Civil Action No. 10cv00416

IN THE

United States Court of Appeals for the First Circuit

QUINTON RICHARDSON,
APPELLANT,

v.

CITY OF WINTHROP, MASSACHUSETTS,
APPELLEES.

On Appeal from the
United States District Court
for the District of Massachusetts

BRIEF FOR APPELLANT, QUINTON RICHARDSON

Attorneys for Appellant
Team # 5
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Am. Canine Found. v. City of Aurora, No. 06-cv-01510-WYD-BNB, 2008 WL 2229943, at *11 (D. Colo. May 28, 2008) 25

Am. Dog Owners Ass'n v. City of Des Moines, 469 N.W.2d 416 (Iowa 1991). 9

Am. Dog Owners Ass'n v. City of Lynn, 404 Mass. 73, 533 N.E.2d 642 (1989) 7, 8

Amsden v. Moran, 904 F.2d 748 (1st Cir. 1990) 14

Arrington v. Arrington, 613 S.W.2d 565 (Tex. Civ. App. 1981) 18

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Coates v. City of Cincinnati, 402 U.S. 611 (1971) 5

Commonwealth v. A Juvenile, 368 Mass. 580, 334 N.E.2d 617 (1975) 6, 13, 14

Commonwealth v. Santiago, 452 Mass. 573, 896 N.E.2d 622 (2008) 26

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 14

Dias v. City of Denver, 567 F.3d 1169 (10th Cir. 2009) 10, 18, 23, 25

Dias v. City of Denver, No. 07-cv-00722-WDM-MJW, 2010 WL 3873004 (D. Colo. Sept. 29, 2010) 24

Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977) 16

Eisenstadt v. Baird, 405 U.S. 438 (1972) 13

Espinoza v. Sabol, 558 F.3d 83 (1st Cir. 2009) 14

Exxon Corp v. Governor of Md., 437 U.S. 117 (1978) 21

Grayned v. City of Rockford, 408 U.S. 104 (1972) 5

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 US 489 (1982) 13

Houseman v. Dare, 405 N.J. Super. 538, 966 A.2d 24 (2009) 17

Jacobson v. Mass., 197 U.S. 11 (1905) 20

Jordan v. Free, 2006 Mass. App. Div. 135 (2006) 8

Lawrence v. Tex., 539 U.S. 558 (2003) 4, 14, 15, 16

Maldonado v. Fontanes, 568 F.3d 263 (1st Cir. 2009) 4, 16, 20

Morgan v. Kroupa, 167 Vt. 99, 702 A.2d 630 (1997) 18

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) 18

Nutt v. Florio, 75 Mass. App. Ct. 482, 914 N.E.2d 963 (2009) 8

People v. Riddle, 258 Ill. App. 3d 253, 630 N.E.2d 141 (1994) 26

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San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962 (9th Cir. 2005) 17

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Singh v. Blue Cross/Blue Shield of Mass., Inc., 308 F.3d 25 (1st Cir. 2002) 3

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United States v. Carolene Prod. Co., 304 U.S. 144 (1938) 20

United States v. Reese, 92 U.S. 214 (1875) 24

Vanater v. South Point, 717 F. Supp 1236 (S.D. Ohio 1989) 10, 13, 25

Wagner v. City of Holyoke, 100 F. Supp. 2d 78 (D. Mass 2000) 5, 11

Wash. v. Glucksberg, 521 U.S. 702 (1997) 4, 15

Zuniga v. County of San Mateo Dep't of Health Serv., 218 Cal. App. 3d 1521 (1990) 24

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Winthrop Mun. Code § 6.04.090 ..... 1, 3, 4, 11

Other Authorities

A Community Approach to Dog Bite Prevention, 218 J. OF THE AM. VETERINARY MED. ASS'N 1732 (2001) 22, 23

BRUCE A. WAGMAN ET AL., ANIMAL LAW: CASES AND MATERIALS (4th ed. 2010) 17, 21, 22

CAROLYN MATLACK, WE'VE GOT FEELINGS TOO!: PRESENTING THE SENTIENT PROPERTY SOLUTION (2006) 16

Charlotte A. LaCroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1 (1998) 15

Human-Animal Bond Boosts Spending on Veterinary Care, JAVMA News, Jan. 1, 2008, *available at* http://www.avma.org/onlnews/javma/jan08/080101a.asp 15, 16

Instincts and Behavior, DOG TRAINING SITE.NET, *available at* http://www.dogtrainingsite.net/dogbehavior/dogs_standpoint.htm 27

Jeffrey Sacks, et al., *Breeds of Dogs Involved in Fatal Human Attacks in the United States Between 1979 and 1998*, 217 J. OF THE AM. VETERINARY MED. ASS'N 836 (2000) 7, 9

Karen Grey, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?*, 27 NOVA L. REV. 415 (2003) 6

Kristen E. Swann, *Irrationality Unleashed: The Pitfalls of Breed-Specific Legislation*, 78 UMKC L. REV. 839 (2010) 9

Leslie Sinclair, *Would I Bite?*, HSUS NEWS 23

Lynn Marmer, *The New Breed of Municipal Dog Control Laws: Are They Constitutional?,* 53 U. CIN. L. REV. 1067 (1984) 6, 19, 21, 22

Malcolm Gladwell, *Troublemakers: What Pit Bulls Can Teach us About Profiling*, THE NEW YORKER, Febr. 6, 2006, *available at* http://www.gladwell.com/2006/2006_02_06_a_pitbull.html 22, 23

Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) 13

Paula Szuchman, *Beagle or Bichon: Can Dog Drool Provide Insight?*, WALL ST. J., Sept. 18, 2009 7

Robert Garner, *Political Ideology of the Legal Status of Animals*, 8 ANIMAL LAW 77 (2002) 17

Sonia S. Waisman & Barbara R. Newell, *Recovery of 'Non-Economic' Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45 (2001) 16

T.E. Houston, *The Media and the Pit Bull*, FOR PIT'S SAKE, Nov. 1, 2007, *available at* http://www.forpitssake.org/MediaPitbull.html 21

UNITED KENNEL CLUB, *available at* www.ukcdogs.com 22

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www.guardiancampaign.com 16

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STATEMENT OF THE ISSUES

1. Did the district court err when it ruled that Winthrop Municipal Code section 6.04.090, designating all "'pit bull' variety of terrier" as *per se* vicious and thus banning them, is not unconstitutionally vague on its face or as applied to Appellant under the Fourteenth Amendment to the U.S. Constitution and does not violate the overbreadth doctrine?
2. Did the District Court err in holding that Winthrop Municipal Code section 6.04.090 does not violate the principles of substantive due process embedded in the Fourteenth Amendment to the U.S. Constitution, in that it deprives them of fundamental liberty interests and property with no rational relationship to its purported objective of ensuring public safety?

