

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 10cv00416

RICHARDSON
Petitioner,

v.

CITY OF WINTHROP, MASSACHUSETTS,
Respondent.

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

BRIEF FOR THE PETITIONER

Team # 11

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STATEMENT OF THE ISSUES FOR REVIEW

- I. DID THE DISTRICT COURT ERR WHEN IT RULED THAT WINTHROP MUNICIPAL CODE SECTION 6.04.090, DESIGNATING ALL “PIT BULL’ VARIETY OF TERRIER” AS *PER SE* VICIOUS AND THUS BANNING THEM, IS NOT UNCONSTITUTIONALLY VAGUE ON ITS FACE OR AS APPLIED TO THE PLAINTIFF UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND DOES NOT VIOLATE THE OVERBREADTH DOCTRINE?

- II. DID THE DISTRICT COURT ERR EHN IT RULED THAT WINTHROP MUNICIPLA CODE SECTION 6.04.090, DESIGNATING ALL “PIT BULL’ VARIETY OF TERRIER” AS *PER SE* VICIOUS, AND THUS BANNIGN THEM, DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION?

STATEMENT OF THE CASE

Procedural History:

The present case was brought before the United States District Court for the District of Massachusetts by Plaintiff Quinton Richardson, challenging Winthrop Municipal Code section 6.04.090 which designates all dogs of the “‘pit bull’ variety of terrier” s as *per se* vicious and bans them from the city. (R, 2). Richardson asserted that the Ordinance violated his rights under the Fourteenth Amendment of the U.S. Constitution because it was impermissibly vague on its face and in its application and denied him substantive due process and equal protection. (R. 2) The District Court awarded summary judgment in favor of the City of Winthrop, the nonmoving party. (R. 6). On appeal by Richardson, the issue is now before this honorable Court.

Statement of Facts:

Plaintiff Quinton Richardson is a lifelong citizen of the City of Winthrop. (R. 4). In 2005, Richardson rescued two dogs from a neighborhood rescue organization. *Id.* The dogs, which he named Zoe and Starla, had been found under a park bench when they were approximately four months old and their true genetic heritage was unknown. *Id.* They were presented to Richardson as “mixed breeds” at the time he acquired them and were subsequently identically classified by Richardson’s veterinarian. *Id.*

The City of Winthrop instituted an Ordinance in 1988, banning all “‘pit bull’ variety of terriers” from within the city limits. (R. 5) In August of 2009, a meter reader observed Richardson’s dog, Zoe and alerted animal control officers about the potential infraction of the Ordinance. *Id.* The City manager determined that Zoe was a Pit Bull

Terrier without any DNA testing and in direct opposition to an affidavit filed by Richardsdon' veterinarian. *Id.* Richardson appealed to the state trial court who affirmed the decision without opinion. *Id.* Richardson was given only ten days to find a new home for Zoe, and was unable to do so. (R. 5).

Zoe was killed on December 1, 2009 by lethal injection. *Id.* Neither Zoe nor Starla, Richardson's second pet, had ever shown any signs of viciousness. (R. 4).

Richardson now fears that the same fate will befall Starla and has filed the present challenge requesting injunctive relief on her behalf. (R. 5). In addition, Richardson also requests damages for the wrongful seizure and death of Zoe. (R. 6).

SUMMARY OF ARGUMENT

Winthrop Municipal Code section 6.04.090 is vague on its face and in its application to Plaintiff, Richardson. A law is unconstitutionally vague if it does not make clear to whom it applies and if it allows for arbitrary enforcement. The Winthrop ordinance fails on both counts.

The law is facially vague because it treats the “‘pit bull’ variety of terrier” as a distinguishable breed, which it is not. The law’s latent ambiguity is further compounded by the risk of misidentification of those breeds the Ordinance seeks to include. Because the Ordinance provides no standards or guidelines, it does not provide adequate notice to Winthrop citizens as to whether or not their pets may fall under the ban.

Furthermore, the lack of established standards provides no guidance for law enforcement officers and allows for the use of subjective evaluations. This leads to arbitrary, discretionary enforcement of the law and renders the Ordinance facially vague and constitutionally impermissible. The Ordinance is also vague in its application to Richardson because none of its terms provide notice that his dogs may have been subject to the ban.

