No. 10cv00416

In the United States Court of Appeals
For the First Circuit

QUINTON RICHARDSON,	)	
	)	
Plaintiff/Appellant ,	)	Civil Action No. 10cv00416
	)	
v.	)	
	)	
CITY OF WINTHROP, MASSACHUSETTS,	)	
	)	
	)	
Defendant/Appellee,	)	

On Appeal from the United States District Court
for the District of Massachusetts
The Honorable Judge H.H. Summers

Brief of Quinton Richardson, Plaintiff/Appellant

Team Number 15

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Winthrop Municipal Code § 6.04.090 ("the Winthrop ordinance") is civil in nature but imposes a penalty, including forfeiture of property on persons who own certain types of dogs. The following questions are presented by this appeal:

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

2. Did the district court err when it ruled that Winthrop Municipal Code section 6.04.090, designating all "'pit bull' variety of terrier" as *per se* vicious and thus banning them, does not violate substantive due process under the Fourteenth Amendment to the U.S. Constitution?

STATEMENT OF THE CASE

A. Course of the Proceedings Below

Plaintiff/Appellant filed a complaint challenging the Defendant/Appellee's Municipal Code section 6.04.090 declaring all "'pit bull' variety of terrier" to be "vicious" and banning them from the city on the grounds that it violates the Fourteenth Amendment of the U.S Constitution as both unconstitutionally vague and an infringement of his substantive due process rights. Briefing Order at 1. Defendant/Appellee moved for summary judgment. Id. The District Court granted summary judgment in favor of Defendant/Appellee, finding that section 6.04.090 is not impermissibly vague, either facially or as applied here, and does not violate Plaintiff/Appellant's substantive due process rights. Id. Plaintiff/Appellant has appealed these findings. Id.

B. Statement of Facts

Twenty-three years ago, the City of Winthrop enacted an ordinance banning all dogs "commonly referred to" as belonging to the "'pit bull' variety of terrier" from the Winthrop city limits. Memorandum Opinion at 5. As discussed in more detail below, the Winthrop ordinance seeks to define "pit bull" in two ways. First it defines "pit bull" by reference to three "breeds," only two of which are recognized by either the American Kennel Club or the United Kennel Club, the two largest dog breed registries in the United States. Id. at 9. Second, the ordinance bans all dogs that are "mixtures thereof" the above referenced "breeds." Both means of characterizing dangerous dogs for the purpose of a city ordinance were found to be void for vagueness by the Supreme Judicial Court of Massachusetts. American Dog Owners Association v. City of Lynn, 404 Mass. 73, 79, 533 N.E.2d 642 (Mass. 1989).

In 2005, Quinton Richardson ("Richardson"), a lifelong resident of the City, obtained two puppies, Zoe and Starla, from a rescue organization that had found the dogs as young strays in a City park. Memorandum Opinion at 4. Zoe and Starla's heritage was unknown and they both were classified by the rescue organization and later by Richardson's veterinarian as "mixed breed." Id. Zoe and Starla provided companionship for Richardson, amusing him with their playful antics. Id. Both dogs were affectionate toward Richardson and to each other, and were friendly and well-socialized even in the company of Richardson's young nieces and nephews. There was no evidence that the dogs had ever bitten a person or other dog, attacked any other animal or otherwise threatened the community peace. Id.

On August 1, 2009, a meter reader observed Zoe inside Richardson's home through a window. Id. at 5. The meter reader notified animal control officers, who seized Zoe the next day, under the Winthrop ordinance. Id. At a hearing, the animal control officer testified that "based on her appearance," Zoe was a "pit bull." Id. There is no evidence that city authorities are

provided with any guidance in identifying dogs of the "'pit bull' variety of terrier." No DNA testing was performed. When Richardson was unable to find a home outside the City for Zoe within the ten days permitted by the City Manager, Zoe was killed. Id.

Starla, who was not in Richardson's home at the time that the meter reader observed Zoe, continues to live with Richardson in the City today. Id. However, Richardson fears that the City also may seize and kill Starla for alleged violation of the ordinance. Id. A preliminary injunction preventing the City from seizing Starla was issued pending the outcome of this case. Id. at 6.

The specific terms of the Winthrop ordinance most relevant to the case state as follows:

> B. Vicious Dogs.
> 1. For purposes of this Section, "vicious dogs" are defined as
> …
>
> (c) 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.
>
> 2. No person shall own, keep or have the custody, care or control of any of the breeds identified in subsection B.1(c) of this Section or mixtures thereof within the Winthrop city limits.
> Winthrop Municipal Code § 6.04.090

Although violation of the Winthrop ordinance is a civil offense, the ordinance is penal in nature because it calls for the forfeiture of property (dogs may be banished or killed) with the alleged intent of protecting the public against injury. *See* Collatos v. Boston Retirement Bd., 396 Mass. 684, 686, 488 N.E.2d 401 (Mass. 1986).

Appellants' complaint alleges that the Winthrop ordinance is impermissibly vague under the due process clause of the Fourteenth Amendment in that it inadequately describes which dogs it bans and, because there is no reliable means of identifying the heritage of unregistered or mixed-breed dogs, it does not provide individuals with adequate notice as to whether the law pertains to them and also is highly susceptible to arbitrary and discriminatory enforcement. Memorandum Opinion at 6-7. The complaint also alleges that that the Winthrop ordinance is

unconstitutionally vague as applied. Richardson's dogs Zoe and Starla were of unknown heritage and neither the rescue group from which he obtained them nor his veterinarian ever suggested to him that the dogs belonged to one of the three listed "breeds," breed types or mixtures. Id. at 9.

