STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the District Court Err when it ruled that Winthrop Mun. Code § 6.04.090, designated all "'pit bull' variety of terrier" as *per se* vicious and thus banning them, is not overly broad or unconstitutionally vague, either on its face or applied to the Plaintiff, (i) when the Ordinance does not burden a substantial amount of constitutionally protected conduct, (ii) is clearly applicable to certain classes of dog owners, and (iii) when § 6.04.090 provides standards for identification of prohibited dogs sufficient to both provide owners with notice that their dogs are subject to the Ordinance and provide minimum guidelines for law enforcement?

II. Does Winthrop Mun. Code § 6.04.090 violate Richardson's right to substantive due process under the Fourteenth Amendment when (i) the owning a breed of a particular type is not a fundamental right, (ii) the ordinance banning the breeds is rationally related to the government's interest in protecting its citizens from being harmed by vicious dogs, and (iii) the legislation that addressess breed specific legislation has repeatedly been affirmed as being neither overinclusive or underinclusive, regardless of the fact that it singles out particular breeds, yet includes dogs that do not have a history of being vicous.

STATEMENT OF JURISDICTION

The United States District Court for District of Massachusetts exercised jurisdiction over this matter pursuant to 42 U.S.C. § 1983 (2010). Exercise of this Court's appellate jurisdiction is appropriate under Fed. R. App. P. 3.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following Constitutional and statutory provisions appear in the appendices following this brief: U.S. Const. amend. XIV, 42 U.S.C. § 1983 (2010), and Winthrop Mun. Code § 6.40.090.

STANDARD OF REVIEW

An Appellate Court reviews a District Court's grant of summary judgment de novo. *Alison H. v. Bayard*, 163 F.3d 2, 4 (1st Cir. 1998). A grant of summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court has stated that summary judgment is appropriate "against a party who fails to make a

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

A. Background

In 2005, Richardson, a lifelong resident of the City, obtained two dogs from a rescue organization that had found them as young strays in a city park. R. at 4. The dogs' heritage was unknown and they both were classified by the rescue organization and later by Richardson's veterinarian as "mixed breed." R. at 4. Richardson claims that his dogs have never bitten a person or other dog, attacked any other animal or otherwise threatened the community peace. R. at 4.

In 1988, the City enacted Winthrop Mun. Code § 6.04.090 ("Ordinance") banning "all 'Pit Bull' variety of terrier" from the Winthrop city limits. R. at 5. On August 1, 2009, a meter reader observed one of Richardson's dogs inside his home through a window. R. at 5. The meter reader notified animal control officers, who seized the dog the next day. R. at 5. During this time, Richardson's other dog was not present in his home. R. at 5.

As provided by the Ordinance, a hearing was held. R. at 5. The animal control officer testified that Richardson's dog appeared to be a "Pit Bull." R. at 5. Richardson presented an affidavit from his veterinarian stating that his dog was a "mixed breed." R. at 5. The Ordinance does not require DNA testing and therefore, none was performed. R. at 5. The City Manager determined that the dog was a "'Pit Bull' Terrier type dog" and consequently "vicious" under the Ordinance. R. at 5. The City Manager required that the dog be removed from the City within ten days. R. at 5. Richardson did not find a home for his dog outside the City within the allotted

time. R. at 5. He appealed to the state trial court, which affirmed the City Manager's finding without opinion. Thereafter, on December 1, 2009, his dog was euthanized. R. at 5. Richardson's other dog continues to live with him in the City today. R. at 5.

B. The Ordinance in Dispute

The City of Winthrop Ordinance at issue provides, in relevant part: 6.04.090 Nuisance Dogs – Vicious dogs – Potentially vicious dogs.

B. Vicious Dogs.

1. For purposes of this Section, "vicious dogs" are defined as

(a) dogs who unprovoked have attached or bitten a human beings or animal or have a known propensity, tendency, or disposition to attack unprovoked, to cause injury or to endanger the safety of human beings or animals;

(b) dogs who are trained or kept for dog fighting; or

(c) 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.

2. No person shall own, keep or have the custody, care or control of any of the breeds identified in subsection B.1(c) of this Section or mixtures thereof within the Winthrop city limits.

3. No dog shall be declared vicious if injury or damage is sustained by a person who was willfully trespassing or committing or attempting to commit a crime or tort upon the premises occupied by the owner or keeper of the dog. Also exempted are dogs who were teased, tormented, abused, or assaulted by the injured person or animal prior to attacking or biting. No dog shall be declared vicious if the dog was protecting or defending a human being in its immediate vicinity from attack or assault. R. at 4.

PROCEDURAL HISTORY

Quinton Richardson ("Plaintiff") filed a complaint alleging that the Ordinance violates the Fourteenth Amendment to the U.S. Constitution because (1) it is unconstitutionally vague, on its face and as applied, and (2) deprives him of substantive due process. Defendant/Appellee the City of Winthrop ("City") moved for Summary Judgment and the District Court granted the motion. R. at 6.

On August 28, 2010, the United States District Court for the District of Massachusetts issued a memorandum opinion addressing Plaintiff's claims. R. at 15. The Court held that, as a

matter of law, Ordinance was not void for vagueness, either facially or as applied to the Plaintiff. R. at 15. Additionally, the Court held that the Ordinance did not violate the Plaintiff's substantive due process rights. R. at 15. As a result, the Court granted summary judgment in favor of the City. R. at 15. A preliminary injunction preventing the City from seizing Plaintiff's other dog was issued pending the outcome of this case. R. at 6.

