NO. 10cv00416

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

QUINTON RICHARDSON, PLAINTIFF-APPELLANT,

V.

CITY OF WINTHROP, MASSACHUSETTS, DEFENDANT-APPELLEE

*Appeal from The United States District Court*
*for the District Of Massachusetts*

BRIEF FOR THE PLAINTIFF-APPELLANT

TEAM 8

*Attorneys for the Plaintiff-Appellant*

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## STATEMENT OF THE ISSUES:

Winthrop Municipal Code section 6.05.090 ("the Ordinance") designates all "'pit bull' variety of terrier" and mixes thereof as *per se* vicious, bans them from the city, and in some cases authorizes their destruction.

I. Is the Ordinance unconstitutionally vague as applied to rescued, "mixed breed" pets of unknown origin?

II. In light of new evidence, does the Ordinance violate substantive due process under the Fourteenth Amendment to the U.S. Constitution?

## STATEMENT OF THE FACTS

### Zoe and Starla

Richardson, a lifelong resident of Winthrop, went to a rescue organization in 2005 seeking canine companionship. (R. at 4.) He adopted two puppies, which he named Zoe and Starla. (R. at 4.) The shelter found Zoe and Starla, believed to be litter mates, abandoned under a City park bench when they were about four months old. (R. at 4.) Zoe and Starla's "cuteness," playful antics, and immediate affection toward Richardson set them apart from the other dogs. (R. at 4.) Both the rescue organization and Richardson's veterinarian independently identified the dogs as "mixed breed," and Richardson had no reason to believe otherwise. (R. at 4.)

At home, Zoe and Starla grew from playful puppies into well-mannered young dogs. Friends and family considered them well-socialized, and the dogs played well with Richardson's

young nieces and nephews. (R. at 4.) For all of Zoe's short life, there was no evidence that she, or her sister Starla, had ever bitten a person, attacked another animal, or otherwise threatened the safety of the community in any way. (R. at 4.)

**The Ordinance**

In 1988, the City enacted Winthrop Municipal Code section 6.04.090 ("the Ordinance") banning "all pit bull variety of terrier" and "mixtures thereof" from the Winthrop city limits. (R. at 5.) The Ordinance states that the "pit bull" breed consists of the "American Staffordshire Terrier," "American Pit Bull" and the "Pit Bull Terrier." The Ordinance does not further define these breeds in any way, or reference any external definitions. Nor does it state what percentage of "pit bull" blood a dog must have to be a "mixture thereof." Further, the "American Pit Bull" and the "Pit Bull Terrier" are fictitious breeds; neither is recognized by the American Kennel Club ("AKC") or the United Kennel Club ("UKC").

**"Destroying" Zoe**

On August 1, 2009, a meter reader spied Zoe inside Richardson's home through a window. (R. at 5.) The meter reader then called animal control, which seized Zoe the next day. (R. at 5.) Starla was at a veterinary hospital recovering from surgery at the time, and has since returned home to Richardson. (R. at 5.)

The City Manager held a hearing to determine whether Zoe was a "pit bull variety of terrier" and therefore *per se* "vicious." (R. at 5.) Richardson provided an affidavit from his veterinarian stating that Zoe was a "mixed breed." (R. at 5.) An animal control officer testified that he thought Zoe was a pit bull based on her appearance. (R. at 5.) But no DNA testing was performed. (R. at 5.) Nor is there any evidence describing the standards that the animal control officer used.

The City Manager determined that Zoe was a "Pit Bull Terrier type dog" and therefore was "vicious" under the Ordinance, again with no accompanying explanation for the decision. (R. at 5.) The City Manager ordered that Zoe be removed from the City within ten days. (R. at 5.) Richardson frantically tried find a home for Zoe outside of the City, but was unable to do so within the allotted time. (R. at 5.) He appealed the decision to the state trial court, which affirmed the City Manager's finding without opinion. (R. at 5.) On December 1, 2009, Zoe was killed by lethal injection. (R. at 5.)

Now, Richardson lives in fear that the City also may seize and kill Starla. (R. at 5.) Since Zoe was taken from him, Richardson has not allowed Starla to leave his home except to relieve herself in their private backyard, and keeps his curtains closed at all times to hide her. (R. at 5-6.) Richardson has not left his house except to go to work, out of fear that Starla will be seized and meet the same fate as her sister. (R. at 6.)

**This litigation**

Richardson brought a complaint in federal court alleging that the Ordinance violates the Fourteenth Amendment to the U.S. Constitution because it (1) is unconstitutionally vague, on its face and as applied, and (2) violates substantive due process. (R. at 6.) A preliminary injunction preventing the City from seizing Starla was issued pending the outcome of this case. (R. at 6.) The defendants filed a motion for summary judgment on both counts and the district court held as a matter of law that the Ordinance is not void for vagueness and does not violate substantive due process. (R. at 15.)

Richardson appealed the district court's decision to this Court.

## SUMMARY OF ARGUMENT

Winthrop's Ordinance designates all "'pit bull'" variety of terrier and mixes thereof as *per se* vicious, bans them from the city, and in some cases authorizes their destruction. It violates the Fourteenth Amendment to the United States Constitution both because (1) it is excessively vague, and (2) it violates substantive due process.

**I. Vagueness**

The Winthrop Ordinance is unconstitutionally vague because it (1) fails to provide notice of which dogs are banned, and (2) lacks standards to steer enforcement and prevent discrimination. If a law fails to achieve either of these requirements, it is impermissibly vague.

