Civil Action No. 10cv00416

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

QUINTON RICHARDSON
PLAINTIFF/APPELLANT

v.

CITY OF WINTHROP, MASSACHUSETTS
APPELLEES

On appeal from the
United States District Court for the
District of Massachusetts

BRIEF FOR THE APPELLANT

Team #1

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ISSUES PRESENTED

1. Did the district court err when it ruled that Winthrop Municipal Code section 6.04.090, designating all "'pit bull' variety of terrier" as *per se* vicious and thus banning them, is not unconstitutionally vague on its face or as applied to the Plaintiff/Appellant under the Fourteenth Amendment to the United States Constitution and does not violate the overbreadth doctrine?
2. Did the district court err when it rule that Winthrop Municipal Code section 6.04.090, designating all "'pit bull' variety of terrier" as *per se* vicious and thus banning them, does not violate substantive due process under the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Procedural History

This is an appeal from a judgment from the United States District Court of the District of Massachusetts rendered by Honorable H.H. Summers on August 28, 2010 in the case of *Richardson v. City of Winthrop*. Plaintiff/Appellant Quinton Richardson ("Richardson") filed a complaint challenging the Defendant/Appellee's, City of Witnthrop ("City"), Municipal Code section 6.04.090 ("Ordinance") which declares that all "'pit bull' variety of terrier" to be "vicious" and bans them from the city on the grounds that it violated the Fourteenth Amendment of the United States Constitution as both unconstitutionally vague and an infringement of his substantive due process rights. The court below issued a preliminary injunction preventing Starla's seizure pending the outcome Richardson's case. The City moved for summary judgment and the court below granted the motion in the City's favor. The court below found that section

6.04.090 is not impermissibly vague, either facially or as applied here, and did not violate Richardson's substantive due process rights. Richardson now appeals these findings.

Statement of Facts

In 2005, Richardson, a lifelong resident of the City, charitably adopted two puppies form a local rescue organization that had found these dogs as abandoned in a City park. *Richardson v. City of Winthrop*, No. CIV.A.10cv00416, at 4 (D. Mass. Aug. 28, 2010). Richardson welcomed these two puppies into his family and affectionately named them Zoe and Starla. *Id.* The dogs were assumed to be of the same age and litter because they were very similar in appearance and rescued from under the same park bench. *Id.* However, there has been no scientific evidence provided to verify that the dogs were in fact related. *Id.* In compliance with the Ordinance enacted in 1988, Richardson took the puppies to a veterinarian who classified Starla and Zoe as "mixed breeds" in part because the puppy's heritage was and remains unknown. *Id.*

Richardson adopted the puppies because of their affectionate nature and he knew they would make great companions. *Id.* The puppies were well reputed as friendly and well-socialized, especially in the company of Richardson's young nieces and nephews. *Id.* Neither Starla nor Zoe has ever bitten a person or another dog, attacked any other animal, or in any way posed a threat to community peace. *Id.*

On August 1, 2009, a meter reader observed Zoe inside Richardson's home through a window and subsequently notified animal control officers. *Id.* at 5. The animal control officers seized Zoe the next day. *Id.* Fortunately for Starla, she was not seized because was at a veterinary hospital recuperating from surgery, from which she made a full recovery. *Id.* Starla currently lives with Richardson in his home. *Id.*

Sometime thereafter, the City held a hearing at which the animal control officer testified. *Id.* He stated that, based on her appearance as a muscular, short haired dog with a large head,[1] and nothing else, Zoe was a pit bull. *Id.* Richardson countered with evidence in the form of an affidavit from his veterinarian affirmatively identifying Zoe as a "mixed breed." *Id.* At no point was any DNA testing done to determine whether or not Zoe was a pit bill as classified under the Ordinance. *Id.* At no point did the local rescue group or his veterinarian ever suggest that Zoe and Starla belonged to one of the three breeds, breed types, or mixtures named in the Ordinance. *Id.* at 9. Richardson also presented evidence that the dogs were always well behaved and never exhibited any problematic behavioral tendencies. *Id.* Despite the lack of evidence, the City manager determined that Zoe was a "Pit Bull Terrier type dog" and therefore was *per se* vicious under the Ordinance requiring that Zoe be removed from the City within ten days. *Id.* at 5. Richardson made every necessary attempt to find Zoe a home outside the City, but could find one in the allotted ten day span. *Id.* To no avail, Richardson desperately appealed the City manager's decision to the state trial court. *Id.* The state trial court affirmed the City Manger's finding without an opinion and Zoe was killed by lethal injection on December 1, 2009 due solely to her appearance. *Id.*

To this day, Richardson lives in constant fear that the City will also seize and kill Starla due to the Ordinance. *Id.* Richardson has had to confine Starla to his home, except to relieve herself in his backyard. *Id.* at 5-6. The impact of the tragic loss of Zoe has forced Richardson to build a privacy fence around his house and to keep his curtains drawn at all times to prevent peering eyes from falling upon Starla. *Id.* at 6. In fact, Richardson, himself, only leaves his house for work. *Id.* Due to the paralyzing fear that Starla may be seized, he is incapable of going on vacation or leaving his house for any extended period of time. *Id.*

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[1] Starla also shares these characterizes.

