Civil Action No.: 10cv00416

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

QUINTON RICHARDSON
Plaintiff – Appellant

v.

CITY OF WINTHROP, MASSACHUSETTS
Defendant – Appellee

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

---

BRIEF FOR CITY OF WINTHROP

Team #14

Table of Contents

Table of Authority

Supreme Court Cases

United States Court of Appeals Cases

United States District Court Cases

State Court Cases

Ordinances and Rules

Other Authority

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Under the 14th Amendment, is the City of Winthrop's Municipal Code section 6.04.090 impermissibly vague and overbroad when it regulates a recognized societal threat by designating pit bulls as per se vicious and banning them from city limits?

2. Under the 14th Amendment, is the City of Winthrop's Municipal Code section 6.04.090 so rationally unrelated to a legitimate government interest that it violates substantive due process when it regulates a recognized societal threat by designating pit bulls as per se vicious and banning them from city limits?

STANDARD OF REVIEW

An appeals court reviews a district court's grant of summary judgment de novo, viewing all evidence in the light most favorable to the non-moving party. *See, e.g.*, *Scottsdale Ins. Co. v. Torres*, 561 F.3d 74, 77 (1st Cir. 2009); FED. R. CIV. P. 50(a), 56(c).

There is a strong presumption of validity of legislation, placing an "onerous burden" on the complainant to prove its unconstitutionality. *Commonwealth v. Henry's Drywall Co.*, Inc., 366 Mass. 539, 541, 320 N.E.2d 911, 913 (Mass. 1974); *see also Internal Naturalization Service v. Chadha*, 462 U.S. 919, 944 (1983). This presumption extends to the legislative act of municipalities, particularly in the realm of health and safety. *Arthur D. Little, Inc. v. Commissioner of Health and Hospitals*, 395 Mass. 535, 546, 481 N.E.2d 441, 449 (Mass. 1985).

STATEMENT OF THE CASE

Mr. Quinton Richardson filed this suit alleging that Winthrop Municipal Code section 6.04.090 (the "Ordinance") (1) is unconstitutionally vague, on its face and as applied, and

violates the overbreadth doctrine, and (2) deprives him of substantive due process under the Fourteenth Amendment to the U.S. Constitution. Mr. Richardson sought both injunctive relief preventing enforcement of the Ordinance and damages under 42 U.S.C. §1983.

The City challenges Mr. Richardson in his appeal of an order from the United States District Court for the District of Massachusetts, Honorable H. H. Summers, United States District Court Judge, granting summary judgment to the City. On August 28th, 2010, the District Court entered its order. Mr. Richardson timely appealed.

STATEMENT OF FACTS

Since 1988, Winthrop citizens have enjoyed the safety afforded by the Ordinance, which bans vicious dogs from the city limits, including the "pit bull variety of terrier." WINTHROP MUNICIPAL CODE § 6.04.090 (1988). Now, in 2010, Mr. Richardson challenges the Ordinance, and its phraseology, claiming it is unconstitutionally vague, on its face and as applied, and it deprives him of substantive due process.

In 2005, Mr. Richardson, a resident of Winthrop, obtained two mixed breed stray dogs from a rescue organization. *Richardson v. City of Winthrop, Massachusetts*, Civ. Action No. 10cv00416, slip op. at 4 (D. Mass. Aug. 28, 2010). In 2009, a city employee observed one of the dogs and reported it to animal control officers who subsequently seized the animal. *Id.* at 5. In accordance with the Ordinance, the City held a hearing. *Id.* During the hearing, the animal control officer testified that the dog was a pit bull based on her appearance and Mr. Richardson presented a veterinarian's affidavit stating that the dog was a "mixed breed." *Id.* At the hearing's conclusion, the City Manager determined that the dog was a "Pit Bull type dog" and therefore "vicious" under the Ordinance and ordered the dog removed from the City within ten days. *Id.*

Mr. Richardson failed to remove the dog within ten days and appealed to the state trial court, which affirmed the City Manager's finding without opinion. Consequently, the dog was put down. *Id.* Mr. Richardson's remaining dog, believed to be littermates with the other, continues to live at Mr. Richardson's home within the city limits. *Id.* at 6. A preliminary injunction prevents the City from seizing the remaining dog pending the outcome of this case.

SUMMARY OF THE ARGUMENT

The Ordinance does not violate the Due Process Clause of the Fourteenth Amendment. It is neither impermissibly vague nor overbroad. Further, the Ordinance satisfies the requirements of substantive due process as it is rationally related to a legitimate government interest.

The Ordinance survives Mr. Richardson's void-for-vagueness challenge because it is reasonably clear in its application, both generally and as applied to Mr. Richardson. Vague laws violate the Due Process Clause because they fail to provide sufficient warning to citizens of prohibited conduct. A law is impermissibly vague only if it is impermissibly vague as to all applications. Because there is a strong presumption of validity for legislation and that the Ordinance at issue is civil in nature, the City of Winthrop's Ordinance has sufficiently defined the activities it prohibits. The plain language is not vague, as supported by the dictionary definition of pit bull and common usage of the term. Acknowledging that language is not mathematically precise, the term "pit bull," as used by the Ordinance, is not ambiguous and applies clearly in at least some instances. The majority of courts facing constitutional challenges to similar breed restrictions agree that the term "pit bull" is not impermissibly vague. Further, the Ordinance is not vague as applied because it clearly encompasses Mr. Richardson's dog, the Ordinance is not at risk of selective enforcement, and the Ordinance provides for an administrative process. Thus, the Ordinance is not impermissibly vague facially or as applied.

The Ordinance also does not violate the overbreadth doctrine. The overbreadth doctrine applies when ambiguity in a legislative enactment causes individuals to steer clear of certain constitutionally protected expression or conduct. Dog ownership is not a constitutionally protected right. Given that dog ownership is all that the Ordinance controls, the Ordinance does not fall within overbreadth doctrine's scope.

In addition to not violating procedural due process, the Ordinance does not violate substantive due process under the Fourteenth Amendment. The Ordinance restricts dog ownership, which is not a fundamental right. Therefore, in order to satisfy due process, the Ordinance must merely bear a rational relationship to a legitimate government interest (the "rational relationship" test), and need not satisfy strict scrutiny.

The parties do not dispute that dog control is a valid exercise of the police power and protection of the public safety from vicious dogs is a legitimate government interest. Contrary to Mr. Richardson's assertion, the Ordinance is rationally related to protecting the public from vicious dogs. The Ordinance satisfies the rational relationship test because it has a rational basis in fact. Pit bulls pose a dangerous threat to public safety and excluding them from the city limits will protect the City's residents and visitors. The majority of courts facing similar challenges defer to the legislature's judgment that pit bulls are dangerous and response to the unique threat they pose is justified and passes Constitutional muster. Finally, the Ordinance is not impermissibly over-inclusive or under-inclusive. Legislative bodies need not address such threats with mathematical precision and courts must defer to the legislature's reasoned balancing of conflicting interests. Thus, the Ordinance satisfies both procedural and substantive due process.

