No. 18-1323

In the
Supreme Court of the United States

June Medical Services, L.L.C., et al., *Petitioners*

v.

Rebekah Gee, Secretary, Louisiana Department of Health and Hospitals, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Brief of Amici Curiae National Right to Life Committee and Louisiana Right to Life Federation Supporting Respondent

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Questions Presented

Amici curiae National Right to Life Committee, Inc. ("NRLC") and Louisiana Right to Life Committee, Inc. ("LRTL") address aspects of Respondent Gee's first and third questions presented:

> 1. Whether *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) ("*WWH*"), forecloses lower courts from evaluating challenges to States' abortion clinic safety regulations in light of a case's specific factual record under the "substantial obstacle" standard derived from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
>
> 3. Whether the substantive due process standard applicable to abortion regulations authorizes a federal court to enjoin application of rational, generally applicable health standards.

Cert. Opp'n (i).

Amici focus on this Court's (i) prior assumption of the national-medical-board role by hyper scrutiny, (ii) rejection of that role by lowered scrutiny in *Casey*, (iii) creation of confusion by apparent resumption of that role in *WWH* with higher scrutiny, and (iv) need to return to *Casey*'s lowered scrutiny, under which the Louisiana statute is constitutional.

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Interests of Amici Curiae[1]

Founded in 1968, the National Right to Life Committee, Inc. is the nation's oldest, largest, pro-life organization. *See* nrlc.org. NRLC is a federation of 50 state affiliates and over 3,000 local chapters. By education and legislation, NRLC works to restore legal protection to the most defenseless members of our society who are threatened by abortion, infanticide, assisted suicide, and euthanasia. NRLC and related entities have a long history of working to protect maternal health. *See, e.g.*, http://www. nrlc.org/uploads/international/MCCLMaternalMort2012.pdf.[2]

Louisiana Right to Life Federation, Inc., established in 1970, is NRLC's Louisiana affiliate. *See* https://prolifelouisiana.org/. LRTL's pro-life advocacy includes maternal-health protection, and LRTL advocated for the maternal-health law at issue herein.

Summary of the Argument

Though *Roe v. Wade*, 410 U.S. 113 (1973), disavowed on-demand abortion and said states could regulate medical aspects of abortion, this Court then em-

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[1] Rule 37 statement: All parties consented to filing this brief; no counsel for any party authored it in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than amici or their counsel funded it.

[2] Counsel for amici have authored numerous briefs on abortion issues in this and other courts. Mr. Bopp is NRLC's General Counsel. Counsel developed some of the themes herein further in James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Absolute, Anomalous, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181 (1989), *available at* https://digitalcommons.law.byu.edu/jpl/vol3/iss2/2.

braced the national-medical-board role, culminating in the hyper scrutiny of *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). (Part I.)

Following calls by Justices to extract this Court from that role, the controlling joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), applied a lowered-scrutiny, undue-burden test with greater respect for legislative judgments and recognition of state interests throughout pregnancy—all designed to extricate this Court from the national-medical-board role. *Casey*, 505 U.S. at 163-64. In essence, a burden is not "undue" unless it imposes a "substantial obstacle" to actually obtaining an abortion (not just increased cost or delay), and absent such a "substantial obstacle" a provision need only be rationally related to a legitimate state interest (determined as a matter of law, not as a fact-based balancing). While the joint opinion sometimes (but not always) recited record evidence in considering provisions, it neither *mandated* a binding, burden-benefit balancing of record evidence nor *was bound* by record evidence in finding burdens undue (or not) or rationally related (or not). Rather those holdings were matter-of-law determinations by the Court. This understanding of the *Casey* analysis was followed in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), and *Gonzales v. Carhart*, 550 U.S. 124 (2007). (Part II.)

But *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) ("*WWH*"), created confusion about *Casey*'s lowered scrutiny and rejection of the medical-board role. (Part III.)

Given the *WWH* confusion, this Court should clarify that its undue-burden test is a lowered-scrutiny, defer-

ential test that keeps federal courts out of the medical-board role. It should return to *Casey*'s lowered scrutiny, as set out in Part II, under which the Louisiana statute is constitutional. (Part IV.)

Argument

I.

From *Roe* to *Thornburgh*, this Court assumed the national-medical-board role with hyper scrutiny.

The medical-board approach of *Roe*, 410 U.S. 113, was early criticized. Archibald Cox said it read like "hospital rules" subject to change and "Constitutional rights ought not to be created ... unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over time." Archibald Cox, *The Role of the Supreme Court in American Government* 113-14 (1976).

Cox was prescient, but *Roe* at least rejected on-demand abortion, recognized compelling interests in fetal life and maternal health, and held that when the maternal-health interest engages (second trimester),

> a State may regulate the abortion procedure to the extent that the regulation *reasonably relates* to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the *person* who is to perform the abortion; as to the licensure of that person; as to the *facility* in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility;

and the like.

410 U.S. at 163 (emphasis added). So *Roe*'s rule was that the maternal-health interest justifies laws *reasonably related* to protecting health, and "[e]xamples" that *do* reasonably relate to protecting health (i.e., are "permissible") include regulating abortion *providers* (e.g., requiring hospital privileges) and *facilities* (e.g., requiring ambulatory-surgical-clinic ("ASC") quality).[3] Since *Casey* recognized a health interest *throughout* pregnancy, 505 U.S. at 878, such provisions are permissible under *Roe* for abortions at *all* stages.

