

No. 10cv00416

In the
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

2011

Quinton RICHARDSON,

Plaintiff/Appellant,

v.

CITY OF WINTHROP, MASSACHUSETTS,

Defendant/Appellee.

Appeal from the United States District Court
for the District of Massachusetts

BRIEF FOR THE APPELLEE

Team # 17

ISSUES PRESENTED FOR REVIEW

The issues on review are: (1) whether an ordinance in the Winthrop Municipal Code defining “pit bulls” as vicious is unconstitutionally vague on its face or as applied to Appellant, Richardson, in violation of his substantive due process rights, and whether the Code is facially overbroad; and (2) whether the Ordinance declaring all “pit bulls” vicious and banning them from the City violates Richardson’s substantive due process rights under the Fourteenth Amendment of the U.S. Constitution.

TABLE OF CONTENTS

QUESTION PRESENTEDi

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT.....2

ARGUMENT.....3

 I. STANDARD OF REVIEW OF SUMMARY JUDGMENT3

 II. REVIEW ON APPEAL FOR DUE PROCESS CHALLENGES UNDER THE FOURTEENTH
 AMENDMENT TO A STATUTE OR ORDINANCE.....5

 A. THE DISTRICT COURT PROPERLY REJECTED APPELLANT’S
 CLAIM THE ORDINANCE WAS UNCONSTITUTIONALLY VAGUE
 BOTH AS APPLIED AND FACIALLY5

 i. *The Ordinance does not suffer from being facially
 vague, and therefore defeats Richardson’s present
 challenge.*.....6

 ii. *Neither does the Ordinance suffer from being
 vague as applied to Richardson, because he knew
 the Ordinance applied to one dog, and thus had
 notice it applied to the littermate.* 12

 B. THE ORDINANCE DOES NOT IMPLICATE THE DOCTRINE OF
 OVERBREADTH UNDER THE FOURTEENTH AMENDMENT,
 BECAUSE THE DOCTRINE APPLIES ONLY TO INSTANCES
 WHERE A PROTECTED RIGHT IS AT ISSUE. 14

 III. THE DISTRICT COURT WAS CORRECT IN DISMISSING APPELLANT’S SUBSTANTIVE DUE
 PROCESS CLAIM AND FOLLOWING WELL-ESTABLISHED CASE LAW 15

 A. RICHARDSON RAISED NO CONSTITUTIONALLY PROTECTED
 RIGHTS, SO THIS COURT SHOULD ONLY APPLY RATIONAL
 BASIS REVIEW 16

 B. RICHARDSON FAILED TO DEMONSTRATE THE ORDINANCE
 BORE NO RATIONAL RELATIONSHIP TO THE CITY’S
 LEGITIMATE INTERESTS 19

 C. CLASSIFYING PROHIBITED CONDUCT ON THE BASIS OF DOG
 BREEDS DOES NOT IMPLICATE AN EQUAL PROTECTION
 VIOLATION23

CONCLUSION.....25

TABLE OF AUTHORITIES

CASES

Am. Canine Found. v. City of Aurora, 618 F. Supp. 2d 1271 (D. Colo. 2009)..... 21, 22

Am. Canine Found. v. Sun, No. C-06-4713 MMC, 2007 WL 878573
(N.D. Cal. Mar. 21, 2007) 22, 25

Am. Dog Owners Ass’n v. City of Des Moines, 469 NW.2d 416 (Iowa 1991)..... 11–12

Am. Dog Owners Ass’n v. City of Lynn, 404 Mass. 73, 533 N.E.2d 642
(Mass. 1989) 10

Barr v. Galvin, 626 F.3d 99 (1st Cir. 2010) 8

Blair v. Forehand, 100 Mass. 136, 1868 WL 5523 (Mass. 1868)..... 16, 17–18, 21

Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985)..... 6

Bukuras v. Mueller Group, LLC, 592 F.3d 255 (1st Cir. 2010) 4

City of Pagedale v. Murphy, 142 S.W.3d 775 (Mo. Ct. App. 2004) 11

Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414,
204 N.E.2d 281 (1965)..... 20

Colorado Dog Fanciers v. City and County of Denver,
820 P.2d 644 (Colo. 1991)..... 11, 15