The Ordinance also violates substantive due process and does not provide the constitutionally mandated equal protection of the laws. Because of the lack of objective standard, the law is applied indiscriminately. The Ordinance relies on a presumption of viciousness to justify discriminatory treatment but that presumption is unsupported by statistics, science or any other empirically verifiable source. Accordingly, there is no rational basis to discriminate between pit bull owners and owners of other breeds.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO RECOGNIZE WINTHROP MUNICIPAL CODE SECTION 6.04.090 AS VIOLATIVE OF THE FOURTEENTH AMENDMENT BECAUSE IT IS UNCONSTITUTIONALLY VAGUE BOTH ON ITS FACE AND IN ITS APPLICATION, AND IS FURTHERMORE VIOLATIVE OF THE OVERBREADTH DOCTRINE.

- A. Winthrop Municipal Code section 6.04.090 is unconstitutionally vague on its face because it fails to adequately prescribe to whom it applies due to the fact that it relies on contested and inconsistent breed taxonomy.

Despite the presumption of constitutionality afforded to the challenged legislation, a law is unconstitutionally vague if it proscribes or requires the doing of an act in terms that necessitate that men of common intelligence guess at their meaning and differ as to their application. *Connally v. Gen'l Const. Co.*, 269 U.S. 385, 391 (1926). Courts have generally applied a two-part test in facial vagueness challenges, considering first whether the law adequately provides notice, and second, whether the law authorizes or encourages arbitrary and discriminatory enforcement. *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999).

Winthrop Municipal Code section 6.04.090 (Ordinance) restricts the ownership of “any of the breeds commonly referred to as belonging to the “pit bull” variety of terrier, which consists of the following breeds or breed types and mixtures: American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier.” (R.3). The terms of the ordinance are not definite enough to eliminate guesswork and arbitrary application of the law because the designations used are not readily discernible and proffer no empirical standards for determination. Thus, men of common intelligence must guess at which dogs are forbidden by the ordinance and which are not.

The ordinance clearly targets three breeds. However, the leading dog registries in the United States do not agree on the existence of any one of those three breeds. Neither the United Kennel Club (UKC) nor the American Kennel Club (AKC) recognize the Pit Bull Terrier as a discernible breed, nor do they agree on the existence of the American Staffordshire Terrier or American Pit Bull Terrier. (R.4).

The term pit bull was not originally applied to a certain lineage of dog, but rather to any that was used for fighting in pits and bull baiting. LOUIS B. COLBY, DIANE JESSUP, COLBY, COLBY'S BOOK OF THE AMERICAN PIT BULL TERRIER 13 (T.F.H. Publications 1997). Most often, these early "pit bulls" were bulldogs and their genetic makeup was, in fact, not anywhere close to the genetic jumble of modern pit bulls, which have been selectively bred to possess certain characteristics. *Id.* Thus, the term pit bull was a term of art originally applied to the utility of the animal rather than its genetic heritage. Over time, the name has been mistakenly applied to many dogs of the Molosser breed group, which also includes mastiffs, bulldogs and Golden Retrievers. DIETER FLIEG, *FIGHTING DOG BREEDS* (T.F.H. Publications 1996).

Dog lovers who have attempted to combat the negative stereotypes associated with pit bulls by reclassifying and changing the name of the breed further complicate the issue. The Tufts Center for Animal and Public Policy conducted a study in 2000 in to the way that pit bull owners managed the stigma associated with the breed. It found that many pit bull owners use "passing" techniques to hide their pet's heritage and avoid the stigmatization that comes with the pit bull name. Hillary Twining, Arnold Arluke & Gary Patronek, *Managing the Stigma of Outlaw*

Breeds: A Case Study of Pit Bull Owners, 8 *Society & Animals* 1 (2000), available at http://www.animalsandsociety.org/assets/library/405_s812.pdf/. Pit bull owners accomplish this by emphasizing the mix of breeds present in the animal—referring, for example, to the dog as a boxer or lab mix—or through an incorrect attribution to a different breed. *Id.*

This problem becomes increasingly troublesome when it happens on an institutional level. As recently as 1996, the San Francisco Society for the Prevention of Cruelty to Animals changed the name of the breed to diminish the pit bull stigma and began calling the dogs St. Francis Terriers. George Cothran, *Shouldn't We Just Kill this Dog?*, *SAN FRANCISCO WEEKLY*, (June 11, 1997) <http://www.sfweekly.com/1997-06-11/news/shouldn-t-we-just-kill-this-dog/2/> (last visited Jan. 22, 2011).

