)(B)'s catchall provision, he was entitled to differential pay under section 5538(a).

In holding otherwise, the court of appeals first misread section 5538(a)'s cross-reference to section 101(a)(13)(B). It then compounded that error by misapplying the *ejusdem generis* canon. This Court should correct those errors.

A. The court of appeals misread the differential-pay statute's cross-reference.

Section 5538(a) of title 5 provides differential pay to a reservist called or ordered to active duty under "a provision of law referred to in section 101(a)(13)(B) of title 10." Section 101(a)(13)(B) in turn defines "contingency operation" as a military operation that "results in the call or order to, or retention on, active duty." The court of appeals erred by reading into section 5538(a) a non-existent requirement that the reservist be called to serve *in* a contingency operation. *See Feliciano*,

2023 WL 3449138, at *2; *Adams*, 3 F.4th at 1379. When section 5538(a) cross-references section 101(a)(13)(B), it does not say that a reservist must be ordered to serve in a contingency operation *as defined by* that section, but rather under "a provision of law *referred to* in section 101(a)(13)(B)" (emphasis added). And section 101(a)(13)(B) refers to "any other provision of law during a war or during a national emergency declared by the President or Congress." The court of appeals is therefore wrong that a reservist called into active duty under a provision of law referred to in section 101(a)(13)(B) is not entitled to differential pay unless he or she serves directly in a contingency operation.

Indeed, the phrase "contingency operation" does not appear in a single qualifying provision enumerated in section 101(a)(13)(B). 10 U.S.C. §688 authorizes the Secretary of Defense to order reservists to active duty "at any time" for "such duties as the Secretary considers necessary in the interests of national defense." Nowhere does it state that those duties are limited to direct involvement in a contingency operation. 10 U.S.C. §12301(a) similarly permits the Secretary to order members into active duty "for the duration of [a] war or emergency and for six months thereafter." Again, contingency operations go entirely unmentioned. The same is true of 10 U.S.C. §§12302 and 12304, which provide similar authority to activate the ready reserves. 10 U.S.C. §12304 permits the President to order certain members of the Coast Guard to active duty for any "named operational mission." But it does not limit such missions to contingency operations.

Other enumerated provisions follow the same pattern. 10 U.S.C. §12304a permits the Secretary to activate reservists "[w]hen a Governor requests Federal

assistance in responding to a major disaster or emergency." 10 U.S.C. §12305 permits suspension of certain laws relating to promotion, retirement, and separation for activated reservists determined to be "essential to the national security of the United States." 10 U.S.C. §12406 allows the President to call into federal service members of the National Guard of any State to repel invasion, suppress rebellion, or execute laws. Chapter 13 of title 10 authorizes the President to call into federal service the militia of any State to enforce laws or suppress rebellion when it becomes "impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings." 10 U.S.C. §252. And 14 U.S.C. §3713 allows for the "emergency augmentation" of the Coast Guard in response to "an imminent, serious natural or manmade disaster." Thus, the enumerated provisions of section 101(a)(13)(B), like its catchall provision, do not require a reservist to serve in a contingency operation to receive differential pay.

B. The Federal Circuit misapplied *ejusdem generis.*

The second major interpretive error that the Federal Circuit made here and in *Adams* concerns *ejusdem generis*, the interpretive principle that a general term following specific words embraces only things of a similar kind. A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012). According to *Adams*, *ejusdem generis* operates to restrict differential pay to reservists "directly called to serve in a contingency operation." *Adams*, 3 F.4th at 1379. As explained above, nothing about the differential-pay statute's text keys differential pay to contingency operations. It instead confines the benefit to those called

to active duty under "a provision of law referred to in" the statutory definition of that term. 5 U.S.C. §5538(a).

But even putting that aside, direct involvement in the "emergency at hand" still would not be required. *Adams*, 3 F.4th at 1380. Any call to active duty during a war or declared national emergency is enough, and *ejusdem generis* is not to the contrary. That is because *ejusdem generis* does not apply when, as here, the statute is unambiguous. And even if the canon were relevant, the court of appeals did not identify the correct trait shared by the enumerated statutory provisions.