Cote-Whitacre v. Dep’t Pub. Health, 446 Mass. 350,
844 N.E.2d 623 (Mass. 2006)..... 20

Crowley v. Christensen, 137 U.S. 86 (1890)..... 16

Dias v. City and County of Denver, 567 F.3d 1169 (10th Cir. 2009)..... 8

Dog Fed’n of Wisconsin, Inc. v. City of South Milwaukee, 178 Wis.2d 353,
504 N.W.2d 375, (Wis. Ct. App. 1993)..... 12, 15

Donovan v. City of Haverhill, 311 F.3d 74 (1st Cir. 2002)..... 5

Emhart Indus. Inc. v. Century Indem. Co., 559 F.3d 57 (1st Cir. 2009)..... 4

Enquist v. Oregon Dept of Agric., 553 U.S. 591 (2008) 23

Exxon v. Governor of Maryland, 437 U.S. 117 (1978)..... 16, 17, 20

FCC v. Beach Comm., 508 U.S. 307 (1993) 19, 24

Fischer v. St. Louis, 194 U.S. 361 (1904) 16, 24

Garcia v. Tijeras, 108 N.M. 116, 767 P.2d 355 (N.M. Ct. App. 1988)..... 12, 22, 25

Gonzales v. Oregon, 546 U.S. 243 (2006) 16

Goodridge v. Dep’t Pub. Health, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003)..... 20

Grayned v. City of Rockford, 408 U.S. 104 (1972)..... 6

Greenwood v. City of North Salt Lake, 817 P.2d 816 (Utah 1991) 12

Hearn v. City of Overland Park, 244 Kan. 638, 772 P.2d 758 (Kan. 1989)..... 15

<i>Holder v. Humanitarian Law Project</i> , __ U.S. __, 130 S.Ct. 2705 (2010).....	13
<i>Holt v. City of Maumelle</i> , 307 Ark. 115, 817 S.W.2d 208 (Ark. 1991).....	12
<i>IMS Health Inc. v. Ayotte</i> , 550 F.3d 42 (1st Cir. 2008)	4
<i>Insituform Techs., Inc. v. Am. Home Assur. Co.</i> , 566 F.3d 274 (1st Cir. 2009).....	4
<i>Kimel v. Florida Bd. of Regents</i> , 528 U.S. 62 (2000).....	24
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	20
<i>Massachusetts Bd. of Retirement v. Murgia</i> , 427 U.S. 307 (1976)	23
<i>Massachusetts Museum of Contemporary Art Found., Inc.</i> <i>v. Buchel</i> , 593 F.3d 38 (1st Cir. 2010)	3–4
<i>Munn v. Illinois</i> , 94 U.S. 113 (1876)	16, 17
<i>Nebbia v. New York</i> , 291 U.S. 502 (1934)	20
<i>New York v. Ferber</i> , 458 U.S. 747, 102 S.Ct. 3348 (1982).....	14
<i>New York City Friends of Ferrets v. City of New York</i> , 876 F. Supp. 529 (S.D.N.Y. 1995).....	22, 23, 25
<i>Range v. Brubaker</i> , No. 3:07 CV 480, 2009 WL 857499 (N.D. Ind. Mar. 31, 2009).....	22
<i>Richardson v. City of Winthrop</i> , No. 10cv00416 (D. Mass. Aug. 28, 2010)	<i>passim</i>
<i>Schall v. Martin</i> , 467 U.S. 253 (1984).....	14
<i>Scottsdale Ins. Co. v. Torres</i> , 561 F.3d 74(1st Cir. 2009).....	4
<i>Sentell v. New Orleans & Carrollton R.R. Co.</i> , 166 U.S. 698 (1897)	4, 14, 16, 18–19, 21
<i>Starkey v. Chester Twp.</i> , 628 F. Supp. 196 (E.D. Pa. 1986).....	25
<i>State v. Peters</i> , 534 So.2d 760 (Fla. Dist. Ct. App. 1988).....	12
<i>Stone v. Mississippi</i> , 101 U.S. 814 (1880).....	16
<i>Sullivan v. City of Springfield</i> , 561 F.3d 7 (1st Cir. 2009).....	4
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	16
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938)	24
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	15
<i>United States v. Sampson</i> , 486 F.3d 13 (1st Cir. 2007)	4, 20
<i>United States v. Stevens</i> , __ U.S. __, 130 S.Ct. 1577 (2010)	14
<i>United States v. Williams</i> , 553 U.S. 285 (2008)	6
<i>URI Student Senate v. Town Of Narragansett</i> , __ F.3d __, __, 2011 WL 17610 (1st Cir. 2011).....	5
<i>Vanatar v. Village of South Point</i> , 717 F. Supp. 1236 (S.D. Ohio 1989)	9, 15, 21, 22

