

Civil Action No. 10cv00416

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

WINTER TERM, 2011

QUINTON RICHARDSON,

Plaintiff/Appellant,

v.

CITY OF WINTHROP, MASSACHUSETTS,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTS

BRIEF FOR THE DEFENDANT/APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Winthrop Municipal Code section 6.04.090, which prohibits residents from possessing certain dog breeds within the city limits, is constitutional *per se* or as applied to the Appellant in addition to overcoming the overbreadth doctrine, when the ordinance designates all pit bull terrier variety of dog breeds and mixes as vicious.
2. Whether Winthrop Municipal Code section 6.04.090, which bans all pit bull terrier variety of dog breeds and mixes within the city limits violates substantive due process rights under the Fourteenth Amendment when the city determines that every dog within the classification is vicious.

STATEMENT OF THE CASE

In 1988, the City of Winthrop, Massachusetts enacted ordinance 6.04.090, which banned ownership of all varieties of pit bull terrier dogs. (Memorandum Opinion, Aug. 28, 2010, 5). In 2005, Quinton Richardson adopted two puppies from a rescue organization. (*Id.* at 4). Both dogs were classified as mixed breeds. (*Id.*). On August 1, 2009, a meter reader saw one of Richardson's dogs and notified the Winthrop animal control agency, which sent an officer to the residence to seize the dog. (*Id.* at 5). A hearing was held pursuant to the ordinance. (*Id.*). At the hearing, the animal control officer testified that the dog was a pit bull, while Richardson provided an affidavit from his veterinarian indicating that the dog was a mixed breed. (*Id.*). The City Manager determined the dog was a pit bull and must be removed from the city limits within ten days. (*Id.*). Unable to find a home for his dog, Richardson appealed to the state trial court. (*Id.*). The state trial court affirmed the City Manager's decision that the dog must be removed from the city. (*Id.*). On December 1, 2009, Richardson's dog was euthanized. (*Id.*).

Richardson currently resides in Winthrop with his other dog that may also be regulated under ordinance 6.04.090. (*Id.* at 6). Richardson filed a claim against the City of Winthrop stating that the ban on pit bull type dog breeds violates the Fourteenth Amendment of the United States Constitution because the ordinance is vague, both *per se* and as applied, overly broad, and violates his substantive due process rights. (*Id.*). The United States District Court for the District of Massachusetts granted the City of Winthrop's motion for summary judgment. (*Id.* at 2). The Court determined that the ordinance was not *per se* unconstitutionally vague because the ordinance adequately described which dogs are subject to the ban. (*Id.* at 7). As to Richardson's challenge to the ordinance's constitutionality as applied to him, the district court determined that, while the fact Richardson did not know what breed of dogs he adopted presented an issue, it did

not present a genuine issue of material fact. (*Id.* at 10). The Court reasoned that the dogs possessed certain characteristics, such as short coats and muscular builds with large heads, that the City Manager was correct in classifying the dog as a pit bull. (*Id.*). Finally, the District Court determined that the ordinance did not violate Richardson's substantive due process rights under the Fourteenth Amendment because the City of Winthrop had a rational basis for enacting the ordinance as a means of limiting human injury caused by pit bull dogs. (*Id.* at 14). The ordinance has a rational relationship to a legitimate governmental objective of protecting the public health, safety, and welfare. (*Id.*). Richardson then appealed to the United States Court of Appeals for the First Circuit to determine whether the District Court erred when it determined that the City of Winthrop ordinance section 6.04.090 was constitutional. (Br. Order, Sept. 28, 2010).

SUMMARY OF THE ARGUMENT

This case is on appeal from the United States District Court of Massachusetts and is a case of first impression. The City of Winthrop, Massachusetts enacted Winthrop Municipal Ordinance section 6.04.090 (hereinafter “Ordinance”) identifying all pit bull terriers as vicious dogs and banned the dogs from its city. Appellant contends the Ordinance is overly broad and vague, and that the Ordinance violates his substantive due process rights under the Fourteenth Amendment of the United States Constitution.

The Winthrop Ordinance is not overly broad because it provides sufficient detail as to which dog breeds or breed mixes are regulated within the city. The terminology used in the Ordinance is not overly broad because it provides notice to dog owners that the dog(s) they own may be subject to stricter regulations. The term “pit bull” includes up to five dog breeds, including mixes of those types of dogs. Because ownership of a dog is not a fundamental right the Ordinance does not regulate a substantial amount of constitutionally protected conduct. The Ordinance is civil in nature, which allows it to have less precise language than a criminal statute.

The Ordinance also survives a *per se* and as applied vagueness challenges for similar reasons. By listing the specific breeds of dogs Winthrop residents are prohibited from possessing within the city, all dog owners, including the Appellant, were put on notice that their dog(s) could be classified as a pit bull. The Ordinance allows a person of average intelligence to know which dog breeds or mixes are prohibited within the city limits. Additionally, the Appellant knew, or had reason to know, that his dogs were the type of breed mix that is regulated by the Ordinance. For these reasons, the Ordinance is not unconstitutionally vague.