Relying on *Roe*, a three-judge court upheld a post-first-trimester-hospitalization requirement, and this Court summarily affirmed. *Gary-Northwest Indiana Women's Services v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980), *aff'd sub nom. Gary-Northwest Ind. Women's Services v. Orr*, 451 U.S. 934 (1981). In *Bowen*, abortion providers said D&E (dilation and evacuation) procedures had so improved that, for the first half of the second trimester, a hospitalization requirement was not reasonably related to the health interest. *Id.* at 897. The lower court rejected the argument as contrary to *Roe*'s express language (quoted above) about what is permissible, *id.* at 898-89, and contrary to *Roe*'s bright-line rule that trimesters be treated as units and not subdivided, *id.* at 889-90. It rejected the argument that "*Roe* allow[ed] regulation not of second trimester abortions, but only of abortions more dangerous than childbirth," *id.* at 900, because absent such bright lines

[3] Though ASC requirements are not at issue here, they were in *WWH* and are discussed here as part of the undue-burden analysis.

"states will be hard-pressed to pursue their legitimate, compelling, interests in protecting maternal health," *id.* The court reiterated the need for bright lines to allow states to legislate and reduce litigation:

> It would be impractical for the constitutionality of a second trimester regulation to depend on a *factual* question, such as whether the regulation in fact reduced maternal morbidity and mortality. [This] would require *relitigation* of the regulation's constitutionality with each change in the availability of abortion, with each improvement in abortion technique, and with each publication of statistics showing that abortion skills have improved. Such an interpretation of *Roe* would result in *repeated relitigation of the constitutionality of the same statute.* It is the policy of the Supreme Court to avoid, if possible, the creation of rules of law which increase litigation.

Id. at 901 (emphasis added). The court said the "ultimate test" was "whether the legislature acted reasonably in determining that the regulation would promote maternal health." *Id.* at 902. And it rejected the test of "whether the statute has the *statistically demonstrable result* of decreasing maternal morbidity or mortality for specific groups of abortions." *Id.* (emphasis added).

This Court's summary affirmance, 451 U.S. 934, was widely viewed as permitting such hospitalization requirements and endorsing the need for bright lines, reduced litigation, and keeping the federal judiciary out of the medical-board role.

But *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), changed all that. The lower courts had upheld a post-first-trimester-hospitalization re-

quirement by applying precedent. *Id.* at 426. This Court reversed because the American Public Health Association ("APHA") and American College of Obstetricians and Gynecologists ("ACOG") said hospitalization for all post-first-trimester abortions was no longer required. *Id.* at 437.[4] So this Court abandoned the bright-line approach and precedent, saying government may not "depart from accepted medical practice." *Id.* at 434 (citations omitted). Justice O'Connor rejected the idea of this Court as "Platonic Guardians" who may substitute their judgment for legislators' by assuming the "medical board" role. 462 U.S. at 453 (citation omitted), 456. She noted that the Constitution makes legislatures "the appropriate forum for resolution" of difficult issues, requiring "careful attention" to them. *Id.* at 465 (citations omitted). "'[R]espect ... properly should be accorded legislative judgments.'" *Id.* at 463 (citation omitted).[5] She said the medical-board approach of government interests depending on factually variable points is "completely unworkable." 462 U.S. at 454. "Rather, these interests are present *throughout* pregnancy." *Id.* at 459 (emphasis in original). And the health interest "justifies ... regulation to ensure that first-trimester abortions are performed as safely as possible." *Id.* at 460.[6]

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[4] *Akron* also struck (inter alia) requirements for a *physician* to conduct the informed-consent dialogue, *id.* at 449, and for a 24-hour waiting period thereafter, *id.* at 451.

[5] Justice O'Connor said legislatures are better equipped than courts to regulate medical standards. *Id.* at 456.

[6] This simply restates *Roe*'s holding that states may regulate abortionists and abortion facilities to "insure maximum safety for the patient." 410 U.S. at 150.

Thornburgh, 476 U.S. 747, was a high-water mark of the abortion-distortion effect, whereby ordinary rules of law are abandoned when abortion is at issue (e.g., by allowing third-party standing for abortion providers)—all in the direction of on-demand abortion. Dissenting Justice O'Connor decried the Court becoming an "ad hoc nullification" machine. *Id.* at 814. And Chief Justice Burger switched sides and called for *Roe*'s reconsideration, noting that *Roe* rejected on-demand abortion and allowed state medical regulation, but *Thornburgh* abandoned that and him. *Id.* at 472-83. He noted that though *Roe* established a compelling interest in protecting maternal health, "[y]et today the Court astonishingly goes so far as to say that the State may not require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure ...." *Id.* at 783. He said *Roe* recognized a compelling interest in protecting viable fetal life, but the Court's willingness to strike a second-physician requirement (to care for a born-alive child) made *Roe* "mere shallow rhetoric." *Id.* at 784. "Undoubtedly," he said, "the Pennsylvania Legislature added the ... requirement on the mistaken assumption that this Court meant what it said in *Roe* concerning the 'compelling interest' of the states ...." *Id.*

The foregoing confirms the early critique that *Roe* was a "Lochnering" decision that threatened rule-of-law principles. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973); *see also* Ely, *Democracy and Distrust* (1980) (same critique). In *Lochner v. New York*, 198 U.S. 45 (1905), this Court used substantive due process to strike state limits on bakers' work hours, based on the

idea that "liberty" included a right to contract unfettered by government regulation.[7] *Lochner* was based on the notions that business could be trusted to do what is best and that business and labor have equal bargaining power. *Roe* and its progeny relied on a trust that doctors will do what's best and on a model of the doctor-patient relationship assuming an identity of interests, which was unrealistic at the time of *Roe*, *see, e.g.*, Bernard Nathanson, *Deeper Into Abortion*, 291 N. Eng. J. Med. 1189 (1974), and has become increasingly so as further evidence emerges of poor conditions in many clinics and abortionists with low standards, *see, e.g.*, Jon Hurdle & Trip Gabriel, *Philadelphia Abortion Doctor Guilty of Murder in Late-Term Procedures*, N.Y. Times (May 13, 2013), https://www.nytimes.com/2013/05/14/us/kermit-gosnell-abortion-doctor-found-guilty-of-murder.html. As Justice O'Connor noted in *Akron*, "the record ... shows that the [doctor-patient] relationship is nonexistent." 462 U.S. at 473. By changing course in *Casey*, *see* Part II, this Court recognized that doctors do not always know and do what's best and that legislatures have the constitutional authority to

[7] The Lochnering approach was strongly criticized and once abandoned: The Lochnering doctrine, "that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely, [had] been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id. See also Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 533-37 (1949). The Lochnering rejection clearly reached "social" matters. *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 484-86 (1961).

regulate abortion in furtherance of vital health and life interests without this Court acting as the national medical board, constantly substituting its judgment for those constitutionally charged legislatures.

