### Civil Action No. 10cv00416

## In the United States Court of Appeals For the First Circuit

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Quinton Richardson,

Appellant,

v.

City of Winthrop, Massachusetts,

Appellee.

Appeal from the U.S. District Court for the District of Massachusetts Honorable H.H. Summers, Presiding

> Brief for Appellant, Quinton Richardson

Team No. 6

### TABLE OF CONTENTS

			<u>oage</u>
ΤÆ	ABLE (	OF CONTENTS	i
ΤA	ABLE (	OF AUTHORITIES	iii
ST	ATEM	MENT OF THE ISSUE	1
ST	ATEM	MENT OF THE CASE	2
SU	JMMA	RY OF THE ARGUMENT	3
ΑI	RGUM	ENT	5
I.	overb	arop Municipal Code section 6.04.090 ("Ordinance") is unconstitutionally broad because it reaches a substantial amount of constitutionally protected arty interests beyond the Ordinance's legitimate purpose	5
II.		Ordinance is unconstitutionally vague both as-applied to Mr. Richardson and face and thus should be invalidated	11
	A	The Ordinance fails to provide sufficient notice to Mr. Richardson or the the citizens of Winthrop	12
	В	. The Ordinance encourages arbitrary and discriminatory enforcement	15
	C.	. The Ordinance is facially vague although it may be validly applied in a handful of cases because it is criminal in nature and infringes substantial constitutionally protected interests of Winthrop citizens	17
	III.	The City of Winthrop implicated Mr. Richardson's substantive due process due process rights by destroying his dog, Zoe.	19
	A	. Mr. Richardson had a significant property interest in his dog	19
	В	. Substantive Due Process analysis applies to the destruction of Mr. Richardson's dog, Zoe	19
	C	. The Court should apply rational basis scrutiny	20
	IV.	The Ordinance does not survive rational basis scrutiny	20
	A		20

B. The Ordinance does not bear a rational relationship to its asserted interest because the Ordinance does not prevent dog bites or attacks	22
C. The Ordinance is unconstitutional because it is both under-inclusive and and over-inclusive	24
D. Non-breed-specific legislation would be more effective at reducing dog attacks on humans	24
CONCLUSION	24

### TABLE OF AUTHORITIES

### FEDERAL CASES

Am. dog Owners Ass'n Inc. v. Dade County, 728 F. Supp. 1533 (S.D. Fla. 1989)	21
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	5
Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010)	11
City of Chicago v. Morales, 527 U.S. 41 (1999)	18
City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)	6
City of Sacramento v. Lewis, 523 U.S. 833 (1998)	19
<u>Dias v. City &amp; County of Denver</u> , 567 F.3d 1169 (10th Cir. 2009)	17
<u>Dutil v. Murphy</u> , 550 F.3d 154 (1st Cir. 2008)	19
Eisenstadt v. Baird, 405 U.S. 438 (1972)	10
Giacco v. Pennsylvania, 382 U.S. 399 (1966)	6, 10
<u>Grayned v. City of Rockford</u> , 408 U.S. 104 (1972)	12, 13, 15
Griswold v. Connecticut, 381 U.S. 479 (1965)	10
<u>Hodel v. Irving</u> , 481 U.S. 704 (1987)	6, 9, 10
<u>Houston v. Hill,</u> 482 U.S. 451 (1987)	6
Kolender v. Lawson, 461 U.S. 352 (1983)	15, 17, 18
<u>Lanzetta v. New Jersey</u> , 306 U.S. 451 (1939)	12
<u>Louisiana v. U.S.</u> , 380 U.S. 146 (1965)	10
Massachusetts v. Oakes, 491 U.S. 576 (1989)	6
<u>Nebbia v. New York</u> , 291 U.S. 502 (1934)	10
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)	12
Parker v. Levy, 417 U.S. 733 (1974)	11, 17

Reno v. Flores, 507 U.S. 292 (1993)	20
<u>Sabri v. U.S.</u> , 541 U.S. 600 (2004)	9
Sentell v. New Orleans & C.R. Co., 166 U.S. 698 (1897)	. 9, 10, 19, 23
<u>Shelton v. Tucker</u> , 364 U.S. 479 (1960)	6
<u>Smith v. Goguen</u> , 415 U.S. 566 (1974)	15
<u>Troxel v. Granville</u> , 530 U.S. 57 (2000)	10
<u>U.S. v. Bohai Trading Co., Inc.</u> , 45 F.3d 577 (1st Cir. 1995)	11
<u>U.S. v. La Hue</u> , 261 F.3d 993 (10th Cir. 2001).	12
<u>U.S. v. Nat'l Dairy Prods. Corp.</u> , 372 U.S. 29 (1963)	11
<u>U.S. v. Rybicki</u> , 354 F.3d 124 (2nd Cir. 2003)	18
<u>U.S. v. Salerno</u> , 481 U.S. 739 (1987).	18
<u>U.S. v. Sampson</u> , 275 F. Supp. 2d 49 (D. Mass. 2003)	18
<u>U.S. v. Stansell</u> , 847 F.2d 609 (9th Cir. 1988)	5
<u>U.S. v. Williams</u> , 553 U.S. 285 (2008)	5
Vanater v. Vill. of South Point, 717 F. Supp. 1236 (S.D. Ohio 1989)	13, 21
Vill. of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982)	17, 18
<u>Virginia v. Hicks</u> , 539 U.S. 113 (2003)	6
Washington v. Glucksberg, 521 U.S. 702 (1997).	19
STATE CASES	
Am. Dog Owners Ass'n Inc. v. City of Lynn, 404 Mass. 73, 533 N.E.2d 642 (Mass.	1989) 8, 14
<u>Am. Dog Owners Ass'n Inc. v. City of Yakima</u> , 113 Wash. 2d 213, 777 P.2d 1046 (Wash. 1989)	. 9, 10, 11, 21
Baer v. Tyler, 261 Mass, 138, 158 N.E. 536 (Mass, 1927)	19

