

STATEMENT OF ISSUES PRESENTED

- I. Is the Winthrop Ordinance unconstitutionally vague where it fails to articulate clear breed standards, gives the city the ability to exercise arbitrary and discriminatory powers, and provides no warning to Richardson of the specific prohibited conduct? Is the Winthrop Ordinance also overbroad where its sweeping, punitive provisions encompass both non-pit bulls and mixed breed dogs?

- II. Does the Winthrop Ordinance, banning all “‘pit bull’ variety of terrier[s],” violate substantive due process where it fails to show that a special threat exists to the City from pit bulls, and prescribes the same penalty for “‘pit bulls” that have a violent history and those that do not?

STATEMENT OF THE CASE

A rescue organization discovered Zoe and Starla, two four-month-old puppies, alone in a Winthrop City Park in 2005. Mem. Op. 4. The two mixed breed littermates hid together under a bench. *Id.* Quinton Richardson, a life-long resident of Winthrop, leapt at the chance to adopt the puppies. He named them Zoe and Starla. *Id.* Richardson delighted in watching Zoe and Starla play and welcomed their affection. *Id.* Zoe and Starla were well-socialized and gentle, so they often played with Richardson’s young nieces and nephews. *Id.* The dogs never bit another person or animal, nor did they ever threaten the community peace. *Id.*

Twenty-three years ago, Winthrop enacted an ordinance that banned “all pit bull variety of terrier[s]” from the city limits. Mem. Op. 5. In August 2009, a meter reader spied Zoe inside of Richardson’s home. *Id.* The meter reader immediately reported Zoe’s presence to animal control officers. *Id.* At the time, Starla was at the veterinarian’s office recovering from surgery. *Id.* She was not reported to the authorities. *Id.*

The city held a hearing to determine Zoe’s fate. The animal control officer testified that Zoe appeared to be a pit bull. *Id.* Richardson, on the other hand, presented an affidavit from his veterinarian stating that Zoe was a mixed breed. Mem. Op. 5. The city failed to conduct DNA

testing. *Id.* Instead, the City Manager merely relied on the animal control officer's appearance-based assumptions, ignored the veterinarian's formal opinion, and determined that Zoe was a pit bull. *Id.* The city gave Richardson 10 days to remove Zoe from Winthrop's limits. *Id.* He was unable to find Zoe a suitable home within the 10-day limit. *Id.* He sought relief in the Massachusetts state court, but it merely affirmed the city's decision without opinion. *Id.* Zoe was killed by lethal injection in December of 2009. Mem. Op. 5.

Starla currently lives with Richardson in the Winthrop city limits. *Id.* Richardson fears that the City will also seize and kill Starla if she is discovered. *Id.* As such, Richardson keeps Starla permanently in his home. *Id.* He keeps his curtains drawn at all times. Mem. Op. 6. He refuses to leave on vacation, and only abandons Starla to attend work. *Id.* Starla only emerges from the home to relieve herself in Richardson's private backyard. *Id.* A court issued a preliminary injunction to prevent the seizure and destruction of Starla pending the outcome of this case. *Id.*

SUMMARY OF THE ARGUMENT

Laws are unconstitutional when they are so vague that the ordinary person cannot know what is expected of him. The Winthrop Ordinance is unconstitutionally vague on its face because it fails to provide specific, comprehensible breed standards in its "vicious dog" ban. The result is that dog owners cannot reliably determine if their pets fall into the banned category. Further, a law is unconstitutionally vague as applied if it fails to give a citizen reasonable notice of the prohibited behavior and allows the government to exercise arbitrary and discriminatory enforcement. The Winthrop Ordinance failed to alert Richardson that his dogs, Zoe and Starla, fell under the unclear provisions of the law. Winthrop dogs are put at risk through the City's discriminatory enforcement of the law against dogs that merely "look like" pit bulls, while

ignoring potentially dangerous dogs that lack these undefined characteristics. Further, the Ordinance violates the overbreadth doctrine by targeting a larger population of dogs than necessary to achieve its governmental goal of increased safety.

