No. 05-380

In The

Supreme Court Of The United States

ALBERTO R. GONZALEZ,

Petitioner,

v.

LEROY CARHART, *et. al*,

Respondents.

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

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,
in support of the *Petitioner*

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INTEREST OF THE AMICUS CURIAE[1]

The National Legal Foundation (NLF) is 501c(3) is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of its public interest litigation and educational activities relating to the issue of abortion.

SUMMARY OF THE ARGUMENT

The Eighth Circuit improperly rejected the *Turner Broadcasting System v. FCC,* 512 U.S. 622 (1994), test, and instead applied the substantial medical authority test from *Stenberg v. Carhart*, 530 U.S. 914 (2000). The Eighth Circuit also erred because it did not apply the *United States v. Salerno*, 481 U.S. 739, facial challenge test, but instead applied the undue burden test from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Salerno* is valid precedent or, at a minimum, judicial *dicta,* not *obiter dicta,* and thus should have controlled this case.

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[1] The parties have consented to the filing of this brief. Copies of the letter of consent accompany this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

ARGUMENT

The Eighth Circuit upheld the trial court's order declaring the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 , unconstitutional in all of its sections because Congress did not include an exception for the health of the mother, and enjoining its enforcement. *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005).

In so doing, the Eighth Circuit erred in several ways. First, they failed to give sufficient deference to congressional findings of fact following *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994). *Carhart*, 413 F.3d at 795. It justified its decision to not give deference to the congressional findings by arguing that it was a question of law and not a question of fact. *Id.* Second, the Eighth Circuit ignored the proper facial challenge test established by this Court in *United States v. Salerno*, 481 U.S. 739 (1987), and instead chose to analyze the Act under the undue burden test found in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Id*. at 794. The Eighth Circuit ruled that *Casey* has replaced *Salerno* for abortion cases and should control, even though this Court never overturned *Salerno*. *Carhart*, at 794-95

I. THE EIGHTH CIRCUIT SHOULD BE REVERSED BECAUSE IT ERRED IN NOT APPLYING THE *TURNER BROADCASTING SYSTEM v. FCC* SUBSTANTIAL EVIDENCE STANDARD OF REVIEW BECAUSE IT MISUNDERSTOOD THE HIGH DEGREE OF DEFERENCE REQUIRED UNDER THE STANDARD AND BECAUSE IT MISUNDERSTOOD THE PROPER REVIEW THAT IT SHOULD CONDUCT.

A. The Eighth Circuit misapplied the *Turner Broadcasting System v. FCC* substantial evidence standard of review because it misunderstood the high degree of deference required under the standard as documented by neutral sources.

The Appellant in this case, Attorney General Gonzalez, argued below that the District Court improperly applied the standard under which courts must evaluate congressional findings. That standard, announced by this Court in *Turner*, requires courts to review congressional findings of fact only to determine whether they are supported by substantial evidence. *Turner*, 512 U.S. at 666. The Appellees in this case staked out the opposite position, namely that the District Court applied the standard correctly. The resolution of this question will be outcome determinative of that portion of the case which this Brief addresses. In its effort to assist this Court, *Amicus* will provide insight into this question from sources that do not have a vested interest in this litigation.

The first source is the Ninth Circuit's extensive document, *Standards of Review*. This document, first published in 1984, was most recently updated in September 2004, and currently stands at 441 pages in length, exclusive of front matter and the index.[2] *Standards of Review* (last updated Sept. 13, 2004) <http://www.ca9.uscourts.gov /ca9/Documents.nsf/519a025470af2daf88256406008016b7/764499fa873462aa88256af5007335d6?OpenDocument>. *Standards of Review* (hereinafter "*Standards*") discusses the application of the substantial evidence standard in multiple contexts, including its application to jury verdicts and to trial court and agency fact finding. While it does not discuss the substantial evidence standard as it applies to congressional

