Civil Action No. 10cv00416

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

QUINTON RICHARDSON
Plaintiff-Appellant

vs.

CITY OF WINTHROP, MASSACHUSETTS
Defendant-Appellee

Appeal from the United States District Court
for the District of Massachusetts

BRIEF FOR THE PLAINTIFF-APPELLANT

Team 13

Attorneys for Quinton Richardson,
Appellant

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STATEMENT OF THE ISSUES PRESENTED 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 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. Statement of Facts

In 2005, Quinton Richardson, a resident of the City of Winthrop, Massachusetts, adopted two puppies from a rescue organization and named them Zoe and Starla. *Richardson v. City of Winthrop*, No. 10cv00416, slip op. at 4 (D. Mass. Aug. 28, 2010). Richardson stated that he found the dogs to be cute, and that he enjoyed their playful antics. *Id*. at 4. Furthermore, Richardson testified that he adopted the dogs because they displayed affection towards him and because he wanted their companionship. *Id*. Evidence indicates that Zoe and Starla were well-socialized and friendly with everyone, including small children. *Id*. Although the Winthrop Ordinance has been in place since 1988, there is no indication that Richardson thought, or had reason to think, that Zoe and Starla were prohibited dogs. *Id*. at 4-5. Furthermore, both the rescue organization and Richardson's veterinarian classified the dogs as "mixed breed." *Id*. at 4. However, in 2009, a city employee observed Zoe on Richardson's property. *Id*. at 5. After a hearing, the City Manager determined that Zoe was a pit bull type dog, although no DNA testing was ever performed. *Id*. Although Richardson searched for a home for Zoe outside the city, he

was not able to find one in time, and Zoe was euthanized on December 1, 2009. *Id*. While Richardson still lives with Starla, he fears for her safety, and does not take her in public. *Id*.

II. Proceedings and Disposition of the Court Below

Richardson brought suit against the City, claiming that section 6.04.090 of the Winthrop Municipal Code ("Winthrop Ordinance" or "Ordinance") violates his constitutional rights under the Fourteenth Amendment to the United States Constitution. *Id*. at 2. Richardson's dog, Zoe, was seized and euthanized pursuant to the Ordinance, which labels all "'pit bull' variety of terrier" as vicious, and prohibits such dogs within the city limits. *Id*. Specifically, Richardson argued that the Ordinance is unconstitutionally vague, both facially and as applied, and that it violated his substantive due process rights. *Id*. The District Court granted summary judgment in favor of the City, and Richardson now appeals.

III. Standard of Review

On appeal, questions of law are reviewed *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

SUMMARY OF THE ARGUMENT

The Winthrop Ordinance violates the overbreadth doctrine by chilling speech through its burden on protected intimate associations between dog owners and their dogs. The ordinance is vague on its face and as applied to Mr. Richardson because it does not provide standards for determining which dogs are subject to the ban. Moreover, the Winthrop Ordinance is unconstitutional because it implicates a fundamental right to companionship, and a breed-specific ban is not narrowly tailored to achieving the City's compelling interest in protecting the public. Even if this Court declines to recognize a fundamental right to companionship, the Winthrop Ordinance fails because its means are not rationally related to its ends.

ARGUMENT

I. THE WINTHROP ORDINANCE VIOLATES THE OVERBREADTH DOCTRINE AND IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS APPLIED TO MR. RICHARDSON UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

"In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

A. The Winthrop Ordinance reaches constitutionally protected intimate associations because dog owners enjoy family-like bonds and commitments with their dogs.

The freedom to maintain intimate relationships is a fundamental element of liberty protected by the Bill of Rights. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). This freedom, protected by the First Amendment, extends to relationships which exhibit "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545, (1987) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984)). Yet, determining "the limits of state authority" entails a "careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Roberts*, 468 U.S. at 620. To determine where on this spectrum a claim of intimate association falls, factors such as "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship" are considered. *Rotary*, 481 U.S. at 546.

First Amendment protection for intimate associations recognizes the freedom of individuals to proclaim their unique identities by forming commitments and nourishing their ideals through personal interactions. Thus, in both *Roberts* and *Rotary* the Supreme Court did not find intimate-association protection for national clubs where, despite exclusive membership requirements, the focus on membership expansion evidenced a commitment to promote the club instead of strong attachments between individual members. *Roberts*, 468 U.S. at 621; *Rotary*, 481 U.S. at 546-47. Similarly, where the purpose of the relationship between a man and his household renters appeared more pecuniary than personal, the Seventh Circuit withheld Constitutional protection, and distinguished that relationship from the committed relationship the man had with his own wife and children. *Johnson v. City of Kankakee*, 260 F. App'x 922, 926-27 (7th Cir. 2008).

Using the selectivity and exclusivity factors from *Rotary*, courts around the country and in Massachusetts have found protection for intimate associations distinguished by signs of deep commitment. An Illinois Court had little trouble finding an intimate association between a couple and their grown, mentally-disabled foster children. *Alber v. Illinois Dep't of Mental Health and Developmental Disabilities*, 786 F.Supp.1340, 1374 (N.D.Ill. 1992). In *Alber*, the court found that the couple demonstrated long-term commitment through their continued care, even after the state ceased to compensate them, and even though they had no blood or legal relation to their former foster children. *Id.* at 1348. When a relationship lacks personal commitment, however, selectivity alone will not register the relationship on the intimate side of the spectrum.