Colo. Dog Fanciers, Inc. v. City & County of Denver, 820 P.2d 644 (Colo. 1991)	13		
<u>Commonwealth v. Beck</u> , 187 Mass. 15, 72 N.E. 356 (Mass. 1904)			
Dog Fed'n of Wisc. v. City of South Milwaukee, 178 Wis. 2d 353, 504 N.W. 2d 375 (Wis. App. 1993)	21		
Garcia v. Vill. of Tijeras, 108 N.M. 116, 767 P.2d 355 (N.M. 1988)	21		
<u>Hearn v. City of Overland Park</u> , 244 Kan. 638, 772 P.2d 758 (Kan. 1989)	. 13, 21		
Illinois v. Riddle, 258 Ill. App. 3d 252, 630 N.E. 2d 141 (Ill. App. 1994)	22		
Zuniga v. San Mateo Dept. of Health Serv., 218 Cal. App. 3d 1521, 267 Cal. Rptr. 755 (Cal. App. 1990).	23		
SECONDARY SOURCES			
American Kennel Club, <i>Judging Approval Process: New Breeds</i> , http://www.akc.org/pdgs/pjdg02.pdf (last accessed on January 23, 2011)	14		
American Kennel Club, <i>Meet the Breeds</i> , http://www.akc.org/breeds/complete_breed_list. (last accessed on January 23, 2004)			
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### Civil Action No. 10cv00416

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUINTON RICHARDSON,

Appellant,

v.

CITY OF WINTHROP, MASSACHUSETTS,

Appellee.

BRIEF FOR THE APPELLANT, QUINTON RICHARDSON

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### STATEMENT OF THE ISSUE

Whether Winthrop Municipal Code section 6.04.090 designating pit bull varieties of dogs vicious and banning them from the city is unconstitutionally overbroad and vague both on its face and as applied when it deprives dog owners of the property interests in their dogs, it is written in language that may prohibit the ownership of lawful breeds and docile dogs, it contains no standards to aid dog owners in identifying which dogs are prohibited, and it contains no guidelines to aid animal control officers in enforcing its provisions?

Whether Winthrop Municipal Code section 6.04.090 violates the substantive due process rights of dog owners because the City of Winthrop is allowed to kill dogs it deems pit bull terriers when there is no evidence that "pit bulls terriers" pose a safety risk within city limits or surrounding areas, no evidence that pit bulls ownership is widespread in the city, and alternatives exist that would more effectively curb the risk of dog attacks?

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### STATEMENT OF THE CASE

On August 1, 2009, City of Winthrop ("City") officials entered Quinton Richardson's home and took away his dog, Zoe. The City cited a twenty-one year old ordinance which banned the ownership of "pit bull variety of terrier[s]." Mem. Op. at 3. Mr. Richardson had no idea he could even be considered in possible violation of the ordinance.

In 2005, Mr. Richardson adopted two adorable puppies from a rescue organization, which found the puppies huddled under a park bench. Mem. Op. at 4. Believed by the rescue organization and Mr. Richardson's veterinarian to be littermates, the puppies were classified as "mixed breed." <u>Id.</u>

For four years, Mr. Richardson, his family, and his friends, enjoyed the company of Zoe and Starla. The puppies quickly became fixtures of the Richardson household, even playing with Mr. Richardson's young nieces and nephews. Mem. Op. at 4. Not once did Zoe or Starla attack any person, animal, or even disturb the peace. <u>Id.</u>

After a hearing at which an animal control officer testified that he believed Zoe to be a pit bull, Mr. Richardson presented an affidavit from his veterinarian that Zoe was a mixed breed, and, without conducting DNA testing, the City Manager required that Zoe be removed from the City within ten days or be destroyed. Mem. Op. at 5. When Mr. Richardson could not find a home for her and the state trial court affirmed the City Manager's decision, Zoe was killed by lethal injection. Id.

Starla, Zoe's probable littermate, continues to live with Mr. Richardson, although he fears the City may also seize and kill Starla. Starla lives a stifled life, staying indoors with curtains

drawn, only going outside to relieve herself. Mr. Richardson fears that he will lose both of his beloved dogs. Mem. Op. at 5-6.

Mr. Richardson appealed the state trial court decision to the United States District Court for the District of Massachusetts. The District Court entered summary judgment in favor of the City of Winthrop because it found that the ordinance was not vague, overbroad, and bore a rational relationship to the goal of protecting the Winthrop community.

### SUMMARY OF THE ARGUMENT

Citizens cannot be forced to surrender their constitutionally protected rights based on the government's unreasonable fear of the alleged viciousness of an ill-defined breed of dog and its portrayal in the media. The property rights of citizens are protected by various constitutional provisions even if that property is the family dog. Winthrop Municipal Code section 6.04.090 is unconstitutional because it bans certain forms of property without complying with the due process requirements of the Fourteenth Amendment.

First, the Ordinance is unconstitutionally overbroad. The overbreadth doctrine is not limited to the First Amendment context and has been utilized to protect property interests. The Ordinance is overbroad because it substantially deprives dog owners of their constitutionally protected property interest by subjecting even docile members of the prohibited breed to be banned. In addition, the Ordinance may inadvertently subject lawful dog owners to its provisions due to its vague language. Although the City of Winthrop ("City") has a legitimate interest to ensure public safety, the broad language of the Ordinance is not narrowly tailored to meet the City's goals. Instead, the Ordinance subjects even law-abiding dog owners to criminal sanctions for owning docile dogs and lawful breeds mistaken for pit bulls.

Second, the Ordinance is unconstitutionally vague both on its face and as-applied. The Ordinance, as written, provides neither Richardson nor Winthrop citizens with any standards to aid them in identifying which dogs are prohibited. Instead, dog owners are left to guess as to which dogs are permitted and which are not. The lack of standards to determine what constitutes a "pit bull variety of terrier or mix" is fatal. Without any standards, the Ordinance may be applied to various dogs which may or may not have any pit bull heritage and also to popular breeds and mixes that are commonly mistaken for pit bulls. Furthermore, the Ordinance allows the City to enforce its provisions with subjective, ad hoc determinations as to which dogs will be subject to the ban. Such subjective determinations invite personal biases and arbitrary enforcement. Therefore, dog owners like Richardson may lose their docile pet at the whim of animal control officers.

The Ordinance is facially vague although it may be validly applied in a few limited instances. The Ordinance imposes criminal sanctions and, due to its language, infringes upon a substantial amount of constitutionally protected interests. Because of this, the Ordinance is unconstitutionally vague on its face because in most circumstances it cannot be validly applied.

Third, the Ordinance violates dog owners' substantive due process rights because it is not rationally related to the legitimate government purpose of providing for safety against dog attacks. The substantive due process doctrine is designed to protect against arbitrary government actions. If a government statute infringes on a person's interest, it must be rationally related to a legitimate government to be constitutional. Because the City of Winthrop has not shown that enacted the Ordinance with a legitimate interest in mind and does not effectively prevent dog attack, it does not survive rational basis scrutiny.

