No. 10cv00416

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

QUINTON RICHARDSON,
Plaintiff and Appellant

v.

CITY OF WINTHROP, MASSACHUSETTS,
Defendant and Appellee

APPEAL FROM FINAL DECISION OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

BRIEF OF THE
APPELLEE CITY OF WINTHROP

Team No. 2

TABLE OF CONTENTS

Page

Statement of the Issues……... 1

Statement of the Case……. 1

Statement of the Facts……. 2

Summary of the Argument……. 2

Argument…… 3

I. THE DISTRICT COURT WAS CORRECT WHEN IT RULED THAT WINTROP MUNICIPAL CODE SECTION 6.04.090 WAS NOT UNCONSTITUTIONALLY VAGUE, FACIALLY, OR AS APPLIED, BECAUSE IT WAS BOTH SPECIFIC AND DOES NOT LEND ITSELF TO ARBITRARY ENFORCEMENT……. 3

A. Ordinance banning "Pit Bulls" is not unconstitutionally vague because it identifies specific breeds and is understandable by a layperson……. 5

B. Ordinance Banning "Pit Bulls" is not unconstitutionally vague, because it is unlikely that it will be arbitrary enforced……... 8

II. THE DISTRICT COURT WAS CORRECT IN RULING THAT WINTHROP MUNICIPAL CODE 6.04.090 WAS RATIONALLY RELATED TO THE CITY'S POLICING AND PUBLIC SAFETY INTERESTS AND THEREFORE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT……. 10

A. The regulation of animals is within the State's policing power and public health and safety interests……... 10

B. Banning Pit Bulls bears a rational relationship to, and also advances, the State's interest in protecting public safety…….. 11

TABLE OF AUTHORITIES CITED

Cases	Page
Am. Canine Found. v. City of Aurora, 618 F. Supp. 2d 1271 (D. Colo. 2009)…….....	11, 12
American Dog Owners Ass'n, Inc. v. City of Des Moines, 469 N.W.2d 416 (Iowa, 1991)…….	5
American Dog Owners Ass'n, Inc. v. City of Lynn, 404 Mass. 73, 533 N.E.2d 642 (1989)……	5-6
American Dog Owners Ass'n v. City of Yakima, 113 Wash. 2d 213, 777 P.2d 1046 (1989)……..……..	5
American Dog Owners Ass'n v. Dade County, 728 F.Supp 1533 (S.D.Fla. 1999)……....	4
Beer Co. v. Mass., 97 U.S. 25 (U.S. 1878)……...	10
Coates v. City of Cincinnati, 402 U.S. 611 (1971)…….....	4
Colorado Dog Fanciers, Inc. v. City and County of Denver By and Through City Council, 820 P.2d 644 (Colo. 1991)…….	4-5
Dias v. City & County of Denver, 567 F.3d 1169 (10th Cir. 2009)……..	13,15
FCC v. Beach Communications, 508 U.S. 307 (U.S. 1993)…….	11
Garcia v. Village of Tijeras, 108 N.M. 116, 767 P.2d 355 (Ct. App. 1988)…….....	6, 9, 12
Gibbons v. Ogden, 22 U.S. 1 (U.S. 1824)…….....	10
Greenwood v. City of North Salt Lake, 817 P.2d 816 (Utah, 1991)…….	5
Hearn v. City of Overland Park, 244 Kan. 638 P.2d 758 (1989)…….	4, 5
Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)……...	5
Holt v. City of Maumelle, 307 Ark. 115, 817 S.W. 2d 208 (1991)……...	5, 13
Jacobson v. Massachusetts, 197 U.S. 11 (U.S. 1905)……...	10
Kolender v. Lawson, 461 U.S. 352 (1983)……	8
McQueen v. Kittitas County, 115 Wash. 672, 198 P. 394 (Wash. 1921)……..	13