II.
Casey, *Mazurek*, and *Gonzales* established lowered scrutiny to reject the medical-board role.

In *Casey*, this Court rejected *Thornburgh*'s hyper scrutiny in favor of a lowered-scrutiny, undue-burden test to reject the medical-board role.

Because Justice O'Connor coauthored the *Casey* joint opinion that largely adopted her *Akron*-dissent analysis, examining her *Akron* analysis is vital to interpreting *Casey*. She said this Court's jurisprudence has a "required threshold inquiry"—the "'unduly burdensome' standard." *Akron*, 462 U.S. at 453. "[N]ot every regulation ... must be measured against the State's compelling interests and examined with strict scrutiny." *Id.* at 461. "[T]his 'unduly burdensome' standard should be applied ... throughout the entire pregnancy" and absent such a burden the only question is whether a "regulation rationally relates to a legitimate state purpose." *Id.* at 453 (citation omitted). So the undue-burden/rational-relationship test was a threshold test under which the sort of regulations at issue in *Akron* would be upheld (as would the sort of regulations that *Roe* held *are* rationally related to maternal-health protection as a matter of law, *see supra* at 3-4).

Justice O'Connor said "an 'undue burden' has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion decision." *Id.* at 464. Importantly, she equated "undue bur-

den" with the *Akron* majority's use of "significant obstacle," *id.* at 463, thereby equating the term "significant obstacle" with "absolute obstacles or severe limitations." As an example of such a significant obstacle, she cited the "*complete* prohibition on abortions in certain circumstances" that the majority saw in the earlier *Danforth* decision. *Id.* at 464 (citing *id.* at 429 n.11, citing *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 78-79 (1976)) (emphasis in original).[8] So a "significant obstacle" or "undue burden" must rise to the level of an "absolute obstacle[] or severe limitation[]," such as a "complete prohibition," before strict scrutiny would engage, short of which only a readily met rational-relationship test would apply.

Justice O'Connor explained what undue burdens do *not* entail: "That a state regulation may 'inhibit' abortions to some degree does not require that we find the regulation invalid." *Id.* at 464 (citation omitted). And regulations at issue in *Akron* did not involve significant obstacles/undue burdens, e.g., a post-first-trimester hospitalization requirement, which is rationally related to the health interest, *id.* at 467, or a 24-hour waiting period, which is rationally related to both state interests, *id.* at 472-74. Extra costs, travel days, delay, scheduling difficulties, and the like are not undue burdens. *Id.* at 466-67, 473. And even if they were, a state's compelling interests[9] "clearly justify the waiting

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[8] Justice O'Connor also equated "undue burden" and "significant obstacle" with "'official interference' with the abortion decision and said that "[a] health regulation, such as the hospitalization requirement, simply does not rise to" such a level. *Id.* at 467 (citation omitted),

[9] Justice O'Connor said "[h]ealth-related factors that

period." *Id.* 473-74.[10] "An 'unduly burdensome' standard is particularly appropriate in the abortion context because of the *nature* and *scope* of the right that is involved," which "'cannot be said to be absolute.'" *Id.* at 463 (citation omitted) (emphasis in original). So requiring admitting privileges (or ASC standards) would not be an undue burden, and even if it were a state's compelling interest would justify it under Justice O'Connor's analysis.

Regarding the "reasonably related" test, Justice O'Connor said the "hospitalization requirement 'reasonably relates' to its compelling interest in ... maternal health under any normal understanding of what 'reasonably relates' signifies." *Id.* at 467 n.11. "The Court has never required that state regulation that burdens the abortion decision be 'narrowly drawn' to express only the relevant state interest." *Id.* Rather, "'[a] State necessarily must have latitude in adopting regulations of general applicability in this sensitive area.'" *Id.* (citation omitted). So as *Roe* held, regulation of abortionists and abortion facilities reasonably relates to the government's health interest. 424 U.S. at 163.[11]

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may legitimately be considered by the State go well beyond what various medical organizations have to say about the *physical* safety of a particular procedure." *Id.* at 467 (emphasis in original).

[10] In *Simopolous v. Virginia*, 462 U.S. 506 (1983), the Court upheld a post-first trimester ASC requirement under strict scrutiny, and Justice O'Connor would have held it constitutional throughout pregnancy under the threshold undue-burden standard, *id.* at 520 (O'Connor, J., concurring in part and in the judgment).

[11] Justice O'Connor reaffirmed her *Akron*-dissent analy-

In *Casey*, 505 U.S. 833, the joint opinion authored by Justices O'Connor, Kennedy, and Souter largely adopted Justice O'Connor's *Akron*-dissent analysis, including greater deference to legislatures, government interests throughout pregnancy, and a lowered-scrutiny, significant-obstacle, undue-burden test, *id.* at 869-79.[12] The articulation and application of the test provide the understandings that (i) added costs, travel, delay, scheduling difficulties, and the like are not undue burdens and (ii) regulations of abortion personnel/facilities are rationally related to governmental interests, *id.* at 869-87. The result was the upholding of provisions (e.g., a 24-hour waiting period and the requirement that informed-consent information be communicated by a physician) that would have failed the *Akron-Thornburgh* hyper scrutiny. *Id.* at 881-87.