The complaint also asserts that the that the Winthrop ordinance violates the Due Process Clause of the Fourteenth Amendment by impermissibly treating so-called "pit bulls" and their owners in a different fashion than other dogs and owners because there is a lack of evidence other than outdated, inaccurate stereotypes that the prohibited animals pose a threat to public safety or constitute a public nuisance. Id. at 11.

STANDARD OF REVIEW

Review of a district court's grant of summary judgment is de novo, with all facts and reasonable inferences reviewed by the appellate court in the light most favorable to the nonmoving party. CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc., 97 F.3d 1504, 1512 (1st Cir. 1996). The court must reverse if, after reviewing the facts and making all inferences in favor of the non-moving party, the evidence on record is "sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side." Maymí v. P.R. Ports Auth., 515 F.3d 20, 25 (1st Cir. 2008) (quoting Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995)).

SUMMARY OF ARGUMENT

The District Court erred in granting summary judgment because genuine issues of material fact exist and the court did not construe such facts in the light most favorable to Plaintiff. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Thompson v. Coca-Cola

Co., 522 F.3d 168, 175 (1st Cir. 2008) (citing Fed. R. Civ. P. 56(c)). A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. Prescott v. Higgins, 538 F.3d 32, 40 (1st Cir. 2008). (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)). A fact is material if it has the potential of determining the outcome of the litigation. Id. (quoting Maymí v. P.R. Ports Auth., 515 F.3d 20, 25 (1st Cir. 2008)).

However, summary judgment is not to be used as a substitute for trial but only when it is quite clear what the truth is and that no genuine issue of fact remains for trial. In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 190 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1979). In this case, genuine issues of material fact remain regarding appellant's vagueness and substantive due process claims, and the parties are entitled to a trial.

ARGUMENT

I. INTRODUCTION

The District Court erred when it ruled that the Winthrop ordinance is not unconstitutionally vague on its face. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited." The Winthrop ordinance is void on its face and as applied because it inadequately describes which dogs it bans.

The District Court also erred when it ruled that the Winthrop ordinance does not violate the substantive due process principles embedded in the Fourteenth Amendment. Appellant argues that a genuine issue of material fact exists whether the relationship between a dog owner and his or her companion dog rises to the level of a fundamental right that may not be infringed by government unless the relevant regulations are narrowly tailored to serve a compelling state interest, and that the Winthrop ordinance is not so narrowly tailored. Even if the relationship

between a dog owner and his or her companion dog does not rise to the level of a fundamental right, a genuine issue of material fact exists whether the ordinance even meets the lesser "reasonable fit" requirement applicable under substantive due process decisions when government limits non-fundamental rights.

II. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS ERRED WHEN IT RULED THAT WINTHROP MUNICIPAL CODE SECTION 6.04.090 IS NOT UNCONSTITUTIONALLY VAGUE ON ITS FACE OR AS APPLIED TO THE PLAINTIFF UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND DOES NOT VIOLATE THE OVERBREADTH DOCTRINE.

The District Court erred by characterizing the Winthrop ordinance as "civil" in nature, and by permitted a "greater degree of vagueness" than for a penal statute. Because the ordinance can result in the forfeiture of property and seeks to protect the public, or society as a whole, against injury, it is penal in nature and subject to a higher degree of scrutiny for vagueness. The District Court then erred when it ruled that the Winthrop ordinance is not unconstitutionally vague on its face. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited." The Winthrop ordinance is overly broad and void on its face because it inadequately describes which dogs it bans. Even where breed standards exist for the dogs that are banned, these are insufficiently definite to allow ordinary people to understand what conduct is prohibited or to prevent arbitrary enforcement by law enforcement personnel. The Winthrop ordinance is also void as applied because there is no evidence that Zoe or Starla are dogs of the breeds banned by the ordinance. Finally, the District Court erred by not recognizing that, pursuant to the doctrine of *stare decisis*, the Supreme Judicial Court of Massachusetts' decision in American Dog Owners Association v. City of Lynn is controlling law, and thus the Winthrop ordinance must be found to be unconstitutionally vague.

A. **The District Court erred by characterizing the Winthrop ordinance as "civil" in nature, and by permitting a "greater degree of vagueness" than for a penal statute.**

The District Court characterized the Winthrop statute as civil in nature and stated that the Constitution tolerates a greater degree of vagueness in enactments with civil rather than criminal penalties because the consequences are less severe. Memorandum Opinion at 7. However, this description understates the nature of the Winthrop statute.

A statute designed to enforce the law by punishing offenders, rather than simply by enforcing restitution to those damaged, is in the nature of a penal statute. Collatos v. Boston Retirement Bd., 396 Mass. at 686. Forfeiture of property, such as the banning or killing of a dog, is punitive. Id. Statutes seeking to protect the public, or society as a whole, against injury are commonly viewed as penal in nature. Id. *See also* American Dog Owners Association, Inc. v. City of Lynn, 404 Mass. at 78; American Dog Owners Association, Inc. v. City of Des Moines, 469 N.W.2d 416, 418 (Iowa 1991).

The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357 (1983). Vague laws engender the possibility of arbitrary and discriminatory enforcement. Grayned v. City of Rockford, 408 U.S. 104 (1972). Because the Winthrop ordinance does not specify the type of dog prohibited with sufficient definiteness that an ordinary citizen, or even enforcement personnel can understand what is prohibited, the Winthrop ordinance must be found void for vagueness.

B. The Winthrop ordinance is facially vague because there are no objective standards for determining if a dog is prohibited under the statute.