Miller v. California, 413 U.S. 15 (1973)…….. 4

New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (U.S. 1885)…… 10

Pagedale, City of v. Murphy, 142 S.W.3d 775 (Mo. Ct. App. E.D. 2004)……... 6

Parker v. Levy, 417 U.S. 733 (1974)…… 4

Starkey v. Chester, 628 F. Supp. 196 (E.D. Pa. 1986)……. 12

Sentell v. New Orleans & C. R. Co., 166 U.S. 698 (U.S. 1897)…….. 10

Singer v. Cincinnati, 57 Ohio App 3d 1, 566 N.E.2d 190 (Ohio Ct. App., Hamilton County 1990)…… 12

Smith v. Goguen, 415 U.S. 566 (1974)……. 8

Toledo v. Tellings, 114 Ohio St. 3d 278, 2007-Ohio-3724, 871 N.E.2d 1152 (Ohio 2007)……. 12, 14

United States v. Harriss, 347 U.S. 612 (1954)……. 4

United States v. National Dairy Corp., 372 U.S. 29 (1963)……. 4

Vanater v. Village of South Point, 717 F. Supp. 1236 (S.D. Ohio 1989)……. 7, 11, 12, 14

Vance v. Bradley, 440 U.S. 93 (U.S. 1979)…….. 11

Washington v. Glucksberg, 521 U.S. 702 (U.S. 1997)……. 10

Record

Memorandum Opinion, Richardson v. City of Winthrop, Massachusetts, Civil Action No. 10cv00416…….. 5, 13, 14

Statutes

Winthrop, Massachusetts, Municipal Code §6.04.090……. 6, 8, 14

Law Reviews

Karyn Grey, *Breed Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?*, 27 NOVALR 415, 439-440 (2003)…….. 9

ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly ruled that Winthrop Municipal Code Section 6.05.090, banning all pit bull terrier varieties as *per se* vicious, is not unconstitutionally vague facially or as applied to the Plaintiff.

2. Whether the district court properly ruled that Wintrhop Municipal Code Section 6.05.090 was rationally related to the state's policing power and public safety interests and therefore does not violate substantive due process under the Fourteenth Amendment.

STATEMENT OF CASE

The City of Winthrop seized Appellant's dog, Zoe, on August 2, 2009 under Winthrop Municipal Code Section 6.05.090, which bans all "'pit bull' variety of terrier" as *per se* vicious. The city held a hearing, as provided by the ordinance, and found that Zoe was, as a matter of fact, a pit bull terrier. Appellant appealed to the state trial court, which affirmed the City Manager's decision.

Appellant then filed a complaint in the United States District Court for the District of Massachusetts challenging the ordinance on the grounds that it violated his due process rights under the Fourteenth Amendment. Appellant also alleged that the ordinance was unconstitutionally vague, both facially and as applied. The District Court ruled in favor of the City of Winthrop on both grounds. Appellant has now filed this appeal.

STATEMENT OF FACTS

Appellant, Quinton Richardson, adopted two puppies from a local animal shelter. Both puppies appeared to be from the same litter as they shared a similar appearance and age. Both the rescue organization and Richardson's veterinarian deemed the puppies to be "mixed breed". The dogs were adopted for companionship purposes and showed no outward signs of aggression for the four years that Richardson owned both dogs.

A meter reader noticed one of the dogs, Zoe, in Richardson's window and notified lthe local animal control on August 1, 2009. Zoe was the only animal seized as the other dog, Starla, was at a veterinary hospital. The city held a hearing at which the animal control officer testified that the animal physical characteristics of a pit bull. In response, Richardson provided an affidavit from his veterinarian claiming that the dog was simply a "mixed breed". The City Manager determined that the dog was, as a matter of fact, a "Pit Bull Terrier type dog" and required the animal to be removed from the city within ten days. Richardson was unable to find a new home for the animal and on December 1, 2009, the animal was destroyed.

SUMMARY OF ARGUMENT

The subject of this brief involves two separate lines of inquiry. First, whether or not a statute banning pit bull terriers as *per se* vicious is void for vagueness. Second, whether or not breed specific legislation is a violation of substantive due process under the Fourteenth Amendment.

