Civil Action No. 10cv00416

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

QUINTON RICHARDSON,

Plaintiff-Appellant,

v.

CITY OF WINTHROP, MASSACHUSETTS

Defendant-Appellee.

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANT QUINTON RICHARDSON

Team Number 10
Attorneys for Plaintiff-Appellant

TABLE OF AUTHORITIES

Supreme Court

Federal Courts

State Courts

Statutes

Secondary Sources

Human-Animal Bond Boosts Spending on Veterinary Care, JAVMA News, Jan. 1, 2008, *available at* http://www.avma.org/onlnews/javma/jan08/080101a.asp 21

Jeanne Gaakeer, *"The Art to Find the Mind's Construction in the Face," Lombroso's Criminal Anthropology and Literature: The Example of Zola, Dostoevsky, and Tolstoy*, 26 Cardozo L. Rev. 2345, 2345-46 (2005) 26

John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. Rev. 53, 107 (2004) 5, 7

Kristen E. Swann, *Irrationality Unleashed: The Pitfalls of Breed-Specific Legislation*, 78 UMKC L. Rev. 839, 855 (2010) ..... *passim*

Merriam-Webster Dictionary, http://www.merriam-webster.com/ (2011) 17

Randall Lockwood, *Humane Concerns About Dangerous-Dog Laws*, 13 U. Dayton L. Rev. 267, 276 (1987) 26

Russell G. Donaldson, *Validity and constructions of statute, ordinance, or regulation applying to specific dogs breeds, such as "pit bulls" or "bull terriers,"* 80 A.L.R. 4th 70 (originally published in 1990) 15

William C. Root, *'Man's Best Friend': Property or family member? An examination of the legal classification of companion animals and its impact on damages recoverable for their wrongful death or injury*, 47 Vill. L. Rev. 423 (2002) ..... *passim*

ISSUES PRESENTED

1. Is an ordinance that infringes on constitutionally protected liberty interests subject to the overbreadth doctrine?
2. Is an ordinance banning all "pit bull variety of terriers" unconstitutionally vague when the ordinance fails to list specific characteristics of the dogs prohibited?
3. Does an ordinance that provides for the forfeiture and destruction of dogs violate an owner's substantive due process rights?

STATEMENT OF THE CASE

Plaintiff-Appellant Quinton Richardson filed a complaint in the United States District Court for the District of Massachusetts, challenging an ordinance enacted in 1988 by the City of Winthrop, Massachusetts. Mem. Op. 2, 5. Winthrop's Municipal Code section 6.04.090 ("the Ordinance"), declares all "'pit bull' variety of terrier" to be *per se* "vicious" and bans the animals from the city. Mem. Op. 2. The Ordinance defines "'pit bull' type variety of terrier" to consist of "breeds" or "breed types" and "mixtures" of American Straffordshire Terrier, American Pit Bull and Pit Bull Terrier. Mem. Op. 3.

In 2005, Richardson obtained two littermate puppies, Zoe and Starla, from a rescue organization for companionship. Mem. Op. 4. The rescue organization, and Richardson's veterinarian classified the dogs as "mixed breed." Mem. Op. 4. The dogs are considered to be friendly and well-socialized and there is no evidence indicating that the dogs have ever bitten a person, attacked another animal, or otherwise threatened the community peace. Mem. Op. 4.

On August 1, 2009, a meter reader observed Zoe inside Richardson's home through a window, and notified animal control officers. Mem. Op. 5. The officers seized Zoe the next day and, upon a hearing, the animal control officer testified, based on her appearance, that Zoe was a

pit bull. Mem. Op. 5. Richardson presented an affidavit from his veterinarian stating Zoe was a mixed breed. Mem. Op. 5. Moreover, "Pit Bull Terrier" is not a breed recognized by either of the two largest breed registries in the country, Mem. Op. 9 After the hearing, the City manager ordered Zoe to be removed from the city within 10 days, but Richardson was unable to find a home for Zoe outside the city within the 10-day period. Mem. Op. 5. Although Richardson appealed to the state trial court, the City Manager's finding was affirmed, without opinion. Mem. Op. 5. Thereafter, Zoe was killed by lethal injection. Mem. Op. 5.

Richardson's other companion animal, Starla, continues to live in the City and Richardson fears that the City will also seize Starla and consider her subject to the Ordinance. Mem. Op. 5. Since Zoe was seized, Richardson has not allowed Starla to leave his home except to relieve herself in the backyard, which has a privacy fence, and he now keeps his curtains drawn over his windows at all times to hide her. Mem. Op. 5-6. Richardson leaves Starla only for work and will not go on vacation, which would require boarding her. Mem. Op. 6.

Richardson asserts that the Ordinance violates the Fourteenth Amendment of the Constitution as overbroad, unconstitutionally vague, both facially and as applied, and an infringement on his substantive due process rights. Mem. Op. 2. He seeks both injunctive relief preventing enforcement of the Ordinance and damages under 42 U.S.C. § 1983. Mem. Op. 2. The district court granted summary judgment in favor of City of Winthrop on all of Richardson's claims, concluding as a matter of law that the Ordinance did not violate the overbreadth doctrine and was not unconstitutionally vague either facially or as applied. Mem. Op. 10-11. The court further concluded that the Ordinance did not implicate a fundamental right, Mem. Op. 12, and the City's decision to ban "pit bull varieties of terrier" is rationally related to reducing the likelihood of human injury. Mem. Op. 14.

SUMMARY OF THE ARGUMENT

The fundamental shift in societal mores in which dogs are no longer characterized as mere property, informs the analysis and resolution of the issues before the court. The Ordinance designating "pit bulls" as *per se* vicious, and banning them from Winthrop City limits, violates the Due Process of the Fourteenth Amendment.

The overbreadth doctrine applies outside the traditional First Amendment context to other constitutionally protected conduct, including the fundamental liberty interest at issue here. The Ordinance is overly broad because it infringes upon a person's fundamental liberty interest in the relationship of an animal companion, in addition to constitutionally protected conduct of free movement and travel. The Ordinance also suffers as unconstitutionally vague, both facially and as applied to Richardson. It fails to provide explicit standards by which owners may adjust their conduct while limiting arbitrary enforcement. The Ordinance also failed to put Richardson on notice that his non-"vicious" dog, Zoe, would fall within the statute as a "Pit Bull Terrier."