1. ***Ejusdem generis*** **does not override the differential-pay statute's plain meaning.**

This Court has consistently disavowed "wooden[]" application of *ejusdem generis* "every time Congress includes a specific example along with a general phrase." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008). As a tool for resolving textual ambiguity, the canon "comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute." *United States v. Turkette*, 452 U.S. 576, 581 (1981). Least of all should it be used to "create ambiguity where the statute's text and structure suggest none." *Ali*, 552 U.S. at 227.

These principles should have stopped the Federal Circuit from applying *ejusdem generis* here. The differential-pay statute extends its benefit to

> an employee who is absent from a position . . . with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under . . . a provision of law referred to in section 101(a)(13)(B).

5 U.S.C. §5538(a). Section 101(a)(13)(B), in turn, lists the following provisions: "section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title, section 3713 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress." Thus, federal civilian employees called to active duty are entitled to differential pay if called under an enumerated provision during peacetime or under "any" provision during a war or national emergency. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588 (1980) (declining to apply *ejusdem generis* to interpret the unambiguous phrase "any other final action").

That should be the end of the analysis. "The rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." *Gooch v. United States*, 297 U.S. 124, 128 (1936). "[I]t may not be used to defeat the obvious purpose of legislation." *Id.*

Confirming the absence of ambiguity, the differential-pay statute's plain language resolves the questions that courts sometimes use the *ejusdem generis* canon to answer. In other words, *ejusdem generis* is thought to flow from two semantic intuitions, but here, the statute's plain language forecloses resort to either.

The first intuition is that when a general term follows specific terms falling within a shared category, the speaker very likely had that category in mind when he used the general term. Scalia & Garner, *supra*, at 199. Thus, "[i]f one speaks of 'Mickey Mantle, Rocky Marciano, Michael Jordan, and other great competitors,' the last noun does not refer to Sam Walton (a great competitor in the marketplace) or Napoleon Bonaparte

(a great competitor on the battlefield). It refers to other great *athletes*." *Id.*

That intuition is not needed here because, sticking with the analogy, section 101(a)(13)(B) does not stop at "other great competitors." Congress did not state merely that differential pay should be granted to reservists activated under "any other provision of law." It chose instead to specify that differential pay should be granted to reservists activated under "any other provision of law during a war or during a national emergency declared by the President or Congress." 10 U.S.C. §101(a)(13)(B).

The second semantic intuition underlying *ejusdem generis* is that the inclusion of a general term must add some communicative content to the sentence. Scalia & Garner, *supra*, at 199–200. A general term thus should not be read so broadly as to render the preceding specific terms superfluous. *Id.* If, for example, a will devises to a particular person "'my furniture, clothes, cooking utensils, housewares, motor vehicles, and all other property' . . . almost any court will construe the last phrase to include only personalty and not real estate." *Id.* at 199. That is because "[i]f the testator really wished the devisee to receive *all* his property, he could simply have said 'all my property.'" *Id.* at 200.

Again, resort to this intuition is unnecessary here because reading section 101(a)(13)(B)'s catchall term broadly would not render its specific terms superfluous. While calls to active duty under the enumerated provisions apply in both peacetime and wartime, the general term applies only "during a war or during a national emergency declared by the President or Congress." 10 U.S.C. §101(a)(13)(B).

Congress thus made a deliberate choice to provide differential pay in a narrow set of specified exigent

circumstances—such as when a state governor requests assistance to respond to a major disaster, 10 U.S.C. §12304a, a rebellion makes it impracticable to enforce the laws, *id.* §252, or a natural disaster is imminent, 14 U.S.C. §3713—regardless of whether the nation is at war or in the throes of a declared national emergency. But when the nation is at war or in a declared state of national emergency, any lawful activation qualifies.

In short, the Federal Circuit's precedent narrowing the circumstances in which activated reservists qualify for differential pay departs from—rather than heeds—the plain meaning of section 101(a)(13)(B). The most fundamental of all semantic principles is that "a legislature says in a statute what it means and means in a statute what it says there." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). "It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring). But "when Congress did specifically address itself to a problem," courts should not "find secreted in the interstices of legislation" an answer different from the one Congress expressly provided. *Id.* "When the words of a statute are unambiguous, then, the first canon is also the law: judicial inquiry is complete." *Barnhart*, 534 U.S. at 462. (quoting *Conn. Nat'l Bank*, 503 U.S. at 253–54).

