

CV: 10-00416  
UNITED STATES COURT OF APPEALS  
FIRST CIRCUIT  
APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MASSACHUSETTS

Quinton Richardson  
**Plaintiff-Appellant**  
vs.  
City of Winthrop, Massachusetts  
**Defendant-Appellant**

BRIEF FOR THE DEFENDANT-APPELLEE (CITY OF WINTHROP)

Team number 12

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**STATEMENT OF THE ISSUES**

- I. Whether 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, 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. Whether 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.

## **STATEMENT OF THE CASE**

### **I. Proceedings and Disposition in the Court Below**

Quinton Richardson (plaintiff-appellant) brought a §1983 claim against the City of Winthrop Massachusetts (defendant-appellee) alleging that municipal code 6.04.090 (Ordinance) violates his rights as set forth in the United States Constitution. Specifically, Mr. Richardson argues that the ordinance violates his procedural due process rights of the Fourteenth Amendment as facially vague and vague as applied, and overbroad. Mr. Richardson also alleges the ordinance violates his substantive due process rights of the Fourteenth Amendment.

The lower district court granted the City of Winthrop's (City) motion for summary judgment, holding that the ordinance was neither facially vague nor vague as applied to Mr. Richardson. In so holding, the district court found that facially the Ordinance puts those who own registered pure bred dogs of the pit-bull varieties on notice that the Ordinance applies to them (R. 10). The lower court also held that the ordinance is not impermissibly vague as applied to Mr. Richardson because the ordinance sufficiently describes characteristics of the prohibited animal. Animals owned by appellant blatantly possess those characteristics and therefore notify him that the ordinance applies to him and his dogs.

The lower court further held that Mr. Richardson's substantive due process rights were not violated. As there is no fundamental right at issue, the lower court therefore applied rational basis review to the challenge. In doing so, the district court held that the City has a legitimate government interest in animal control, and public safety. Evidence presented by the city indicates that the prohibited breed of animal possesses inherent

characteristics of exceptional aggression, viciousness and unpredictability. This evidence demonstrates that the ban bears a rational relationship to the governmental purpose of reducing human injury and promoting public safety (R. 12). Mr. Richardson brings appeal from the lower court's decision.

## **II. Statement of Facts**

The City enacted a civil ordinance in 1988 as a response to the significant threat pit bull types pose to the health, safety and welfare of the City residents (R. 13). This ordinance designates American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier breeds as "vicious" dogs (R. 5). Under the ordinance, "all pit bull variety of terrier" breeds and "mixtures thereof" are banned from City limits (R. 3). The city claims that "pit bull" is a common term in news media, popular culture and among welfare and advocacy groups (R. 10).

In 2005, Mr. Richardson, a resident of City, obtained two dogs he claims were of unknown heritage from a local rescue organization (R. 4). Although the dogs were classified as "mixed breed" by the rescue organization and a veterinarian, they are both muscular in appearance with large heads (R. 4). Mr. Richardson claims that he did not believe the ordinance applied to his dogs because they did not exhibit an aggressive disposition (R. 9).

In August 2009, a meter reader saw one of the dogs through a window at Mr. Richardson's residence and notified animal control officers (R. 5). Animal control officers detained the dog after identifying it as a pit bull based its physical appearance. *Id.* At a hearing, the City Manager found the dog was "vicious" under the ordinance because it was a "Pit Bull Terrier type dog." *Id.* Mr. Richardson was asked to remove the dog

from city limits within ten days, but was unable to do so. *Id.* Subsequently, the dog was euthanized. *Id.* The other dog was not seized because it was at recovering from surgery at the veterinary hospital when animal control officers arrived. *Id.* Richardson has kept the dog at his residence within the City. *Id.* An injunction pending decision on this case prevents seizure of this dog (R. 6).

### **III. Standard of Review**

Courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of constitutional standards. Independent review is necessary if appellate courts are to maintain control of, and to clarify, the legal principles. *De novo* review tends to unify precedent and stabilize the law. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* 532 U.S. 424, 436 (2001) *citing BMW of North America, Inc. v. Gore* 517 U.S. 559, 697 (1996). In the present case, all of the arguments presented on appeal pertain to constitutional rights, and therefore *de novo* review is appropriate for each claim.