The Ordinance also unconstitutionally violates substantive due process when by allowing animal companions to be seized or destroyed, the City infringes upon a person's fundamental liberty interest in the relationship with one's animal companion and family member. Without narrowly tailoring the Ordinance to serve a compelling government interest, the enactment is invalid. Alternatively, the Ordinance was not rationally related to the legitimate government interest in protecting health and safety because there is no factual basis for concluding "pit bulls" alone pose a danger or that the breed ban would reduce the number of dog attacks.

ARGUMENT

To their owners, dogs have long been considered a part of the family, but the law has been slow to recognize a person's interest in the companionship of an animal. Legal scholars

note that over the past century, the notion of "property" in dogs continues to evolve as science and experience brought understanding to the relationship between owner and pet. William C. Root, *'Man's Best Friend': Property or family member? An examination of the legal classification of companion animals and its impact on damages recoverable for their wrongful death or injury*, 47 Vill. L. Rev. 423 (2002) (compiling studies, case law, and statutes relevant to the legal relationship developing between owners and companion animals).

In the most oft-cited case on the nature of property interest in dogs, the Supreme Court held that "property in dogs is of an imperfect or qualified nature." *Sentell v. New Orleans & Carolina R.R.*, 166 U.S. 698, 701 (1897). However, American values have fundamentally shifted away from the notion of dogs as mere property, toward a status marked by valued companionship and as members of the family unit. Root, *supra*, at 423. Numerous studies show that people think of dogs as family. Root, *supra*, at 423, 427. Researchers also found that the grief people experience after loss of a pet is comparable to grief following the loss of a spouse, parent or child. *Id*. at 439. Dogs are not seen merely for their economic worth, but for their worth as companions and members of the family.

Through state and local enactments, the law has increasingly afforded dogs and the relationship between owners and companion animals more protection under the law. All fifty states and the District of Columbia have criminal laws against the mistreatment of animals. Brief of Amicus at *9, *Dias v. City and County of Denver*, 2008 WL 4126150 (10th Cir. Aug. 25, 2008). In Hawaii, Florida and Tennessee, owners of companion animals may be compensated for emotional distress caused by the loss of an animal. *See Campbell v. Animal Quarantine Station*, 63 Haw. 557, 632 P.2d 1066 (1981) (allowing damages for the emotional distress a family suffered when its dog was negligently killed); *LaPorte v. Associated Independents, Inc.*,

163 So.2d 267 (Fl. App. 1964) (awarding compensatory and punitive damages for pain and suffering caused by the malicious killing of a companion animal); "The T-Bo Act," TENN. CODE. ANN. § 44-17-403 (2001) (allowing award of non-economic damages for harm suffered in connection with death of a pet cat or dog). Given the change in societal mores concerning companion animals, it would irresponsible for a court to continue to blindly adhere to the law's archaic categorization of companion animals as mere property.

I. The Ordinance is overbroad because it intrudes on the liberty interests of dog owners.

The overbreadth doctrine has origins in First Amendment jurisprudence; however, it informs our analysis because the Ordinance covers a substantial amount of conduct protected by the Fourteenth Amendment and, therefore, is unconstitutionally overbroad. By applying to non-vicious dogs, the Ordinance intrudes into a person's fundamental liberty interest in the relationship with a companion animal in violation of the Fourteenth Amendment. *See infra* § III.a. The Ordinance also causes dog owners to refrain from conduct due to the risk of penalty and forfeiture, further infringing on dog owner's liberty interests. By substantially intruding on constitutionally protected conduct, the Ordinance is overbroad.

a. Courts apply the overbreadth doctrine outside of the First Amendment context.

A law is unconstitutionally overbroad when its language, given its normal meaning, is so broad that the regulation intrudes into constitutionally protected conduct. *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1346 (9th Cir. 1984); *see also* John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. Rev. 53, 107 (2004) (arguing that the overbreadth doctrine is not limited to First Amendment challenges). Courts created the overbreadth doctrine to provide a forum for "those who desire to engage in legally protected expression, but who may refrain from

doing so rather than risk prosecution . . . ." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). Therefore, the overbreadth doctrine provides an exception to the basic requirements of standing rules by allowing third-party standing. *Id*.

In an overbreadth challenge, a court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inv.*, 455 U.S. 489, 494 (1982). If it does, "the enactment may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity[.]" *Brockett*, 472 U.S. at 503. Yet if a limiting construction may be placed on a law, a challenge to overbreadth will fail. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

The Supreme Court stated that the overbreadth doctrine does not apply outside of the First Amendment context. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984). However, at least some Supreme Court decisions analyze conduct protected by constitutional provisions other than the First Amendment in terms of overbreadth. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (declining to decide whether the impact of an ordinance on constitutionally protected liberty interest would suffice to support a facial challenge under the overbreadth doctrine).[1] Further, federal and state court decisions decided after *Schall* and *Salerno* continue to apply the overbreadth doctrine outside of the First Amendment context. *See, e.g., Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992) (applying the overbreadth doctrine to an enactment that implicated rights under the Eighth

[1] *See also Hodel v. Irving*, 481 U.S. 704 (1987) (employing what might be described as an "overbreadth-type" analysis to a challenge based on Fifth Amendment property interests); *Berger v. New York*, 388 U.S. 41, 44 (1967) (holding state statute authorizing eavesdropping on less than probable cause is "too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments"); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (applying the overbreadth doctrine to the right to travel protected by the Fifth Amendment and holding "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms").

and Fourteenth Amendments); *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990) (applying the overbreadth doctrine to the right to privacy). The overbreadth doctrine should not be limited to the First Amendment arena because "legislation that substantially erodes any constitutionally protected activity because its language is not more narrowly tailored should be struck down." Decker, *supra*, at 105.[2] Because the Ordinance sweeps into dog owners' protected liberty interests, the Ordinance is unconstitutionally overbroad and must be held invalid.

b. The Ordinance is overly broad because it reaches a substantial amount of constitutionally protected conduct.