The Ordinance cannot be validly applied to Mr. Richardson because layer after layer of ambiguity make it impossible for anyone to tell if the Ordinance would apply to mixed breed dogs of unknown origin. The Ordinance simultaneously (1) fails to define breed characteristics; (2) lists breeds not recognized by professional organizations; (3) does not explain whether breed compositions are based on appearance, temperament, or genetics; (4) does not require expert opinions or provide training for enforcement officers; and (5) does not tell how much "pit bull" blood is necessary for a dog to qualify as a "mixed breed." Because it lacks these crucial parameters, the Ordinance gives no clue as to whether it encompasses every dog slightly resembling a "pit bull," or only those dogs that are fit to compete in breed shows.

These compounding layers of confusion also enable discriminatory and arbitrary enforcement, especially in the case of mixed breed dogs. With no ascertainable standards to guide their decisions, the animal control officer in this case pegged Zoe as a "pit bull," and the City Manager classified Zoe as "Pit Bull Terrier type dog," a breed type which is not recognized

by any professional kennel club. This determination was made without genetic testing, despite contrary expert testimony from a veterinarian and an adoption shelter.

Further, the Constitution requires a higher standard of clarity for this Ordinance because it (1) contains no scienter requirement, (2) is non-economic in nature, (3) is essentially penal, and (4) threatens to infringe the constitutionally protected property right of owning a dog. The Winthrop Ordinance falls far short of this high bar, and is therefore unconstitutionally vague.

**II. Substantive Due Process**

Banning Ford cars would not reduce car accidents any more than banning "pit bulls" reduces dog attacks. Bad drivers can easily switch to another brand. And empirical evidence shows that irresponsible dog owners just switch to another breed. The Ordinance violates substantive due process because its breed-specific ban does not actually reduce the number or severity of dog attacks, and therefore bears no rational relation to the government's interest in public safety.

Because pet dogs are a constitutionally protected from of property, *see Maldonado v. Fontanes*, 568 F.3d 263, 270 (1st Cir. 2009), the Ordinance cannot deprive owners of their dogs unless it is "rationally related to a legitimate government purpose." *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir. 2005). Although protecting the public from dangerous dogs is a legitimate government interest, the Ordinance's breed-specific ban on "pit bulls" violates substantive due process because it is not even rationally related to that government interest.

Breed-specific bans do not work. Empirical evidence has shown that "pit bull" and other "dangerous breed" legislation do not reduce dog attacks. Breed-specific bans have no effect on public safety for two reasons. First, scientific evidence shows that it is the owner, not the breed, that determines whether a dog will become vicious. Statistics show that (1) almost any breed can

be transformed into a vicious dog; (2) when one breed of dog is banned or goes out of style, owners seeking vicious dogs simply switch to another breed. Second, the dogs banished by "pit bull" legislation are not inherently more dangerous than any other dogs. In fact, temperament testing has revealed that American Staffordshire Terriers are better behaved than the average breed.

These studies illustrate that the city's hypothesis - that breed-specific bans reduce the number of dog attacks - lacks any "footing in the realities of the subject" and therefore flunks the rational relation test. *Heller v. Doe*, 509 U.S. 312, 321 (1993). Without that disproven hypothesis, the Ordinance rests on nothing more than irrational prejudice. And the ordinance is not only ineffectual, but also wasteful; many dogs like Zoe have been killed with no added benefit to public safety. Perhaps even worse, the "pit bull" ban gives the illusion of safety without actually providing any, shifting public focus away from the legislative solutions that do work.

Because the Ordinance is unconstitutionally vague and violates substantive due process, this Court should reverse the district court's grant of summary judgment to the defendants.

## STANDARD OF REVIEW

This court reviews the district court's conclusions of law – that the Ordinance is not unconstitutionally vague and does not violate due process – *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). When reviewing summary judgment, the court must construe all disputed facts in the light most favorable to the non-moving party, Mr. Richardson. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261 n.2 (1986). The court should deny the defendant's summary judgment motion so long as Mr. Richardson's factual allegations "raise a right to relief above the

speculative issue." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely." *Id.* at 556 (quotations omitted).

## ARGUMENT

### I. THE ORDINANCE'S BAN ON UNDEFINED AND FICTITIOUS DOG BREEDS AND MIXES, WITHOUT REFERENCE TO ANY STANDARDS FOR ENFORCEMENT, IS UNCONSTITUTIONALLY VAGUE.

#### A. The Ordinance is especially vague as applied to Mr. Richardson's dogs, which are at the murky outer limits of the Ordinance's confusing terms.

The Fourteenth Amendment protects citizens against vague and standardless ordinances. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law is impermissibly vague if it either (1) fails to provide notice of what is prohibited to a person of ordinary intelligence, or (2) authorizes arbitrary or discriminatory enforcement. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), citing *Grayned*, 408 U.S. at 108. Each of these prongs is independently sufficient for a finding of unconstitutional vagueness. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

##### 1. The Ordinance is vague as applied to Mr. Richardson because it fails to notify owners of mixed breed dogs of unknown origins that they could be swept into the ambit of the Ordinance.

The due process clause requires legislation to provide individuals with sufficient notice of what its terms prohibit. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *American Dog Owners Ass'n v. Dade County*, 728 F. Supp. 1533, 1539 (S.D. Fla.1999). An ordinance provides insufficient notice as applied if a person of ordinary intelligence must speculate about the ordinance's meaning. *Morales*, 527 U.S. at 56.