SUMMARY OF THE ARGUMENT

The district court erred in granting the City's summary judgment motion. The district court found that the "Pit Bull Terrier" breed is not recognized by any kennel clubs, but improperly concluded that the Ordinance was not unconstitutionally vague in all of its applications. The Ordinance is overbroad in its declaration that all pit bulls are *per se* vicious. Furthermore, the Ordinance is improperly vague on its face because the Ordinance cannot provide adequate notice to dog owners that their dog may be classified as an unrecognized breed. The Ordinance is also unconstitutionally vague because it does not provide specific and definite criteria to protect against arbitrary enforcement. Instead, the Ordinance permits, and, in the case of a "Pit Bull Terrier," requires, enforcement personnel to make a subjective determination as to a particular dog's status as a "pit bull." The district court also erred when it granted the City's summary judgment motion with respect to Richardson's as applied vagueness claim because the determination of whether a dog is covered by the Ordinance should go to trial. Viewed in the light most favorable to Richardson, there is genuine issue of material fact whether the Ordinance applies to him.

The district court heard evidence of Starla's physical appearance and pattern of behavior. Beyond that, the district court merely relied on inaccurate stereotypes of the "pit bull." Before the district court rendered judgment, Richardson was not provided an opportunity to build an evidentiary record showing that the relationship between a dog and a dog owner is fundamental, thus, the Ordinance abridges that right and must past strict scrutiny. Before granting summary judgment, the lower court should have allowed Richardson to present evidence that the City was in fact abridging a fundamental right and that the Ordinance must be narrowly tailored to serve a compelling governmental interest.

By granting summary judgment in favor of the City, the district court further limited Richardson's ability to provide evidence that the Ordinance is not rationally related to a legitimate governmental interest. The Ordinance labels all "'pit bull' variety of terriers" as *per se* vicious. The Ordinance further bans vicious dogs in order to serve the public safety. However, the Ordinance does not serve the purpose of providing for the public safety, thus it is a violation of substantive due process under the Fourteenth Amendment of the United States. Case law dictates that a court must afford a person an opportunity to build evidence showing that a statute is not rationally related to a legitimate governmental purpose and in violation of substantive due process rights. Therefore, by granting summary judgment in favor of the City, Richardson was denied his right to build an evidentiary record regarding the legitimacy of the Ordinance. Under *de novo* review, the lower court's granting of summary judgment in favor of the City should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). As required under the summary judgment standard, the facts are reviewed in the light most favorable to the non-movant, drawing all reasonable inferences in the non-movant's favor. *August v. Offices Unlimited, Inc.*, 981 F.2d 576, 580 (1st Cir. 1992). The standard of review over the district court's decision on summary judgment is *de novo*. *Terry v. Bayer Corp.*, 145 F.3d 28 (1st Cir. 1998). Findings of fact are reviewed under a "clearly erroneous" standard. *Brophy v. Lavigne*, 801 F.2d 521, 524 (1st Cir. 1986).

II. THE DISTRICT COURT ERRED WHEN FINDING THAT DESIGNATING ALL "'PIT BULL' VARIETY OF TERRIER" AS *PER SE* VICIOUS AND THUS BANNING THEM DOES NOT VIOLATE THE OVERBREADTH AND VAGUENESS DOCTRINES, BOTH ON ITS FACE AND AS APPLIED TO APPELLANT'S CASE.

The vagueness doctrine requires that, to satisfy due process of law, an ordinance define an "offense with 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). "Vague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Id.* A vague ordinance impermissibly delegates basic policy matters to officers "for resolution on an ad hoc and subjective basis." *Id.* at 109.

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement.

Kolendar, 461 U.S. at 357-58 (citing *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

There is a presumption of constitutionality and an ordinance is not unconstitutionally vague because there is difficulty "in determining whether certain marginal offenses fall with [its] language." *Parker v. Levy*, 417 U.S. 733, 757 (1974). Absent First Amendment implications, an ordinance may be unconstitutional "if the enactment is impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). If a court finds that an ordinance is not void-for-vagueness on its face, the court must determine whether the ordinance is vague as applied to the facts of the specific case. *United States v. Mazurie*, 419 U.S. 544, 550 (1975).

a. *The Ordinance does not provide adequate notice to dog owners that their dogs may be covered by the Ordinance because it is overbroad and classifies as vicious breeds not universally recognized, if at all, by kennel clubs.*