SUMMARY OF THE ARGUMENT

The District Court correctly held that the Ordinance was not was not unconstitutional on its face, nor did the City violate any of Plaintiff's constitutional rights when, pursuant to the Ordinance, the City seized and subsequently euthanized one of Plaintiff's dogs because the City determined the dog to be of the "'pit bull' variety of terrier." R. at 2, 15. The Ordinance should remain in effect for several reasons.

First, the District Court correctly determined that the Ordinance was not facially vague, because it clearly could be applied to owners of registered purebred American Staffordshire Terriers and American Pit Bull terriers, and was thus not impermissibly vague in all of its applications. R. at 10. In addition, the Ordinance was not overly broad because it did not substantially burden constitutionally protected conduct, as the ownership of specific breeds of dog is not a fundamental right secured by the Constitution. Additionally, the Ordinance is not vague as applied to Plaintiff as the owner of dogs of unknown parentage, because the Ordinance provides sufficient guidelines for a dog owner, using ordinary and readily available means of reference, to determine that his dog was subject to the Ordinance, and furthermore established minimal standards for law enforcement such that the enforcement of the Ordinance was not arbitrary or discriminatory.

Second, the Ordinance did not violate Plaintiff's right to substantive due process under the Fourteenth Amendment, because the Ordinance does not implicate a fundamental right, and

therefore must only bear a rational relationship to a legitimate government interest. R. at 12,14. Precedent clearly establishes that the right to own specific breeds of dogs is not a right that is deeply rooted in this Nation's history and tradition, such that it is protected by the Constitution. *See Sentell v. New Orleans & Carrollton R. R.*, 166 U.S. 698, 704 (1897). Other courts have upheld ordinances that prohibit "pit bulls" as rationally related to a legitimate government interest in the safety of its citizens. *See Vanater v. Vill. Of S. Point*, 717 F. Supp. 1236, 1244 (S.D. Ohio 1989). The Supreme Court of Massachusetts has noted the aggressive nature of the "pit bull" breed. *Commonwealth v. Santiago*, 452 Mass. 573, 578, 896 N.E.2d 622, 627 (2008). The fact that the method chosen by the legislature to combat the problem of dangerous dogs is not the most effective, humane, or comprehensive is not fatal under the rational relationship test.

For these reasons, the opinion of the District Court, holding the Ordinance constitutional and not in violation of Plaintiff's constitutional rights, should be upheld by this Court.

ARGUMENT

I. THE ORDINANCE DOES NOT REGULATE CONSTITUTIONALLY PROTECTED CONDUCT; NOR IS IT IMPERMISSIBLY VAGUE IN ALL OF ITS APPLICATIONS; NOR DOES IT FAIL TO PROVIDE NOTICE TO DOG OWNERS THAT THEY ARE SUBJECT TO THE STATUTE OR PROVIDE MINIMUM STANDARDS FOR LAW ENFORCEMENT IN ENFORCING THE ORDINANCE

A law is unconstitutionally overbroad if it regulates a substantially greater amount of conduct that is protected by the Constitution than it allows to be controlled. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) ("*Hoffman Estates"*); *Bd. of Airport Comm'rs. of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). If a statute does not implicate conduct protected by the Constitution, it not overly broad. *Hoffman Estates*, 455 U.S. at 499. Additionally, if the statute does not substantially burden protected conduct, it is not overly broad merely because some hypothetical impermissible applications of the statute can

be conceived. *Jews for Jesus, Inc.*, 482 U.S. at 574. The Ordinance is not overly broad, because dog ownership is not constitutionally protected under the rule of *Sentell,* 166 U.S. at 704.

A law is void for vagueness if a reasonable person cannot tell what conduct is prohibited and what is permitted. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Laws that do not affect fundamental rights guaranteed by the Constitution, and that impose only civil penalties, are allowed the greatest degree of vagueness. *Hoffman Estates*, 455 U.S. at 498-99. Laws are not void for vagueness because of difficulty in deciding if the statute applies to certain marginal offenses; instead, a law is only unconstitutionally vague if it is "impermissibly vague in all of its applications." *Id.* at 495. The Ordinance clearly provides notice to owners of purebred American Staffordshire Terriers, American Pit Bulls, and "Pit Bull Terriers", as well as owners of registered mixed breeds, that their dogs are subject to its prohibitions. R. at 3. Thus, the statute is not facially void.

A law is not vague as applied to a particular plaintiff unless the statute lacks both sufficient definiteness to allow a person of ordinary intelligence to determine whether the statute applies to him and minimal guidelines for law enforcement. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). The plaintiff challenging a law for vagueness must show such a fundamental lack of guidance that the statute essentially permits arbitrary and discriminatory enforcement. *Id.* Here, the Ordinance provides specific types of breeds and mixtures that are subject to the ban. R. at 3. Courts have only found ordinances banning "pit bulls" void for vagueness when the ordinances make no reference to a specific breed type and instead rely only on common knowledge. *See Am. Dog Owners Ass'n v. City of Lynn*, 404 Mass. 73, 79, 533 N.E.2d 642, 646 (1989); *Am. Dog Owners Ass'n v. City of Des Moines*, 469 N.W.2d 416, 418 (Iowa 1991). The Ordinance at issue here refers to specific breed types with identifiable characteristics, and, although perhaps subject

to alternative interpretations or ambiguities, provides sufficient notice to enable both Plaintiff and law enforcement to determine that his dogs are subject to the ban.