First, the statute, as constructed, cannot possibly be void for vagueness as it leaves little room for interpretation or arbitrary enforcement. The courts have held that the standard test should be whether or not a lay person would have effective notice of the statutes intent and meaning. Further, the courts have held that there are a variety of ways in which a person can educate himself/herself with regards to the meaning of a particular breed distinction. This along with the well settled principle that there is some presumption of constitutionality in statutes means that the Appellant had proper notice of the statute. Further, the statute does not lend itself to arbitrary enforcement as the procedural steps that the ordinance provides establishes several layers of review by which a dog owner could be cleared of owning a vicious dog.

Second, under *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489 (1977) absent a violation of a fundamental right or the targeting of a protected class, the normal standard to determine whether a particular statute violates the substantive due process clause of the Fourteenth Amendment is: a.) whether the state has a legitimate interest at stake and b.) whether the statute in question has a rational basis to that interest. It is well settled law that the state has a legitimate in public safety and policing. Many courts have held that the registration and control of dogs falls within that power, with little dissent. Further, the courts, with few exceptions have held that the banning or regulation of specific breeds of dogs bears a rational relationship to the public safety interest of the state.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT WHEN IT RULED THAT WINTROP MUNICIPAL CODE SECTION 6.04.090 WAS NOT UNCONSTITUTIONALLY VAGUE, FACIALLY, OR AS APPLIED, BECAUSE IT WAS BOTH SPECIFIC AND DOES NOT LEND ITSELF TO ARBITRARY ENFORCEMENT.

"The fourteenth amendment due process guarantee against vagueness requires that laws provide fair warning to persons of ordinary intelligence of the conduct prohibited, and standards to protect against arbitrary and discriminatory enforcement." *American Dog Owners Ass'n v. Dade County*, 728 F.Supp 1533, 1539 (S.D.Fla. 1999); *See also United States v. Harriss,* 347 U.S. 612, 617 (1954). The Appellant must show that the ordinance in question is either void for its lack of specificity or that it is likely to be arbitrarily enforced by city officials. Appellant lacks a convincing argument in both situations.

"Facial vagueness occurs when a statute or an ordinance is so utterly void of standard of conduct that it simply has no core and cannot be validly applied to any conduct." *Colorado Dog Fanciers, Inc. v. City and County of Denver By and Through City Council,* 820 P.2d 644, 651 (Colo. 1991). To make such a challenge, the plaintiff must prove that the ordinance is vague, "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative stand, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

Several general principles apply when determining whether a statute or ordinance is void for vagueness. Legislation is generally presumed to be constitutional, and should not be "invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within [its] language." *Parker v. Levy*, 417 U.S. 733, 757 (1974) (quoting *United States v. National Dairy Corp.*, 372 U.S. 29, 32-33 (1963)). The United States Constitution does not require that the language be mathematically precise or require an "ultimate, God-like precision." *Miller v. California,* 413 U.S. 15, 28 (1973); *see also Hearn v. City of Overland Park,* 244 Kan. 638, 772 P.2d 758 (1989). And finally, more vagueness is tolerated when the

ordinance results in civil rather than criminal penalties. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498-99 (1982).

A. Ordinance banning "Pit Bulls" is not unconstitutionally vague because it identifies specific breeds and is understandable by a layperson.

While breed-specific legislation continues to be a debated subject, courts have generally concluded that such statutes and ordinances are constitutional, especially when containing definitions that specify which breeds should be controlled, rather than referring to them generally (i.e. American Staffordshire Terrier, rather than the ambiguous term Pit Bull). Six state supreme courts, along with numerous federal and state district courts, have deemed Pit Bull ordinances to be constitutional. *American Dog Owners Ass'n v. City of Yakima,* 113 Wash. 2d 213, 777 P.2d 1046 (1989); *Hearn v. City of Overland Park,* 244 Kan. 638, 772 P.2d 758, 80 A.L.R.4th 51 (1989); *American Dog Owners Ass'n, Inc. v. City of Des Moines,* 469 N.W.2d 416 (Iowa, 1991); *Greenwood v. City of North Salt Lake,* 817 P.2d 816 (Utah, 1991); *Colorado Dog Fanciers Ass'n,* 469 N.W.2d at 416; *Holt v. City of Maumelle,* 307 Ark. 115, 817 S.W. 2d 208 (1991).

