No. 10cv00416

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

QUINTON RICHARDSON, Plaintiff/Appellant,
v.
CITY OF WINTHROP, MASSACHUSETTS, Defendant/Appellee

Appeal of the grant of summary judgment to the Defendant/Appellee granted by the United States District Court for the District of Massachusetts

Brief for Appellant

TEAM NUMBER 7

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ISSUES PRESENTED

I. Did the lower court err by ruling that Winthrop Municipal Code section 6.04.090, designating all "'pit bull' variety of terrier" as per se vicious and thus banning them, was not impermissibly vague in all of its applications and thus violated the procedural due process clause of the Fourteenth Amendment?

II. Did the lower court err by ruling that Winthrop Municipal Code section 6.04.090 was not unconstitutionally vague on an as applied basis under the Fourteenth Amendment to the U.S. Constitution?

III. Did the lower court err by concluding there are no genuine issues of material fact, despite conflicting evidence and uninformed stereotypes about the inherent public safety threat presented by a vague category of dogs, as to whether Winthrop Municipal Code section 6.04.090 violated the substantive due process clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

In 2005, Quinton Richardson, plaintiff/appellant, adopted two adorable puppies from a local rescue organization. *Richardson v. City of Winthrop*, No. 10cv00416, at 1 (D. Mass. Aug. 28, 2010). He later named them Zoe and Starla. *Id.* The rescue organization believed them to be littermates and told Richardson that they were found as strays in a local park. *Id.* Only their ideal disposition was known; nothing was known of their heritage. *Id.*

From the moment he met Starla and Zoe in the shelter, he was taken with their adorable appearances, playful nature, and affection. *Id.* Both proved to be ideal additions to Richardson's family. *Id.* Both were friendly around strangers and were fond of children. *Id.* The evidence reveals absolutely no indication that Starla and Zoe are anything other than friendly and well socialized. *Id.* There have been no complaints about their behavior. *Id.*

Sadly, despite their ideal disposition, the City of Winthrop, Massachusetts, killed Zoe and threatens to kill Starla based solely on their appearance. *Id.* at 5-6. In 1988, the City enacted Ordinance 06-04-090, which bans vicious dogs from the City. *Id.* at 5. The Ordinance defines two categories of "vicious dogs." Winthrop, Mass., Municipal Ordinance § 6.04.090 (1988). First, those that have actually shown themselves to be vicious by, for example, attacking a person without reasonable provocation. Second, those that are "'pit bull' variety of terrier. *Id.*

In August 2009, a meter reader saw Zoe inside Richardson's home and reported her as a "pit bull." *Richardson*, at 5. In accordance with the Ordinance, a hearing was held at with Zoe was determined to be a "'pit bull' terrier type dog" and, therefore, "vicious." *Id.* She was killed by lethal injection four months later. *Id.* Starla has not been taken, but Richardson lives in fear that she too will be taken from his home and killed. *Id.* at 5-6.

To save Starla's life and ensure she does not meet the same fate as her sister, Richardson filed this lawsuit in the United States District Court for the District of Massachusetts alleging that the Winthrop Ordiance violates the Fourteenth Amendment to the United States Constitution because it is (1) unconstitutionally vague on its face and as applied and (2) it deprives him of substantive due process. *Id.* at 6. The District Court entered summary judgment in favor of the City of Winthrop on both grounds. *Id.* at 2. This timely appeal followed, seeking reversal of that summary judgment and remand to the District Court for the case to proceed to the factfinder.

SUMMARY OF THE ARGUMENT

This Court should reverse the District Court's grant of summary judgment to the defendant/appellee because there are genuine issues of material fact as to whether or not Winthrop Ordinance § 6.04.090 is unconstitutional under the Fourteenth Amendment to the United States Constitution. First, the Ordinance is impermissibly vague both facially and as applied. The ordinance fails to adequately place affected parties on notice of prohibited conduct and employed arbitrary definitions to the appellant. Alternatively or additionally, the Ordinance violates substantive due process because the ordinance is not rationally related to a legitimate government interest. While the City has an interest in public safety, both of these issues present genuine issues of material fact that should be presented to the fact finder; summary judgment was inappropriate in this case.