The City has not shown that pit bull varieties of dogs pose a safety risk to persons within the City, or even in neighboring areas. Unlike cases where dog attacks had wounded or fatally injured citizens, the City has not shown it experiences such problems during the time period in which it enacted the Ordinance or even in the twenty-one years since. Without a valid reason for enacting the Ordinance, it cannot be used to confiscate and destroy beloved pets and property without violating the substantive due process rights of dog owners.

In addition, the City has not shown that the Ordinance is effective in reducing safety risks posed by dangerous dogs and pit bull terriers. Because the City of Winthrop has not shown that enacted the Ordinance with a legitimate interest in mind and does not effectively address any dog attack concerns, it does not survive rational basis scrutiny and is unconstitutional.

Therefore, the Ordinance should be invalidated as unconstitutional and Mr. Richardson's request for an injunction to prevent further enforcement of the Ordinance should be granted. In addition, Mr. Richardson is entitled to damages under 42 U.S.C. § 1983.

### **ARGUMENT**

I. Winthrop Municipal Code section 6.04.090 ("Ordinance") is unconstitutionally overbroad because it reaches a substantial amount of constitutionally protected property interests beyond the Ordinance's legitimate purpose.

A challenge of unconstitutional overbreadth is reviewed de novo. <u>U.S. v. Stansell</u>, 847 F.2d 609, 612 (9th Cir. 1988). The first step in overbreadth analysis is to construe the statute to determine whether it reaches a substantial amount of constitutionally protected conduct. <u>U.S. v. Williams</u>, 553 U.S. 285, 293 (2008).

The second step in overbreadth analysis is to determine if the enactment is substantially overbroad "judged in relation to the statute's plainly legitimate sweep." <u>Broadrick v. Oklahoma</u>,

413 U.S. 601, 615 (1973). The claimant must demonstrate that substantial overbreadth exists from the enactment's text and actual fact. <u>Virginia v. Hicks</u>, 539 U.S. 113, 122 (2003). Although substantial overbreadth cannot be "readily reduced to an exact definition," <u>City of Los Angeles v. Taxpayers for Vincent</u>, 466 U.S. 789, 800 (1984), it can be demonstrated by showing a significant number of instances where a law could be applied to prohibit constitutional rights. <u>Houston v. Hill</u>, 482 U.S. 451, 459 (1987).

The final step in overbreadth analysis is to determine if the enactment is overly broad in relation to the legislative goals. The court must determine the enactment's legislative purpose and whether the enactment should be invalidated to avoid unconstitutional applications. Vincent, at 800 n.19. If a statute is criminal in nature, less overbreadth will be deemed "constitutionally tolerable." Massachusetts v. Oakes, 491 U.S. 576, 595 (1989). Legitimate government purposes cannot be achieved through enactments that stifle personal liberties when the end can be more narrowly achieved. Shelton v. Tucker, 364 U.S. 479, 488 (1960). Therefore, if a statute could be more narrowly drawn to prevent infringing on constitutionally protected interests that are not within the scope of the legislature's purpose, the enactment should be invalidated as overly broad.

Property interests are specifically protected by the Fourteenth Amendment against any deprivation which does not meet due process standards. <u>Giacco v. Pennsylvania</u>, 382 U.S. 399, 402 (1966). The Supreme Court implicitly applied overbreadth analysis to protect property interests in <u>Hodel v. Irving</u>, 481 U.S. 704 (1987).

In <u>Hodel</u>, Congress had passed the Indian Land Conservation Act providing that no interest in Indian lands would descend by intestacy or devise and instead, such lands would escheat to the Tribe. <u>Id.</u> at 706-07. The Court recognized Congress's legitimate interest in

prohibiting the further fractionation of Indian lands. <u>Id.</u> at 712-13. The Court noted that Congress had the authority to regulate property in a manner that adversely affected property owners. <u>Id.</u> at 713. However, the Court found that the Act abrogated the right to pass property to one's heirs and was overbroad because it prohibited the passing of property even when it may result in the consolidation, rather than the fractionation, of Indian lands. <u>Id.</u> at 716. Thus, the Court concluded that the Act had "gone too far." <u>Id.</u> at 718. The Court reasoned that Congress's purpose could have been upheld if it had been more narrowly drawn. <u>Id.</u> However, as written, the Act was unconstitutional. <u>Id.</u> Therefore, the Court implicitly adopted the overbreadth analysis outside the realm of the First Amendment. <u>Id.</u> at 724 (Stevens, J., dissenting).

In the present case, the Ordinance should be invalidated because it is substantially overbroad in relation to the City's legitimate purpose. The Ordinance deprives dog owners like Mr. Richardson of their constitutionally protected property interests. The Ordinance also is substantially overbroad because, as written, it includes all dogs that are defined as pit bulls, regardless of their prior behavior. For instance, although Zoe had never exhibited any signs of aggression, the City classified her as a vicious dog simply because they believed she was a pit bull mix.

The Ordinance is further overly broad because the vague terms may also deprive other dog owners of their property although their dogs are not pit bulls or pit bull mixes. These owners may be subjected to the terms of the Ordinance merely because they own dogs that are commonly mistaken for pit bulls. There are approximately twenty-five breeds that are commonly mistaken for pit bulls. Safia Gray Hussain, Note, Attacking the Dog Bit Epidemic: Why Breed Specific Legislation Won't Solve the Dangerous-Dog Dilemma, 74 Fordham L. Rev. 2847, 2870 (2006). These include popular breeds such as the Labrador retriever and Rottweiler

among others. Pit Bulls on the Web, <u>Find the Pit Bull</u>, http://www.pitbullsontheweb.com/petbull/findpit.html (last accessed January 21, 2011). As written, the Ordinance may also apply to these breeds and mixes of these breeds. Thus, the Ordinance deprives pit bull type or mix dog owners and the dog owners of breeds commonly mistaken for pit bulls of their constitutionally protected property interests. In fact, there are relatively few instances where the Ordinance will be applied to reach the unlawful ownership of vicious dogs.