The Ordinance substantially infringes on dog owners' liberty interests. An owner's interest in the companionship of a dog is subordinate to the state's interest in protecting the health and safety of its citizenry. *Sentell*, 166 U.S. at 704. However, the Constitution limits the subordination of one's liberty interest to what is necessary to achieve the state's legitimate purpose of protecting the health and safety of the citizenry. *Id*. (dogs are "subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is *necessary* for the protection of its citizens") (emphasis added). In so far as the Constitution limits an infringement of liberty interests to enactments that are necessary to protect the health and safety of the public, the state's regulation of that interest is constitutional. The state has not shown such necessity here.

[2] Decker further reasons that "[t]here is no compelling reason why the doctrine should be limited solely to First Amendment rights. An overbreadth doctrine beyond the First Amendment is needed for the same reasons it was needed inside the First Amendment context. The benefits of third-party standing, which is at the heart of overbreadth, should not be monopolized by the First Amendment. Most importantly, overbreadth analysis clearly advances the interest of insisting that the conduct and rights of all persons be squared with a valid rule of law, a concept that should apply equally to all fundamental rights; therefore, these other constitutional rights should be afforded the same." Decker, *supra*, at 107.

The Ordinance applies, and will continue to apply, to dogs that do not exhibit "vicious" characteristics in the colloquial sense.[3] Even assuming, *arguendo*, that the list of dog breeds in the Ordinance is not unconstitutionally vague, it is reasonable to assume that not all American Staffordshire Terriers or American Pit Bull Terriers are *per se* vicious. If a dog is harmless, the state cannot justify infringing on a person's liberty interest in owning and possessing a dog through forfeiture or banishment because there is no legitimate threat to public health and safety. Therefore, the Ordinance is overly broad in that it *unnecessarily* infringes on an owner's constitutionally protected liberty interest in the relationship with an animal companion.

The Ordinance further infringes on an owner's fundamental liberty interest in free movement and travel. For example, Richardson will not allow his other dog, Starla, to leave his home due to the risk of forfeiture. Mem. Op. 5. Because traveling would require Richardson to board Starla and subject Richardson to potential forfeiture, he refuses to go on vacation or leave home except to go to work. Mem. Op. 6. It is to infer that other owners refrain from similar conduct out of fear that the City will enforce the Ordinance against them. This conduct is protected by the Constitution as part of a person's basic liberties under the Fifth and Fourteenth Amendment. *See Morales*, 527 U.S. at 53-54 (Stevens, J., in dictum) ("We have expressly identified [the] right to remove from one place to another according to inclination as an attribute of personal liberty protected by the Constitution") (citations omitted). Because the Ordinance causes a person to refrain from engaging in constitutionally protected conduct out of fear of forfeiture or penalty, it is unconstitutionally overbroad and is void in *toto*.

[3] In fact, it already has in regards to Zoe, a dog that was considered friendly, well-socialized dog that had never bitten a person or otherwise threatened the community peace. Mem. Op. 4.

Even if the Ordinance does not reach constitutionally protected conduct and, therefore, satisfies the overbreadth test, the Ordinance may nevertheless be challenged as unduly vague, in violation of due process. *See Flipside,* 455 U.S. 489.

II. The Ordinance is unconstitutionally facially vague and as applied to Richardson.

Unlike the overbreadth doctrine, the void-for-vagueness doctrine seeks to ensure "fair and non-discriminatory application of the laws." *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1266 (3d Cir. 1992). Because the Ordinance does not proscribe any standards of conduct, it is facially void. Even if the Ordinance is not vague in all of its applications, it is vague as applied to Richardson because Richardson had no reason to know that Zoe would be subject to the Ordinance.

a. The "void-for-vagueness" doctrine.

In a constitutional challenge to a law on vagueness grounds, a reviewing court must engage in a two-part analysis. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). First, the court must determine if the law defines the prohibited conduct with sufficient definiteness to put a person of ordinary intelligence on notice of what conduct is prohibited.[4] *Graynard v. City of Rockford*, 408 U.S. 104, 108-9 (1972). Second, and more importantly, the court must determine if the law provides explicit standards for law enforcement officials. *Kolender*, 461 U.S. at 358 (explaining that the "more important aspect of the vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement."). For a law to overcome the presumption of constitutionality and be held vague beyond a reasonable doubt, a plaintiff must show one of these two parts is missing. *Am. Dog Owners Ass'n v. City of Yakima*, 113 Wash.2d 213, 215, 777 P.2d 1046, 1047 (1989). Although much of the same

[4] "'Notice' in this context refers to the objective intelligibility of the law's content to a reasonable person rather than the claimant's subjective awareness and understanding." *McNeely v. United States*, 874 A.2d 371, 381 (D.C. 2005) *citing Lying v. Payne*, 476 U.S. 926, 942 (1986).

evidence will be relevant to both parts of the analysis, courts continue to analyze vagueness challenges as presenting two separate issues.

A person may challenge a law on the grounds that the law is facially vague or that the law is vague as applied to the challenger. *Thibodeau v. Portuondo*, 486 F.3d 61, 67 (2d Cir. 2007). A facial vagueness challenge requires a person to show that the law is impermissibly vague in all of its applications. *Flipside*, 455 U.S. at 497. However, a person may bring an "as applied" vagueness challenge on the grounds that a statute failed to clearly define the specific conduct with which the challenger was charged. *Smith v. Goguen*, 415 U.S. 566, 578 (1974). Unlike a facial challenge, which allows an attack on the entire enactment, an as applied challenge focuses only on whether the law was inappropriately applied to the complainant's conduct and must be decided on the facts of the case at bar. *See Palmer v. City of Euclid, Ohio*, 402 U.S. 544 (1971). Therefore, where an individual engages in conduct without any reasonable realization that it falls within the reach of the law, that person may bring an as applied challenge.

b. The Ordinance is facially vague.

The Ordinance is vague on its face because it is vague in all of its applications. Facial vagueness does not mean there are some ambiguities in interpretation, but that there is no standard of conduct to which a person can conform. *Parker v. Levy*, 417 U.S. 733 (1974). However, because the Ordinance is penal, the Constitution allows a lesser degree of vagueness because the penalties for violation are qualitatively severe. Because a person of ordinary intelligence could not determine what dogs are subject to the Ordinance and enforcement officials do not have objective standards by which to judge if a dog is subject to the Ordinance, the Ordinance is facially vague.

i. The Constitution allows a lesser degree of vagueness because the Ordinance is penal.