The Winthrop ordinance is facially vague because there are no objective standards for determining if a dog is prohibited under the statute. Breed-specific ordinances, like the Winthrop

ordinance, imply that there is an objective method of determining the breed of a particular dog, when in fact, there is not. American Veterinary Medical Association Task Force on Canine Aggression and Human-Canine Interactions, A Community Approach to Dog Bite Prevention. 218 Journal American Veterinary Medical Association 1732, 1736 (June 2001) [hereinafter "AVMA Dog Bite Prevention"].

The Winthrop ordinance bans dogs and mixtures of dogs belonging to a two registered breed types: the American Staffordshire Terrier and the American Pit Bull [Terrier]. Winthrop Municipal Code § 6.04.090(B)(1)(c). The American Kennel Club recognizes the American Staffordshire Terrier. Although "objective" standards exist for these two registered breeds of dogs, the standards themselves consist of hundreds of elements and are permeated with comparative terms.

The kennel club standards for the American Pit Bull Terrier consist of 214 elements. Brief for the Humane Society of the United States as Amicus Curiae Supporting Appellants. Dias v. City and County of Denver, 567 F.3d 1169 (10th Cir. 2008) (No. 08-1132) 2008 WL 4126151 at *4. The kennel club standards for the American Staffordshire Terrier consist of 90 elements. Id. It is simply not possible for a citizen striving to comply with the Winthrop ordinance or for a city employee attempting to enforce it to assess a dog against all of the elements of the breed standard to determine if a particular dog is banned under the statute.

Even if it were possible for citizens and City employees to assess a dog against hundreds of elements, many of the elements of each breed are inherently subjective. For example, the American Kennel Club describes the American Staffordshire Terrier as "well put-together," "stocky," with a "medium" length neck, a "fairly short" back, and "moderate size" feet. AKC Meet the Breeds: American Staffordshire Terrier, American Kennel Club,

http://www.akc.org/breeds/american_staffordshire_terrier/ (last visited January 24, 2011). The United Kennel Club describes the American Pit Bull Terrier as "medium-sized," with a body that is "slightly" longer than tall, a "medium" length head, and "small to medium" size ears. American Pit Bull Terrier, United Kennel Club, http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008 (last visited January 20, 2011).

There is no evidence that Winthrop city authorities are provided with any guidance in how to determine if a dog's neck or head is "medium" sized, or whether its back is "fairly short," let alone how to interpret each of the hundreds of other elements in the two breed descriptions. A study published in the Journal of Animal Welfare Science has shown that even people who work with dogs on a daily basis in an expert capacity cannot reliably identify breed mixtures, and some dogs whose appearance suggests a particular breed may in fact have little to no genetic evidence of that breed. Gary J. Patronek et al., Use of a Number-Needed-to-Ban Calculation to Illustrate Limitations of Breed-Specific Legislation in Decreasing the Risk of Dog bite–related Injury, 237 Journal of the American Veterinary Medical Association 788, 790 (October 1, 2010) [hereinafter "Patronek"] (citing Victoria Voith et al., Comparison of Adoption Agency Identification and DNA Breed Identification of Dogs, 12 Journal of Applied Animal Welfare Science 253 (July 2009)). The study found that, where adoption agencies had identified a dog as a particular breed or mix of breeds, in only a quarter of these dogs was at least one of the breeds proposed by the adoption agencies also detected as a predominant breed by DNA analysis.[1] Victoria Voith et al., Comparison of Adoption Agency Identification and DNA Breed Identification of Dogs, 12 Journal of Applied Animal Welfare Science 253 (July 2009). 87.5%

[1] Predominant breeds were defined as those comprised of the highest percentage of a DNA breed make-up.

of the dogs were identified by DNA as breeds which had not been recognized by the agency workers.[2] Id.

This is not to say that even DNA analysis is infallible. A September 2009 Wall Street Journal article published results of DNA analysis by four different companies of samples from a single mixed breed dog. Each company reported a different result, highlighting the difficulty in accurately determining an individual dog's genetic make-up. Paula Szuchman, Beagle or Bichon: Can Dog Drool Provide Insight?, Wall Street Journal (September 18, 2009, 6:08 AM), http://online.wsj.com/article/SB10001424052970204518504574416810535466706.html (last visited January 18, 2011). One lab claimed the dog's heritage to be a mix of Italian Greyhound, Boston Terrier, Bichon Frise, Golden Retriever, Mastiff and West Highland Terrier. A second lab found traces of Staffordshire Terrier, Bull Terrier, and Wire Fox Terrier. Id. In explaining its test results, one laboratory stated that "DNA is inherited randomly from each parent which makes every dog unique. This is why a dog's appearance may look different than the breeds detected in the DNA test." Id. Quite simply, "there is no scientific means, by blood type, DNA, enzyme, or otherwise, to determine if a dog is a particular breed or any mixture thereof." American Dog Owners Association, Inc. v. City of Lynn, 404 Mass. at 76. Therefore the Winthrop ordinance must be found void for vagueness.

C. The Winthrop ordinance is facially vague because it contains inherently ambiguous provisions.

The District Court found that the Winthrop ordinance, is not "impermissibly vague in all of its applications," because "the owners of dogs registered either as purebred American Stafford Terriers or American Pit Bull Terriers necessarily must know that the Ordinance applies to them." Memorandum opinion at 10. While this may be correct, the District Court failed to

[2] A breed must have been detected at a minimum of 12.5% of a dog's make-up to be reported in the DNA analysis.

recognize the inherent ambiguity in other provisions in the ordinance, particularly those provisions that ban dogs "commonly referred to" as pit bulls, or consisting of "breed types and mixtures." The District Court also failed to acknowledge that one provision of the Winthrop ordinance refers to a "Pit Bull Terrier," which is not a recognized breed, and thus there can be no "purebred" Pit Bull Terriers.