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982)..... 5, 7, 13, 14

Washington v. Glucksberg, 521 U.S. 702 (1997) 16, 17

CONSTITUTIONS, STATUTES AND RULES

U.S. CONST. amend. V..... 16

U.S. CONST. amend. XIV..... 6, 16, 23

FED. R. CIV. P. 56(c)(2).....4

MASS. GEN. LAWS ch. 140 § 147 (2002)..... 1

DENVER, COLO., REV. MUN. CODE § 8-55.....8

PAGEDALE, MO., ORDINANCE 1169..... 11

VILLAGE OF SOUTH POINT, OHIO, Ordinance 87-6.....9

WINTHROP, MASS., MUN. CODE § 6.04.090.....*passim*

OTHER MATERIALS

American Kennel Club, *AKC Meet the Breeds®: Staffordshire Bull Terrier*,
http://www.akc.org/breeds/staffordshire_bull_terrier/ (last visited Jan. 21, 2011)7

United Kennel Club, *American Pit Bull Terrier (Revised November 1, 2008)*,
<http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008>
(last visited Jan. 21, 2011)..... 7–8

STATEMENT OF THE CASE

In 2005, Appellant, Quinton Richardson, adopted two young female dogs from a rescue organization. *Richardson v. City of Winthrop*, No. 10cv00416 at *4 (D. Mass. Aug. 28, 2010).¹ The organization had found the two dogs under a nearby park bench. *Id.* The organization believed the dogs to be littermates based on their age when found and their behavior toward one another—a belief Richardson assumed to be true. *Id.* At the time Richardson adopted the dogs, the organization labeled them “mixed breed” because their true breed could not be determined. Richardson’s veterinarian later adopted this “mix” definition. *Id.*

In August 2009, a Winthrop employee observed one of Richardson’s dogs inside his home. *Id.* at *5. The employee notified animal control officers that Richardson may be in possession of a pit bull. Animal control officers later seized the dog, pursuant to a 1988 Ordinance which banned all dogs of the breed type “pit bull.” *Id.* The City held a hearing, as provided for in the Ordinance, to determine whether the dog was a pit bull. *Id.* At the hearing, the City Manager determined that Richardson’s dog fell within the type regulated. *Id.* Pursuant to a Massachusetts enforcement law and the Winthrop Ordinance, the City Manager gave Richardson ten days to relocate the dog outside the City. *Id.*; MASS. GEN. LAWS ch. 140 § 147 (2002). Richardson appealed to the state trial court, which affirmed the City Manager’s decision. *Id.* Richardson failed to find a suitable home within the ten-day period, and in December of 2009 the city euthanized the dog. *Id.*

Thereafter, Richardson initiated an action in Federal District Court for the District of Massachusetts to protect his remaining dog. *Id.* at *6. Richardson alleged that the City violated his substantive due process rights by passing and enforcing a vague and overbroad statute which

¹ Note that page numbers for *Richardson v. City of Winthrop*, No. 10cv00416 (D. Mass. Aug. 28, 2010) come from the Nat’l Animal Law Competitions, *2011 Appellate Moot Court Competition: Memorandum Opinion* (2011) <http://www.lclark.edu/live/files/6563-2011-nalc-mem-opinion> (last visited Jan. 21, 2011).

infringed his right to keep his dog as a pet. *Id.* Richardson sought injunctive relief and damages under United States Code title 42 section 1983. *Id.* at *2. The City moved for summary judgment, and the District Court awarded it. *Id.* at *6. Richardson now appeals. *Id.*

SUMMARY OF ARGUMENT

On appeal from the federal district court, Richardson argues the ordinance violates his rights protected by the Fourteenth Amendment because the ordinance is unconstitutionally vague both facially and as applied to the present facts; is overbroad; and infringes his substantive due process rights and the equal protection clause.