This court should tolerate a lesser degree of vagueness in the Ordinance because it is penal in nature. The Supreme Court affords greater tolerance for vagueness in "enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Flipside*, 455 U.S. at 499. With penal ordinances, the void-for-vagueness doctrine requires particular scrutiny of the law "to protect against arbitrary and discriminatory enforcement without fair warning that an act is prohibited." *Smith v. Commonwealth*, 3 Va.App. 650, 656, 353 S.E.2d 159, 162 (1987) (citing *Kolender*, 461 U.S. at 357).

The Ordinance allows the City Manager of Winthrop to "impose any and all penalties and fines allowed under MGL c. 140." Mem. Op. at 3, n.1. Chapter 140 of the Massachusetts General Laws provides that "proceedings [for the violation of dog control laws] shall not be deemed criminal." MASS. GEN. LAWS c. 140 § 173A (2010). However, the Supreme Court of Massachusetts interpreted this provision to mean only that the "*proceedings* governing a complaint for violation of a municipality's ordinance or by-law concerning licensing and restraining of dogs 'shall not be deemed criminal.'" *American Dog Owners Ass'n, Inc. v. City of Lynn*, 404 Mass. 73, 78, 533 N.E.2d 642, 646 (1989) (emphasis in original) (internal citations omitted). The court ultimately held that because the ordinance at issue imposed a penalty on offenders, involved forfeiture of property (banishment of the dog), and sought to protect the public against injury, the ordinance was "clearly penal in nature." *Id*. In scrutinizing a statue for intolerable vagueness as applied to specific conduct, a reviewing court should interpret the legislation consistently with any judicial construction preferred by the jurisdiction's highest court. *Schwartzmiller*, 752 F.2d at 1348. Therefore, the interpretation of Chapter 140 set forth

by Massachusetts' highest court should inform this court's construction and analysis of the Ordinance.

The Ordinance imposes a penalty on offenders by imposing a fine and liability for fees incurred; involves forfeiture of property through banishment, even destruction, of the dog; and seeks to protect the public against injury by lowering the number of dog bites. Therefore, under the standard enunciated by the Massachusetts Supreme Court, the ordinance is penal in nature. *City of Lynn*, 404 Mass. at 78, 533 N.E.2d at 646.

ii. An owner of ordinary intelligence could not ascertain which dogs the Ordinance covers.

The Ordinance fails to define with sufficient definiteness what dogs the City prohibits. First, it is important to note that dog owners are not an especially knowledgeable group.[5]

Second, the Ordinance does not enumerate which standards or source a dog owner should reference for guidance. The Ordinance merely states that "vicious dogs are defined as ... any of the breeds commonly referred to as belonging to the 'pit bull' variety of terrier, which consists of the following breeds or breed types and mixtures: American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier." WINTHROP MUN. CODE 6.04.090(B)(1)(c).[6] If there are conflicting definitions or characteristics listed in two sources, it will be impossible for an owner to know which source should control. *See City of Lynn*, 404 Mass. at 80, 53 N.E.2d at 647 (holding that

[5] To the extent that some courts have charged a dog owner, who is subject to the penalties of BSL, with knowledge of the kind of dogs he owns, those cases are flawed. *See, e.g., City of Lima v. McFadden*, 1986 WL 7474 (Ohio. Ct. App. 1986). Often it is impossible to positively identify a dog's breed and even experts have difficulty determining in which breed a dog should be placed. *See Hearn v. City of Overland Park, Kan.*, 244 Kan. 638, 642, 772 P.2d 758, 762 (1989) (noting the inherent difficulty in attempting to identify a breed with absolute certainty). In all fairness, the law cannot charge people of ordinary intelligence with knowledge that even trained professionals do not possess.

[6] This court cannot presume that the City of Winthrop intends any particular standards to apply unless those standards are specifically listed in the Ordinance or incorporated by reference. Courts may liberally construe a statute to save it from constitutional infirmities; however, a court cannot rewrite laws in order to render them constitutional. *State v. Robinson*, 44 Ohio App.3d 128, 130, 541 N.E.2d 1092, 1094 (1989).

the failure to identify with specificity the physical characteristics to be judged in a determination of which dogs would be subject to the statute's operation as "Pit Bulls" rendered the statute unconstitutionally vague).

Third, the Ordinance is vague as to registered purebreds. An owner who registers their dog with the AKC or the UKC as one of the listed breeds will not know that the City applies the AKC's or UKC's definition of the breed when making a breed determination under the statute unless explicitly referenced in the Ordinance. *See State v. Peters*, 534 So.2d 760, 766, n.10 (Fla. Ct. App. 1988), *review denied*, 542 So.2d 1334 (allowing standing to one who admitted that her dog was a purebred Pit Bull, but claimed that the dog was nevertheless not a "Pit Bill" within the meaning of the particular ordinance).[7]

Fourth, the inclusion of "mixtures" in the Ordinance is unconstitutionally vague. The Ordinance provides no qualifying characteristics of a mixed breed dog that would subject it to the Ordinance. WINTHROP MUN. CODE 6.04.090(B)(1)(c). If the court were to accept the contention that the general reference to breeds provides specific phenotypes that would put owners on notice that their dog is subject to the Ordinance, the requisite level that a "mixture" or mixed breed dog must conform to those standards is inscrutable. *See* Kristen E. Swann, *Irrationality Unleashed: The Pitfalls of Breed-Specific Legislation*, 78 UMKC L. Rev. 839, 855 (2010). There are no standards by which an owner could judge if their mixture looked *enough* like one of the listed breeds to be subject to the Ordinance.

[7] To the extent that courts argue that whether a dog is covered by an ordinance is a matter of evidence, not constitutional law, those cases are flawed. *See, e.g, City of Lima v. McFadden*, 1986 WL 7474, *2 (Ohio Ct. App. 1986) ("Whether any particular animal falls within this classification is an issue of fact to be determined by the evidence presented"); *State v. Peters*, 534 So.2d 760, 768 (Fla. Ct. App. 1988). Under the Ordinance at issue, a trier of fact would not have a standard to compare any evidence offered because there may be multiple and conflicting standards defining the listed breeds.