ARGUMENT

I. The Ordinance Is Not Impermissibly Vague or Overbroad.

The Ordinance passed by the City of Winthrop banning vicious dogs, which encompasses "pit bulls" and mixtures thereof, is not impermissibly vague or overbroad. The Ordinance prohibits the ownership, keeping, or custody of vicious dogs, which is relevantly defined as "any of the breeds commonly referred to as belonging to the 'pit bull' variety of terrier, which consists of the following breeds or breed types and mixtures: American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier." WINTHROP MUNICIPAL CODE § 6.04.090 (1988). The Due Process Clause of the Fourteenth Amendment requires that legislative enactments clearly describe prohibited conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law can violate due process if it is too vague such that a person of ordinary intelligence cannot understand what behavior is unlawful. *Id.* Because the Ordinance here clearly applies to Mr. Richardson and provides specific notice of prohibited activities, it is not void for vagueness.

A law can also violate due process if it governs conduct that is specially protected by the Constitution. The overbreadth doctrine protects citizens from ambiguity in the law that would otherwise cause them to avoid certain constitutionally protected behaviors for fear of prosecution. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The Ordinance controls dog ownership, which does not enjoy special constitutional protection. *See Sentell v. New Orleans & C. Railroad Co.*, 166 U.S. 698, 701–02 (1897); *Nicchia v. New York*, 254 U.S. 228, 230 (1920). Thus, the overbreadth doctrine does not apply because the Ordinance does not control specially protected constitutional rights and activities.

A. The Ordinance Is Not Impermissibly Vague.

The Ordinance is not impermissibly vague, but clearly defines the conduct prohibited by law and gives proper notice to specific dog owners. As a threshold matter, an individual cannot challenge a law for vagueness if "engag[ing] in some conduct that is clearly proscribed" by law. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (Flipside)*, 455 U.S. 486, 495 (1982). Thus, the court must first look to the complainant's conduct before considering other applications of the law. *Id.* Mr. Richardson's conduct is "clearly proscribed" by the law—he is harboring a dog clearly prohibited by the Ordinance based on her appearance. Since his other dog, possibly from the same litter and thus of the same breed, has already been removed as a result of the Ordinance, his remaining dog is "clearly proscribed." However, even if he can refute this clear application to his circumstances, he must demonstrate that the law is "impermissibly vague in all applications." *Id*. The language of the Ordinance referring to pit bulls is not impermissibly vague in all of its applications nor is it vague as applied to Mr. Richardson.

1. The Ordinance Is Not Impermissibly Vague in All of Its Applications.

Legislative enactments are unconstitutionally vague, and thereby violate due process, if they do not give sufficiently clear notice of prohibited conduct. *Commonwealth v. Williams*, 395 Mass. 302, 304, 479 N.E.2d 687, 688 (Mass. 1985). Penal statutes must provide "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Due process mandates that no law be so vague as to specify no standard of conduct. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Grayned*, 408 U.S. at 108–109. The relevant inquiry in this case is from the perspective of "whether the average dog owner is given fair warning." *American Dog Owners Ass'n v. Dade County, Florida (ADOA v. Dade County)*, 728 F.Supp. 1533, 1539–40 (S.D.Fla. 1989).

Ordinances are not "automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *Parker v. Levy*, 417 U.S. 733, 757 (1974) (quoting *United States v. National Dairy Corp.*, 372 U.S. 29, 32–33 (1963)). The amount of vagueness that the Constitution tolerates in ensuring fair notice and enforcement depends on the nature of the legislative enactment. *Flipside*, 455 U.S. at 498. The standard for legislation imposing criminal penalties provides greater protection and less tolerance for vagueness than civil ordinances where "the consequences of imprecision are qualitatively less severe." *Id.* at 499.

Legislation prescribes conduct through the use of words, yet it is commonly acknowledged that language itself is susceptible to ambiguity. Thus, "mathematical precision in the definition of legislative enactments is not required." *Commonwealth v. Bohmer*, 374 Mass. 368, 371, 372 N.E.2d 1381, 1385 (Mass. 1978); *Grayned*, 408 U.S. at 110; *Miller v. California*, 413 U.S. 15, 28 (1973) (recognizing that the Constitution does not require "ultimate, god-like precision" in legislative language). A valid law can require conformation of conduct to "an imprecise but comprehensible normative standard so that men of common intelligence will know its meaning." *Commonwealth v. Orlando*, 371 Mass. 732, 734, 359 N.E.2d 310, 312 (Mass. 1977). Uncertainty as to whether marginal offenses are included within the coverage of a law does not render it unconstitutional if its scope "measured by common understanding and practices" is substantially clear. *Commonwealth v. Jarrett*, 359 Mass. 491, 496–497, 269 N.E.2d 657, 661 (Mass. 1971). Furthermore, a reviewing court must consider any limiting construction that a state court or enforcement agency has proffered. *Grayned*, 408 U.S. at 110.

The plain language of the Ordinance, namely "pit bull" as it is used in the Ordinance, is not impermissibly vague under this analysis. The majority of courts facing vagueness challenges to analogous wording in legislative enactments have upheld the constitutionality of these laws.

a. The Plain Language of the Ordinance Is Not Vague.

In determining whether a law is vague, courts employ standard statutory interpretation. Absent clear indication to the contrary, statutory language is to be given its "ordinary lexical meaning." *Surrey v. Lumbermens Mut. Cas. Co.*, 384 Mass. 171, 176, 424 N.E.2d 234, 238 (Mass. 1981). A term's ordinary meaning is determined by reference to a commonly used dictionary, which is "a fundamental tool in ascertaining the plain meaning of terms." *United States v. Lachman*, 387 F.3d 42, 51 (1st Cir. 2004).

The plain meaning of the term "pit bull" can be obtained from a commonly referenced dictionary. Merriam-Webster defines pit bull as "a dog (as an American Staffordshire terrier) of any of several breeds or a real or apparent hybrid with one or more of these breeds that was developed and is now often trained for fighting and is noted for strength and stamina." MERRIAM-WEBSTER UNABRIDGED, http://mw1.merriam-webster.com/dictionary/pit%20bull (last visited Jan. 14, 2011). Given that "mathematical precision" is not required of legislation, the definition provides sufficient clarity of dogs encompassed by the pit bull breed. The definition indicates behavioral and physical traits that should put an owner on notice. Specifically, it mentions that these dogs are strong and trained for fighting. Thus, an owner whose dog has a muscular build should be aware that the dog might be a pit bull. Furthermore, both the Ordinance and the dictionary refer specifically to the recognized breed—American Staffordshire Terrier. As such, the Ordinance clearly applies to some dogs and is not vague in all of its applications.