The Winthrop Ordinance is constitutional because it does not violate the Appellant’s Fourteenth Amendment substantive due process rights. Because ownership of a dog is not a

fundamental right, an ordinance banning ownership of certain dog breeds must only bear a rational relationship to a legitimate government interest or purpose. An ordinance is rational if the reasoning behind the ordinance is sound. Regulation of dog ownership to protect the public does not violate substantive due process.

Pit bulls are unique and pose a danger because the dogs are strong, aggressive, vicious, and unpredictable. While pit bulls may not be the only type of dog that poses a risk of danger, it is reasonable to restrict pit bulls to avoid the danger the dogs potentially create. The Ordinance is rational because Winthrop identified pit bull terriers as a threat to safety, making the dogs a public concern.

This Court should affirm the Massachusetts District Court because the Ordinance is not overly broad or vague, and does not violate substantive due process under the Fourteenth Amendment.

ARGUMENT

The United States Court of Appeals for the First Circuit is to determine the constitutionality of a Winthrop ordinance relating to vicious dogs. This Court is to examine whether Winthrop Ordinance section 6.04.090 (hereinafter “Ordinance”) is overly broad or vague, and whether the Ordinance violates substantive due process under the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV § 1. This is a case of first impression for the First Circuit.

City ordinances are presumed to be constitutional if the ordinance promotes public health, safety, and welfare. *Ohio v. Anderson*, 27 Ohio St. 3d 168, 171, 566 N.E.2d 1224, 1226 (1991). The court is not tasked with the responsibility of determining whether or not the ordinance fulfills its objectives, but rather whether or not the ordinance is constitutional. *Vanater v. Vill.of S. Point*, 717 F. Supp. 1236, 1243 (S.D. Ohio, W. Div. 1989) (citing *Dandridge v. Williams*, 397 U.S. 471, 487, 90 S. Ct. 1153, 1162 (1970)).

Dogs are qualified property and may be subjected to extreme and abnormal regulations without depriving the dog owners of any constitutionally protected rights. *Nicchia v. People of State of N.Y.*, 254 U.S. 228, 230-231, 41 S. Ct. 103, 104 (1920) (citing *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 17 S. Ct. 693 (1897)); *City of Toledo v. Tellings*, 114 Ohio St. 3d 278, 282, 871 N.E.2d 1152, 1156 (2007). The United States Supreme Court stated that even if dogs are property in the fullest sense, dogs are subject to the police power of the government, and may be destroyed or dealt with by the government when it is necessary to protect its citizens. *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. at 704, 17 S. Ct. at 695. Ordinances

restricting ownership of certain dog breeds do not implicate a fundamental right. *Am. Dog Owners Ass'n v. Dade County Fla.*, 728 F. Supp 1533, 1541 (S.D. Fla. 1989).

This Court's review of a constitutional challenge is *de novo*. *U.S v. Nieves-Castano*, 480 F.3d 597, 603 (1st Cir. 2007). The District Court for the District of Massachusetts correctly found that the Winthrop Ordinance banning possession of certain dog breeds and mixes within the city limits is constitutional because the Ordinance does not violate the Fourteenth Amendment of the U.S. Constitution. The Ordinance does not violate the overbreadth doctrine because owning a dog is not a fundamental right and does not reach the substantial amount of constitutionally protected conduct to invoke an overbreadth challenge. Additionally, the Ordinance is not vague in any application because the language used contains sufficient detail to provide notice to dog owners within the city that their dog(s) may be subject to the restriction. Finally, the Ordinance does not violate the Appellant's substantive due process rights because the City of Winthrop had a legitimate interest in protecting the public from harm by certain dog breeds and mixes. The Ordinance is a rational means to solve the government interest in public safety.

This Court should affirm the Massachusetts District Court because it properly determined the Winthrop Ordinance is not overly broad or vague and does not violate substantive due process under the Fourteenth Amendment to the United States Constitution.

I. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS CORRECTLY CLASSIFIED WINTHROP MUNICIPAL CODE SECTION 6.04.090 AS CONSTITUTIONAL BECAUSE THE ORDINANCE IS NOT OVERLY BROAD OR VAGUE.

The Winthrop Ordinance, which prohibits possession of certain dog breeds and breed mixes within the City of Winthrop, is constitutional because the Ordinance is not overly broad or vague, either *per se* or as applied to the Appellant. The Winthrop Ordinance is not overly broad

because it does not reach a substantial amount of constitutionally protected conduct.

Additionally, the civil nature of the Winthrop Ordinance allows the language to be less precise than the language of a criminal statute. The Winthrop Ordinance survives a *per se* vagueness challenge because the language of the Ordinance contains sufficient details which places all dog owners residing in Winthrop on notice that certain breed and breed mixes of dogs are regulated by the city. The Ordinance also survives an as applied challenge because the dog breeds listed in the Ordinance put the Appellant on notice that his dogs are regulated by the pit bull ban.