Finally, the "distinctly personal" nature of an intimate association, from which flows deep commitment, is evidenced by the exclusion of others from "critical aspects" of the relationship. Hence, the paucity of commitment between the guests of an hourly rate motel kept the Supreme

Court from finding protected interests, despite the exclusive nature of the short-lived associations. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990). Similarly, a dating relationship lacked a sufficient show of commitment even though the female prison guard claimed to be exclusively dating her ex-inmate boyfriend. *Poirier v. Massachusetts Dept. of Corr.*, 532 F.Supp.2d 275, 281 (D.Mass. 2008.) The Court noted the absence of any intention to move beyond a casual dating status. *Id.*

Mr. Richardson, like many other dog owners, displays a deep attachment and commitment to his dogs. This deep attachment between dogs and humans is formed through the same bonding process that parents undergo with their children. The human infant makes herself understood through gazes and grunts to which the caregiver response is biologically driven. ELIZABETH MEINS, SECURITY OF ATTACHMENT AND THE SOCIAL DEVELOPMENT OF COGNITION 61-63 (1997). The response in the adult caregiver is an increase in the level of the "bonding hormone," oxytocin, creating an adult-child bond which places the well-being of the infant over the caregiver's own self-interest. *Id.*

Humans respond to their dogs' grunts and gazes in much the same way they respond to their children. The biological bond between owners and their dogs is evidenced by the large increases of oxytocin observed in humans who spent thirty minutes of face to snout time with their pups. Miho Nagasawa et al., *Dog's Gaze at its Owner Increases Owner's Urinary Oxytocin During Social Interaction*, 55 HORMONES & BEHAV. 434, 434 (2009). Researchers in that study said, "One can assume that [gazing] is very similar to that of a human child, so that an owner who is gazed upon by their dog perceives an emotional condition of the dog and regards the gaze as an attachment behavior." *Id.* at 440. Dogs respond to the bond through their superior understanding of human non-verbal communication. Brian Hare et al., *The Domestication of*

Social Cognition in Dogs, 298 SCIENCE 1634, 1636 (2002) (dogs were much more successful at retrieving hidden items by following human gaze than were primates or wolves). This may be why seventy-five percent of dog owners view their dogs as their children. J.A. Serpell, *Anthropomorphism and Anthropomorphic Selection – Beyond the "Cute Response*," SOCIETY & ANIMALS J., Mar. 2003, at 83, 84. Thus, dog owners' bonds are based in the same biological and psychological processes that attach humans to each other.

Dog owners' relationships with their dogs fall on the intimate side of the spectrum when viewed through the *Rotary* factors. Small household-based associations like an owner and her companion animals are distinguishable from *Rotary* and *Roberts* because they are not huge clubs that are open to anyone fitting the membership requirements. *See City of Dallas*, 493 U.S. at 237; *Poirier*, 532 F.Supp.2d at 280. Unlike the plaintiff in *Johnson*, who claimed intimate association with his household renters, the purpose of the household association between dog owners and their dogs is for personal enrichment, not financial gain. There is only the satisfaction that comes from caring for a dog and receiving its affectionate response. Therefore, the small and personal association between a dog owner and her dogs is distinct from the attenuated relationships between members of a national club or between landlord and tenant, and resonates more with the intimate relationship between the *Johnson* plaintiff and his family.

The selectivity of dog owners fits well within the *Rotary* requirements because dog owners make a choice to commit to certain dogs. Upon the eighteenth birthday of their foster children, the *Alber* plaintiffs could have chosen to open their home to other disabled kids and would have been compensated for that service by the state. Yet, even without blood or legal relation, the Albers were so bonded to their children that giving them up would have harmed their very identity. Mr. Richardson would rather suffer inconvenience and an altered life than risk

Starla's. She is not “some dog” to him any more than the *Alber* dependents were “some kids.” In both cases, the commitment is rooted in an attachment so profound that the claimant would rather suffer temporal discomfort than risk the end of the relationship.

Finally, the commitment dog owners have to their dogs springs from the personal bond they nurture exclusively with their dogs in the seclusion of their homes. Though other dogs may be added to the mix, the home is not open to the public and the established dogs are not abandoned when or if new dogs are added to the family. The stability of the relationship stands in contrast to the transient nature of associations formed in hourly motel rooms or even that of a dating relationship. The dog owner does not move from one pet to another, leaving a string of cast off dogs in her wake as does a woman still searching for her life partner. The dog owner's commitment is for life and not for a few hours in an impersonal motel room. The exclusivity of dog and owner push the relationship into the intimate association part of the *Rotary* spectrum.

Recognizing the intimate association of dog and owner does not extend First Amendment protection to manifold casual relationships. It simply builds on the tradition of protecting those personal associations through which people form their identities and find solace from the buffets of everyday life. Given the similarity between families and dog owners, Mr. Richardson's relationship with Starla is unlike the more attenuated associations in national clubs or dating relationships and materially closer to intimate family associations. Thus, he and other dog owners sit very near families on the relationship spectrum and should be afforded similar protection.

B. The Winthrop Ordinance violates the overbreadth doctrine because it threatens dog owners with the destruction of their dogs based on the subjective review of the City Manager which serves to deter expressions of disapproval about the Ordinance.