STATEMENT OF THE CASE

This is an appeal from summary judgment entered in the United States District Court of Massachusetts on August 28, 2010 in favor of Defendant/Appellee City of Winthrop, Massachusetts ("City"). This brief is filed on behalf of Plaintiff/Appellant Quinton Richardson.

City of Winthrop Municipal Code section 6.04.090 ("Ordinance") defines as *per se* vicious and bans "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." R. at 3. The Ordinance is an example of breed-specific legislation ("BSL").

In 2005, Richardson, a lifelong resident of the City, adopted from a rescue organization two stray puppies found under a park bench. Both the rescue organization and Richardson's veterinarian classified the puppies, thought to be siblings, as "mixed breed." R. at 4. Richardson named the two puppies Zoe and Starla. *Id.*

Zoe and Starla proved to be excellent family dogs, interacting well with Richardson's nieces and nephews and never exhibiting any aggressive, vicious or dominant behavior. *Id*.

On August 1, 2009, a meter reader observed Zoe inside Richardson's home through a window. R. at 5. The meter reader notified animal control officers, who seized Zoe the next day while Starla was at the vet. *Id.*

At a hearing held pursuant to the Ordinance, an animal control officer testified that Zoe was a "pit bull" based on her appearance. *Id.* No genetic testing was performed. *Id.* Richardson produced an affidavit from his veterinarian, which claimed Zoe was a "mixed breed." *Id.* Nonetheless, the City Manager concluded Zoe was a "Pit Bull Terrier type dog," and ordered Zoe removed from the City within ten days. *Id.* Because Richardson could not find a suitable home for Zoe within that short time, he appealed the City Manager's decision to the state trial court. *Id.* The state trial court affirmed the City's finding without opinion. *Id.* On December 1, 2009, Zoe was killed by lethal injection. *Id.*

Starla continues to live with Richardson in Winthrop, but Richardson fears for her life. R. at 6. Except for work, Richardson does not leave the house, and only allows Starla outside to relieve herself. *Id.* Pursuant to a preliminary injunction, the City cannot seize Starla until the conclusion of this litigation. *Id.*

Richardson contends 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) it deprives him of substantive due process. He seeks both prospective relief, voiding the Ordinance and permanently enjoining Starla's seizure, and retrospective relief in the form of damages.

STANDARD OF REVIEW

The district court granted the City's motion for summary judgment. A court reviews a grant or denial of summary judgment *de novo*. *See Singh v. Blue Cross/Blue Shield of Mass., Inc.*, 308 F.3d 25 (1st Cir. 2002). A district court's summary judgment order should only be upheld if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

SUMMARY OF THE ARGUMENT

Ordinance 6.04.090 is unconstitutionally vague, both facially and as applied, because it is not clearly defined. It neither provides notice of the prohibition to dog owners and the public, nor provides sufficient guidelines to curb arbitrary and discriminatory enforcement by government officials.

The entire Ordinance is facially vague because dog breeds cannot be identified with sufficient clarity, either by phenotype or genetic testing. The sections of the Ordinance pertaining to "Pit Bull" terriers and mixed breeds are especially vague. "Pit Bull" is not a registered dog breed, and therefore there is little guidance about the characteristics of a pit bull. Likewise, breed mixes can exhibit a wide range of traits, and there is no guidance in the Ordinance as to the necessary percentage of "Pit Bull" or other "vicious" breed that brings a dog under the Ordinance.

The Ordinance is also unconstitutionally vague as applied to Richardson because he had no way of knowing that Zoe and Starla would be considered "vicious." The rescue organization and Richardson's veterinarian described his dogs as "mixed breed," never once hinting that they were pit bull mixes. R. at 4. Richardson was not on notice purely because of his dogs' physical appearance, because a number of breeds permitted under Winthrop municipal law have the same

features (determined to be "Pit Bull" characteristics under the Ordinance), including large heads, short coats, and muscular bodies.

In addition, the Ordinance violates the overbreadth doctrine. The Ordinance is unconstitutionally overbroad because its vagueness results in the targeting of dog owners of both docile and aggressive dogs. In the alternative, even if the Court deems the Ordinance to be precise, the Ordinance is overbroad because it results in the prohibition of protected conduct (for example, the fundamental liberty interest in human-animal companionship discussed below).

The Ordinance is also unconstitutional because it violates substantive due process. The Ordinance deprives Richardson and other pit bull owners of liberty and property interests in their dogs, without a sufficient relationship between the legislation and a valid threat to public safety.

Because of the significance of companion animals in contemporary American society, the human-companion animal relationship constitutes a "fundamental liberty interest[]," and thus legislation infringing that interest must be "narrowly tailored to serve a compelling state interest." *See Lawrence v. Tex.*, 539 U.S. 558, 593 (2003) (citations omitted). The Ordinance fails strict scrutiny analysis because it infringes this fundamental right by allowing dogs to be seized and destroyed without any showing that the *particular* dog is a threat to public safety, when there are other, less restrictive ways to protect the public from canine aggressiveness.

Even if this Court finds the human-companion animal bond does not amount to a fundamental liberty interest, Richardson and other dog owners still have a protected property interest in their dogs under the Fourteenth Amendment. *See Maldonado v. Fontanes*, 568 F.3d 263, 272 (1st Cir. 2009). To pass constitutional muster, legislation infringing a lesser right such as a property right must bear a rational relation to a genuine legislative goal. *Wash. v. Glucksberg*, 521 U.S. 702, 728 (1997). Because the City's justification for the Ordinance is

premised on inaccurate factual data and skewed statistical analyses, the Ordinance fails the rational basis test and must be struck down.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY CONLUDED THE ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Laws are voided for vagueness when they are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Underlying the vagueness doctrine are two important objectives: (1) that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," and (2) that laws have "explicit standards" to avoid "arbitrary and discriminatory enforcement." *Id*. As discussed below, these underlying considerations compel a holding that the Ordinance is unconstitutionally vague on its face and as applied.