A. The Ordinance is Not Overly Broad Because it Does Not Implicate Constitutionally Protected Conduct

The Supreme Court has stated that, when considering a vagueness and overbreadth challenge to a statute, a court's first task is to determine "whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates* 455 U.S. at 498-99. If the statute does not implicate conduct protected by the Constitution, then it is not overly broad. *Id* at 499. Thus in *Hoffman Estates*, the Court decided that a statute that banned only commercial speech related to illegal activities, "which a government may regulate or ban entirely," was not overly broad. *Id.* at 496-497. Similarly, it is long established that the regulation of dog possession or ownership is a valid exercise of a state's police power. *Sentell,* 168 U.S. at 698. In *Sentell,* the Court recognized that there is only an "imperfect or qualified" property right in dog ownership, and that "it is purely within the discretion of the legislature to say how far dogs shall be recognized as property, and under what restrictions they shall be permitted to roam the streets." *Id.* at 695, 706.

Plaintiff's ownership of his dogs was not protected by the Constitution against the exercises of the City's police power. The City's legislature was free to ban all dogs from its confines, or enact any sort of regulation limiting dog possession and ownership within its borders.

In addition, a statute is only void for overbreadth if "[it] is substantial." *Jews for Jesus, Inc.* 482 U.S. at 574. The Supreme Court has stated that "[t]he concept of substantial overbreadth is not readily reduced to an exact definition. It is clear, however, the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it

susceptible to an overbreadth challenge." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984). Thus, assuming that the rare situation might arise where the Ordinance conflicted with a right secured by federal law, such as a disabled person that uses a dog subject to the ban as a service animal under the Americans with Disabilities Act, 42 U.S.C. § 1201 *et seq.* (2010), such a hypothetical and relatively unlikely application would not render the statute vulnerable to an overbreadth challenge.

Having dispensed with Plaintiff's overbreadth challenge, the next task the Court faces is to "examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, . . . uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Hoffman Estates,* 455 U.S. at 495.

B. The Ordinance is Not Facially Vague, As it is Not Impermissibly Vague in All Its Applications

A law is unconstitutionally vague if a reasonable person cannot tell what conduct is prohibited and what is permitted, requiring the persons subject to the law to "necessarily guess at its meaning." *Connally*, 269 U.S. at 391. The Constitution tolerates a greater degree of vagueness in laws that do not threaten protected conduct and impose only civil, rather than criminal, penalties, as correctly noted by the District Court below. *Hoffman Estates,* 455 U.S. at 498-99.

Facial challenges are "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Courts do not invalidate statutes for facial vagueness very often, as the plaintiff in a facial challenge bears a heavy burden. As the District Court correctly observed, acts of the legislature are entitled to a strong presumption of constitutionality. *Parker v Levy,* 417 U.S. 733, 757 (1974). Statutes are not invalidated as vague because it is difficult to decide if the statute applies to marginal offenses; in fact the Supreme Court has "consistently sought an interpretation

which supports the constitutionality of the legislation." *Id.* A facial vagueness standard will be sustained only if "the enactment is impermissibly vague in all of its applications." *Hoffman Estates,* 455 U.S. at 495.

Here the Ordinance at issue is enacts a civil penalty and, as previously discussed, implicates no constitutionally protected conduct. R. at 3. As such, the Constitution tolerates the greatest degree of vagueness in the language of the statute. However, Ordinance needs no such tolerance, as it clearly and unambiguously applies to owners of registered purebred American Staffordshire Terriers, as well as mixed breeds whose parentage is known. R. at 3. Owners of these dogs would have clear notice that their dogs were subject to the statute.

Since the Plaintiff can advance no colorable argument that the Ordinance is impermissibly vague in all of its applications, this Court should affirm the District Court in holding that the Ordinance is not void for vagueness.

C. The Ordinance is Not Vague As applied to Plaintiff, Because it Provided Sufficient Notice to Plaintiff That his Dogs Were Subject to its Prohibitions, and Provided Sufficient Minimal Standards to Law Enforcement to Prevent Arbitrary or Discriminatory Enforcement.

Plaintiff has also challenged the Ordinance on the grounds that it is unconstitutionally vague as applied to him, the owner of unregistered mixed-breed dogs. In support of his position, Plaintiff cites *City of Lynn*, 404 Mass. at 79, 533 N.E.2d at 646 and *City of Des Moines*, 469 N.W.2d at 418. However, Plaintiff has mischaracterized the holding of these two cases, and has ignored the great weight of authority that favors upholding ordinances such as the one in question.

In order to find a statute vague as applied, the court must find that the statute both (i) lacks sufficient definiteness to allow a person of ordinary intelligence to determine whether the statute applies to him and (ii) fails to provide minimal guidelines for law enforcement, making

enforcement of the statute arbitrary and discriminatory. *Kolender,* 461 U.S. at 358. In *Kolender,* Justice O'Connor identified "the more important aspect of the vagueness doctrine . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 352. The plaintiff pressing a vagueness challenge bears the heavy burden of showing such a fundamental lack of guidance for law enforcement that the ordinance "permit[s] a standardless sweep that allows policemen, prosecutors and juries to pursue their personal predilections." *Id.* at 358 (citations omitted). Mere inconsistency or ambiguity does not automatically render a statute unconstitutionally vague; "ultimate, god-like precision" is not required by the Constitution." *Miller v. California*, 413 U.S. 15, 28 (1973).