A. The District Court correctly concluded that the Ordinance was not overly broad because the Ordinance does not reach a substantial amount of constitutionally protected conduct.

The Ordinance is not overly broad because it sufficiently lists the types of dog breeds and mixes affected. The dog breeds that are listed – American Staffordshire Terriers, American Pit Bulls, and Pit Bull Terriers – are commonly referred to as pit bulls. The term “pit bull” is used in the modern lexicon to encompass up to five dog breeds, including the American Pit Bull Terrier, American Staffordshire Terrier, Bull Terrier, American Bulldog, and Staffordshire Bull Terrier. *U.S. v. Kizeart*, 2010 U.S. Dist. LEXIS 97487, at *13 (S.D. Ill. Sept. 17, 2010). This definition also includes all mixes of the breeds. *Id.* These breeds and breed mixes are classified as pit bulls because they share physical and behavioral traits, namely powerful physiques, intelligence, strength, and courage. *Id.* These breeds and mixes of dogs have a history of being abused at the hands of dog fighters because of these very characteristics. *Id.* at *14. The City of Winthrop uses the term “pit bull” to encompass the dog breeds listed in the Ordinance, along with any dog of mixed pedigree that possesses physical or behavior traits that belong to those breeds.

To determine whether an enactment is unconstitutionally vague or overly broad, the Court must determine whether the ordinance reaches a substantial amount of constitutionally

protected conduct. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S. Ct. 1186, 1191 (1982). If the ordinance does not reach a substantial amount of constitutionally protected conduct, then the overbreadth challenge fails. *Id.* As discussed *supra*, owning a dog is not a fundamental right, but is a right that is subject to regulations by the state. See *Nicchia v. People of State of N.Y.* 254 U.S. at 230-31 (1920); *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. at 700 (1897); *Am. Dog Owners Ass’n v. Dade County, Fla.*, 728 F.Supp at 1541 (S.D. Fla. 1989).

The Supreme Court of the United States has given greater deference to civil ordinances because the “consequences of imprecision are qualitatively less severe” than those attached to criminal statutes. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 499, 102 S. Ct. at 1193. Even though the term “pit bull” is imprecise, statutes of a civil nature are not required to be mathematically precise, but rather provide sufficient notice to those it is intended to affect. See *Commonwealth v. Bohmer*, 374 Mass. 368, 373, 372 N.E.2d 1381, 1385 (1978). The statute or ordinance is constitutional if it “clearly indicates what it prohibits as a whole.” *Id.*

Due to the civil nature of the Ordinance, and the lack of a substantial amount of constitutionally protected conduct, the overbreadth doctrine fails. Owning a dog, regardless of the breed or breed mixes, is not a fundamental right. Without a fundamental right, the Appellant cannot challenge the Ordinance as overly broad because the Ordinance does not reach a substantial amount of constitutionally protected conduct.

The United States District Court for the District of Massachusetts classified the Ordinance as civil in nature. (Memorandum Opinion, Aug. 28, 2010, 7). As discussed *infra*, the dog breeds listed in the Ordinance provides ample guidance to dog owners to determine whether or not their dog(s) fall within the scope of the Ordinance. The Appellant argued below that only

owners with purebred registered American Staffordshire Terriers, American Pit Bulls, or Pit Bull Terriers would know whether or not the Ordinance applied to their dogs(s). (Memorandum Opinion, Aug. 28, 2010, 8). Lack of registration of a dog as a purebred in either the American Kennel Club or the United Kennel Club does not preclude a dog from being classified as a pit bull. The City of Winthrop decided which breeds of dogs and breed mixes to include in its definition of pit bull. As such, dogs, whether purebred or of mixed pedigree, can be classified as a pit bull. Because the Ordinance does not reach a substantial amount of constitutionally protected conduct, and provides sufficient detail as to which dogs are included in the term “pit bull,” the Ordinance does not violate the overbreadth doctrine.

B. The District Court correctly concluded that the Ordinance was not vague, either *per se* or as applied to the Appellant, because the Ordinance provides sufficient detail as to which dogs are regulated.

The Winthrop Ordinance is not vague, either *per se* or as applied to the Appellant, because it provides sufficient detail in determining which dogs are subject to the Ordinance. A law is unconstitutionally vague if the terms used are uncertain to the degree that a person of “average intelligence would have no choice but to guess at its meaning and modes of application.” *U.S. v. Nieves-Castano*, 480 F.3d at 603. The Appellant must prove the Ordinance is “impermissibly vague in all of its applications.” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494, 102 S. Ct. at 1191. Even though the United States Constitution requires adequate notice of unlawful acts, the language of the ordinance is not required to be mathematically precise. *Colo. Dog Fanciers, Inc., v. City of Denver*, 820 P.2d 644, 650 (Colo. 1991). As such, the Winthrop Ordinance survives both *per se* and as applied challenges because the Ordinance uses terms that a person of common intelligence can determine the meaning and modes of application.