Laws that bear no rational relationship to a legitimate government purpose violate substantive due process. Because pit bulls as a breed are not innately vicious, the legitimate aim of the City to protect its citizens from dog attacks cannot be achieved by irrationally banning one disfavored breed. Pit bull bans can only be rationally related to a government's legitimate purpose when the breed poses a special, particularized threat to the specific locale. No such threat exists in Winthrop. Additionally, Winthrop's breed ban is underinclusive and will ultimately be ineffective because dangerous owners will create dangerous dogs out of any breed. Winthrop's Ordinance is also fatally overinclusive because it fails to differentiate between pit bulls with a violent background and those who lack such propensities.

STANDARD OF REVIEW

When reviewing a district court's decision to grant or deny summary judgment, the standard of review is de novo. *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 365 (5th Cir. 2000). The reviewing court must credit all allegations in the complaint and draw all inferences in a light most favorable to the appellants. *Dias v. City and County of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009). The appellate court reviews the legal question without regard to the conclusions of the trial court.

ARGUMENT

I. The Winthrop Ordinance is unconstitutionally vague both on its face and as applied to Richardson pursuant to the Fourteenth Amendment of the United States Constitution.

The Fourteenth Amendment to the Constitution requires that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. Implicit in a person’s right to due process is the right to know whether his specific conduct is prohibited. Excessively vague laws violate this principle. A statute is unconstitutionally vague on its face if it can have no valid application in any case. *Am. Dog Owners Ass’n v. Dade County Fla.*, 728 F. Supp. 1533, 1541 (S.D. Fla. 1989) (quoting *Fla. Businessmen for Free Enter. v. City of Hollywood*, 673 F.2d at 1218 (11th Cir. 1982)). Further, the Supreme Court articulates a two-part test to determine whether a law is unconstitutionally vague as applied: 1) whether the statute “give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited” and 2) whether the law “provide[s] explicit standards for those who apply [it].” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Winthrop Ordinance is incapable of any valid application because it fails to articulate breed standards. WINTHROP, MASS., MUN. CODE § 6.04.090. The Winthrop Ordinance also fails to give Richardson the ability to know whether the statute applies to his mixed breed dogs, Zoe and Starla. Additionally, the Winthrop law provides no standards for dog owners against which to assess the breed of their dog.

a. An ordinance must give the ordinary person reasonable notice of the prohibited behavior to be constitutionally valid.

An ordinance must describe the activity proscribed with sufficient definiteness so that ordinary people can understand what is prohibited. *Am. Dog Owners Ass’n v. City of Lynn*, 404 Mass. 73, 78, 533 N.E.2d 642, 646 (1989) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357

(1983)). In *City of Lynn*, the Massachusetts Supreme Court struck down a local ordinance restricting the ownership of “American Staffordshire, Staffordshire Pit Bull Terrier, Bull Terrier, or any mixture thereof.” *Id.* at 75, 533 N.E.2d at 644. Though a later passage of the ordinance repealed the law under review, the court still chose to complete a careful analysis of the law. The court declared the ordinance void for vagueness. “[T]he Lynn Pit Bull ban ordinance depends for enforcement on the subjective understanding of dog officers of the appearance of an ill-defined ‘breed,’ and leaves dog owners to guess at what conduct or dog ‘look’ is prohibited.” *Id.* at 80, 533 N.E.2d at 647. The court declared the ordinance vague because it relied on listing three breed types (American Staffordshire, Staffordshire Pit Bull Terrier and Bull Terrier) and mixed breeds, but gave officers no standards by which to enforce the ordinance. Further, the ordinance gave dog owners no standards to determine whether their dogs fell within the prohibited breeds.

On the contrary, in *American Dog Owners Association v. Dade County Florida*, the court upheld pit bull muzzling and confinement requirements because the city specifically referenced breeds recognized by the American Kennel Club (“AKC”) and the United Kennel Club (“UKC”), including a description of the breeds. 728 F. Supp. 1533 (S.D. Fla. 1989). The ordinance also included an appendix that listed the physical characteristics of the restricted breeds based on the AKC and UKC standards. *Id.* at 1540. By relying on breed standards, rather than merely naming a “pit bull,” the ordinance provided fair, comprehensible warning to dog owners.

b. The Winthrop Ordinance is facially vague because it fails to articulate breed standards for pet owners.