[2] The complete document is available as four pdf files on the Ninth Circuit's website. Links can be found on the home page, www.ca9.uscourts.gov.

findings, the document is still very helpful for the reasons that will be explained below. However, before summarizing what *Standards* says about the substantial evidence standard, a word is in order as to why this document is being used (citing as it does some United States Supreme Court cases, but mostly Ninth Circuit cases) in lieu of using cases decided by this Court. As stated above, the purpose of this portion of the brief is to offer the views of sources that do not have a vested interest in the issues before this Court. *Amicus* did not want either the Respondent or this Court to be concerned that it was only choosing cases in which the standard is described most favorably to the party *Amicus* is supporting, Attorney General Gonzalez. Therefore, by using *Standards*, *Amicus* will be able to use that court's characterization of the standard rather than its own.[3]

We turn now to the Ninth Circuit's characterization of the standard in various contexts. In its introduction to the substantial evidence standard of review, *Standards* states, "[s]ubstantial evidence means more than a mere scintilla; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id*. at 15 (citing nine cases). In the context of reviewing agency decisions, *Standards* then goes on to very correctly note that "[t]he court must consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the agency's decision." *Id.* (citing two cases). However, *Standards* then immediately—and again, very correctly—

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[3] While it is theoretically possible that there are some differences in the application of the substantial evidence standard between the Eighth Circuit and the Ninth Circuit—and *Amicus* has not sought to exhaustively determine whether such a difference exists— the "flavor" of the substantial evidence standard is fairly uniform between the two courts as subsequent portions of this brief will make plain. Of course, it is ultimately the Court's view that will control the issue. Nonetheless, *Amicus* believes *Standards* is helpful here.

adds (here addressing review of both agency decisions and jury verdicts) that "[u]nder the substantial evidence standard of review, the court of appeals must affirm where there is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw contrary conclusions from the evidence." *Id* (citing ten cases). Several of the case descriptions indicate that "[i]f the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the [agency]." *Id*. Instead, as *Standards* makes clear again near the end of the document, "the standard, however, is 'extremely deferential' and a reviewing court must uphold the agency's findings 'unless the evidence presented would compel a reasonable fact finder to reach a contrary result.'" *Id*. at 417 (citation omitted) (quoting one case and citing two cases).

Even where the agency and a hearing officer disagree, the courts examine the fact finding of the agency and not of the hearing officer. "Thus, the standard of review is not modified when a disagreement occurs." [4] *Id*. at 418.

Amicus points out that, while not as important here as is the application of the substantial evidence standard in the agency context, *Standards* also discusses the application of the substantial evidence standard in the civil jury determination context. [5] Once again, the standard is that "[s]ubstantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw a contrary

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[4] The cases cited in this section of *Standards* lay out various specific nuances not germane to this case, since, as will be discussed below, congressional findings are entitled to even greater deference. In this same section, *Standards* also discusses the application of the substantial evidence standard to credibility findings of hearing officers.

[5] *Standards* gives shorter shrift to criminal jury determinations here but the gist is the same. *Id.*

conclusion from the evidence." *Id*. at 17 (citing six cases). Neither the trial court nor the appellate court should review the credibility of witnesses. *Id*. at 18 (citing two cases); *see also*, *id*. at 295 (citing nine cases).

Standards also walks through the substantial evidence standard as it applies to various substantive areas of law. For example, a jury's award of damages in an anti-trust suit is reviewed under this standard. *Id*. at 306. Furthermore, *Standards* addresses the application of the substantial evidence standard in the context of specific agencies. Some of the case descriptions, *e.g*., those involving the Board of Immigration Appeals, *id*. at 346-49 (citing numerous cases), and the Securities Exchange Commission, *id*. at 362, add nothing to what *Standards* discussed in its introductory sections cited above. However, other descriptions add some clarifying detail. So, for example, in the Social Security context, "[s]ubstantial evidence is more than a mere scintilla, but less than a preponderance." *Id*. at 363 (citing eight cases). Other descriptions show how *very* deferential the courts must be to some agencies. For example, a labor arbiter's award is entitled to "nearly unparalleled deference." *Id*. at 354. (citation omitted) (quoting one case and citing six cases). [6] Similarly, the National Transportation Safety Board's findings are "conclusive if supported by substantial evidence." *Id*. at 437 (citing one case).

