No. 04-16621

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., AND PLANNED PARENTHOOD GOLDEN GATE,
*Plaintiffs/Appellees*,

vs.

JOHN ASHCROFT, Attorney General of the United States, in his official capacity,
*Defendant/Appellant*,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
*Plaintiff-Intervenor-Appellee.*

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On Appeal From the United States District Court
For the Northern District of California,

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# BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,
in support of *Defendants/Appellants*
*Supporting Reversal.*

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## FRAP RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae The National Legal Foundation has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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## INTEREST OF AMICUS

The National Legal Foundation (NLF) 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.

This Brief is filed pursuant to the consent of the Counsel of Record for both original parties and for Plaintiff-Intervenor.

## ARGUMENT

### I. THE DISTRICT COURT MIS-APPLIED THE *TURNER BROADCASTING V. FCC* SUBSTANTIAL EVIDENCE STANDARD OF REVIEW BECAUSE IT MISUNDERSTOOD THE HIGH DEGREE OF DEFERENCE REQUIRED UNDER THE STANDARD.

The Appellant in this case, Attorney General Ashcroft, claims that the District Court improperly applied the standard under which courts must evaluate congressional findings. That standard, announced by the United States Supreme Court in *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994), requires courts to review congressional findings of fact only to determine whether they are supported by substantial evidence. Undoubtedly, the Plaintiffs and Plaintiff-Intervenor in this case will stake out the one of two "opposite" positions, namely that the District Court applied the standard correctly or that this case is not governed by *Turner*.[1] The resolution of this question will be outcome determinative of that portion of the

[1] The argument is likely to occur in one or both of these variations due to the District Court's non-decision on the standard of review for Congress' fact-finding. After asking for briefing on this issue and after summarizing the positions of the parties and amici, the District Court wrote, "[n]evertheless, while recognizing the importance of the issue, this court need not articulate the precise degree of deference to be accorded the congressional findings in this case. That is because, even if this court were to assume that the findings are entitled to the most stringent standard of deference advocated by the government and Congress: that of substantial deference, the court concludes for the reasons set forth below, that Congress has not drawn reasonable inferences based on substantial evidence, and its findings are therefore not entitled to substantial deference." *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1013-14 (N.D. Cal. 2004).

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 such source is this Court'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* [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 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 in lieu of citing the opinions of this Court directly. As stated above, the purpose of this brief is to offer the views of sources that do not have a vested interest in the issues before this Court. In so doing, an immediate problem arises. Numerous decisions of this Court involve the substantial evidence standard. For example, a Westlaw

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

search of this Court's decisions (even excluding unreported opinions) produced 3,974 results, with 114 of those being from decisions issued since January 1, 2004. Adding the additional search term "standard of review" only lowered the totals to 1,049 and 60 respectively. With so many results to chose from, *Amicus* did not want either the Plaintiffs or this Court to be concerned that it was only chocing the cases in which the standard is describe most favorably to the party *Amicus* is supporting, *i.e*., General Ashcroft. Therefore, by using *Standards*, *Amicus* will be able to use this Court's characterization of the standard rather than its own.

We turn now to how this Court has characterized 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—adds (here addressing both review of 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 cases 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 factfinder 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 not the hearing officer. 'Thus, the standard of review is not modified when a disagreement occurs."[3]

While not as important here as is the application of the substantial evidence standard in the agency context, *Amicus* points out that *Standards* also discusses the application of the substantial evidence standard in the civil jury determination

[3] 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.

context.[4] 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 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*. (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 Commision, *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 arbitor's award is entitled to 'nearly

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

unparalleled deference." *Id*. at 354. (citation omitted) (quoting one case and citing six cases).[5] Similarly, the National Transportaion 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 the United States Supreme Court has stated, congressional findings are entitled to *even more* deference than agency findings.

Before documenting what the Supreme Court has stated in this regard, we pause to note several tangential, but important points. First, despite the fact that *Standards* is 441 pages 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, (9th Cir. 1994), discusses *Turner's* substantial evidence standard as applied to congressional findings and only a handful of others even cite it.

Significantly, however, *Standards* refers its readers to S. Childress & M. Davis, *Federal Standards of Review* (3d ed. 1999). The following lengthy quotation from *Federal Standards of Review* is warranted, not only because that work is cited several times by *Standards,* but also because it, too, is a source

[5] Additional cases are cited to the same effect in the rest of the labor law section of

untainted by a vested intertest 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 (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

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*Standards*. *See generally, id.* at 354-59.

> 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.
>
> 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 (ellipses in the internal *Turner* quotations added by *Federal Standards of Review*).

In light of all of the above, of the evidence discussed in the District Court's own opinion (especially in Part IV.D.3, *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1014-32 (N.D. Cal. 2004) and of the arguments made in General Ashcroft's brief, it seems obvious that the District Court has mis-

applied the substantial evidence standard.[6]

In particular, the District Court, despite disclaiming doing so, weighed the credibility of the evidence upon which Congress relied. *Id*. at 1019-1021. Also, the District Court seems to place great import upon the fact that some of Congress' finding "were disputed within Congress." *See, e.g., id.* at 1024. These approaches appear nowhere in the *Turner* standard. Congress may weigh the credibility and motives of various witnesses whose testimony they hear in finding facts while the District Court (as it paid lip service to) may not. Furthermore, *Turner* does not impose a standard of unanimity on Congress. *Any* finding of fact, whether disputed or not is subject only to the substantial evidence standard. A unanimous finding of fact would be a rare animal indeed.

Relatedly, and in some ways a re-hashing of the above concerns, the District Court seems to place great import upon Congress' use of the word "consensus." *See, e.g., id*. at 1025. This is a flimsy reed upon which to hang its conclusion. This approach also appears nowhere in the *Turner* standard. As noted above, Congress may weigh the credibility and motives of various witnesses whose testimony they hear in determining whether a consensus exists.

For all of these reasons, the District Court, while purporting to apply the

[6] Furthermore, all of the above also undercuts the position of the *amici*-below-law-professors on this issue which the District Court discussed but did not adopt. *See Planned Parenthood*, 320 F. Supp. 2d at 1011-14.

*Turner* Standard, actually *mis*-applied it.

## CONCLUSION

For the foregoing reasons and for other reasons stated in Appellant's brief, the decision of the District Court should be reversed.

Respectfully submitted
this 29th day of December, 2004

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## CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached *Amicus* Brief in the case of *Planned Parenthood Fed'n of Am., et al. v. Ashcroft v. City and County of San Francisco*, No. 04-16621, on all required parties by depositing the required number of copies of the same in the United States mail, first class postage, prepaid on December 29, 2004, addressed as follows:

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