The Winthrop Ordinance fails to incorporate any breed standards from either the AKC or the UKC, leaving owners to guess whether their dog falls under the Ordinance. The Ordinance

merely restricts dog ownership based on “breeds commonly known as belonging to the ‘pit bull’ variety of terrier,” and a short list of the breed names. WINTHROP, MASS., MUN. CODE § 6.04.090. However, without the guidance of breed standards, an owner cannot know with sufficient certainty whether his animal is a “pit bull variety of terrier.” *Id.* Just as in *City of Lynn*, this Ordinance is facially vague because it neglects to provide any clear, comprehensible standard by which to evaluate dog breeds. 404 Mass. at 79, 533 N.E.2d at 646. The Ordinance leaves owners in the dark. It forces owners to speculate about the breed of their dog with frightening consequences for those who guess incorrectly.

Further, unlike *American Dog Owners Association v. Dade County Florida*, where the court upheld the ordinance *because* the city provided breed standards, Winthrop lists no standards. 728 F. Supp. 1533 (emphasis added). Dade County provided owners with an appendix, listing breed characteristics. Winthrop lists only names of breeds. Because the Winthrop Ordinance fails to give owners any benchmark for measurement of dog breeds, it is unconstitutionally vague on its face.

c. An ordinance that permits arbitrary and discriminatory enforcement by the state and gives unclear notice of what is prohibited is unconstitutionally vague.

Unclear language in a statute allows subjective determinations of guilt or innocence by the state. In *American Dog Owners Association v. City of Des Moines*, the court struck down portions of a local ordinance that banned ownership of the “breed commonly known as pit bulls” because the ordinance was so vague that it gave improperly broad discretion to enforcement personnel. 469 N.W.2d 416, 418 (Iowa 1991). Without breed standards or breed definitions, the ordinance would allow the state to be categorized on the basis of subjective criteria. *Id.* In

addition, dog owners would have no definitive method of determining whether the ordinance applied to their dog.

An ordinance that does not clearly articulate persons or property within its scope is unconstitutionally vague. In *Lanzetta v. New Jersey*, the court held that a criminal statute defining a person as a “gangster” was vague. 306 U.S. 451 (1939). The Court took note of the term’s meaning in dictionaries and historical writings, but found that the definitions were so numerous and varied that a person of ordinary intelligence could not determine whether his conduct fell within the ordinance. *Id.* at 455. While the court applauded the city’s attempt to promote safety, it ultimately struck down the statute because it was so vague that the city could enforce it broadly or narrowly. The ordinance’s vague definition yielded broad discretionary powers to the city.

d. The Winthrop Ordinance is vague as applied to Richardson because he could not know that his conduct was prohibited and the City exercised arbitrary and discriminatory enforcement.

The Ordinance failed to give Richardson clear notice of the prohibited breed and allowed the City of Winthrop to apply the Ordinance in an arbitrary and discriminatory manner. As in *City of Des Moines*, the City has far too much discretion in determining which dogs fall under the statute, and which do not. 469 N.W.2d 416 (Iowa 1991). Because the statute does not communicate breed standards and also fails to explain the process for dealing with mixed breed dogs, owners are left in the dark and the City maintains full control. A veterinarian determined that Zoe was a mixed breed. Mem. Op. 5. Richardson adopted the dogs from a rescue organization that discovered both Zoe and Starla alone in a city park. Mem. Op. 4. He possessed no way of knowing whether Zoe and Starla fell under the ambit of this vague law. Despite the veterinarian’s sworn affidavit that Zoe was a mixed breed dog, the City Manager’s

determination that Zoe was a pit bull trumped. Mem. Op. 5. The City retained broad discretionary powers in its decision whether or not to affirm Zoe's pit bull status. However, the City's opinion was only based on Zoe's *appearance*, not her actual genetic make-up. Mem. Op. 5. As such, the Ordinance is vague as applied to Richardson because it gave him no notice that his friend and pet, Zoe, would be subject to the vague Ordinance's harsh provisions.