### **SUMMARY OF THE ARGUMENT**

The Ordinance is not unconstitutional under the overbreadth doctrine. In order for the overbreadth doctrine to be applicable, the Ordinance must infringe on rights protected by the First Amendment. In this case, Mr. Richardson has alleged a claim under Fourteenth Amendment and not the First Amendment. Therefore, the overbreadth doctrine fails.

The Ordinance is not impermissibly vague on its face. A facial application of the void for vagueness test fails because Mr. Richardson does not have standing. Mr. Richardson lacks standing because he engaged in conduct prohibited by the



Ordinance. Mr. Richardson continues to keep a dog prohibited by the ordinance in his residence. He is aware that the dog is of a breed considered to be a mixture of Pit Bull.

The “as applied” test for vagueness also fails. The phrases American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier all refer to the same breed of dog. Further, this breed of dog is identifiable by its physical traits. Accordingly, Mr. Richardson was put on notice that his conduct was prohibited under the Ordinance.

The Ordinance prohibiting the “pit-bull variety” of dog from the city limits does not violate the substantive due process clause of the fourteen amendments. In the present case the alleged deprivation by appellant (property right of animals) in no way implicates a fundamental right, and therefore rational basis review is the appropriate standard of review in addressing the city ordinance to ensure it is not arbitrary. The ordinance is not arbitrary as the city has a legitimate purpose in protecting its citizens from violent harm. Rational basis is highly deferential to the governmental entity where courts have repeatedly held that the fit between the purpose of the statute and the deprivation does not have to be perfect. And while it may be true that some pit bulls are not vicious animals, there is an undeniable culture surrounding the breed, where the animal has been repeatedly cultivated in pursuit of violent endeavors. Therefore the ordinance bears a rational relationship between the governmental purpose of protecting its citizens from violence and the means chosen to advance that purpose.

Judicial restraint must be exercised in examining substantive due process. If there is a constitutional provision that provides an explicit textual source for a constitutional protection against certain governmental behavior, substantive due process does not apply. Appellant asserts that the ordinance is under inclusive and over inclusive. He asserts that his substantive due process rights are violated as a result of the ordinance treating owners of pit-bulls differently than other owners. Such arguments do indeed describe prohibited governmental treatment. However, such treatment is prohibited under the equal protection clause. Therefore substantive due process does not apply, and the lower court's decision must be affirmed.

## **ARGUMENT**

*I. The District court properly ruled that is not unconstitutionally vague on its face or as applied to the Plaintiff under the Fourteenth Amendment and does not violate the overbreadth doctrine.*

When a statute or ordinance is challenged on the basis of overbreadth and facial vagueness, a two step analysis is applied. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 (1982) (“Flipside”). The first step requires a determination of whether “the enactment reaches a substantial amount of constitutionally protected conduct.” *Id.* If substantial application to constitutionally protected rights is not implicated, overbreadth fails. *Id.* Analysis should then proceed to an examination of vagueness. *Id.* Thus, the enactment should be upheld if it does not reach a substantial right and is not impermissibly vague. In the present case, neither requirement is met.

A. *The District Court correctly concluded that the Ordinance is not in violation of the overbreadth doctrine because Mr. Richardson has failed to show a substantial application to protected rights.*

An ordinance or statute is overbroad if it reaches beyond unprotected conduct into other constitutionally protected activities. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). If a statute is deemed overbroad, all enforcement of the law is declared invalid. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Accordingly, facial application under the overbreadth doctrine is “strong medicine” and should be used sparingly. *Id.* at 120. Invalidation for overbreadth can create substantial social costs when laws regulating unprotected conduct are terminated. *Id.* at 119. In order to ensure that these “costs do not swallow the social benefits of declaring a law “overbroad,” the ordinance or statute must have a “substantial” reach over protected conduct relative to the scope of its legitimate application. *Id.*

The overbreadth doctrine is uniquely situated within the context of the First Amendment. This doctrine was developed as a response to the “chilling” effect enforcement of an overbroad law may have on constitutionally protected speech. *Id.* Society would be deprived of the “marketplace of ideas” if individuals were to abstain from protected speech out of fear for overbroad enforcement. *Id.* Application of the overbreadth doctrine has therefore been expressly limited to speech and conduct protected under the First Amendment. *Schall v. Martin*, 467 U.S. 253, 268 (1984).