All of this is relevant for two reasons. First, it shows how the substantial evidence standard plays out in a variety of contexts. Second, and more importantly, it is relevant because as this Court has stated, congressional findings are entitled to even more deference than agency findings.

Before documenting what this Court has stated in this regard, we pause to note several tangential, but important points. First, despite the fact that *Standards* is 441 pages

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[6] Additional cases are cited to the same effect in the rest of the labor law section of *Standards*. *See generally, id.* at 354-59.

long, it should not be surprising that it does not directly address the application of the substantial evidence standard to congressional findings. To *Amicus'* best ability to ascertain, only a single Ninth Circuit case, *US West v. United States*, 48 F.3d 1092, 1101 (9th Cir. 1994), discusses *Turner's* substantial evidence standard as applied to congressional findings and only a handful of others even cite it.

We also note that while *Amicus* is unaware of any document from the Eighth Circuit that is comparable to *Standards*, the Eighth Circuit's *Practioners' Handbook,* under the section "Scope of Review," follows the *Standards* approach for jury verdicts and factual findings of trial courts and agencies. United States Court of Appeals for the Eighth Circuit, *2000 Practioners' Handbook* (last updated Dec. 28, 2005) <http://www.ca8.uscourts.gov/newrules/coa/2000 handbook.pdf>. The scope of this "factual review is limited to determining whether or not there is sufficient evidence to support the verdict or finding." *Id.* It is also not surprising that the *Practioners' Handbook* does not include congressional findings in its discussion since (again, to the best of *Amicus'* ability to ascertain) not a single other opinion of the Eighth Circuit discusses *Turner's* substantial evidence standard as applied to congressional findings and only a handful of others even cite it. However, the *Practioners' Handbook* refers its readers to the treatise, *Federal Standards of Review*. Significantly, the Ninth's Circuit's *Standards* refers to the same work, and will be discussed later.

In light of all of the above and of the evidence discussed in the Circuit Court's own opinion, it seems clear that the Circuit Court inappropriately failed to apply the substantial evidence standard. The court owed "extreme deference" to the factual determination of Congress, and it failed to do so.

B. The Circuit Court erred when it attempted to distinguish the *Turner Broadcasting System v. FCC* substantial evidence standard of review by stating that the question before it was a question of law.

When the Circuit Court addressed the question of which standard of review was proper to assess Congress' findings of fact, it misconstrued the question at the same time that it accused Attorney General Gonzalez of doing the same thing. Instead of applying *de novo* or clearly erroneous review to Congress' factual findings, the court must apply substantial evidence review, which is a different standard altogether. Therefore, the Circuit Court inappropriately applied de novo review to the Congressional findings.

The following lengthy quotation from *Federal Standards of Review* is warranted because it is recommended by both the Eighth and Ninth Circuits; because it, too, is a source untainted by a vested interest in the present litigation, and because it contains several internal quotations from *Turner*.

> De novo and clearly erroneous review go straight to the question of whether the decision under review is correct; substantial evidence review, if properly performed, does not reach that question. Rather than evaluate the judgment of the agency relative to that of the court, as is done in agreement review[9] (considering the record before the agency and any nonrecord matters the agency is allowed to take into account, it has made a mistake), under substantial evidence review, the reviewing court evaluates the judgment of the agency for its soundness and for its proper or reasonable exercise. The conclusion the court would have reached in the sound exercise of its judgment is not relevant under substantial evidence review. In other words, clearly erroneous and

substantial evidence review *different* things and recent decisions seem to signal a return to pre-*Universal Camera* standards, as seen in *Turner Broadcasting System, Inc. v. FCC*, where substantial evidence is asserted as the standard for reviewing congressional decisions on First Amendment issues. In *Turner Broadcasting*, the Court said:

> In reviewing the constitutionality of a statute, "courts must accord substantial deference to the predictive judgments of Congress." Our sole obligation is "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." As noted in the first appeal, substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency." We owe Congress' findings deference in part because the institution "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" legislative questions . . . . Though different in degree, the deference to Congress is in one respect akin to deference owed to administrative agencies because of their expertise. *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) ("[C]omplete factual support in the record for the [FCC's] judgment or prediction is not possible or required; 'a forecast ... necessarily involves deductions based on the expert knowledge of the agency.' "). . . . This is not the sum of the matter, however. We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power.

> The question is not whether Congress, as an objective matter, was correct . . . . Rather, the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before the Congress . . . . In making that determination, we are not to "re-weigh the evidence *de novo*, or to replace Congress' factual predictions with our own." Rather, we are simply to determine if the standard is satisfied. If it is, summary judgment for defendants-appellees is appropriate regardless of whether the evidence is in conflict.
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> It is noted that *Turner Broadcasting* is a 5-4 opinion, but the dissent makes no argument against using the substantial evidence standard, except to say that the standard has not been applied in the proper manner. The majority, says Justice O'Connor, "disavows a need to closely scrutinize the logic of the regulatory scheme," and indeed the majority opinion language does seem to hark back to the pre-*Universal Camera* standard that any support in the agency record would be sufficient to sustain the agency decision.

2 *Federal Standards of Review* § 15.04 (1999) (ellipses in the internal *Turner* quotations added by *Federal Standards of Review*).

In its opinion, the Eighth Circuit stated that the government incorrectly assumed that the "substantial medical authority" standard is a question of fact, and went on to state that it is a mixed question of law and fact. *Carhart*, 413 F.3d at 797. However, even assuming that the court is correct, that does not establish that it analyzed the question

properly. As the court noted questions of law and questions of fact are not always neatly separated into two distinct categories; they may be "mixed questions of fact and law." *Id.* The Eighth Circuit Court stated that when "[r]eviewing the record to determine if the evidence presented suffices to support the conclusion reached by the lower court [it would] typically [be] treated as a matter of law," however, the Eighth Circuit noted that this case is slightly different from the typical case and applied the "substantial medical authority" standard. *Id.* at 797-98.

The court's mistake was in disregarding the *Turner* substantial evidence standard of review, which is the proper standard in this case. As the quote from *Federal Standards of Review* recognizes, when Congress performs its fact finding functions in the process of passing a law, the conclusions that it draws from those findings deserve a great amount of deference, more than an administrative agency's decision receives.

The court's confusion on the correct standard to apply can be illustrated in another way. The court implied that *Turner* cannot be the proper standard to apply because this case is dealing with a supposed fundamental right. *Id*. at 796. The court further illustrated this assumption by drawing an analogy to the First Amendment–Free Speech cases. The Eighth Circuit Court noted that this Court has placed higher burdens on plaintiffs before they may succeed in defamation law suits. *Id.* at 797-98. However, presuming that the court is correct, it still failed to remember that *Turner* itself was a Free Speech case, and that the main issue in *Turner* was whether Congress's "Must Carry" regulation was consistent with the First Amendment. In the final result of that case, this Court found that the regulation was consistent with the First Amendment and affirmed the summary judgment granted to the government. *Id*. at 799.

Therefore, the Eighth Circuit Court misconstrued the question in the case and applied the wrong standard to apply to Congressional findings. In doing so it failed to give

Congress the proper deference that its decisions deserve and, as a result, should be overturned.

II. THE EIGHTH CIRCUIT SHOULD BE REVERSED BECAUSE IT FAILED TO APPLY THE *SALERNO* TEST TO SEE IF THE ACT WAS UNCONSTITUTIONAL ON ITS FACE.