Five analytical points from *Casey* are key to the present analysis. *First*, *Casey* adopted Justice O'Connor's significant-obstacle/undue-burden test as *the* test for abortion regulations, not just as a threshold test. *Id.* at 874-79. While Justice O'Connor previously said precedent made it a threshold test, after which an abortion regulation might survive strict scrutiny given compelling interests, *Casey* made it the *only* test: "[A]n

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sis in her *Thornburgh* dissent. 476 U.S. at 828.

[12] *Casey*'s undue-burden analysis (Part IV) only obtained plurality support, but its analysis controls under *Marks v. United States*, 430 U.S. 188, 193 (1977), so "plurality" is not always noted herein. And though the joint opinion says Justices O'Connor and Kennedy both "utilized" "the concept of an undue burden," 505 U.S. at 876, Justice Scalia's dissenting opinion showed that Justice Kennedy did not actually perform an undue-burden analysis, *id.* at 987 n.4.

undue burden is an unconstitutional burden." *Id.* at 877 (citation omitted). Given this elimination of strict scrutiny, the undue-burden test cannot mean anything approaching strict scrutiny,[13] let alone the hyper scrutiny of *Akron* and *Thornburgh*.[14]

Second, regarding what constitutes an undue burden, *Casey*'s elimination of strict scrutiny could not have *lowered* what constitutes an undue burden (as Justice O'Connor described it in *Akron*) because *Casey* was implementing lower scrutiny (as evidenced by provisions upheld that would have failed before and by subsequent cases applying the new test). Removal of strict scrutiny could not mean that the undue-burden test was to be a new strict-scrutiny test. Rather, making the undue-burden test the *only* test logically *raised*

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[13] Justice O'Connor identified the analysis at work in abortion jurisprudence beyond the undue-burden threshold test as "strict scrutiny," *Akron*, 462 U.S. at 461, though least-restrictive-means was not required, *id.* at 467 n.11.

[14] Having eliminated strict scrutiny, *Casey* did not identify interests as compelling, speaking instead, e.g., of "a substantial interest in potential life," *id.* at 876 (plurality), though that "substantial interest" was sufficiently compelling at viability to justify banning abortion (with a maternal life/health exception), *id.* at 879. Though the *Casey* plurality abandoned *Roe*'s trimester scheme, it did not overrule *Roe*'s holding that life and health interests are compelling at certain points, which is what actually justifies the post-viability ban under substantive-due-process analysis. So at a minimum, ASC requirements are constitutional post-first-trimester—as this Court held in *Simopolous* under strict scrutiny, 462 U.S. at 519—due to the compelling health interest. *Casey*'s lower-scrutiny analysis cannot properly be read to be higher scrutiny than that of *Simopolous*.

the bar for what is undue because there is no backup opportunity for a state to prove that regulations designed to protect maternal health are justified by a compelling state interest if the incidental burden might be deemed undue—as Justice O'Connor indicated would be the case regarding a 24-hour waiting period in her *Akron* dissent. 462 U.S. at 473-74. It would be nonsensical to implement an undue-burden line that would have made the hospitalization and waiting-period requirements at issue in *Akron* unconstitutional without the opportunity for justification under strict scrutiny, so the line for what is undue had to be drawn above such hospitalization and waiting-period requirements (with attendant costs, delays, etc. that were not undue). In short, *Casey* created a high bar for what is an undue burden because this Court was getting out of the medical-board role with a more deferential approach involving lowered scrutiny.

So when *Casey* adopted an "undue burden" test and defined "undue burden [a]s a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," 505 U.S. at 877, it was not inviting challenges to hospital-privilege standards for abortionists (and ASC standards for abortion facilities) that were clearly constitutional under Justice O'Connor's *Akron* analysis. Nor when Justice O'Connor coauthored *Casey* did her use of "substantial obstacle" in any way lower the bar from the synonymous "significant obstacle"[15] terminology that

[15] Though "significant" and "substantial" are at least synonymous, the change may be another indication of the raised bar for cognizable burdens because a burden may be

she equated in *Akron* with "undue burden," *id.* at 463, and with "absolute obstacles or severe limitations," *id.* at 464, an example of which was the "*complete* prohibition on abortions in certain circumstances," *id.* (emphasis in original). So a "substantial obstacle"—just as a "significant obstacle" or "undue burden"—must rise to the level of an "absolute obstacle[] or severe limitation[]," such as a "complete prohibition," before it would be unconstitutional.

Third, this Court has consistently held that extra costs, delays, scheduling difficulties, and the like (including those of the sort at issue here) fall below the undue-burden bar, *Casey*, 505 U.S. at 885-86, as Justice O'Connor said in *Akron*, 462 U.S. at 466-67, 473. The fact that particular women might have more difficulty obtaining an abortion than others, e.g., because of a waiting period, does not create an undue burden because "[a] particular burden is not of necessity a substantial obstacle." *Casey*, 505 U.S. at 887. Rather, *Casey*'s focus in determining what is "undue interference" (yet another synonym for "undue burden"), *id.* at 846, is on something that is "a *prohibition* of abortion or the imposition of a substantial obstacle to the woman's effective *right to elect* the procedure," *id.* (emphasis added). So "undue burden" does not focus on a right to be free of lesser obstacles that do not go to the right to *choose* abortion itself, particularly such less-prohibitive obstacles that are not of the state's making. Put another way, the test is whether an abortion regulation is "designed to strike *at the right itself*" or in [a] real sense deprive[s] women of the *ultimate decision*," *Id.* at 875 (emphasis added). Burdens imposed by "a

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significant without being substantial.

law which serves a valid purpose"[16] and only has "the incidental effect of increasing the cost or decreasing the availability of medical care," *id.* at 874, are not undue as a matter of law.