Even the AKC and the UKC, upon whom many (including the District Court in the present case), rely for breed standards have not been consistent with their naming and identification of pit bulls. The AKC has changed the name of the breed twice, once in 1935 and a second time in 1972, after initially refusing to recognize the pit bull as a breed. *American Staffordshire Terrier History*, AMERICAN KENNEL CLUB, http://www.akc.org/breeds/american_staffordshire_terrier/'history.cfm/ (last visited Jan. 22, 2011). Thus, in 1898, the UKC was formed with the express purpose of registering the unrecognized bloodlines that we now identify as pit bulls. The organization registered its founder's own pet as the first American Pit Bull Terrier. *American Pit Bull Terrier*, UNITED KENNEL CLUB, <http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008/> (Revised November 1, 2008).

The City's argument that dog owners, law enforcement and the general public know what types of dogs constitute the "pit bull" variety of terrier is fundamentally flawed because not even professionals can agree on what breeds and mixes should be included in that classification. This is evidenced by the inconsistencies between pit bull bans in different jurisdictions and the specific breeds that are lumped together under this category. While the Winthrop ordinance names only three breeds, other pit bull bans have been more expansive, targeting other breeds and grouping them into the same classification as those listed in the Winthrop ordinance due to their shared heritage. *See, e.g.,* Ohio R.C. § 955.11 (Westlaw current through 2010 File 58 of 128th GA (2009-2010))(A)(4)(a)(iii) (additionally including the American Bulldog in its classification of pit bull-type terrier); City of Winnipeg Pound By-Law 2443/79, section 20.19 (designating the Argentine Dogo as a "pit bull" type of terrier).

The common knowledge upon which the City relies to justify breed-specific legislation is further flawed because the general public's perception of the pit bull as a breed type is fatally overinclusive. The general public tends to identify all short-haired, stocky dogs as pit bulls and almost any dangerous dog of an unknown breed is often incorrectly labeled as a pit bull. *Pit Bull Bias in the Media*, AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.aspca.org/fight-animalcruelty/advocacy-center/animal-laws-about-the-issues/pit-bull-bias-in-the-media.aspx/> (last visited Jan. 22, 2011).

The media's bias toward sensationalizing and over-reporting alleged pit bull attacks and misidentifying dangerous dogs as pit bulls is well documented in a series of

studies performed by the National Canine Research Council. *Dog Bites and the Media*, NATIONAL CANINE RESEARCH COUNCIL, <http://nationalcanineresearchcouncil.com/dog-bites/dog-bites-and-the-media/> (last visited Jan. 22, 2011). Because of these general misconceptions, it is imprudent to rely on the common knowledge of dog owners, law enforcement and the general public to attribute any degree of specificity to the Winthrop ordinance. Dogs as diverse as Rottweilers and Laborador Retrievers have been confused with pit bulls based on flawed common knowledge. *Which One is the American Pit Bull Terrier?*, MID-AMERICA BULLY BREED RESCUE, <http://mabbr.org/legislation4.html/> (last visited Jan. 22, 2011). In fact, relying on such common knowledge further confuses the issue and virtually guarantees the arbitrary application of the law.

The District Court found that the Winthrop ordinance was not impermissibly vague “in all of its application,” citing *Hoffman Estates* as the leading authority. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). However, *Hoffman* itself provides the caveat that the standards used to evaluate facial vagueness should not be “mechanically applied.” *Id.* at 498. The court cited varying tolerances and a scienter requirement as necessary considerations in a vagueness challenge. *Id.* at 499.

Supreme Court Justice Steven Breyer reinterpreted the *Hoffman* standard in his concurrence in *Morales*, stating that “if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all of its applications” *Morales* at 44. The District Court may be correct that if one chooses to register their dog as one of the offending breeds, then one must know that the ordinance applies to him. (R. 10). However, inconsistencies between identification standards over time and between

agencies, coupled with the mixed nature of the breed's genetic history makes it impossible to know whether registration as one of the forbidden breeds is truly proper. Relying solely on registration to inform the applicability of the law does not give the majority of alleged pit bull owners any indication whether their dog is included in the ban and leaves such determinations subject to the pervasive discretion condemned by Justice Breyer.

B. The Ordinance is further invalidated by its vagueness because it fails to provide any guidelines to govern law enforcement.

The Supreme Court has stated that

[The void-for-vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, [the Court has] recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement.

Kolender v. Lawson, 461 U.S. 352, 357 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). The Winthrop Ordinance contains no provisions or guidelines to govern law enforcement; instead, it leaves the determination of whether a dog is of the pit bull breed type subject to entirely arbitrary decision by the City Manager.