Finally, the City enacted a criminal ordinance that could have been more narrowly drawn to reach the goal of protecting the public from vicious dogs. The Ordinance is penal in nature because the court is relegated to the words of the ordinance itself and to the interpretations the court below has given to analogous statutes. Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). Although the District Court found that the Ordinance was civil in nature, (Mem. Op. at 7.), this was in error because the Massachusetts Supreme Court, in a similar case, found that a pit bull ban ordinance was criminal in nature because it imposed penalties and involved the forfeiture of property (the banishment of the dog). Am. Dog Owners Ass'n, Inc. v. City of Lynn, 404 Mass. 73, 78, 533 N.E.2d 642, 646 (Mass. 1989). Therefore, because the Ordinance is criminal in nature, less overbreadth can be tolerated. As written, the Ordinance imposes criminal sanctions on entirely lawful conduct. It ensures that a greater number of law-abiding dog owners will be subject to criminal sanctions and forfeit their docile pets.

To prevent this result, the City could have narrowed the Ordinance in a number of ways to address public safety concerns. The City could have adopted an ordinance that only prohibited the ownership of vicious dogs or imposed criminal liability on dog owners whose dogs are involved in attacks. Safia Gray Hussain, Note, <u>Attacking the Dog Bit Epidemic: Why</u>

Breed Specific Legislation Won't Solve the Dangerous-Dog Dilemma, 74 Fordham L. Rev. 2847, 2877 (2006). The City also could have drafted a potentially dangerous dog law where a dog would be deemed dangerous only after biting a human and causing minimal or no injury or severely injuring or killing a domestic animal while outside of the owner's property. Id. at 2878. These alternatives would adequately address the City's concern without depriving Winthrop citizens of their non-aggressive dogs – dogs like Zoe and Starla. Instead, the City condemned a friendly yet misunderstood breed based on stereotypes and fear. This cannot be permitted and the Ordinance should therefore be invalidated as unconstitutionally overbroad.

In contrast, the Supreme Court for the State of Washington held, in Am. Dog Owners Ass'n, Inc. v. City of Yakima, 113 Wash. 2d 213, 777 P.2d 1046 (Wash. 1989) (en banc), that the city's pit bull ordinance was constitutional even though friendly pit bulls would also be banned. Id. at 1048. The court relied on Sentell v. New Orleans & C. R. Co., 166 U.S. 698 (1897) for the premise that dogs are subject to police power and may be regulated by the government. Yakima, at 216, 777 P.2d at 1048. Therefore, the court determined that overbreadth did not apply because there is no constitutionally protected interest in dogs that is not subject to the government's police power. Id. The court stated that harmless pit bulls could be banned so other vicious pit bulls may also be prohibited. Id. The court also recognized that the ordinance may not stop all dog bites and that the city could address threats "piecemeal" so long as there was a rational basis for the decision. Id.

Nonetheless, <u>Yakima</u> is not applicable in the present case for several reasons. First, an ordinance such as the one at issue here is subject to overbreadth analysis because, as exhibited in <u>Hodel</u>, the Supreme Court does apply overbreadth analysis outside of the First Amendment. Although the Court stated in <u>Sabri v. U.S.</u>, 541 U.S. 600, 609-10 (2004), that overbreadth

analysis is limited to cases dealing with First Amendment rights, the right to travel, abortion, and legislation under Section Five of the Fourteenth Amendment, the Court's statement is inconsistent with its practices. The Court has implicitly recognized that other constitutional rights demand the same protection; therefore, the Court has applied the overbreadth analysis to invalidate enactments in cases concerning the right to property, the right to privacy, the right to vote, and the right to raise one's children. See Hodel v. Irving, 481 U.S. 704 (1987) (right to property); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to privacy); Louisiana v. U.S., 380 U.S. 145 (1965) (right to vote); Troxel v. Granville, 530 U.S. 57 (2000) (right to raise one's children). In fact, the Court implicitly applied overbreadth in these cases while explicitly stating in others that the overbreadth doctrine was inapplicable outside the First Amendment.

Second, the holding of <u>Sentell</u> is inapposite in the context of breed specific legislation. In <u>Sentell</u>, the Supreme Court was examining an ordinance that applied to all breeds. <u>Sentell</u>, 166 U.S. at 700. Furthermore, the <u>Sentell</u> ordinance required dogs to be licensed before an owner could claim damages when the dog was negligently killed. <u>Id.</u> at 695. The Court was not addressing a vicious dog ordinance and definitely not an ordinance basing its conclusion of viciousness on the breed of a dog.

Finally, although dogs are subject to the City's police power, this power is not boundless. Rather, the Fourteenth Amendment limits the legislature's power in regards to private property. Giacco v. Pennsylvania, 382 U.S. 399, 402 (1966). Health and welfare regulations must be consistent with due process, requiring that the regulation not be "unreasonable, arbitrary, or capricious" and have a "real and substantial relation to the object sought to be obtained." Nebbia v. New York, 291 U.S. 502, 510-11 (1934). In Yakima, the court found that pit bull bans have a

rational relation to the government's interest in public safety. <u>Id.</u> at 216, 777 P.2d at 1048. While the government in <u>Yakima</u> may have had a valid safety concern, the City of Winthrop does not. In <u>Yakima</u>, the city had experienced three unprovoked attacks by pit bulls only a few months prior to the enactment of the ordinance. <u>Id.</u> In the present case, the City has presented no information showing that pit bull attacks have ever been or are currently a problem in Winthrop. Furthermore, the Ordinance in its present form does not ensure that dog bites and attacks will decrease. Therefore, because the City cannot show a rational relation between the Ordinance and its legitimate purpose, the regulation of the dogs based on breed rather than aggressiveness is arbitrary and unreasonable.

Thus, the Ordinance should be invalidated because it is unconstitutionally overbroad.

## II. The Ordinance is unconstitutionally vague both as-applied to Mr. Richardson and on its face and thus should be invalidated.

A claim that an enactment is unconstitutionally vague is reviewed de novo. <u>U.S. v. Bohai</u>

Trading Co. Inc., 45 F.3d 577, 580 (1st Cir. 1995). When considering the vagueness of an enactment, there is a presumption that the enactment is valid. <u>U.S. v. Nat'l Dairy Prods. Corp.</u>, 372 U.S. 29, 32 (1963). A challenge for vagueness can be either an as-applied challenge or a facial challenge. An as-applied challenge is evaluated considering how it operates against a particular litigant and the facts of the instant case. <u>Parker v. Levy</u>, 417 U.S. 733, 757 (1974). The distinction between facial and as-applied constitutional challenges goes to the breadth of the remedy employed by the court, not what must be pleaded in a complaint. <u>Citizens United v. Fed. Election Comm'n</u>, 130 S. Ct. 876, 893 (2010).