Additionally, courts often argue that dog owners can determine whether their dog is a pit bull by "refer[ring] to a dictionary, a dog buyer's guide or any dog book for guidance." *Vanater v. Vill. of S. Point*, 717 F. Supp. 1236, 1244 (S.D. Ohio 1989). However, the *Lanzetta* court expressly rejected this argument because the term defined in the statute was subject to numerous definitions. 306 U.S. 451. The Winthrop Ordinance is also subject to numerous definitions. The description of a purebred pit bull might be clear, but a mixed breed dog's definition is inherently subject to multiple classifications. Winthrop intends to enforce the Ordinance on animals that are purebred pit bulls as well as animals that are mixed breed. The "clear" definition that Winthrop submits is not so clear. A dictionary or a dog breed book might be helpful for a dog that is a purebred pit bull, but not for a mixed breed dog of unknown origins, like Zoe and Starla. As such, the law remains vague as applied to Richardson because the City of Winthrop uses an ambiguous term that allows it to enforce the law arbitrarily.

II. The Winthrop Ordinance violates the overbreadth doctrine by targeting a wider population of dogs than necessary.

A law cannot sweep unnecessarily broadly so as to encroach on other freedoms. Though the overbreadth doctrine typically applies to constitutionally protected speech, some cases hold that laws prohibiting possession of property can infringe on a fundamental right as well. *U.S. v. Johnson*, 738 F. Supp. 594 (D. Mass. 1990). The Winthrop Ordinance focuses on a citizen's

right to possess a dog. The Ordinance sweeps so broadly that it targets dogs that look like pit bulls, but are in fact another breed. The Ordinance also unfairly includes mixed breed dogs, presumably even those dogs with 1 percent of pit bull blood in their lineage.

a. An ordinance that proscribes more conduct than necessary violates the overbreadth doctrine.

The pit bull ban in *City of Lynn* was struck down because its provisions encroached on citizens' freedoms. 404 Mass. at 80, 533 N.E.2d at 646-47. The court articulated that "some dogs might appear to be 'Pit Bulls,' and that some dogs, 'commonly understood' by the owner or dog registry to be a breed 'known as a Pit Bull' might not appear to be 'Pit Bulls,' and so escape the notice and enforcement of the Lynn dog officers." *Id.* at 80, 533 N.E.2d at 646. In essence, the ordinance could unfairly target protected dog breeds that *look* like pit bulls, while neglecting actual pit bulls that exhibited no breed characteristics.

b. The Ordinance condemns a greater number of pit bulls than required to achieve its supposed legislative purpose.

The Winthrop Ordinance's broad, sweeping condemnation of pit bulls is highly likely to target friendly, loving companions. The Winthrop Ordinance purports to be about safety.

However, dangerous dogs cannot just be identified by breed. In fact, the UKC declares that pit bulls possess a "zest for life" and are "eager to please and brimming with enthusiasm."

American Pit Bull Terrier, UNITED KENNEL CLUB, <http://www.ukcdogs.com/WebSite.nsf/>

Breeds/AmericanPitBullTerrierRevisedNovember12008 (last updated Nov. 1, 2008). The UKC

does recognize the *potential* for pit bulls to show aggression, but notes that this behavior can be

avoided by an "owner who will carefully socialize and obedience train the dog." *Id.* Finally, the

UKC states that "[a]ggressive behavior toward humans is uncharacteristic of the breed and

highly undesirable.” *Id.* The Winthrop Ordinance, on the contrary, chooses only to focus on a breed of dog, ignoring the possibility that dangerous dogs are created by dangerous *people* and poor training. In essence, the Winthrop Ordinance unfairly encompasses well-behaved dogs, like Zoe and Starla.

c. The Ordinance permits the removal and destruction of more than just pit bulls by targeting mixed breed animals.