It has "long been recognized that the First Amendment needs breathing space" and, therefore, regulations burdening the exercise of First Amendment rights must be "narrowly drawn" and necessary to serve the "compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). Overbreadth challenges are usually successful where the Court finds that a law, because of its "broad sweep," might burden rights of association. *Id.* at 612. Since the First Amendment guarantee of expression is so intrinsically tied to democratic process, litigants are permitted to challenge the overbreadth of regulations even on the basis that the regulation "may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 613. However, "rarely, if ever, will an overbreadth challenge succeed" where the regulation is not "specifically addressed" to speech or to conduct associated with speech. *Virginia v. Hicks*, 539 U.S. 113, 124 (2003). Thus, where conduct is involved, the overbreadth of a statute must "not only be real, but substantial." *Broadrick*, 413 U.S. at 615.

While regulation of conduct not "specifically addressed" to free speech will often stand, the Supreme Court takes a closer look at regulations that impose such a substantial burden on conduct that speech is chilled before it happens. Congress, concerned that the independence of its members was being compromised by the acceptance of honoraria for extracurricular speaking and writing engagements, imposed a ban on payments of such compensation to government employees. *United States v. National Treasury Emp. Union*, 513 U.S. 454, 460 (1995). The ban included honoraria for speeches and publications on non-work related subjects, yet it allowed compensation for travel and lodging. *Id.* The Supreme Court found that this ban might keep lower paid employees from engaging in speech because their appearances and publications were

often made for the purpose of supplementing their incomes. *Id.* 513 U.S. at 469-70. Thus, the regulation chilled "potential speech before it happen[ed]" and was subjected to higher scrutiny by the Court. *Id.* at 468.

Dog owners who speak against this ordinance identify themselves as people who may be affected by the regulation and since there are no standards defining what a "pit bull" is, any dog owner could be found in violation and separated from his or her dog. Since the value dog owners place on their dogs is often so great that it cannot be quantified monetarily, the Ordinance imposes a much heavier burden on potential dissenters than withholding an honorarium. Here, Winthrop dog owners face the potential destruction of their dogs based on the standardless review of the City Manager. Such a grim repercussion will result in dog owners who are unsure of the breed of their dogs declining to engage in discourse related to the regulation for fear that it will alert the City to their ownership, and ultimately result in the destruction of their dog. If withholding payment for speech beyond travel and lodging expenses chills speech, threatening to destroy what seventy-five percent of dog owners consider a member of the family will certainly put a damper on expressions of dissent.

Because the Ordinance so profoundly burdens the intimate association of dog and owner, it menaces even the fundamental political discourse necessary to ensure a representative democracy. Thus, the Winthrop "pit bull ban" violates the overbreadth doctrine and should be declared unconstitutional.

C. The Winthrop Ordinance is unconstitutionally vague on its face and as applied because it fails to provide standards to guide its enforcement.

Even if this Court does not find that the relationship between dog owners and their dogs is protected under the First Amendment, thus satisfying the overbreadth test, Mr. Richardson may nevertheless challenge the Ordinance on its face as unduly vague, in violation of due process.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982). "To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Id.*

Vague laws "offend several important values" when they fail to 1) give notice to men of ordinary intelligence, 2) provide explicit standards to avoid arbitrary enforcement and encourage ad hoc determinations by police, or 3) when they chill the free exercise of constitutionally protected rights. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). When there are no standards governing the enforcement of an ordinance, it "permits and encourages an arbitrary and discriminatory enforcement of the law" and allows for "harsh and discriminatory enforcement" against particular individuals or groups. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

In declaring "pit bull" regulations sufficiently descriptive to avoid facial vagueness challenges, Courts have relied on the specialized understanding of dog owners and the breed conformations set out by the American Kennel Club ("AKC") and United Kennel Club ("UKC"). Some courts have recognized that when regulations affect people that have "specialized understanding" of the subject being regulated, the "degree of definiteness" required to satisfy due process is measured by the group's common knowledge and understanding. *American Dog Owners Ass'n v. Dade Cnty., Fla.*, 728 F.Supp. 1533, 1539 (S.D.Fla.1989) (quoting *Fleming v. United States Dep't of Agric.*, 713 F.2d 179, 194 (6th Cir.1983)). In *American Dog Owners Ass'n*, the court went on to explain that dog owners needed no more than the breed conformation standards defined by the AKC and UKC. *Id.* at 1540-41. An earlier case used similar reasoning when it said that use of AKC and UKC breed names in the statute should put "pit bull owners" on notice of the regulation and alert officers to the standards used by the kennel clubs. *State v.*

Peters, 534 So.2d 760, 768 (Fla. 3d DCA 1988). Even after the Colorado legislature banned breed specific legislation, the Colorado Supreme Court agreed with the plaintiffs' stipulation that use of the AKC and UKC descriptions within the statue gave at least some notice to dog owners. *Dias v. City and Cnty. of Denver*, 567 F.3d 1169, 1180 (10th Cir. 2009).