To successfully challenge an enactment as unconstitutionally vague, the complaining party must show that the enactment fails to define an offense "(1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not

encourage arbitrary and discriminatory enforcement." <u>Kolender v. Lawson</u>, 461 U.S. 352, 357 (1983). Although the same facets raise concerns for both notice and enforcement, each element must be analyzed separately. <u>U.S. v. La Hue</u>, 261 F.3d 993, 1005 (10th Cir. 2001).

## A. The Ordinance fails to provide sufficient notice to Mr. Richardson or the citizens of Winthrop.

A citizen cannot be required to speculate as to what the state forbids at the peril of life, liberty, or property. <u>Lanzetta v. New Jersey</u>, 306 U.S. 451, 453 (1939). An enactment must provide a reasonable opportunity for a person of ordinary intelligence to know what is prohibited. <u>Grayned v. City of Rockford</u>, 408 U.S. 104, 108 (1972). An enactment fails to provide fair notice if it includes an indefinite standard that may vary based on the subjective beliefs of others.

Furthermore, if an ordinary person may be confused by the terms of an enactment and thus not understand its impact, the enactment fails to provide notice. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). In Papachristou, the Court concluded that a local vagrancy ordinance adopted from an old English law was vague because it provided no notice to citizens of what was prohibited. Id. The Court determined that an ordinary person may not understand the terms of the ordinance, including "common thief" and "vagabond." Id. at 162-63. The ordinance also made innocent acts such as night walking and visiting a bar unlawful. Id. The Court concluded that the ordinance had cast a net so large that it enabled police to catch even vaguely undesirable people although they had committed no offense. Id. at 166.

In the present case, the Ordinance is unconstitutionally vague because it fails to provide Mr. Richardson with any means of determining if his dogs were a "breed type or mixture." "Breed type or mixture" is just as vague as "common thief" because the City failed to provide any objective standards to determine how the terms are defined. Because the Ordinance

contains no objective standards, Mr. Richardson had no information to aid him in identifying if his dogs were a "breed type or mixture." In fact, Mr. Richardson attempted on two occasions to identify the breed of his dogs; however, both the rescue organization where he acquired the dogs and his veterinarian were unable to provide any information beyond "mixed breed." (Mem. Op. at 4.) Therefore, Mr. Richardson and other citizens of Winthrop have no way to discern which dogs are prohibited under the Ordinance and which dogs are permitted. Therefore, the Ordinance is vague for lack of notice.

In contrast, the Constitution does not require that legislation be precisely written to be enforced. Grayned, 408 U.S. at 110. Various lower courts have determined that pit bulls can be identified by dog owners through various sources outside the terms of enactments. See Vanater v. Vill. of South Point, 717 F. Supp. 1236, 1240 (S.D. Ohio 1989) (court determined that pit bulls can be identified by certain behavioral characteristics such as "grasping strength, climbing and hanging ability, weight pulling ability, history of frenzy . . . killing instinct, ability to be aggressive" and more); Hearn v. City of Overland Park, 244 Kan. 638, 643, 772 P.2d 758, 763 (Kan. 1989) (court held that pit bulls could be identified by physical characteristics such as a "short, squatty body with developed chest, shoulders and legs, a large flat head, muscular neck and a protruding jaw"); Colo. Dog Fanciers, Inc. v. City & County of Denver, 820 P.2d 644, 652 (Colo. 1991) (en banc) (court found that ordinary dog owners could look to American Kennel Club ("AKC") and United Kennel Club ("UKC") breed standards to aid in identifying whether dogs were pit bulls).

Nonetheless, these decisions are unpersuasive for various reasons. First, to survive a claim for vagueness, an enactment must provide sufficient notice that can be easily understood by people of ordinary intelligence. Breed standards cannot be easily understood by the ordinary

public. AKC and UKC judges have specialized knowledge and years of training in identifying dogs. In fact, AKC dog show judges must have at least twelve years experience in at least one breed, have produced at least four champions, attend various seminars on evaluating dogs, and pass an exam on canine anatomy and judging procedures. American Kennel Club, <u>Judging Approval Process: New Breeds</u>, http://www.akc.org/pdfs/pjdg02.pdf (last accessed January 21, 2011). Therefore, the breed standards cannot be applied by ordinary people with little to no formal training in dog breeds.

Finally, the physical characteristics and traits proposed by other courts and the breed standards are also too vague to provide sufficient notice to Mr. Richardson or Winthrop citizens. The breed standards offer little to no guidance because they are wrought with vague elements. For instance, the AKC's breed standard for an American Staffordshire Terrier states that the breed is a "well put-together dog," with a back "fairly short," "forelegs set rather wide apart," and a "tail short in comparison to size." American Kennel Club, Meet the Breeds: American Staffordshire Terrier, http://www.akc.org/breeds/american\_staffordshire\_terrier/ (emphasis added). Traits such as grasping strength, history of frenzy, and a short, squatty body are likewise vague and thus offer no assistance in identifying dogs prohibited by the Ordinance.

Furthermore, the lower court's contention that pit bulls are readily identifiable due to the common knowledge of the general public and media is incorrect. The common understanding of the term pit bull is another vague standard that supplies no notice to dog owners like Mr. Richardson. In fact, the Massachusetts Supreme Court invalidated an ordinance which defined pit bull using "common understanding and usage" of the term. Am. Dog Owners Ass'n, Inc. v. City of Lynn, 404 Mass. 73, 79; 533 N.E. 2d 642, 646 (Mass. 1989). The court concluded that this language left dog owners to guess at what dogs were prohibited. Id.

An ordinance that leaves definitions to common usage is too vague to supply ordinary citizens such as Mr. Richardson with notice as to what conduct is prohibited. The language of the Ordinance leaves identification of an ill-defined breed to the subjective, ad hoc determinations of unknown persons, who make decisions based on their personal biases. Such a subjective definition fails to provide any notice. Therefore, because the Ordinance failed to provide Mr. Richardson with notice that his dogs were prohibited and also fails to inform other Winthrop citizens of which dogs are subject to the ban, the Ordinance is unconstitutionally vague.