1. The Winthrop ordinance is facially vague because it bans dogs that are "commonly referred to" as pit bulls.

The Winthrop ordinance bans dogs "of the breeds commonly referred to as belonging to the 'pit bull' variety of terrier…" Winthrop Municipal Code § 6.04.090(B)(1)(c). The Supreme Court of Iowa dealt with a similarly worded provision and found it unconstitutional. American Dog Owners Association, Inc. v. City of Des Moines, 469 N.W.2d 416 (Iowa 1991).) The City of Des Moines, Iowa passed an ordinance that governed "Staffordshire Terriers," "American pit bull terriers," "American Staffordshire terriers," or "dogs of mixed breed or of other breeds than above listed which breed or mixed breed is known as pit bulls, pit bull dogs or pit bull terriers," and "any other breed commonly known as pit bulls, pit bull dogs or pit bull terriers, or combination of any of these breeds." Id. at 417.)

While finding that the portion of the ordinance that referred to particular breeds of dogs provided adequate guidance, the court found that the language "known as pit bulls, pit bull dogs or pit bull terriers" allowed "subjective determinations based on a choice of nomenclature by unknown persons and based on unknown standards." Id. at 419. Reference to dogs "known as" a particular breed leaves "a reader of ordinary intelligence confused about the breadth of the ordinance's coverage," and gives improperly broad discretion to enforcement personnel who are free to make the "ad hoc and subjective determinations condemned in Grayned." Id. The court found that there was an unacceptable risk of arbitrary and discriminatory application of this

portions of the ordinance. Id. . Similarly, the portion of the Winthrop ordinance which refers to breeds of dogs "commonly referred to as belonging to the 'pit bull' variety of terrier" must be found void for vagueness.

2. The Winthrop ordinance is facially vague because it bans a "Pit Bull Terrier," which is not a recognized breed.

In addition to banning two recognized breeds of dogs, the Winthrop ordinance bans the "Pit Bull Terrier." Winthrop Municipal Code § 6.04.090(B)(1)(c). Neither the American Kennel Club or the United Kennel Club, the two largest dog breed registries in the United States, recognize a breed of a dog called a "Pit Bull Terrier." There is nothing in the Winthrop ordinance which informs an ordinary person of the common characteristics of a Pit Bull Terrier or Pit Bull Terrier mix. Therefore, an ordinary person of average intelligence cannot determine whether their dog is regulated under the ordinance, in violation of Grayned and Kolender, and enforcement personnel are given improperly broad discretion. Thus, the Winthrop ordinance is facially vague.

D. The Winthrop ordinance is vague as applied because there is no evidence that Zoe or Starla are of the "pit bull" variety of terrier.

The District Court based its dismissal of Richardson's challenge that the Winthrop ordinance was impermissibly vague as applied to him on evidence that Zoe and Starla are "muscular dogs with large heads and short coats" and thus must be of the "'pit bull' variety of terrier" subject to the ban. Memorandum Opinion at 10. Appendix 1 illustrates the difficulty of identifying breeds of dogs based on ambiguous definitions of appearance. All twenty-five purebred dogs pictured are "muscular dogs with large heads and short coats," yet only one of these dogs is of a breed prohibited by the Winthrop ordinance.

Cases of mistaken identity abound. Hugh Smith owned three Cane Corso dogs which were impounded by the city of Toledo because they were determined to be of a breed

"commonly known as pit bulls" and therefore considered "vicious" under the Ohio Revised Code and the Toledo Municipal Code. State of Ohio/City of Toledo v. Hugh Smith, Case Number CRB 09 16531 (Toledo Municipal Court, 2010). Because Smith had documentation showing that his dogs belonged to the Cane Corso breed, and showing that Cane Corsos are not "commonly known as Pit Bulls," the court held that the classification by the dog warden was unreasonable and arbitrary and that the law was unconstitutional as applied to the defendant. Id. at 2-3.

In this case, Richardson acquired Zoe and Starla as puppies from a rescue organization which had identified them as mixed breed dogs. The puppies were originally strays and therefore their ancestry was unknown. Richardson testified that he acquired the dogs because they were cute, and that they were friendly and well-socialized even in the company of his young nieces and nephews and. He also testified that his veterinarian had provided him with an affidavit stating that his dog was a mixed breed. Richardson submitted evidence that, because his dogs were always well-behaved and exhibited none of the problematic behavioral tendencies attributed to "pit bull" types of terriers, he had no reason to consider whether they might be considered to be the type of dogs banned from the City. The Winthrop ordinance lists no professional breed standard or illustration and Richardson had no reason to believe that his two dogs fell within the type regulated. He also has no reliable means to ascertain their genetic make-up as DNA analysis is not reliable. Indeed, the only evidence produced to indicate that Zoe and Starla fall under the statute is that, "based on appearance," they are "muscular" and have "large heads and short coats" and thus they are "pit bulls." This description, however, would also apply to a number of breeds, including the notably gentle Bull Terrier and American

Bulldog. The Winthrop ordinance allows City officials unlimited subjective discretion and permits arbitrary enforcement, and is therefore unconstitutional as applied to Richardson.

E. Pursuant to the doctrine of *stare decisis*, the Supreme Judicial Court of Massachusetts' decision in American Dog Owners Association v. City of Lynn is controlling law and the Winthrop ordinance must be found to be void for vagueness.

