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

APPELLEE'S BRIEF

Prepared by Team 19
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

ORDINANCES:

COURT RULES:

SECONDARY SOURCES:

STATEMENT OF THE ISSUES

Is Winthrop Municipal Code section 6.04.090 B.1.(c) banning "pit bull" variety of terrier, including mixes of American Staffordshire Terrier, American Pit Bull, and Pit Bull Terrier and designating them as "vicious" vague on its face, as applied, or a violation of the overbreadth doctrine?

Is Winthrop Municipal Code section 6.04.090 B.1.(c) banning "pit bull" variety of terrier, including mixes of American Staffordshire Terrier, American Pit Bull, and Pit Bull Terrier and designating them as "vicious" in violation of the Fourteenth Amendment substantive due process clause due to a lack of reasonable fit between a legitimate governmental interest and the regulation?

STATEMENT OF THE CASE

In 2005 Appellant obtained two stray puppies from a rescue organization. The exact lineage of the dogs was uncertain, but they were classified by the rescue organization and the Appellant's veterinarian as "mixed breed." There was no evidence the dogs had attacked any person or other dog.

In 1988 the City of Winthrop enacted Municipal Code section 6.04.090, banning "all pit bull variety of terrier" from the city. August 1, 2009, a meter reader saw Appellant's dogs inside Appellant's home through a window. The meter reader notified animal control and one of Appellant's dogs was seized while the other was at the veterinary hospital.

A hearing was held where the animal control officer testified that based on appearance the seized animal was a pit bull. Appellant offered evidence that the dog was a "mixed breed." There was no DNA evidence. The City Manager decided the animal was a "Pit Bull Terrier type dog" and therefore "vicious" under the ordinance. Appellant was required to remove the animal from the City within ten days; however, Appellant failed to do so. Appellant then appealed to the state trial court who affirmed the City Manager's decision. The animal was put to sleep on December 1, 2009. The other animal continues to live with Appellant. A preliminary injunction was ordered preventing the City from seizing Appellant's animal until the termination of all legal proceedings. Appellant filed a complaint in the United States District Court for the District of Massachusetts, alleging section 6.04.090 violates his constitutional rights. The District Court granted summary judgment in favor of the City, finding section 6.04.090 is not impermissibly vague, either facially or as applied, and does not violate Appellant's substantive due process rights. Appellant now brings the case before the United States Court of Appeals for the First Circuit.

SUMMARY OF THE ARGUMENT

The District Court properly granted summary judgment in favor of the City of Winthrop in response to Appellant's constitutional claims that Winthrop Municipal Code section 6.04.090 impermissibly vague, either facially or as applied, and violates Appellant's substantive due process rights.

Section 6.04.090 does not regulate a substantial amount of constitutionally-protected behavior. Therefore, facial claims of overbreadth and vagueness must fail. Appellant's claim of vagueness as applied must also fail because 6.04.090 was definite enough to put Appellant on notice his dogs were banned from Winthrop city limits, and it was also definite enough to support the City Manager's finding that the dog fell within the definition of "pit bull."

Because dog ownership is not a constitutionally-protected fundamental right, section 6.04.090 only needs to have rational relationship to the government's legitimate interest in protecting the public from costly "pit bull" attacks. The evidence shows that pit bulls, as a breed, are a danger to the public and Winthrop may properly enact legislation to regulate them.

ARGUMENT

Appellate review of a grant of summary judgment is plenary, and the Court must view the record in the light most favorable to the party opposing summary judgment. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). However, the opponent of a summary judgment ruling must present specific factual evidence to show there is a genuine issue for trial. Fed.R.Civ.P. 56(c). Here, Appellant does not present factual evidence there is a material issue sufficient to overturn a ruling of summary judgment in favor of the City of Winthrop. The facts support the ruling that 6.04.090 is not vague – either facially or as applied, is not overly broad, and does not violate the substantive due process clause of the Fourteenth Amendment.

1) This Court should affirm the District Court's summary judgment ruling in favor of the City of Winthrop because the evidence is insufficient to show in any way that 6.04.090 is impermissibly vague or overly broad.

a. The District Court correctly concluded Winthrop Municipal Code section 6.04.090 is not overly broad or void on its face because it adequately describes the dogs it bans.

Appellant's facial challenge to the validity of 6.04.090 must fail. In a facial challenge to the overbreadth and vagueness of a law, the Court first looks at whether the law reaches a substantial amount of constitutionally-protected conduct. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). If a substantial amount of constitutionally-protected conduct is not affected, the overbreadth challenge must fail. *Id*. While dogs are private property, they are subject to regulation under the state's broad police power in order to protect the public. *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698 (1897). Additionally, "the overbreadth doctrine applies only if the legislation is applicable to conduct protected by the First Amendment." *State v. Robinson*, 44 Ohio App.3d 128, 133, 541 N.E.2d 1092, 1097 (Ohio Ct. App. 1989) (citing *Dandridge v. Williams*, 397 U.S. 471 (1970)). Dog ownership may be

regulated to protect the public, and dog ownership is not conduct protected by the First Amendment. Thus, Appellant's overbreadth claim must fail.