The Winthrop Ordinance is vastly overbroad because it attempts to ban more than just pit bulls from the city. The City of Winthrop fails to define a pit bull adequately; thus, allowing dogs who *appear* to be pit bulls to be euthanized under the Ordinance. And, dogs who are pit bulls but possess few pit bull characteristics may escape the ban. Because the Winthrop Ordinance grounds its decision on the dog’s appearance, it permits a broad, sweeping destruction of otherwise safe, friendly non-pit bull dogs. Presumably, the Winthrop Ordinance could fairly euthanize a dog with 1 percent of pit bull blood in its lineage, especially when pit bulls’ physical traits are likely “to dominate when dogs are allowed to breed freely.” Mem. Op. 10. Zoe and Starla are both mixed breed dogs of unknown origin, yet Zoe was unfairly subjected to the statute. Richardson lost a beloved family member and companion due to the overbroad provisions of the poorly drafted Winthrop Ordinance.

III. Substantive due process is violated when an ordinance lacks a rational relationship to a legitimate government purpose.

The right to keep dogs, despite a long history of interdependence and emotional support between humans and canines, has yet to be recognized as a fundamental right.¹ *Dias v. City and County of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009). Since strict scrutiny is restricted to fundamental rights, rational basis analysis applies to the keeping of pets.

Grounded in the Fourteenth Amendment, substantive due process exists to prevent the individual against arbitrary government action. *Id.*; U.S. CONST. amend. XIV, § 1. To meet this requirement, the ordinance must be rationally related to a legitimate government objective. *Id.* at 1182. The test, articulated by the Supreme Court in *Reno v. Flores*, requires at least a “reasonable fit” between a legitimate government purpose and the government’s proposed action. 507 U.S. 292, 305 (1993).

a. Pit bull bans bear no rational relationship to a legitimate government interest because pit bulls are not inherently dangerous.

Modern science rejects the notion that pit bulls are naturally crazed, vicious aggressors, and the judicial system is beginning to realize it. *Carter v. Metro North Association* asserted that “at most, pit bulls possess the *potential* to be trained to behave viciously” 255 A.D.2d 251,

¹ There may be some support for considering the keeping of dogs as a fundamental liberty right. The court in *Dias* discussed such a classification but ultimately avoided the issue by finding that “[p]laintiffs’ complaint is devoid of any factual allegations which would lend support to” that conclusion. “[T]he nature and history of the relationship between the plaintiffs and their dogs is not raised in the complaint. Because of such failure, we do not further pursue a strict scrutiny analysis.” 567 F.3d at 1181. In contrast, the nature and history of Richardson’s relationship with his dogs is well-documented. The memorandum opinion notes that Richardson adopted Zoe and Starla for companionship and enjoyed their affection and playfulness. Mem. Op. 4. Richardson’s strong attachment to his remaining dog, Starla, is evident in his efforts to protect her, including keeping his curtains drawn and declining to take a vacation or even leave the house unnecessarily. *Id.* at 6. By depriving Richardson of both the emotional comfort he received from his dogs and of his own personal liberty by relegating him to a near prisoner, Winthrop could be said to have violated Richardson’s fundamental liberty interest.

252, 680 N.Y.S.2d 239, 240 (1998). The *Carter* court found that the city presented insufficient evidence to scientifically establish that “merely by virtue of their genetic inheritance,” pit bulls are biologically prone to viciousness and thus unsafe in a neighborhood environment. *Id.* at 252, 680 N.Y.S.2d at 240-241. In addition, *Toledo v. Tellings* cited experts who consider pit bulls to have better temperaments than many others regarded appropriate as family pets, including miniature poodles and Shih-Tzus. 114 Ohio St. 3d 278, 285, 871 N.E.2d 1152, 1159 (2007) (O’Connor, J., concurring).