In general, Pit Bull ordinances have defined "Pit Bull" as falling within American Staffordshire Terrier, Staffordshire Bull Terrier, American Pit Bull Terrier, or just Pit Bull Terrier. These are the breeds generally associated with the United Kennel Club or American Kennel Club. Neither of these organizations recognizes a breed simply known as a "Pit Bull." Memorandum Opinion at 8, Richardson v. City of Winthrop, Massachusetts, Civil Action No. 10cv00416. In addition, most ordinances state that dogs that have a substantial part or are of a mixed breed that includes the aforementioned breeds are subject to regulation. The Massachusetts Supreme Court did find that a statute that had no breed designation, merely the term "Pit Bull" to be unconstitutionally vague. *American Dog Owners Ass'n, Inc. v. City of Lynn,*

404 Mass. 73, 533 N.E.2d 642 (1989); *compare with Pagedale, City of v. Murphy,* 142 S.W.3d 775 (Mo. Ct. App. E.D. 2004) (The court found that a statute that did not have definition beyond that of "Pit Bull" was constitutional).

In *Garcia v. Village of Tijeras,* the New Mexico Court of Appeals handled the difficult question of whether a layperson could identify a "Pit Bull." Although there is some ambiguity in the term "Pit Bull", American Pit Bull Terrier and American Staffordshire Terrier (or just Staffordshire Terrier) are generally considered interchangeable and are used by different organizations. The court held, through expert witness testimony, that there is a very specific phenotype (or physical characteristics) associated with these breeds of dog. Hence, the breeds commonly associated with the term "Pit Bull" are easily identified by a layperson. *Garcia v. Village of Tijeras,* 108 N.M. 116, 767 P.2d 355 (Ct. App. 1988).

Dog Fanciers of Colorado, holds that an ordinance is not invalid just because it fails to list the majority of the physical traits of the breeds listed. Lists of these traits are available from many sources, including the American Kennel Club and the United Kennel Club. It is understandable that legislatures may not wish to define them specifically, because it might result in an underinclusive statute that eliminates all non-pedigreed dogs. *Colorado Dog Fanciers, Inc. v. City and County of Denver By and Through City Council,* 820 P.2d 644, 651 (Colo. 1991).

In the case at hand, the ordinance is precisely defined regarding which dog breeds should be regulated. The statute covers "any of the breeds commonly referred to as belonging to the "Pit Bull" variety of terrier, which consists of the following breeds or breed types and mixtures: American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier." Winthrop, Massachusetts, Municipal Code §6.04.090. While there may be some debate as to who defines

the characteristics of each breed, at least two of those breeds are well recognized by respected national organizations. People interested in these breeds have resources readily available through the national kennel clubs, which define the physical appearance as well as behavioral characteristics. It would be fairly easy for the layperson to look up information regarding any dog in question. Therefore, this is not an ambiguous standard.

While there is no immediate precedent regarding the constitutionality of breed-specific legislation in this jurisdiction, the respondent urges the court to consider the many states and federal circuits that have determined these kinds of ordinances to be constitutional. Although it may sometimes be difficult to determine a specific breed of dog, it is by no means "so utterly void of a standard of conduct that it simply has no core and cannot be validly applied to any conduct."*Vanater v. Village of South Point*, 717 F. Supp. 1236 (S.D. Ohio 1989).

The statute in question is also not vague as applied. The physical characteristics of most dog breeds are commonly known, and indeed can be procured from a variety of sources. The court in *Vanater* held that even an ordinary person could easily refer to a dictionary, a dog buyer's guide, or another reference and determine which dogs would fall into the described categories. *Id.* at 1243. Had Richardson taken the time to consult with a similar appendix, he might have concluded that his dogs did indeed fall under the scope of the ordinance.

The term "Pit Bull," is a common term and used by news media and humane societies. It is not an unfamiliar term to the layperson. Richardson is held to the standard of a reasonable person, and in this case, a reasonable person should have been aware that his might be under scrutiny. Any responsible dog owner should be aware of the statutes governing his pets, and should understand that he is liable for conforming to those statutes. It was not the responsibility

of the veterinarian or of the city to inform Richardson that his animals were not in compliance with the ordinance.