In a facial vagueness challenge, the Court should only uphold the challenge if the law is impermissibly vague in all its applications; a person who engages in proscribed conduct cannot contend the law is vague in all its applications. *Village of Hoffman Estates*, 455 U.S. at 495. Appellant engaged in conduct proscribed by 6.04.090, described *infra*, and therefore cannot challenge the law as applied to others. Appellant's facial vagueness claim must also fail.

b. The term "pit bull," as used in Winthrop Municipal Code section 6.04.090, denotes dogs sharing the same characteristics as Appellant's dogs, giving Appellant notice 6.04.090 regulated his dogs, and is not vague as applied to him.

When the First Amendment is not implicated, a vagueness challenge must be unconstitutional as applied, which is determined by the facts of the case at hand. *U.S. v. Barnes*, 890 F.2d 545, 552 (1st Cir. 1989). "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). Moreover, the Constitution tolerates a greater degree of vagueness in enactments that impose civil penalties. *Village of Hoffman Estates*, 455 U.S. at 498-9.

Appellant claims he did not have notice 6.04.090 applied to his dogs because the dogs did not exhibit any of the problematic behavioral tendencies attributed to pit bulls. This argument is not convincing. Appellant falls into the dog-owning public, a group found to have special knowledge of the matter being regulated. *American Dog Owners Ass'n, Inc. v. Dade County, Fla.*, 728 F.Supp. 1533, 1539 (S.D. Fla. 1989). Even though Appellant obtained his dogs through a rescue organization and not a breeder, pit bulls are distinctive enough in appearance that a reasonable dog owner could ascertain his dogs were of the kind banned by 6.04.090. *See*

id. at 1536. Furthermore, pit bulls are generally identified by their physical appearance, not by the problematic behavioral tendencies they may or may not exhibit, and laymen can identify a pit bull by its physical characteristics. *See generally id.; State v. Peters*, 534 So.2d 760, 57 USLW 2358 (Fla. Dist. Ct. App. 1988); *State v. Anderson*, 57 Ohio St.3d 168, 566 N.E.2d 1224 (1991); *State v. Robinson*, 44 Ohio App.3d 128, 541 N.E.2d 1092 (Ohio Ct. App. 1989). Appellant had sufficient notice 6.04.090 regulated his dogs.

Appellant looks for support of his argument of vagueness in two cases: *American Dog Owners Ass'n, Inc. v. City of Lynn*, 44 Mass. 73, 533 N.E.3d 642 (1989) and *American Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416 (Iowa 1991). However, the court in *Des Moines* only struck certain clauses in the ordinance that did not reference *any* particular breed and upheld those that did. *See City of Des Moines* at 418.

The decision in *Lynn* was not followed by *American Dog Owners Ass'n, Inc. v. Yakima*, 113 Wash.2d 213, 777 P.2d 1046 (1989) because *Lynn's* statute was "devoid of any reference to a particular breed." *Lynn* at 79, 646. *Yakima* distinguished its statute based on the fact that it designated four particular breeds. *Id*. at 216, 1048. While the statute deemed unconstitutional in *Lynn* was similar in wording to 6.04.090, the standard *Lynn* used to determine vagueness of the statute and declaring it "devoid of any reference to a particular breed" was incorrectly applied, as there were sufficient references to particular breeds within the statute. *Id*. *Lynn* was incorrectly decided because, while it used the standard that the activity proscribed must be sufficiently defined so ordinary people can understand what conduct is prohibited, it looks more closely at how the proscribed activity might be interpreted and applied by officials. *Id*. at 78-9, 646. However, the public and officials are both privy to a common understanding of what type of dog is prohibited. A simple "Google Images" search of "pit bull" brings up a wide variety of

photographs depicting dogs with the physical characteristics often described in relation to pit bulls. The "common understanding and usage" of the term "pit bull" that the *Lynn* court found insufficiently definite is no longer so, if it ever was, because of the wide availability of information through simple Internet searches. *Id*. at 79, 646. While members of the public and officials might disagree about a determination a particular dog falls under the "pit bull" designation, that disagreement does not create sufficient vagueness to invalidate the statute as applied.

Appellant's claim that he had no reason to believe his dogs fell within the ordinance is untenable. The appearance of his dogs comports with easily-understandable definitions of a "pit bull" variety of terrier. The District Court correctly found that there was ample evidence to put Appellant on notices his dogs were subject to the ban and to support the City Manager's finding that Appellant's dog was of a "pit bull" variety.