ARGUMENT

Standard of Review

Summary judgment is reviewed de novo. *Plumley v. S. Container, Inc.*, 303 F.3d 364, 369 (1st Cir. 2002); *Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49, 53 (1st Cir. 2000). Summary judgment is only appropriate where evidence shows the absence of a genuine issue of material fact. Fed. R. Civ. P. 56(c). The burden is on the non-moving party and all inferences are to be drawn in favor of the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

I. The Winthrop Municipal Code section 6.04.090, designating all "'pit bull' variety of terrier" as per se vicious and thus banning them, is unconstitutionally vague on its face

under the Fourteenth Amendment to the U.S. Constitution; therefore, the district court erred in ruling it constitutional.

The Ordinance is unconstitutionally vague on its face in violation of the Fourteenth Amendment. A law that is imprecisely defined is void for vagueness because a person of ordinary intelligence does not have fair notice of what conduct is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Laws must allow a person of ordinary intelligence to have a reasonable opportunity to know what is and is not prohibited, so that the person may avoid the conduct. *Id.* Furthermore, the vagueness doctrine is not limited to criminal statutes; the Fourteenth Amendment protects against any state deprivation of property without due process of law. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 47 (1991) (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966)).

Massachusetts' highest court has examined the constitutionality of a civil statute banning pit bulls. *See Am. Dog Owners Ass'n, Inc. v. City of Lynn*, 404 Mass. 73, 533 N.E.2d 642 (Mass. 1989) ("American Dog Owners"). In *American Dog Owners*, the civil ordinance at issue restricted the presence of pit bulls, defined as the "'American Staffordshire, Staffordshire Pit Bull Terrier, Bull Terrier or any mixture thereof.'" *Id.* at 75, 533 N.E.2d 642. Despite the terminology, law enforcement employed no objective criteria in determining the breeds. *Id.*, 533 N.E.2d 642. A later revision of the ordinance, however, removed all references to any particular breed and instead relied on the "'common understanding and usage' of the term 'Pit Bull.'" *Id.* at 79, 533 N.E.2d 642. In both versions, banishment of the dog was a possible penalty. *Id.*

The court rationalized that, although the ordinance was civil and not criminal, it was nevertheless subject to the scrutiny of the vagueness doctrine. *Id.* (quoting *Custody of a Minor (No. 2)*, 378 Mass. 712, 717, 393 N.E.2d 379 (1979). The banishment of a dog is a forfeiture of

property, and this court has noted the punitive nature of such forfeiture. *Collatos v. Boston Retirement Bd.*, 396 Mass. 684, 686, 488 N.E.2d 401 (Mass. 1986) (citing *Commonwealth v. One 1972 Chevrolet Van*, 385 Mass. 198, 201, 431 N.E.2d 209 (Mass. 1982)). This court has further noted that statutes that seek to protect society from injury are commonly viewed as punitive. *Id.* (citing *Sackett v. Sackett*, 8 Pick. 309, 319, 1829 WL 1865 (Mass. 1829)).

Therefore, the court scrutinized the law for vagueness and evaluated whether the statute gave fair notice of the prohibited conduct. *American Dog Owners*, 404 Mass. 73, 79, 533 N.E.2d 642. The court reasoned that both versions of the ordinance were so indefinite as to fail to meet due process requirements. *Id.* at 79-80, 533 N.E.2d 642. The previous version of the Linn pit bull ban, which broadly listed breed names and included any mixture thereof, failed to provide ascertainable standards sufficient to apply the law and was therefore impermissibly vague. *Id.*, 533 N.E.2d 642. Moreover, the revision that relied only on an assumed common understanding of the term "pit bull" did not provide a clearer understanding of what type of dog the law prohibited. *Id.*, 533 N.E.2d 642. Under both versions, the ordinance did not adequately provide dog owners with fair notice of which specific types of dogs it prohibited. *Id.*, 533 N.E.2d 642.

The Winthrop Ordinance is impermissibly vague because it does not give fair notice of the prohibited conduct. The civil Ordinance labels as vicious, and banishes, any breed belonging to the "'pit bull' variety of terrier." Muni. Code § 6.04.090.B.1(c), B(2). A pit bull variety of terrier is defined as "American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier" breeds, breed types, or mixtures. *Id.* § B.1(c). The Ordinance does not provide any description of the characteristics of the "pit bull variety of terrier."