The overbreadth doctrine fails in the present case because substantial application to constitutionally protected rights is not implicated. Mr. Richardson’s claim alleges violation of rights protected under the Fourteenth Amendment. He has not raised a claim related to speech or conduct under the First Amendment. Because the overbreadth

doctrine is limited to claims brought under the First Amendment, he cannot show that the Ordinance has an overbroad reach under this doctrine.

*B. The District Court correctly concluded that the Ordinance is not impermissible vague on its face or as applied to Richardson.*

The void for vagueness doctrine protects individuals from arbitrary enforcement of law and ensures that the law provides fair warning of prohibited conduct. *Flipside*, 455 U.S. at 494-495. Under this doctrine, the statute must provide explicit standards for the application of enforcement. *Id.* Statutes and ordinances must also have enough clarity that a reasonable person can ascertain what prohibited conduct is in order to act accordingly. *Id.*

There are two distinct applications of vagueness analysis: facial vagueness and vagueness as applied to an individual. *Id.* In order for a statute to be determined invalid under facial analysis, it must be vague in all its applications. *Id.* at 497. Vagueness “as applied” requires examination of facts of the case to determine whether the ordinance is vague as applied. *Id.*

A challenge predicated on facial vagueness requires standing. *Id.* at 495. When a statute clearly applies to a plaintiff’s conduct, vagueness of the law as applied to the conduct of others cannot be raised. *Id.* When such conduct occurs, individuals will only have standing to challenge the ordinance as it applies to them. *Id.*

There has been some discussion that a determination of overbreadth can be made under the umbrella of facial vagueness. *See John F. Decker, Overbreadth Outside the First Amendment*, 34 N.M. L. Rev. 53 (2004). Analysis of an overbroad statute can

occur, however it is generally not referred to as overbreadth. Instead, it is included in facial analysis. *Id.* at 89.

1. *Standing for facial vagueness fails in this case.*

Standing for facial vagueness is denied when an individual has had fair warning of conduct prohibited under a statute. In *Parker v. Levy*, 417 U.S. 733 (1974), military provisions clearly proscribed statements that attacked the war aims of the United States. *Id.* at 754. The plaintiff made statements encouraging individuals not to go to war. The Court held that he had no standing to bring a claim under facial vagueness because the manual containing the provision had an example of prohibited behavior very close to the plaintiff's statements. *Id.* at 755-756. The Court's rationale was that even though there may be uncertainty in the statute in some cases, it was certain that the plaintiff's activity was prohibited.

When "vagueness as applied" is examined, the physical appearance dog breeds provides sufficient notice of prohibited conduct. In *Garcia v. Vill. of Tijeras*, 108 N.M. 116, 767 P.2d 355, 358 (1988) upheld an ordinance banning "any dog breed known as American Pit Bull Terrier" within village limits under a vagueness as applied test. There the plaintiffs claimed that the term American Pit Bull Terrier doesn't have enough specificity for adequate notice. *Id.* at 357. The court cited evidence establishing "Pit Bull" as a common name for American Staffordshire Terrier and American Pit Bull Terrier and Pit Bull as the same breed. *Id.* at 358. Further, the court held that both unregistered dogs and dogs that appear to be an American Pit Bull Terrier are included in the ordinance. This is because a determination of the breed can be recognized through the physical

appearance of the dog. *Id.* The physical appearance gave the plaintiff sufficient notice. *Id.*