The Winthrop Ordinance bans "any of the breeds commonly referred to as belonging to the 'pit bull' variety of terrier," which is defined only as "the following breeds or breed types and mixtures: American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier." Winthrop Municipal Code § 6.04.090(B)(1)(c). The Ordinance does not further define these breeds, either in its text or by reference to professional breed standards. No clarifying regulations exist to remedy these deficiencies.

Other ordinances attempting to ban specific breeds have been struck down as unconstitutionally vague, *see, e.g., American Dog Owners Ass'n v. City of Lynn*, 404 Mass. 73, 533 N.E.2d 642 (1989), but the Winthrop Ordinance is particularly troublesome because it suffers from multiple, compounding levels of vagueness. Each level of vagueness acts as another blurry lens that further obfuscates the meaning of the Ordinance. When every lens of vagueness is lined up at once, as is they are in this case, it is impossible for any person of any intelligence level to discern which dogs the ordinance actually prohibits.

***a. Reference to breed names alone is insufficient to provide notice.***

In *City of Lynn*, a Massachusetts court held that a dog ban ordinance was unconstitutionally vague because it identified dogs by breed name only, without any further definition or reference to external standards. 404 Mass. 73, 79, 533 N.E.2d 642, 646 (1989). Most dog ban ordinances that have been upheld at least referred to AKC or UKC descriptions or provided elucidating characteristics within the ordinance or through regulation. *See Hearn v. City of Overland Park*, 244 Kan. 638, 643, 772 P.2d 758, 763-64 (1989) (clarifying the breed names listed in the ordinance through regulation); *State v. Peters*, 534 So.2d 760, 762 (Fla. Dist. Ct. App. 1988) (referencing AKC and UKC breed characteristics); *Colo. Dog Fanciers, Inc. v. City of Denver*, 820 P.2d 644, 646-47 (Colo. 1991) (referencing AKC and UKC characteristics).

Yet even the AKC standards for the American Staffordshire Terrier, the only breed listed in the Winthrop Ordinance that is professionally recognized, are worrisomely nonspecific. The AKC references an array of imprecise characteristics such as "small," "medium," "deep," "broad," "well-defined," "moderate," "confident," etc., as well as completely non-limiting phrases such as "[a]ny color." American Kennel Club, *American Staffordshire Terrier Breed Standard* (2011), *available at* http://www.akc.org/breeds/american_staffordshire_terrier.

AKC standards are also both over- and under-inclusive. The standards capture countless dogs, particularly mixed breed dogs, that share these characteristics but are actually of a wholly different genetic lineage. The AKC standards are also meant to be ideals, and therefore ignore purebred American Staffordshire Terriers with less conforming phenotypes.

***b. Two of the three breeds named in the Winthrop Ordinance do not actually exist.***

The Winthrop Ordinance not only failed to reference AKC or UKC standards, but also listed two breeds – American Pit Bull and Pit Bull Terrier – that are not even recognized by the AKC or UKC. The American Pit Bull Terrier ("APBT") is recognized by UKC, but the legislative reason for dividing this defined breed into two undefined breeds is elusive. Interpreting both the words "American Pit Bull" and "Pit Bull Terrier" to refer to a single breed – the APBT – would be duplicative and violate the cannon against surplusage. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Yet taken separately, they have no recognized meaning, either within or outside of the Winthrop Ordinance.

A few ordinances have been upheld despite defining breeds solely by name, but they at least listed breeds that were recognized by the AKC or UKC. *See Dog Fed'n of Wis., Inc. v. City of South Milwaukee*, 178 Wis.2d 353, 362, 504 N.W.2d 375, 378-79 (1993); *Vanater v. Village of South Point*, 717 F. Supp. 1236, 1239 (1989).

The lack of precision in the Ordinance leaves the public at a loss as to how the statute will be applied to even purebred dogs. Are pedigree papers required, or DNA testing? Should owners refer to the AKC and UKC description of the breeds, or the dictionary? If a dog shares one or two physical characteristics with a listed breed, is that sufficient? Are physical characteristics more important, or temperament and personality characteristics? What about puppies that do not yet exhibit characteristics listed in the dictionary, AKC, or UKC standards? Is an expert opinion by a veterinarian necessary? Is it sufficient?

***c. Inclusion of mixed breeds adds another layer of vagueness.***

All of these questions are especially amplified for owners who may have a mixed breed that could be covered by the Ordinance. Is a dog that is one-quarter "Pit Bull Terrier" covered under the Ordinance? What about one-eighth, or even one-sixteenth? The Ordinance puts no limits on what percentage of DNA or how many characteristics a mixed breed dog must share with one of the listed breeds before the dog in question can be banned or destroyed. Nor does the Ordinance consider the weight of expert testimony about a mixed breed dog's lineage.