On the first claim, Richardson argues the Winthrop Ordinance is unconstitutionally vague in defining pit bulls. The Ordinance provides in part:

(1) Vicious dogs are defined as dogs who unprovoked have attacked or bitten a human being or animal or have a known propensity, tendency or disposition to attack unprovoked, to cause injury or to endanger the safety of human beings or animals.

....

(3) The definition of vicious dog also includes dogs who are trained or kept for dogfighting or 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. No person shall own, keep or have the custody, care or control of any of these breeds or mixtures thereof in the town.

WINTHROP, MASS., MUN. CODE § 6.04.090 (A)(1), (3). The Ordinance imposes strict requirements for any dog owner who is found to have in his or her possession an animal classified as vicious. *See* WINTHROP, MASS., MUN. CODE § 6.04.090 (H) (requiring owners to—at a minimum—keep dogs falling under the statute within fenced yards, with a fence height of at least six feet) (I) (requiring muzzling for dogs under the statute) (J) (requiring owner to obtain liability insurance for any prospective attack by an animal) (K) (requiring owners to post warnings of the dog). However, before the City can institute any restrictions on a vicious dog, a

complaint must reach the town council, and the town manager must “determine whether the dog in question is a nuisance, vicious or potentially vicious dog.” *Id.* § 6.04.090 (D) (the Ordinance provides that “the animal's owner will be notified of the hearing by certified mail. . . . [and] [t]he hearing must be open to the public and must be held within two weeks of the service of notice upon the owner or keeper of the dogs.”). The district court substantiated its reasoning that Richardson had notice his dogs fell under the defined category of animals because their “characteristics were ample to support” such a finding. *Richardson*, No. 10cv00416 at *10. Based on the definitive phrasing of the Winthrop Ordinance and courts’ interpretations of similar ordinances in the past, Richardson’s vagueness challenge fails.

Richardson’s claim that the Ordinance is overbroad also fails. Traditionally, courts have limited application of this doctrine. To prevail on his claim that the Ordinance is overly broad, Richardson must first show that it infringes on a constitutionally protected area. He cannot do so; thus, his overbreadth claim also fails.

Richardson’s substantive due process claims are only entitled to rational basis review because they raise no issues of fundamental rights. Under rational basis, Winthrop has a legitimate interest in protecting the safety of its citizens and has developed an Ordinance rationally related to that interest. Further, there is no equal protection claim here, where there are no fundamental rights and no suspect classes.

For all these reasons, this Court should uphold the District Court’s decision.

ARGUMENT

I. STANDARD OF REVIEW OF SUMMARY JUDGMENT.

A federal appellate court sitting in review of a district court’s summary judgment award reviews the case de novo. *Massachusetts Museum of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 52 (1st Cir. 2010); *Insituform Techs., Inc. v. Am. Home Assur. Co.*, 566 F.3d 274,

276 (1st Cir. 2009). Summary judgment may be granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c)(2); *see also Sullivan v. City of Springfield*, 561 F.3d 7, 14 (1st Cir. 2009). A motion for summary judgment should be viewed in the light most favorable to, with all inferences drawn in favor of, the non-moving party. *Bukuras v. Mueller Group, LLC*, 592 F.3d 255, 262 (1st Cir. 2010). “A dispute is ‘genuine’ if the evidence about the fact is such that a reasonable jury could resolve the point in favor of the non-moving party. A fact is ‘material’ if it has the potential of determining the outcome of the litigation.” *Scottsdale Ins. Co. v. Torres*, 561 F.3d 74, 77 (1st Cir. 2009) (citation omitted). An appellate court “may affirm summary judgment on any ground manifest in the record.” *Emhart Indus. Inc. v. Century Indem. Co.*, 559 F.3d 57, 65 (1st Cir. 2009).