Courts have routinely upheld ordinances banning specific dog breeds in the face of vagueness challenges. *See Am. Dog Owners Assn' v. City of Yakima*, 113 Wash. 2d 213, 777 P.2d. 1046 (1989) (en banc); *State v. Peters*, 534 So. 2d 760 (Fla. Dist. Ct. App. 1988); *Dog Fed'n of Wis., Inc. v. City of S. Milwaukee*, 178 Wis. 2d 353, 504 N.W.2d 375 (Ct. App. 1993). The cases cited by Plaintiff in support of his position were vulnerable to a vagueness challenge, unlike the Ordinance at issue in the instant case, only because the challenged ordinances made *no* reference to specific breeds of dogs.

The Supreme Court of Massachusetts invalidated a number of dangerous-dog ordinances on various grounds. In *City of Lynn*, the court found an ordinance that referred only to "Pit Bulls" and was "devoid of *any* reference to a particular breed" was unconstitutionally vague, as it relied on only the '"common understanding and usage' of the term 'Pit Bull"' to provide adequate notice to dog owners of the types of dogs covered by the law.[1] 404 Mass. at 79, 533 N.E.2d at 646.

[1] In dicta, the Supreme Court of Massachusetts also indicated that the Superior Court's finding that a third ordinance, repealed at the time of the Supreme Court appeal, was valid. *City of Lynn*, 533 N.E.2d at 646.

Similarly, certain subsections of the ordinance at issue in *City of Des Moines*, although referring to specific breeds, were found unconstitutionally vague because they referred to "[d]ogs of mixed breed or of other breeds than above listed which breed or mixed breed *is known as* pit bulls, "Pit Bull" dogs or Pit Bull Terriers" and "any other breed commonly known as pit bulls, "Pit Bull" dogs or "Pit Bull Terriers", or a combination of any of these breeds." 469 N.W.2d. at 418. The court found that this language left a person of ordinary intelligence "confused about the breadth of the ordinance's coverage" and gave "improperly broad discretion to enforcement personnel" as they were allowed to make "subjective and *ad hoc* determinations" of breed type. *Id.* at 418-19.

Reference to standard breed characteristics readily available to the ordinary person is sufficient to insulate a breed specific ordinance from a vagueness challenge. The Southern District of Ohio, faced with a vagueness challenge to an ordinance worded very similarly to the Ordinance at issue, found that:

> the definitions of a "Pit Bull Terrier" in this Ordinance are not unconstitutionally vague. An ordinary person could easily refer to a dictionary, a dog buyer's guide or any dog book for guidance and instruction; also, the American Kennel Club and United Kennel Club have set forth standards for Staffordshire Bull Terriers and American Staffordshire Terriers to help determine whether a dog is described by any one of them. While it may be true that some definitions contain descriptions, which lack "mathematical certainty," such precision and definiteness is not essential to constitutionality.

Vanater, 717 F. Supp. at 1244.

In addition, several courts have upheld ordinances prohibiting "Pit Bulls" even when the ordinances lack a precise definition of the term. Courts have held that the "Pit Bull" possesses distinct physical and behavioral characteristics, and general knowledge and information available

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This ordinance referred to specific breeds of dogs and "mixtures thereof." *Id.* This holding appeared to be based upon evidence that "the dog officers of the city of Lynn used conflicting, subjective standards for ascertaining what animals are to be defined as 'Pit Bulls.'" *Id.* Plaintiff has not alleged similar conflicting standards used by law enforcement in the case at bar.

to ordinary dog owners would make it apparent whether or not possession of their dogs would violate an ordinance prohibiting possession of "pit bulls." *See Vanater*, 717 F. Supp at 1244; *City of Pagedale v. Murphy*, 142 S.W.3d 775 (Mo. Ct. App. 2004).

The Ordinance in the instant case does not suffer from the same fault as the ordinances in *City of Lynn* and *City of Des Moines*: reliance on common knowledge. Although the Ordinance refers to "any of the breeds commonly referred to as belonging to the 'pit bull' variety of terrier," the Ordinance then goes on to define the term "Pit Bull" by stating that the breed at issue "consists of the following breeds or breed types and mixtures: American Staffordshire Terrier, American Pit Bull, and Pit Bull terrier." R. at 3. Thus, instead of relying on ill-defined "common knowledge" like the ordinances in *City of Lynn* and *City of Des Moines*, the Ordinance actually provides a definition of "Pit Bull" upon which citizens and law enforcement officials can rely.

Plaintiff concedes that the American Staffordshire Terrier is recognized by the American Kennel Club ("AKC") and that the United Kennel Club ("UKC") recognizes the American Pit Bull Terrier. Although the Ordinance refers to an "American Pit Bull" and a "Pit Bull Terrier", it seems obvious that both of these types refer to the "American Pit Bull Terrier", a breed recognized by the UKC. R. at 8-9. A common sense reading of the Ordinance would lead inevitably to the conclusion that the breed types referred to by § B.1(c) included the American Pit Bull Terrier as well as the American Staffordshire Terrier. R. at 3.