The Ordinance is impermissibly vague on its face. The court below found that, even though "Pit Bull Terrier" is not a breed recognized by the American Kennel Club ("AKC") or the United Kennel Club ("UKC"), the ordinance is not impermissibly vague in all of its applications, because owners of the other two named breeds must know the Ordinance applies to them. This determination goes against the reasoning of the Supreme Judicial Court of Massachusetts, which found that, unlike the general prohibition of vicious dogs based on behavior, which would put an owner on notice, an ordinance is unconstitutionally vague if its enforcement depends "on the subjective understanding of dog officers of the appearance of an ill-defined 'breed,' leav[ing] dog owners to guess what conduct or dog 'look' is prohibited." *Am. Dog Owners Ass'n, Inc. v. City of Lynn*, 404 Mass. 73, 80, 533 N.E.2d 642, 647 (1989).

There is inherent confusion in the identification of a particularly alleged breed of dog that prevents the Ordinance from providing notice to a dog owner, even if the dog is registered. The AKC does not recognize the American Pit Bull Terrier. American Kennel Club, *AKC Breeds by Group: Terrier Group*, http://www.akc.org/breeds/terrier_group.cfm., (last visited Jan. 17, 2011) [hereinafter *AKC Breeds*]. The UKC does not recognize the American Staffordshire Terrier. United Kennel Club, *List of UKC Breeds by Group*, http://www.ukcdogs.com/WebSite.nsf/ WebPages/ LrnBreedInfoByGroup., (last visited Jan. 17, 2011) [hereinafter *UKC Breeds*]. Neither kennel club recognizes a "Pit Bull Terrier" or a "'pit bull' variety of terrier." *AKC Breeds*; *UKC Breeds*. Other than as its own breed, neither the AKC or UKC distinguishes the American Staffordshire Terrier or the American Pit Bull Terrier, respectively, from other breeds of terriers, nor categorizes it as any variety of terrier. *AKC Breeds*; *UKC Breeds*. Consequently,

the Ordinance is inherently confusing in the identification of the dogs to which it refers. To further confusion, there are recognized breeds of dogs not named in the Ordinance with similar characteristics and names, such as the Staffordshire Bull Terrier, Bull Terrier, and the Miniature Bull Terrier. *AKC Breeds*; *UKC Breeds*. This confusion becomes especially troubling when identifying a dog that is a mixture of one or more of these unnamed, but very similar to named, breeds. Thus, the Ordinance does not provide adequate notice to dog owners that the Ordinance may apply to them.

The Ordinance is also inherently confusing because it violates the overbreadth doctrine. An ordinance banning all dogs of the "Pit Bull" type was constitutionally fatal in overbreadth, because a harmless or inoffensive "Pit Bull" may be banned. *Am. Dog Owners Ass'n, Inc. v. City of Yakima*, 113 Wash. 2d 213, 777 P.2d 1046 (1989). Both the AKC and the UKC note that the American Staffordshire Terrier and the American Pit Bull Terrier are friendly and excellent family dogs. American Kennel Club, *AKC Meet the Breeds: American Staffordshire Terrier*, http://www.akc.org/breeds/american_staffordshire_terrier/index.cfm, (last visited Jan. 17, 2011); United Kennel Club, *American Pit Bull Terrier*, http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008, (last visited Jan. 17, 2011). Thus, it is overinclusive to include all American Staffordshire Terriers and American Pit Bull Terriers as "vicious dogs" in the Ordinance. Not only is it a violation of the overbreadth doctrine, but the calm nature of the dogs cuts against finding that a dog owner has adequate notice that his or her dog may be covered by a vicious dog Ordinance. *C.f. State v. Ferguson*, 57 Ohio St. 3d 176, 177, 566 N.E.2d 1230, 1232 (1991) (finding that the combination of physical *and behavioral* traits of a dog "commonly known as a pit bull dog" provide an owner adequate notice under the vagueness doctrine); *State v. Anderson*, 57 Ohio St.3d 168, 566 N.E.2d 1224 (1991) (same).

Even if the Court finds that the Ordinance is constitutional as applied to "American Staffordshire Terrier" and the "American Pit Bull," the Ordinance is impermissibly vague in all of its applications of identifying "Pit Bull Terriers," a breed the court below found did not exist, and the Ordinance's use of the term is unconstitutionally vague.

b. The Ordinance does not provide specific standards or objective criteria to protect against arbitrary enforcement by law enforcement personnel.

The requirement that the Ordinance protect against ad hoc and subjective determinations by law enforcement is the weightier prong of the vagueness doctrine. *Kolendar*, 461 U.S. at 357-58; *Smith*, 415 U.S. at 574. The court below found that the "Pit Bull Terrier" breed, the breed Zoe was determined to be, was not a recognized breed of dog. The naming of an unrecognized breed of dog cannot, and does not, satisfy the minimum guidelines for objective determination by law enforcement for due process of law. *See Grayned*, 408 U.S. at 108-09 (1972).