Finally, the inclusion of the phrase "commonly referred to as belonging to the 'pit bull' variety of terrier" in the Ordinance is unconstitutionally vague. Faced with similar language to the Ordinance at issue here, the Supreme Court of Iowa held that the use of "commonly known as pit bulls" in breed specific legislation (BSL) was unconstitutionally vague because "this language allows subjective determinations based on a choice of nomenclature by unknown persons and based on unknown standards [and] ... leaves[s] a reader of ordinary intelligence confused about the breadth of the ordinance's coverage." *Am. Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416, 418 (Iowa 1991). For the foregoing reasons, the language chosen by the City is unconstitutionally vague because it fails to put an owner on notice that his or her dog is subject to the Ordinance.

iii. The Ordinance encourages arbitrary and discriminatory enforcement.[8]

The Ordinance fails to provide explicit standards to law enforcement officials, thereby, promoting arbitrary and discriminatory enforcement. Due to the lack of definite standards in the Ordinance, it cannot be administered in a fair and impartial fashion. *See Graynard*, 408 U.S. at 108-109 (noting that "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis"). The "I know it when I see it" test does not provide explicit standards to law enforcement officials. *See State v. Anderson*, 1989 WL 119949, *3 (Ohio Ct. App. 1989) *overruled State v. Anderson*, 57 Ohio St.3d 168, 566 N.E.2d 1224 (1991).[9] The Ordinance depends for enforcement on the *subjective* understanding

[8] The reasons articulated in Section II.b.ii are also relevant to the analysis of whether the Ordinance encourages arbitrary and discriminatory enforcement. However, there are factors beyond those already articulated that further make the Ordinance susceptible to arbitrary and discriminatory enforcement by officials charged with its implementation.

[9] The court noted its disagreement with "Justice Stewart's now famous quote, 'I know it when I see it' ... That statement was made in a concurring opinion and was not meant to be the law of the land. In any event, whatever validity this statement has in regard to obscenity, it has none in regard to describing or identifying dogs." *Anderson*, 1989 WL 119949 *1.

of enforcement officials, who have no objective guideline available to know with some certainty that a particular dog is subject to the Ordinance. *See* WINTHROP MUN. CODE 6.04.090. Allowing the fate of a companion animal to come down to a "judgment call" encourages arbitrary and discriminatory enforcement that does not withstand scrutiny under due process. *See* Russell G. Donaldson, *Validity and constructions of statute, ordinance, or regulation applying to specific dogs breeds, such as "pit bulls" or "bull terriers*," 80 A.L.R. 4th 70 (originally published in 1990) (noting "the difficulties experienced by dog officers or other public officials concerned with the enforcement or interpretation of such legislation to make an accurate identification of the target breed based on an unguided research of general descriptive reference sources").

Further, the Ordinance does not require *mens rea* and imposes penalties on the owner without regard to fault. WINTHROP MUN. CODE 6.04.090(B)(2). The absence of a *scienter* requirement may be a factor when determining if a statute is unconstitutionally vague. *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (citing, *inter alia*, *United States v. Ragen*, 314 U.S. 513, 524 (1942) (stating that in the absence of a *scienter* requirement, a statute may become little more than a trap for those who act in good faith)). Although not determinative, when coupled with the considerations above, the lack of a *mens rea* encourages arbitrary and discriminatory enforcement of the Ordinance because enforcement officials can pick and choose who they enforce against without regard to fault. Therefore, the Ordinance is vague on its face because it promotes arbitrary and discriminatory enforcement.

c. The Ordinance is vague as applied to Richardson.

The court should tolerate less vagueness in the Ordinance as applied to Richardson because the Ordinance penalized and subjected him to criminal liability. The Ordinance did not

put Richardson on notice that Zoe was subject to its terms and allowed law enforcement officials to arbitrarily deem Zoe a pit bull and *per se* vicious against contrary evidence.

i. The Ordinance put Richardson at risk of criminal liability.

As applied to Richardson, the Ordinance was penal in nature. Chapter 140 of Massachusetts General Laws allows for imprisonment if an owner fails to abide by a ruling of the trial court as to the correctness of the City Manager's ruling. MASS. GEN. LAWS c. 140 § 157 (2010). Chapter 140 allows a person to request a de novo hearing before the court, the decision being final as to the parties. MASS. GEN. LAWS c. 140 § 157 (2010). Any person failing to comply with such order is subject to imprisonment up to 30 days for the first offense and up to 60 days for the second and subsequent offenses. MASS. GEN. LAWS c. 140 § 157 (2010).

After a determination by the City Manager that Zoe was a "Pit Bull Terrier," *per se* "vicious" under the Ordinance and must be removed from the City within ten days, Richardson appealed to the state trial court, which affirmed the City Manager's finding without opinion. Mem. Op. 5. Richardson, who was unable to find a home for Zoe outside of the City, found himself in violation of the state court's order and therefore was subject to forfeiture and imprisonment. *See* MASS. GEN. LAWS c. 140 § 157 (2010). Therefore, the Ordinance was penal as it applied to Richardson.

ii. The Ordinance did not put Richardson on notice that Zoe was a "Pit Bull Terrier."

The Ordinance did not provide Richardson with definitions or standards by which to judge if Zoe was a "pit bull type terrier" within the meaning of the statute. "Pit Bull Terrier" is not a breed recognized by either of the two largest breed registries in the country, Mem. Op. 9, and the Ordinance did not reference any specific standards that Richardson could use to determine if Zoe was a "Pit Bull Terrier" within the meaning of the statute.

The dictionary defines "pit bull terrier" as (1) a "pit bull" or (2) an American Pit Bull Terrier (APBT). Merriam-Webster Dictionary, http://www.merriam-webster.com/ (2011). The Dictionary further defines "pit bull" as "a dog (as an American Staffordshire Terrier of any of several breeds or a real or apparent hybrid with one or more of these breed that was developed and is now often trained for fighting and is noted for strength and stamina." *Id*. And an "APBT" as "any of a breed of dogs developed to combine the traits of terriers and bulldogs that have extremely powerful jaws and great strength and tenacity and that were originally bred for dog fighting – called also *pit bull terrier*." *Id*. The dictionary provides no standards by which to judge if your dog falls under the definition of "pit bull terrier" and gives Richardson no guidance as to whether his dog is subject to the Ordinance.