Breed-specific legislation, similar to the ordinance in question has been upheld in many jurisdictions. *See, e.g., Vanater v. South Point*, 717 F. Supp. 1236 (S.D. Ohio 1989); *Dias v. City & County of Denver*, 567 F.3d 1169 (10th Cir. 2009). However, the legislation in those cases was much more carefully drafted than the Winthrop Ordinance and included guidelines and standards that both limited the discretionary powers of law

enforcement officials and helped to provide adequate notice to those potentially affected by the legislation's enactment.

Consider the legislation upheld in *Vanater*, Ordinance 87-6, which defines a pit bull terrier as the following:

... any Staffordshire Bull Terrier or American Staffordshire Terrier breed of dog, or any mixed breed of dog which contains, as an element of its breeding the breed of Staffordshire Bull Terrier or American Staffordshire Terrier as to be identifiable as partially of the breed of Staffordshire Bull Terrier or American Staffordshire Terrier *by a qualified veterinarian duly licensed by the State of Ohio.*

Vanater at 1239 (emphasis added). Ordinance 87-6 is distinguishable from the Winthrop ordinance because it provides an explicit qualification that governs the application of the law. Such clarifications lend the requisite specificity to the definition of pit bull terrier and preclude arbitrary enforcement of the law. Similarly, consider Section 8-55 of the Revised Municipal Code of the City and County of Denver, challenged in the above-mentioned *Dias* case. It reads:

A "pit bull," for purposes of this chapter, is defined as any dog that is an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying the majority of physical traits of any one (1) or more of the above breeds, or any dog exhibiting those distinguishing characteristics *which substantially conform to the standards established by the American Kennel Club or United Kennel Club* for any of the above breeds.

Dias at 1173 (emphasis added). Like the *Vanater* ordinance, Denver's clearly identifies the standard under which the law will be enforced. *Id.* By citing to the UKC and AKC standards, the ordinance submits itself to an objective authority and, once again, allows

concerned citizens to know the standards by which their pets will be judged to fall under the legislation.

Conversely, the Winthrop ordinance fails to achieve this level of specificity. It neither establishes an objective standard for consideration as in *Vanater*, nor submits itself to one already in place, as in *Dias*. The Winthrop Ordinance merely states that the ban is applicable to the American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier. (R. 3). The ordinance provides no authority or standard for a determination of whether a dog belongs to one of those offending breeds. Consequently, it is impossible for citizens of Winthrop to know whether their dogs will be found to fall under the ordinance. As stated in *Kolender*, “due process does not require “impossible standards” of clarity.” 461 U.S. at 361. However, when possible and practical, further precision is required. *Id.* There has been no reason presented to the court why the Winthrop Ordinance could not have been better drafted in accordance with the examples given above and their progeny, so as to eliminate the questionable application of the law.

Massachusetts state courts have echoed the need for precise legislation, overturning similar ordinances because of the fatal flaw present in “conflicting, subjective standards”. *Am. Dog Owners Ass’n, Inc. v. City of Lynn*, 404 Mass. at 76, 533 N.E.2d at 646 (Mass. 1989). In its current form, Winthrop Municipal Code section 6.04.090 encourages arbitrary and discretionary enforcement of the law and is facially vague so as to render the Ordinance constitutionally impermissible.

- C. The Ordinance is impermissibly vague in its application to Richardson because it provides no reason for him to believe that it is applicable to his dogs and is fatally over-inclusive in its current form.

Due to the Ordinance's failure to establish any necessary standards of application, Richardson was not provided with adequate notice that his pets may have been subject to the pit bull ban. The District Court found that Richardson should have been on notice based merely on the presence of a set of common physical characteristics, namely that his dogs were muscular, had large heads and short coats. (R. 10). However, such descriptions apply to many breeds and are hardly conclusive proof of a dog's pit bull heritage. Nor are those characteristics sufficiently distinguishing to compel Richardson to consider his dog's genetic heritage.

Many experts believe that it is nearly impossible to determine whether a dog may have a pit bull heritage by appearance alone. Consider the following opinion from Certified Applied Animal Behaviorist and dog bite expert Richard H. Polsky, PhD, CAAB of Animal Behavior Counseling Services, Inc.:

In my experience as an expert on breed identification, various dog types have been erroneously misidentified as American Staffordshire Terriers or American Pit Bull Terriers, and when there is a mixed breed dog involved accurate identification becomes problematic. In my opinion, when percentages fall below approximately 75% for the American Pit Bull terrier or American Staffordshire terrier, I do not feel that it is possible to accurately assess the breed composition of a mixed breed dog based on appearance alone for the purpose of stating that the dog is partially American Pit Bull terrier or American Staffordshire terrier or a closely related breed.