The difficulty of applying a breed standard is relieved by banning dogs that are proven vicious through their history or the actions of their owners. The highest court in Massachusetts illustrated this point when it explained that breed specific bans "depend[] for enforcement on the subjective understanding of dog officers," or "require[] 'proof' of a dog's 'type' which, unless the dog is registered, may be impossible to furnish." *American Dog Owners Ass'n, Inc. v. City of Lynn*, 404 Mass. 73,80, 533 N.E.2d 642, 647 (1989). Furthermore, the "ill-defined 'breed,' leaves dog owners to guess at what conduct or dog 'look' is prohibited." *Id.* The court reasoned that such "subjective understanding" invited "unleashed discretion" to the enforcers of the ordinance, thus arbitrarily depriving people of their canine companions without accomplishing the goal of protecting the public. *Id.* Using similar reasoning, the Supreme Court of Iowa struck the portions of a breed specific statute that referred to breeds or mixed breeds or combinations of breeds "commonly known as" or "known" as pit bulls, explaining that such language "allows subjective determinations based on a choice of nomenclature by unknown persons and based on unknown standards." *American Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416, 418 (Iowa 1991).

The description and standards set out in various "pit bull bans" have been held sufficient on the incorrect assumption that dog owners are more aware of breeds than the average person. The *Dade* court's reliance on the "specialized" understanding of dog breeds due to pre-purchase research does not reflect the sixty-five percent of American dog owners who are introduced to

their dog through a friend or family member or the twenty percent of owners who find their dogs through shelters or adoption drives. The Am.Soc'y for Prevention of Cruelty to Animals, *Facts About Animal Sheltering*, PETFINDER.COM, http://www.petfinder.com/for-shelters/facts-about-animal-sheltering.html (2003). This means that only fifteen percent of dog owners purchase their dogs from a breeder or veterinarian. The *Dias* court pointed out that a dog's breed is determined by veterinarians at routine examinations; however as in the case of Zoe and Starla, veterinarians often classify dogs as "mixed breed" without any reference to an AKC or UKC recognized breed. Even if a dog has been registered as one of the specifically banned breeds and her owner is on notice, there are still no standards by which this law may be enforced. This is because an officer cannot know that a dog is a registered breed unless registration papers are produced. Yet, an investigation into a dog's registration is not required by the Ordinance. Thus, determination of even a registered dog's breed is up to the unfettered discretion of the City Manager.

This law is unconstitutionally vague because it does not provide explicit standards and invites "ad hoc determinations" by the police. Although the *Dade*, *Peters*, and *Dias* Courts found that at least owners of registered breed dogs would be on notice, not one court examined the standards by which determinations of breed were made. In *Dade* and *Dias*, the "pit bull regulations" included a reference to the AKC and UKC standards for American Pit Bull Terriers, Staffordshire Bull Terriers and American Staffordshire Terriers. Those statutes also included pictures of each listed breed, yet this statute leaves the determination of breed or mix of breed entirely up to the visions of "pit bull" uniquely possessed by the City Manager. Even though the *Peters* Court said that including formal breed names would prompt animal control officers to research breed standards, this may only be true if the animal control officer knows herself to be uneducated in breed standards. If an animal control officer or city manager never questions her

ideas of what a breed looks like, dogs will be subject to the unique ideas of breed held by individual law enforcers. These are not the "explicit standards" required by *Grayned.* Instead, they are "ad hoc determinations" by police or other enforcers – precisely what *Grayned* attempted to prevent. The only objective information available to the City Manager is an owner's admission that his dog is a banned breed or facts that have nothing to do with breed, like a history of biting. The Ordinance should be based on the viciousness of the individual dog in order to avoid vague application of so-called standards, which are based solely on the look of the dog.

Massachusetts' historical protection of dogs from banishment on the basis of arbitrary determinations ought to be followed in this case. This statute, like the one in *Lynn*, does not simply ban dogs known to be vicious. Instead, it depends on the "subjective understanding" of the dog officers. The statute itself provides standards for determining vicious dogs by describing those dogs that have bitten or attacked without provocation. No further protection is accomplished by separating harmless dogs from their owners because one of the many possible people who fill the post of City Manager thought the dog "looked" like a pit bull.

In addition to this statue's facial unconstitutionality, it is unconstitutional as applied to Mr. Richardson because the breed Zoe was determined to be has no standards, and is not supported by the standards of other banned breeds. As in *Des Moines*, this statute's regulation of dogs that are "commonly known as pit bulls" or those that "substantially" look like pit bulls invites an "unacceptable risk" of "discriminatory and arbitrary" enforcement. Zoe's blue eyes were surrounded by pink skin, her mostly white coat had brown patches and her veterinarian was unable to determine her breed. *Richardson*, at *4-5. Further, these particular attributes are listed as serious faults "not to be encouraged" by the AKC and UKC breed standards for each of the

Ordinance's listed breeds. *AKC Meet the Breeds: American Staffordshire Terrier*, American Kennel Club, http://www.akc.org/breeds/american_staffordshire_terrier/ (last visited January 17, 2011); *AKC Meet the Breeds: Staffordshire Bull Terrier*, American Kennel Club, http://www.akc.orgbreeds/american_staffordshire_terrier/ (last visited January 17, 2011); *UKC Breed Information: American Pit Bull Terrier*, United Kennel Club, http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008 (last updated Nov. 1, 2008).

Although, Mr. Richardson maintains that the statute is vague on its face, it is also unquestionably vague as applied to him.