Further, Richardson would have no reason to believe that Zoe was a "Pit Bull Terrier" because both the rescue organization and Richardson's veterinarian classified Zoe and Starla as "mixed breed." Mem. Op. 4. Zoe never exhibited any signs of viciousness or aggressiveness that would cause Richardson to believe that Zoe fell under the Ordinance. Therefore, by failing to explicitly define "Pit Bull Terrier," the Ordinance is vague as applied to Richardson.

iii. Those charged with enforcement of the Ordinance arbitrarily decided that Zoe was subject to the Ordinance based on physical characteristics.

The determination that Zoe was a "Pit Bull Terrier," and therefore *per se* vicious, based on her physical characteristics alone was arbitrary. Zoe was considered to be friendly and well socialized and there is no evidence that she threatened the community peace. Mem. Op. 4. The City Manager determined Zoe was a pit bull and *per se* vicious based on testimony provided by an animal control officer. Mem. Op. 5. The animal control officer based his testimony *solely* on Zoe's appearance. Mem. Op. 5. It is unclear what physical characteristics the meter reader or the animal control officer used to make this determination, but it is clear that the determinative

characteristics are not defined in the Ordinance. Further, an affidavit from Richardson's veterinarian that Zoe was a "mixed breed" contradicted the animal control officer's testimony that Zoe was a "Pit Bull Terrier" within the meaning of the Ordinance. Mem. Op. 5. Because the Ordinance offered no standards by which the animal control officer, the City Manager or the court could judge whether Zoe was a "Pit Bull Terrier" of the type the City intended to ban, the Ordinance allowed enforcement officials to arbitrarily decide, based on *subjective* standards, that Zoe fell under its ambit even in the face of contrary evidence offered by a licensed professional. Therefore, the Ordinance is vague as applied to Richardson because he owned Zoe without reasonable realization that she was subject to the prohibitions in the Ordinance.

Even if this Court concludes the Ordinance withstands the constitutional overbreadth and vagueness challenges, the Ordinance nonetheless violates substantive due process.

III. The Ordinance violates substantive due process

"[T]he touchstone of due process is protection of the individual against arbitrary action of government." *City of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998). In addition to guaranteeing fair procedures, the Due Process Clause "cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *Lewis,* 523 U.S. at 840 (internal quotation omitted).

In order to guard against arbitrary legislation, the substantive component of due process requires government action be related to the interest the government seeks to advance. If a legislative enactment burdens a fundamental right, the infringement of the right must be narrowly tailored to serve a compelling government interest. *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997). However, even when the government enactment does not burden a fundamental right, that enactment must bear a rational relation to a legitimate government

interest. *Id*. at 728; *see also Reno v. Flores,* 507 U.S. 292, 305 (1993) ("The impairment of a lesser interest . . . demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose."). "Rational" suggests "elements of legitimacy and neutrality." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring). Thus, where a legislature fails to provide a reasonable fit with the legitimate government purpose, the enactment is not rationally related and may be declared unconstitutional in violation of substantive due process.

a. The Ordinance is not narrowly tailored to serve a compelling government interest.

A dog owner has a fundamental liberty interest in his relationship with his companion animal, and the City's confiscation and killing of an animal companion burdens that fundamental liberty interest. The Ordinance states, "[n]o person shall own, keep, or have the custody, care or control of any of the [breeds commonly known as pit bull] identified [as vicious] in subsection B.1(c) of this Section or mixtures thereof within the Winthrop city limits." WINTHROP MUN. CODE § 6.04.090. The procedures accompanying this ordinance authorize the seizure, removal, and even destruction of dogs deemed allegedly vicious. Mem. Op. 3-4, n.1. The City determined that Appellant Richardson's animal companion, Zoe, was a "Pit Bull Terrier" and *per se* vicious and ordered Zoe to be removed from the city within 10 days. Mem. Op. 5. When Richardson was unable to find a home for his companion, the City seized and killed Zoe by lethal injection. Mem. Op. 5.

At issue is whether the intrusion that results when the government confiscates, seizes, or kills a person's companion animal burdens the fundamental liberty interest in the relationship with a companion animal such that it requires narrow tailoring to serve a compelling government

interest.[10] The Supreme Court recognizes that some liberty interests are so deeply rooted in our nation's history and tradition as to be deemed fundamental. *Washington v. Glucksberg*, 521 U.S. at 720-21. Many of the liberty interests the Supreme Court deems fundamental include those interests tailored toward protecting the integrity of the family from government intrusion. *See id*. at 720. (cataloging other Supreme Court opinions recognizing fundamental rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity).

Well over a century ago, the Supreme Court in *Sentell* characterized dog ownership as a property interest "of an imperfect or qualified nature," finding that dogs may be taken and destroyed as a valid exercise of the state's police power when necessary to protect the health and safety of the citizenry without offending the owner's constitutional rights. 166 U.S. at 701. The Court stated that having little utility, "[dogs] have no intrinsic value[,]" and characterized dogs (with few exceptions) as no more than a "public nuisance" suited for extermination. *Id*. at 694. *See also Nicchia v. People of the State of New York*, 254 U.S. 228, 230-31 (1920) ("Property in dogs is of an imperfect or qualified nature and they may be subject to peculiar and drastic police regulations by the state without depriving their owners of any federal right.")

In relying primarily upon *Sentell* and its progeny, some courts reject the notion of one's fundamental property interest in pets. *See Vanater*, 717 F. Supp. at 1242-43 (concluding that plaintiff's protected property interest in his dog was not fundamental, and must be balanced against the state's police power to protect public health and safety.); *see also American Dog*

[10] Appellant does not dispute that the City has a legitimate interest in animal control in the name of protecting public health, safety and welfare. Appellant further does not assert that dogs may *never* be taken and destroyed under the state's police power without offending the constitutional rights of their owners. Appellant merely disputes the State's characterization of dogs as non-sentient property rather than companions, and urges that the means to meet the state's interest must comport with due process requirements of the constitution.

Owners Ass'n v. Dade County, Fla., 728 F. Supp. 1533, 1541 (S.D. Fla. 1989) (rejecting the notion that there is a fundamental liberty interest in the familial relationship to pets). These courts concluded the property interest in pets is not so deeply rooted in the history and traditions of this country as to be deemed fundamental. *Id*.