The failure of the Ordinance to specify how dogs are to be identified is particularly troublesome because different methods of breed identification regularly yield different results. This is true even when the testers are very familiar with breed classifications. For example, one study has shown that even dog experts can identify the breed of a dog correctly based on appearance only twenty-five percent of the time. Victoria L. Voith, *A Comparison of Visual and DNA Identification of Breeds of Dogs*, published in Proceedings of Annual AVMA Convention by the National Canine Research Council (2009). And even DNA tests estimate only an eighty-five percent accuracy rate in correctly identifying mixed breed ancestry. *Id.*

***d. Confusion is most profound where the origin and ancestry of a mixed breed is unknown.***

Mr. Richardson's case exemplifies the vague outer reaches of the statute's murkiness. Mr. Richardson adopted Zoe and Starla without knowing their heritage. He did not consult AKC guidebooks in deciding the breed of dog that he wanted, or seek out certain characteristics by looking for a registered breed. He merely observed Zoe and Starla's playful nature and decided they would be wonderful canine companions. The dogs did not have any formal registration or pedigree. No DNA testing was conducted to determine the ancestry of the dogs. The only professional advice that Mr. Richardson ever received about the breed of his dogs came from the animal shelter and a veterinarian, each of which could only identify Zoe and Starla reliably as "mixed breeds." And to the best of his knowledge, this is what Mr. Richardson thought the dogs were.

The city manager determined that Zoe was a "Pit Bull Terrier type dog," but no physical characteristics were annunciated in the Ordinance that Mr. Richardson could have consulted to determine whether his dogs matched the "Pit Bull Terrier" phenotype. Since the "Pit Bull Terrier" breed does not exist according to the AKC and UKC, no clarification was available from those sources either. Even had Mr. Richardson suspected that the dogs had a "Pit Bull Terrier" lineage, there was no way that he could tell what percent of their heritage came from this fictitious breed, or what percentage was required by the Ordinance.

In sum, Mr. Richardson could not have known that the City Manager would use unidentified standards to determine that Zoe was a member of a contrived breed, when to the best of his knowledge and the knowledge of animal experts, his dogs' heritage could not be determined more accurately than "mixed breeds." Winthrop should not be permitted to force Mr. Richardson to jump through multiple vague hoops in order to discover how to exist within the law, and further to risk the death of one his pets if he stumbles along the way.

2. **The confusion created by the vague terms of the Ordinance invites arbitrary and discriminatory enforcement, especially for mixed breeds at the far reaches of the Ordinance's scope.**

Laws must provide explicit standards for enforcement in order to pass Constitutional muster. Vague enactments impermissibly delegate policy decisions to enforcers "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108. By placing unfettered discretion in the hands of enforcers, vague laws cast a net large enough to catch all possible offenders and leave enforcers free to pick and chose whom to punish based on personal predilections. *United States v. Reese*, 92 U.S. 214, 221 (1875); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

***a. The Winthrop Ordinance is at least as confusing to law enforcers as it is to dog owners, if not more so.***

The Winthrop Ordinance is devoid of any standards to help enforcers make sense of its vague terms. For all of the reasons that dog owners will struggle to decipher the meaning of the breeds listed in the Ordinance, officers will have equal or more trouble because they are likely less familiar with dog breeds than dog aficionados are.

Unlike other ordinances that have been upheld, the Winthrop Ordinance does not describe any characteristics for an officer to consult in making a determination to ban or exterminate a dog. *See Dade*, 728 F. Supp. at 1539. While "American Staffordshire Terrier" is defined by the AKC, other listed breeds and mixed breeds are not. And in any case enforcing officers are not required to consult AKC definitions, or to ask for registered paperwork, or to identify dogs using physical features. Instead, the Ordinance impermissibly allows officers to use their "moment-to-moment judgment" to determine on a whim whether a particular dog meets some undefined standard. *Kolender*, 461 U.S. at 360.

This can lead to confusion and arbitrary decision making on the part of enforcers, or more alarmingly, can allow officers to base their determinations on subjective factors such as a bias toward the dog's owner. One officer may require pedigree papers to determine whether a dog is covered under the Ordinance, while in a different neighborhood another officer may use a subjective guess to conclude that a dog resembles her definition of a "pit bull." And so on. Without any legal guidance or constraints, officers are free to use all of these methods or none of them. And worse yet, they can decide which methods they want to use to discriminate against certain classes of people.

***b. The Ordinance does not provide training to mitigate this confusion.***

Unlike in other dog ban cases, there is no evidence that identification training was given to Winthrop officers. *See Dade,* 728 F. Supp. at 1537. Even with training, officers in *Dade* could not always identify pit bulls correctly. *Id.* With no standards and no training, Winthrop officers might as well be blindly trying to pin the tail on the "pit bull."

Other dog ban ordinances also provide for expert identification by a veterinarian in tough cases involving mixed breeds. *See Vanater,* 717 F. Supp. at 1239. The Winthrop Ordinance, on the other hand, does not ameliorate vagueness concerns in this way, and the City Manager even ruled against the veterinarian's expert opinion.

***c. As applied to mixed breed dogs, the opportunity for arbitrary and selective enforcement is at its peak.***

There is special room for discrimination and arbitrary enforcement when identifying mixed breed dogs of unknown origin, such as Zoe and Starla. Zoe was seized from Mr. Richardson based on the claim of a layperson who thought that Zoe looked like the kind of dog that might be banned from the city. The animal control officer at Zoe's hearing could only specify that he felt that Zoe appeared to be a "pit bull dog." The rationale underlying this

judgment remains a mystery, as no further evidence is required by the Ordinance. Based on an untrained officer's hunch, the City Manager determined that Zoe was a "Pit Bull Terrier type of dog," contrary to expert opinion by Zoe's veterinarian that her breed could not be pinpointed with more certainty than "mixed breed." Yet "Pit Bull Terrier" is not recognized by the AKC or UKC, and the standards used by the City Manager to reach this conclusion are likewise inscrutable.