There are two ways that a law can be voided for vagueness. First, the law can be held to be impermissibly vague on its face. That is, when "it provides no ascertainable standard to give notice of its reach." *Wagner v. City of Holyoke*, 100 F. Supp. 2d 78, 84 (D. Mass 2000). A facially vague statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, 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). Second, the law can be held impermissibly vague as applied to a party in particular. "In other words, given the language of the rule, the challenger must show that he did not have sufficient warning that his conduct would violate the statute or regulation." *Wagner*, 100 F. Supp. 2d at 84.

There are also two ways a law can be deemed unconstitutionally overbroad. First, the law can be overbroad because of its vagueness. That is, "[a] vague statute may be overbroad if its

uncertain boundaries leave open the possibility of punishment for protected conduct and thus lead citizens to avoid such protected activity in order to steer clear of the uncertain proscriptions." *Commonwealth v. A Juvenile*, 368 Mass. 580, 587 n.4, 334 N.E.2d 617, 622 (1975) (citations omitted). In the alternative, "[a] statute is also overbroad… if, even though it is clear and precise, it prohibits constitutionally protected conduct." *Id.* (citations omitted).

A. The Ordinance is facially vague because dogs of specific breeds cannot be identified easily or with certainty.

Breed-specific ordinances are unconstitutionally facially vague due to the difficulties in identifying whether a particular animal belongs to a particular breed. *See* Karen Grey, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?*, 27 NOVA L. REV. 415, 440 (2003) ("In light of the difficulty involved in concluding that a dog is a particular breed, ordinances that ban particular breeds are inherently vague."); Lynn Marmer, *The New Breed of Municipal Dog Control Laws: Are They Constitutional?,* 53 U. CIN. L. REV. 1067, 1075 (1984) [hereinafter Marmer, *The New Breed*] ("[B]ecause it is impossible to identify a breed of a dog with the certainty required to impose criminal sanctions on the dog's owner, it appears that the ordinances are unconstitutionally vague, and therefore violative of procedural due process."). Thus, breed-specific legislation like the Ordinance violates the vagueness doctrine because potential dog owners are not put on notice, and government officials can arbitrarily decide who is violating the law. In other words, "[b]reeds and mixes are hard to identify and often dogs are mislabeled and destroyed based on paranoia and prejudice." www.pbrc.net/breedspecific.html *linked from* www.humanesociety.org.

Non-legal scholars agree that breed identification is difficult or impossible. For example, a study of the breeds involved in fatal attacks on humans found that "identification of a dog's breed may be subjective (even experts may disagree on the breed of a particular dog)," and

"because of difficulties inherent in determining a dog's breed with certainty, enforcement of breed-specific ordinances raises constitutional and practical issues." Jeffrey Sacks, et al., *Breeds of Dogs Involved in Fatal Human Attacks in the United States Between 1979 and 1998*, 217 J. OF THE AM. VETERINARY MED. ASS'N 836 (2000) [hereinafter *Breeds of Dogs*].

Although genetic testing seems like a simple solution, it is expensive, time-consuming, and unreliable. *See id.* ("Pedigree analysis (a potentially time-consuming and complicated effort) combined with DNA testing (also time-consuming and expensive) is the closest to an objective standard for conclusively identifying a dog's breed."); Paula Szuchman, *Beagle or Bichon: Can Dog Drool Provide Insight?*, WALL ST. J., Sept. 18, 2009 (noting the disparate results of four separate genetic tests conducted on a single dog). Genetic testing is not a panacea for facially vague breed-specific legislation.

The Supreme Judicial Court of Massachusetts has declared an ordinance banning pit bulls (defined as "American Staffordshire, Staffordshire Pit Bull Terrier, Bull Terrier or any mixture thereof") void for vagueness because "there is no scientific means, by blood, enzyme, or otherwise, to determine whether a dog belongs to a particular breed, regardless of whether 'breed' is used in a formal sense or not." *Am. Dog Owners Ass'n v. City of Lynn*, 404 Mass. 73, 75-76, 533 N.E.2d 642, 644 (1989). The court emphasized that the vagueness doctrine was important even in the context of a non-criminal ordinance. *Id* at 77 ("[S]ince the ordinance imposes a penalty on offenders, involves forfeiture of property (banishment of the dog), and seeks to protect the public against injury, it is clearly penal in nature."). Although the findings are likely dicta because the specific case before the court was moot, the *City of Lynn* court felt it important to clarify its position "to conserve judicial resources and to guide future conduct of the parties." *Id*. at 78. Thus, *City of Lynn* should guide future decisions, even if the court's finding

about the vagueness of BSL was technically dicta. Furthermore, as discussed below, subsequent Massachusetts decisions have cited *City of Lynn* favorably, which should further encourage this Court to heed its findings. *See Jordan v. Free*, 2006 Mass. App. Div. 135, 135 (2006); *Nutt v. Florio*, 75 Mass. App. Ct. 482, 487 n.7, 914 N.E.2d 963, 968 n.7 (2009).

Massachusetts courts and many others have emphasized the difficulties of identifying particular breeds, even those identified by trade groups and organizations. Thus, since the Court should apply Massachusetts law, it should invalidate the Ordinance as facially vague because it does not provide ascertainable standards giving notice of its reach.

B. The Ordinance is facially vague because it does not sufficiently define pit bulls and mixed breeds.

Breed-specific laws singling out unregistered breeds like "Pit Bulls," "Pit Bull Terriers," or mixtures of certain breeds raise additional vagueness concerns. *City of Lynn* found that the portion of the ordinance affecting dogs that were "any mixture thereof" was "impossible to ascertain," and was therefore impermissibly vague. 404 Mass. at 79. Likewise, the *City of Lynn* court held that a companion ordinance listing "Pit Bulls" without reference to any specific breed was unconstitutionally vague because it "relie[d] instead on the even less clear 'common understanding and usage' of the term 'Pit Bull,' [and was] not sufficiently definite to meet due process requirements." *Id.* Invoking the underlying rationale for the vagueness doctrine, the court stated, "[d]og owners do not receive fair notice from the ordinance of the conduct proscribed or the dog 'types' covered by the law." *Id.* Later Massachusetts cases echoed this sentiment. See *Jordan*, 2006 Mass. App. Div. at 135 ("'[P]it bulls' are not a breed as such. Moreover, a dog's appearance can be misleading in determining whether the dog is of a breed 'commonly understood' to be 'pit bulls.'"); and *Nutt*, 75 Mass. App. Ct. at 487 ("[T]he term ['Pit Bull'] may describe any number of breeds.").