As indicated by *Sentell*, dogs have not always enjoyed a status of companion or family member that can be characterized as deeply rooted in our history and traditions. However, the Supreme Court recognizes that recent laws and traditions are relevant in evaluating rights, and "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003), *citing Lewis*, 523 U.S. at 857 (Kennedy, J., concurring). Indeed, *Sentell*'s outdated characterization of dogs does not reflect the fundamental shift in American values which now place more emphasis on the relationship between people and their companion animals.

Legal scholars note society's emerging trend of treating animals as valuable companions and not as mere property. *See* page 4, *supra*. One such scholar notes the significance of a study indicating that nearly "seventy percent of American pet owners 'consider [their] companion animals as family.'" Swann, *supra*, at 846 (citing Christina Risley-Curtiss et al., *The Animal-Human Bond and Ethnic Diversity*, 51 Soc. Work 257, 258 (2006)). Moreover, in a 2006 study conducted by the American Veterinary Medical Association, only 2.1 percent of 50,000 pet owners surveyed considered their pets to be property. *Human-Animal Bond Boosts Spending on Veterinary Care,* JAVMA News, Jan. 1, 2008, *available at* http://www.avma.org/onlnews/javma/jan08/080101a.asp. The vast majority characterized their pets as either family or companions. *Id*. In keeping with this trend, some courts recognize the flaws in coldly designating companion animals as property. For example, the Wisconsin

Supreme Court stated,

> At the outset, we note that we are uncomfortable with the law's cold characterization of a dog . . . as mere "property." Labeling a dog "property" fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog."

Rabideau v. City of Racine, 2001 WI 57, 243 Wis. 2d 486, 491-92, 627 N.W.2d 795, 798 (2001) (internal footnotes omitted) (recognizing the flaw in treating dogs as property, but following binding precedent designating dogs as property).

As Justice Cardozo notably stated, "[i]f judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." Benjamin Cardozo, *The Nature of the Judicial Process* 152 (1921), quoted in *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring). In a country where there is roughly one companion animal for every two Americans, Root, *supra,* at 423, pets enjoy a status more akin to a family member or live-in companion than that of a non-sentient object of property. As such, the relationship enjoyed between person and companion animal is appropriately protected as a liberty interest in line with other recognized fundamental liberty interests that preserve the integrity of the family and its bonds, guarding these bonds against government intrusion.

The Supreme Court has described the family unit as "perhaps the most fundamental social institution of our society." *Lehr v. Robertson*, 463 U.S. 248, 276 (1983) (citing *Trimble v. Gordon*, 430 U.S. 762,769 (1977). In so doing, the Court also acknowledged that "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." *Lehr*, 463 U.S. at 258. Importantly, the Court recognizes that the

familial unit is not based solely on genetic bonds. *Id*. at 261. Rather, "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association . . ." *Id.* (citing *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 844 (1977)). Given the fundamental shift in mores towards the familial nature of the relationship between people and their companion animals, the City's intrusion burdening the fundamental liberty interest in this relationship is severe, particularly when seizing or killing an animal recognized as a member of the family unit. Such an intrusion can hardly be likened to the intrusion that results when the government seizes or destroys an item of furniture or other property. *Rabideau,* 243 Wis. 2d at 491-92, 627 N.W.2d at 798. Therefore, the City must establish that its interest is compelling and that the Ordinance is narrowly tailored to meet that compelling interest. The City has not done so here.

Even assuming, for the sake of argument, that the city's interest in protecting public health and safety by preventing dog attacks is compelling, the means chosen for accomplishing this objective are not narrowly tailored to that interest. Not only is the targeting of a specific breed rooted in unsupported prejudice and fear rather than facts, Swann, *supra*, at 847, here, the means used by the Ordinance are not narrowly tailored to meet the end. The ordinance is overly broad.[11] It casts its net widely over many "pit bull" dogs, like Starla and Zoe, who are "friendly and well-socialized," including around children, have "[n]ever bitten a person or other dog, attacked [another] animal, or otherwise threatened the community peace." Mem. Op. at 4. Many dogs that *could* be adjudged to fall within the ambit of the Ordinance may never exhibit any signs of aggression or viciousness, yet are deemed *per se* vicious, taken from their families, and destroyed. Such action is not the narrow tailoring that due process requires when legislation

[11] *See* Section I, *supra*, discussing overbreadth of the Ordinance.

infringes on a fundamental interest. Further, the Ordinance is also under inclusiveness, because it fails to account for the many dogs of other breeds that have vicious tendencies, but are not of the "pit bull" designation.[12]

b. There is No Rational Relation Between the City's Ordinance Banning "Pit Bulls" and Its Legitimate Interest in Public Health and Safety.

Even if this court were to conclude that a person does not possess a fundamental liberty interest in the relationship with its companion animal, the City failed to articulate that a rational relationship exists between public health and the banning of "pit bulls." The City's reliance on its police power as supporting the rationality of the Ordinance attempts to put the cart before the horse. The exercise of police power is not limitless; it is cabined by the constitutional requirements of due process. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

The Ordinance is not rationally related to a legitimate government. The only other Circuit to address this issue in the context of BSL did so in *Dias v. City and County of Denver*, 567 F.3d 1169 (10th Cir. 2010). In *Dias*, the Tenth Circuit reversed the dismissal of the plaintiff's substantive due process claim, finding the district court improperly granted the motion when the city, without any evidence, stated that the pit bull ordinance was "rational as a matter of law." *Id*. at 1183. The City relied on case law denying substantive due process claims rather than proffering its own evidence, while plaintiff offered evidentiary factual support for the irrationality of the ordinance. *Id*. at 1183-84.

[12] For example, one legal scholar cites a 2008 University of Pennsylvania study in which researchers evaluated the relationship between aggression and dog breed, sampling nearly 5,000 dogs, representing 33 breeds. Swann, *supra*, at 858 (internal citation omitted). Despite their "benign reputation," the study concluded Dachshunds, Chihuahuas, and Jack Russell terriers exhibit "consistently high aggression toward all targets." *Id*. at 858-859. Whereas the authors "note that 'pit bulls' relatively average . . . scores for stranger-directed aggression . . . were *inconsistent with their universal reputation as a 'dangerous breed*.'" *Id*. at 859 (emphasis added).