In any event, assuming *arguendo* that the breed types "American Pit Bull" and "Pit Bull Terrier" refer to breeds not recognized by the AKC or UKC, this does not cause the statute to be unconstitutionally vague as applied to Plaintiff. In *Peters*, the Florida court stated that alternative definitions of "pit bull" in an ordinance were permissible, as long as a dog owner was

able to compare his dog to specific standards in order to determine if the dog met any one of the definitions. 534 So.2d at 766. Plaintiff had at his disposal readily available standards for both American Staffordshire Terriers and American Pit Bull Terriers for evaluation of his own dogs' breed. R. at 8-9. Plaintiff could refer to these standards and receive ample notice that his dogs may be subject to the Ordinance as unregistered or mixed breeds of the types specified.

In addition, the availability of well-defined standard characteristics for the dog breeds described in the Ordinance satisfy "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 352. Here, as shown above, the animal control officers and City Manager had ample written and photographic evidence of breed characteristics in order to make their determination that Plaintiff's dog was subject to the statute. R. at 8-9. The District Court correctly noted that the physical characteristics of Plaintiff's dogs, particularly their muscularity, large heads, and short coats, were "ample to support the City Manager's finding that Plaintiff's dog was of the ''pit bull' variety of terrier." R. at 10. Plaintiff's statement that he had no reliable means of identifying the breed heritage of his dogs was clearly inaccurate in light of the guidance provided by the Ordinance.[2] R. at 8-9.

To conclude, the Ordinance provides clear standards for identification of prohibited breeds, sufficient to give Plaintiff notice that his dogs were subject to regulation. Had the Ordinance lacked the specificity with which it defined prohibited breeds, the District Court may still have upheld the Ordinance, notwithstanding cases to the contrary cited by Plaintiff. *See*

[2] The District Court notes, "no DNA testing was performed." R. at 5. DNA testing for dog breed is a relatively new technology. Although many home DNA testing kits for dogs are available, their scientific reliability has not been widely established. The American Veterinary Medical Association has established a program to catalogue the genetic "fingerprints" of dogs using DNA analysis, but the DNA profiles they have collected "contain no information about the dogs' health or breeds." *See* "A Puppy Paternity Test", http://www.avma.org/onlnews/javma/apr04/040415q.asp (last visited 1/21/2011). With the current scientific reliability of dog DNA testing being what it is, this Court should attach no special import to the failure to perform a DNA test. The City is aware of no current dangerous-dog ordinance that requires proof of breed by DNA testing.

Vanater, 717 F. Supp at 1244 (holding that the "Pit Bull" possesses distinct physical and behavioral characteristics that make it apparent to dog owners that their dogs are of that breed). Because the Ordinance provides a list of prohibited breeds that possess a defined set of characteristics, the District Court's task became much easier. The presence of guidelines sufficient to give notice to both dog owners and law enforcement of prohibited breeds, together with the strong presumption of constitutionality that legislative enactments enjoy, compelled the District Court, as it should compel this Court, to find the Ordinance constitutionally sound and not vague as applied to Plaintiff.

II. THE ORDINANCE DOES NOT VIOLATE THE SUBSTANTIVE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Unless a statute impinges on a fundamental right, courts give great deference to the legislature's rationale in enacting regulations. Pursuant to the Fourteenth Amendment of the United States Constitution, no "State shall deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "The touchstone of due process is protection of the individual against arbitrary action of government." *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974)). In addition to guaranteeing fair procedures, the Due Process Clause of the Fourteenth Amendment "cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *Lewis,* 523 U.S. at 840 This substantive component guards against arbitrary legislation by requiring a relationship between a statute and the government interest it seeks to advance. *Id.*

If a legislative enactment burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest. *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997). The adjective "fundamental" is reserved for deeply-rooted, sacrosanct rights such as

"the right of a man and woman to marry, and to bear and raise their children." *Brokaw v. Mercer County,* 235 F.3d 1000, 1018 (7th Cir. 2000).

Conversely, if an enactment burdens some lesser right, the infringement is merely required to bear a rational relation to a legitimate government interest. *Washington*, 521 U.S. at 728; *Reno v. Flores,* 507 U.S. 292, 305 (1993) ("[T]he impairment of a lesser interest . . . demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose."); *Seegmiller v. LaVerkin City,* 528 F.3d 762, 771-72 (10th Cir. 2008) ("[A]bsent a fundamental right, the state may regulate an interest pursuant to a validly enacted state law or regulation rationally related to a legitimate state interest." (citing *Reno*, 507 U.S. at 305)). As a result, it is extremely difficult for a plaintiff to overcome the "rational basis test" if a right is not determined to be fundamental.

A. The Ability to Own a "Pit Bull" is Not A Fundamental Right Protected Under the United States Constitution

The Supreme Court has held that some liberties are so important that they are deemed to be "fundamental rights" and generally the government cannot infringe upon them unless strict scrutiny is met. For almost all of fundamental rights, the Supreme Court has indicated that strict scrutiny should be used, which requires that the government must justify its interference by proving that its action is necessary to achieve a compelling government purpose.

The Court's established method of substantive due process analysis has two primary features. First, the Court has regularly observed that the Clause specially protects those fundamental rights and liberties, which are, objectively, deeply rooted in this Nation's history and tradition. *E.g., Moore v. East Cleveland,* 431 U.S. 494, 503 (1977) (plurality opinion). Second, the Court has required a "careful description" of the asserted fundamental liberty interest. *Reno,* 507 U.S. at 302. In a long line of cases, the Supreme Court has held that, in

addition to the specific freedoms protected by the Bill of Rights, the "liberty" protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479 (1965); to use contraception, *Eisenstadt v. Baird,* 405 U.S. 438 (1972); and to bodily integrity, *Rochin v. California,* 342 U.S. 165 (1952).

The Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). By extending constitutional protection to an asserted right or liberty interest, the Supreme Court places the matter outside the arena of public debate and legislative action The Supreme Court has noted that as a result, "[they] must exercise the utmost care whenever we are asked to break new ground in this field." *Id.*

Courts have repeatedly determined that ownership of a specific breed of dog does not constitute a fundamental right. For example, in a recent Tenth Circuit decision, the court considered a constitutional challenge to a Denver city ordinance banning a category of dogs "commonly known as 'Pit Bulls.'" *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1172 (10th Cir. 2009). The court determined that the owners of the "Pit Bulls" failed to allege the nature and history of their human and companion bond with their dogs, as required to demonstrate a fundamental due process liberty interest in such a bond. *Id.* at 1169. As a result, the ordinance did not violate a fundamental right protected under the Fourteenth Amendment. Moreover, in *Vanater*, the court held that an ordinance that banned "owning or harboring … 'pit bull' terriers or other vicious dogs within village limits" did not classify people based on suspect categories

and did not affect fundamental rights." *Id.* at 1239. Consequently, the court said the statute was entitled to minimal scrutiny under the equal protection clause. *Id.* at. 1244. Notably, the Supreme Court has determined that dogs are property and may be legally destroyed in order to help the welfare and comfort of our citizens. The court stated in *Sentell*:

> [e]ven if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens. That a state, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be which has for its objects the welfare and comfort of the citizen.

166 U.S. at 704.

The District Court correctly concluded that the Ordinance does not implicate a fundamental right. R. at 12. While owning a dog can be extremely rewarding and fulfilling to one's life, it is not a right that the Supreme Court has determined to be protected. As stated above, the Supreme Court is extremely cautious to expand on what is determined a fundamental right because it places the matter outside the arena of public debate and legislative action. *Washington*, 521 U.S. at 720. The government's job is to protect the safety of its citizens. The Supreme Court has admitted that when they break new ground into this field, the liberty protected by the Due Process Clause is subtly transformed into the policy preferences of the Members of the Supreme Court. *Id.*

As a result, it is not proper for the Ordinance to be assessed under a strict scrutiny standard. Courts have determined that rights that are afforded fundamental protection involve the right to marry, to have an abortion, to bear children, etc. The right to own a "Pit Bull" within a particular location is not afforded this same protection. Therefore, because the dog ownership is not a fundamental right, the rational basis test is applied.

B. The City has a Legitimate Government Interest in Protecting the Health and Safety of its Citizens from Traditionally Vicious Breeds and the Ordinance is Rationally Related to that Objective

It is extremely difficult for a statute or ordinance to *not* be determined rationally related to a government interest. In fact, the "rational basis test" is the minimal level of review of a statute's constitutionality. Under the rational basis test, a law will be upheld if it is rationally related to a legitimate government purpose. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1 (1988); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980); *Allied Stores v. Bowers*, 358 U.S. 522 (1959); *Williamson v. Lee Optical*, 348 U.S. 483 (1955). In other words, the government's objective only need be a goal that it is legitimate for government to pursue. Therefore, the means chosen need only be a reasonable way to accomplish the objective.

This Court must give a high degree of deference to the City in applying the "rational relationship test." Importantly, under the rational basis test, the challenger of law has the burden of proof. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 540 (3rd ed. 2006. As a result, the rational basis test is enormously deferential to the government, and only rarely has the Supreme Court invalidated laws as failing rational basis review. *Id.*

Several courts have determined that municipal ordinances prohibiting "Pit Bulls" are rationally related to a legitimate government interest. For example, a 1986 district court decision stated that a municipal ordinance was rationally related to a legitimate legislative objective of protecting the safety of citizens of the municipality. *Starkey v. Chester*, 628 F Supp 196 (E.D. Pa. 1986). The ordinance stated that Pit Bills are dangerous dogs and potentially hazardous to the community, and therefore required extraordinary security measurements upon pain of banishment or destruction of the dogs. *Id.* at 197. The court pointed to testimony as to the extraordinary danger posed by this breed of dogs, and deferred to a legislative judgment of necessity and reasonableness in an area not subject to strict scrutiny, commenting that the

township which promulgated the ordinance could reasonably determine, as it did, that "Pit Bulls" are dangerous, based on testimony that the "Pit Bull" "bites to kill without signal." *Id.* The court said the township had not "gone too far" in regulating, licensing, and charging fees for Pit Bulls. *Id.*; *see also Colo. Mun. League v. Mountain States Tel. & Tel. Co.,* 759 P.2d 40, 45 (Colo. 1988) (finding that the classification of "Pit Bulls" as dangerous animals had a rational basis in fact and that the prohibition of their possession bears a rational relationship to the legitimate governmental objective of protecting the public's health, safety, and welfare).