American Dog Owners Ass'n v. City of Des Moines severed and held unconstitutionally facially vague a portion of a city ordinance referring 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; or [a]ny dog which has the appearance and characteristics of being predominately of the breeds of Staffordshire terrier, American pit bull terrier, American Staffordshire terrier; any other breed commonly known as pit bulls, pit bull dogs or pit bull terriers, or combination of any of these breeds.

469 N.W.2d 416, 418 (Iowa 1991). With respect to the singling out of mixed breeds and undefined "Pit Bull" breeds, the court stated:

> This language allows subjective determinations based on a choice of nomenclature by unknown persons and based on unknown standards. This language … does leave a reader of ordinary intelligence confused about the breadth of the ordinance's coverage. Moreover, this language also gives improperly broad discretion to enforcement personnel, who are free to make the 'ad hoc and subjective' determinations condemned in *Grayned*. There is an unacceptable risk of 'arbitrary and discriminatory application' of these portions of the ordinance.

Id.

Commentators have consistently noted the difficulty in identifying pit bulls and mixed pit bull breeds. *See, e.g.,* Kristen E. Swann, *Irrationality Unleashed: The Pitfalls of Breed-Specific Legislation*, 78 UMKC L. REV. 839, 854 (2010) (finding "[p]it bulls and their mixes vary widely," making it difficult to "establish[] the parameters of the prohibited pit bull breed . . . [e]ven where ordinances provide phenotype definitions" such as from the United Kennel Club ["UKC"] or American Kennel Club ["AKC"] breed standards). Even laws that attempt to define the physical characteristics of unregistered and mixed-breed dogs are inadequate because "such descriptions are usually vague, rely on subjective visual observation, and result in many more dogs than those of the specified breed being subject to the restrictions of the ordinance." *Breeds of Dogs*.

Although most courts have chosen not to invalidate BSL on vagueness grounds, even courts upholding the constitutionality of these laws have expressed concern for the uncertainty associated with classifying particular dogs, especially pit bulls and mixed breeds. Courts upholding breed-specific ordinances have emphasized the importance of detailed legislative guidelines as to which dogs meet the criteria for a specific breed. Often, BSL has incorporated by reference the breed definitions of groups like the AKC or the UKC. *See, e.g., Dias v. City of Denver,* 567 F.3d 1169 (10th Cir. 2009). For breeds not recognized by these groups (like the "Pit Bull Terrier"), the challenge of identifying the breed is even greater. The court in *State v. Peters* upheld the constitutionality of an ordinance regulating dogs that "[s]ubstantially conform to the standards established by the American Kennel Club for American Staffordshire Terriers or Staffordshire Bull Terriers; or . . . [s]ubstantially conform to the standards established by the United Kennel Club for American Pit Bull Terriers." 13 Fla. L. Weekly 2517, 534 So. 2d 760, 761 (1988). However, the court noted that without reference to explicit standards, "it can be difficult to determine to which breed a dog belongs, and pit bulls (as a recently developed breed) are particularly difficult to distinguish." *Id.*

Vanater v. South Point upheld an ordinance banning "Pit Bull Terriers" defined as any dog "identifiable as partially of the breed of Staffordshire Bull Terrier or American Staffordshire Terrier by a qualified veterinarian duly licensed by the State of Ohio." 717 F. Supp 1236, 1239 (S.D. Ohio 1989). The *Vanater* court emphasized that the ordinance was not vague because dog owners were put on notice by the club-recognized breed names and because government officials were not making arbitrary decisions independently, but were required to seek the assistance of a state licensed veterinarian. *Id.* at 1244 ("An ordinary person could easily refer to a dictionary, a dog buyer's guide or any dog book for guidance and instruction; also, the [AKC] and [UKC]

have set forth standards for Staffordshire Bull Terriers and American Staffordshire Terriers. . . .”).

The Winthrop Ordinance lacks the important definitions and safeguards incorporated in the ordinances upheld in the above cases. Although the Ordinance refers to “American Staffordshire Terriers” and “American Staffordshire Pit Bulls,” it does not incorporate the definitions of the AKC or the UKC. R. at 3. The term “Pit Bull Terrier” is not defined at all, and so can only be defined by variable common usage. *Id.* Furthermore, the Ordinance covers “mixtures thereof” without any limiting criteria. *Id.* No guidance is given for how to identify a mixture (for example, with the aid of a state licensed veterinarian) or how much pit bull is enough to trigger the ordinance. Thus, dog owners have little guidance as to whether they are covered by the Ordinance. Individuals who act charitably by adopting dogs from a pound or shelter are particularly at risk, because “rescue” dogs are often unidentified mixes. In addition, the Ordinance gives government officials little direction as to how to apply it, and officials must make subjective, ad hoc decisions.

For these reasons, this Court should void the Ordinance as vague on its face. At the very least, the Court should sever and hold impermissibly facially vague the portions of the Ordinance referring to Pit Bull Terriers or mixtures of American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier, as these sections do not provide adequate guidelines for legal compliance and enforcement.

C. The Ordinance is unconstitutionally vague as applied.

The Ordinance is unconstitutionally vague as applied to Richardson because “he did not have sufficient warning that his conduct would violate the statute or regulation.” *Wagner*, 100 F. Supp. 2d at 84. As outlined in the factual background above, Richardson was never told by the

rescue group or by his veterinarian that his dogs were of the "pit bull variety of terrier." R. at 3. In addition, the Ordinance did not provide any details describing the characteristics of "vicious dogs" under the law that would put Richardson on notice, because none of them pertained to Richardson's dogs. Neither Starla nor Zoe had attacked "unprovoked," "bitten a human being or animal," had "a known propensity, tendency or disposition to attack unprovoked, to cause injury or to endanger the safety of human beings or animals," or had been "trained or kept for dogfighting." *Id*.

According to the district court, the fact that Zoe and Starla are "muscular dogs with large heads and short coats" was "ample to support the City Manager's finding that Zoe was of the 'pit bull variety of terrier' and to put Richardson on notice that both of his dogs were subject to the ban." R at 10. However, Richardson had no reason to believe that his dogs fell within the statute by their appearance alone. Many dogs have characteristics similar to dogs commonly referred to as pit bulls. For instance, the AKC states that Bulldogs have "straight, short" coats, "massive short-faced heads," and that their "general appearance and attitude should suggest great stability, vigor and strength." www.akc.org/breeds.[1] Likewise, the Cane Corso is a "muscular and large-boned breed" with a "short" coat and a "large" head, and the Dogo Argentino has "powerful muscles which stand out," a "strong and powerful" head and a "[u]niform, short, plain and smooth" coat. *Id.* Similar characteristics describe other breeds like Boxers and Presa Canarios. Therefore, Zoe and Starla's appearance is not unique to their breed type. They could easily be mixes of other breeds not subject to the ban. As a result, Richardson had no reason to consider his dogs "vicious," and the Ordinance should be deemed vague as applied to Richardson and his companion animals.