In some instances, the use of specialized terminology in legislation may require reference to usage in a particular field. *Lachman*, 387 F.3d at 53. Furthermore, statutory interpretation of specialized terms should be considered "in connection with their development, … the history of the times, prior legislation, contemporary customs and conditions … to cover subjects presumably within the vision of the Legislature." *Commonwealth v. Welosky*, 276 Mass. 398, 401, 177 N.E. 656, 658 (Mass. 1931). Accordingly, consideration of definitions provided by dog specialists or otherwise available to the legislators and the general public may inform the interpretation of "pit bull."

Kennel clubs focus on the breeding and showing of conforming purebred animals and extensively define breed characteristics. The American Kennel Club (AKC) website redirects a search for "pit bull" to the American Staffordshire Terrier. The AKC defines the American Staffordshire Terrier as having an "athletic build and intelligence … often identified by his stocky body and strong, powerful head [with a] short coat [of] any color." *Meet the Breeds*, AMERICAN KENNEL CLUB, http://www.akc.org/breeds/american_staffordshire_terrier/ (last visited Jan. 19, 2011). The AKC also provides extensive details regarding general impression, head, neck, shoulders, back, body, tail, legs, coat, color, and size of the breed. *Id*. Similarly, the United Kennel Club (UKC) recognizes a breed called the American Pit Bull Terrier, defining the breed as "a medium-sized, solidly built, short-coated dog with smooth, well-defined musculature." *American Pit Bull Terrier*, UNITED KENNEL CLUB, http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008 (last visited Jan. 14, 2011). The UKC's website provides further information on specific breed measurements and faults. *Id.*[1]

[1] Numerous other kennel clubs recognize some variant of the American Pit Bull or Staffordshire Terrier. *See, e.g.*, *American Staffordshire Terrier*, WESTMINSTER KENNEL CLUB, http://www.westminsterkennelclub.org/breedinformation/terrier/amstaff.html (last visited Jan. 19, 2011); *American Pit Bull Terrier Breed Standard*, NATIONAL KENNEL CLUB, INC., http://www.nationalkennelclub.com/Breed-

While neither the AKC nor the UKC specifically references a "pit bull" breed, veterinarians, humane societies, and specialists commonly use the term. *See, e.g.*, *Pit Bull Resources*, UNITED STATES HUMANE SOCIETY, http://www.humanesociety.org/animals/dogs/tips/pit_bull_resources.html (last visited Jan. 14, 2011). Furthermore, the term has significant understanding in common parlance. A Google search of the term "pit bull" provides millions of hits, of which the top matches include pit bull rescues and dog breed informational sites. Search of Term "Pit Bull," GOOGLE, http://www.google.com (enter "Pit Bull" into search field and follow "Search" hyperlink).[2] Thus, society at large has an understanding of the term "pit bull."

Under the relevant inquiry, which is "whether the average dog owner is given fair warning," the language of the Ordinance is not impermissibly vague. *ADOA v. Dade County*, 728 F.Supp. at 1539. The dictionary provides a definition of pit bull, authoritative kennel clubs, including the UKC and AKC, provide refined definitions of animals that are of a pit bull breed, and the term is commonly used by veterinarians, humane societies, and other dog specialists. Legislation, given as it is to the frailties of language, need not be mathematically precise. The language of the legislation has removed as much vagueness as possible from its phraseology—greater specificity would be impractical or impossible. The Ordinance includes, within the concept of "pit bull," the recognized breeds of American Staffordshire Terrier, American Pit Bull, and Pit Bull Terrier. The Ordinance clearly refers to specific dogs and indisputably applies

---

Standards/apbt-astb%20standard.htm# APBT%20Standard (last visited Jan. 19, 2011); *Dog Breeds*, CONTINENTAL KENNEL CLUB, http://www.continentalkennelclub.com/breedmain.aspx (last visited Jan. 19, 2011) (recognizing both the American Staffordshire Terrier and the American Pit Bull Terrier; giving other names for American Pit Bull Terrier: "American Pit Bull, Pit Bull Terrier").

[2] Additionally, numerous books provide breed descriptions or advice specific to pit bulls and mixes. *See e.g.*, SHELDON L. GERSTENFELD, ASPCA COMPLETE GUIDE TO DOGS 290 (1999); LIZ PALIKA, THE HOWELL BOOK OF DOGS: THE DEFINITIVE REFERENCE TO 300 BREEDS AND VARIETIES 128–130 (2007) (recognizing both the American Staffordshire Terrier and the American Pit Bull Terrier); TETSU YAMAZAKI ET AL., LEGACY OF THE DOG: THE ULTIMATE ILLUSTRATED GUIDE 224 (1995) (stating that the American Staffordshire Terrier is "known also as the pit bull terrier").

in some circumstances. As used in the Ordinance, the term "pit bull" is not impermissibly vague because a person of ordinary intelligence, more specifically the average dog owner, would be aware of whether the Ordinance applied to his or her dog.

b. A Majority of Courts Have Correctly Found Similar Ordinances Constitutional.

Legislative enactments similar to the Ordinance have consistently been upheld. The large majority of courts hold that breed restrictions pertaining to "pit bulls" are constitutional. In rejecting vagueness challenges, courts have found that prohibiting dogs referred to merely as "pit bull" without providing any additional breed definitions or standards satisfies the notice requirement of due process. Courts generally find the term "pit bull" clearly indicates a breed of dog conforming to specific behavioral and physical traits. Courts find this information accessible, even to the layperson, but certainly to the average dog owner.

In *Vanater v. Village of South Point*, the court upheld an ordinance prohibiting ownership of "Pit Bull Terriers" defined as "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 …." 717 F.Supp. 1236, 1239 (S.D. Ohio 1989) (quoting VILLAGE OF SOUTH POINT ORDINANCE 87-6 (1987)). This statute was upheld even without providing specific physical definitions or other references. The court noted that while identification may be difficult in some limited circumstances, these are "merely issues and obligations which are incidental to most criminal ordinances." *Id.* at 1246. In *ADOA v. Dade County*, the court rejected a vagueness challenge to an ordinance defining "pit bull" extensively and by reference to AKC and UKC standards. 728 F.Supp. at 1541–42. The court's decision weighed heavily on the knowledge particular to dog owners. For example, the court found, through the opinion of veterinarians, that "ordinary citizens may be trained to identify the

breed of a dog based on the dog's physical appearance." *Id.* at 1537. Furthermore, dog owners "select a dog of a particular breed because of their knowledge of or interest in a particular breed." *Id.* at 1539–40. Even if an individual remains unsure, "the owner could seek guidance from a dictionary, a guidebook to dogs or from his or her veterinarian." *Id.* at 1541.