B. Ordinance Banning "Pit Bulls" is not unconstitutionally vague, because it is unlikely that it will be arbitrary enforced.

The second prong of the void for vagueness doctrine establishes that the statute or ordinance cannot promote or allow arbitrary or discriminatory enforcement. The Supreme Court has established the importance of this: "[W]e have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson,* 461 U.S. 352 (1983), *quoting Smith v. Goguen,* 415 U.S. 566 (1974).

When an ordinance places the burden of proof on the city, and requires at least a preponderance of the evidence that the animal is indeed a "Pit Bull", the ordinance does not permit discriminatory or arbitrary enforcement. "Moreover, the ordinance's hearing procedure, as construed with the burden properly placed on the city to prove Pit Bull status, provides a sufficient safeguard to avoid arbitrary application of the law." *Colorado Dog Fancier,* 820 P.2d at 651.

The ordinance in the case at bar does squarely place the burden of proof on the city. "A hearing by the City Manager or the City Manager's designee will determine whether the dog in question is a nuisance, vicious or potentially vicious dog." Winthrop, Massachusetts, Municipal Code §6.04.090. The hearing requires the City Manager to determine by a preponderance of the evidence, if the dog falls under the ordinance, therefore, arbitrary enforcement is unlikely. The hearing must be public, and the owner of the dog must be notified in a timely fashion. This allows the owner to present any evidence that he believes will help dismiss the charges. Because

the hearing is public, it allows an accurate and appropriate record to be kept as to how the decisions regarding the animals are being made. The public then has the opportunity to determine if the decisions are indeed being made arbitrarily or discriminatorily.

It is clearly not arbitrarily enforced as applied in the case. Richardson found the dogs and raised them. Zoe was identified as potentially vicious by a mail carrier. The City Manager then held a hearing to determine whether Zoe was indeed a "Pit Bull Terrier type dog." Richardson presented an affidavit from his veterinarian saying that Zoe was a "mixed breed." Mixtures of "Pit Bull" breeds are also prohibited under the statute. No DNA testing was performed, but it would have been moot, since DNA testing is imprecise on mixed breed dogs. Karyn Grey, *Breed Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?,* 27 NOVALR 415, 439-440 (2003). Although the determination was not justified, we must conclude that the City Manager used the phenotype of the animal for his determination. As mentioned in *Garcia*, this is a perfectly appropriate way for a layperson to determine the breed of the animal. *Garcia* 108 N.M. 116, 767 P.2d 355.

In light of these facts, we request that the court declare in favor the City of Winthrop. The court should consider that legislation must be constitutional even if there may be marginal offenses that would not fall within the scope of the statute or ordinance. In addition, this is a civil statute; therefore a greater degree of vagueness should be permitted. Although the ordinance does not reach a standard of mathematical certainty, such a standard is not required under the vagueness doctrine.

The ordinance gives any dog owner a set of prohibited breeds with defined characteristics, thus giving them as much information as can be afforded without being

underinclusive. The determination of breed is left to the City Manager, who publicly announces his or her findings, making it impossible for the ordinance to be enforced arbitrarily.

II. THE DISTRICT COURT WAS CORRECT IN RULING THAT WINTHROP MUNICIPAL CODE 6.04.090 WAS RATIONALLY RELATED TO THE CITY'S POLICING AND PUBLIC SAFETY INTERESTS AND THEREFORE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

Substantive due process requires that when there is an issue of law does not concern a fundamental right or a protected class that the regulation must have a rational tie to a legitimate state interest. *Washington v. Glucksberg*, 521 U.S. 702 (U.S. 1997). This creates a two part test to determine constitutionality. First, was there a legitimate state interest at issue. Second, was there a rational relationship between that state interest and the regulation in question.

A. The regulation of animals is within the State's policing power and public health and safety interests.

It is well settled law that the state has the power to regulate any matter that affects public safety and health. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11, 25 (U.S. 1905); *Gibbons v. Ogden*, 22 U.S. 1 (U.S. 1824); *Beer Co. v. Mass*., 97 U.S. 25, (U.S. 1878); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 661 (U.S. 1885). In particular, courts have found that dogs, are classified as regular property and would therefore be subject to regular state policing powers, as most property is. *Sentell v. New Orleans & C. R. Co.*, 166 U.S. 698 (U.S. 1897).