2. Even if *ejusdem generis* applied, the Federal Circuit failed to identify the correct link between the enumerated provisions.

Even assuming *ejusdem generis* had something to contribute here, the court of appeals did not identify a trait common to all the enumerated provisions. *Adams* states that the provisions share "a connection to [a] declared national emergency." 3 F.4th at 1380. But the term "national emergency" does not appear in the lion's share of those provisions. *See, e.g.*, 10 U.S.C. §§688, 12304a, 12305, 12406; 14 U.S.C. §3713. In fact, 10 U.S.C. §12304 applies in times "other than during war or national emergency." The Government thus conceded below that connection to a national emergency cannot serve as the relevant link between the enumerated provisions. *See* Resp. to Pet. for Reh'g En Banc 12 n.4, *Feliciano v. Dep't of Transp.*, No. 22-1219 (Fed. Cir. Sept. 25, 2023). *Adams* states elsewhere that the differential-pay statute benefits only those "directly called to serve in a contingency operation." 3 F.4th at 1379. But, again, none of the enumerated provisions require that an activated reservist serve on the front lines of any operation—much less a contingency operation. *See supra*, Part II.A.

Rather, each of these provisions is a means for augmenting military capabilities in response to a national crisis. The Secretary of Defense may order reservists to active duty when "necessary in the interest of national defense," 10 U.S.C. §688, or for the "duration of [a] war or emergency"—whether declared or not—"and for six months thereafter," *id.* §12301(a). The President's authority under 10 U.S.C. §12304 is triggered when "necessary to augment the active

forces." 10 U.S.C. §12304a applies when a governor seeks federal aid in response to "a major disaster or emergency," while 10 U.S.C. §12305 applies when "essential to the national security of the United States." 10 U.S.C. §252 operates when the judicial system breaks down and 14 U.S.C. §3713 when the nation faces "an imminent, serious natural or manmade disaster."

Nor do the enumerated provisions limit the duties to which activated reservists can be assigned. There is no reason to think, for example, that a supporting role is any less "necessary in the interests of national defense," 10 U.S.C. §688, than a direct one. As General John Pershing, Commander of the American Expeditionary Forces during World War I, famously said: "Infantry wins battles, logistics wins wars." U.S. Army Materiel Command, *Army Materiel Command White Paper: Sustaining Army 2030* at i (Oct. 1, 2023), http://tinyurl.com/army2030.

Indeed, "robust sustainment capabilities" are vital to the success of any contingency operation. *Id.* at 4. That is why the Department of Defense's Financial Management Regulation defines "contingency operations costs" as "those expenses necessary to cover incremental costs 'that would not have been incurred had the contingency operation not been supported.'" Brendan McGarry & Emily Morgenstern, CRS Report R44519, *Overseas Contingency Operations Funding: Background and Status* at 16 (Sept. 6, 2019), http://tinyurl.com/R44519 (citing Dep't of Def., *Financial Management Regulation, Contingency Operations*, vol. 12, ch. 23 at 23–26 (Dec. 2017)). That includes both expenses arising directly from combat and combat support costs, "such as those for overseas basing, depot maintenance, ship operations, weapons system

sustainment" as well as "readiness and munitions." *Id.* at 26. And when active army units deploy to contingency operations, army reserve units must backfill installation base operation activities previously conducted by those units. *See* Kathryn Roe Coker, *The Indispensable Force: The Post-Cold War Operational Army Reserve, 1990-2010* at 187 (2013), http://tinyurl.com/coker2013.

Congress was wise to provide differential pay not only to reservists called to serve directly in a contingency operation but also to those called to support them and staff the positions they have vacated. And given that recruiting is already becoming more challenging, *see supra*, Part I.B, the Federal Circuit's decisions threaten to harm not only the personal lives of reservists and their families but also our national defense.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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MARCH 2024

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