Courts have additionally upheld statutes regulating dogs "commonly known as pit bulls" or "known as the American Pit Bull Terrier" as well as statutes regulating dogs sharing physical characteristics with pit bulls. For example, in *Garcia v. Village of Tijeras*, the court upheld an ordinance banning "any dog of the breed known as American Pit Bull Terrier," finding that pit bulls share typical physical characteristics, and are therefore possible to identify, even by laypersons. 108 N.M. 116, 119, 767 P.2d 355, 358 (N.M. Ct. App. 1988). The court in *State v. Robinson* upheld an ordinance regulating "a breed that is commonly known as a pit bull dog" against a vagueness challenge, even in light of a finding that the statute does not refer to purebred dogs, but rather dogs "which display the physical characteristics generally conforming to the various standards normally associated with pit bulls." 44 Ohio App.3d 128, 133, 541 N.E.2d 1092, 1097 (Ohio Ct. App. 1989). Similarly, in *State v. Anderson*, the court upheld an ordinance applicable to "any dog that ... [b]elongs to a breed that is commonly known as a pit bull dog" because "the physical and behavioral traits of pit bulls together with the commonly available knowledge of dog breeds typically acquired by potential dog owners or otherwise possessed by veterinarians or breeders are sufficient to inform a dog owner as to whether he owns a dog commonly known as a pit bull dog." 57 Ohio St.3d 168, 173, 566 N.E.2d 1224, 1228 (Ohio 1991). A vagueness challenge was also rejected in *Colorado Dog Fanciers, Inc. v. City and County of Denver* "even though [the regulation] permit[ted] a finding of pit bull status to be

based on an expert opinion or nonscientific evidence." 820 P.2d 644, 651 (Colo. 1991).[3] In light of this case law, the Ordinance at issue here is not impermissibly vague.

In one circumstance where breed restriction legislation was found unconstitutionally vague, the court deemed it appropriate to sever the vague portions and uphold the remainder of the legislation. In *American Dog Owners Ass'n v. City of Des Moines*, the court determined that most of an ordinance regulating specific breeds, similar to those listed in the Ordinance, was constitutional. 469 N.W.2d 416, 418 (Iowa 1991). However, the court found that the portion regulating "[d]ogs of mixed breed or … which breed or mixed breed is known as pit bulls, pit bull dogs or pit bull terriers" was unconstitutionally vague and severable. *Id.* at 417 (quoting MUNICIPAL CODE OF THE CITY OF DES MOINES, IOWA, ch. 7, subch. 2 §§ 7-13 (ix) (1987)). Given that the City of Winthrop's Ordinance is more similar to the preserved portion of the ordinance than the severed portion, this case also supports a finding of constitutionality here.

In the rare case where a breed restriction law was found unconstitutional in its entirety, the decision is distinguishable. In *American Dog Owners Ass'n v. City of Lynn*, the court found an ordinance placing restrictions on pit bulls (the term of which "is employed to the full extent of its common understanding and usage") unconstitutionally vague. 404 Mass. 73, 80, 533 N.E.2d 642, 646 (Mass. 1989). The court specifically stated that this pit bull ban was unlike ordinances prohibiting vicious dogs, and that this ban's enforcement depended too heavily "on the

---

[3] *See also Greenwood v. City of N. Salt Lake*, 817 P.2d 816, 820 (Utah 1991) (rejecting constitutional challenge to an ordinance classifying all pit bulls as vicious dogs and providing special licensing, confinement, and insurance requirements for owners); *Hearn v. City of Overland Park*, 244 Kan. 638, 644, 772 P.2d 758, 763 (Kan. 1989) (upholding ordinance defining pit bulls as dogs "which have the appearance and characteristics of being predominantly of the breeds of dogs known as Staffordshire Bull Terrier, American Pit Bull Terrier, [or] American Staffordshire Terrier"); *City of Lima v. McFadden*, No. 1-85-22, slip op. at 2 (Ohio Ct.App. Jun. 30, 1986) (upholding ordinance that permits ownership of only one "pit bull dog"); *American Dog Owners Ass'n v. City of Yakima*, 113 Wash.2d 213, 215, 777 P.2d 1046, 1047 (Wash. 1989) (upholding regulation of "pit bulls" finding that "breeds outlined in the ordinance are understood to refer to dogs satisfying detailed professional standards").

subjective understanding of dog officers." *Id*. The court found that this subjectivity "leaves dog owners to guess at what conduct or dog 'look' is prohibited." *Id*. Unlike most breed restrictions and the Ordinance at issue here, City of Lynn's ordinance did not provide reference to any specific breeds (for example, the American Staffordshire Terrier). Reference to certain breeds further reduces any uncertainty in the Ordinance at issue in this case.

In sum, breed restriction legislation is constitutional and not impermissibly vague. A finding of unconstitutionality is rare and results from excessive ambiguity in the regulation that is not present here. The City of Winthrop's Ordinance is crystal clear in at least some of its applications. Therefore, it is not impermissibly vague in all of its applications.

2. The Ordinance Is Not Vague As Applied to Mr. Richardson.

If an ordinance is not vague in all of its applications, it is typically facially constitutional; however, the ordinance is also reviewed for vagueness as applied to the facts at hand. *United States v. Mazurie*, 419 U.S. 544, 550 (1975). Vague laws are a concern when they trap innocent parties or potentially result in arbitrary enforcement. *Grayned*, 408 U.S. at 108–09. To succeed in such a challenge, Mr. Richardson must demonstrate that the enactment, as applied to him, provides no notice and specifies no standard of conduct. *Coates*, 402 U.S. at 614. To the contrary, the Ordinance is clear in what is required of Mr. Richardson and it clearly encompasses his dogs. Furthermore, it is not subject to arbitrary enforcement. Additionally, there is an administrative procedure by which Mr. Richardson could obtain clarification from the City as to whether or not his dogs are included under the Ordinance.

a. The Ordinance Provides Mr. Richardson with Fair Notice.

As noted in *Grayned*, vagueness in legislation violates due process because it does not clearly define prohibited behavior. 408 U.S. at 108. Notice is the key aspect of the void-for-vagueness doctrine—a law must "give [a] person of ordinary intelligence a reasonable

opportunity to know what is prohibited, so that he may act accordingly." *Id.* This is required because "[v]ague laws may trap the innocent by not providing fair warning." *Id.* In this instance, the relevant inquiry is "whether the average dog owner is given fair warning." *American Dog Owners Ass'n v. Dade County, Florida*, 728 F.Supp. at 1539.