Additionally, Courts presume that statutes are constitutional. In *United States v. Sampson*, this court stated that, “[s]tatutes duly enacted by Congress are presumed to be constitutional. Thus, the burden of proving that the [law] is unconstitutional is on the challenger.” 486 F.3d 13, 20 (1st Cir. 2007); *see also IMS Health Inc. v. Ayotte*, 550 F.3d 42, 63 (1st Cir. 2008) (“[S]tatutes should be given a constitutional as opposed to an arguably unconstitutional interpretation whenever fairly possible.”). Thus, when a plaintiff challenges a statute—or municipal ordinance like the one in question—the plaintiff must overcome this presumption. Furthermore, the Ordinance does not implicate any constitutional rights, and as the Supreme Court explained in *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 706 (1897), dogs are “subject to the police power of the state, and might be destroyed or otherwise dealt with as in the judgment of its citizens.” In this case, then, the court must defer to the properly situated legislative bodies, and find that Richardson cannot rebut the presumption of constitutionality.

II. REVIEW ON APPEAL FOR DUE PROCESS CHALLENGES UNDER THE FOURTEENTH AMENDMENT TO A STATUTE OR ORDINANCE.

This court “review[s] an appeal from the entry of summary judgment de novo.” *URI Student Senate v. Town Of Narragansett*, ___ F.3d ___, ___, 2011 WL 17610, *3 (1st Cir. 2011). “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Id.* at *9 (quotations omitted). Furthermore, to succeed on a facial challenge, “the complainant must demonstrate that the law is impermissibly vague in all of its applications.” *Id.* (citing *Donovan v. City of Haverhill*, 311 F.3d 74, 77 (1st Cir. 2002)). This court has recognized the Sisyphean task for a challenger. *See Donovan*, 311 F.3d at 77 (“To prevail in a facial challenge to an ordinance that does not regulate constitutionally protected conduct, plaintiffs must surmount a dauntingly high hurdle.”).

Richardson appeals from the federal district court. *Richardson*, No. 10cv00416 at *2. He claims the district court erred when it found the statute was “‘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 them.” *Id.* (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). Furthermore, Richardson claims that the district court erred in finding “the Ordinance is not impermissibly vague as applied to [him].” *Id.* In this case, the precise drafting of the Ordinance negates any inference that the regulated conduct—the definition of the animal—is vague or overly broad, as prohibited by the due process clause of Fourteenth Amendment of the United States Constitution.

A. THE DISTRICT COURT PROPERLY REJECTED APPELLANT’S CLAIM THE ORDINANCE WAS UNCONSTITUTIONALLY VAGUE BOTH AS APPLIED AND FACIALLY.

As the Supreme Court has repeatedly stated, the “Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause” *United States v. Williams*, 553 U.S.

285, 304 (2008); *see also Brasslett v. Cota*, 761 F.2d 827, 834 (1st Cir. 1985) (arguing a town ordinance “was void for vagueness under the due process clause of the Fourteenth Amendment”). The due process clause of the Fourteenth Amendment requires that no State “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. The substance of a vagueness challenge incorporates two main concerns corresponding to the due process clause, and in *Williams* the Court explained that “[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” 553 U.S. at 304. Thus, the Court offered different theories for invalidating a statute: (1) if a person of ordinary intelligence does not have fair notice of the prohibited activity, or (2) if the statute “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Against the backdrop of these interests, the Winthrop Ordinance consists of unequivocal language that provides notice to dog owners and directs with specificity the actions of enforcement officials while ensuring they do not engage in arbitrary or discriminatory activity.

- i. *The Ordinance does not suffer from being facially vague, and therefore defeats Richardson’s present challenge.*

The United States Supreme Court has refined its analysis for vagueness challenges to statutes or ordinances. In *Village of Hoffman Estates*, 455 U.S. at 495, the Court stated that when examining a facial challenge under the theory of vagueness, if the statute does not implicate an area of constitutional protections, a court “should uphold the challenge only if the enactment is impermissibly vague in all of its applications.” *Id.*; *cf. Richardson*, No. 10cv00416 at *7 (citing

Village of Hoffman Estates, 455 U.S. at 498-99) (“The Constitution tolerates a greater degree of vagueness in enactments with civil rather than criminal penalties because the consequences are less severe.”). Thus, if a single application under the statute is not vague, the statute passes this threshold inquiry. The Court further explained that this analysis begins with “the complainant’s conduct before analyzing other hypothetical applications of the law,” so as to ensure that “[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.” *Village of Hoffman Estates*, 455 U.S. at 495.