Pursuant to the rule of *stare decisis*, the Supreme Judicial Court of Massachusetts' decision in American Dog Owners Association v. City of Lynn is binding law. Federal courts should "in all instances follow the law of the state with respect to the construction of state statutes. Where that law has been determined by the courts of last resort their decisions are stare decisis, and must be followed" irrespective of another court's opinion as to what the law ought to be. Kehaya v. Axton, 32 F. Supp. 266, 268 (S.D.N.Y. 1940).

This rule was recognized by the Colorado District Court in American Canine Foundation v. Aurora when it found that the Colorado Supreme Court decision in Colorado Dog Fanciers v. City of Denver, 820 P.2d 644 (Colo. 1991) was controlling law and thus that a similar ordinance did not deny dog owners substantive due process. Order on Summary Judgment, American Canine Foundation v. City of Aurora, 618 F. Supp. 2d 1271 (D. Colo. 2008) (No. 06-CV-1510) 2008 WL 2229943, at *4. Following the same principle, but yielding a different result, the District Court here erred in not acknowledging that the Supreme Judicial Court of Massachusetts' decision in Lynn is controlling, and therefore that the Winthrop ordinance is void for vagueness.

In 1989, the Supreme Judicial Court of Massachusetts ruled that an ordinance regulating pit bull breeds enacted by the City of Lynn was unconstitutional. American Dog Owners Association, Inc. v. City of Lynn, 404 Mass. 73, 533 N.E.2d 642 (Mass. 1989). The case was an appeal from a judgment upholding two of three ordinances restricting ownership of "Pit Bulls" within the city limits. Id. at 74. By the time of the appeal, a fourth ordinance had been enacted

which effectively mooted the case. Id. at 78. However, to "conserve judicial resources and to guide future conduct of the parties," the court chose to both affirm the lower court's finding that the third ordinance was void for vagueness and to apply principles from the lower court record to find the fourth ordinance also void. Id.

The third Lynn ordinance defined a "Pit Bull" as an American Staffordshire, Staffordshire Pit Bull Terrier, Bull Terrier or any mixture thereof," and imposed a fine and possible banishment of the dog. Id. at 75. The court found that there was no scientific means "by blood, enzyme, or otherwise, to determine whether a dog belongs to a particular breed, regardless of whether 'breed' is used in a formal sense or not." Id. at 76. Even more troubling was the finding that law enforcement personnel used both conflicting and subjective standards to determine whether a particular dog conformed to a "Pit Bull" breed. Id. Additionally, testimony by the city veterinarian revealed that he relied on owners' identification of his or her dog and had no medical basis with which to dispute an owner's identification. Id. Based on these findings the Supreme Judicial Court affirmed the lower court's ruling that the provisions of the third ordinance were unconstitutional and void for vagueness. Id. at 79.

The fourth ordinance removed all reference to specific breeds and banned "Pit Bulls, or "dogs known as Pit Bulls, stating that "[n]o formal breed designation is intended by the use of the term 'Pit Bull,' or its plural 'Pit Bulls'. The term is employed to the full extent of its common understanding and usage." Id. at 77 n.8. The court concluded that the fourth ordinance provided even less guidance for dog owners than the third ordinance, leaving law enforcement with unlimited discretion and complete reliance on subjective speculation in deciding whether a particular dog is one "commonly understood" to be a "Pit Bull." Id. at 80.

The language in the Winthrop ordinance is almost identical to the language of the third

Lynn ordinance that was found to be void for vagueness. The Winthrop ordinance bans "any of the breeds commonly referred to as belonging to the "pit bull" variety of terrier," including "American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier," or "*mixtures thereof*" (emphasis added) Winthrop Municipal Code § 6.04.090(B)(2). The Lynn ordinance defined a "Pit Bull" as "American Staffordshire, Staffordshire Pit Bull Terrier, Bull Terrier or any *mixture thereof*." (emphasis added). American Dog Owners Association, Inc. v. City of Lynn, 404 Mass. at 75.

Because the ordinance in Lynn was found to be facially vague, and under the principle of *stare decisis*, the decision in Lynn is controlling law and the Winthrop ordinance must be found to be facially vague.

III. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS ERRED WHEN IT RULED THAT WINTHROP MUNICIPAL CODE SECTION 6.04.090 DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

The District Court erred when it ruled that the Winthrop ordinance does not violate the substantive due process principles embedded in the Fourteenth Amendment. Appellant argues that a genuine issue of material fact exists whether the relationship between a dog owner and his or her companion dog rises to the level of a fundamental right that may not be infringed by government unless the relevant regulations are narrowly tailored to serve a compelling state interest, and that the Winthrop ordinance is not so narrowly tailored. Citizens, and increasingly courts, view companion animals as members of the family, and because the Winthrop ordinance is not narrowly tailored to serve a compelling government interest, it imposes an unconstitutional burden on this fundamental right.

Even if the relationship between a dog owner and his or her companion dog does not rise to the level of a fundamental right, a genuine issue of material fact exists whether the ordinance

even meets the lesser "reasonable fit" requirement applicable under substantive due process decisions when government limits non-fundamental rights. The Winthrop ordinance is not "rationally" related to a legitimate government interest because it is based on outdated, incorrect stereotypes, and because similar laws have been shown to have no impact on reducing the number of dog bite injuries.

A. The relationship between a dog owner and his or her companion animal rises to the level of a fundamental right.

As the District court properly recognized, if a legislative enactment burdens a "fundamental right," the infringement must be narrowly tailored to serve a compelling government interest. Washington v. Glucksberg, 521 U.S. 702, 721 (1997). However, the court, in its grant of summary judgment, mistakenly found that there is no issue of material fact about whether the relationship between a dog owner and his or her companion rises to the level of a fundamental right.