Permitting an unrecognized breed to pass constitutional muster is without support in the relevant caselaw. The Supreme Judicial Court of Massachusetts affirmed that an ordinance listing specific types of dogs, some of which are of "'dubious existence,' and one ('any mixture thereof') impossible to ascertain-was void for vagueness." *City of Lynn*, 404 Mass. at 79, 533 N.E.2d at 646. Cases that have upheld breed specific ordinances have done so, noting that"[r]eference to *recognized* breeds provides sufficient specifics to withstand a vagueness challenge." *Dog Fed'n of Wis., Inc. v. City of S. Milwaukee*, 178 Wis. 2d 353, 362, 504 N.W.2d 375, 379 (Ct. App. 1993) (emphasis added); *see also Co. Dog Fanciers, Inc. v. City & County of Denver By & Through City Council*, 820 P.2d 644, 651-52 (Colo. 1991) (finding that the named

breeds were all recognized by the AKC or the UKC); *City of Yakima*, 113 Wash. 2d at 215, 777 P.2d at 1047-48 (finding all listed breeds were recognized breeds).

A "Pit Bull Terrier" is not a recognized breed as to have objective, or even identifiable, criteria for determination. An enforcement official's determination that a dog is a "Pit Bull Terrier" is, therefore, necessarily subjective. An ordinance is unconstitutionally vague if its enforcement depends:

> on the subjective understanding of dog officers of the appearance of an ill-defined 'breed,' … and requires 'proof' of a dog's 'type' which, unless the dog is registered, may be impossible to furnish.

City of Lynn, 404 Mass. at 80, 533 N.E.2d at 647.

The phrase "breeds commonly referred to as belonging to the 'pit bull' variety of terrier" does not save the Ordinance from being void-for-vagueness for two reasons. Muni. Code § 6.04.090.B.1(c). First, the phrase itself is still subjective. One court found that the language "*commonly known as* pit bulls" gives unconstitutionally "broad discretion to enforcement personel [sic], who are free to make the 'ad hoc and subjective' determinations condemned in *Grayned*." *Am. Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416, 418 (Iowa 1991) (citing *Grayned*, 408 U.S. at 108-109) (emphasis in original).

Second, the Ordinance's definition of "pit bull" is an exclusive definition, limiting itself to the three listed breeds or breed types and mixtures. Muni. Code § 6.04.090.B.1(c) (limiting its coverage to terriers "which consist of the following breeds or breed types and mixtures . . . "). Although some cases have found that generally referring to "pit bulls" is enough to defeat a vagueness challenge, finding that it is within the public's common knowledge what is or is not a "pit bull", the language in those ordinances did not appear in exclusive definitions of "pit bull." *City of Pagedale v. Murphy*, 142 S.W.3d 775 (Mo.App. E.D. 2004); *Anderson*, 57 Ohio St.3d

168, 655 N.E.2d 1224. Therefore, even if the Court finds that, as was argued by the City below, it is within law enforcement agents' and the public's common knowledge what dogs constitute "pit bulls," such a finding would have no relevance here. Here, the issue is whether the Ordinance permits, if not requires, subjective decision making due its lack of specific and definite criteria to guide enforcement agents. The determination of a dog as an unrecognized breed requires a subjective determination by law enforcement officers. Because the court below found that a "Pit Bull Terrier" is not a recognized breed of dog, the court erred in finding the Ordinance was not constitutionally vague.

The Ordinance also lacks the kind of procedural safeguards that could save it from being unconstitutionally vague. *See Am. Dog Owners Ass'n, Inc. v. Dade County*, 728 F. Supp. 1533, 1540 (S.D.Fla. 1989); *Co. Dog Fanciers, Inc*., 820 P.2d 644. In *Dade County*, the court found that a process contained in the Ordinance which allowed for clarification of a dog's status was a safeguard that lessened "the amount of precision in definition required by due process." *Dade County*, 728 F. Supp. at 1540. In *Colorado Dog Fanciers*, the court found that Denver's ordinance's procedure, "as construed with the burden properly placed on the city to prove pit bull status, provides a sufficient safeguard to avoid arbitrary application of the law." *Co. Dog Fanciers, Inc.*, 820 P.2d at 652. Although the Ordinance provides for a hearing, the Ordinance does not establish any burden for proving a dog's breed. Muni. Code § 6.04.090. Moreover, the Ordinance does not even require an animal control officer to investigate the dog's breed. *Id.* at n.1 ("Investigation of the matter may be made by an animal control officer."). The fact that the City Manager identified Zoe as a "Pit Bull Terrier" against the evidence presented by a veterinarian, and in spite of the animal control officer not actually identifying Zoe as a specifically named breed or breed type in the Ordinance, demonstrates the subjective nature of

the Ordinance's enforcement. Additionally, the *Colorado Dog Fanciers* court particularly relied upon the fact that "doubtful cases are resolved in favor of finding that the animal in question is not a pit bull." *Id.* The Ordinance contains no such safeguard to protect against arbitrary enforcement. The Ordinance's language, combined with its lack of procedural safeguards, renders it unconstitutionally subject to arbitrary enforcement and void-for-vagueness on its face.

c. Appellant's case should be permitted to go to trial because there is a general issue of material fact as to whether the Ordinance applies to Starla and because whether a particular dog is covered by the Ordinance is an evidentiary issue that should not be decided as a matter of Constitutional law.