Ordinances including similar language to that challenged here have been upheld against constitutional challenges in numerous cases. Under its terms, the ordinance covers any pit bull variety of terrier “consist[ing] of the following breeds or breed types and mixtures: American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier.” WINTHROP, MASS., MUN. CODE § 6.04.090 (B). The American Kennel Club (“AKC”) recognizes the American Staffordshire Terrier, while the United Kennel Club (“UKC”) recognizes the American Pit Bull Terrier. American Kennel Club, *AKC Meet the Breeds®: Staffordshire Bull Terrier*, http://www.akc.org/breeds/staffordshire_bull_terrier/ (last visited Jan. 21, 2011); United Kennel Club, *American Pit Bull Terrier (Revised November 1, 2008)*, <http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008> (last visited Jan. 21, 2011). In addressing like statutes, courts have found that similar language is not impermissibly vague, provides citizens with adequate notice, and does not lead to the discriminatory conduct of enforcement personnel.

For example, addressing a statute in Colorado, the Tenth Circuit did not find the statute vague. *Dias v. City and County of Denver*, 567 F.3d 1169, 1173 (10th Cir. 2009). In *Dias*, the

relevant statute read in part “A ‘pit bull’ for purposes of this chapter is defined as an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying the majority of physical traits of any one (1) or more of the above breeds” *Id.* (citing DENVER, COLO., REV. MUN. CODE § 8-55). The statute also referenced the AKC and UKC as setting out the distinguishing characteristics of these breeds. *Id.* The plaintiffs argued the statute did not define with certainty the dog breeds targeted; however, the court held that though some elements of the statute may contain vague terms, “a statute with some arguably vague elements is not automatically vague on its face” *Id.* at 1180. Instead, the court turned to the UKC and AKC breed standards of the listed breeds to determine whether a person who had a purebred dog could understand the statute as applying to them—finding they could. *Id.* Though reliance upon the AKC and UKC templates may seem beyond the express language of the Ordinance at issue here, “[t]he mere fact that a statute requires interpretation does not necessarily render it void for vagueness.” *Barr v. Galvin*, 626 F.3d 99, 108 (1st Cir. 2010). In our case, the statute does not incorporate these standards; however, the inclusion of readily identifiable breeds without express reference to breed guides is enough to put an owner on notice of the dog characteristics at issue. Furthermore, as *Dias* points out, if an owner of a purebred would have sufficient notice under the statute—knowledge that the statute applies to their American Staffordshire Terrier—that situation suffices to defeat any vagueness charge.

A federal district court in Ohio had a similar opportunity to strike down a pit bull ordinance. *Vanatar v. Village of South Point*, 717 F. Supp. 1236, 1238–39 (S.D. Ohio 1989). In *Vanatar*, the ordinance prohibited owning a pit bull terrier, where a Pit Bull Terrier was defined as “. . . any Staffordshire Bull Terrier or American Staffordshire Terrier breed of dog, or any mixed breed of dog which contains, as an element of its breeding the breed[s]” named. *Id.* at

1239 (citing VILLAGE OF SOUTH POINT, OHIO, Ordinance 87-6). The court explained that “[f]acial 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.” *Id.* at 1243 (citations omitted). The court went on to explain that the issue here was not of constitutional importance, but rather evidentiary, and that “[a]n ordinary person could easily refer to a dictionary, a dog buyer’s guide or any dog book for guidance and instruction” *Id.* at 1244. Our present case resembles *Vanatar*, in that both ordinances identify breeds by name without explicit reference to breed standards (as in *Dias*). While *Vanatar* has a broad explanation of mix-breed dogs the statute applies to (“or any mixed breed of dog which contains as an element of its breeding the breed of Staffordshire Bull Terrier or American Staffordshire Terrier as to be identifiable as partially of the breed of Staffordshire Bull Terrier or American Staffordshire Terrier”), the Winthrop Ordinance simplifies this statutory wording into: “which consists of the following breeds or breed types and mixtures” VILLAGE OF SOUTH POINT, OHIO, ORDINANCE 87-6; WINTHROP, MASS., MUN. CODE § 6.04.090 (B). Nevertheless, the same sentiment underlies both statutes: that the breed characteristics be readily identifiable. Nothing exists in the upheld ordinance in *Vanatar* or the present Ordinance to suggest that these definitions could be misconstrued or misinterpreted.