Misidentified, Misjudged, and Misunderstood, PIT BULL AWARENESS COALITION,

<http://www.whatapittie.org/misunderstood.html/> (last visited Jan. 22, 2011).

Again, the drafters of the Ordinance have supplied breed names as the only qualitative determinant of which dogs fall under its purview. Thus, if a dog's breed is unknown, there is no conceivable way that Richardson either could have or should have known that it was applicable to his pets. Had the Ordinance been drafted so as to include appropriate standards and guidelines, it may have given Richardson adequate notice. However, it failed to do so and was therefore unconstitutionally vague in its application.

Even the physical characteristics relied on by the court to justify the application of the Winthrop Ordinance as sufficient notice are so general that they render the legislation fatally overbroad. It is generally accepted that there are over twenty breeds commonly misidentified as pit bulls, which may be muscular, have short hair and large heads. *See, e.g. Expert Opinions and Research*, ANIMAL FARM FOUNDATION, http://animalfarmfoundation.org/view_article.php?id=86 (last visited Jan. 22, 2011); *Misidentified, Misjudged, and Misunderstood*, PIT BULL AWARENESS COALITION, <http://www.whatapittie.org/misunderstood.html/> (last visited Jan. 22, 2011). The lack of discernible standards and absence of burden of proof in the Winthrop Ordinance allow the Ordinance to be applied to any of these breeds that may have the misfortune of being misidentified by the City Manager. The City has also failed to properly utilize DNA testing and other scientific methods of ascertaining the true genetic heritage of the dogs and thus provides no checks or balances to the City Manager's wonton application of the law. Without more precise guidelines and restrictions, the Winthrop Ordinance essentially outlaws any short-haired, large-headed dogs and is thus fatally overbroad.

II. THE DISTRICT COURT ERRED WHEN IT RULED THAT WINTHROP MUNICIPAL CODE SECTION 6.04.090, DESIGNATING ALL “PIT BULL’ VARIETY OF TERRIER” AS *PER SE* VICIOUS AND THUS BANNING THEM, DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION BECAUSE THE PRESUMPTION OF VICIOUSNESS IS WITHOUT MERIT AND DENIES PIT BULL OWNERS EQUAL PROTECTION OF THE LAWS.

In *Sentell*, the United States Supreme Court held that most dogs are harmless, but asserted that legislatures have broad police powers to control all dogs to protect against the public nuisance posed by a vicious dog. *Sentell v. New Orleans and Carrollton R.R.*, 166 U.S. 698, 705 (1897). *See also Downing v. Cook*, 431 N.E.2d 995 (1982). The *Vanater* court similarly uncovered a state’s right to protect the public but identified it as a right to protect against a vicious dog. *Id.* at 1242 (emphasis added). Similarly, the holding of the court in *Sentell* did not address the issue of controlling an entire breed of dog, only the behavior of one animal. *Sentell* at 705.

A. The subjective identification procedures used in identifying “pit bulls” is neither accurate nor fairly administered.

Pit bulls are typically identified using subjective standards, based on the characteristics listed by the AKC or UKC. *See, e.g., Am. Dog Owner’s Ass’n., Inc. v. City of Lynn*, 404 Mass. at 75, 533 N.E.2d at 644 (Mass. 1989). In *Lynn*, two dog officers acknowledged that they used subjective standards to decide whether a particular dog was one of the types covered by the ordinance. Furthermore, the officers admitted that they had been furnished with no training to aid them in identifying pit bulls even though the responsibility would fall to them within the course of their duties. *Id.*

A subjective standard is a legal standard peculiar to a particular person and based

on that individual's views and experiences. *Black's Law Dictionary* p. 1172 (8th ed. 2004). When an animal control officer identifies what he believes to be a pit bull using a subjective standard, he draws on his own background regarding the breed. He does not consult the proper guides for breed identification, but relies on his own perception of how the pit bull terrier appears. Pit bull owners are not being treated equally when subjective standards are used because there is no benchmark criterion to evaluate the officer's decision. Furthermore, subjective evaluations are not subject to being disproven by legitimate evidence because they often lack a factual basis. *See, e.g., Lynn*, 404 Mass. 73, 533 N.E.2d at 644 (finding that animal control officers responsible for identifying pit bulls were not provided with any training to adequately prepare them for the task).

