Nos.: 04-3379

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LEROY CARHART, ET AL.
Plaintiffs/Appellees,

vs.

JOHN ASHCROFT, ET AL.
Defendants/Appellants,

On Appeal From the United States District Court
For the District Nebraska,
District Court Case No.: 4:03-CIV-3385

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

Steven W. Fitschen
Counsel of Record for Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133

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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 parties.

ARGUMENT

II. 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 AND BECAUSE IT CONCLUDED THAT SUBSTANTIAL DEFERENCE WAS NOT OWED TO NON-PREDICTIVE CONGRESSIONAL FINDINGS.

A. 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 as documented by neutral sources.

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 in this case will stake 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.[1] *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 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 (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 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 search of this Court's decisions (even excluding unreported opinions) produced 4,111 results, with 105 of those being from decisions issued since January 1, 2004. Adding the additional search term "standard of review" only lowered the totals to 529 and 27 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,

[1] The complete document is available as four pdf files on the Ninth Circuit's

i.e., General Ashcroft. Therefore, by using *Standards*, *Amicus* will be able to use that court's characterization of the standard rather than its own. [2]

We turn now to how the Ninth Circuit has characterized the standard in various contexts. In its introduction to the substantial evidence standard oaf 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 de cision." *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

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website. Links can be found on the home page, www.ca9.uscourts.gov.

[2] While it is theoretically possible that some difference in the application of the substantial evidence standard may exist between this Court and the Ninth Circuit—and Amicus has not sought to exhaustively determine whether such a difference

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 context.[4] Once again, the standard is that '[s]ubstantial evidence is su ch 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

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exists—the 'flavor" of the substantial evidence standard is fairly uniform between the two courts as subsequent portions of this brief will make plain.

[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 entitle to even greater deference. In this same section, *Standards* also discusses the application of the substantial evidence standard to credibility findings of hearing officers.

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

(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 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).

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

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 important 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.

We also note, that while *Amicus* is unaware of any document of this Court that is comparable to *Standards*, this Court's *Practioners' Handbook,* under the section 'Scope of Review," follows the *Standards* approach for jury verdicts and factual findings of trial courts and agencies. The scope of this Court's '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 opinion of this Court 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. The following lengthy quotation from *Federal Standards of Review* is warranted because it is recommended by this Court; because it is cited several times by *Standards*; because it, too, is a source 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 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, and of the arguments made in General Ashcroft's brief, it seems obvious that the District Court has mis-applied the substantial evidence standard. The District Court seems to place great import upon Congress' use of the word "consensus." *See, e.g., Carhart v. Ashcroft*, 331, F. Supp 805, 1008-15 (D. Neb. 2004). This is a flimsy reed upon which to hang its conclusion. This approach appears nowhere in the *Turner* standard. Congress may weigh the credibility and motives of various witnesses whose testimony they hear in determining whether a consensus exists.

B. The District Court mis-applied the *Turner Broadcasting v. FCC* substantial evidence standard of review because it concluded that substantial deference was not owed to non-predictive congressional findings, contrary to the language of *Turner* itself.

In light of all of the above, this Brief will look directly at the language of *Turner* for only one point. The District Court claimed that "because the fact-finding process engaged in by Congress in this case requires no 'predictive' judgment . . . the findings of congress are not due 'substantial' deference . . . " *Id.* at 1006. In other words, the District Court thought that *Turner* did not control (at

least in this regard) because in the instant case "the answers to the relevant questions require no prophesy." *Id.*

This conclusion stands *Turner* on its head. As the Supreme Court wrote:

> [t]he Government contends that this finding, *though* predictive in nature, must be accorded great weight in the First Amendment inquiry, especially when, as here, Congress has sought to "address the relationship between two technical, rapidly changing
>
> We agree that courts must accord substantial deference to the predictive judgments of Congress. *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103, 36 L. Ed. 2d 772, 93 S. Ct. 2080 (1973) (The "judgment of the Legislative Branch" should not be ignored "simply because [appellants] cast [their] claims under the umbrella of the First Amendment"). Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. *See FCC v. National Citizens Comm. for Broadcasting*, *supra*, at 814; *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29, 5 L. Ed. 2d 377, 81 S. Ct. 435 (1961). As an institution, moreover, Congress is far better equipped than the judiciary to "amass and evaluate the vas t amounts of data" bearing upon an issue as complex and dynamic as that presented here. *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 331 n.12, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985).

Turner Broad. Sys. v. FCC, 512 U.S. 622, 664-66 (U.S., 1994) (emphasis added) (one citation omitted).

The point here, as one can see in context, is that congressional finding of fact are entitled to *Turner* deference *even when* they are predictive. The District Court read *Turner* to mean that congressional findings are entitle to *Turner* deference *only when* they are predictive. Thus, if the District Court is correct in

seeing no predictive aspect to the congressional findings, then the findings get more deference, not less.

That this is the correct way to read *Turner* is underscored by Justice Stevens' concurrence in that case. He would have affirmed the decision below under the standard as stated by the majority. In explaining why, he noted that not all the evidence before Congress was of a predictive nature: 'Thus, even if Congress had had before it no historical evidence" it could have had a basis for its action, according to Stevens. Clearly, such non-predictive evidence would be an *even stronge*r basis for congressional findings.

Again, the District Court's reading of *Turner's* standard is clearly erroneous on this point, at least.

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 8th day of December, 2004

_____
Steven W. Fitschen
Counsel of Record for *Amicus Curiae*,
The National Legal Foundation
2224 Virginia Beach, VA 23454
(757) 463-6133

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32(a)(7)(B). Exclusive of the exempted portions, this Brief contains 2931 words. This total was calculated with the Word Count function of Microsoft Word 2000. The diskettes used in accordance with Local Rule 28A(d)(2) have been scanned and found to contain no viruses.

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Steven W. Fitschen

Counsel of Record for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Amicus Brief and accompanying disk in the case of *Carhart, et al. v. Ashcroft et al.*, No. 04-3379 on all required parties by depositing the required number of paper and electronic copies of the same in the United States mail, first class postage, prepaid on December 8, 2004, addressed as follows:

Priscilla J. Smith
The Center for Reproductive Law & Policy
120 Wall street, 18th Floor
New York, NY 10005
Counsel for Plaintiffs/Appellees

James J. Gilligan
Teal Luthy Miller
United States Department of Justice
601 D Street, N.W.
Patrick Henry Building
Washington, DC 20530
Counsel for Defendants/Appellants

_____

Steven W. Fitschen
Counsel of Record for Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133