- i. **The Ordinance is *per se* constitutional because it contains a sufficient description of the types of breeds and breed mixes that are regulated in the City of Winthrop, thereby providing notice to all dog owners.**

The Winthrop Ordinance is *per se* constitutional because the Ordinance is sufficiently detailed to provide notice to dog owners of the types of breeds or breed mixes regulated by the Ordinance. Use of some arguably vague elements does not automatically create an unconstitutionally vague ordinance. *Dias v. City & County of Denver*, 567 F.3d 1169, 1180 (10th Cir. 2009). To prove an ordinance is unconstitutionally vague, the Appellant must show that there is no valid application of the ordinance. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 495, 102 S. Ct. at 1191.

Once the court determines the ordinance is not overly broad, it must then consider the facial challenge to the ordinance. *Id.* at 455 U.S. at 494, 102 S. Ct. at 1191. So long as the ordinance does not implicate a constitutionally protected conduct, the ordinance is presumed to be constitutional. *Id.*, 455 U.S. at 495, 102 S. Ct. at 1191. “Facial vagueness occurs when a statute or an ordinance is so utterly void of a standard of conduct that it simply has no core and cannot be validly applied to any conduct.” *Vanater v. Vill. of S. Point*, 717 F. Supp. at 1243 (citing *U.S. v. Powell*, 423 U.S. 87, 96 S. Ct. 316 (1975)). A facial challenge to an ordinance should only be upheld if the ordinance is impermissibly vague in all its applications. *Id.*, 455 U.S. at 495, 102 S. Ct. at 1191. The Appellant must show that the law in question is vague in the sense that there is no standard of conduct specified, not that the language is imprecise. *Id.* at 1243 (citing *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688 (1971)).

Even though the term “pit bull” is a generic term used to classify several dog breeds, courts have found that the use of the term “pit bull” in a city ordinance does not create a vagueness issue. See *Dias v. City & County of Denver*, 567 F.3d 1169; *City of Toledo v.*

Tellings, 114 Ohio St. 3d 278, 871 N.E.2d 1152; *Ohio v. Anderson*, 27 Ohio St. 3d 168, 566 N.E.2d 1224. These courts rationalized that the general public has been introduced to the term “pit bull” and knows what characteristics are common in those breeds of dogs. *Id.* Courts have also stated that when a person purchases or adopts a dog, he or she tends to research the breed, or in the case of mixed breeds, the potential breeds, of the animal in an effort to provide the best care for the dog. *See City of Toledo v. Tellings*, 114 Ohio St. 3d at 284, 871 N.E.2d at 1158; *Ohio v. Anderson*, 27 Ohio St. 3d at 173, 566 N.E.2d at 1228. Such research can be done by consulting breed books, the internet, animal control agencies, rescue groups, or veterinarians. *Ohio v. Anderson*, 27 Ohio St. 3d at 173, 566 N.E.2d at 1228.

The Winthrop Ordinance is presumed constitutional because dog ownership is not constitutionally protected conduct. Dog owners in Winthrop, Massachusetts were given notice that they were not permitted to possess certain breeds or breed mixes within the city limits. Winthrop Municipal Code section 6.04.090 provides that “any of the breeds commonly referred to as belonging to the ‘pit bull’ variety of terrier, which consists of the following breeds or breed types and mixtures: American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier” are not permitted within the Winthrop city limits. WINTHROP, MASS., CODE §6.04.090(B) (1988). The Ordinance clearly states that all dogs classified as pit bulls, which include the three breeds listed, or any dog of mixed pedigree matching this description, is to be considered a vicious dog and therefore prohibited within the Winthrop city limits. By listing the breeds that Winthrop wanted to classify as pit bull dogs, a dog owner can find what the primary characteristics of those breeds include to determine whether or not the dog in question meets those classifications. The same is particularly true for dogs with an unknown pedigree. Because the dog owners do not know the specific breed of dog in their possession, those owners are put on notice that their dog

may be regulated by the Ordinance. Owners in that situation can research the breed characteristics of the breeds listed in the Ordinance to determine if the dog would be classified as vicious under the Winthrop standard. Additionally, owners who do not know the pedigree of their dog(s) can specifically ask their veterinarian for an opinion, because veterinarians have knowledge of the physical and behavioral traits associated with certain dog breeds. Therefore, the Ordinance is not *per se* unconstitutionally vague because it provides sufficient detail as to which dog breeds and breed mixes are prohibited in the City of Winthrop.

ii. The Ordinance is constitutional as applied to the Appellant because he knew, or had reason to know, that his dogs were the type of dogs regulated by the City of Winthrop.

The Ordinance is constitutional because it is not vague as applied to the Appellant and this case. The Appellant was put on notice that there was a breed restriction within the Winthrop city limits, which would necessarily mean that any dog owner, regardless of the breed of dog in their possession, knew or would have reason to know that certain dogs are prohibited from living within the city.