Richardson may point to a case arising from the Supreme Judicial Court of Massachusetts, however his reliance on this case is fundamentally misplaced. In *Am. Dog Owners Ass’n v. City of Lynn*, plaintiffs challenged a town ordinance—actually three separate ordinances—regulating dogs within the town. 404 Mass. 73, 75–77, 533 N.E.2d 642, 644–45 (Mass. 1989). The Supreme Judicial Court first declared that any discussion of the ordinances challenged was in fact moot. *Id.* at 78, 533 N.E.2d 642, 645. However, in dicta, the court went on

to address the question of whether the fourth statute—which was not before the court—was vague. *Id.* The fourth ordinance in question applied to “so-called ‘Pit Bulls,’ or dogs known as Pit Bulls. No formal breed designation is intended by the use of the term ‘Pit Bull . . . [and] [t]he term is employed to the full extent of its common understanding.” *Id.* at 77, 533 N.E.2d 642, 645, n.8. The court took umbrage with the indefinite term ‘Pit Bull,’ explaining that the ordinance is “devoid of *any* reference to a particular breed, [and] relies on the even less clear ‘common understanding and usage’ of the term ‘Pit Bull” *Id.* at 79, 533 N.E.2d 642, 646. While the Massachusetts court found that the ordinance at question did not provide a clear definition, the current Ordinance is readily distinguishable. Winthrop has included readily identifiable breeds which any reasonable person could research to discover relevant traits. Furthermore, the Winthrop Ordinance omits the “common understanding and usage” phrase, instead focusing of the referential capacity of the language within the statute—referential, in that a person has recourse to substantive definitions of the regulated breeds. Finally, it is vital to recognize that the court here did not rule on any statute or ordinance before it; pleasant as it may be for Richardson to hypothesize about how that court may theoretically rule today, we must keep in mind that the ordinances at issue are substantially different.

Aside from the Massachusetts Supreme Judicial Court, many other state courts have ruled on ordinances regulating pit bulls. Most recently in *City of Pagedale v. Murphy*, the Missouri Court of Appeals found an ordinance was sufficiently valid to defeat a challenge on vagueness. 142 S.W.3d 775, 779 (Mo. Ct. App. 2004). In *Pagedale*, the ordinance stated that “No person shall within the City raise, maintain or possess within his or her custody or control a dog of the ‘pit bull’ breed.” PAGEDALE, MO., ORDINANCE 1169. The statute omitted any reference to breed, let alone breed-identifying organizations, and nonetheless the court held that “given the

distinctive physical and behavioral characteristics of pit bulls, as well as the general knowledge and information available to dog owners” an owner should have been on notice as to whether he owned a dog the ordinance covered. *Pagedale*, 142 S.W.3d at 779. Where the Winthrop Ordinance contains sufficiently more definite guidelines by which an owner can measure whether the Ordinance regulates their dog, a vagueness challenge fails.