The court below incorrectly held that whether the ordinance applied to Richardson did not create a general issue of material fact, noting that the determination that Zoe was a "'pit bull' variety of terrier" put Richardson on notice that Starla would also be subject to the ban. The court below stated that Zoe and Starla are large dogs with muscular heads, and found there was ample to support finding that Zoe was a pit bull under the Ordinance. *Id.* However, such a conclusion is unsupported by the record. On summary judgment, facts must be viewed in the light most favorable to the opposing party. *August*, 981 F.2d at 580. Here, the fact is that it is unknown if Starla is genetically related to Zoe. Richardson's veterinarian does not recognize Starla as a breed under the Ordinance. Even though the Ordinance covers mixtures of the three named breeds, and Starla was identified as a "mixed breed," the veterinarian not once indicated Starla's lineage includes a breed named in the Ordinance. These facts, viewed in the light most favorable to Richardson, suggest that there is an issue of material fact as to whether the Ordinance covers Starla.

The district court's granting summary judgment in favor of the City is against the weight of relevant caselaw from other jurisdictions. Whether a particular dog falls under the Ordinance is a matter of evidence to be determined at trial, and not as an issue of constitutional law. *Vanater v. Vill. of S. Point*, 717 F. Supp. 1236, 1244 (S.D. Ohio 1989); *City of Pagedale*, 142 S.W.3d at 779; *Anderson*, 57 Ohio St.3d at 174, 566 N.E.2d at 1228-29; *see also Garcia v. Vill. Of Tijeras*, 108 N.M. 116, 118, 767 P.2d 355, 357 (Ct. App. 1988) (noting that the village's motion for summary judgment motion was denied and the case was decided on the merits at trial). The district court erred in not permitting the issue of whether the Ordinance was unconstitutionally vague as applied to Richardson from going to trial.

III. THE DISTRICT COURT ERRED WHEN FINDING THAT DESIGNATING ALL "'PIT BULL' VARIETY OF TERRIER" AS *PER SE* VICIOUS AND THUS BANNING THEM DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

A party that challenges a public safety law must show by clear and convincing evidence that the statute enacted by the legislature is unconstitutional. *In re Winship*, 397 U.S. 358 (1970). The Due Process Clause of the Fourteenth Amendment "cover[s] a substantive sphere . . . barring certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). If the challenged statute affects a fundamental right, the statute must pass strict scrutiny, meaning that the effect of the statute must be narrowly tailored to serve a compelling government interest. *Washington v. Glucksberg*, 521 U.S. 702 (1997). If the statute infringes on a lesser right, the substantive rights of an individual requires a statute to bear a rational relation to a legitimate legislative goal or purpose. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *Reno v. Flores*, 507 U.S.

292, 305 (1993) (there must be a "'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose.").

a. The district court should have allowed Appellant to present evidence that the relationship between a dog and a dog owner is a fundamental right and that any statute that infringes upon this right must be narrowly tailored to serve a compelling governmental interest.

In order to show that the bond between a dog and a dog owner rises to the level of a fundamental liberty interest the lower court should have allowed Richardson to "carefully describe the asserted fundamental liberty interest" in order for the court to determine if the interest is "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Dias v. City & County of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009) (quoting *Glucksberg*, 521 U.S. at 720-21).

Courts are beginning to recognize the essential bond that develops in the relationship between a dog owner. *See Raymond v. Lachmann*, 695 N.Y.S.2d 308, 264 A.D.2d 340 (1st Dep't 1999) (ruling that when deciding which divorced party should retain custody of their pet cat, the court should consider the "best interest of the cat."); *Brousseau v. Rosenthal*, 110 Misc. 2d 1054, 443 N.Y.S.2d 285 (N.Y. Civ. Ct. 1980) (deciding that in order to determine the actual value of a healthy dog that died after being boarded at defendant veterinarian's kennel the court should consider the plaintiff's relationship with her dog and the trauma of a companion animal's death); *Bueckner v. Hamel*, 886 S.W.2d 368, 373, (Tex. Ct. App. 1st Dist. 1994) (Andell, J., concurring) (deciding that when a dog was intentionally killed, the damages awarded should be based on "the intrinsic or special value of domestic animals as companions and beloved pets.").

In the case at bar, Richardson established a meaningful bond between himself and his two dogs, Zoe and Starla. When the City seized and killed Zoe, that bond was destroyed.