The Appellant must show that the Winthrop Ordinance provided insufficient notice that the Appellant was prohibited from possessing his dogs within the city limits. *See Dickerson v. Napolitano*, 604 F.3d 732, 745 (2nd Cir. 2010). Generally, courts determine whether the law provides sufficient notice or the opportunity to understand what conduct is prohibited by an ordinary person. *Id.* at 746. A city is not required to give the Appellant an actual warning that his behavior or conduct would cause a violation of the ordinance. *Id.*

Pit bulls are known for possessing intelligence, strength and courage. *U.S. v. Kizeart*, 2010 U.S. Dist. LEXIS 97487, at *13. While the pit bulls are popularly known for their ability to inflict substantial damage to other dogs and humans, these animals also exhibit great loyalty to

its owner, a gentle disposition, and protective nature toward children. *Id.* It is because of the pit bulls' loyalty that such dogs are favored among dog fighters because the dogs will withstand abuse and neglect at the hand of its owner without becoming aggressive toward the owner. *Id.* at *14.

The Ordinance is not unconstitutionally vague as applied to the Appellant simply because his dogs were of unknown pedigree. Dogs of unknown pedigree tend to be classified as a pit bull variety of terrier mix based on the physical characteristics displayed by the dog. The three breeds listed in the ordinance – the American Staffordshire Terrier, the American Pit Bull, and the Pit Bull Terrier – along with dogs of mixed pedigree, display certain physical characteristics which create the pit bull group. Both of the Appellant's dogs, based on the photograph in the Memorandum Opinion from the United States District Court for the District of Massachusetts dated August 28, 2010, have large heads, short coats, and muscular bodies. Because the dogs are of an unknown pedigree, the Appellant could have easily referenced a dog breed guidebook, or specifically asked his veterinarian about the potential breed make up of his dogs. The mere fact that the veterinarian did not volunteer information about the dogs to the Appellant does not remove the responsibility of the Appellant to determine whether the Ordinance which banned pit bulls applied to him.

While the Appellant contends that the dogs never exhibited any of the problematic behavioral traits associated with dogs in the pit bull group, he admitted that the dogs did display the positive behavioral traits. (Memorandum Opinion, Aug. 28, 2010, 4). The lower court referenced language from the United Kennel Club standard for the American Pit Bull Terrier which indicated that the breed was eager to please, extremely friendly, not aggressive toward humans, and an excellent family companion. (Memorandum Opinion, Aug. 28, 2010, 9). The

Appellant testified that his two dogs were affectionate toward him, friendly, well-socialized, and he even trusted them with his young nieces and nephews. (Memorandum Opinion, Aug. 28, 2010, 4). The lack of problematic behavioral traits does not negate the fact that his dogs did display the positive behavioral traits attributed to an American Pit Bull Terrier. While lack of negative behavior may not have put the Appellant on notice that his dogs may be classified as a pit bull variety of terrier, the presence of certain physical characteristics and positive behavioral traits certainly did put the Appellant on notice.

The Ordinance is not unconstitutionally vague as applied to the Appellant because he knew, or should have known, that his dogs were included in the breed or breed mixes designated as vicious dogs based on the dogs' physical and behavioral traits.

II. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS CORRECTLY CLASSIFIED WINTHROP MUNICIPAL CODE SECTION 6.04.090 AS CONSTITUTIONAL BECAUSE THE ORDINANCE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.

The Winthrop Ordinance is constitutional because it does not violate substantive due process under the Fourteenth Amendment to the United States Constitution. The Appellant claims that the Ordinance impermissibly treats pit bulls and their owners in a different way than it treats other dogs and dog owners due to erroneous and outdated stereotypes relating to these varieties of dogs. (Memorandum Opinion, Aug. 28, 2010, 11). The substantive due process issue before this court is one that has been addressed by a variety of courts throughout the nation. *E.g. Dias v. City & County of Denver*, No. 07-cv-00722, 2010 U.S. Dist. LEXIS 103814 (D. Colo. 2010); *City of Toledo v. Tellings*, 114 Ohio St. 3d 278, 871 N.E.2d 1152; *Holt v. City of Maumelle*, 307 Ark. 115, 817 S.W.2d 208 (1991); *Garcia v. Vill. of Tijeras*, 108 N.M. 116, 767 P.2d 355 (1988).

Individuals have a protected property interest in their animals under the Fourteenth Amendment. *Maldonado v. Municipality of Barceloneta*, 682 F. Supp. 2d 109, 128 (D. P.R. 2010). The substantive due process component of the Fourteenth Amendment provides for a safeguard against arbitrary legislation. *Dias v. City & County of Denver*, 567 F. 3d at 1181. The Fourteenth Amendment requires a relationship between the regulation and the government interest that it is designed to advance. *Id.* If a government enactment infringes upon a fundamental right, then the regulation must be tailored to a compelling government interest. *Id.* (citing *Wash. v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 1381 (1993)). If the regulation burdens anything less than a fundamental right, the infringement only needs to bear a rational relationship to the government interest. *Id.* (citing *Wash. v. Glucksberg*, 521 U.S. at 728, 117 S. Ct. at 2258). Because possession of a dog does not implicate a fundamental right, as discussed *supra*, an ordinance which bans the possession of certain dog breeds within a city must bear only a rational relationship to a legitimate government interest. *Am. Canine Found. v. City of Aurora, Colo.*, 618 F. Supp. 2d 1271, 1278 (D. Colo. 2009).