Like the ordinance in *American Dog Owners*, which also restricted any American Staffordshire, Staffordshire Pit Bull Terrier, Bull Terrier or any mixture thereof, the Winthrop

Ordinance lacks ascertainable standards. The Ordinance provides no specific criteria with which to determine that a dog qualifies as a banned type: Mr. Richardson's dog Zoe was evaluated using unknown standards, without any blood test to determine her lineage. Memo. Op. at 5. Similarly, the ordinance in *American Dog Owners* contains no criteria with which to determine that a dog qualifies as one of its banned types.

Additionally, the Ordinance is civil in nature, but it involves forfeiture of property as a penalty; law enforcement officials seized Zoe from Mr. Richardson and euthanized her after she was labeled a "pit bull terrier type," therefore a per se vicious, dog. *Id.* Likewise, the *American Dog Owners* ordinance was civil in nature, but it involved forfeiture of property as a penalty in order to restrict dogs deemed a threat to society.

The Defendant/Appellee may argue that the types of dogs listed under § 6.04.090.B.1(c) are so widely known that description is unnecessary; however, identifying pit bull mixes is highly problematic. One commentator has argued that the accuracy of identifying these dogs has persisted to be a problem because the size, ear shape, and coat coloration varies widely among pit bulls and their mixes. Kristen E. Swann, *Irrationality Unleashed: The Pitfalls of Breed-Specific Legislation*, 78 UMKC L. REV. 839, 854 (2010). Furthermore, "[o]ther breeds share some of the hallmark features of pit-bull-type dogs: a broad skull, prominent cheek muscles, and a short muzzle; a compact, muscular body with well-sprung ribs; or a smooth, close coat." *Id.*

Complicating the analysis of the Ordinance is that it mentions breed types with no reference to well-known dog-breed registries, such as the AKC or the UKC. However, even if the Ordinance did provide such information, its readers would still be confounded by the absence of any explanation as to the level of conformity a dog must have to be classified as per se vicious under § 6.04.090.B.1(c).

A law is unconstitutionally vague if its terms are so indefinite as not to give fair notice to persons of ordinary intelligence. Without proper notice, or procedural due process, such persons have to guess at which conduct is illegal. While the Ordinance is of a civil nature, it results in consequences that are of a penal nature: property forfeiture for the alleged protection of society. As such, the Ordinance merits scrutiny under the vagueness doctrine. Since the Ordinance fails to provide ascertainable standards with which to categorize and evaluate the prohibited dog types, the Ordinance is impermissibly vague.

II. The Winthrop Municipal Code section 6.04.090, designating all "'pit bull' variety of terrier" as per se vicious and thus banning them, is also unconstitutionally vague as applied to Mr. Richardson under the Fourteenth Amendment to the U.S. Constitution.

The vagueness doctrine necessitates a legislature give not only proper notice, but reasonably clear guidelines, which prevent law enforcement and triers of fact from overreaching the statute's scope and enforcing it in an arbitrary and discriminatory fashion. *Smith v. Goguen*, 415 U.S. 566, 572-73. Where the language of a statute allows unknown persons to make subjective determinations based on unknown standards, a reader of ordinary intelligence is left confused about its scope and grants impermissibly broad discretion to its enforcers. *Am. Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416 (Iowa 1991) ("Dog Owners Association").

In *Dog Owners Association*, the highest court in the State of Iowa examined the constitutionality of a breed-specific ban. *Id.* The ordinance at issue defined a "vicious dog" to include, inter alia:

(vi) Staffordshire terrier breed of dog; or

(vii) The American pit bull terrier breed of dog; or

(viii) The American Staffordshire terrier breed of dog; or

(ix) Dogs 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

(x) Any 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.

Id. at 417 (emphasis added).

In determining if the ordinance survived scrutiny under the void-for-vagueness doctrine, the court separated the statute into two parts. *Id.* at 418. The court reasoned that those subsections that listed specific breeds, that is, subsections (vi)-(vii) and the first clause of subsection (x), withstood the vagueness challenge because they provided reasonably objective standards against which to compare a dog. *Id.*

However, the *Dog Owners Association* court distinguished subsection (ix) and the latter clause of subsection (x) as fatally vague because they granted improperly broad discretion to enforcement officers, risking "ad hoc and subjective" assessments. *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)). The court reasoned that qualifying those two subsections with the phrase "is known" and "commonly known" introduces an impermissibly vague terminology. *Id.* Under subsection (ix) and the second clause of (x), the standards by which dogs are categorized as pit bull-type dogs are unknown, and the persons assigning that terminology are unknown. *Id.* Those subsections risked arbitrary and discriminatory enforcement, therefore the court struck the impermissibly vague sections from the statute. *Id.* at 418.