Fourth, this Court has provided examples of non-undue-burdens that are rationally related to a governmental interest. *Roe* categorized some "examples" of regulations that *are* rationally related to the health interest. 410 U.S. at 163. This was a matter-of-law conclusion, based on the obvious relationship of such regulations of abortion providers and facilities to a health interest, not a factual test designed to suck this Court into the medical-board role to determine whether a particular regulation—clearly designed to protect maternal health—actually does so.

The *Casey* joint opinion followed this matter-of-law analysis. 505 U.S. at 881-87 (Part V(B)), 899-01 (Part V(D)-(E)). Regarding the 24-hour waiting period, the plurality said that "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable" and "[i]n theory, at least, the waiting period is a

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[16] The lowered-scrutiny undue-burden test is no warrant for challenges seeking to prove improper *purposes* where the regulations at issue are rationally related to the health interest, i.e., their "purpose" is clear. *Mazurek* rejected a "purpose" argument, especially where requiring that only physicians may perform abortions lacked a substantial-burden effect. 520 U.S. at 972. *Gonzales* found that a partial-birth-abortion ban had the "self-evident" purpose (and "reasonable inference") of promoting the life interest. 550 U.S. at 157-60. This Court does not infer improper purpose given "legitimate reasons." *McClesky v. Kemp*, 481 U.S. 279, 298-99 (1987).

reasonable measure to implement the State's interest in protecting the life of the unborn ...." *Id.* at 885. Regarding the parental-consent provision, these three Justices said that the provision "may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private ...." *Id.* at 899-00. Regarding the recordkeeping and reporting requirements, they noted that in *Danforth* this Court had held that recordkeeping and reporting provisions 'that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible.'" *Id.* at 900 (citation omitted). They added regarding "all the provisions at issue here," that "they do relate to health." *Id.* "[S]o it cannot be said that the [reporting] requirements serve no purpose other than to make abortions more difficult." *Id.* at 901. The foregoing statements are consistent with the joint opinion's categorical statement that "*[r]egulations designed to foster the health of a woman seeking an abortion* are valid if they do not constitute an undue burden." *Id.* at 878 (emphasis added). In other words, if a regulation is designed to foster health, it is rationally related to the state's health interest. This is all matter-of-law analysis about what is *rational*, not the substitution of a *factfinding* test.

Fifth, regarding reliance on facts, *Casey* sometimes did recite record (and nonrecord) facts, and it sometimes relied on some of those in determining whether an "undue burden" existed. But it did not do so in *all* of its constitutional analyses, as discussed next. And it nowhere imposed a binding,[17] burden-benefit balancing

[17] The term "binding" is useful here for analytical purposes because, as shall be shown, *Casey* was not bound by

of record (or nonrecord) facts to establish what constitutes a "substantial obstacle" (and thus an "undue burden") or even what is rationally related to a legitimate interest or "necessary." It did not "require[] that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer" as stated in *WWH*. 136 S. Ct. at 2309. And even if *Casey* had required a court to "consider" facts (which it did not), "consideration" is not the same as the "balancing" that *WWH* claimed *Casey* did regarding the spousal-notice and parental-consent provisions. *Id.* The fact that a binding, burden-benefit balancing of record facts for determining "substantial burden" (or rational-relationship) was *not* required by *Casey* is self-evident from considering the Court's analysis in the four provisions that *Casey* considered.[18]

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any evidence-based balancing in deeming provisions to be "substantial obstacles" or not. *WWH* does not actually say that any court is bound by the balancing that it says is required by the undue-burden test. Rather, it says that a court may "give significant weight to evidence in the judicial record," 136 S. Ct. at 2310, in the context of "resolv[ing] questions of medical uncertainty," *id.* at 2310—as opposed to deferring to legislatures in that context (as in *Gonzales*, 550 U.S. at 164). And *WWH* held that such balancing *supported* the district court's finding of "undue burden," 136 S. Ct. at 2310-11, 2313, 2316, and of the ASC provision being "not necessary," *id.* at 2316. Though *WWH* never *said* the balancing is binding, or that *Casey* said it was, the balancing seems to have acquired such an interpretation, e.g., in the present case, so we highlight the nonbinding nature of "balancing" in *Casey* (to the extent there arguably is some) to establish that such balancing would not be binding.

[18] In addition to the following provisions, the *Casey* ma-

The Informed-Consent Provision. The Court considered an informed-consent provision that required (i) a *physician* to conduct an informed-consent dialogue, (ii) the communication of prescribed *information*, and (iii) a 24-hour *wait* thereafter. *Id.* at 881-887. The Court upheld (i) the *physician* requirement, holding that a physician could be required to conduct the dialogue "even if an objective assessment might suggest that those tasks could be performed by others"—the antithesis of a binding, burden-benefit balancing based on record evidence. *Id.* at 882-85.[19] The Court upheld (ii) the prescribed-*information* requirement (overruling precedent to do so) without a record-based burden-benefit balancing, instead simply reciting matter-of-law reasons why truthful information serves legitimate interests. *Id.* at 881-82. The Court upheld (iii) the *24-hour wait*—even though record facts indicated that costs and delay would increase and two trips may be required (risking harassment, hostility, and difficulty of explanation), *id.* at 885-86—because the Court found those burdens were not a "substantial obstacle" and were rationally related to legitimate state interests, *id.* at 886-87. It did so as a matter of law, in the face of

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jority considered whether the medical-emergency provision sufficed and—accepting a favorable construction and considering some facts about when it might be needed—held that it did. 505 U.S. at 879-80.

[19] The ability of states to regulate doctors was also settled by precedent, not balancing, *id.* at 885, indicating that (a) states may rely on precedent in enacting or retaining abortion-regulation provisions and (b) new burden-benefit balancing ought not be permitted to overturn what precedent permits.