Richardson is prepared to show that the bond between a dog and a dog owner is fundamental and that the Ordinance is not narrowly tailored to serve a compelling state interest. When the lower court granted the City's summary judgment motion, Richardson was never allowed the opportunity to prove this fundamental bond or provide evidence against the City, therefore summary judgment was improper.

b. If, after proper evidence has been presented and the relationship between a dog and dog owner is found not to be fundamental, the district court should have at least allowed Appellant to present evidence that the Ordinance is not rationally related to a legitimate government interest.

In order to meet substantive due process requirements the Ordinance must bear a rational relation to a legitimate legislative goal or purpose. *Exxon Corp.*, 437 U.S. 117; *Dias*, 567 F.3d at 1182 (stating that "[e]ven if the [o]rdinance does not implicate a fundamental right, it must nonetheless bear a rational relationship to a legitimate governmental interest"). As long as an ordinance has a rational relationship to a legitimate governmental purpose, then a city may use its police powers to protect the public health, safety, and welfare. *Kelley v. Johnson*, 425 U.S. 238 (1976); *Nebbia v. New York*, 291 U.S. 502 (1934); *Stone v. Mississippi*, 101 U.S. 814 (1880). However, simply because a statute passes this type of minimum scrutiny does not mean that the statute is practical, sensible, just, or fair. *See Exxon Corp.*, 437 U.S. 117. Furthermore, the "constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (citing *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924)).

Although this issue is a case of first impression in the First Circuit, the Tenth Circuit has directly spoken to the issue. In *Dias v. City & County of Denver* a Denver city ordinance

banning pit bulls was challenged by plaintiffs as denying their substantive due process rights. The plaintiffs claimed that there was a lack of evidence that pit bulls as a breed posed a threat to the public safety, and thus it was irrational for Denver to enact such breed specific legislation. *Dias*, 567 F.3d at 1172-73. Plaintiffs further contended that the Denver statute was created twenty years earlier and while the statute may have been justified by the then-existing body of knowledge, it was no longer justified because the "state of science in 2009 [was] such that the bans [were] no longer rational." *Id* at 1183. The court agreed with this argument and granted no merit to Denver's arguments that the ordinance was rational as a matter of law, citing to the plaintiffs' arguments supported by the AKC and the UKC. *Id* at 1884. While the court applied strict scrutiny in this case, it found that plaintiffs alleged a substantive due process violation that was sufficient to survive a motion to dismiss. *Id* at 1181. The court stated that the majority of cases where other courts sustained a pit bull ban as reasonable did not apply in this particular situation because those cases were decided based on a sufficiently developed evidentiary record. *Id* at n.12 (citing *Vanater*, 717 F. Supp. 1236; *Co. Dog Fanciers, Inc.* 820 P.2d 644; *Garcia*, 108 N.M. 116, 767 P.2d 355; *City of Toledo v. Tellings*, 114 Ohio St. 3d 278, 871 N.E.2d 1152 (2007). Since there was no such evidentiary record developed in the case at hand, the district court should not have granted the City's summary judgment.

Furthermore, courts have recognized that the legal reasoning similar to the decision in *Dias* applies when deciding a motion for summary judgment. *Am. Canine Found. v. City of Aurora*, No. 06-CV-1510, 2008 WL 2229943 (D. Colo. May 28, 2008). In *City of Aurora*, the court stated that summary judgment should be denied where the record does not contain "ample evidence [] to establish a rational relationship between the city's classification of certain dogs as pit bulls and the legitimate governmental purpose of protecting the health and safety" of the

public. *Id.* at *8. The court in *City of Aurora* decided that at the very least, the parties involved in the action should be able to present evidence showing a statute is not rationally related to a legitimate government purpose. *Id.* at *11. The court concluded that granting summary judgment in this type of action would prevent the evidence that is necessary to be presented regarding substantive due process. *Id.*

In the case at hand, summary judgment was granted against Richardson. When the lower court granted summary judgment it prevented Richardson from creating an evidentiary record that his dog, Starla, were friendly, well-socialized animals, and were of a "mixed breed" not included in the Ordinance. Furthermore, the granting of summary judgment in this case prevented Richardson from presenting evidence that the Ordinance has no rational relationship to a legitimate public purpose. Allowing the previous mentioned evidence is essential for the court to be able to properly determine the relationship of the statute to a legitimate government purpose.