Enforcement officers, based on the judgment of an animal control officer, arbitrarily and discriminatorily applied its terms when they ended Zoe's life. However, Mr. Richardson rescued Zoe and Starla at an age they were likely demonstrating few breed characteristics, and when they did reach such an age, their veterinarian classified them as "mixed-breed." Mem. Op. at 4. Therefore, Mr. Richardson had no reason to believe that either of his well-behaved, well-socialized dogs fell into the prohibited categories of the Ordinance. While the Defendant/Appellee may argue that Zoe and Starla share traits in common with pit-bull-type dogs, such an argument would be misleading; many different breeds, which are distinct from pit-bull-type dogs, share physical characteristics with them and therefore confuse the classification.[1]

The Ordinance that condemned Zoe permitted an animal control officer to categorize her broadly as a "pit bull terrier." Mem. Op. at 5. A "pit bull terrier" is not a recognized breed by either the UKC or the AKC, the two largest dog-breed registries. Mem. Op. at 8. The fatally vague elements of the statute in *Dog Owners Association* presented classifications with no objective basis. Categorizing dogs as "known" or as "commonly known" to be pit-bull-type dogs, without any standard guidelines, threatened arbitrary and discriminatory enforcement. Likewise, the Ordinance at issue here categorizes any dog as a pit-bull-type dog, if they are "commonly referred" to as belonging to the group. However, the first two "breeds" listed in this group are inconsistently recognized by dog-breed registries, and the third, "pit bull terrier" is not

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[1] Mid-America Bully Breed Rescue, *Another Reason Why BSL Doesn't Work: Which One Is the American Pit Bull Terrier?*, http://www.mabbr.org/legislation4.html (last visited Jan. 24, 2011). This website displays a chart depicting twenty-four breeds distinct from the "pit-bull variety of terrier;" however, these breeds are commonly mistaken for pit-bull-type dogs due to their similar coat patterns and large heads.

a recognized breed at all. Such vague language invites, as the *Dog Owners Association* statute did, ad hoc and subjective assessments.

III. The district court erred in granting summary judgment as there are genuine issues of material fact as to whether all "pit bull' variety of terrier" are per se vicious.

Because of conflicting evidentiary information and stereotypes, there are genuine issues of material fact regarding whether "pit bulls" are vicious. This evidentiary question should have been presented to a trier of fact and not resolved on summary judgment. As a result, reversal of the district court's opinion is required.

Substantive due process requires that legislation advance a legitimate government interest in a manner appropriately tied to that interest. Whether the manner is "appropriately tied" is determined by the level of review, which is determined by whether or not a fundamental right is at issue. The district court held Richardson's fundamental rights were not implicated by either his property or privacy interests.[2] Memo. Op. at 12. Therefore, Ordinance 6.04.090 is subject to rationality review.

Under rationality review, the appropriate inquiry is whether the means (i.e., ordinance) is rationally related to a legitimate government interests. While the government enjoys great deference under rationality review, the means must be shown to be rationally related to the ends sought. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). This means that there must be a showing of a "'reasonable fit' between government purpose . . . and the means chosen to advance that purpose." *Reno v. Flores*, 507 U.S. 292, 305 (1993).

Appellant does not deny that the City has an interest in public safety, including animal control. *See Sentel v. New Orleans & Carrollton R.R.*, 166 U.S. 698, 704 (1897); *Dias v. City*

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[2] If helpful to the Court, the Appellant is prepared to submit additional briefing or present during arguments that a fundamental interest is implicated.

and County of Denver, 567 F.3d 1169, 1183 (10th Cir. 2009) ("It is uncontested that Denver has a legitimate interest in animal control—the protection of health and safety of the public."). The appellant only argues that the Ordinance as drafted does not bear a rational relationship to the City's legitimate interest in animal control. Instead, the Ordinance is based on conflicting factual information and flawed stereotypes. Because of this conflicting information, there are genuine issues of material fact regarding whether or not such dogs are per se vicious. Therefore, the lower court erred by disposing of this substantive due process question on summary judgment.