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[1] Notably, Bulldogs' disposition is "equable and kind, resolute and courageous (*not vicious or aggressive*)." www.akc.org/breeds (emphasis added).

D. The Ordinance is unconstitutionally overbroad because it results in individuals avoiding legal and protected activity.

The Ordinance is unconstitutionally overbroad whether the Court considers the Ordinance to be vague or precise. Although typically the overbreadth doctrine applies to First Amendment situations, the Supreme Court has also applied it in non-First Amendment challenges. *See*, *e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972). Furthermore, commentators have advocated extending the overbreadth doctrine beyond the First Amendment. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 264 (1994) ("[S]trong theoretical and practical reasons, some of which the Court has adopted, justify extending the overbreadth doctrine beyond the First Amendment.").

A law will only be deemed overbroad if it reaches "a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 US 489, 494 (1982). Although most courts have not deemed the ownership of a dog to be constitutionally protected conduct, given the increasing awareness of the strength and importance of the human-companion animal bond and the changing perception of pets as a unique form of property, discussed below, ownership of a companion animal should be viewed as a constitutionally protected interest.

If the Ordinance is deemed vague, as the *A Juvenile* court noted, "[t]he vagueness and overbreadth doctrine are not always separate and distinct." 368 Mass. at 587 n.4. Although most courts have rejected overbreadth challenges to BSL, courts remain cautious. For instance, in *Vanater*, the court concluded that the ordinance was not overbroad "as drawn" because it was not vague, but left open the possibility that another, less carefully drawn statute may violate the overbreadth doctrine because "identification of a Pit Bull may be difficult in some situations." 717 F. Supp. at 1246. Unlike the ordinance in *Vanater*, which required identification of a pit bull

by a licensed state veterinarian, the Ordinance at issue here is overbroad *as drawn* because it causes dog owners to refrain from owning non-vicious dogs, even those of legally permissible breeds, for fear those dogs will be considered pit bull mixes and seized.

Additionally, even if the Ordinance is deemed precise, it is still overbroad because it results in the prohibition of protected conduct — enjoying the fundamental liberty interest of the human-companion animal relationship discussed below. *See A Juvenile*, 368 Mass. At 587 n.4.

II. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THE ORDINANCE DOES NOT VIOLATE APPELLANT'S RIGHTS TO SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The Due Process Clause of the Fourteenth Amendment, U.S. CONST. art XIV, § 1, not only ensures procedural fairness, but also "cover[s] a substantive sphere . . . , barring certain government actions regardless of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (internal quotations and citation omitted). As this Court described in *Amsden v. Moran*, substantive due process protects against state action that is "arbitrary and capricious," "run[s] counter to the concept of ordered liberty," or "appear[s] shocking or violative of universal standards of decency" (also known as the "shock the conscience" test[2]). 904 F.2d 748, 753-54 (1st Cir. 1990) (internal quotations and citations omitted).

By contrast, courts consider substantive due process challenges to legislative action in two ways. First, if the interest infringed by state legislation amounts to a "fundamental liberty interest[]," then the infringement must be "narrowly tailored to serve a compelling state interest." *Lawrence*, 539 U.S. at 593 (citations omitted). In other words, strict scrutiny applies when the government infringes a fundamental right. Second, if the interest infringed by the legislation

[2] The "shock the conscience" test applies only to executive action, and is thus not applicable to this case. *See Lewis*, 523 U.S. at 846-47 & n.8; *Espinoza v. Sabol*, 558 F.3d 83, 87 (1st Cir. 2009).

does not amount to a "fundamental liberty interest" but instead constitutes a lesser right, the legislation must be "rationally related" to a compelling government interest. *Glucksberg*, 521 U.S. at 728; *see Reno v. Flores*, 507 U.S. 292, 305 (1993).

The Ordinance at issue infringes the fundamental interest of the human-animal companion bond, and is unconstitutional under the Fourteenth Amendment because it fails strict scrutiny. If this Court finds Richardson's interest amounts only to a lesser right, the Ordinance is still unconstitutional because it fails the rational basis test.

A. The Ordinance impermissibly burdens Appellant's fundamental right.

1. The human-companion animal bond should be considered a fundamental liberty interest.

Substantive due process protects not only the specific freedoms enumerated in the Bill of Rights, but also a variety of other fundamental liberty interests. *Glucksberg*, 521 U.S. at 720. These protected interests involve "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence*, 539 U.S. at 574-75 (citation omitted). In the U.S., there are more than 53 million dogs that are human companions. *Human-Animal Bond Boosts Spending on Veterinary Care*, JAVMA News, Jan. 1, 2008, *available at* http://www.avma.org/onlnews/javma/jan08/080101a.asp [hereinafter *Human-Animal Bond Boosts Spending*]. Domestic pets are an important part of contemporary American life, as they offer emotional support and protection and act as therapy dogs, seeing-eye dogs, and hunting dogs. Given that the majority of American companion animal owners view their pets as "children," *see* Charlotte A. LaCroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 7 (1998), pet owners experience the loss of a companion animal in a manner similar to the experience of losing a child or other family

member, *see* Sonia S. Waisman & Barbara R. Newell, *Recovery of 'Non-Economic' Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 45 (2001). Since interests related to family relationships and child rearing constitute fundamental rights protected by due process, *Lawrence*, 539 U.S. at 574-75, an individual's right to enjoy an emotional bond with a companion animal should also be considered a fundamental liberty interest. *See, e.g., Drollinger v. Milligan*, 552 F.2d 1220, 1227, n.6 (7th Cir. 1977) (finding that although due process-protected fundamental rights to care for other family members have typically been confined to the nuclear family unit, there is "no reason, . . . not to extend this guaranty to the grandfather-grandchild relationship."). Thus, the Court should apply strict scrutiny when the human-companion animal relationship interest is infringed.