Moreover, Richardson should have been allowed to create an evidentiary record demonstrating that the Ordinance was enacted in 1988 and that the facts and circumstances that existed then are no longer in existence today. Richardson can show, much as the plaintiffs did in *Dias*, that breed specific legislation, specifically the Ordinance, is no longer rationally related to irrational fears which served as the basis for the Ordinance. In fact "once research is conducted most community leaders correctly realize that [Breed Specific Legislation] won't solve the problems they face with dangerous dogs." The Humane Society of the United States, *Dangerous Dogs and Breed-Specific Legislation*, http://www.humanesociety.org/animals/dogs/facts/statement_dangerous_dogs_breed_specific_legislation.html (last visited January 17, 2011). This type of legislation should be "directed at fostering safety and protection of the general public

from animals classified as dangerous" providing that the "legislation does not refer to specific breeds or classes of animals." American Veterinary Medical Association, *Dangerous Animal Legislation* http://www.avma.org/issues/policy/ dangerous _animal_legislation.asp (last visited January 17, 2011). The Ordinance only targets a suspect group of dogs that may not be vicious by nature, which results in serving no public purpose.

The lower court relied on *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698 (1896), to state that Ordinance meets the requirements for substantive due process because the City has a legitimate interest in animal control and that dogs may be taken and destroyed under the City's police power. However, this argument is misplaced and *Sentell* is readily distinguished from the case at bar. Here, Richardson is not questioning the City's police power, but rather the legitimacy of the Ordinance. In *Sentell*, the court concluded that "[i]t is purely within the discretion of the legislature to say how far dogs shall be recognized as property." *Sentell*, 166 U.S. at 705. The case at hand is not concerned with the property status of dogs; rather, it is concerned with the rationality of the Ordinance and the violation of Richardson's substantive due process rights. Richardson concedes the fact that dog's may be taken by the City under its police power, but unlike in *Sentell*, Richardson should have been able to present evidence showing that the Ordinance is arbitrary and unrelated to a legitimate public purpose.

There is a clear lack of evidence to show that pit bulls as a breed posed any threat to the public safety, therefore it was irrational for the city to enact the Ordinance banning the possession of pit bulls. It was also irrational for the lower court to grant summary judgment to the City without at least creating a proper evidentiary record. Therefore, under the reasoning in *Dias* and *Aurora*, Richardson should have at least been permitted to present ample evidence

concerning why the Ordinance is not rationally related to a legitimate public purpose or safety. Richardson is prepared to make this argument.

c. *The designation of all "pit bull" variety of terrier as being* per se *vicious under the Ordinance is not rationally related to a legitimate governmental purpose, thus it violates Appellant's substantive due process rights.*

Richardson was also denied the opportunity to present evidence negating the assumption that pit bulls are *per se* vicious and thus showing that the ordinance bears no rational relation to a legitimate governmental interest. Furthermore, the ordinance is both overinclusive and underinclusive. The lower court mistakenly relied on several stereotypes of the pit bull breed's physical characteristics suggesting that the breed poses a significant threat to the health, safety, and welfare of the City's residents. The lower court stated that pit bulls possess powerful instincts for dominance which naturally result in a proclivity for fighting, a strong prey drive, a natural chase instinct, powerful jaws, and "gameness."[2] The Ordinance also covers more dogs than necessary since it bans an entire breed without any proof of individual acts of viciousness. The ordinance further covers too few types of dogs because breeds other than pit bulls can be considered vicious.

It is well established that "[d]ogs are regarded by the common law as ordinarily harmless animals." *Jordan v. Free*, 2006 Mass. App. Div. 135, 137 (2006) (quoting *Splaine v. E. Dog Club, Inc.*, 306 Mass. 381, 385, 28 N.E.2d 450, 452 (1940)); *See also Carter v. Metro N. Assoc.*, 680 N.Y.S.2d 239, 255 A.D.2d 251 (1st Dept. 1998) (where a court refused to take judicial notice of the viciousness of pit bulls); *Ferrara v. Marra*, 823 A.2d 1134 (2003) (deciding that the trial judge properly declined to take judicial notice that pit bull terriers are inherently dangerous

[2] "Gameness" is defined by the district court as "the will to successfully complete a task." *Richardson v. City of Winthrop*, Civil Action No. 10cv00416 (D.C. Mass.).

by virtue of their breed at the summary judgment hearing). Moreover, the case at bar is a clear example of how difficult it is to distinguish breeds of dogs from one another, and often mixed breeds may contain any of several dog breeds. In fact, the AKC and the UKC do not recognize a distinct pit bull breed. *See AKC Breeds*; *UKC Breeds*. The breeds that these two organizations do recognize, the American Staffordshire Terrier and the American Pit Bull Terrier, have not been labeled as vicious animals. The American Staffordshire Terrier is said to "thrive[] when he [or she] is made part of the family" and has been found to be extremely "loyal to family." American Kennel Club, *American Staffordshire Terrier*, http://www.akc.org/ breeds/american_staffordshire_terrier/ (last visited January 17, 2011). The American Pit Bull Terrier is "eager to please" and an "excellent family companion[]."United Kennel Club, *American Pit Bull Terrier*, http://www.ukcdogs.com/WebSite.nsf/Breeds/ AmericanPitBullTerrierRevisedNovember12008 (last visited January 17, 2011). It is uncharacteristic of this particular breed to be aggressive towards humans. *Id.* The American Temperament Society, which tests the temperament of different breeds of dogs, has rated pit bulls as having a better temperance than many other breeds. American Temperament Society, *ATTS Breed Statistics*, http://www.atts.org/ stats1.html (last visited January 17, 2011).