Objective standards are legal standards based on conduct and perceptions external to a particular person. *Black's Law Dictionary* at 1172. If the objective standard is applied, an officer must refer to specific guidelines every time that a determination must be made. However, even submission to an objective standard does not remove all ambiguity. Many breeds exhibit the characteristics respectively listed by the AKC and the UKC for the American Staffordshire Terrier and American Pit Bull Terrier.

For example, the UKC breed standard for an American Pit Bull Terrier (APBT) states that "Any color, color pattern, or combination of colors is acceptable" for the dog's nose, and the dog does not need to fall within any specified weight range. *American Pit Bull Terrier*, UNITED KENNEL CLUB, <http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008/> (Revised November 1, 2008). If the APBT had more specific standards, akin to those of the Boston Terrier, which requires a

“white muzzle band; an even white blaze between the eyes and over the head,” then the breed could be more easily identified. *Boston Terrier*, UNITED KENNEL CLUB, <http://www.ukcdogs.com/WebSite.nsf/Breeds/BostonTerrier> (revised April 15, 2007). The UKC standard is vague enough that a dog with a brown nose, like that of a Chocolate Labrador Retriever, or a black and white dog like a Dalmatian could be mistakenly identified as an APBT. *American Pit Bull Terrier*, UNITED KENNEL CLUB, <http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008/> (Revised November 1, 2008). The AKC has similarly indistinguishing standards; it allows for the American Staffordshire Terrier to be any color, although it does require that the dog’s nose be black. *AKC Meet the Breeds: American Staffordshire Terrier*, AMERICAN KENNEL CLUB, http://www.akc.org/breeds/american_staffordshire_terrier/ (last visited Jan. 22, 2011). However, a black nose is a common trait also required for Boxers and Bulldogs, among others. *AKC Meet the Breeds: Boxer*, AMERICAN KENNEL CLUB <http://www.akc.org/breeds/boxer/> (last visited Jan. 22, 2011); *AKC Meet the Breeds: Bulldog*, AMERICAN KENNEL CLUB, <http://www.akc.org/breeds/bulldog/> (last visited Jan. 22, 2011) Both breeds are commonly mistaken for the American Staffordshire Terrier. *Misidentified, Misjudged, and Misunderstood*, PIT BULL AWARENESS COALITION, <http://www.whatapittie.org/misunderstood.html/> (last visited Jan. 22, 2011).

The UKC has noted the potential for misidentification by featuring a disclaimer on its “Breed Identification” website stating:

The UKC standards contained herein are intended for use by people already familiar with the breeds they describe, such as responsible

breeders and UKC judges. They are not intended for use by other organizations for breed identification and should not be adopted for those or similar purposes, either in part or as a whole.”

Breed Information, UNITED KENNEL CLUB, <http://www.ukcdogs.com/WebSite.nsf/WebPages/LrnBreedInfo/> (last visited Jan. 22, 2011). The standards supplied by the AKC and UKC are simply not specific enough, with respect to these two breeds, to be applied uniformly and accurately for classification purposes. The *Lynn* court found that

[S]ome dogs might appear to be “Pit Bulls” yet belong to a breed “commonly understood” *not* to be “Pit Bulls,” and that some dogs, “commonly understood” by the owner or dog registry to *be* a breed “known as Pit Bull” might not *appear* to be “Pit Bulls,” and so escape the notice and enforcement efforts of [the officers].

404 Mass. at 80, 533 N.E.2d 642, 647 (Mass. 1989).

Many sources refer to a 1987 “Sports Illustrated” article as the public’s first major exposure to the alleged pit bull problem. E.M. Swift, *The Pit Bull: Friend and Killer. Is the Pit Bull a Fine Animal, As Its Admirers Claim, Or Is It a Vicious Dog, Unfit For Society?*, 67 *Sports Illustrated*, 74, 77 (July 27, 1987). *See, e.g.*, Kristen E. Swann, *Irrationality Unleashed: The Pitfalls of Breed-Specific Legislation*, 78 *UKMC L. Rev.* 839 (2010); Safia Gray Hussain, *Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won’t Solve the Dangerous Dog Dilemma*, 74 *Fordham L. Rev.* 2847 (2006). Of particular importance is the article’s discussion of the difficulties of identification. According to the article, a pit bull is not a specific breed, but rather a catchall term, such as when one refers to a dog as simply a hound or retriever.