So too, the lower court here erred in concluding that the Ordinance was rationally related to protecting public health and safety. Just as in *Dias*, the City attempts to supplant actual evidence of the dangerousness of "pit bulls" with case law to support is conclusion that "pit bulls" allegedly pose threats to public health and safety.[13] The City's attempt to rely on case law rather than evidence directly reflects the fact that evidence does not support most BSL.

The Ordinance banning pit bulls and allowing their destruction does not rationally relate to the City's legitimate government interest in protecting public health and safety because the Ordinance is rooted in fear, not factual evidence. Swann, *supra*, at 847. The false notion that genes, and only genes, determine canine behavior forms the basis of BSL. Swann, *supra*, at 854-55. BSL is also inappropriately premised on incomplete and inaccurate "statistics" that don't reflect the true challenges associated with predicting breed-specific aggression. Finally, the Ordinance is irrational because courts, and many organizations recognize that "pit bull" type dogs are not the aggressive, dangerous beings characterized in the media, but are rather affectionate animal companions. Thus, district court erred in granting summary judgment to City of Winthrop on Richardson's substantive due process claim.

Upon declining to declare mentally retarded citizens as a quasi-suspect class, the Supreme Court in *City of Cleburne*, applied rational basis review to an ordinance treating these individuals differently. 473 U.S. at 446. In doing so, the Court noted that the Constitution does not allow differential treatment to be founded on considerations such as "mere negative attitudes,

[13] Moreover, the City's reliance on *Commonwealth. v. Santiago*, 452 Mass. 573, 896 N.E.2d 622, 626 (2008) does not support its conclusion that "pit bulls" pose a threat to public health and safety rationalizing the breed ban. The City's reliance on *Santiago* to demonstrate the "aggressiveness" of the "pit bull" is misplaced. While the Massachusetts Supreme Court did note the "pit bull's" general reputation for aggressiveness, it explained that this alone was not sufficient to justify an exception to the knock and announce rule typically used to protect officers from threats of safety. *Santiago*, 452 Mass. 573, 896 N.E.2d at 626. Rather, it was the combination of history of narcotics trafficking, possession of a weapon, prior arrests for violence, and a history of violating court orders, coupled with the presence of a "pit bull" dog that justified the exception. *Id*. at 627.

or [unsubstantiated] fear," nor on personal biases. *Id*. at 448. Therefore, the City may not irrationally target "pit bulls" in the Ordinance when the alleged dangerousness of the "pit bull" is rooted in unsubstantiated fear and personal biases rather than factual evidence.[14]

Most expert organizations oppose BSL in part because it does not rationally address public health and safety issues, improperly presuming that mere genetics predetermine behavior. Swann, *supra*, at 857-58 (citing Randall Lockwood, *Humane Concerns About Dangerous-Dog Laws*, 13 U. Dayton L. Rev. 267, 276 (1987)). BSL uses dogs' genetic makeup as a proxy for dangerousness and aggression, irrationally presuming that genes dictate behavior and that "pit bull" genes are always dominantly expressed in a dog's physical characteristics (i.e. that the allegedly aggressive "pit bull" genes are observable and drown out the allegedly non-aggressive genes when genetically mixed with other breeds). Swann, *supra*, at 853. This type of genetic determinism, the idea that DNA is the sole determiner of certain traits such as aggression, or even criminality, is not novel. The logic behind predicting behavior based upon the appearance or genes of an animal is about as rational as Cesare Lombroso's attempt to predict criminal tendencies through physiognomy just before the turn of the 20th century. Jeanne Gaakeer, *"The Art to Find the Mind's Construction in the Face," Lombroso's Criminal Anthropology and Literature: The Example of Zola, Dostoevsky, and Tolstoy*, 26 Cardozo L. Rev. 2345, 2345-46 (2005). Just as his infamous work in the field of criminology was discredited as science progressed, so too should the court look upon this argument skeptically when applied to canines.

Moreover, the American Veterinary Medical Association's Canine Aggression Task Force cautions that "[do]g bite statistics are not really statistics[.]" Swann, *supra*, at 857, (citing

[14] Some legal scholars note the tendency for the legal system and the media to regard "pit bull" ownership as a proxy for criminality. *See* Swann, *supra*, at 844-45 for a discussion of how breed bans may serve as a pretext to legislate socially undesirable individuals out of the community without triggering the typical constitutional limitations imposed on suspect classifications.

AVMA Task Force on Canine Aggression and Human-Canine Interactions, *A Community Approach to Dog Bite Prevention*, 218 J. Am. Veterinary Med. Ass'n 1732, 1733 (2001)). Not only are such "statistics" charged as being incomplete and unreliably sourced (making them a poor tool to document "dangerousness" of dog breeds), the "statistics" do not reflect the multiple variables influencing dog behavior, such as "fear, dominance, possessiveness, protectiveness (of people and territory), predation, punishment, pain, and [intraspecies threat]." *Id*.

These shortcomings are precisely why many expert canine organizations strongly oppose breed specific legislation. The National Animal Control Association, the American Veterinary Medical Association, and the Humane Society of the United States all oppose this type of legislation. Mem. Op. 12-13. The UKC and the AKC also oppose BSL. *See Dias*, 567 F.3d at 1184.[15] In *Dias*, the Tenth Circuit found that in light of commentary by the UKC and AKC, plaintiff stated at least a plausible substantive due process claim. *Id*. In light of the weight of authority discrediting the rationality of BSL, and the City's failure to present any evidence other than citations to case law, the district court erred in concluding that the City's exercise of police power was rational as a matter of law.

CONCLUSION

For the foregoing reasons, Richardson respectfully requests this Court reverse all of the legal decisions of the district court and remand for further proceedings. This Court should hold that Richardson may pursue his claims alleging that the Ordinance designating "pit bulls" as "vicious" and banning them from the city or allowing their destruction, is unconstitutionally vague, facially and as applied, violates the overbreadth doctrine, and violates substantive due process under the Fourteenth Amendment to the Constitution.

[15] The UKC commentary notes the that "American Pit Bull Terriers make excellent family companions and that "[a]ggressive behavior toward humans is uncharacteristic of the breed . . . ." *Id*. The AKC commentary notes similar positive attributes in the Staffordshire Bull Terrier. *Id*.