### B. The Ordinance encourages arbitrary and discriminatory enforcement.

The most important element of the vagueness doctrine is the requirement that the legislature provide minimal guidelines to prevent arbitrary enforcement. <u>Kolender v. Lawson</u>, 461 U.S. at 358. To avoid arbitrary and discriminatory enforcement of an enactment, it must provide explicit standards to guide those in charge of its enforcement. <u>Grayned</u>, 408 U.S. at 108. A vague law delegates law-making to police and judges, who in turn make subjective and ad hoc determinations on the reach of the enactment. <u>Id.</u> at 108-09. These subjective and ad hoc determinations invite personal bias. <u>Kolender</u>, 461 U.S. at 357-58. If full discretion is given to enforcement personnel, the legislature has left lawmaking to the "moment-to-moment judgment of the policeman on his beat." <u>Id.</u> at 359.

In <u>Smith v. Goguen</u>, the Court determined that the language of a statute prohibiting "contemptuous treatment" of the U.S. flag was void for vagueness. 415 U.S. 566, 578 (1974). The Court concluded that the language failed to specify any conduct, instead giving full discretion to law enforcement officials to define the term. <u>Id.</u> The Court concluded that such full discretion subjected Goguen to criminal liability under a "standard so indefinite that the

police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." Id.

Without guidelines or standards, the determination of what dogs are subject to the Ordinance is left to the subjective judgment of animal control officers. Furthermore, the lack of any language signifying the number of characteristics a dog must have before it is considered a mixed breed also grants too much discretion to animal control officers. The Ordinance fails to define which characteristics a dog must possess before being declared a pit bull variety and also fails to disclose whether a dog must have a majority of these characteristics or less to be deemed a mixed breed. In the present case, Mr. Richardson's dog Zoe was deemed to be a pit bull based on three vague characteristics: she was a muscular dog with a large head and a short coat. Because the Ordinance fails to identify any standards to guide animal control officers in its enforcement, these three characteristics alone were enough to give Zoe, a well-behaved dog classified as a mixed breed by two experts, a death sentence.

Furthermore, these three characteristics apply to a wide variety of dogs that are not targeted by the Ordinance. A glance through the AKC breed standards alone shows that these three characteristics apply to a number breeds of dogs, including popular breeds such as Bulldogs, Labrador Retrievers and Mastiffs. American Kennel Club, Meet the Breeds, http://www.akc.org/breeds/complete\_breed\_list.cfm (follow "Bulldog," or "Labrador Retriever," or "Mastiff" hyperlink) (last accessed January 21, 2011). Moreover, because the Ordinance leaves full discretion to the animal control officer enforcing its provisions, these dogs may also be banned based merely on the officer's biases, subjective beliefs, and inexperience. Such discretion is allowing animal control officers to change the Ordinance as they see fit and further deprive citizens of their property interests.

# C. The Ordinance is facially vague although it may be validly applied in a handful of cases because it is criminal in nature and substantially infringes the constitutionally protected interests of Winthrop citizens.

Generally facial vagueness challenges can only be upheld "if the enactment is impermissibly vague in all its applications." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982). However, this standard does not apply to statutes which are criminal in nature and infringe on protected activity, like the Ordinance at issue. When a law reaches a substantial amount of constitutionally protected conduct and imposes criminal penalties, the enactment may be invalidated even though it could have had a valid application. Kolender v. Lawson, 461 U.S. at 358 n.8. In Kolender, the Court found that the statute requiring "credible and reliable identification" to be presented to police upon request reached a substantial amount of constitutionally protected conduct – First Amendment liberties and the constitutional right to the freedom of movement. Id. at 358. Furthermore, the statute was criminal in nature. Id. Therefore, the Court held that the statute was facially vague. Id.

In contrast, the Court has stated that even if marginal applications exist in which a statute would infringe constitutional liberties, facial invalidation is not appropriate if the remainder covers a whole range of easily identifiable and proscribable conduct. Parker v. Levy, 417 U.S. 733, 760 (1974). In accordance with Hoffman and Parker, the Tenth Circuit, in Dias v. City & County of Denver, 567 F.3d 1169 (10th Cir. 2009), held that because the breeds specifically listed in the ordinance would be subject to its provisions, the ordinance was not vague in all of its applications and thus could not be invalidated as facially vague. Id. at 1180.

Nonetheless, the Ordinance should be invalidated as unconstitutionally vague on its face. In <u>Kolender</u>, which was decided one year after <u>Hoffman</u>, the Court stated that a less stringent analysis was utilized in <u>Parker</u> because it involved members of the military and a challenge to the

Uniform Code of Military Justice. <u>Kolender</u>, 461 U.S. at 358 n.8. The Court also concluded that <u>Hoffman</u> did not apply because it dealt with a business regulation and thus was also subject to a less strict vagueness test. <u>Id.</u> The Court invalidated the statute although it could be validly applied in some instances. <u>Id.</u> at 371-72 (White, J., dissenting).

The Supreme Court has also stated that facial challenges require that "no set of circumstances" exist where the enactment could be constitutionally applied. <u>U.S. v. Salerno</u>, 481 U.S. 739, 745 (1987). However, the Supreme Court stated that the "no set of circumstances" language in <u>Salerno</u> is merely dicta and not followed by the Court. <u>City of Chicago v. Morales</u>, 527 U.S. 41, 54 n.22 (1999). Thus, in <u>Morales</u>, the Court determined that an anti-loitering statute was facially unconstitutional because it was a criminal law, it contained no mens rea requirement, and it infringed on constitutionally protected rights. <u>Id.</u> at 55. Because of the Court's inability to specify which test is preferred, the Second Circuit has adopted the language of <u>Morales</u> in facial vagueness claims. <u>U.S. v. Rybicki</u>, 354 F.3d 124, 131 (2nd Cir. 2003). Similarly, the District Court of Massachusetts has also declined using the "no set of circumstances" test in facial challenges. <u>U.S. v. Sampson</u>, 275 F. Supp. 2d 49, 58 (D. Mass. 2003). This court must do the same.

In the present case, the Ordinance is facially vague because it is a criminal statute that infringes upon a substantial amount of constitutionally protected conduct. As discussed above, the Ordinance substantially deprives dog owners of their property interests. The Ordinance is vague because this deprivation extends beyond the owners of pit bulls and includes owners of dogs that are commonly mistaken for pit bulls. Furthermore, the Ordinance is permeated with vagueness. The vague terms of the Ordinance fail to provide the citizens of Winthrop with notice as to which dogs are prohibited and allows animal control officers to arbitrarily pick and

choose which dogs will be prohibited on an ad hoc basis. Therefore, the Ordinance should be invalidated as unconstitutionally vague on its face.