Even experts have admitted that it can be difficult, if not impossible, to identify a pit bull based purely on physical characteristics. In one Florida case, experts for both the

plaintiff and the defense testified that they have been wrong in their identification of pit bulls. *Am. Dog Owners Ass'n., Inc. v. Dade Co., Fla.*, 728 F.Supp 1533, 1536 (S.D. Fla 1989). However, in that case, the court noted that, if after consulting the ordinance for that county, a dog owner still doesn't know if the ordinance applies to him, he can consult his veterinarian or receive a determination from Animal Control as to the breed of the dog. *Id.* at 1541. The Winthrop Ordinance provides no such secondary assurances and, in fact, disregarded the determination of Richardson's veterinarian that his dog was a mixed breed.

The *Lynn* court acknowledged that enforcement of an ordinance prohibiting the keeping of a "vicious dog" requires questions of fact as to whether the particular animal is vicious or known to be vicious. 404 Mass. at 80, 533 N.E.2d at 644. However, the ordinance challenged in *Lynn* banned "pit bulls", a term even less definite than those in the Winthrop Ordinance. The court recognized that such a classification is much more difficult to enforce because it was based upon a dog officer's subjective understanding of the phenotype of an unclassified "pit bull" breed. *Id.* As a result of the lack of objective standards, it was nearly impossible for a dog owner to know if or when his dog fell under the ban, unless the dog in question was a purebred.

Richardson received information from both the rescue organization from which he adopted his dogs and the veterinarian who treated them, that the dogs were "mixed breed." Neither identified them as the "pit bull variety of terrier," such that would fall under Winthrop's Municipal Code § 6.04.090. The court erred in relying instead on a determination made by an animal control officer, the City Manager, or the City

Manager's designee. The Ordinance supplied these parties with no objective standards, so it is highly likely that the means used to identify Zoe as a "pit bull type of terrier", based on the past testimony of animal control officers, were most likely inaccurate, and the determination was incorrect.

B. Equal protection is not being afforded to owners of "pit bull type terriers" because the presumption of viciousness is without merit.

At the beginning of the twentieth century, the "pit bull dog" was regarded as the quintessential American dog. However, in the 1980s, that image was tarnished by several highly publicized attacks. Hussain, *supra* at 2854. Further media coverage of a few serious attacks spawned the subsequent hysteria regarding the "vicious" nature of "pit bulls." *Id.* In order to deal with the extensive media coverage and public outcry, legislators created a quick-fix solution: simply ban ownership of such dogs. The end result is a faulty law that attempts to control the dog-bite problem by merely outlawing a specific breed of animal.

The U.S. Department of Justice (DOJ) recognized the flaw in such legislation in February 2010 when it reviewed the Americans with Disabilities Act (ADA). *Nondiscrimination on the Basis of Disability in State and Local Government Services*, http://www.ada.gov/regs2010/titleII_2010/reg2_2010.html/, DEPARTMENT OF JUSTICE, (last updated Aug. 31, 2010) (Relevant portion available in Appendix A). The legislation forbids a person with a disability to use a trained service dog of a particular breed in a certain locality. *Id.* The DOJ wrote that it "does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or

attacks.” *Id.*

The Department of Justice has recognized that breed specific legislation restricts the ownership of animals that have loyally served in the past. In the report, the German Shepherd is the breed used for the example of dogs that have loyally served. It can be reasonably inferred that the DOJ is referring to any breed of dog that has been involved in human services, such as the American Pit Bull Terrier and the American Staffordshire Terrier. Furthermore, the DOJ wrote

State and local government entities have the ability to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal’s actual behavior or history--not based on fears or generalizations about how an animal or breed might behave. This ability to exclude an animal whose behavior or history evidences a direct threat is sufficient to protect health and safety.

Id. The DOJ recognizes that a dog should be judged individually, based on its own prior behavior, rather than being condemned because of an assumption that all dogs of a specific breed will behave in the same manner.

This Court should follow the Department of Justice’s example and declare that the discrimination against a particular breed of dog is not constitutional, based upon the Fourteenth Amendment’s guarantee of equal protection. Vicious dog laws must be used to protect the public from individual animals that have exhibited aggressive behavior and should not be used to discriminate against an entire breed.

C. Although the application of the rational basis test was correct, it was incorrectly applied because the presumption of viciousness is baseless.

The District Court was correct when it applied the rational basis test, stating that “It is uncontested that the City has a legitimate interest in animal control . . . and that dogs may be taken and destroyed under the state’s police power without offending the constitutional rights of their owners.” (R. 12) However, the City applied the test incorrectly.