History further illustrates that singling out specific dog breeds is the result of reactionary and vacillating public opinion. In the early part of the 20th century, society fondly looked upon pit bulls as good family pets. One even starred as the children’s loyal companion in *The Little Rascals* movies popular in the 1920s and 30s. Larry Cunningham, *The Case Against Dog Breed Discrimination by Homeowners' Insurance Companies*, 11 CONN. INS. L.J. 1, 36 (2004). Intelligent and brave, pit bulls also carried messages on the battlefields of the two World Wars. Diane Laratta, *American Pit Bull Terrier? Friend or foe?*, LIMAOHIO.COM, (Feb. 17, 2008, 12:00 AM), <http://www.limaohio.com/articles/pit-3803-dog-bull.html?cb=1295760232> (last visited Jan. 22, 2011). It was not until the 1980s that the pit bull’s reputation began to suffer at the hands of embellished media depiction. Cunningham, *supra* at 37. “In short, today's public target may be tomorrow's favorite pet, and vice versa.” *Id.* Any city that aims to protect their citizens from vicious dogs cannot rationally do so merely by banning a breed that has been the victim of a media-fueled witch hunt.

b. Kennel Club publications assert the true nature of pit bulls as affectionate and intelligent.

The AKC and UKC descriptions of pit bull characteristics are useful to appreciate the irrationality of breed-specific legislation. The AKC calls the Staffordshire (or pit) Bull Terrier

primarily “a family companion” which is “obedient, highly intelligent and affectionate with a sense of humor.” *AKC Meet the Breeds: Staffordshire Bull Terrier*, AMERICAN KENNEL CLUB, http://www.akc.org/breeds/staffordshire_bull_terrier/ (last visited January 12, 2011) [hereinafter “AKC”]. The UKC says, “[t]his breed is eager to please and brimming over with enthusiasm. [American Pit Bull Terriers] make excellent family companions and have always been noted for their love of children The APBT is not the best choice for a guard dog since they are extremely friendly, even with strangers” *American Pit Bull Terrier*, UNITED KENNEL CLUB, <http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008> (last updated Nov. 1, 2008).

Notably, both Kennel Clubs recommend that “[w]hile he is a sweet-tempered, affectionate dog, his strength and determination *require an experienced owner* who can work with him in a firm, but gentle way.” AKC, *supra* (emphasis added).

The physical strength of the pit bull is undisputed here. The Kennel Clubs’ separation of the dog’s naturally obedient, affectionate temperament from the responsibility of the owner to properly socialize and train him is demonstrative of the legislative struggle between ineffective breed-specific legislation and the more enlightened, non-discriminatory behavior-oriented legislation.

c. The Winthrop Ordinance is not rationally related to a legitimate government objective because pit bulls as a breed are not a danger to its citizens.

Winthrop seeks to protect its citizens from vicious dog attacks, a legitimate government objective. But the City has taken an oversimplified, backward-looking, and ultimately ineffective approach. By arbitrarily banning one breed based on an unexamined portrayal,

Winthrop has done a disservice to its citizens, to pit bulls and their owners, and to justice itself. The Ordinance is not supported by anything more than habitual aversion and ignorance.

The Winthrop Ordinance was a stop-gap measure when it was enacted over two decades ago. It was never well-considered or thoughtfully delineated. Moreover, as noted by the AKC and UKC, modern science rejects the stereotype it perpetuates. The Ordinance violates substantive due process because it is unjustified by legitimate concerns about pit bulls' inherent nature.

d. The majority of courts only uphold ordinances deeming pit bulls dangerous when the city can show a special threat exists.

Where the proponents of a breed-specific ordinance have failed to set forth a record detailing why such broad legislation is necessary to the city's particular circumstances, courts have declined to grant summary judgment on breed-specific legislation. In *Dias*, the court refused to grant summary judgment on a substantive due process claim where the city did not set forth an evidentiary record. 567 F.3d at 1184. Likewise, in *American Canine Foundation v. City of Aurora*, the court found that "no evidence or facts have been presented as to why the Aurora City Council believed that the ordinance was necessary to protect the safety of its residents" and refused to grant summary judgment. No. 06-cv-01510-WYD-BNB, 2008 WL 2229943, at *9 (D. Colo. May 28, 2008).