The Ordinance specifies a standard of conduct—it prohibits the keeping of vicious dogs, which includes pit bulls. Pit bulls are further defined as a dog that is of one of three breed types or a mixture. WINTHROP MUNICIPAL CODE § 6.04.090(B)(1)(c) (1988). As discussed above, the term pit bull is commonly used and an ordinary person, especially the ordinary dog owner, has an understanding of the term's meaning. The Ordinance therefore is not vague or indefinite, but pertains to a particular type of dog with characteristics generally conforming to the characteristics set forth in the above-cited references. Whether any particular animal falls within this classification is an issue of fact to be determined by the evidence presented. *Mazurie*, 419 U.S. at 550 (1975). However, as noted by the District Court, "[e]ven at a glance, the evidence Mr. Richardson presented shows that Zoe and Starla are muscular dogs with large heads and short coats." *Richardson*, Civ. Action No. 10cv00416, slip op. at 10. This is a key feature of the dogs commonly known as pit bulls, appearing in the dictionary definition as well as the breed descriptions given by the AKC and UKC. Because his dogs exhibit characteristics and traits that are distinctive of pit bulls (i.e. muscular, large head, short coat), Mr. Richardson is on notice that his dogs may be covered by the Ordinance. Thus, the Ordinance is clearly not vague as it applies to Mr. Richardson.

b. The Ordinance Is Not at Risk of Selective Enforcement.

In addition to fairly notifying Mr. Richardson of his expected compliance, the Ordinance is not subject to arbitrary or selective enforcement. The void-for-vagueness doctrine's primary

focus regards notice, but also requires enactments to establish minimal guidelines to govern enforcement of the legislation. *Kolender*, 461 U.S. at 357. Without minimal guidelines, "[s]tatutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

That concern is not at issue here. Since the Ordinance puts Mr. Richardson on notice of his own animals' subjection to the law, it likewise puts those responsible for implementing the Ordinance on notice. Enforcement of the Ordinance is not subject to ad hoc decisions by officials and therefore cannot be arbitrarily enforced. The Ordinance's standard of "'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" clearly encompasses a breed of dog recognized by the public and does not require a subjective decision. WINTHROP MUNICIPAL CODE § 6.04.090(B)(1)(c) (1988). Furthermore, the same resources available to dog owners are available to enforcers of the Ordinance. Should there be any question of whether the Ordinance applies to an animal, the clear guidance of breed books, kennel clubs, and veterinarians is available to enforcement officials. Thus, the Ordinance is not at risk of selective enforcement.

c. Any Uncertainty of the Statute's Application Can Be Clarified Through the Provided Administrative Process.

In cases where legislation may otherwise be unconstitutional, administrative cures that clarify notice for potentially regulated parties can resolve issues of unconstitutionality. *Flipside*, 455 U.S. at 504 ("[A]dministrative regulation will often suffice to clarify a standard with an otherwise uncertain scope."). The Ordinance has provisions that protect the rights of dog owners through the availability of an administrative process, providing for a hearing "by the City Manager or … designee [to] determine whether the dog in question is a nuisance, vicious or potentially vicious dog." WINTHROP MUNICIPAL CODE § 6.04.090(1) (1988). This administrative

process can narrow potentially vague interpretations and prevent arbitrary enforcement. Even if the Ordinance could be found vague as applied to Mr. Richardson, this available process ensures that it will not be improperly applied to him. Any individual who is uncertain whether the Ordinance applies to his or her dog can receive a definitive answer through the provided administrative process. The Ordinance is thus not void for vagueness.

B. The Ordinance Does Not Violate the Overbreadth Doctrine Because It Does Not Reach Constitutionally Protected Conduct.

The overbreadth doctrine protects individuals who want to engage in constitutionally protected expression, but who may refrain from such expression to avoid the risk of prosecution. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). The doctrines of void-for-vagueness and overbreadth overlap when statutory ambiguity causes citizens to "steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked." *Baggett*, 377 U.S. at 372. However, a law may be clear and precise, and therefore not vague, but overbroad because it prohibits constitutionally protected conduct. *Commonwealth v. A Juvenile*, 368 Mass. 580, 586 n. 4, 334 N.E.2d 617, 622 (Mass. 1975). In assessing legislation for a violation of the overbreadth doctrine, a court must first determine whether the law controls a substantial amount of constitutionally protected conduct. This typically appears in First Amendment cases.

Mr. Richardson's allegation of overbreadth in this instance is an inappropriate assertion of his due process rights. Dog ownership does not enjoy special constitutional protection. The broad discretion of legislatures to regulate dog ownership has been long recognized—"[dogs hold] their lives at the will of the legislature." *Sentell*, 166 U.S. at 702. In *Nicchia*, the Supreme Court recognized dog ownership as an "imperfect or qualified" property interest that "may be subjected to peculiar and drastic police regulations without depriving their owners of any federal

right." 254 U.S. at 230. Since dog ownership is not specially protected, Mr. Richardson's invocation of the overbreadth doctrine is improper because it does not apply to the Ordinance.

This is similar to determinations reached by other state courts in reviewing similar challenges to the constitutionality of breed restriction ordinances. In *Hearn v. City of Overland Park*, the court rejected an overbreadth challenge to a breed restriction ordinance because "outside the limited First Amendment context, a criminal statute may not be attacked as overbroad." 244 Kan. 638, 645, 772 P.2d 758, 764 (Kan. 1989) (quoting *Schall v. Martin*, 467 U.S. 253, 268 n. 18 (1984)). Thus, the court held that because the "right to own pit bull dogs is not guaranteed by the First Amendment … [and because] plaintiffs' activities do not fall within the scope of rights guaranteed by the First Amendment, the city ordinance may not be attacked as constitutionally overbroad." *Id.* Likewise, in *Robinson*, another challenge to breed restriction legislation, the court noted "the overbreadth doctrine prohibits a statute from making criminal constitutionally protected or innocent conduct … [and generally] applies only if the legislation is applicable to conduct protected by the First Amendment." 44 Ohio App.3d at 133, 541 N.E.2d at 1097. Given that the ordinance at question in that case did not implicate the First Amendment, the court found no violation of the overbreadth doctrine. *Id; see also Colorado Dog Fanciers*, 820 P.2d at 650 (rejecting overbreadth challenge to regulation for similar reasons).

Mr. Richardson's complaint similarly falls outside of the scope of the overbreadth doctrine. Dog ownership is not a constitutionally protected right nor does the Ordinance implicate the First Amendment. Thus, the Ordinance cannot be constitutionally overbroad.