The Fourteenth Amendment’s Due Process Clause prevents state and local governments from depriving its citizens of life, liberty, or property without certain steps. Additionally, it affords all citizens equal protection of the laws. U.S. CONST. amend. XIV. In *Vanater*, the plaintiff argued that the ordinance in his state was “unconstitutional because it irrationally distinguishes between Pit Bulls and other breeds of dogs and that it fails to include other specific breeds of dogs that could be grouped into the dangerous Pit Bull category.” 717 F.Supp. at 1245. The court, however, disagreed and determined that the argument was without merit because the guarantee of equal protection of the laws does not guarantee that all dog owners will be treated alike, but rather guarantees that all pit bull owners will be treated alike. *Id.* However, because it is so difficult to identify pit bulls themselves, it is nearly impossible to identify all “pit bull owners.”

Furthermore, the distinction between pit bull owners and owners of other breeds is entirely discriminatory and not based on any rational factor. It is the consequence of a collection of urban myths, misquoted statistics and an improper presumption of viciousness.

The bite statistics proffered by proponents of breed-specific legislation are inaccurate and should not be considered as a reliable source. There are many reasons why such statistics are inaccurate. Many dog bites are unreported, while bites from certain breeds, such as pit bulls, may be over reported. Bites from animals that society believes to be “dangerous” or “vicious,” such as the pit bull or other guarding breeds of dog, are more likely to be reported by the media. Randall Lockwood & Kate Rindy, *Are “Pit Bulls” Different? An Analysis of the Pit Bull Terrier Controversy*, 1 *Anthrozoos* 2 (1987). (Lockwood).

Identification difficulties only amplify the bias already present within the reports. Because the term pit bull can encompass a variety of breeds and phenotypes, many breeds are often erroneously reported as pit bulls. According to Lockwood, who surveyed over 2,000 bite reports, any medium-sized black and tan animal was likely to be recorded as a German Shepherd. If the animal was a stocky short-haired animal, it was likely to be recorded as a pit bull. *Id.* He further notes that “it is not unusual to find newspaper accounts of “pit bull attacks” accompanied by a picture of a boxer, pug, or some other breed.” *Id.* at 3.

The under reporting of a breed’s population also detracts from the credibility of dog bite statistics. Given the current restrictions on pit bulls in many jurisdictions, pit bull owners are less likely to register their dogs or visit their veterinarians. An accurate assessment of pit bull bite frequencies would require an accurate population count, something that becomes less and less likely with each pit bull ban put into effect.

Owners who have acquired a dog and were told that it was simply a “mixed breed” report the dog as such, leading to an inflation of bite statistics.

After conducting a comprehensive study of dog bites, the United States Centers for Disease Control (CDC) declined to support breed specific legislation because of these inaccuracies and identification issues. The CDC even went so far as to stop tracking dog bites by breeds in 1998. The CDC found that breed-specific dog bite statistics were not accurate enough to inform public policy and that dangerous animal legislation was a better policy. Jeffrey Sacks, et al., *Breeds of Dog Involved in Fatal Human Attacks in the United States between 1979 and 1998*, CENTER FOR DISEASE CONTROL, <http://www.cdc.gov/ncipc/duip/dogbreeds.pdf> (2000). Along with the CDC, breed specific legislation is also opposed by the American Veterinary Medical Association, the American Society for the Prevention of Cruelty to Animals, the National Animal Control Association, the Humane Society of the United States, the American Kennel Club and the National Canine Research Council among others. ANIMAL FARM FOUNDATION, http://animalfarmfoundation.org/view_article.php?id=86 (last visited Jan. 22, 2011).

Expert opinion is overwhelmingly unanimous that the presumption of viciousness is little more than a cultural fabrication and should *not* inform public policy. Absent the presumption of viciousness, there remains no rational basis for discriminating against pit bull owners. Doing so deprives them of the equal protection of laws and other fundamental liberties and constitutes a violation of the principles of substantive due process.

CONCLUSION

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 and as applied to the plaintiff as presently constructed. Furthermore, it violates substantive due process under the Fourteenth Amendment to the U.S. Constitution. Accordingly, this Court should rule in favor of the plaintiff and overturn the District Court’s grant of summary judgment. Plaintiff should be awarded injunctive relief and damages according to 42 U.S.C. § 1983.

Respectfully submitted,

Counsel for the Petitioner

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