The holding of *Sentell* was reaffirmed in *Nicchia v. New York*, when the court held that dog ownership is not an unqualified right and could be "subjected to peculiar and drastic police regulations by the State without depriving their owners of any federal right." 254 U.S. 228 (1920). Among more recent cases, several lower courts, have found that the control and registration of dogs falls within the realm. A District Court in Ohio ruled that the outright

banning of any pit bull type breed was valid under the state's police power. *Vanater,* 717 F. Supp. at 1241.

In the instant case, the record does not indicate any objection by Appellant that the ability to regulate dogs is outside of the state's lawful authority to regulate health and public safety. The ordinance, as it stands, is not only concerned with dogs that the City believes are inherently dangerous, but also dogs that have proven to be actually dangerous. If the state cannot regulate particular breeds, it stands to reason that the state also lacks the power to regulate dogs in general.

A ruling finding the regulation of dogs outside of the state's protected police and public safety powers would go against nearly two centuries of established jurisprudence. The ruling would also severely hamstring any regulation of property by the state. By classifying this particular type of property as special would call into question the very notion of property in our justice system.

B. Banning Pit Bulls bears a rational relationship to, and also advances, the State's interest in protecting public safety.

When challenging a regulation as a violation of substantive due process, the challenging party bears the burden of proof in showing that there is absolutely no rational basis between the regulation and the state's legitimate objective. *FCC v. Beach Communications,* 508 U.S. 307, 315 (U.S. 1993). A regulation comes to the court with a "strong presumption of validity." *Id.* The court has clarified this notion by holding that the challenging party must negate "every conceivable basis which might support it." *Am. Canine Found. v. City of Aurora,* 618 F. Supp. 2d 1271 (D. Colo. 2009) (quoting *Beach Communications*, 508 U.S. at 315). *See also,* Vance v. Bradley, 440 U.S. 93, 111 (U.S. 1979).

The courts have accepted a varying degree of evidence when deciding whether or not breed specific legislation bears a rational relationship to public safety concerns. In *Am. Canine Found. v. City of Aurora*, the court found that the city simply gathering input in a public hearing from animal control officers, members of the public and the American Canine Foundation was a sufficient basis for the city to act. 618 F. Supp. 2d at 1274. In a similar ruling, a district court ruled that the record established that the legislature acted with the intent to curb dog violence after testimony from the police chief and the county health commissioner. *Starkey v. Chester*, 628 F. Supp. 196, 197 (E.D. Pa. 1986).

The *Vanater* court concluded that pit bulls may not all be dangerous, but the physical traits of the breed give them the "*ability* to perform in an unreasonably dangerous manner." 717 F. Supp at 1240 (original emphasis). The court stated that pit bulls have a great deal of strength and athleticism that made them especially dangerous. *Id.* The court also accepted similar reasoning regarding the pit bulls natural abilities, in addition to events in the town in question. *Garcia*, 108 N.M at 120, 767 P.2d at 359. The court was particularly concerned with the extreme athleticism of the pit bull, as well as the pit bulls tendancy to "bite and hold" rather then to "bite and release". *Id.* The court concluded that this evidence, along with witnesses to particular incidents, was more than enough to establish a rational relationship. *Id.* Further, some courts have held that even though there is little evidence that properly trained and socialized dogs of suspect breeds are inherently dangerous, that does not prove that the breed, as a whole, or the dog in particular are not more potentially dangerous. *Toledo v. Tellings*, 114 Ohio St. 3d 278, 2007-Ohio-3724, 871 N.E.2d 1152 (Ohio 2007), cert. denied, 128 S. Ct. 1302, 170 L. Ed. 2d 140 (U.S. 2008); *See also Singer v. Cincinnati*, 57 Ohio App 3d 1, 566 NE2d 190 (Ohio Ct. App., Hamilton County 1990).