There has been a strong shift in perspective with respect to domestic animals over the last thirty years. While companion animals are classified as property in the legal sense, *see Maldonado*, 568 F.3d at 272 (holding Fourteenth Amendment includes "pet cats and dogs" as protected property), society now views living pets as a very different kind of property than inanimate objects, *see* CAROLYN MATLACK, WE'VE GOT FEELINGS TOO!: PRESENTING THE SENTIENT PROPERTY SOLUTION (2006) (advocating the concept of "sentient property"). Currently, only 2.1% of companion animal owners consider their companion animals to be "property," while the rest classify their pets as "family" or "companions." *See Human-Animal Bond Boosts Spending*. Various cities such as Boulder, Colorado and West Hollywood, California have replaced the word "owner" with "guardian" in legislation pertaining to domestic animals. *See* www.guardiancampaign.com. Further, the existence of animal cruelty statutes underscores the idea that companion animals are distinct from non-sentient forms of property.

There are now criminal animal cruelty statutes in all U.S. states, and at least one felony animal cruelty law in forty-six states and the District of Columbia (thirty-nine of which have been passed in the last fifteen years). BRUCE A. WAGMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 90-91 (4th ed. 2010) [hereinafter WAGMAN]. While in the past, animal cruelty statutes have been justified on the basis of benefit to *humans*, society now widely acknowledges that the main goal of animal cruelty statutes is to protect the animals themselves. *See* Robert Garner, *Political Ideology of the Legal Status of Animals*, 8 ANIMAL L. 77, 84 (2002). In this way, the law treats animals differently than other kinds of property (which property owners are free to harm or destroy at will).

Courts are increasingly recognizing that companion animals occupy a unique place in contemporary life, and that pets do not fit perfectly within the traditional framework of property principles. For example, in *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, the Ninth Circuit considered whether police officers intruded unreasonably on the plaintiffs' Fourth Amendment interests when they shot and killed the plaintiffs' dogs during the execution of a search warrant. 402 F.3d 962, 975 (9th Cir. 2005). Holding that the shooting of the dogs was unreasonable, the court recognized that "dogs are more than just a personal effect," and that "the emotional attachment to a family's dog is not comparable to a possessory interest in furniture." *Id. See also Akers v. Sellers*, 114 Ind. App. 660, 661-62, 54 N.E.2d 779, 779 (1944) (court in divorce/custody proceeding approves consideration of the "interests and desires of the dog" as opposed to determining the matter "on the brutal and unfeeling basis of legal title"); *Houseman v. Dare*, 405 N.J. Super. 538, 543-44, 966 A.2d 24, 27-28 (2009) (court recognizing the "special subjective value" of a dog by comparing the parties' emotional attachment to the dog with a "party's sincere sentiment for an inanimate object based upon a relationship with the

donor," a type of property relationship our legal system recognizes and protects); *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981) (court in divorce proceeding referencing a dog's capacity to bestow love on her owners, and drawing parallel between dogs and human children by employing the phrase "custody of the dog"); *Morgan v. Kroupa*, 167 Vt. 99, 103, 702 A.2d 630, 633 (1997) (arguing that courts "must fashion and apply rules that recognize [the] unique status" of pets as property). Judicial recognition of the special role of companion animals in our society further supports the argument that the human-animal relationship, like other familial relationships, constitutes a fundamental liberty interest.

While the Tenth Circuit in *Dias* held that the Denver pit bull ordinance did not infringe a fundamental liberty interest, the reason the court gave for this conclusion was that the

> [p]laintiffs' complaint [was] devoid of any factual allegations which would lend support to a conclusion that the human/companion animal bond is a fundamental liberty interest. Quite to the contrary, the nature and history of the relationship between the plaintiffs and their dogs is not raised in the complaint. Because of such failure, we do not further pursue a strict scrutiny analysis.

567 F.3d at 1181. Thus, the Tenth Circuit's holding in *Dias* should be confined to the facts that were before that court, and *Dias* does not preclude a holding in this case that the human-companion animal bond constitutes a fundamental liberty interest.

2. The Ordinance fails strict scrutiny because it is not narrowly tailored so as to avoid infringing the fundamental right of the human-companion animal relationship.

Where legislation infringes a fundamental right, the legislation must employ the "least restrictive means" to achieve a "compelling government interest." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000). As the district court noted, it is uncontested that the City has a compelling interest in protecting the public through the exercise of its police power. R. at 12. However, the "compelling government interest" of public safety must be balanced against

Richardson's interest in enjoying his relationship with his animal companions. The Supreme Court in *Sentell v. New Orleans & Carrollton Railroad*, a case relied on by the district court, acknowledges that a court "in determining what is due process of law . . . [is] bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power." 166 U.S. 698, 705 (1897).

Evaluating the Ordinance in light of the emotionally significant human-companion animal bond, the seizing and killing of pets is unjust, and impermissibly infringes the fundamental liberty interest at stake. There are a variety of other less restrictive measures, already adopted by other states and municipalities, that the City could have taken to protect against any legitimate threat posed by dogs: the City could hold dog owners strictly liable for injuries inflicted by their dogs, could require dog owners to restrict their animal's activities through, for example, leashing, or could focus on prosecuting individuals involved in illegal dog fighting activities. Marmer, *The New Breed* (suggesting that these alternative laws "approach the protection of the public welfare and safety with the degree of precision that characterizes effective legislation" while also "recogniz[ing] the current problem with pit bull dogs accurately as a problem of vicious dogs, not a vicious breed"). Because the City did not take any of these less restrictive approaches and instead targeted all pit bull-type dogs, causing owners like Richardson to suffer the trauma of the seizure and killing of their dogs (even with no history of violence), the Ordinance is not sufficiently tailored to withstand strict scrutiny analysis.

B. Even if the human-animal bond at issue does not rise to level of a fundamental liberty interest, the Ordinance violates substantive due process because it fails the rational basis test.

If this Court finds that Richardson's interest in the human-companion animal relationship does not rise to the level of a fundamental right for due process purposes, Richardson still has a

property right in his pets protected by the Fourteenth Amendment. *See Maldonado*, 568 F.3d at 272. Due to the limits due process places on legislative action impairing protected property interests, the Ordinance must bear a rational relationship to its objective in order to pass constitutional muster. *See Jacobson v. Mass.*, 197 U.S. 11, 25 (1905).

In this case, there is no rational relation between the Ordinance and its legislative goal of protecting the public. Thus, the Ordinance is constitutionally defective under the Fourteenth Amendment. While there may have been some rational basis for the Ordinance when it was enacted in 1988, R. at 5, current scientific knowledge about whether dog breeds determine tendencies for violence have eliminated any valid factual basis on which to justify breed-specific legislation. Thus, even though it is possible the Ordinance could have passed constitutional muster several decades ago, if the facts on which it was based cease to exist because they have been proven false, the Ordinance cannot stand. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.") (internal citations omitted).