An ordinance does not violate substantive due process if: (1) there is a public problem, (2) the regulation is not unduly oppressive on the persons regulated, and (3) the regulation tends to solve the public problem. *Rhoades v. City of Battle Ground*, 115 Wash. App. 752, 763, 63 P.3d 142, 148 (2003). The party who attacks an ordinance has the burden of establishing that the ordinance is invalid by clear and convincing evidence. *N.Y. City Friends of Ferrets v. City of N.Y.*, 876 F. Supp. 529, 535 (S.D. N.Y. 1995), *aff'd*, 71 F.3d 405 (2nd Cir. 1995); *Garcia v. Vill. of Tijeras*, 108 N.M. at 118, 767 P.2d at 357. To withstand scrutiny by the challenging party, the “ordinance must bear a rational relationship to a legitimate” purpose. *Id.*, 108 N.M. at 119, 767 P.2d at 358.

The Appellant has the burden of proving that the Ordinance banning pit bulls is unconstitutional. The City of Winthrop must only show that the Ordinance has a rational relationship to achieve a legitimate government purpose. Winthrop determined that pit bull terrier type dogs pose a public threat, and therefore create a public safety concern in its city. The Winthrop Ordinance banning pit bulls within its city seeks to keep its residents safe, which is a legitimate government interest. The Ordinance bears a rational relationship to achieve the legitimate government interest of keeping the Winthrop public safe from pit bull attacks.

A. The District Court correctly concluded that Winthrop has a legitimate government interest in protecting the public from dogs that are a danger to health and safety.

Winthrop must be able to show that the enactment of the vicious dog Ordinance was related to a legitimate government interest. The city has a legitimate interest in protecting its residents from possible injury and death from attacks by vicious dog breeds and mixes, including pit bull terriers. Pit bulls are strong and give no warning signs before attacking. *Am. Canine Found. v. City of Aurora, Colo.*, 618 F. Supp. 2d at 1278-1279. Because of these characteristics, the city has “a legitimate interest in protecting citizens against unsafe conditions caused by pit bulls.” *See City of Toledo v. Tellings*, 114 Ohio St. 3d at 282, 871 N.E.3d at 1157.

Pit bulls are a threat to the public safety and welfare of the Winthrop public. The Ordinance is not unduly oppressive to pit bull owners and tends to solve the problem it was designed to prevent. Therefore, Winthrop has a legitimate government interest and purpose in enacting an ordinance banning vicious dogs from the city to protect its public.

i. Pit bulls are a public concern and a threat to public safety in Winthrop.

Massachusetts has labeled the use of pit bull terriers in criminal activity as the use of a “dangerous weapon.” *Commonwealth v. Fettes*, 64 Mass. App. Ct. 917, 917, 835 N.E.2d 639, 639 (2005); *Commonwealth v. Smith*, 56 Mass. App. Ct. 1117, 1117 (2002). Historically, pit bulls have been bred for a propensity for violence that is impossible to control. *Vanater v. Vill. of S. Point*, 717 F. Supp. at 1241. Pit bulls have genetic physical strengths and abilities which always pose a *possibility* of danger – a danger that is different from other dog breeds. *Id.* Although pit bulls may not be the only dog breeds that pose a risk of danger or viciousness, it is reasonable to single out pit bulls to avoid the danger. *Id.*

The Supreme Court of Massachusetts has stated that pit bulls are known to be aggressive. *Commonwealth v. Santiago*, 452 Mass. 573, 578, 896 N.E.2d 622, 626-627 (2008). Pit bulls have been described as strong, intelligent, courageous, aggressive, vicious, and unpredictable. *See U.S. v. Kizeart*, 2010 U.S. Dist. LEXIS 97487, at *13; *U.S. v. Berry*, 2010 U.S. Dist. LEXIS 45754, at *14 (S.D. Ill. May 11, 2010); *Am. Canine Found. v. City of Aurora, Colo.*, 2008 U.S. Dist. LEXIS 42545, at *21 (D. Colo. May 28, 2008). In an expert opinion provided in a 2010 case, pit bulls were described as having an “inherent fighting nature, strength, and a high pain threshold” which give pit bulls a higher potential for involvement in serious attacks over other dog breeds. *Dias v. City & County of Denver*, 2010 U.S. Dist. LEXIS 103814, at *12. The same expert testified that pit bulls made bad pets because of their unpredictability and the seriousness of their bites. *Id.* Unlike other dog breeds, “pit bulls will bite and hold,” causing significantly more damage than other dog breeds. *Am. Canine Found. v. City of Aurora, Colo.*, 2008 U.S. Dist. LEXIS 42545, at *22.