Frequently, courts have upheld breed-specific legislation when it is based on circumstances particular to the time and place it was passed. In *Garcia v. Village of Tijeras*, nearly 25 percent of the Village's households owned one or more pit bulls. 108 N.M. 116, 120, 767 P.2d 355, 359 (1988). These pit bulls were neither properly socialized nor supervised. Their owners created a dangerous situation that resulted in a pattern of destruction. Several residents

were injured by pit bulls and many of the Village's animals had been killed. A nine-year-old girl was attacked just two months before the Village's breed-specific ban was enacted. *Id.* at 117, 767 P.2d at 356. This "unique situation . . . presented a special threat to the residents of the Village, due to the dogs' prevalence in the Village and to *those dogs' history* of aggressive behavior." *Id.* at 121, 767 P.2d at 360 (emphasis added); *see also Vanater*, 717 F.Supp. at 1246 (finding that pit bulls posed a "special threat" to the residents "above that presented by any other breed of dogs which is kept there"); *Singer v. City of Cincinnati*, 57 Ohio App. 3d 1, 3, 566 N.E.2d 190, 192 (1990) (noting that there had been a number of serious incidents in the city leading up to the breed ban).

In those cases, the cities had a rational basis, rooted in the behavior the dogs' owners had permitted, on which to legislate against the breed. The cities' sweepingly broad bans, while not the most effective option in the long term, were the most efficient way to deal with the irresponsible owners because of the need for immediate action and the sheer number of unsupervised pit bulls.

e. The Winthrop Ordinance bears no rational relationship to a legitimate government interest because the town is not experiencing a special threat from pit bulls.

Like the defendants in *Dias* and *American Canine Foundation*, Winthrop has failed to present evidence that pit bulls present a special threat to the city. 567 F.3d at 1184; No. 06-cv-01510-WYD-BNB, 2008 WL 2229943, at *9. Nothing in the record sets forth a pattern of attacks or even indicates an extraordinary number of pit bulls living in the city. Winthrop has singled out pit bulls and exacerbated their unearned, over-hyped reputation for violence, yet it has failed to present even one instance of actual pit bull aggression within Winthrop City limits.

Winthrop's goal of protecting its citizens cannot be rationally related to a breed-specific ban when that breed does not present a particularized threat to the city.

IV. Breed-specific ordinances that have been upheld provided less severe consequences or were less under- and overinclusive.

Statutes that did not violate due process were constitutional because they had more moderate effects or were much more narrowly tailored so as to subject to the maximum punishment only animals with violent histories. In *Zuniga v. County of San Mateo Department of Health Services*, the ordinance at issue permitted an animal to be destroyed only if it had injured a person or another animal. 218 Cal. App. 3d 1521, 1528, 267 Cal. Rptr. 755 (1990). It also provided for the owner of a dog deemed "dangerous," to apply for a permit and agree to abide by certain precautionary measures. *Id.* Under the ordinance's unambiguous language, an animal could be adjudged dangerous if it attacked without provocation, ran at large and harassed people, or created a danger to the public because of its training or nature. *Id.* The court rejected the overly inclusive classification of puppies as dangerous based on their genetics because they had not demonstrated violent tendencies. *Id.* at 1532. The court also addressed the nature/nurture dichotomy, observing that "a dog whose genetic predisposition is to be aggressive may present little or no danger if the dog is well-trained and reasonably supervised, whereas an animal with little innate tendency to bite may become dangerous if improperly trained, socialized, supervised, treated, or provoked." *Id.* at 1533.