## III. The City of Winthrop implicated Mr. Richardson's substantive due process rights by destroying his dog, Zoe.

### A. Mr. Richardson had a significant property interest in his dog.

A federal appellate court should decide a substantive due process claim under a de novo standard where the state court below did not judge the claim on its merits. <u>Dutil v. Murphy</u>, 550 F.3d 154, 160 (1st Cir. 2008).

As early as 1897, the United States Supreme Court recognized that persons hold property interests in their dogs. Sentell v. New Orleans & C.R. Co., 166 U.S. 688. Although at Massachusetts common law, persons do not have an absolute property interest in their dogs, they possess a qualified interest. If their dog is injured or killed, they have the right to maintain an action against the alleged tortfeasor. Baer v. Tyler, 261 Mass. 138, 139-140, 158 N.E. 536, 536 (Mass. 1927).

Furthermore, laws in derogation of property interests, such as ones permitting the destruction of a person's dogs, must be narrowly construed. <u>Id.</u> at 140, 158 N.E. at 537 (citing <u>Commonwealth v. Beck</u>, 187 Mass. 15, 72 N.E. 356 (Mass. 1904).

## B. Substantive Due Process analysis applies to the destruction of Mr. Richardson's dog, Zoe.

The constitutional protections enshrined in the substantive due process doctrine are designed to protect persons "against arbitrary action of government." <u>City of Sacramento v. Lewis</u>, 523 U.S. 833, 845 (1998). If a statute violates a fundamental right which is "'deeply rooted in this Nation's history and tradition,' " that statute must be shown to be narrowly tailored to achieve a compelling governmental interest. <u>Washington v. Glucksberg</u>, 521 U.S. 702, 721

(1997). On the other hand, if the interest asserted is not fundamental, the statute must only survive rational basis scrutiny. By this, the statute must only be rationally related to a legitimate government interest. Reno v. Flores, 507 U.S. 292, 305 (1993).

### C. The Court should apply rational basis scrutiny.

In this case, there is government action because the City of Winthrop passed an ordinance prohibiting the ownership of pit bull terriers. Not only did the City of Winthrop pass the ordinance, it also enforced its provisions against Mr. Richardson by seizing and destroying his dog, Zoe. The City of Winthrop, by destroying his dog, Zoe, clearly destroyed his property interest in her. Because there is a government action which infringed on Mr. Richardson's property interests, the doctrine of substantive due process applies.

### IV. The Ordinance does not survive rational basis scrutiny.

### A. The City did not have a legitimate interest with which to enact the statute.

The City enacted the ordinance at issue in 1988. Yet the record only shows that one dog, Mr. Richardson's dog, has been subjected to the ordinance. Apparently twenty-one years passed between the passage of the ordinance and its first usage. The City asserts its police power to provide for public safety through animal control. Mem. Op. at 11-12. However, the City has not presented any evidence to show that pit bulls are dangerous, that pit bulls in the City of Winthrop are dangerous, or that Mr. Richardson's dogs are dangerous. Nor has it shown that dog attacks are a problem within the city limits or the surrounding area.

Generally cities have a legitimate interest in protecting against vicious creatures. Nevertheless, courts have upheld pit bull bans only after finding that the municipalities had valid reasons for enacting such bans. The reasons are typically that pit bulls had attacked people and caused serious injuries, or, after hearing of pit bull attacks, experts testified to the dangers of pit

bulls. See Dog Fed'n of Wisc. V. City of S. Milwaukee, 178 Wis. 2d 353, 367, 504 N.W.2d 375, 381 (Wis. App. 1993) (where the city council examined multiple reports, including one from the Wisconsin Humane Society); Am. Dog Owners Ass'n v. Dade County, 728 F. Supp. 1533, 1535 (S.D. Fla. 1989) (where the Ordinance's preamble set forth the factual findings relating to pit bulls and to which the dog owners did not object); Hearn v. City of Overland Park, 244 Kan. 638, 772 P.2d 758 (Kan. 1989) (expert testimony at trial indicated the vicious tendencies of pit bull dogs); Am. Dog Owners Ass'n v. City of Yakima, 113 Wash. 2d 213, 214 777 P.2d 1046, 1047 (Wash. 1989) (en banc) (city enacted pit bull ban after three attacks on citizens by pit bulls).

In <u>Garcia v. Vill. of Tijeras</u>, 108 N.M. 116, 117, 767 P.2d 355, 356 (N.M. 1988), city residents and their animals were repeatedly attacked by pit bull terriers. Eighteen out of eighty households within city limits possessed at least one pit bull. <u>Id.</u> The Village enacted an ordinance prohibiting pit bull ownership two months after a nine year-old girl was attacked and severely mauled by a pit bull terrier. <u>Id.</u>

In <u>Vanater v. Vill. of South Point</u>, 717 F. Supp. 1236, 1239 (S.D. Oh. 1989) the municipality enacted an ordinance which prohibited "'pit bull terriers' " or "'any other type of vicious dog' " within the city limits. <u>Id.</u> The year before the ordinance was enacted, village officials received complaints about pit bulls in South Point. Investigation revealed that several pit bulls resided in South Point. <u>Id.</u> at 1239-1240. When persons in two nearby towns, both within a ten-mile radius of South Point, were attacked, South Point enacted the ordinance. Id. At 1239.

Whereas in all the cases cited above, the City did not show that it suffered from pit bull attacks, that multiple pit bull terriers resided within city limits and threatened citizens, that nearby towns experienced vicious bouts with pit bulls, or even that pit bull terriers themselves

are inherently dangerous. Furthermore, it has not shown that the City has enforced the statute, besides the confines of this case, in the twenty-one years since the ordinance was enacted. Because the City cannot show that it had a legitimate government interest in enacting and enforcing the ordinance, the ordinance does not survive rational basis scrutiny.

## B. The Ordinance does not bear a rational relationship to its asserted interest because the Ordinance does not prevent dog bites or attacks.

Even if the City of Winthrop had a rational basis with which to enact the Ordinance, it has not shown that the Ordinance effectively protects the public. The record does not show that any other pit bull dogs, besides Mr. Richardson's Zoe, have been banned, seized, or destroyed pursuant to the statute. Nor does the record support any contention that the Ordinance has reduced the number of dog attacks in Winthrop in its twenty-one year history.

Furthermore, breed-specific legislation, such as the Ordinance at issue, does not effectively prevent dog attacks or get rid of dangerous dogs. First, pit bull terriers are not more dangerous than other breeds of dogs. Secondly, pet owners may still raise dogs, regardless of breed, to become aggressive, vicious, and prone to attacking others.