Human fatalities appear to be associated with certain dogs, including pit bulls and Rottweilers. Jeffrey J. Sacks, Leslie Sinclair, Julie Gilchrist, Gail C. Golab, & Randall Lockwood, *Breeds of Dogs Involved in Fatal Human Attacks in the U.S. between 1979 & 1998*, 217 J. OF THE AM. VETERINARY MED. ASS'N 836, 836 (2000). Pit bulls and Rottweilers were responsible for sixty-seven percent of dog bite related fatalities between 1997 and 1998. *Id.* at 839. Between 1982 and 2010, pit bulls alone were responsible for 1,654 physical injuries to humans in the United States and Canada. Merritt Clifton, *Dog Attack Deaths & Maimings, U.S. & Canada*, ANIMAL PEOPLE, Sept. 1982 to June 25, 2010. Of those 1,654 injuries, 733 were child victims, 905 suffered permanent disfigurements or the loss of a limb, and 173 victims died from their dog bite related injuries. *Id.* Other dog breeds, including Rottweilers, Huskies, Wolf hybrids, German Shepherds, Bullmastiffs, Chows, Boxers, Mastiffs, and Malamutes combined were responsible for only 859 physical injuries – 795 less than pit bulls. *Id.* The study noted that pit bulls have less inhibition about attacking people and are notorious for attacking without warning. *Id.* A pit bull bite can result in a person being maimed or killed, whereas other dog bites tend to result in a lesser physical injury. *Id.*

Pit bulls were responsible for fifty-two (fifty-nine percent) of the eighty-eight fatal dog attacks reported in the United States between 2006 and 2008. *Report: U.S. Dog Bite Fatalities Jan. 2006 to Dec. 2008*, DogsBite.org, April 20, 2009 at 1-2. Rottweilers only accounted for twelve (fourteen percent) of the fatal dog attacks. *Id.* at 4. The study revealed that pit bulls caused the death of five children under the age of two, while causing twenty-eight deaths for individuals aged twenty-one and older. *Id.* at 3.

Pit bull dogs have a temperament showing a volatile capacity for violent behavior and hostility. *McNeely v. U.S.*, 874 A.2d 371, 384 (D.C. 2005). As such, pit bulls are a matter

properly regulated by a state's police power. *Id.* (citing *McIntosh v. Wash.*, 395 A.2d 744, 756 (D.C. 1978)). Enacting an ordinance banning pit bulls serves the legitimate purpose of protecting the health and safety of the public. *Garcia v. Vill. of Tijeras*, 108 N.M. at 119, 767 P.2d at 358.

The above statistics show that pit bulls are dogs which have a propensity for violent attacks with serious, and sometimes deadly, consequences. Appellant asserts that pit bull bans have previously been justified using outdated scientific information. (Memorandum Opinion, Aug. 28, 2010, 11). However, pit bulls have been linked to attacks and injuries as recently as 2010. See Merritt Clifton, *Dog Attack Deaths & Maimings, U.S. & Canada*, ANIMAL PEOPLE, Sept. 1982 to June 25, 2010. Winthrop recognized that pit bulls created an unnecessary and dangerous condition for the public. The City of Winthrop identified pit bulls as a threat and determined that the Ordinance would protect individuals from possible peril. When Winthrop enacted the Ordinance banning pit bulls, the city did what was in its power to protect the public.

ii. The Ordinance is not unduly oppressive to the owners of pit bulls.

The exercise of police power for the regulation of dogs for the purpose of protecting the public does not violate substantive due process. *Hearn v. City of Overland Park*, 244 Kan. 638, 646, 772 P.2d 758, 765 (1989) (citing *Johnston v. Atlanta Humane Soc'y*, 173 Ga. App. 416, 417, 326 S.E.2d 585, 587 (1985)). Another court has previously ruled that substantive due process is not violated when a dog is determined to be a pit bull based on appearances and not scientific evidence. *Colo. Dog Fanciers, Inc. v. Denver*, 820 P.2d at 650.

The ban on pit bulls is not unduly oppressive to the Appellant or other pit bull owners. Appellant claims there is a lack of evidence and inaccurate stereotypes that have been pushed upon pit bulls and their owners. (Memorandum Opinion, Aug. 28, 2010, 11). The Appellant

may argue that other restrictions may be placed on pit bull owners without the outright ban of the dogs, such as registering the dogs and increasing fees which other cities currently employ. *E.g.* LITTLE ROCK, ARK., CODE art. 2, § 6-19 (2009); S.F., CAL., HEALTH CODE art. 1, § 43.1 (2005); BOSTON, MASS., CODE § 16-1.9E.1 (2004). However, the registration of a pit bull would do nothing to prevent the problem that Winthrop is attempting to avoid with the Ordinance. A registered pit bull that is allowed to be within the Winthrop city limits is just as likely to attack as an unregistered pit bull.