"findings [that are] troubling in some respects." *Id.* at 886. This indicates that *Casey* clearly recognized *no* requirement of a binding, burden-benefit balancing of record evidence to determine what is a "substantial obstacle" and rationally related to a legitimate interest.

The Spousal-Notice Provision. In considering the spousal-notice provision, *id.* at 887-899, the Court recited record and nonrecord social-science facts, *id.* at 988-98, but, as Justice Scalia's four-member dissent put it, "the joint opinion's fact-intensive analysis ... does not result in any measurable clarification of the 'undue burden' standard," *id.* at 991. The joint opinion "simply ... highlight[s] certain facts ... that apparently strike the three Justices as particularly significant in establishing (or refuting) ... an undue burden." *Id.* "[T]hen [it] simply announces ... a 'substantial obstacle' or 'undue burden,'" without indicating what might happen on a different record or why this one compelled the finding. *Id.* In other words, the finding of "undue burden" was a matter-of-law decision informed by some facts, but it was not based on a binding, burden-benefit balancing based on record (or nonrecord) evidence. In fact, the majority's analysis did not even consider all relevant interests, as noted in Chief Justice Rehnquist's four-member dissent. *See id.* at 974-76.

The Parental-Consent Provision. In considering the "parental consent provision,"[20] *Casey* did *not* perform any burden-benefit balancing as *WWH* said it did. 136 S. Ct. at 2309 (citing 505 U.S. at 899-01 [sic]). Contrary to *WWH*'s recitation of the "same balancing with

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[20] *WWH* mistakenly called this "a parental notification provision," 136 S. Ct. at 2309, but it required "informed parental consent," *Casey*, 505 U.S. at 899.

respect to parental notification provision," *id.*, *Casey* recited no record facts and thus did no record-based, burden-benefit balancing, 505 U.S. at 899-00. Rather, it relied on precedents upholding parental consent and informed parental consent, and held as a matter of law that these reasonably relate to legitimate purposes.

The Recordkeeping Provision. In considering record-keeping and reporting requirements, the Court again relied on precedent in upholding them. *Id.* at 900-01. In upholding all of these (except those related to spousal notice), the Court held as a matter of law that these are reasonably related to the maternal-health interest. There was no burden-benefit balancing.

In sum, only one of the four provisions that *Casey* analyzed for an "undue burden," i.e., the spousal-notice provision, had what might be argued to be some sort of factual "balancing," but it wasn't a binding, burden-benefit balancing to determine "undue burden," rational relation, necessity, etc. Rather it was a selection of facts (largely nonrecord) that the majority found persuasive in making the matter-of-law finding that an "undue burden" existed. Neither that analysis nor the other three analyses mandated that courts do a binding, burden-benefit balancing to determine whether a "substantial burden," rational relationship, necessity, etc. exists. And particularly, *Case* relied on precedent, where it existed, to uphold provisions, so there was no authorization to submit long-approved provisions to state-by-state relitigation based on such a balancing.

Of course, *Casey* did periodically say things like "on the record before us," *see, e.g.*, *id.* at 887 (re waiting period), but that revealed no mandated, binding, burden-benefit balancing, only that given different facts the Court might come to a different matter-of-law

determination of whether something constitutes an "undue burden" because it is a "substantial obstacle" to obtaining an abortion. Recall that no burden-benefit-balancing is required or controls because requiring physicians to conduct the informed-consent dialogue was not an undue burden "even if an objective assessment" didn't require it. *Id.* at 885.

After *Casey*, some say the word "[u]nnecessary"in the joint opinion changes the foregoing analysis:

> As with any medical procedure, the State may enact regulations to *further* the health or safety of a woman seeking an abortion. *Unnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

Id. at 878 (emphasis added). The claim is that "unnecessary" requires states to factually prove necessity under neo-strict scrutiny. But "unnecessary" simply relates to the reasonable-relationship prong of the undue-burden test as the opposite of "further[ing] the health or safety of a woman seeking an abortion" in the prior sentence. As just shown, the rational-relationship test is a matter-of-law test (note the words "reasonabl[e]" and "rational") under which, ever since *Roe*, a medical-regulation law regulating abortion providers and facilities to maximize maternal health *is* rationally related to the state's health interest. "Unnecessary" is shorthand for the opposite of the first phrase in the following categorical statement earlier on the same page: "*Regulations designed to foster the health of a woman seeking an abortion* are valid if they do not constitute an undue burden." *Id.* (emphasis added). So

"[u]nnecessary" created no new test, and the reasonable-relationship prong remains a matter-of-law, rational-basis test. And any notion that medical regulations imposing the quality-level requirement that abortionists get admitting privileges (and abortion clinics meet ASC standards) do not relate to a maternal-health interest as a matter of "reason" or "rationality" is erroneous.

It is useful to consider how the four members in dissent understood the joint opinion's undue-burden test, i.e., did they understand it as compelling a binding, benefits-burdens balancing? They did not. The four-member dissent authored by Chief Justice Rehnquist said the undue-burden test is "based even more on a judge's *subjective* determination than ... the trimester framework." *Id.* at 965 (emphasis added). The test requires "judges ... to decide whether [abortion regulations] place a 'substantial obstacle' in the path of a woman seeking an abortion." *Id.* The analysis did not turn on a fact-based, binding, burden-benefit balancing. In fact, the dissent noted that "the joint opinion would uphold Pennsylvania's 24-hour waiting period, concluding that a 'particular burden' on some women is not a substantial obstacle," "[b]ut ... would at the same time strike ... [the] spousal notice provision ... [because] in a 'large fraction' of cases the provision will be a substantial burden." *Id.* at 965.[21] In other words,

[21] This dissent noted that the "large fraction" analysis violated the usual rule for facial challenges under *United States v. Salerno*, 481 U.S. 739 (1987), was "not based on any hard evidence" in the record below, ignored women for whom it imposed no obstacle, and ignored situations where wives might not wish to advise their husbands for reasons