This Court should take the Illinois approach and not "malign a breed of dogs on the basis of rumor and hysteria." <u>Illinois v. Riddle</u>, 258 Ill. App. 3d 252, 260, 630 N.E.2d 141, 146 (Ill. App. 1994). The Court should require that municipalities and their agents prove that individual dogs are dangerous.

The Humane Society of the United States and the National Animal Control Association oppose breed-specific legislation. The National Animal Control Association opposes breed-specific legislation for three reasons: (1) any dog can become aggressive, regardless of breed; (2) it can be extremely difficult to accurately pinpoint a dog's breed; and (3) breed-specific

legislation unfairly targets otherwise responsible pet owners and well-behaved dogs. The Humane Society of the United States. *Dangerous Dogs and Breed-Specific Legislation*, http://humanesociety.org/animals/dogs/facts/statement\_dangerous\_dogs\_breed\_specific\_legislation.html (last accessed February 10, 2010). The Humane Society of the United States reports that community leaders, upon learning the research, realize that breed-specific legislation does not solve the problem of dog attacks. <u>Id.</u>

The American Veterinary Medical Association ("AVMA") studied legislation intended to prevent dog attacks. The AVMA, in 2000, released a special report discussing its research and findings regarding fatal attacks on humans by dogs. J. Sacks, et al. *Special Report: Breeds of Dogs Involved in Fatal Human Attacks in the United States Between 1979 and 1998.* J. Am. Veterinary Assoc. Vol. 217, No. 6 (September 15, 2000).

It found that although some breeds may exhibit more violent propensities than others, all dogs may be or become aggressive and violent. Even breeds that seem to cause a large proportion of dog bites may not actually prove to be a large threat because they may not be a large percentage of the dog population in a given area. <u>Id.</u> Furthermore, which breeds attack most varies over time. At various points between 1979 and 1998, Rottweilers and Great Danes caused the majority of fatal dog attacks. <u>Id.</u> Lastly, courts have had difficulty since <u>Sentell</u> days in separating one type of breed from another. <u>Sentell</u>, 166 U.S. at 701.

Perhaps most importantly, any dog can become aggressive. Aggression stems from a variety of factors, "including a genetic predisposition towards aggression, lack of early socialization with people, specific training to fight, the quality of care provided by the owner, and the behavior of the victim." Zuniga v. San Mateo Dept. Of Health Serv., 218 Cal. App. 3d 1521, 1533, 267 Cal. Rptr. 755, 761 (Cal. App. 1990). Therefore, a well-trained dog "may

present little or no danger," "whereas an animal with little innate tendency to bite may become dangerous if improperly trained, socialized, supervised, treated, or provoked." <u>Id.</u>

### C. The Ordinance is unconstitutional because it is both underinclusive and over-inclusive.

Breed specific legislation which only targets a few breeds does not prevent dog owners from acquiring dogs which may be dangerous. Owners may simply acquire other breeds they believe are dangerous or acquire different dogs which they raise to become vicious or dangerous. The Ordinance only targets pit bulls and does not address other breeds of dogs which could also potentially become dangerous. Similarly, the ordinance targets all pit bull terriers, regardless of their individual behavioral predispositions and their actions towards humans and other animals. Because the ordinance is both under-inclusive and over-inclusive, it is unconstitutional and violates the doctrine of substantive due process.

## D. Non-breed-specific legislation would be more effective at reducing dog attacks on humans.

First, the City of Winthrop could enact (or enforce any existing) ordinances relating to restraining dogs while not on enclosed property to help prevent dog attacks. Second, could also institute or encourage educational programs designed to help pet owners be responsible stewards of their dogs. Last, it could strictly enforce the dangerous dog provision of the statute at issue. By removing individual dogs that are proven to be dangerous, the City could best protect its citizens.

#### CONCLUSION

A legislative enactment must comply with the due process requirements of the Fourteenth Amendment to be constitutional. The Ordinance fails to do so for various reasons. First, the Ordinance is overbroad because it reaches a substantial amount of constitutionally protected

conduct in relation to its legitimate goal. The Ordinance subjects docile dogs and dogs mistaken for pit bulls to the ban. The City failed to narrowly tailor the Ordinance to reach its goals.

Second, the Ordinance is unconstitutionally vague both on its face and as-applied to Mr. Richardson. The Ordinance fails to provide dog owners like Mr. Richardson with any notice as to which dogs are prohibited. The Ordinance also fails to provide any guidelines to aid animal control officers and ensure against arbitrary and subjective enforcement. As written, the Ordinance can be utilized to prohibit not only pit bull varieties and mixes but also various other breeds that are commonly mistaken as pit bull mixes. Because the Ordinance imposes criminal sanctions and, due to its vagueness, reaches a substantial amount of constitutionally protected interests, it is unconstitutionally vague on its face even though it may be validly applied in limited instances.

Third, the Ordinance violates the Substantive Due Process doctrine because it is not rationally related to a legitimate government interest. Without any evidence of dog attacks, especially by pit bull terriers or pit bull terrier mixes, in the twenty-one year history of the Ordinance, the City cannot show that the Ordinance bears a rational relationship to the goal of reducing dog attacks. Furthermore, the City cannot show that the Ordinance effectively reduces the number of attacks by pit bulls, or even the risk of attack. Without a rational relationship to preserving public safety, the Ordinance is arbitrary and unconstitutional.

Therefore, the Ordinance should be invalidated as unconstitutional and Mr. Richardson's request for an injunction to prevent further enforcement of the Ordinance should be granted. In addition, Mr. Richardson is entitled to damages under 42 U.S.C. § 1983.

Respectfully Submitted,

Team No. 6

Civil Action No. 10cv00416

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## In the United States Court of Appeals For the First Circuit

Quinton Richardson,

Appellant,

v.

City of Winthrop, Massachusetts,

Appellee.

### Certificate of Service

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We, Team No. 6, do hereby certify that a true copy of the foregoing *Brief for Appellant*, *Quinton Richardson*, was delivered on Opposing Counsel via e-mail to lhandzel@lclark.edu and a true copy of the same was deposited with the Clerk of Court at the address of Center for Animal Law Studies, Lewis & Clark Law School, 10015 S.W. Terwilliger Blvd., Portland, OR 97219 on this the 24<sup>th</sup> day of January, 2011.

Team No. 6