The Eighth Circuit erroneously declared that *Salerno* had been superseded by *Stenberg v. Carhart*, 530 U.S. 914 (2000) in the abortion context. *Carhart*, 413 F.3d at 794-95. This Court has never explicitly overturned *Salerno,* and, as will be explained below, the federal courts of appeals do not have the authority to declare this Court's precedent overturned.

In *Salerno*, this Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully; since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. The *Salerno* test has been applied to various statutory challenges throughout the years, including challenges to abortion statutes as recently as 2002. *See, e.g. Schall v. Martin*, 467 U.S. 253 (1984) (Sherman Anti-Trust case), *Pharm. Research and Mfrs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001) (Medicaid), *Webster v. Reprod. Health Servs*, 492 U.S. 490, 524 (1989) (prohibited use of public facility for abortions), *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (parental notification for abortion), *Greenville Women's Clinic v. Comm'r,* 317 F.3d 357 (4th Cir. 2002) (licensing standards for abortion clinics).

However, in *Casey*, this Court passed over *Salerno* in silence and fashioned a new test. *Casey*, 505 U.S. at 876 (1992). Applying this new test, the joint opinion stated that "an undue burden is 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." *Id.* at 877. In his dissent, Chief Justice Rehnquist explicitly noted that the joint opinion had failed to apply the *Salerno* test. *Id*. at 972 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

Then, in a memorandum respecting the denial of a petition for certiorari, Justice Stevens explained his view that the *Salerno* test is *dicta* and therefore not controlling. *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (Stevens, J.). According to Justice Stevens, the no set of circumstances test "was unsupported by citation or precedent. It was also unnecessary to the holding in the case . . . ." *Id*.

Finally, this Court had the opportunity to explicitly overturn *Salerno* post-*Casey* in *Stenberg*, but it did not. In fact, the court again never even mentioned *Salerno* in its reasoning.

The confusion regarding *Salerno* and *Casey* is not limited to the history laid out above. As will be explained immediately below, the courts of appeals have split into multiple camps on the issue of the status of *Salerno* post-*Casey*. However, even those courts that have abandoned *Salerno's* facial challenge test in favor of *Casey's* undue burden test, have consistently admitted that *Salerno* has not been overturned. *See, e.g., Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 194 (6th Cir. 1997) (summarizing how courts to that date had characterized *Salerno's* status).[7]

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[7] In a dissent to the Sixth Circuit's opinion in *Women's Medical Prof'l Corp.*, Judge Boggs expressed frustration with the post-*Casey* decisions, as they have discarded *Salerno*, and clung to *Casey's* ambiguous language ensuring legislatures that they have the right to regulate abortion, but not clearly defining the parameters for such regulation. 130 F.3d at 218 (Boggs, J., dissenting).

Eight courts of appeals have abandoned *Salerno* in favor of *Casey*, but their widely varied reasons for doing so are inconsistent. Four of the courts of appeals have decided that "[a]lthough *Casey* does not expressly purport to overrule *Salerno*, in effect it does." *Women's Medical Pro'. Corp.*, 130 F.3d at 194. *Accord Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1027 (9th Cir. 1999); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996). *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005).

Two of the circuits have held that, while this Court did not overturn *Salerno*, the *Casey* decision simply "set a new standard for facial challenges to pre-viability abortion laws." *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 143 (3rd Cir. 2000) (citation and internal quotation omitted). *Accord, Planned Parenthood v. Heed*, 390 F.3d 53, 58 (1st Cir. 2004) *vacated by Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2005). *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 295-96 (2nd Cir. 2006).

Finally, the Seventh Circuit declared that *Salerno* was merely a "suggestion" and could, therefore, be ignored. *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002). The Seventh Circuit essentially said that *Salerno* was mere *dicta*, and cited *Troxel v. Granville*, 530 U.S. 57, 85 n.6 (2000), for that proposition.