1. The Ordinance was premised on inaccurate and misleading data.

For the Ordinance to be justified, all pit bulls and pit bull mixes must be inherently dangerous. As the Court in *Sentell* noted, while property that is "dangerous to the safety or health of the community" can be destroyed notwithstanding due process, "[s]o far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner." 166 U.S. at 705.

However, the Ordinance was premised on misunderstood and often inaccurate data indicating that pit-bull type dogs (American Staffordshire Terriers, American Pit Bulls, and Pit

Bull Terriers, R. at 3) are inherently dangerous breeds. Media attention surrounding several reports of pit bull attacks on humans in the 1980's "prompted an anti-pit bull dog hysteria in various communities," creating the negative pit bull stereotype. Marmer, *The New Breed*, at 1067-68; *see* T.E. Houston, *The Media and the Pit Bull*, FOR PIT'S SAKE, Nov. 1, 2007, *available at* http://www.forpitssake.org/MediaPitbull.html ("The media driven hysteria had people terrified of any dog that remotely might resemble a pit bull."). Pit bulls became the scapegoat, and legislatures enacted breed-specific legislation to appease the public's misperception of the root causes of the problem: irresponsible owners and those who train dogs to fight or attack. *See* WAGMAN, at 370. While it may be true even today that the public perceives pit bulls to be a safety threat, public sentiment alone cannot satisfy the rational basis test for legislation. Discussing another court's focus on the "public's outcry over pit bull attacks," an Ohio appellate court stated that "public sentiment alone will not make a law constitutional." *State v. Anderson*, Nos. 88AP-711, 88AP-712, 1989 WL 119949, at *3 (Ohio App. 10 Dist. Oct. 12, 1989), judgment rev'd, 57 Ohio St. 3d 168, 566 N.E.2d 1224 (1991).

However, much of the factual, "scientific" basis for breed-specific legislation has proven false, establishing that breed-specific legislation is irrational. Mathematical certainty is not required in drafting legislation, and the rational basis for legislation does not depend on its ultimate effectiveness. *Exxon Corp v. Governor of Md.*, 437 U.S. 117, 124-25 (1978). However, the City cannot enforce laws premised on baseless stereotypes and myths. Because there are no dog breeds that are "inherently dangerous," breed does not determine whether a dog is likely to bite or attack a human. *See* Marmer, *The New Breed*, at 1081 ("One breed is not inherently good or evil, vicious or docile, harmful or helpful."). The main cause in almost all instances of dog violence is an owner's irresponsible behavior through mistreatment or neglect of a dog—not the

dog's breed. As the district court noted, the National Animal Control Association, the American Veterinary Medical Association, and the Humane Society of the United States all oppose breed-specific legislation. R. at 12-13. The American Veterinary Medical Association stated in a "Task Force on Canine Aggression and Human-Canine Interactions" that "a dog's tendency to bite depends on at least 5 interacting factors: heredity, early experience, later socialization and training, health (medical and behavioral), and victim behavior." *A Community Approach to Dog Bite Prevention*, 218 J. OF THE AM. VETERINARY MED. ASS'N 1732, 1736 (2001) [hereinafter AVMA REPORT]. *See also* Marmer, *The New Breed*, at 1081 (arguing the "current problem of vicious dogs at its source…[is] the individual dog's owner . . . . It is the people who breed and foster viciousness in dogs whom legislators also must control"); Malcolm Gladwell, *Troublemakers: What Pit Bulls Can Teach us About Profiling*, THE NEW YORKER, Febr. 6, 2006, *available at* http://www.gladwell.com/2006/2006_02_06_a_pitbull.html [hereinafter *Troublemakers*] (factors causing dog bites were whether dogs were "hungry or in need of medical attention," had "a history of aggressive incidents," or were "socially isolated," whether child victims did something "to provoke the dog," or whether "the dog owners were previously involved in illegal fighting."). Furthermore, not only are pit bulls no more predisposed to violence than dogs of other breeds, a variety of sources suggest that pit bulls are particularly friendly, gentle dogs. *See American Pit Bull Terrier*, UNITED KENNEL CLUB, *available at* www.ukcdogs.com (describing American Pit Bull Terriers as "excellent family companions . . . noted for their love of children," "extremely friendly, even with strangers," and noting that "[a]ggressive behavior toward humans is uncharacteristic"); WAGMAN, at 370 (noting pit bulls were initially known for their gentle disposition and their fitness for interaction with children);

Troublemakers (arguing that a "pit-bull ban is a generalization about a generalization that is not, in fact, general," thus creating a "category problem").

Another factor undermining the rationality of the Ordinance is that statistical data about dog bites has consistently been skewed and misinterpreted. The American Veterinary Medical Association, arguing that "breed or type bans" are "inappropriate and ineffective," explored the reasons why "statistics on fatalities and injuries caused by dogs cannot be responsibly used to document the 'dangerousness' of a particular breed, relative to other breeds":

> First, a dog's tendency to bite depends on at least 5 interacting factors [unrelated to breed; noted above] . . . . Second, there is no reliable way to identify the number of dogs of a particular breed in the canine population at any given time (e.g., 10 attacks by Doberman Pinschers relative to a total population of 10 dogs implies a different risk than 10 attacks by Labrador Retrievers relative to a population of 1,000 dogs). Third, statistics may be skewed, because often they do not consider multiple incidents caused by a single animal. Fourth, breed is often identified by individuals who are not familiar with breed characteristics . . . Fifth, the popularity of breeds changes over time, making comparison of breed-specific bite rates unreliable.

AVMA REPORT, at 1736. *See also Troublemakers*: (stating the statistics on breeds associated with dog bites are often inaccurate because of the fact that "the popularity of certain breeds changes over time"). This statistical unreliability is compounded by the fact that there is no nationwide reporting agency for animal bites. Leslie Sinclair, *Would I Bite?*, HSUS NEWS.