II. The Ordinance Satisfies Substantive Due Process under the Fourteenth Amendment.

As the Supreme Court has explained, "the touchstone of due process protection is protection of the individual against arbitrary action of the government." *City of Sacramento v.*

Lewis, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). In addition to fair procedure, the Due Process Clause of the Fourteenth Amendment also requires government action to provide citizens with substantive due process. *Lewis*, 523 U.S. at 840 (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). To satisfy substantive due process, legislative acts such as the Ordinance that do not burden a fundamental right need only bear a rational relationship to a legitimate government interest. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Reno v. Flores*, 507 U.S. 292, 305 (1993) ("The impairment of a lesser [non fundamental] interest…demands no more than a 'reasonable fit' between governmental purpose…and the means chosen to advance that purpose."). Under this minimum scrutiny standard, the Ordinance in question provides sufficient substantive due process because it is rationally related to the legitimate government interest of public safety, a majority of courts support this finding, and the Ordinance is not impermissibly under or over-inclusive.

A. The Rational Relationship Test For Substantive Due Process Applies to the Ordinance.

In conducting a substantive due process analysis, courts scrutinize a given legislative enactment in proportion to the rights it affects. If the act impairs fundamental rights entitled to constitutional protection, courts apply "strict scrutiny," which requires the legislature to tailor its enactments narrowly to a compelling government interest. *Glucksberg*, 521 U.S. at 721. If the legislation does not infringe fundamental rights, courts apply "minimum scrutiny" requiring only that the law bear a rational relationship to a legitimate government interest (the "rational relationship" test). *Id.*; *Flores*, 507 U.S. at 305. The rational relationship test is very deferential to legislative judgment. 2 Treatise on Const. L. § 15.4(e) (4th ed.) (stating that judicial review under the rational relationship test involves great deference to legislative decision-making and "a true presumption of constitutionality").

The Ordinance in question in this case restricts the ownership of dogs. It is well established that dog ownership is not a fundamental right entitled to heightened constitutional protection. *Sentell.*, 166 U.S. at 704. *See also Nicchia*, 254 U.S. at 230; *American Canine Foundation v. Sun*, No. C-06-4713 MMC, slip op. at 6 (N.D.Cal. Nov. 27, 2007) (holding that private interest in the ownership of dogs is subject to more limited protections). Therefore, "minimum scrutiny" or the "rational relationship" test applies in a substantive due process analysis of the Ordinance. See *Glucksberg*, 521 U.S. at 728; *Flores*, 507 U.S. at 305.

Though the rational relationship test serves to guard against arbitrary legislative action, the Due Process Clause does not authorize courts "to sit as a 'superlegislature to weigh the wisdom of legislation.'" *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)). Accordingly, courts must defer to legislatures' consideration of conflicting interests and not substitute their own judgment for the legislatures' reasoned decisions. *Exxon*, 437 U.S. at 124 (courts cannot second guess legislature's determination of the best response to a problem as long as it bears a reasonable relation to the State's legitimate purpose.) *See also Vanater*, 717 F.Supp. at 1243 (in considering pit bull ban ordinance "the Court must defer to the legislature's consideration of the conflicting positions"). Thus, the court may invalidate the Ordinance only if Mr. Richardson meets the "onerous burden" of proving that the Ordinance exceeds constitutional limits. *See supra* Standard of Review.

In his challenge to the Ordinance, Mr. Richardson essentially claims that the Ordinance is an abuse of legislative power so clearly unjustified by any legitimate objective of government as to be barred by the substantive due process requirement of the Fourteenth Amendment. However, as explained below, the Ordinance is rationally related to a legitimate government interest and therefore satisfies substantive due process.

B. The Ordinance is Rationally Related to the Legitimate Government Interest of Protecting the Public from Vicious Dogs.

The Ordinance satisfies the rational relationship test because it is rationally related to the legitimate government interest of providing public safety.[4] Vicious dogs, including pit bulls, pose a significant threat to the City's citizens and visitors and the Ordinance is a reasoned response to that threat. The City's choice in remedy deserves deference because it has a rational basis in fact. A majority of courts have upheld similar laws as not violative of substantive due process. Furthermore, the Ordinance is not impermissibly over or under-inclusive.

1. The Ordinance Has a Rational Basis in Fact.

When analyzing police power regulations such as the Ordinance, courts apply a basic reasonableness test and uphold a regulation as long as its requirements have a rational connection to protecting and promoting the public safety. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976); *Nebbia v. New York*, 291 U.S. 502, 537 (1934). The Ordinance here is a reasonable response to the threat presented by pit bulls based on the historical use of pit bulls in dog fighting, the unique characteristics and traits of pit bulls, and the severity of pit bull dog attacks.

First, the dog fighting history of pit bulls is widely known. Pit bulls are a cross between terriers, known to be quick and aggressive, and bull dogs. Lynn Marmer, *The New Breed of Municipal Dog Control Laws: Are They Constitutional?*, 53 U. CIN. L. REV. 1067, 1076 n. 61 (1984). Their origin lies in the medieval sport of bull baiting. *Id.* at 1076. Once bull baiting was outlawed, these fierce die-hard dogs were pitted against one another in dog fighting. Sallyanne

---

[4] As the District Court correctly stated, the parties do not dispute that the City has a legitimate interest in protecting the public from vicious dogs. *Richardson*, Civ. Action No. 10cv00416, slip op. at 12. Local governments enjoy wide discretion in their exercise of the police power, which comprises generally the protection of the public health, safety, and welfare. *See Stone v. Mississippi*, 101 U.S. 814, 818 (1880). As stated above, the police power includes a virtually unlimited power to control dogs to protect the public health and welfare, including prohibiting and even destroying dogs. *Sentell*, 166 U.S. at 704.

K. Sullivan, *Banning the Pit Bull: Why Breed-Specific Legislation is Constitutional*, 13 U. DAYTON L. REV. 279, 283 (1988). Over centuries, people bred pit bulls to be smaller and faster resulting in varieties of pit bulls known today by different names, including the three listed in the Ordinance. *Id*. Pit bulls have been selectively bred to fight unprovoked and to fight to near death, and are still used in dog fighting (though it is outlawed throughout the United States). *Id*.