Courts have determined that ample evidence has been displayed that "Pit Bulls" possess inherent characteristics of exceptional aggression, athleticism, strength, viciousness, and unpredictability. *Vanater*, 717 F. Supp at 1244. Additionally, they possess an extraordinary fighting temperament, and the greatest tenacity in combat of any breed of dog, with a history of unpredictability and instantaneous attack in a berserk and frenzied rage. *Id.*; s*ee also Garcia v. Tijeras*, 108 N.M. 116, 117, 767 P.2d 355, 356 (Ct. App. 1988) (declaring that a village ordinance completely banning the possession of dogs known as "American "Pit Bull" Terriers" had been shown by the evidence to bear such a rational relationship to the legitimate goal of protecting the property and physical safety of village inhabitants, in part because expert testimony as to the inherent characteristics of aggression, strength, viciousness, and unpredictability found in this breed of dog to an extent beyond that of any other breed). The court acknowledged in *Vanater* that this description was not true of every "Pit Bull", however, the court nevertheless deferred to the legislature's consideration of the conflicting positions on this point, refusing to substitute its own judgment for the reasoned findings and decision of the village council. 717 F. Supp at. 1244. Therefore, the court declared that a village ordinance banning the possession or harboring of "Pit Bull" Terriers, as well as "other vicious dogs," did

have such a rational relationship to a legitimate interest of the village in the protection of its citizens, and hence was constitutional.

An ordinance established to regulate the possession of "Pit Bulls" has a rational relationship to the City's interest in protecting the health and safety of its residents. The District Court of Colorado found that the city presented ample evidence that "Pit Bulls" tended to be stronger than other dog breeds, they often gave no warning signals before attacking and were less willing than other dogs to retreat from an attack, and that attacks from such breeds resulted in multiple bites and attacks of greater severity than attacks by other dogs. *Am. Canine Found. v. City of Aurora*, 618 F. Supp. 2d 1271, 1278-79 (D. Colo. 2009) *aff'd sub nom Vianzon v. City Aurora*, 377 F. App'x 805 (10th Cir. 2010) . Therefore, due to the fact that the ordinance helped achieve the government's goal of protecting the health and safety of its citizens, the ordinance was rationally related. *See Colo. Dog Fanciers, Inc. v. City & Cnty. of Denver*, 820 P.2d 644, 652 (Colo. 1991) (affirming an ordinance did not violate the dog owners' constitutional rights because a rational relationship existed between the city's classification of certain dogs as "Pit Bulls" and the legitimate governmental purpose of protecting the health and safety of the city's residents and dogs).

The City's interest in protecting its citizens from vicious dogs outweighs Plaintiff's interest in protecting his dogs. The Supreme Court of Massachusetts has recognized that "Pit Bulls" as a breed are commonly known to be aggressive. R. at. 14; *Santiago*, 452 Mass. at 578, 896 N.E.2d at 627. Because courts have taken notice of these animals violent nature, the City has a rational basis for implementing the ordinance. Furthermore, it is not irrational for the City to conclude that "Pit Bulls" and the like are dangerous. Regardless of the location of the animal, "Pit Bulls" everywhere can be aggressive, vicious, and unpredictable. Even if not all "Pit Bulls"

are aggressive; nonetheless, the legislature's interest to enact the ordinance is rationally related to protecting its citizens. *See Vanater*, 717 F. Supp at. 1244.

The City has provided ample evidence that dogs of the "'Pit Bull' variety of terrier" pose a threat to public safety and/or constitute a public nuisance. Furthermore, the lower court determined that enough evidence was displayed in the record that the City had a "rational basis" for implementing the statute. R. at 14. While Plaintiff concedes that "Pit Bull" bans twenty years ago may have been justified, he does not offer sufficient data to display that the bans no longer bear any rational relation to the government's interest. R. at 12. Without this data or information available, Plaintiff's argument has no support or merit. Consequently, until data can prove otherwise, the City has determined that breed specific legislation supports its effort in protecting the health and safety of its citizens.

1. The Ordinance is not *overinclusive* because there are several methods to determine with sufficient certainty whether a dog is a "pit bull" within the meaning of the ordinance

Courts have held in a number of cases that the United States Constitution was not violated because "Pit Bull" legislation was arguably overinclusive. The cases concluded that the statutes that regulated dangerous breeds and included individual dogs that were in fact quite harmless, were not fatally overinclusive. One example was the decision in *Vanater*, where the plaintiff claimed that his "Pit Bull" terrier was a model pet and never had any difficulty either with humans, dogs, or other animals. 717 F Supp. at 1236. The court concluded that an ordinance banning such dogs within the territorial limits of the municipality was valid as against a charge of unconstitutional overinclusiveness as proscribed by the Fourteenth Amendment. *Id.* The court opined that while identification of a "Pit Bull" might be difficult in some situations, such identification was sufficiently certain within the ordinance to survive an overbreadth challenge. *Id.* The District Court said that the United States Supreme Court has cautioned that it

could not decide that the ordinance was wise or that a more just and humane system could not be devised; and that the United States Constitution did not empower this Court to second guess state officials charged with the difficult responsibility of protecting the safety and welfare of its public. *See Dandridge v. Williams,* 397 U.S. 471, 487 (1970).

The fact that Plaintiff's animals have never previously hurt a human being or other dog, does not make the Ordinance overinclusive. R. at 13. Plaintiff's argument that the Ordinance is overinclusive because it impacts a great many dogs who pose no danger at all due to their temperament, the responsible behavior of their owners, or both is unconvincing. R. at 13. The Ordinance is clear that it singles out all "Pit Bull" varieties, in part because the breed as been responsible for more bites than any other breed in the United States.[3] R. at 14. As a result, this goal is rationally related and not overinclusive.

The City legislature does not need to come up with the best solution possible in order for the ordinance to be rationally related. Plaintiff asserted that this poor fit between means and ends renders the Ordinance inherently ineffective. R. at 13. Plaintiff's argument is not supported by Supreme Court decisions. *See Dandridge*, 397 U.S. at 487; *Hagans v. Lavine*, 415 U.S. 528, 565 (1974); *Saenz v. Roe*, 526 U.S. 489, 506 (1999). Therefore, the Ordinance is not overinclusive.