The bond between a dog owner and his or her companion dog can be as strong and as personal as the bond between family members. Sonia S. Waisman & Barbara R. Newell, Recovery of Non-Economic Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend, 7 Animal L. 45, 62 (2001) ("it is simply [an] inescapable reality that a significant portion of our society ... considers animal companions to be part of the American family"); Debra Squires-Lee, In Defense of Floyd: Appropriately Valuing Companion Animals in Tort, 70 N.Y.U. L. Rev. 1059, 1069 (1995) ("The deep emotional attachment people feel for their companion animals embodies itself in a grief which 'can be the same in form and intensity as the grief which is felt when a human friend or relative dies"') (quoting William Kay et al., Thanatology: Death of a Pet, in Dynamic Relationships In Practice: Animals in the Helping Professions 107, 109 (Phil Arkow ed. 1984)).

In a 2004 American Animal Hospital Association survey, ninety-three percent of pet owners stated that they would be "likely to risk their own life for their pet." Press Release, American Animal Hospital Association, It's Official, Pets Rule the Roost: National Survey Finds Pet Owners Bend Household Rules For Their Furry Friends, November 29, 2004. According to a 2007 survey by the American Veterinary Medical Association, over forty-nine percent of companion animal owners viewed their companion animals as family, while only two percent of those surveyed viewed their companion animals as property. Human-Animal Bond Boosts Spending on Veterinary Care, American Veterinary Medical Association, JAVMA News, Jan. 1, 2008, http://www.avma.org/onlnews/javma/jan08/080101a.asp (last visited January 20, 2011). This change in attitude has developed over the last thirty years, evidencing a major shift in the public's attitude toward companion animals. Id.

There is also increasing recognition from courts that "a great number of people in this country today treat their pets as family members. Indeed, for many people, pets are the only family members they have." Bueckner v. Hamel, 886 S.W.2d 368, 378 (Tex. App. 1994). ("The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live.") The death of a beloved dog is a "a grievous loss." Brousseau v. Rosenthal, 110 Misc.2d 1054, 1056, 443 N.Y.S.2d 285 (N.Y. Civ. Ct. 1980). An ordinance such as Winthrop Municipal Code § 6.04.090 that banned any other family member based on appearance or genetic makeup would clearly be found to be an unconstitutional intrusion on fundamental personal rights. No lesser a court than the United States Supreme Court has declared that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, *family relationships*, child rearing, and education. (emphasis added) Lawrence v. Texas, 539 U.S. 558,

574 (2003) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)). Such family relationships should extend to the companion animals that form a part of our families, and thus the Winthrop ordinance implicates a fundamental right. It is properly a matter for trial, and not for summary judgment, to determine if the Winthrop ordinance is sufficiently narrowly tailored.

B. Alternatively, the Winthrop ordinance does not bear a rational relation to a legitimate government interest.

If an enactment burdens some lesser right, the infringement must bear a rational relation to a legitimate government interest. Washington v. Glucksberg, 521 U.S. at 728. Where the existence of a rational basis for legislation whose constitutionality is attacked depends on facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry. Bolden v. City of Topeka, No. 02-2635-KHV, 2007 WL 2746683 at *7 (D. Kan. September 19, 2007) (quoting United States v. Carolene Products Co., 304 U.S. 144, 153 (1938)). Further, the "constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." United States v. Carolene Products Co., 304 U.S. at 153 (citing Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924)).

Although the City may have a legitimate interest in animal control and dogs may be taken and destroyed under the state's police power without offending the constitutional rights of their owners, the District Court, in its grant of summary judgment, mistakenly found that there is no issue of material fact about whether the Winthrop ordinance bears a "rational" relationship to that interest.

1. The Tenth Circuit found that a ordinance like the Winthrop ordinance was not rational as a matter of law.

In a substantially similar case, the Tenth Circuit found that the contested ordinance was not rational as a matter of law and that plaintiffs had alleged a substantive due process violation sufficient to survive a motion to dismiss for failure to state a claim. Dias v. City and County of Denver, 567 F.3d 1169 (10th Cir. 2009). While acknowledging that that Denver had a legitimate interest in animal control – the protection of health and safety of the public, the Dias plaintiffs alleged that the means by which Denver chose to pursue that interest was irrational, because of a lack of evidence that "pit bulls" as a "breed" pose a threat to public safety or constitute a public nuisance. 567 F.3d at 1183. The City of Denver in turn argued that, because courts across the country had rejected substantive due process challenges to such bans, the Denver ordinance must be rational *as a matter of law*. (emphasis added) Id.

The 10th Circuit Court disagreed, stating that Denver's argument "misconceives the nature of the plaintiffs' challenge." Id. The court found support for plaintiff's argument that "although pit bull bans sustained twenty years ago may have been justified by the then-existing body of knowledge, the state of science in 2009 is such that the bans are no longer rational." Pointing to the language in the AKC and UKC breed standards themselves, the court ruled that "[w]ithout drawing factual inferences against the plaintiffs, the district court could not conclude at this early stage in the case that the Ordinance was rational as a matter of law." Id. at 1183-84. Similarly, without construing facts against the plaintiff, the District Court here could not conclude that the Winthrop ordinance was rational as a matter of law, and the parties are entitled to a trial.

2. What may have been rational twenty-three years ago is no longer rational.

Although the Winthrop ordinance may have been justified by the then-existing body of knowledge when it was passed twenty-three years ago, the state of science in 2011 is such that the ordinance may no longer be rational. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." Lawrence v. Texas, 539 U.S. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).