> The post-*Casey* history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the *Peanuts* comic strip. Lucy repeatedly assures Charlie Brown that he can kick the football, if only *this time* he gets it just right. Charlie Brown keeps trying, but Lucy never fails to pull the ball away at the last moment.

Boggs implored this Court to bring clarity to the issue, and to provide guidance to the state legislatures as to what abortion regulations will be upheld as constitutional. *Id.* at 219.

However, the Seventh Circuit failed to indicate that the passage it cited from *Troxel* in support of that proposition was not from this Court's opinion, but from Justice Stevens' dissent.

On the other side of the equation, one circuit has recognized *Salerno* as binding precedent. Another has been inconsistent in its application of *Salerno*. The Fifth Circuit first dealt with the question in *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992), the same year *Casey* was decided, and held that this Court had not overturned *Salerno*. *Id.* at 14 n. 2. It reaffirmed that holding in *Barnes v. Mississippi*, 992 F.2d 1335 (5th Cir. 1993). The Fifth Circuit declined to re-evaluate *Barnes'* use of *Salerno* in *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1102-04 (5th Cir. 1997) (overruled for another issue).

The First Circuit's rulings concerning *Salerno* have been inconsistent. In *Manning v. Hunt*, 119 F.3d 254 (4th Cir. 1997), the panel held that it was bound to apply *Salerno* as precedent until such time as this Court might explicitly overturn it. *Id.* at 268 n.4. The Fourth Circuit has reaffirmed this decision twice. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000); *Greenville Women's Clinic*. However, in *Richmond Med. Ctr.* the panel held that the *Casey* and *Stenberg* overturned *Salerno* in effect. The panel distinguished the case from the circuit's previous decisions. *Richmond Med. Ctr.*, 409 F.3d at 627. The majority decided this way over the objection of the dissent of Judge Niemeyer, who stated that panels do not have the authority to overrule previous Fourth Circuit decisions, and that their attempt to distinguish the case was only a mockery of precedent. *Id.* at 636.

Thus, at least technically speaking (and in several cases, more than technically speaking) none of the courts of appeals have declared that *Salerno* has been actually overturned. Nonetheless, to the extent that some of the courts of appeals *treated Salerno* as overturned, they exceeded their authority. This principle is evident in

Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989), in which this Court wrote that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* This principle has been expanded to include precedent that seems to have been overruled by implication. *See, e.g. Agostini v. Felton*, 521 U.S. 203 (1997); *State Oil Co. v. Khan*, 522 U.S. 3 (1997). For these reasons, this Court should hold that the Eighth Circuit erred in ignoring the *Salerno* test.

III. THE *SALERNO* TEST SHOULD BE GIVEN PRECEDENTIAL OR NEAR-PRECEDENTIAL VALUE BECAUSE IT WAS NECESSARY FOR THE DETERMINATION OF THE CASE OR, IN THE ALTERNATIVE, BECAUSE IT WAS NOT MERE *DICTA*.

As noted above, Justice Stevens argued in his memorandum in *Janklow* that the *Salerno* test is not binding precedent, but only *dicta.* 517 U.S. at 1175. This is not the case, because, as will be explained, the passage in *Salerno* that contains the facial challenge test was necessary for the proper adjudication of the case. However, even should this Court decide that the passage is *dicta*, the Eighth Circuit should still have given it deference or treated it as precedential because the passage is arguably judicial *dicta* rather than *obiter dicta*, and, at a minimum, it is much closer to the former than to the latter. Furthermore, this Court should similarly make its decision based upon the *Salerno* test.

A. The passage containing the *Salerno* facial challenge test was necessary to the adjudication of the case and, therefore, was not *dicta*.