[3] Between January 1, 2006 to December 31, 2008, DogsBite.org recorded 88 U.S. fatal dog attacks. The data show that pit bulls are responsible for 59% (52) of these attacks. The data also shows that pit bulls commit the vast majority of off-property attacks that result in death. Only 18% (16) of the attacks occurred off owner property, yet pit bulls were responsible for 81% (13). "Dog Bite Statistics," http://www.dogsbite.org/bite-statistics.htm (last visited 1/21/11).

2. The Ordinance is not fatally *underinclusive* because ordinances do not have to regulate every dangerous animal at the same time in the same way to be constitutional

Several courts have found no constitutional violation in "Pit Bull" legislation, regardless of the fact that other breeds of dogs besides "Pit Bulls" should be regulated because they are "inherently dangerous." For instance, in *Starkey*, the court held that a municipal ordinance imposing extraordinary requirements upon "Pit Bull" dog owners was not fatally underinclusive in that it mentioned no other breeds of dogs as inherently dangerous, despite evidence that dogs of any breed might be vicious, as well. 628 F. Supp. 197. The court held that the municipality could reasonably determine that "Pit Bulls" are indeed especially dangerous, and that the ordinance did not have to regulate "every dangerous animal at the same time in the same way in order to pass constitutional muster." *Id.*

Courts have also said that the Constitution does not guarantee that all dog owners be treated alike, but only that all dog owners of defined "Pit Bulls" be treated alike. To exemplify, in *Vanater*, the court the rejected an argument that a village ordinance banning the possession or harboring of "Pit Bull Terriers" or "other vicious dogs" within village limits was unconstitutionally underinclusive. *Vanater*, 717 F. Supp. at 1246; *see also Garcia*, 108 N.M. at 117, 767 P. 2d at 360 (declaring that the defendant village's classification, whereby owners of American "Pit Bull" Terriers were treated differently than owners of other breeds of dog, was not violative of either due process). The court rejected the argument on the basis that the statute did have the minimal "rational basis" of relevance to a legitimate legislative aim to survive constitutional challenge. *Vanater*, 717 F. Supp. at 1246. The court declared that, notwithstanding that the ordinance in question might fail to include other specific breeds of dogs that could be grouped into the "dangerous" category, there is no constitutional requirement in ordinary cases that classifications be perfect. *Id.* The court said that the Constitution does not

guarantee that all dog owners would be treated alike, but only that all dog owners of defined "Pit Bulls" would be treated alike. *Id.* Further, the court pointed out, there was substantial evidence that "Pit Bulls" presented a special threat to the safety of village residents over and above that presented by any other breed of dogs kept there. *Id.*

Finally, courts have held that an ordinance is not unconstitutional because some dogs might not be removed from the city that could potentially bite a human being. For example, a court held that the fact that banning all "Pit Bull" dogs, as required by the city ordinance under consideration therein, would not stop all dog bites nor remove all unidentifiable "Pit Bull" mixes did not render the ordinance unconstitutional for underbreadth, since a municipality may address threats in a piecemeal fashion, as long as there is a rational basis for the decision. *City of Yakima*, 113 Wash. 2d at 215, 777 P.2d at 1048.

The Ordinance is not underinclusive because of the fact that it does not include other breeds of dogs that have had the reputation for being vicious. As stated above, courts have repeatedly concluded that breed specific legislation is not unconstitutional if the ordinance fails to include all dogs that have had a reputation at some point for being vicious. Furthermore, as the Ordinance states, if a dog attacks or bites a human being, that dog will also be forbidden to be within the city limits. R. at 3.

The City does not need to treat all dog owners alike. Plaintiff's argument that the statute is underinclusive because it does not apply to dogs of non-targeted breeds who exhibit behaviors that threaten public safety is not convincing. R. at 13. The truth is that the Constitution does not guarantee that all dog owners be treated alike, but only that all owners of "Pit Bulls" be treated alike. *Vanater*, 717 F Supp 1246; *Garcia v Tijeras*, 108 N.M. at 117, 767 P. 2d 360. Therefore, the Ordinance is constitutional.

The fact that specific breeds, other than breeds enumerated in the Ordinance are not directly regulated does not invalidate the Ordinance invalid. The City is allowed to address threats to its citizens in a piecemeal fashion, as long as there is a rational basis for the decision. In addition, all vicious dogs are regulated by § B(1)(a) of the Ordinance. R. at 3. Therefore, the Ordinance is not fatally underinclusive and therefore constitutional.

CONCLUSION

The ownership of a specific breed of dog is not a fundamental right secured by the Constitution. Therefore, dog ownership is subject to the valid and lawful exercise of a State's police powers. This legal principle underlies all of the City's arguments, and compels the conclusion this Court should draw. The Ordinance at issue does not burden conduct protected by the Constitution. It is not impermissibly vague in all of its applications. It provides adequate notice to a dog owner that his dogs are subject to its prohibitions and provides minimal guidelines for law enforcement. Furthermore, it does not impinge on a right that is deeply rooted in this Nation's history and tradition. Finally, it bears a rational relationship to the legitimate governmental interest the City has in protecting its citizens from dangerous dogs.

For the foregoing reasons, Appellee respectfully requests that this Honorable Court affirm the judgment of the District Court of Massachusetts.

Respectfully submitted,

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Team # 3
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