The history of our law is replete with examples of stereotypes that fell with the passage of time. In Dred Scott v. Sandford, the United States Supreme Court declared that "[a] free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a 'citizen' within the meaning of the Constitution of the United States." Dred Scott v. Sandford, 60 U.S. 393 (1856) at **1. In People v. Hall, the Supreme Court of California ruled that that the testimony of a Chinese man who witnessed a murder by a white man was inadmissible, largely based upon the prevailing opinion that the Chinese were "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference." People v. Hall, 4 Cal. 399, 405 (Cal. 1854), *available at* http://www.uchastings.edu/racism-race/people-hall.html (last visited January 21, 2011). And in Motion to admit Miss Lavinia Goodell to the Bar of this Court, the Wisconsin Supreme Court determined that women should not be allowed to practice law in part because "[t]he peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling" were incompatible with the "decision, firmness, and vigor" that men brought to the practice of law. Motion to Admit Miss Lavinia Goodell to the Bar of this Court, 39 Wis. 232, 237-45 (Wis. 1875).

The Winthrop ordinance is based on a outdated, inaccurate stereotype: if a dog is a so-called "pit bull," or a mixture of some type of "pit bull," it must be vicious and dangerous. Like almost all stereotypes, this one is false. It is contrary to the weight of scholarly research and opinion. *See, e.g.*, A Community Approach to Dog Bite Prevention, 218 Journal of the American Veterinary Medical Association 1732, 1736 (June 1, 2001).

In Germany, a study was done to assess the temperaments of dogs belonging to breeds regulated by a breed ban in Lower Saxony. Test results of 415 dogs affected by the legislation were compared to those of Golden Retrievers. No difference was noted and the law in Lower Saxony was changed. SA Ott et al., Is There a Difference? Comparison of Golden Retrievers and Dogs Affected by Breed Specific Legislation Regarding Aggressive Behavior, 2 Journal of Veterinary Behavior 134 (May 2008). The perception that "pit bulls" are vicious is even contradicted by language in the breed standards themselves which describe the American Pit Bull Terrier as "extremely friendly, even with strangers," and notes that "aggressive behavior toward humans is uncharacteristic of the breed..." Opinion at 9. The American Kennel Club standard for the American Staffordshire Terrier states that "a people-oriented dog that thrives when he is made part of the family." AKC Meet the Breeds: American Staffordshire Terrier, American Kennel Club, http://www.akc.org/breeds/american_staffordshire_terrier/ (last visited January 24, 2011).

Without drawing factual inferences against the plaintiffs, the District Court could not conclude that the Ordinance was rational as a matter of law, and thus summary judgment was inappropriate. Because there is a genuine issue of material fact of whether the prohibited animals pose a threat to public safety or constitute a public nuisance, or whether a particular set of "facts" which may have justified breed bans in the past "have ceased to exist," the District

Court erred in granting summary judgment.

3. Similar breed bans have been shown to be ineffective.

Breed bans such as the Winthrop ordinance are not rational for the simple reason that they have been shown to be ineffective in reducing dog bite injuries.

In Aragon, Spain, an analysis of medically attended dog bites before and after the addition of a list of dangerous breeds to existing dangerous dog legislation did not indicate any change in frequency of bites. Patronek at 790 (citing B. Rosado et al. Spanish dangerous animals act: effect on the epidemiology of dog bites, 2 Journal of Veterinary Behavior: Clinical Applications and Research 166 (September 2007)).

The Toronto Humane Society surveyed health departments throughout the province of Ontario, and reported that the breed ban enacted in 2005 had not produced a reduction in dog bites. New Study Explains Why Breed Specific Legislation Does Not Reduce Dog Bites, National Canine Research Council, Dog News, October 1, 2010, http://nationalcanineresearchcouncil.com/dog-news/ (last visited January 20, 2011). In Winnipeg, Manitoba, after the city banned one type of dog, dog bites actually rose, just involving other types of dogs. Id.

The Netherlands repealed its breed specific legislation in 2008 because rates of dog bite incidents had not gone down since the law came into effect. Associated Press, Dutch Government to Lift 25-year Ban on Pit Bulls, June 10, 2008. Italy repealed its breed specific legislation in April of 2009, because it was ineffective. Jane Berkey, President Animal Farm Foundation, Inc., Dog Breed Specific Legislation: The Cost to People, Pets and Veterinarians, and the Damage to the Human-Animal Bond, Proceedings of Annual AVMA Convention, (July 11-14, 2009). Italy has since replaced its breed ban with a law making owners more responsible for their dogs' training and behavior. Patronek at 790.

Because there is a genuine issue of material fact of whether ordinances such as Winthrop Municipal Code § 6.04.090 are effective and thus rationally related to a legitimate government purpose, the District Court erred in granting summary judgment.