Mr. Richardson lacks standing when he engaged in conduct that he had fair warning was prohibited under the ordinance. After one of his dogs was determined to be of a “pit bull variety,” Mr. Richardson has continued to keep his other dog in City. Like the plaintiff in *Parker* who had fair warning of prohibited conduct, Mr. Richardson is aware that his dogs are prohibited under the statute. Although only one dog was identified as a pit bull, the dogs are littermates and are similar in appearance. This is similar to *Parker*, where uncertainty in some areas does not mean that the ordinance lacks clarity. Mr. Richardson has demonstrated through his actions that he is aware his dog is banned under the ordinance. He has not allowed the dog to leave his home and fears that it may be seized. Mr. Richardson certainly has been given fair warning that this prohibited conduct. He lacks standing for facial vagueness and vagueness as applied to Mr. Richardson.

*2. Even if overbreadth analysis is expanded to the Fourteenth Amendment, this claim is irrelevant because facial vagueness does not apply in this case.*

It is possible that the District court erroneously labeled their analysis as the overbreadth doctrine. This quasi-overbreadth analysis will only apply if there is standing for facial vagueness. Further, analysis outside of the First Amendment is rare and unspoken. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. Rev. at 93 (2004).

3. *Adequate notice is provided by the terms American Staffordshire Terrier, American Pit Bull, Pit Bull Terrier, and mixtures thereof under the “vague as applied test.”*

American Staffordshire Terrier provides adequate notice under “vague as applied” analysis. Like the ordinance in *Garcia*, the phrases “American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier” are not vague. In *Garcia* the court held that there was sufficient evidence that the three terms can be equated. This same logic can be applied here. Pit Bull is generic and is meant to encapsulate all pit bull mixed breeds and registered dogs, eliminating vagueness.

Mr. Richardson’s should have been able to ascertain the breed of his dogs based on appearance. In *Garcia*, the court indicated that the common physical traits of Pit Bull type dogs are readily identifiable. Those common physical traits were clearly present in Mr. Richardson’s Dogs. Their musculature, head size and coat are indicative of the breed of dogs mentioned in the ordinance. In *Garcia*, the court held that physical appearance eliminated any vagueness in the phrase “known as.” This phrase should be interpreted to include mixed breeds and unregistered dogs. “Mixtures thereof” as used in the Ordinance can be interpreted in the same way. Based on the physical appearance of his dogs, Richardson should have known that his conduct was prohibited under “mixtures thereof” in the statute.

II. *The city ordinance which prohibits certain breeds of dogs from its city limits is not arbitrary and therefore is not in violation of the substantive due process clause of the Fourteenth Amendment.*

The substantive due process clause of the fourteenth amendment is a guidepost to protection of the utmost fundamental rights of US citizens, which are so deeply rooted in the nation's history. The judicial branch must always be reluctant to expand the concept of substantive due process. *Reno. v. Flores*, 507 U.S. 292, at 302 (1993) citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). The first step in the substantive due process analysis is to carefully identify the right being asserted. Furthermore, when said right cannot be considered "so rooted in the traditions and conscience of the American people" as to be ranked as fundamental, the legislative "deprivation" need only supply a reasonable fit between the governmental purpose and the means chosen to advance that purpose. *Daniels v. Williams*, 474 US. 327, 331(1986). In the present case, the deprivation imposed by the ordinance is prohibition against owning a certain kind of animal. In no way can precedent support such a deprivation as fundamental. Fundamental rights are reserved to privacy, marriage, parenting and procreation.

The substantive due process clause forbids arbitrary legislative action by a governmental body. However, the Court has held that a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. *Heller v. Doe*, 509 US. 312 (1993). A statute is constitutional under rational basis scrutiny so long as there is any reasonably conceivable state of facts that provide a rational basis for the statute. *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). It is important that the legislature be allowed to approach a perceived



problem incrementally *even if* its approach is *significantly over-inclusive or under-inclusive*. *Heller*, 509 U.S. at 321 (1993) (emphasis added).