In the case at bar there has not been any effort by the City to actually test the breed of Richardson's dogs. The lower court even found that no DNA testing was ever performed upon Richardson's dogs. Therefore, the lower court made a rash decision that Richardson's dogs were dangerous because it merely looked at the dogs' physical characteristics as well as stereotypical physical traits of pit bulls. The Ordinance does little to protect the public when it merely labels a dog "vicious" simply because of its breed. Dangerous animals should be labeled due to their actions or behavior, not simply because of the dog's breed. National Animal Control

Association, *National Animal Control Association Guidelines*, http://www.nacanet.org/ guidelines.html (last visited January 17, 2011). Any animal may exhibit some sort of aggressive behavior regardless of the breed. *Id.* Different treatment of a class of individuals, humans or dogs, cannot be based on "mere negative attitudes, or [unsubstantiated fear]," nor on personal biases. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (deciding that the court should afford mentally retarded citizens some protection, while not a suspect class, requiring that an ordinance that treated mentally handicapped people differently to bear a rational relationship to the city's legitimate governmental purpose). According to the Humane Society of the United States, any dog can be dangerous, regardless of its breed. The Humane Society of the United States, *When Breed Should be Ignored*, http://www.pitbullsontheweb.com/petbull/ hsus.html (last visited January 17, 2011). Moreover, most vicious dogs are vicious because of the treatment of their owners, not by any innate nature due to their breed. Therefore, an ordinance that is limited to the actions of a breed, but not the owner's actions will not serve the intended rationale and thus have no legitimate connection to the governmental purpose.

The District Court relies on the cases of *Commonwealth v. Santiago*, 452 Mass. 573, 896 N.E.2d 622 (2008) and *Vanater*, 717 F. Supp. 1236 to stand for the proposition that pit bulls are commonly known to be aggressive. However, this belief is misplaced. In *Santiago*, the court dealt with exceptions to the" knock and announce" protocol of a search by police officers. *Santiago*, 452 Mass. 573. *Santiago* does not deal with a pit bull ordinance or any breed specific legislation, but rather deals specifically with the issue of police safety. It is common knowledge that police safety is held to be a great concern and that courts have ruled that "knock and announce" procedures are intended to protect police officers from a potential dangerous situation. *Commonwealth v. Valerio*, 449 Mass. 562, 870 N.E.2d 46 (2007). While *Santiago*

deals specifically with a pit bull, any dog can feasibly be considered dangerous and therefore fall under an exception for the "knock and announce" rule, not merely pit bulls.

The case of *Vanater* is distinguishable from the case at bar. In *Vanatar*, the court found that there was sufficient evidence presented to the court to show a rational connection with a legitimate public purpose. *Vanater*, 717 F. Supp. at 1246-47. The court found that there was "substantial evidence presented at trial" to find the statute was rationally related to the safety and welfare of city residents when the city presented specific instances of violent propensities. *Id.* at 1246. In the case at hand, no evidentiary record was created by either party on the issue of the Ordinance's rational relation to any legitimate purpose. The lower court merely used a list of several physical stereotypes to show that the pit bull breed is *per se* vicious. Richardson was not given the opportunity to provide evidence to negate the belief that pit bulls are *per se* vicious and thus not given a sufficient opportunity to show that the Ordinance violated his substantive due process rights. Finally, *Vanater* was a case decided over 20 years ago and, as previously noted, the current state of science no longer rationalizes this court decision. *Dias*, 567 F.3d at 1183.

Breed is a human construct that utilized to place dogs in a group based on similar characteristics. There is no scientific test to determine a particular dog's breed without first examining the dog's heredity. *City of Lynn*, 404 Mass. at 76, 533 N.E.2d at 644 (1989) (finding that "there is no scientific means, by blood, enzyme, or otherwise, to determine whether a dog belongs to a particular breed, regardless of whether 'breed' is used in a formal sense or not."). In the case at bar, the City never presented evidence that a pit bull is *per se* vicious. Similarly, because summary judgment was granted in favor of the City, Richardson was never given a chance to present evidence that the ordinance labeling pit bulls as *per se* vicious bears no rational relationship to a legitimate governmental interest for the public good. The lower court should

have allowed Richardson to provide evidence that the pit bulls are not *per se* vicious and therefore, the ordinance does not bear a rational relationship to the public purpose it is intended to serve.

CONCLUSION

For the foregoing reasons, the summary judgment rendered in favor the City should be reversed.

Respectfully Submitted,

____Team #1____
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