2) This Court should affirm the District Court's decision to uphold the Winthrop Municipal Code section 6.04.090 as not violating the substantive due process clause under the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment protects individuals from arbitrary government regulations. *City of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). There must be a relationship between the government regulation and a legitimate government interest. If a fundamental right is burdened by the regulation then the regulation must be narrowly tailored to a compelling government interest. *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997). If the right burdened is not a fundamental right, then the regulation must only have a rational relationship to a legitimate governmental interest, or pass a "reasonable fit" test. *Reno v. Flores,* 507 U.S. 292, 305 (1993).

A state is given great deference to draft and enforce legislation to protect the health safety and welfare of the public. *Stone v. Mississippi*, 101 U.S. 814, 818 (1880). It is through the police power that state may regulate property, such as animals, as long as the regulation is not unreasonable and is rationally related to a legitimate government interest. *Vanater v. Village of South Point*, 717 F. Supp. 1236, 1241 (10th Cir. 1989); *see also Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489 (1977) (no fundamental right involved). Local governments may also regulate under the police powers as long as the regulation does not oppose state regulations. *Vanater,* 717 F. Supp. at 1241 (citing *Jacobson v. Mass*, 197 U.S. 11, 25 (1905)). Because there is a presumption of constitutionality, the municipality code in question should be held valid if "it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary." *Id*. Additionally, the challenger must be able to show by clear and convincing evidence that the code is unconstitutional. *Id.* at 1242.

The City of Winthrop decided via its democratic, legislative process to regulate the possession of nuisance or vicious dogs in order to protect the public from dangerous canines. The Appellant argues that the legislation is not a rational means of protecting the public's safety because there is insufficient evidence showing "'pit bull' variety of terrier" poses a threat to the public safety. However, the Appellant tends to ignore the wealth of evidence showing how the physical characteristics, breeding history and character of canines from the "pit bull" family create a risk to the public.

"Pit bulls," while not easily defined, are known for their powerful jaws, muscles and great strength. Also, the breed and related breeds tend to have high prey drives and are very

stubborn. These characteristics combined indicate that a bite from a bit pull variety, while maybe less frequent than some other breeds, are more harmful to the victim.

The Appellant has introduced evidence that groups like the National Animal Control Association are opposed to breed-specific legislation and that breed-specific legislation is not the most effective way to protect the public from dangerous animals. Whether or not that contention is true should have no relevance in this case. The court is not meant to sit as a super-legislature and the Appellant should pursue political avenues to achieve his agenda. The true issue in this case is whether to legislation is a rational means of protecting the legitimate government interest in public safety. There is more than enough evidence to prove that the physical and breeding characteristics possessed by "pit bulls" warrant some protective legislation by the City.

"Pit bulls" are powerful animals with powerful jaws capable of doing a lot of physical damage to their victims. These animals are also able to ignore their own injury or pain in order to continue the attack. "Pit bulls" have great stamina, agility and strength. These characteristics are why they are so popular for illegal dog fights. However, with these kind of innate characteristics there is automatically a greater risk to the public when there are populations of "pit bulls" in the community.

Even if there are other breeds that are more likely to attack there is still a specific threat to the community from "pit bulls" simply because of the severity of the attack. Additionally, the Winthrop code does not only ban "pit bulls" but it also bans any dog that has shown a propensity for unprovoked violence. The City's approach to protecting the public from vicious dogs is reasonable because the City is protecting from especially severe attacks caused by "pit bulls" and from any other dog that proves to be dangerous. It is not an arbitrary distinction being drawn by the City, it is one that considers the cost to society from "pit bull" attacks against the cost of

banning the breed. Because the attacks are so vicious and costly it is reasonable to decide banning the breed would be in the best interest of the public, rather than waiting for the animal to attack and later dealing with the oftentimes tragic consequences. For example, of all the fatal canine attacks between 1981 and 1992 "pit bulls" were involved in a third of the attacks. Safia Hussain, *Attacking the Dog-Bite Epidemic*, 74 Fordham L. Rev. 2847, 2849 (2006). Furthermore, courts have ruled consistently that the classification of "pit bulls" as dangerous meets the rational relationship test under substantive due process analysis. *Id.* at 2854. (*see Hearn v. City of Overland Park*, 772 P.2d 758, 772 P.2d 758 (1998) ("debatable questions as to reasonableness are not for the courts but for the legislature.")).

It is not the position of this Court to sit as a super-legislature and decide upon the wisdom of breed-specific legislation. It is up to the legislature to make such determinations. The evidence shows that "pit bulls" have characteristics that make them a unique hazard to the public. There is clearly a rational basis for the City to enact legislation banning these dangerous dogs in order to protect the legitimate governmental interest of protecting the public from costly "pit bull" attacks.

Appellant cannot show sufficient factual evidence to overturn the District Court's summary judgment ruling in favor of the City of Winthrop.

CONCLUSION

For all the reasons stated herein, the City of Winthrop respectfully requests the District Court's ruling of summary judgment be affirmed.