II. THE WINTHROP ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT INFRINGES A FUNDAMENTAL RIGHT AND IS NOT NARROWLY TAILORED; ALTERNATIVELY, IN THE ABSENCE OF A FUNDAMENTAL RIGHT, THE ORDINANCE DOES NOT PASS RATIONAL BASIS.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV §1. Moreover, the Clause applies not only to procedural matters, but "contain[s] a substantive component as well." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). This substantive component is derived from the word "liberty" and is not limited to "those rights already guaranteed to the individual…by the express provisions of the first eight Amendments to the Constitution." *Id.* at 847. The first step in substantive due process analysis is to determine whether the governmental action in question infringes upon a fundamental right. *See Lawrence v. Texas*, 539, U.S. 558, 564 (2003).

A. A fundamental right to companionship should be recognized because such a right stems from the right to privacy and is both analogous to existing fundamental rights and deeply rooted in history and tradition.

"Fundamental rights and liberty interests" that emanate from the word liberty are given "heightened protection against government interference." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). When determining whether a fundamental right is at stake, courts must carefully describe the right asserted and determine if that liberty interest is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (internal quotation marks omitted). Furthermore, fundamental rights are those rights that are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 719 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (internal quotation marks omitted). In determining whether to extend protection, the examining court must exercise caution, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [court]." *Id.* However, history is not the lone factor, and Due Process protection must reflect "the balance which our Nation…has struck between…liberty and the demands of organized society." *Casey*, 505 U.S. at 850 (quoting with approval Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 542 (1961)) (internal quotation marks omitted). That balance must have "regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke" because "tradition is a living thing." *Id.*

Indeed, numerous decisions demonstrate the Court's recognition that history is not static, and due process analysis must adjust accordingly. Often the Court has found justification for new fundamental rights, which have emerged with our changing society, under the umbrella of a right to privacy. In *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) the Court held that the right

to privacy encompassed a married couple's choice to use contraceptives, even though such a right was not deeply rooted in history or tradition. That right was soon expanded to include unmarried persons when the Court declared that "privacy inheres in the individual." *Eisenstadt v. Baird*, 405 U.S. 438, 439 (1972). In *Roe v. Wade*, 410 U.S. 113, 153 (1973) the Court stated that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Finally, in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the Court held that private, sexual activity between same-sex couples must be protected under the right to privacy. Thus, while a particular right, narrowly drawn, may not find substantial support in history or tradition, it may nevertheless be protected under an individual's deeply rooted and fundamental right to privacy.

The Supreme Court has consistently reaffirmed the constitutional protection afforded activities and decisions within the sphere of private life, including matters related to companionship. In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the Court struck down an antimiscegenation statute, declaring that the "right to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness." Furthermore, the freedom to choose one's partner is an integral part of that right. *Id.* In *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), the Court underscored the companionship component in marriage stating that marriage "is an association that promotes a way of life . . . a harmony in living . . . a bilateral loyalty." More recently, some courts have declared that the right to marry cannot be denied to same-sex couples who similarly wish to partake in marriage as a "celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 322, 798 N.E.2d 941, 954 (2003); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010), *cert. granted*, 2011 WL 9633 (9th Cir. Jan. 4, 2011) (No. 10-

16696) (marriage is a fundamental right, rooted in "choice and privacy," and cannot be denied to same-sex couples).

But marriage is not the only fundamental right that grew out of the important role that companionship plays in human happiness. The Supreme Court has declared that parents have a fundamental right "in the companionship, care, custody, and management" of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). That companionship interest extends regardless of whether the parent-child relationship was created by blood or adoption. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983). In fact, the existence of a biological relationship is less important in determining whether a fundamental right exists than is the nature of the parent-child bond itself. *Id*. In *Lehr*, the Court held that the denial of a biological father's petition to set aside an order of adoption did not violate his substantive due process rights where the father had "never supported and rarely seen" his child since birth. *Id.* at 249-50. Indeed, the Court has explained that "the importance of the familial relationship…stems from the emotional attachments that derive from the intimacy of daily association." *Smith v. Organization of Foster Families for Equal.& Reform*, 431 U.S. 816, 844 (1977). Furthermore, "[n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." *Id.*

While the Court in *Smith* ruled that foster parents do not have a fundamental right in the custody or care of their foster children, it was not because the Court doubted that a profound emotional bond could develop in such a setting. 431 U.S. at 843-44. Instead, the Court identified two countervailing facts that counseled against extending a fundamental right to foster parents. *Id*. at 845. First, the Court explained that the relationship between foster parent and child is not an exclusive one, but rather one "in which the State has been a partner from the outset." *Id*.

Second, extension of a fundamental right to foster parents would necessarily curtail the fundamental rights of a child's natural parents. *Id*. at 846. The Court explained "[i]t is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered," but "[i]t is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest." *Id*.

In *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion), the Court expanded fundamental rights protection beyond the scope of the nuclear family. *Moore* involved a city ordinance that restricted the types of family members that could reside in a common household. *Id*. at 498-99. The challenged ordinance prevented the plaintiff, a grandmother, from residing with one of her grandsons. *Id*. at 497. In striking down the ordinance, the Court explained that the scope of substantive due process protection "is a rational continuum" and while "history counsels caution and restraint . . . it does not counsel . . . cutting off any protection of family rights at the first convenient, if arbitrary boundary [sic] the boundary of the nuclear family." *Id*. at 502.