Second, pit bulls are known for uniquely dangerous traits and characteristics.[5] For example, in *Vanater*, the court found that pit bulls are known for their "exceptional aggression, athleticism, strength, viciousness and unpredictability," as well as "extraordinary fighting temperament" and tenaciousness, their "history of unpredictably and instantaneously attacking in a berserk and frenzied rage," and their "ability to inflict significant damage upon their victims." 717 F. Supp. at 1243. Similarly, the court in *Commonwealth v. Santiago* noted that pit bulls as a breed are "commonly known to be aggressive" and dangerous. 452 Mass. 573, 578, 896 N.E.2d 622, 626–27 (Mass. 2008) (finding presence of a pit bull on premises was factor justifying a "no-knock" entry by police).[6] Even the United Kennel Club recognizes that "some level of dog aggression is characteristic of this breed." *Meet the Breeds*, AMERICAN KENNEL CLUB, http://www.akc.org/breeds/american_staffordshire_terrier/ (last visited Jan. 19, 2011) (noting

---

[5] As argued before the District Court, pit bulls as a breed are dangerous to the public because they generally display the following traits: (i) powerful instincts for dominance which naturally result in a proclivity for fighting; (ii) a strong prey drive, which inspires a natural chase instinct that often results in their aggressive pursuit of cats, rabbits, other dogs, and human children; (iii) a stubbornness that results in sustained, unyielding aggressiveness once an attack begins; (iv) powerful jaws capable of crushing bones and hanging on to victims even while the animal withstands infliction of injury or pain; and (v) a combination of stamina, strength, agility, and "gameness" (the will to successfully complete a task). *Richardson*, Civ. Action No. 10cv00416, slip op. at 13–14 (D. Mass. Aug. 28, 2010).

[6] *People v. Riddle* held to the contrary, rejecting the presence of pit bulls as sufficient exigent circumstances. 630 N.E.2d 141, 144–146 (Ill. App. Ct. 1994). However, that case is distinguishable easily from this case because (1) the state legislature in *Riddle* had explicitly chosen not to classify vicious dogs "in a manner that is specific to breed," but rather individual by individual, *Id.* at 146; (2) the actual number and type of dogs present at the home was confused or exaggerated by members of the police and the court refused to "malign a breed of dogs on the basis of rumor and hysteria," *Id*. at 144, 146; and (3) the court dealt with the Fourth Amendment right against unreasonable search and seizure, which receives significantly more protection than the lesser right of dog ownership at issue in this case.

that although aggression towards humans is uncharacteristic, the breed's general aggressiveness requires an owner who will carefully socialize and obedience train the dog).

Third, attacks by pit bulls are particularly dangerous. Due to their unique traits and characteristics, pit bull attacks are often particularly severe for their victims. For example, studies show that pit bulls (along with rottweilers) are responsible for the bulk of deaths caused by dog attacks. J.J. Sacks et al., *Breeds of Dogs Involved in Fatal Human Attacks in the United States between 1979 and 1998*, 217 J. Am. Vet. Med. Assoc. 836, 840 (2000). ("Studies indicate that pit bull-type dogs were involved in approximately a third of human DBRF (i.e., dog bite related fatalities) reported during the 12-year period from 1981 through 1992."). Pit bull attacks are particularly serious because pit bulls "go for the deep musculature and [do not] release; they hold and shake." Sallyanne K. Sullivan, *Banning the Pit Bull: Why Breed-Specific Legislation is Constitutional*, 13 U. DAYTON L. REV. 279, 283 (1988). Furthermore, pit bull attacks often come without any warning from the dog and continue even after the victim submits. *Id.* Accordingly, in *Nutt v. Florio*, the court recognized that while defendants could not be held strictly liable for a bite by a pit bull terrier based solely on the dog's breed, the defendant's knowledge of the dog's breed and its propensities for attacking humans could properly be a factor in determining negligence. 75 Mass. App. Ct. 482, 487, 914 N.E.2d 963, 968 (Mass. App. Ct. 2009) *review denied*, 455 Mass. 1106, 918 N.E.2d 91 (Mass. 2009).

The totality of these facts provides a rational basis in fact for the Ordinance. Opponents to pit bull control laws have argued that the breed's reputation is merely misconception inappropriately perpetuated by the media and public hysteria. *See, e.g.*, Devin Burstein, *Breed Specific Legislation: Unfair Prejudice & Ineffective Policy*, 10 Animal L. 313, 314 (2004). But to the contrary, reasonable restrictions on pit bull ownership, such as the Ordinance, are based on

verifiable facts and constitute reasonable preventative measures designed to reduce the occurrence of the tragic incidents involving pit bulls.

2. A Majority of Courts Have Found Similar Ordinances Have a Rational Basis in Fact.

The District Court determination that the Ordinance has a rational basis in fact comports with well-established case law from many jurisdictions. For example, the court in *Greenwood v. City of N. Salt Lake*, upheld as constitutional an ordinance imposing various restrictions on vicious dogs. 817 P.2d 816 (1991). The ordinance at issue in *Greenwood*, defined "vicious" in part by listing breeds, including pit bulls, that "have a propensity to be vicious" due to their "unique hereditary characteristics, owner training or instruction, or mistreatment." *Id.* at 817. The Court found that the evidence demonstrated pit bull breeds are "dangerous animals" and that the ordinance furthered and was "relationally related" to public safety. *Id.* at 821.

Similarly, the court in *Garcia*, found that the evidence supported the determination that "American Pit Bull Terriers presented a special danger to the health and safety of Village residents." 108 N.M. at 119, 767 P.2d at 358. After recounting several incidents of pit bull attacks, including the horrific account of an attack on a nine-year old girl necessitating decades of reconstructive surgeries, and accepting as credible extensive evidence that pit bulls possess "inherent characteristics of aggression, strength, viciousness and unpredictability," the court found that the Village's ordinance banning pit bulls was "clearly rationally related" to efforts to combat a threat. *Id.* at 120–121. Other courts as well, faced with similar questions of constitutionality, have repeatedly upheld bans on pit bulls. *See, e.g., Colorado Dog Fanciers*, 820 P.2d at 650 (finding ordinance banning pit bulls did not deny dog owners substantive due process of law and thus was not unconstitutional on that ground); *Singer v. City of Cincinnati*, 57 Ohio App. 3d 1, 3, 566 N.E.2d 190, 192 (Ohio Ct. App. 1990) (finding ordinance banning "pit bull terriers" did not violate due process guarantees under "rational basis" test). Thus, as a

majority of courts agree, laws prohibiting or restricting pit bulls have a rational basis in fact and satisfy the rational relationship test.

3. The Ordinance Is Not Impermissibly Over-Inclusive or Under-Inclusive.

The District Court correctly held that the Ordinance satisfies the rational relationship test irrespective of Mr. Richardson's contention that it is impermissibly under-inclusive and over-inclusive. Legislative bodies need not employ mathematical precision when proscribing behavior in exercise of the police power. *See Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). The City's Ordinance achieves a sufficient balance between its means and ends necessary to satisfy the rationality requirement of substantive due process.