2. United States Courts are increasingly recognizing the flawed premises underlying BSL.

Courts also have begun to recognize the problematic underpinnings of BSL. In *Dias*, the Tenth Circuit rejected a motion for summary judgment on a substantive due process challenge to the Denver pit bull ban, holding that "the complaint plausibly alleges that the Ordinance is not rationally related to a legitimate government interest." 567 F.3d at 1183. The Tenth Circuit specifically noted the official UKC breed standard for the American Pit Bull Terrier, which highlights the breed's friendly, gentle nature. *Id.* at 1183-84. On remand, the district court again

rejected the State's motion for summary judgment and found that the due process challenge should be allowed to proceed. *Dias v. City of Denver*, No. 07-cv-00722-WDM-MJW, 2010 WL 3873004, at *7 (D. Colo. Sept. 29, 2010). The case remains pending at the time of this brief.

In *Anderson*, an Ohio appellate court considered the problem of the over-inclusiveness of a vicious dog law, stating, "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." 1989 WL 119949, at *3 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)). The court in *Anderson* also recognized that "people make dogs vicious and . . . some breeds may only be easier trained to be such . . . in order to combat this problem, laws must be directed at the actions of the owners and not towards the breed of a dog." *Id.* at *4. *See also Zuniga v. County of San Mateo Dep't of Health Serv.*, 218 Cal. App. 3d 1521 (1990) (finding no evidence that pit bull puppies had inherently violent nature, and thus no evidence they threatened public safety); *Carter v. Metro North Assoc.*, 680 N.Y.S.2d 239, 255 A.D.2d 251 (1998) (court finding insufficient evidence behind proposition that pit bulls are genetically dangerous to support claim that animal owner knew or should have known of his dog's propensity for violence).

C. The district court improperly relied on *Sentell*, *Vanater*, and *Santiago* to support finding of a rational basis for the Ordinance.

Courts must depart from precedent when departure is necessary to "bring a decision into agreement with experience and with facts newly ascertained…particularly . . . in constitutional cases." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932). Several of the cases relied on by the district court are outdated in that they do not accurately reflect contemporary social mores with respect to companion animals, and they do not reflect the current state of knowledge with respect to the causes of canine aggressiveness.

The Supreme Court decided *Sentell* over a century ago in 1897, and because companion animals did not occupy the same place in American life as they do today, the Court did not even consider the human-companion animal bond. 166 U.S. 698. *Vanater*, also relied on by the district court, is over twenty years old. 717 F. Supp at 1243. As discussed above, public sentiment toward animals has shifted, particularly over the last several decades.

Furthermore, because of newly available data affirming the lack of correlation between dog breed and inherent aggressiveness, while courts considering BSL in the past may have correctly found a rational basis, a court today would not be justified in doing so. For the Winthrop Ordinance to pass constitutional muster, Appellees would have to be able to point to a credible factual basis on which to justify *this* piece of legislation *today*. When the city of Denver in *Dias* pointed to cases in which other courts had rejected substantive due process challenges to pit bull bans, the Tenth Circuit found support in the plaintiffs' contention that "although pit bull bans sustained twenty years ago may have been justified by the then-existing body of knowledge, the state of science in 2009 is such that the bans are no longer rational." 567 F.3d at 1183 (footnote omitted). Along these lines, the court in *American Canine Foundation v. City of Aurora* denied a motion for summary judgment against plaintiffs challenging a pit bull ordinance on substantive due process grounds. No. 06-cv-01510-WYD-BNB, 2008 WL 2229943, at *11 (D. Colo. May 28, 2008). The court distinguished other similar cases because "ample evidence exist[ed] [in those cases] to establish a rational relationship" between the legislation and public safety, while there was no evidence supporting the rationality of the Aurora ordinance. *Id.* at *8-9. Therefore, a finding of rational basis in other contexts does not compel such a finding for the Ordinance at issue.

Additionally, *Commonwealth v. Santiago* is distinguishable from the case *sub judice* because it involved fundamentally different factual circumstances and legal issues. 452 Mass. 573, 896 N.E.2d 622 (2008). The district court cited *Santiago* as evidence that the Massachusetts Supreme Court believed that the pit bull breed is "commonly known to be aggressive." *Id.* at 577-78; R. at 14. However, the court in *Santiago* was determining whether the statements contained in a search warrant application made it reasonable for police officers relying on that application to perceive a risk sufficient to merit an exception to the "knock and announce" requirement of the Fourth Amendment. Thus, the *Santiago* court was not adopting the statement in the warrant application about pit bulls' aggressiveness as its own belief, just as the court was not affirming the accuracy of the statement in the search warrant that Santiago was "an active drug dealer." *Id.* at 574. The statement that pit bulls were "commonly known to be aggressive" was only relevant to evaluate the police officers' mindsets and the reasonableness of their subsequent actions. The *Santiago* court even distances itself from the warrant's assessment of pit bulls by stating, "the magistrate knew that the defendant possessed a type of dog which, *in the officer's experience*, was known to be dangerous and aggressive." *Id.* at 578.

The district court also acknowledges another case, *People v. Riddle*, in which a court came to the opposite conclusion about whether a pit bull's presence in a home qualifies as a sufficient risk to justify an exception to the "knock and announce" rule. 258 Ill. App. 3d 253, 260-61, 630 N.E.2d 141, 146-47 (1994) (stating "we cannot malign a breed of dogs on the basis of rumor and hysteria," and that under Illinois law, "[v]icious dogs shall not be classified in a matter that is specific as to breed" and "each dog is to be evaluated individually and is not to be classified as 'vicious' merely because of its breed or type"). Furthermore, the circumstances of search and seizure cases such as *Santiago* are unique, because even the most docile dog of any

breed may respond aggressively due to protective instincts when a stranger enters the dog owner's property. *See Instincts and Behavior,* DOG TRAINING SITE.NET, *available at* http://www.dogtrainingsite.net/dogbehavior/dogs_standpoint.htm. Legislatures have recognized and accepted this fact; most non breed-specific "vicious dog" statutes preclude liability if the bite takes place when the injured party is trespassing on the dog owner's property. *See*, *e.g.*, OHIO REV. CODE ANN. § 955.28(B).

While the City could legitimately regulate individual dogs who have acted violently in the past, because the current body of knowledge shows there is no correlation between breed and canine aggressiveness, seizing and destroying dogs with no history of violence does nothing to protect the public. Thus, there is no rational basis for the Ordinance, and it must be struck down as unconstitutional.

CONCLUSION

For the foregoing reasons, Plaintiff/Appellant Richardson respectfully requests that the Court reverse the summary judgment entered in favor of Defendant/Appellee. Plaintiff/Appellant Richardson requests damages for the loss of Zoe, a permanent injunction barring the seizure of Starla, and invalidation of the Ordinance.