**3. The vague language of the Ordinance is especially problematic because the Ordinance contains no mens rea requirement, is non-economic, imposes qualitatively criminal penalties, and infringes on a constitutionally protected right.**

"The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment." *Hoffman Estates*, 455 U.S. at 498-99. The Constitution requires a higher degree of clarity for laws that (1) are non-economic in nature; (2) contain no *mens rea* requirement; (3) impose criminal rather than civil penalties; and (4) threaten to inhibit the exercise of a constitutionally protected right. *Id.* These factors should not be applied mechanically, and the existence of one, two, or all of these elements may be sufficient to raise the standard for clarity. *See Parrish v. Lamm*, 758 P.2d 1356, 1366 (Colo. 1988).

The Winthrop Ordinance is not economic, and contains no scienter requirement to abate vagueness concerns. Although the Ordinance does not officially impose criminal sanctions, the civil penalties of banishing and killing pets are qualitatively severe. And although the Ordinance does not infringe First Amendment rights, it does implicate the constitutionally protected right of property ownership.

***a. The Ordinance does not contain any mens rea requirement to ameliorate concerns about its vagueness.***

Without the extra layer of protection provided by a scienter requirement, an enactment must be worded with greater definiteness and clarity. *United States v. Nieves-Castano*, 480 F.3d 597, 603 (1st Cir. 2007). A scienter requirement may mitigate a law's vagueness, especially with regard to the notice prong of the vagueness analysis. *Hoffman Estates*, 455 U.S. at 499. The Winthrop Ordinance contains no knowledge of wrongdoing requirement, and should therefore be held to a higher standard of clarity.

***b. The Ordinance is not economic, and therefore courts should scrutinize vagueness in the statute strictly.***

Courts accept more vagueness in economic regulations because they are addressed to sophisticated parties that regularly consult counsel and seek out advisory opinions through administrative processes. *Hoffman Estates*, 455 U.S. at 498; *United States v. Lachman*, 387 F.3d 42, 57 (1st Cir. 2004). Because dog owners do not have the means of clarification available to sophisticated business enterprises, the Constitution's tolerance for vagueness approaches its nadir in the case at hand.

***c. The Winthrop Ordinance imposes harsh, criminal-like penalties.***

Courts tolerate more vagueness in enactments that have civil rather than criminal penalties "because the consequences of imprecision are qualitatively less severe" in civil cases. *Hoffman Estates*, 455 U.S. at 499. The underlying reason for disparate treatment of civil and criminal ordinances disappears when the consequences are "quasi-criminal." In *Hoffman*, the court noted that the prohibitory and stigmatizing effect of a civil ordinance "may warrant a relatively strict test." *Id.* The ordinance in *Hoffman* forced stores to obtain a license in order to sell drug paraphernalia. *Id.* at 500. In other cases, courts have held that punitive damages are quasi-criminal as well. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 52 (2010).

Massachusetts courts have held that dog ban ordinances (1) seek to protect the public against injury and (2) punish owners through forfeiture of property, and are therefore "clearly penal in nature." *City of Lynn*, 404 Mass. at 78, 533 N.E.2d at 646. "Pit bull" ordinances that have been classified as civil and upheld in other jurisdictions have rarely involved cases where dogs were actually destroyed. *See Garcia v. Village of Tijeras*, 108 N.M. 116, 767 P.2d 355 (1988) (no dogs destroyed); *State v. Robinson*, 541 N.E.2d 1092 (Ohio App. 1989) (no ban, no dogs destroyed); *Hearn*, 244 Kan. 638, 772 P.2d 758 (required only restraints, such as confinement, muzzles, and leashes); *Dade*, 728 F. Supp. 1533 (no dogs destroyed); *Dog Fed'n of Wis., Inc. v. City of South Milwaukee*, 178 Wis.2d 353, 504 N.W.2d 375 (1993) (required only registration, not destruction).

The Winthrop Ordinance is not labeled "criminal," but its consequences are unmistakably severe. The Constitution therefore demands a more exacting definition of what the Ordinance prohibits.

***d. The Winthrop Ordinance also threatens the constitutionally protected right to property.***

A law that threatens to inhibit the exercise of constitutionally protected rights is also held to a higher standard of clarity. *Hoffman Estates*, 455 U.S. at 498. Courts have held that this principle extends to the constitutional right to "freedom of movement." *Kolender*, 461 U.S. at 358. Liberty and property "stand upon the same footing" under the due process clause, *Bowden v. Davis*, 205 Or. 421, 434, 289 P.2d 1100, 1106 (1955), and the First Circuit has held that dogs are protected property for the purposes of the Fourteenth Amendment. *Maldonado v. Fontanes*, 568 F.3d 263, 272 (1st Cir. 2009). Therefore, the Winthrop Ordinance should take greater care to define the terms of its application to people's protected property interest in their pets.

### B. The Winthrop Ordinance is also unconstitutionally vague on its face.

In most cases, a statute will be struck down on its face only if "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). But if an ordinance (1) threatens a constitutionally protected property right; (2) contains no *mens rea* requirement; and (3) imposes criminal-like sanctions, it is unconstitutionally vague as a whole, even if small sections are clear, if vagueness "permeates" the statute. *Morales*, 527 U.S. at 55. As noted in part I.A.3, the Winthrop Ordinance meets these three criteria.