In *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001) the court reversed the lower court's finding that an Alabama statute lacked a rational basis to a legitimate government purpose. The statute prohibited commercial distribution of "sexually stimulating devices." The eleventh circuit held that preventing citizens' pursuit of orgasms by artificial means, as such pursuits are "detrimental to the health and morality of the state" as these devices obstruct "marital eroticism," is a legitimate governmental purpose that is a reasonable fit to the ban. *Williams*, 240 F.3d at 949 (11th Cir. 2001). What the ban includes despite itself are married couples who supplement their "marital eroticism" and "sexual stimulation" through these devices in efforts to procreate. Procreation is the underlying value being protected by the statute. Regardless of such over inclusion the ordinance still had a reasonable fit between means and ends. *Id.* at 950

In the present case, the city has a legitimate purpose of protecting citizens from vicious dog attacks. These attacks often result in serious injuries or death. Prohibition of the breeds of dogs is a reasonable means in achieving that legislative purpose, when those dogs are notorious and intentionally cultivated by people for their capabilities of causing great harm. E.g. *US v. Stevens*, \_\_U.S.\_\_, 130 S.Ct. 1577(2010) (dealing with claims that promotional videos promoting bloody dogfights were protected by the first amendment). *See also U.S. v. Kizeart*, Slip Copy, 2010 WL 3768023 (S.D.Ill., 2010). (criminal dog fighting case discusses inherent dangers of "sport" and also describes the dog fighting case involving a celebrity professional football player's intricate dog fighting business). *People v. Knoller*, 158 P.3d 731, 59 Cal.Rptr.3d 157 (2007) (murder case involving dogs

used to maul a woman to death).

There may be owners who raise gentle pit-bulls and their dogs are not in fact vicious are overly included within the terms of the statute. However, such oversight is not sufficient to deem the ordinance invalid. In *Williams* the court upheld an ordinance that sought to “protect” citizens from self- sexual orgasm and over inclusion was justified. In the present case, the City of Winthrop is attempting to protect its citizens from vicious mauling.

*A. The substantive due process clause is an inappropriate constitutional source of protection from the conduct alleged by the plaintiff-appellant.*

Substantive due process is an extremely important doctrine used in protecting fundamental rights. There must be judicial reluctance in expanding the clause to new rights. Therefore where a particular constitutional provision provides an explicit textual source of constitutional protection against a particular sort of government behavior, the perceived rubric of substantive due process does not apply *Cnty of Sacramento v. Lewis*, 523 U.S. 883(1998) *citing Albright v. Oliver*, 510 U.S. 266, 273 (*plurality opinion Rehnquist, C.J.*)

The appellant’s attack upon the ordinance relates to the classification it makes amongst different dog owners. When a statute is being challenged for its different treatment of individuals, challenge is usually an equal protection violation. *e.g. Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985). In equal protection claims where there are not suspect classes of people or fundamental rights, the statute is presumed to be constitutional and subject to rational basis review. *Heller*, 509 U.S. at 324 (1993).

Appellant claims that the distinction between pit bull owners and owners with other types of dogs is arbitrary. As discussed above the ordinance survives the arbitrary argument. And furthermore the ordinance does not differentiate amongst owners but rather amongst types of dogs. In fact, it is constitutionally safer for the ordinance to per se ban all pit bull breeds, rather than attempt to distinguish between owners that raise friendly dogs and owners that do not. If the ordinance were to make such distinctions the clarity of the ordinance's constitutionality would become murky. It is unfortunate that a violent culture has developed around pit bulls, but such a culture is undeniable. Paul H. Robinson 85 N.Y.U. L. Rev. 1940 Disutility of Injustice (December 2010) (for discussion of crime control sentencing policy relating to manslaughter resulting from dog mauling and link between dog fighting and attacks by pit bulls). Although substantive due process is the inappropriate doctrine for appellant's claims and equal protection is a better fit, the ordinance would still be applied under rational basis review. Under this standard of review the ordinance would be upheld as constitutional. The real classification distinction that the ordinance makes is between dog breeds and not types of owners. This classification is rationally related to a legitimate government purpose.

## **CONCLUSION**

For the above stated reasons it is respectfully requested that this court affirm the District Courts granting of summary judgment for the city.