Appellant may suggest Winthrop undertake the great expense and burden of DNA testing dogs to determine whether a dog is a pit bull, or what percentage of pit bull blood is in a dog. DNA testing is not the purpose of the Ordinance and would not be of any assistance. Even if DNA testing was used by Winthrop, the city would then have to determine what percentage or amount of pit bull genetics classify a dog as vicious. No matter what percentage of genetics Winthrop uses to classify a dog as a pit bull, there would be individuals who would challenge the validity and rationale of the established percentage. Additionally, the DNA testing of dogs will become very expensive for Winthrop, and therefore become a burden on all the residents of the city by an increase in taxes or other fees to subsidize testing costs.

Winthrop understands and is sympathetic to the fact that the Appellant and other residents may lose their dogs because of this Ordinance. The safety and welfare of individuals in Winthrop outweighs a dog owner's interest in keeping their dog. Winthrop's Ordinance banning pit bulls is related to the legitimate government interest of protecting the public because it is not unduly oppressive on pit bull owners.

iii. The Ordinance banning pit bulls tends to solve the problem of pit bull attacks.

As Winthrop has demonstrated *supra*, pit bulls are a threat because they are strong, aggressive, and hold onto their victim while attacking. A ban on all pit bulls will solve the problem of pit bull attacks because the threat to public safety ceases to exist. The method and manner – the Ordinance banning vicious dogs – achieves the goal of public safety.

Winthrop identified pit bulls as possessing traits and characteristics that posed a serious threat to its city. It was reasonable for Winthrop to believe that banning pit bulls would extinguish the threat of pit bull attacks in the city. If pit bulls are banned from Winthrop, and the residents do not possess pit bulls, then the likelihood of a member of the Winthrop public being attacked by a pit bull dramatically decreases.

B. The District Court correctly concluded that the Ordinance bears a rational relationship to a legitimate government interest.

A city ordinance which regulates the possession of a specific dog breed must bear a rational relationship to a legitimate government purpose. *Am. Canine Found. v. City of Aurora, Colo.*, 618 F. Supp. 2d at 1278. An ordinance is rational if there is any sound reason, either hypothetical or real, for the ordinance. *Greater Chi. Combine & Ctr. v. City of Chi.*, No. 04 C 5429, 2004 U.S. Dist. LEXIS 25706, at *23 (N.D. Ill., E. Div. 2004), *aff'd*, 431 F.3d 1065 (7th Cir. 2005). Before the Appellant can prevail, he must be able to negate every possible basis which may support the Winthrop Ordinance. *See Dias v. City & County of Denver*, 2010 U.S. Dist. LEXIS 103814, at *17. Because pit bull dogs are more aggressive and destructive than other dogs, pit bulls represent a unique hazard to public safety. *Hearn v. City of Overland Park*, 244 Kan at 647, 772 P.2d at 765. The *Hearn* court determined that due to the public hazard

caused by pit bulls, an ordinance regulating possession of pit bulls reasonably related to a legitimate government objective. *Id.*

The Village of Tijeras enacted an ordinance banning the possession of pit bull terriers for the safety of its residents. *Garcia v. Vill. of Tijeras*, 108 N.M. at 117, 767 P.2d at 355. The village identified pit bulls as a threat to public safety after several residents were attacked, including a nine year-old girl who was severely injured on her way home from school. *Id.* The *Garcia* court held that the village was entitled to fight the problem of pit bulls and the ordinance was clearly related to the threat pit bulls posed. *Id.*, 108 N.M. at 121, 767 P.2d at 360. An ordinance which bans pit bulls is reasonable if it is “related to protecting the health and safety of” the city’s residents. *Id.*

Ohio has held that an ordinance banning pit bulls is a reasonable response to the special threat posed by pit bulls. *Vanater v. Vill. of S. Point*, 717 F. Supp. at 1243. Even if a description such as “vicious” and “aggressive” may not describe every pit bull, a court must defer to the governing body to consider conflicting positions. *Id.* The court should not substitute its own judgment for the reasonable decisions of a governing body. *Id.* Ohio determined the ordinance banning pit bulls “was a reasonable preventative response and solution to a dangerous and possibl[y] tragic situation.” *Id.*

Like the cities and village in *Hearn*, *Vanater*, and *Garcia*, Winthrop recognized that pit bull terriers represented a serious threat of danger to the public. These courts have properly held that due to the seriousness and severity of injuries caused by pit bulls, government entities may restrict the possession and ownership of pit bulls to protect individuals. Preventing pit bulls from residing in a city is a reasonable and rational method for a city to protect the public from being

harmed by vicious dog attacks. Therefore, this Court should determine that the Winthrop Ordinance does not violate substance due process.

CONCLUSION

This Court should affirm the sound judgment of the Massachusetts District Court by holding the Winthrop Ordinance is not overly broad or vague, and the Ordinance does not violate substantive due process rights under the Fourteenth Amendment to the United States Constitution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On this 21st day of January, 2011, we certify that we have sent an electronic copy of the Brief of the City of Winthrop, Massachusetts, to: lhandzel@lclark.edu. We certify that we have placed in the U.S. mail, prepaid, four (4) copies of Brief of the City of Winthrop, Massachusetts, to the following:

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