The application of the Ordinance to Mr. Richardson, discussed *supra* in sections I.A.1 and I.A.2, illustrates how the Ordinance is not just permeated, but supersaturated with vagueness. It piles one level of confusion on another by: (1) failing to define breed characteristics; (2) listing breeds not recognized by professional organizations; (3) not explaining whether breeds are determined by appearance, temperament, or genetics; (4) and failing to specify how much "pit bull" blood is necessary for a dog to be a mixture of one of the breeds listed in the Ordinance. Because it ignores these crucial parameters, the Ordinance is "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits," and is therefore facially invalid. *Morales*, 527 U.S. at 56.

## II. THE ORDINANCE'S BREED-SPECIFIC BAN VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT IS BASED ON AN IRRATIONAL, OUTDATED, AND EMPIRICALLY DISPROVEN STEREOTYPE THAT "PIT BULLS" ARE INHERENTLY MORE DANGEROUS THAN OTHER BREEDS.

The First Circuit has recognized dog ownership as a constitutionally protected form of property. *See Maldonado v. Fontanes*, 568 F.3d 263, 270 (1st Cir. 2009) ("privately owned pets do qualify as property, such that pets are 'effects' under the seizure clause of the Fourth Amendment"); *Maldonado v. Municipality of Barceloneta*, 682 F. Supp. 2d. 109, 128 (D.P.R.

2010) ("for purposes of the Fourteenth Amendment, people have a protected property interest over their pets"). Because ownership of a dog is not a "fundamental" interest,[1] Winthrop cannot deprive dog owners of their pets unless the Ordinance is "rationally related to a legitimate government purpose." *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir. 2005); *see also Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

Although protecting the public from dangerous dogs is a legitimate government interest, *see Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698, 704 (1897), the Ordinance's breed-specific ban on "pit bulls" violates substantive due process because it is not even rationally related to that government interest. It turns out that banning "pit bulls" has the same effect on dog attack rates as banning lolli-pops: none.

We do not argue merely that there is a "lack of evidence" that "pit bulls" pose a public safety threat, even though at least one court has denied a defendant-city's motion for summary judgment simply for failure to produce evidence that "pit bulls" are dangerous. *See Am. Canine Found. v. City of Aurora*, No. 06-cv-01510, 2008 WL 2229943, at *9 (D. Colo. May 28, 2008) (denying city's motion for summary judgment because "no evidence or facts ha[d] been presented as to why the Aurora City Council believed that the ordinance was necessary to protect the safety of its residents").

Instead, we present empirical evidence affirmatively showing that "pit bull" bans do *not* reduce the number of dog attacks. In short, the enactment of breed-specific bans has had no effect on number of dog attacks in areas affected by the bans. This evidence is not subject to

[1] We do not contend that the bond between a dog and its owner should be recognized as a new "fundamental" Constitutional right for two reasons. First, it is unnecessary because the Ordinance fails even the more deferential rational relation standard, see *infra*. Second, the attempt would seem frivolous in light of the Supreme Court's admonition that courts should be "reluctant to expand the concept of substantive due process." *See, e.g., Chavez v. Martinez*, 538 U.S. 760, 775-76 (2003) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

multiple interpretations. Granted, rational relation review does require courts to defer to legislative bodies when the evidence is unclear. But it also requires courts to strike down legislation when, as here, evidence shows that the government's theory lacks any "footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

### A. Empirical studies have proven that pit bull bans do not reduce the number of dog attacks.

Winthrop's ordinance is based on the hypothesis that banning certain "pit bull-type" breeds will reduce the number of dog attacks. If that hypothesis is disproven and revealed as an inaccurate stereotype, then the ordinance lacks a rational relation to the city's interest in reducing the number of dog attacks. Recent empirical evidence studying breed-specific legislation, such as pit bull bans, has conclusively proved that pit bull bans *do not* reduce the number of dog-related attacks.

As of October 1st, 2010 "there currently is no published evidence supporting claims that [breed specific legislation] is efficacious." Gary J. Patronek, Margaret Slater, Amy Marder, *Use of a number-needed-to-ban calculation to illustrate the limitations of breed-specific legislation in decreasing the risk of dog-bite related injury*, 237 J. Am. Veterinary Med. Ass'n (JAVMA) 788, 790 (2010) [hereinafter *Use of a number-needed*].

But the lack of evidence is one-sided; mounds of evidence disprove the hypothesis that breed specific bans reduce the number of dog attacks. If the Ordinance's hypothesis were rational, one would expect the number dog attacks to fall following the enactment of breed specific legislation. Yet that has not happened. For example, even though Aragon, Spain enacted dangerous dog legislation that banned supposedly "dangerous" breeds of dogs in 2000, the frequency of dog attacks was the same from 1997-1999 as it was from 2000-2004. *See* Belen Rosado, Sylvia Garcia-Belenguer, Marta Leon, et al., *Spanish dangerous animals act: effect on*

*the epidemiology of dog bites*, 3 J. Veterinary Behav. 38 (2007). And the Netherlands recently repealed a national ban on "pit bull-type" dogs after 15 years "because the ban did not lead to a decrease in dog bites." *See* J.M. Cornelissen, H. Hopster, *Dog bites in the Netherlands: a study of victims, injuries, circumstances and aggressors to support evaluation of breed specific legislation*, 186 Veterinary J. 292 (2010).