Other cities' statutes also provided options besides the euthanization of animals that did not display violent tendencies, such as muzzling when in public, the maintenance of liability insurance, or confinement to a secure place. See *Toledo*, 114 Ohio St. 3d 278, 871 N.E.2d 1152; *Starkey v. Chester Twp.*, 628 F. Supp. 196 (E.D. Pa. 1986); *Emolo v. Dep't of Animal Care and Regulation*, No. C037620, 2002 WL 1376081 (Cal. Ct. App., June 25, 2002). The *Starkey*

ordinance also made pit bull licenses available to responsible owners. 628 F. Supp. at 197. Significantly, the court in *Emolo* noted that the ordinance in question provided two possible outcomes for dogs deemed “vicious:” 1) destruction or 2) return to their owners, contingent on specific conditions being met, for some dogs that “do not pose the same degree of danger.” 2002 WL 1376081 at *7.

a. Winthrop’s Ordinance bears no rational relation to a legitimate government interest because it is fatally underinclusive and therefore ultimately ineffective.

Because most dogs, along with almost all other domestic animals, can potentially pose a danger to humans, Winthrop’s breed-specific legislation will not end vicious dog attacks. *Toledo*, 114 Ohio St.3d at 285, 871 N.E.2d at 1159 (2007) (O’Connor, J., concurring).

Vicious dog attacks are a human problem, not a dog problem. Winthrop’s Ordinance will not prevent citizens that value aggression in dogs from raising aggressive dogs. People who permit or encourage hostile behavior in their dogs will continue to do so. Citizens who want threatening dogs will create them, whether from a pit bull or a Labrador. Cunningham, *supra* at 36. Rational legislation should focus on the behavior of these owners who fail to properly socialize their dogs or allow them to roam unattended. 114 Ohio St. 3d at 285, 871 N.E.2d at 1159 (2007) (O’Connor, J., concurring).

b. Winthrop’s Ordinance is overinclusive because it prescribes the same severe penalty for dogs which have shown vicious propensities and dogs which have never shown aggression to anyone.

Winthrop’s unnecessarily broad regulation doesn’t provide room for a thoughtful determination of whether a dog has presented a danger to the community. It forecasts what a dog’s personality and propensities will be based on its physical attributes and blindly issues punishments. Winthrop’s Ordinance mocks the concept that appearances do not dictate destiny,

a theme running throughout American culture and jurisprudence. Most importantly, it provides no meaningful opportunity for the responsible owner of a sweet-tempered, innocent dog to keep possession of his dog and still abide by the statute. There is no possibility of obtaining a license – the cost of which could go toward education or other measures to make the city safe for both its human and canine inhabitants – or following precautionary measures to satisfy those in the city who have singled out one breed to focus their fears on. The Ordinance obliges caring, responsible owners like Richardson to go underground. There is no possibility of reprieve, compromise, or reasonableness under the Winthrop Ordinance.

c. Winthrop’s Ordinance violates substantive due process because it is sweeping overinclusive of good-natured dogs.

The logical, predictable outcomes of the statutes referenced above stand in stark contrast to Winthrop’s arbitrary, capricious Ordinance. Winthrop draws no line between dogs that have attacked people or animals and those who have never shown such tendencies, but merely have some of the same physical attributes as those dogs who have.

No evidence exists that Zoe or Starla ever ran the streets, attacking luckless animals or humans. No evidence exists that they ever acted in a vicious or unpredictable way toward anyone, including Richardson’s young nieces and nephews. Mem. Op. 4. No such evidence could exist, because Starla is, and Zoe was, affectionate and friendly, just as the AKC and UKC describe others of their breed, and were fortunate enough to have an owner who socialized them well from puppyhood. *Id.* Zoe received a punishment she did not deserve because Winthrop chose to enact unjust, over-inclusive legislation that distorted, or perhaps just ignored, the character of an entire breed.

CONCLUSION

This court should vacate the district court's grant of summary judgment. When viewing all the evidence in the light most favorable to appellant, it is clear that there is dispute in material facts that demands a full trial.

“This is an animal death penalty case.” *Emolo*, No. C037620, 2002 WL 1376081, at *1. Winthrop's ill-considered Ordinance already convicted and executed one innocent. Other sweet-tempered, intelligent pit bulls, ripped from their homes and the families who love them, sit on the death rows of cities around the country, waiting to be exonerated from their wrongful convictions. They wait for the impartiality that behavior-oriented legislation will bring. They wait to be recognized for the individuals they are, and not as stereotyped attack machines. They wait for justice.