The type of relationship that Richardson shared with his dogs Zoe and Starla should be protected as a fundamental right to companionship, especially in light of increasing information about the human-companion-animal bond. Evidence indicates that "since ancient times…people at all levels of society kept dogs as loved pets and members of the family." Michael J. Dotson & Eva M. Hyatt, *Understanding Dog-human Companionship*, 61 J. BUS. RES. 457, 458 (2008). Indeed, Richardson reported that he adopted Zoe and Starla from a rescue organization because he wanted their "companionship" and because he enjoyed the "affection they displayed toward him and each other." *Richardson*, at *4. The type of relationship Richardson had with his dogs is

common, and today "many dog owners report attachments to their dogs that are as strong as their attachments to their best friends, children, and spouses." Dotson & Hyatt, *supra*, at 458.

This sentiment is not isolated, and in fact has become so widespread that it can now be considered deeply rooted in American culture. Many of our nation's leaders have had pets as valued companions. President Franklin D. Roosevelt had a dog named Fala that accompanied him to meetings and social events around the country. Froma Walsh, *Human-Animal Bonds I: The Relational Significance of Companion Animals*, 48 FAM. PROCESS 462, 465 (2009). Fala also "attended Roosevelt's funeral, was buried near him, and is depicted at his side in the FDR Memorial sculpture on the capitol mall." *Id*. Today, more than sixty-three percent of households have pets, and that figure jumps to seventy-five percent for households with children. *Id*. at 464. A 2007 study revealed that 97.9 percent of the nearly 50,000 households surveyed "consider their pets to be family members or companions." *Human-Animal Bond Boosts Spending on Veterinary Care*, JAVMA NEWS (Jan. 1, 2008), http://www.avma.org/onlnews/javma/jan08/080101a.asp.

Moreover, the innate human desire for companionship, like that expressed by Richardson, is further evident when the positive physiological effects of companionship are studied. Numerous researchers have found that "companionship has a profound effect on human health and longevity." *e.g.* ALAN BECK & AARON KATCHER, BETWEEN PETS AND PEOPLE: THE IMPORTANCE OF ANIMAL COMPANIONSHIP, 9 (1996). Given the inherent human need for companionship, the profound nature of the human-companion-animal bond, and widespread views that pets are family members and beloved companions, there is ample support for recognizing a fundamental right to companionship. Furthermore, the Court has demonstrated a consistent trend of expanding protection for decisions concerning family and private life, despite its overall doctrine of restraint. This willingness to expand protection under the right to privacy

militates in favor of finding that Richardson has a fundamental right to companionship in his dogs.

In certain respects, there is a commonality between the ideals that underlie marriage and the characteristics of the human-companion-animal bond. Just as courts have found marriage to be founded in part upon ideals of companionship and mutuality, research has revealed that "pets are said to enter into a 'relationship of mutualism' with their owners." Dotson & Hyatt, *supra*, at 457 (quoting J.W.S. Bradshaw, Social Interaction Between Pets and People—A New Biological Framework, Address at the 7th International Conference on Human-Animal Interactions (Sept. 6, 1995)). While *Loving* stressed the importance of being able to choose one's partner in marriage, recognizing a right to companionship would acknowledge the fundamental importance of being able to choose those companions that will foster happiness in one's life. Just as marriage is an association that that promotes companionship, family, and a "harmony in living," so too is the relationship that many people share with their children, their close relatives and their pets. While there are significant distinctions to be drawn between marriage and a person's relationship with her companion animal, those distinctions are not so profound as to justify protection for one relationship, but not the other.

Furthermore, Richardson's fundamental right to companionship with his dogs should be recognized because the human-companion-animal bond is very similar to the parent-child bond for many people. A 2007 study found that eighty-seven percent of respondents include their pets in important holiday celebrations, fifty-three percent stay home from work when their pet is sick, and fifty-two percent make home-cooked meals for their pets on occasion. Walsh, *supra*, at 465 (citing American Pet Products Association, 2007-2008 APPA National Pet Owners Survey

(2008))[1]. Increasing numbers of Americans take their dogs to "doggie daycare," travel on airplanes with their pets, and include their pets on family vacations. Dotson & Hyatt, *supra*, at 458. The profound nature of the human-companion-animal bond stems from precisely these types of associations, just as the fundamental right to companionship and custody of one's children stems from the "intimacy of daily association," and not merely from blood relationship.

Although the Supreme Court in *Smith* determined that foster parents could not be included in the sphere of fundamental rights protection, the result in this case should not be bound by *Smith*. Unlike *Smith*, where the State was a "partner from the outset," the situation here is very different. Richardson was the sole custodian of his dogs Zoe and Starla, and the State of Massachusetts played no role in that relationship. Furthermore, while the Court in *Smith* was greatly concerned that extending protection to foster parents would infringe on the fundamental rights of natural parents, there is no similarly competing interest here. If anything, *Smith* weighs in favor of expanding protection in this case because it recognized that a strong emotional bond could exist in the absence of a relationship formed by blood or adoption. Because the same countervailing facts do not exist here, there is little support for depriving Richardson of protection for a right that is analogous to those already recognized.