A ban on pit bull dogs in Italy recently met the same fate after a study revealed that the ban was not reducing the number of dog attacks. *See Use of numbers-needed* at 790. Similarly, the Toronto Human Society reported that a breed ban enacted in 2005 in Ontario has not reduced dog bites in the province. National Canine Research Council, *New Study Explains Why Breed Specific Legislation Does Not Reduce Dog Bites*, http://nationalcanineresearchcouncil.com/wp-content/uploads/2009/03/NNB-now-available-in-JAVMA.pdf (last visited Jan. 24, 2011). After Winnipeg, Manitoba banned one breed, dog bites actually rose due to increased attacks from other dog types. *Id*.

These empirical studies affirmatively disprove the hypothesis that pit bull bans increase public safety. Thus, the only relation remaining between the pit bull ban and the government interest in public safety is an inaccurate stereotype. That is not a rational relation. The ordinance therefore violates substantive due process.

### B. Breed-specific bans do not reduce the number of dog attacks because vicious dogs are created by owners seeking to foster vicious behavior. When pit bulls are banned, those vicious owners just switch to a different breed.

Experience has shown that pit bull bans do not reduce the number of dog-related attacks, *see supra* part II.A, yet over the years, pit bulls have accounted for a disproportionate number of dog-related fatalities. *See* Jeffrey J. Sacks et al., *Breeds of dogs involved in fatal human attacks in the United States between 1979 and 1998*, 217 JAVMA 836, 837 (2000). Although these two

statistics are seemingly contradictory, exploring what does, and does not, make a dog "vicious" and dangerous reveals that these statistics are surprisingly reconcilable.

### *1. The owner, not the breed, determines whether a dog will become vicious.*

From 1979 to 1998, many different dog breeds have been involved in dog-related fatalities, including: Rottweilers, German Shepherds, Huskies, Malamutes, Doberman Pinschers, Great Danes, and Saint Bernards. *See id.* Even fluffy Chow Chows killed at least eleven people during the twenty year period, *id*., illustrating that any breed, perhaps with the exception of the Chihuahua, can be transformed into a vicious, deadly dog. Conversely, any breed when treated correctly can become a safe pet. For example, during the ten-year period spanning 1966-1975 there was no more than one fatal dog attack in the United States from by a dog which could "even remotely be identified as a 'Pit bull.'" Karen Delise, *The Pit Bull Placebo* 95 (2007).

"Owners are ultimately responsible for their dogs' actions." C.M. Schuler, et al., *Canine and human factors related to dog bite injuries*, 232 JAVMA 542 (2008). Though the vast majority of dog owners, like Mr. Richardson, seek loving pets for companionship, a select few instead purposefully seek aggressive, vicious dogs. Some owners want dogs with aggressive tendencies for protection purposes. *See* American Veterinary Medical Association Task Force on Canine Aggression and Human-Canine Interactions, *A community approach to dog bite prevention*, 218 JAVMA 1732 (2001). Others try to create dogs that are "game" and will not back down even when injured so that they can compete in illegal dog-fighting rings. *Id.*

Irresponsible owners can turn just about any breed into a vicious dog through various means, most involving animal cruelty. Fighting dogs "spend most of their lives on short, heavy chains, often just out of reach of other dogs." ASPCA, *Dog Fighting FAQ*, http://www.aspca.org/fight-animal-cruelty/dog-fighting/dog-fighting-faq.aspx (last visited Jan.

24, 2011). Owners condition the dogs for fighting by using steroids to enhance muscle mass and encourage aggressiveness. *Id.* Others "rely on cruel methods to encourage their dogs to fight, including starvation, physical abuse, isolation, and the use of stimulants or other drugs that excite the dogs." *Id.*

Because owners can transform many breeds into vicious dogs, the number of vicious, dangerous dogs depends not on the prevalence of particular breeds, but rather on the number of owners seeking vicious dogs. If one breed of dog goes out of style with dog fighters, or is outright banned, owners seeking vicious dogs simply switch to another breed. Statistics bear this out. As Malcolm Gladwell observed in a New Yorker piece, "the kinds of dogs that kill people change over time, because the popularity of certain breeds changes over time." Malcolm Gladwell, *Troublemakers*, The New Yorker (February 6, 2006) *available at* http://www.gladwell.com/2006/2006_02_06_a_pitbull.html. But the total number of people killed by dogs changes little from year to year, since the number of owners seeking vicious dogs remains relatively static. *Id*.

Thus, the two seemingly contradictory statistics actually go hand-in-hand. Pit bulls accounted for a greater number of deaths in the 1980s because vicious owners preferred pit bulls during that time period. *See Pit Bull Placebo* at 100. But pit bull bans do not reduce the number of dog-related attacks because owners seeking vicious dogs just switch to different breeds. During the 1990s, for example, Rottweilers overtook Pit Bulls as the dog of choice for vicious owners, and unsurprisingly also surpassed pit bulls in fatal dog attacks during that time period. *Id.*

That explains why breed-specific bans are irrational, and truly do not reduce dog attacks any more than lolli-pop bans. And because lolli-pop bans and pit bull bans are not rationally

related to reducing dog attacks, they violate substantive due process. By contrast, an ordinance aimed at preventing irresponsible owners from obtaining dogs would reduce the number of vicious dogs created, and therefore also the number of dog attacks. Such a statute would easily pass the rational relation test, just as laws banning dangerous drivers rather than car brands do.

### *2. Pit bull type dogs are no more pre-disposed to attack humans than any other breed.*

If a menacing, man-eating breed of dog actually existed, it would of course be rational for the government to ban it. But the "pit bull variety of terrier" (which is not actually a specific breed, see *supra* Part I) is not any more dangerous than any other breed. If it were, "pit bull" bans would have reduced the number of dog attacks. But they have not. *See supra* Part II.A.