The facial challenge test in *Salerno* was not *dicta* because it was necessary for the adjudication of the case. *Dictum* is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication . . . ." Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999). The sentence that has been dismissed as *dicta* is the articulation of the general rule upon which the case was decided. When a court makes its ruling, there are many different issues that it must consider. A holding that is necessary for the adjudication of a case is treated precedentially. *Id*. at 711. When a holding does not address the main issues in a case, but is still necessary for the court to reach its conclusion, that too should be treated precedentially. *Id*. After Chief Justice Rehnquist, writing for the Court, stated the rule in *Salerno*, he immediately proceeded to analyze the facts of the case accordingly to ascertain whether the test had been met. He concluded that the requirements of the test had not been met: "respondents have failed to shoulder their heavy burden to demonstrate that the Act is 'facially' unconstitutional." *Salerno*, 481 U.S. at 745. Because the facial challenge test set forth in *Salerno* was *the rule* upon which the case was decided, the test cannot be classified as *dicta*.

B. Even if this court were to find the passage in *Salerno* to be *dicta*, it cannot be *Obiter Dicta* and thus deserves precedential or near-precedential value.

However, because Justice Stevens found the *Salerno* test to be stated more broadly than he thought necessary, he argued in his memorandum in *Janklow* that the test was not actually binding precedent, but only *dicta*. *Janklow*, 517 U.S. at 1175. This compels one to consider the definition of *dicta*. *Dictum* is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication . . . ." Quinn, *supra*, at 710. *Dicta* are often divided into *obiter* and judicial *dicta* to determine their precedential value. *Id*. at 712-13. *Obiter*, or mere, *dicta* is an opinion expressed in passing and has less persuasive value. *Id*. at 713. Judicial *dicta* are a "court's reasoned consideration and elaboration upon a legal norm" and have much more persuasive value. *Id*. at 713-14. Indeed, as will be explained, judicial *dicta* sometimes can and should be given precedential value.

Even if the *Salerno* passage is construed as *dicta*, it should still be given precedential value because it is judicial *dicta*. This Court heavily weighs judicial *dicta*. In *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996), this Court adhered to judicial *dicta*, which was regarded as a "well-established rationale upon which the Court based the results of its earlier decisions." Similarly, this Court has stated that the "principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989).

Likewise, the Third Circuit noted that "[a] . . . distinction has been drawn between 'judicial *dictum*' and 'obiter *dictum*': Judicial *dicta* are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to a decision. A judicial *dictum* may

have great weight." *Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 978 n.39 (3d Cir. 1980) *(citation omitted)*. Indeed, judicial *dicta* are of such consequence that some courts consider judicial *dicta* issued by supreme courts to be binding precedent: "A Wisconsin court has stated it thus: 'When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision.'" *Id*. (citations omitted).

Furthermore, the distinction between *obiter dictum* and *judicial dictum* is not a bright line. Quinn, *supra*, at 717-18. Hard and fast divisions "are probably wrong" and can lead to "intellectual chicanery." *Id.* at 730, 776. It is not easy to determine what constitutes judicial *dictum*. *Id.* at 735. In fact, *dicta* are better thought of as being on a continuum. *Id.* at 740. Under this view, *obiter dicta*, in which a court has not deliberated over what it has said, *see id.*, rest at the lower end of the continuum. Judicial *dicta* rest at the upper end of the continuum because the court considers that what it has said will guide future litigation, *id.* at 730. Therefore, it is important under this view to realize that *dicta*, even *dicta* other than that which is *technically* judicial *dicta*, can lie very close to that end of the continuum and can be worthy of receiving precedential or near-precedential value. Certainly, at a minimum, that can be said of *Salerno's* "no set of circumstances" language.[8]

Thus, under any legitimate view, the *Salerno* test should be treated as controlling in the instant case.

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[8] This has not been changed by the post-*Casey* confusion, which is an analytically distinct question.

CONCLUSION

For the foregoing reasons, as well as other reasons stated in the Petitioner's brief, the decision of the Eighth Circuit should be reversed.

Respectfully submitted,
This 22nd day of May, 2006

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