In *Moore*, decided over thirty years ago, the Supreme Court recognized the changing nature of the American household and expanded fundamental rights protection beyond the nuclear family. This Court, following in the footsteps of *Moore*, should also recognize the ever-evolving definition of "family" to include the type of relationship Richardson shared with his dogs. In 2002, fifty-six percent of pet owners said they would not trade their pets for a million dollars. Amani El-Alayli et al., *Reigning Cats and Dogs: A Pet-Enhancement Bias and Its Link to*

[1] Original survey copy unavailable due to prohibitive cost.

Pet Attachment, Pet-Self Similarity, Self-Enhancement, and Well-Being, BASIC & APPLIED SOC. PSYCHOL., June 2006, at 131, 131. On average, respondents said they would have to be paid close to fifty-three million dollars before they would give up their pets. *Id*. at 136. Of course, there were many respondents who said they would not give up their pets for any amount of money. *Id*. The *Moore* Court cautioned against drawing arbitrary boundaries when it comes to protecting rights of the family, and that same cautionary advice rings true today. The "rational continuum" of due process protection is a flexible doctrine that can be expanded when the time is right, and that time is now.

B. The Winthrop Ordinance is unconstitutional because while the government has a compelling interest in public safety, the Ordinance is not narrowly tailored, and therefore it does not pass strict scrutiny.

Where the exercise of a fundamental right is burdened, the government must prove that its action is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Narrow tailoring requires that a law be "necessary" to accomplish the stated interest. *See Casey*, 505 U.S. at 872. Furthermore, because state and local governments have been given "general authority to regulate for the health and welfare of their citizens," *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997), public safety will ordinarily be deemed a compelling interest. *E.g. Welsh v. Wisconsin*, 466 U.S. 740, 762 (1984). Thus, whether the Winthrop Ordinance serves a compelling governmental interest is not at issue here, as animal control laws fall within the scope of public health and safety. *Dias*, 567 F.3d at 1183.

Moreover, because the Winthrop Ordinance employs a means of regulation that is not necessary to its objective of keeping the public safe from vicious dogs, it does not pass strict scrutiny. There are many alternatives to breed-specific bans that would be more effective in keeping the public safe from dangerous dogs. For instance, the CDC has indicated that a better

option would be to "regulate individual dogs and owners on the basis of their behavior." Jeffery J. Sacks et al., Centers for Disease Control, *Special Report: Breeds of Dogs Involved in Fatal Human Attacks In the United States Between 1979 and 1998*, 217 J. AM. VETERINARY MED. ASS'N 836, 840 (2000). Another option would be to create or enforce "leash laws," as only "one half of 1%" of dog bite related fatalities "were caused by leashed animals off the owners' property." *Id*. at 840. Because there are many, less restrictive options that would accomplish the City's goal, if not obtain much better results, the Winthrop Ordinance does not pass strict scrutiny.

C. In the absence of a fundamental right, The Winthrop Ordinance is nevertheless unconstitutional because its means are not rationally related to its ends.

If the right infringed is not deemed fundamental, the reviewing court must first determine whether the challenge involves a legislative or an executive action. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). While an executive action must "shock[] the conscience" of the court before it will be deemed unconstitutional, a legislative action need not rise to that level. *Id*. at 846. Instead, courts must apply rational basis review to statutes and other legislative actions to determine if they bear "a reasonable relation to a legitimate state interest." *Glucksberg*, 521 U.S. at 722. Under rational basis, a law will not necessarily be deemed unconstitutional simply because it is "overinclusive or underinclusive with regard to its goal." *Baker v. City of Concord*, 916 F.2d 744, 755 (1st Cir. 1990). Instead, a challenger must show that the government has acted arbitrarily, *Id*., or that there is not a "reasonable fit between governmental purpose and the means chosen to advance that purpose." *Reno*, 507 U.S. at 303.

United States Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) involved a law that was so over-inclusive and under-inclusive that it could not be rationally related to the government's stated objectives. *Moreno* struck down a federal law that denied food stamps to

any "household containing an individual who [was] unrelated to any other member of the household." *Id*. at 530. The government declared that its objective was to prevent fraud, and that "unrelated" households were more likely to be "unstable" and to "contain individuals who abuse the program." *Id*. at 535. The Court declared that these assertions were "unsubstantiated" and instead, the law would bar many households that were "desperately in need of aid," while at the same time failing to target those likely to commit fraud. *Id*. at 538. In declaring the law unconstitutional, the Court explained that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id*. at 534.

While recent cases continue to uphold laws that target pit bulls where the law does not involve an absolute ban, it is no longer clear that absolute bans will continue to survive rational basis review, especially in light of today's knowledge of the breed. In *City of Toledo v. Tellings*, 2007-Ohio-3724, ¶ 20, 871 N.E.2d 1152, an Ohio court upheld an ordinance that did not absolutely ban, but instead restricted ownership of pit bull dogs to one per household, and required such dogs to be muzzled when in public. In *Tellings*, the court found "little evidence that pit bulls are a dangerous breed when trained and adapted in a social situation and that there is no evidence that pit bulls bite more frequently than other breeds of dogs." *Id*. at ¶ 25. Instead, the court noted that pit bulls may pose a danger because they are more often "associated with problem circumstances." *Id*. Thus, the court found that an attempt to control those circumstances, including stricter control over pit bull ownership and the manner in which the dogs were exposed to the public, was rationally related to the city's goal of protecting the public. *Id*. at ¶ ¶ 27-28. While the court in *Dias* did not reach the issue of whether a Denver ordinance banning pit bulls violated substantive due process, it refused to find the ordinance "rational as a matter of law."