While the lower court was correct that, previously, many courts have held that there was a rational relationship between breed specific legislation and a legitimate government interest in public safety, most of those decisions occurred years ago and were based on scientific evidence now known to be inaccurate or misleading. That other courts have found pit bulls to be per se vicious or dangerous cannot be used to show that indeed such dogs are vicious. They can take judicial notice of "another court's order" for the judicial act, but not for the "truth of the matters asserted therein." See 257 F3d 1262, 1283 (11th Cir. 2001) and 453 F.3d 1244 (10th Cir. 2006).

In *Dias*, the District Court for the District of Colorado was faced with a similar situation, a motion for summary judgment on the question of a substantive due process violation stemming from the City of Denver's breed restrictive legislation involving a similarly vague category of "pit bulls." *Dias v. City & County of Denver*, No. 07-cv-00722-WDM-MJW, 2010 WL 3873004, at *1 (D. Colo. Sept. 29, 2010); *see also Dias v. City & County of Denver*, 567 F.3d 1169 (10th Cir. 2009). The court explicitly found that, given the conflicting evidence presented by the parties, the question should be presented to the trier of fact. "With this record, a reasonable trier of fact may find that the plaintiffs' experts are correct and there exists no rational basis for a breed specific ordinance. Accordingly, summary judgment would be inappropriate."

Dias, 2010 WL 3873004, at *7. Some other courts, largely in dated opinions, have rejected similar substantive due process challenges to similar breed-restrictive legislation. As noted by the Tenth Circuit, such legislation may have been rationally related to the ends when enacted, but the science has changed substantially in recent years. *Dias*, 567 F.3d at 1183. Given the changing body of science, a rational jury could find for the appellant and, therefore, there are genuine issues of material fact and summary judgment is inappropriate.

There are genuine issues of material fact as to whether there is rational basis between the legitimate government interest of public safety and the means employed in Ordinance 6.04.090. There is simply not a reasonable fit between the interest in public safety and the unreasonable conclusion that all pit bulls and like dogs are per se dangerous and vicious. As a result, the question of a legitimate government interest should be presented to the trier of fact and not resolved on summary judgment.

For example, there is conflicting evidence about what threat, if any, pit bulls and similar dogs actually pose to public safety. As presented to the lower court, numerous professional organizations oppose breed-specific legislation. In particular, the National Animal Control Association, see http://www.nacanet.org/guidelines.html, the American Veterinary Medical Association, see http://avma.org/issues/policy/dangerous_animal_legislation.asp, and the Humane Society of the United States, see http://www.humanesociety.org/animals/dogs/facts/statement_dangerous_dogs_breed_specific_legislation.html, oppose such legislation in part because of the inaccuracy of classifying certain dog breeds as per se dangerous.

Simply, there is insufficient evidence to establish that, as a matter of law, pit bulls are a per se threat to the health and safety of the city. Because of contradictory evidence currently

available, a reasonable trier of fact could find that the Ordinance is not rationally related to the means. This case is analogous to the situation presented by the Denver breed-restrictive legislation, where courts found that conflicting evidence about the alleged inherent threat posed by certain groups of dogs and that such evidence should be presented to a factfinder and not disposed of on summary judgment. Therefore, there is a genuine issue of material and it was inappropriate for the district court to dispose of this substantive due process issue on summary judgment.

Because this is an appeal of a summary judgment, all evidence should be viewed in a light most advantageous to the appellant as the non-moving party. Therefore, the appellant's evidence that pit bulls and similar dogs are not per se vicious and that any contrary evidence is largely based on stereotypes raises genuine issues of material fact that should be presented to the trier of fact to evaluate whether or not such evidence shows that, as a matter of law, such dogs pose a threat to public safety.

Genuine issues of material fact exist on the question of whether or not pit bulls or similar dogs are per se vicious. Therefore, there are genuine issues of material fact as to whether the Ordinance as written is rationally related to a legitimate government interest in public safety. Such issues of material fact should be presented to a trier of fact and not resolved on summary judgment. Therefore, a reversal and remand of this matter, is necessary. Because a reasonable trier of fact could find that these stereotypes are unfounded and, therefore, the legitimate interests advanced by this ordinance are not accomplished, there is a genuine issue of material fact requiring a reversal of the district court's grant of summary judgment.

CONCLUSION

For the aforementioned reasons, appellant asks this Court to reverse the lower court's grant of summary judgment as there are genuine issues of material fact that should be presented to a trier of fact.