Several state supreme courts have also held that the power to regulate dogs is well in the police power, so there is no logical reason to not allow distinctions within a class of property. *McQueen v. Kittitas County*, 115 Wash. 672, 198 P. 394 (Wash. 1921). The Arkansas Supreme Court also accepted this distinction and incorporated the *McQueen* holding in their judgment. *Holt*, 307 Ark at 118, 817 SW2d at 210. The reasoning behind these two decisions is clear; the courts allow legislatures to use its policing powers in regulating personal property, and if they were to disallow any attempts to regulate based on classes of property, the policing power would be ineffective. *McQueen*, 115 Wash. At 678, 198 P. at 394.

The only caselaw that could possibly support Appellant's claim that the pit bull ban violates substantive due process comes from a decision that overruled a motion to dismiss for failure to state a claim. *Dias v. City & County of Denver*, 567 F.3d 1169 (10th Cir. 2009). The court in that case ruled that in order to determine whether or not there was a rational basis for the law, there must be some development of facts. *Id.*

In the instant case, the Appellant has failed to present enough evidence to overcome the burden of proof that accompanies challenging the ordinance on due process grounds. The City maintains that the purpose of the legislation is to ensure the public safety from a breed that is often a menace. The evidence presented by Appellant in the lower court speaks only generally to the concept of breed specific legislation rather than the specifics of why a state actor passes such legislation.

The evidence that the appellant offered at to the District Court consisted of three position statements by national organizations. Memorandum Opinion at 13, Richardson v. City of Winthrop, Massachusetts, Civil Action No. 10cv00416. Only one of those organizations (The National Animal Control Association) has any responsibilities to public health and safety.

Further, the guidelines offered by the NACA say nothing as to the legitimacy of breed specific legislation as a method for enforcing public safety. NACANet.org, NACA Policy, http://www.nacanet.org/guidelines.html#dangerous (last visited January 23, 2011). The guidelines simply present what the organization feels are better alternatives that put less of a burden on owners or municipalities. *Id.* Even if the court were to accept these statements there is little evidence offered on any of these sites as to exactly *why* these policies do not work. In fact, they make no claims that breed specific legislation is completely ineffective, as Appellant contends.

Appellant also contends that there is no rational purpose behind the ordinance as it is simultaneously under-inclusive and over-inclusive. Memorandum Opinion at 13, Richardson v. City of Winthrop, Massachusetts, Civil Action No. 10cv00416. The notion that the ordinance is under-inclusive is directly defeated by the language of the statute. Sections B-1(a) and (b) specifically address this program by banning dogs that have specifically shown aggressive tendencies or is used for dogfighting. Winthrop, Massachusetts, Municipal Code §6.04.090.

Appellants point regarding the over-inclusive nature of the law has also been addressed by several courts. The courts in both *Vanater* and *Toledo* addressed the fact that many members of the breed class may not, in fact, be vicious, but the statute is in place as a general safeguard to the public. The key in both of these rulings was that the dogs of the breed class have the *ability* to be dangerous, thus it is well within the state's discretion to ban the suspect breed.

The court also had substantial opportunity to develop the factual background necessary to make a ruling on the rational basis of Appellants claim. Both Appellant and the city had the opportunity to present evidence either for or against the underlying the purpose of the ordinance. This evidence was explicitly mentioned the District Court's opinion regarding the rationality of

the ordinance. Accordingly, the *Dias* case is clearly dissimilar from the instant case and should be given very little weight.

The City has offered both findings of other courts as well as its own private findings that pit bulls have an increased risk of being dangerous animals at the lower court. These examples were accepted by the lower court. Given the courts' deference to the discretion of legislatures to make laws and protect the common good, both inside and outside of this area of law. The court here should find that the law banning pit bull variety dogs is constitutionally valid.

CONCLUSION

Accordingly, the City of Winthrop respectfully requests that this Court uphold the District Court for the District of Massachusetts' ruling that the Winthrop Municipal Code 6.04.090 does not violate the defendant's constitutional rights. Further, the City of Winthrop respectfully requests that the court uphold the District Court's summary judgment order.

Dated: _____