"undue burden" was in the eye of the beholder, the opinion noted, as confirmed by Justice Stevens deeming upheld provisions undue burdens on the same factual record. *Id.* Moreover, the opinion noted, the parental-consent-for-minors provision "places very substantial obstacles in the path of a minor's abortion choice," and the "joint opinion ... admit[s] ... a policy judgment" in upholding it, so "substantial obstacle" doesn't actually control the undue-burden test, only judicial choice. *Id.* at 965-66. Justice Scalia's four-member opinion (concurring and dissenting) noted that the joint opinion frequently referenced "the record before us" but that statement neither clarified the undue-burden test nor compelled an undue-burden finding. *Id.* at 990-91. He noted that regarding the spousal-notice provision, the court relied on nonrecord materials and findings of its own, concluding that there was no real reliance on "detailed factual findings." *Id.* at 992 n.6. Chief Justice Rehnquist called the undue-burden test "a standard ... not built to last," *id.* at 965, and Justice Scalia called it "inherently manipulable" and said it "will prove hopelessly unworkable in practice," *id.* at 985. But from the foregoing, the dissent clearly did not believe that the joint opinion's undue-burden test required, and was bound by, a record-based, burden-benefit balancing.

That the foregoing explanation of the analysis instituted by *Casey* is correct is borne out by this Court's

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other than spousal abuse, e.g., "because of perceived economic constraints or her husband's previously expressed opposition to abortion." *Id.* at 972-73 & n. 2. As others address the large-fraction test, it isn't addressed here, but it too creates confusion, requiring clarification or overruling.

applications of the *Casey* standard in two subsequent cases. In *Mazurek*, 520 U.S. 968, this Court applied *Casey*'s analysis to uphold a requirement that abortions be performed by physicians against a challenge claiming that the evidence showed that physician assistants could as safely do some abortions as physicians. Plaintiffs argued that "'all health evidence contradicts the claim that there is any health basis' for the law." *Id.* at 973 (citation omitted). Notably, this Court did not require—and positively *rejected*—the challenger's argument that a binding, benefits-burden balancing was mandated by *Casey*. Instead, this Court held that such an argument was "squarely foreclosed by *Casey* itself," *id.*, for which it cited *Casey*'s upholding of the requirement that only physicians perform the informed-consent dialogue "'even if an objective assessment might suggest that'" others might perform the informed-consent dialogue as well, *id.* (quoting *Casey*, 505 U.S. at 885). This Court did not require the state to prove that the physician-only requirement was medically necessary. It did not require facts showing that medical benefits outweighed burdens. It was enough that a physician-only requirement is not "undue," and that regulation of the qualifications of those performing abortion is reasonably related (based on rationality, not factual proof) to the maternal-health interest.[22]

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[22] In *Stenberg v. Carhart*, 530 U.S. 914 (2000), this Court found a partial-birth-abortion law an undue burden because it lacked a health exception (as interpreted), but the Court also did no burden-benefit balancing in the undue-burden analysis, *id.* at 945-46. *Cf. id.* at 1011 n.20 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dis-

In *Gonzales*, this Court applied the *Casey* analysis in the same manner, requiring a "rational basis" and no "undue burden," but not a balancing test to prove necessity or actual medical benefit. 550 U.S. at 158. And this Court once again eschewed the medical-board role, both in words, *id.* at 163-64, and by the above analysis. The existence of "medical uncertainty" as to a medical benefit did not require this court to sit as the national medical board and resolve that issue, but instead the uncertainty supported a finding of no undue burden, *id.* at 164, thereby respecting legislative judgment. And as already noted, *Gonzales* did not search for medical-benefit evidence to determine some impermissible purpose but relied in finding no impermissible purpose on the rational-relationship approach of "self-evident" and "reasonable inference" evidence that a law designed to prevent a procedure widely viewed as infanticide promoted respect for human life that was partially born. *Id.* at 157-60.

From the foregoing, it is clear that from *Casey* through *Gonzales* this Court eschewed the national-medical-board role by adopting an undue-burden test that did not require a binding, burden-benefit balancing to determine what is a "substantial obstacle" and hence an "undue burden." Whether a provision was rationally related to a legitimate interest was also a matter of-law determination—not based on a binding, burden-benefit balancing. And big picture, from *Akron* forward (until *WWH*) this Court allowed more latitude in protect legitimate governmental interests, including in maternal health and protecting preborn human be-

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senting) (noting that majority avoided balancing).

ings. But that changed with *WWH*.

III.
WWH created confusion about *Casey*'s lowered scrutiny and rejection of the medical-board role.

WWH "applie[d] the undue standard in a way that will surely mystify lower courts." 136 S. Ct. at 2326 (Thomas, J., dissenting). That confusion is evident in the courts below and in other cases.

As Justice Thomas described it, *WWH* "radically rewr[ote] the undue-burden test in three ways": (1) requiring burden-benefit balancing to determine "undue burden," (2) eliminating legislative deference where there is medical uncertainty, and (3) absent a substantial obstacle, requiring "something much more akin to strict scrutiny" than a rational relationship to legitimate interests. *Id.* at 2324. So "[t]he majority's undue-burden test looks far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected ...." *Id.* at 2326. "[T]he majority's undue-burden balancing approach risks ruling out even minor, previously valid infringements on access to abortion." *Id.* And "the majority reappoints this Court as 'the country's *ex officio* medical board ....'" *Id.*

WWH cited *Casey* for its new burden-benefits-balancing emphasis, *id.* at 2309, but as shown in Part II, *Casey* did *not* require the sort of balancing to determine undue burdens that *WWH* said it did. *Casey* only did something approaching record-fact balancing regarding *one* of the four provisions it considered. *Casey* held that, *even if* evidence shows that nonphysicians might do informed-consent dialogues as well as physicians, the state could still require physicians to do that

dialogue—just as *Mazurek* said states may bar nonphysicians from doing abortions *even if* record evidence showed that no maternal-health benefit resulted. And *Casey* held that obstacles must be "substantial," not merely incremental, before a court may make the matter-of-law undue-burden finding. It found rational-relationships to legitimate interests based on rationality, not burden-benefit balancing. It created no new "necessity" test. And it followed precedent on issues already settled instead of reopening them for burden-benefit balancing. *See* Part II.