567 F.3d at 1183.[2] Additionally, the court noted that there is "some support" for plaintiffs' argument that "pit bull bans sustained twenty years ago" are no longer supported by "the state of science in 2009." *Id*. The court cited several facts concerning the docile and friendly nature of pit bulls, including the fact that "[a]ggressive behavior toward humans is uncharacteristic of the breed." *Id*. at 1183-84 (quoting *UKC Breed Information: American Pit Bull Terrier*, United Kennel Club, http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008 (last updated Nov. 1, 2008).

The extreme over-inclusiveness and under-inclusiveness of the Winthrop Ordinance creates a relationship between means and ends that is so attenuated that the law cannot be considered rational. Like the law in *Moreno* which was over-inclusive because it would have prevented many needy households from receiving food stamps, the Winthrop Ordinance is similarly over-inclusive because the vast majority of pit bull dogs it targets do not threaten public safety. Indeed, "[w]hile breed is one factor that contributes to a dog's temperament, it alone cannot be used to predict whether a dog may pose a danger to his or her community." Humane Society of the U.S., *Dangerous Dogs and Breed-Specific Legislation* (Feb. 10, 2010) http://www.humanesociety.org/animals/dogs/facts/statement_dangerous_dogs_breed_specific_legislation.html [hereinafter *Dangerous Dogs and BSL*]. The Court in *Moreno* also found that the food stamp law would not target those most likely to commit fraud, and the Winthrop Ordinance is similarly under-inclusive because it fails to target those dogs that are the greatest danger to the community. For instance, while pit bull dogs have been widely targeted by breed-specific

[2]The case has been remanded, and while the district court has yet to rule on the plaintiffs' substantive due process claim, it denied Defendants' Motion for Summary Judgment, stating that "a reasonable trier of fact may find that Plaintiffs' experts are correct and there exists no rational basis for a breed specific ordinance." *Dias v. City and Cnty. of Denver*, No. 07-cv-00722-WDM-MJW, 2010 WL 3873004 at *7 (D. Colo. Sept. 29, 2010).

legislation, "other breeds may bite and cause fatalities at higher rates." Sacks et al., *supra,* at 836. Just as the *Moreno* Court found the government's assertion that "unrelated" households were more likely to commit fraud to be "unsubstantiated," here the notion that pit bulls are more prone to attack because of their breed is similarly unsubstantiated. In fact, the CDC has identified factors that are predictors of aggression, including "irresponsible dog owners," failure to spay or neuter one's dog, dogs that are not properly socialized, dogs that are off-leash or allowed to roam freely, and dogs that are in poor health. *Id*. at 839-40. Because the Winthrop Ordinance targets dogs by breed alone, rather than any of the factors that can actually predict aggression, the law is not rationally related to the stated goal.

Additionally, in light of recent case law, and because scientific knowledge now overwhelmingly indicates that breed is not an adequate predictor of aggression, there is no indication that courts will continue to uphold absolute bans based on breed. Although the court in *Tellings* upheld an ordinance based on breed, that ordinance did not involve an absolute ban, as is the case here. While the *Tellings* ordinance merely limits the number of pit bulls per household and requires them to be muzzled in public, the Winthrop Ordinance absolutely bans pit bulls from the city limits, regardless of the situation or the temperament of the dog. The *Tellings* ordinance may not be an ideal solution, but it is sufficient to survive rational basis review, whereas the Winthrop Ordinance is not. Refusal of the court in *Dias* to grant summary judgment in favor of the city indicates that courts are rethinking the constitutionality of breed-specific bans. The *Dias* court agreed that there is evidence to support the argument that such bans are no longer constitutional, and indeed that evidence is substantial. The American Veterinary Medical Association has stated that breed specific laws are "inappropriate and ineffective," and furthermore, "[s]tatistics on fatalities and injuries caused by dogs cannot be responsibly used to

document the dangerousness of a particular breed." American Veterinary Med. Ass'n Task Force on Canine Aggression and Human-Canine Interactions, *A Community Approach to Dog Bite Prevention*, 218 J. AM. VETERINARY MED. ASS'N 1732, 1736 (2001). Furthermore, "singling out 1 or 2 breeds for control…ignores the true scope of the problem and will not result in a responsible approach to protect a community's citizens." *Id*. at 1733. The Humane Society of the United States has stated that breed specific legislation is ineffective and "won't solve the problems [communities] face with dangerous dogs." *Dangerous Dogs and BSL*. Given the overwhelming evidence that breed-specific bans do not work, the Winthrop Ordinance cannot be considered a rational solution to the City's goal of protecting the public from dangerous dogs.

CONCLUSION

The Winthrop Ordinance violates the overbreadth doctrine because it chills speech by burdening intimate associations between dog owners and their dogs. The Ordinance is unconstitutionally vague both on its face and as applied to Mr. Richardson because it provides no standards for enforcement and there are no definitions of "pit bull." Further, the Ordinance is unconstitutional because it is not narrowly tailored to protect Mr. Richardson's fundamental right to companionship with his dog and is not rationally related to public safety because of the ineffectiveness of breed-specific bans. Mr. Richardson asks that this Court strike the breed-specific ordinance and instruct the City to narrowly tailor any future attempts to regulate dog ownership so that his and other dog owners' rights are not infringed.