And the American Temperament Test Society, which has put over twenty-eight thousand dogs through a standardized drill "designed to assess different breeds' temperaments, *see About ATTS*, www.atts.org/about.html (last visited Jan. 24, 2011), ranks American Staffordshire Terriers, the one real breed listed in the Ordinance, ahead of more than half of the other dogs tested. *See id.* (the test's average overall pass rate is 81.6%); *ATTS Statistics*, Page 1, http://www.atts.org/stats1.html (last visited Jan. 24, 2011) (510 of 608, or 83.9% of American Staffordshire Terriers tested, have passed).

Ironically, dogs that descend from the bulldogs that were once used in dog fighting are often more human-friendly than others. This is because fighting dogs have been selectively bred not only for their willingness to fight other dogs, but also for their aversion to attacking humans, such as their handlers and the crowd. Selectively breeding fighting dogs for their kindness towards humans has become so common that it has created a mantra in dog-fighting circles: "man-eaters must die." *See* Malcolm Gladwell, *Troublemakers*, The New Yorker (February 6, 2006) *available at* http://www.gladwell.com/2006/2006_02_06_a_pitbull.html.

Consequently, it is irrational for the ordinance to ban "pit bulls," an amorphous class of dogs that is likely genetically pre-disposed *against* attacking humans, in order to reduce the number of dog attacks. The fact that pit bull bans, despite killing thousands of dogs, have not actually reduced the number of dog attacks, serves a sobering monument of the ordinance's irrationality.

### C. In light of new empirical evidence, modern courts have consistently denied defendant-cities' substantive due process summary judgment motions in breed-specific legislation cases.

Three different courts in the past three years have denied city-defendants' substantive due process summary judgment motions in similar cases involving "pit bull" bans, and no court in that time period has ruled otherwise. This modern trend reverses one from twenty years ago, when several courts upheld similar breed-specific bans under rational relation scrutiny. *See, e.g.*, *Vanater v. Village of South Point*, 717 F. Supp. 1236, 1242-43 (D. Ohio 1989); *Hearn v. City of Overland Park*, 244 Kan. 638, 647, 772 P.2d 758, 765 (1989).

Why has the trend reversed course? The courts that upheld the ordinances twenty years ago were not presented with empirical evidence disproving the governments' theories. The cities' since discredited, but then uncontroverted, anecdotal evidence that "pit bulls are more aggressive than other dogs" won the day. *See, e.g.*, *Overland Park*, 244 Kan. at 647. With empirical evidence now available, courts are now swinging the other way.

One court threw out a city's summary judgment motion after it failed to present any evidence that banning "pit bull" type dogs would increase public safety. *Am. Canine Found. v. City of Aurora*, No. 06-cv-01510, 2008 WL 2229943, at *9 (D. Colo. May 28, 2008) (Daniel, J.).

And in *Dias v. City of Denver*, the most recent breed-specific-legislation case, the Tenth Circuit denied the defendants' summary judgment motion on the substantive due process issue

because the plaintiffs' evidence created a genuine issue of material fact. *Dias v. City of Denver*, 567 F.3d 1169, 1184 (10th Cir. 2009). Specifically, the plaintiffs presented evidence that the American Kennel Club describes American Staffordshire Terriers as a "foremost all-purpose dog" with "affection for its friends, and children in particular." *Id*.

On remand, the District Court of Colorado again denied the defendants' summary judgment motion, this time after hearing expert scientific testimony. *See* No. 07-cv-00722, 2010 WL 3873004 at *6 (D. Colo. Sept. 29, 2010) (Miller, J.). The plaintiffs in *Dias*, like we have here in *supra* Part II.A, presented evidence showing that the "breed of a dog is not a predictor that a dog will attack or bite." *Id.* at *4. But our case is even stronger than the plaintiffs' in *Dias*. We have presented an extra, crucial piece of empirical evidence: studies showing that breed-specific-legislation has not reduced the number of dog attacks.

Thus, there is no controversy in this case. The empirical evidence presented in this brief affirmatively rebuts what shards of evidence the city has remaining – anecdotes about how "pit bulls," an amorphous category of many dog breeds, are "dangerous," and statistics that show that "pit bulls" have been reported to be involved in a disproportionate amount of dog attacks in certain time periods. As explained *supra*, "pit bulls" are no more dangerous than any other type of dog, and it is the owner, not the breed, that determines whether a dog becomes vicious. Breed-specific bans do not work because owners seeking vicious dogs simply switch to one of the many other breeds that they can transform into public menaces. And because the "pit bull" ban does not actually reduce the number of dog attacks, it is out of touch with reality and therefore flunks the rational relation test.

The Ordinance is not only ineffectual, but also wasteful. Many dogs like Zoe have been killed with no added benefit to public safety. Perhaps even worse, the "pit bull" ban gives the

illusion of safety without actually providing any, shifting the public focus away from legislative solutions that actually work. As odd as it sounds, even the equally ineffectual lolli-pop ban is better than the "pit bull" ban, because it at least lacks the "pit bull" ban's drawbacks.

## CONCLUSION

For these reasons, more than ample material issues of fact exist, and this Court should REVERSE the district court's judgment and REMAND the case back to the district court for further consideration.

Respectfully Submitted,

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Team # 8

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