But *WWH* is being interpreted precisely as Justice Thomas described it. For example, the district court below recited *WWH* for the proposition that "[t]his balancing of benefits and burdens is central to addressing the question of whether 'any burden imposed on abortion access is "undue."'" Pet. App. 267a (citation omitted). "[I]n assessing the burdens ..., courts must consider not only ... closure of clinics, but also the 'additional burden[s]' ... [of] longer wait times, increased crowding, and longer travel distances." Pet. App. 267a-68a. "[N]o single factor is determinative ..., but rather the burden's impact must be evaluated cumulatively, and [burdens] are undue if unjustified by the law's purported benefits ...." Pet. App. 268a.

And this sort of reading of *WWH* is even being used to challenge long-settled abortion regulations with burden-benefit balancing. For example, in *Box v. Planned Parenthood of Indiana and Kentucky*, No. 18-1019 in this Court (Cert. Ptn. filed Feb. 4, 2019), Indiana combined two provisions long recognized as constitutional—(i) an informed-consent dialogue with mandated information followed by a waiting period and (ii) an opportunity to monitor an ultrasound—into

one provision. This provision simply moved the mandatory ultrasound from the abortion-procedure setting to the informed-consent setting, thereby affording a woman the opportunity to consider the ultrasound as part of her consideration of whether to choose an abortion. Cert. Ptn. at 3 (No. 18-1019). Though both waiting periods and ultrasound options have long been approved and readily survive *Casey*'s undue-burden test, the courts in *Box* enjoined Indiana's provision under *WWH*'s interpretation of the undue-burden test because "increased travel distances and delays," *id.* at 7-8—which were not "substantial obstacles" under *Casey* and so not "undue burdens"—were deemed to outweigh the perceived small benefit from the provision, *id.* at 9.

To some extent *WWH* may be read more narrowly than some interpret it. For example, *WWH* said *Casey* required courts to *consider* benefits and burdens, 136 S. Ct. at 2309 (emphasis added), and such consideration can *support* an undue-burden finding, 136 S. Ct. at 2310-11, 2313, 2316. Read narrowly, that requires "consideration"—not balancing or binding balancing—and even *Casey considered* burdens and benefits in *some* contexts. But lower courts are not reading that part of *WWH* narrowly, instead deeming burden-benefit balancing "*central*" to determining "undue burden," not as something that might *inform* the matter-of-law determination of when an obstacle is substantial and (consequently) a burden is undue—as done in *Casey*. And the use of burden-benefit balancing to pronounce the ASC provision "not necessary," *id.* at 2316, introduces a "necessity" test that *Casey* did not establish. *See supra* at 22. Moreover, the notion that burdens such as "increased driving distances"—which were held *not* "substantial obstacles" in *Casey*—can now be added

to clinic closings and lack of health benefit to "support[] ... [an] 'undue burden' conclusion," *id.* at 2313, is inconsistent with *Casey*.

Notably, this case has been litigated *based* on a factual burden-benefit-balancing analysis, with the Fifth Circuit holding that such analysis *supports* its finding of no substantial obstacle, and abortion-rights advocates *resisting* such factual balancing in favor of a stare decisis argument based on *WWH*. The irony of abortion-rights advocates' differing arguments here and elsewhere should not be overlooked: They (i) *promoted* a record-fact, burden-benefit balancing to win in *WWH*, (ii) *resist* balancing to win here on a stare-decisis argument, while (iii) elsewhere advocating overturning long-upheld regulations using a cumulative-effect, fact-record, burden-benefit balancing *despite* stare decisis.

As predicted and predictable, *WWH* created confusion among lower courts about *Casey*'s lowered-scrutiny, undue-burden test and its rejection of the medical-board role. *WWH* introduced undue-burden-test elements that are inconsistent with *Casey* while purporting to follow *Casey*. *WWH* robustly re-assumed the national medical-board role—previously rejected—for this Court and lower courts.

IV.

This Court should return to *Casey*'s lowered scrutiny and rejection of the medical-board role, under which the Louisiana statute is constitutional.

As established in Part I, *Roe* rejected on-demand abortion and authorized reasonable regulation of abortion as a medical procedure (including hospitalization, physician credentialing, etc.), but from *Roe* to *Thorn-*

burgh this Court became the national medical board by hyper-scrutinizing abortion regulations.

As established in Part II, *Casey* rejected that role by a lowered-scrutiny, undue-burden test.

But as established in Part III, *WWH* re-assumed that role, re-asserted a strict form of scrutiny, and even introduced new elements to the undue-burden test, including (i) burden-benefit balancing as a central feature for determining both "undue burden" and "necessity," (ii) a "necessity" test for determining "undue burden" (as used herein), and (iii) a cumulative-burden approach in place of analyzing a particular burden's effects. That has caused great confusion, spurred litigation, and put the courts back in the medical-board role, threatening even regulations long established as permissible for states.

WWH should be deemed an aberration and this Court should return to *Casey*'s undue-burden analysis, as established in Part II, to eliminate these problems and again reject the *ex officio* medical-board role for this and lower courts. Under *Casey*'s lowered scrutiny, the Louisiana statue is constitutional.

Conclusion

The Court should rule in favor of Respondent Gee, but not just on the basis of *WWH*'s analysis. Instead, this Court should return to *Casey*'s lowered-scrutiny, undue-burden test and uphold the challenged provision on that basis.

Respectfully submitted,

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