4. Other courts have found a legitimate factual dispute as to the alleged inherently dangerous nature of "pit bulls."

In American Canine Foundation v. City of Aurora, a United States District Court rejected a request for summary judgment, finding that there was sufficient contradictory information about the inherent danger of "pit bulls" to preclude judicial notice. Order on Summary Judgment, American Canine Foundation v. City of Aurora, 618 F. Supp. 2d 1271 (D. Colo. 2008) (No. 06-CV-1510) 2008 WL 2229943, at *9. The court cited other cases where courts have found that there was insufficient evidence that "pit bull" dogs or puppies are inherently dangerous. *See* Carter v. Metro North Assocs., 255 A.D.2d 251, 251-52, 680 N.Y.S.2d 239 (N.Y. App. Div. 1998) ("On the subject of the propensities of pit bull terriers as a breed there are alternative opinions that preclude judicial notice such as was taken by the Court. While many sources, including the authorities relied upon by the [ ] court, assert the viciousness of pit bulls in general, numerous other experts suggest that, at most, pit bulls possess the *potential* to be trained to behave viciously…"). *See also* Zuniga v. San Mateo Dept. of Health Serv., 218 Cal. App. 3d 1521, 1532-33, 267 Cal. Rptr. 755 (Cal. Ct. App. 1990) (finding no evidence that puppies born to a female dog trained for dog fighting were "congenitally dangerous" animals – "Commentators have noted that a dog's propensity to bite results from a combination of many factors, including a genetic predisposition towards aggression, lack of early socialization with people, specific training to fight, the quality of care provided by the owner, and the behavior of the victim….Thus a dog whose genetic predisposition is to be aggressive may present little or no danger if the dog is well-trained and reasonably supervised, whereas an animal with little innate

tendency to bite may become dangerous if improperly trained, socialized, supervised, treated, or provoked.")

This view is in agreement with experts who state that heredity is only one of five factors, in addition to early experience, early socialization and training, behavioral and medical health, and victim behavior, that may influence a dog's propensity to bite in a given situation. Patronek at 790 (citing AVMA Dog Bite Prevention at 1736). If this were not the case, it would be impossible to account for the fact that of the forty-nine "pit bull" dogs taken into government custody following the raid of Michael Vick's Bad Newz Kennels, forty-seven were deemed suitable for placement in foster homes, permanent homes or dog sanctuaries.[3] Rebecca J. Huss, Lessons Learned: Acting as Guardian/Special Master in the Bad Newz Kennels Case, 15 Animal L. 69 (2008).

Because there is a genuine issue of material fact whether "pit bull" breeds are inherently dangerous and thus whether Winthrop's ordinance is rationally related to a legitimate government purpose, the District Court erred in granting summary judgment.

5. Although an owner's interest in his or her dog may be subject to the state's police power, the city of Winthrop has not sufficiently asserted the safety basis as the justification for the ordinance.

Although an owner's interest in his or her dog may be subject to the state's police power, the city of Winthrop has not sufficiently asserted the safety basis as the justification for the ordinance. In articulating the safety basis for which it claims a need for the disputed ordinance, the City of Winthrop relies almost exclusively on a recitation of stereotypes of alleged breed characteristics, such as the "stubbornness," "aggressiveness," and "gameness" of "pit bulls." Memorandum opinion at 13-14. But whether this constitutes sufficient grounds to establish a rational relationship to a legitimate legislative goal or purpose is a matter of fact, not of law, and

[3] Only one dog was euthanized for aggression issues; one was euthanized for medical reasons.

thus is not appropriate for summary judgment. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124 (1978); *See also* Order on Summary Judgment, American Canine Foundation v. City of Aurora, 618 F. Supp. 2d 1271, 2008 WL 2229943, at *7. In Aurora, the court denied the defendants' motion for summary judgment by contrasting the evidence presented by Aurora regarding the perceived need for the legislation against what other courts had found sufficient to establish a safety basis that justifies such an ordinance. *See* Colorado Dog Fanciers v. City of Denver, 820 P.2d at 652; Garcia v. Village of Tijeras, 108 N.M. 116, 118-19, 767 P.2d 355 (N.M. Ct. App. 1988). It is a disputed matter of material fact whether the justification for the ordinance articulated by the City of Winthrop is sufficient to establish the safety basis necessary to uphold the ordinance, and thus the District Court erred in granting summary judgment.

CONCLUSION

The District Court erred when in ruled that the Winthrop ordinance is not unconstitutionally vague on its face or as applied to the Plaintiff, and that it does not violate substantive due process under the Fourteenth Amendment. Summary judgment is only appropriate when there is no genuine issue as to any material fact, and is not a substitute for a trial. The District Court erred in not acknowledging the substantial number of disputed issues of material facts in the case, and in not construing disputed facts in the light most favorable to the plaintiff.

Accordingly, the decision below granting the City of Winthrop's motion for summary judgment should be reversed and the case should be remanded to the District Court for further proceedings consistent with this Court's decision.

Appendix 1

FIND THE PITBULL

Only one of the pictures below features the real American PitBull Terrier. Take the test to see if you can find it. To find the breed of a dog, click on image. Note there are no mixes or rescue dogs of unknown background who's breed could be debated. All dogs have been picked from breeders' websites and should be good representatives of their breed.

When you are done, ask your family and friends to take to test and watch the results. For many people, a Pit Bull is a a big headed dog, or a dog with cropped ears. For some it's a brindle dog, a big, stocky dog, or one with an eye patch.

Quite often dogs that attack are identified as pit bulls when they are not. There are 20+ breeds that are commonly incorrectly identified as pit bulls. Visit **Understand-a-bull** for more information.


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Guide: 1. Boxer; 2. Dogue De Bordeau; 3. Alapaha blue blood bulldog; 4. Great Swiss Mountain Dog; 5. Visla; 6. Rhodesian Ridgeback; 7. Dogo Argentino; 8. Labrador Retriever; 9. BullMastiff; 10. Jack Russell Terrier; 11. Fila Brasileiro; 12. Rottweiler; 13. Presa Canario; 14. American Bulldog; 15. Cane Corso; 16. American Pit Bull Terrier; 17. Patterdale Terrier; 18. Olde English Bulldogge; 19. Catahoula; 20. Bull Terrier; 21. Black Mouth Cur; 22. Alano Espanol; 23. Boerboel; 24. Ca De Bou; 25. Thai Ridgeback. http://www.pitbullsontheweb.com/petbull/findpit.html