Mr. Richardson asserts that the Ordinance fails to meet the rational relationship test because it is fatally both under-inclusive and over-inclusive. It is true that a given piece of legislation's under-inclusiveness or over-inclusiveness can undermine its rational relationship to a legitimate government interest. *See* 3 Treatise on Const. L. § 18.2(b) (4th ed.). However, the issues of over-inclusiveness and under-inclusiveness are typically considered within the context of a challenge brought under the Equal Protection Clause of the Fourteenth Amendment, where the rational relationship test also applies. *Id*; *see also, Garcia*, 108 N.M. at 121, 767 P.2d 360 ("Although [the under-inclusiveness] argument was raised in the context of [the plaintiff's] due process claim, we view it as alleging a violation of equal protection."); *Greenwood*, 817 P.2d at 820 (over and under-inclusiveness raised as equal protection challenge). But regardless of whether Mr. Richardson's argument is framed as equal protection or substantive due process, the Ordinance satisfies the rational relationship test and is not impermissibly over or under-inclusive.

In regards to under-inclusiveness, Mr. Richardson complains that the Ordinance inappropriately does not apply to other breeds of dog that exhibit behaviors that threaten public safety. *Richardson*, Civ. Action No. 10cv00416, slip op. at 13 (D. Mass. Aug. 28, 2010). But the

Ordinance need not address every possible threat to public safety in order to satisfy the Constitution. As the Supreme Court has stated within the equal protection context, legislation "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative." *Vanater*, 717 F. Supp. at 1245 (quoting *Williamson v. Lee Optical of Oklahoma*, Inc., 348 U.S. 483, 489 (1955)); *see also Colorado Dog Fanciers*, 820 P.2d at 650 (citations omitted) ("Upon choosing to regulate a hazard, a legislature is not required to simultaneously regulate every similar hazard."). Therefore, though the City's chosen approach may not protect from all dogs potentially dangerous by virtue of their breed or type, it need not. *See, e.g., Vanater*, 717 Supp. at 1246 ("The decision not to name or ban other potentially dangerous breeds does not render the law constitutionally defective."). The City is free to tackle one aspect of the threat and leave the rest neglected. *See Railroad Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (the rational relationship test in the equal protection context does not require that "all evils of the same genus be eradicated or none at all."). Thus, even if the Ordinance does not cover all vicious breeds, it is not impermissibly under-inclusive.

In regards to over-inclusiveness, Mr. Richardson complains that the Ordinance inappropriately impacts dogs that pose no danger at all due to their temperament, the responsible behavior of their owners, or both. *Richardson*, Civ. Action No. 10cv00416, slip op. at 13. But the Ordinance need not display mathematical precision in achieving protection of the public from the debilitating and even fatal attacks of pit bulls. *See Vanater*, 717 Supp. at 1245. In the seminal dog control case, *Sentell*, the Supreme Court acknowledged that some "harmless" dogs are always affected by dog control laws, but the broad reach of these laws is necessary in order to protect the public safety. 166 U.S. at 701–02. Therefore, though the Ordinance may reach some dogs that are not necessarily dangerous to the public, it is not impermissibly overbroad so as to

violate the Fourteenth Amendment. *See* Sallyanne K. Sullivan, *Banning the Pit Bull: Why Breed-Specific Legislation is Constitutional*, 13 U. DAYTON L. REV. 279, 290 (1988) ("Legislatures may act to protect the public from pit bull attacks "even if it means taking steps that sweep more broadly than that which would be sufficient to accomplish this important goal.").

Thus, the Ordinance does not violate substantive due process. Regardless of any over or under-inclusiveness, the Ordinance is well within the legislature's discretion in protecting the public safety through its police power. Courts may not judge the wisdom of such regulation nor second-guess the legislature's balancing of conflicting claims of morality and intelligence raised by such. *See Dandridge v. Williams*, 397 U.S. 471, 487 (1970). While perhaps not every pit bull exhibits the breed's dangerous traits and characteristics, and while the Ordinance might not prevent all dog attacks, the court must defer to the City's reasoned balancing of public and individual interests. *Starkey v. Township of Chester*, 628 F.Supp. 196, 196 (E.D. Pa. 1986) (noting that pit bull regulation belongs to the sphere of social regulation in which courts properly defer to a legislative judgment of necessity and reasonableness). As the District Court below correctly held, the Ordinance satisfies the rational relationship test, displaying a rational connection between ends and means neither impermissibly over-inclusive nor under-inclusive.

CONCLUSION

For the foregoing reasons, the grant of summary judgment should be upheld.

Respectfully submitted,
Team #14

APPENDIX: U.S. CONSTITUTION AND ORDINANCE

14th Amendment to the U.S. Constitution

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Winthrop Municipal Code section 6.04.090 [Excerpt]

B. Vicious Dogs.

1. For purposes of this Section, "vicious dogs" are defined as

(a) dogs who unprovoked have attacked or bitten a human being or animal or have a known propensity, tendency or disposition to attack unprovoked, to cause injury or to endanger the safety of human beings or animals;

(b) dogs who are trained or kept for dogfighting; or

(c) 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.

2. No person shall own, keep or have the custody, care or control of any of the breeds identified in subsection B.1(c) of this Section or mixtures thereof within the Winthrop city limits.

3. No dog shall be declared vicious if injury or damage is sustained by a person who was willfully trespassing or committing or attempting to commit a crime or tort upon the premises occupied by the owner or keeper of the dog. Also exempted are dogs who were

teased, tormented, abused or assaulted by the injured person or animal prior to attacking or biting. No dog shall be declared vicious if the dog was protecting or defending a human being in its immediate vicinity from attack or assault.

Procedural Requirements of Winthrop Municipal Code section 6.04.090

(1) Dogs who have violated any of the conditions of subsections A through C of this Section can be declared to be a nuisance, vicious or potentially vicious by the City Council upon written complaint of a citizen or by the animal control officer, police department or other public safety agent. A hearing by the City Manager or the City Manager's designee will determine whether the dog in question is a nuisance, vicious or potentially vicious dog. Investigation of the matter may be made by the animal control officer, and the animal's owner will be notified of the hearing by certified mail. The hearing must be open to the public and must be held within two weeks of the service of notice upon the owner or keeper of the dogs.

(2) Prior to the hearing, if the dog is believed to be a potential threat of serious harm to people or to other animals, the City Manager may require the dog to be impounded during the hearing and appeal process. The owner or keeper is liable for any boarding and impounding fees incurred.

(3) The owner will be notified of the findings of the City Manager, in writing. If the dog is declared a nuisance, vicious or potentially vicious dog, the City Manager may impose any and all penalties and fines allowed under MGL c. 140. Furthermore, if the dog is declared vicious, the City Manager may require that the dog be removed from the City or that the owner or keeper comply with the provisions of this Section as stated below. Any owner or keeper may appeal an adverse determination by the City Manager to a trial court of appropriate jurisdiction.