A series of other cases from state courts have dealt with pit bull statutes, finding that these statutes—in various iterations—are all framed with sufficient definiteness to defeat a challenge based upon vagueness. In *Colorado Dog Fanciers v. City and County of Denver*, the Colorado Supreme Court looked at the same ordinance addressed in *Dias* and similarly held the ordinance constitutional where the “standards for determining whether a dog is a pit bull are readily accessible to dog owners” 820 P.2d 644, 652 (Colo. 1991). The Supreme Court of Iowa held an ordinance regulating Staffordshire terriers, American pit bull terriers, American Staffordshire terriers not vague when “the breed classifications . . . give the reader as much guidance as the subject matter permits” *Am. Dog Owners Ass’n v. City of Des Moines*, 469 NW.2d 416, 418 (Iowa 1991). The Iowa court did strike portions of the ordinance that read “any other breed commonly known as pit bulls, pit bulls dogs or pit bull terriers . . . ,” however it focused its analysis on the “commonly known” language—language not appearing in the Winthrop Ordinance. *Id.* The Utah Supreme Court also found a dog ordinance constitutional, where the ordinance regulated Bull Terriers, American Staffordshire Terriers, Staffordshire Bull Terriers, Tosas, and Shar-peis. *Greenwood v. City of North Salt Lake*, 817 P.2d 816, 818 (Utah 1991). The court there held that the ordinance was not impermissibly vague where the plaintiffs failed to “demonstrate either that the ordinance does provide them adequate notice or that the ordinance could be arbitrarily enforced against them.” *Id.* at 820. Needless to say, Winthrop has

drafted an ordinance that operates at least on par with the constitutional standards of other ordinances, and—in comparison to some—with far greater specificity.²

These cases focus on whether a resident of the city will have notice of the type of animal the ordinance covers. To return to the Winthrop Ordinance at issue, it covers “American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier.” WINTHROP, MASS., MUN. CODE § 6.04.090 (B). The question posed is whether this language puts a dog owner on notice of the type of dog the Ordinance aims to regulate. Based on the referenced AKC and UKC standards and on the similar holdings of all courts addressing these controversies, the Ordinance withstands any challenge based on facial vagueness.

- ii. *Neither does the Ordinance suffer from being vague as applied to Richardson, because he knew the Ordinance applied to one dog, and thus had notice it applied to the littermate.*

Turning to the as applied challenge, the district court correctly held that the statute was not impermissibly vague as applied to Richardson. In addressing as applied vagueness challenges, the inquiry—while incorporating the above interests—hinges on “whether a statute is vague as applied to the particular facts at issue, for ‘[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.’” *Holder v. Humanitarian Law Project*, ___ U.S. ___, ___, 130 S.Ct. 2705, 2719 (2010)

² The list of cases upholding pit bull statutes goes beyond these few. See *Holt v. City of Maumelle*, 307 Ark. 115, 118, 817 S.W.2d 208, 210 (Ark. 1991) (holding that “a person of ordinary intelligence is placed on sufficient notice by [the statute] to reasonably determine the prohibited conduct”); *State v. Peters*, 534 So.2d 760, 768 (Fla. Dist. Ct. App. 1988) (a Florida court held that, despite some deficiencies in the phrasing of the statute, the language used was “sufficiently well understood by pit bull owners to enable them to determine whether their dogs fall within the proscription of the ordinance”); *Garcia v. Tijeras*, 108 N.M. 116, 119, 767 P.2d 355, 358 (N.M. Ct. App. 1988) (explaining that “[t]he essence of the vagueness doctrine is notice. . . ,” and in this case the plaintiffs had sufficient notice that the ordinance regulating pit bull terriers applied to them); *Dog Fed’n of Wisconsin, Inc. v. City of South Milwaukee*, 178 Wis.2d 353, 363, 358, 504 N.W.2d 375, 379, 375 (Wis. Ct. App. 1993) (finding “the individual appellants here have not carried their burden of demonstrating beyond a reasonable doubt that [the Ordinance] is impermissibly vague on its face. . .” where the ordinance regulates dogs qualifying as “American Pit Bull Terrier or Staffordshire Bull Terrier or American Staffordshire Terrier as to be identifiable as partially of [these] breed[s] . . .”).

(quoting *Village of Hoffman Estates*, 455 U.S. at 495). In *Humanitarian Law Project*, the Court distinguished between statutes invalidated in the past under vagueness and its present facts, finding that as applied to the plaintiffs they had definitive notice of the type of behavior the statute identified. *Humanitarian Law Project*, ___ U.S. at ___, 130 S.Ct. at 2720 (comparing invalidated statutes containing language like annoying, indecent, and vagrants, with the definite statutory language “training,” “expert advice or assistance,” and “personnel” of which plaintiffs reasonably should have knowledge). In the present case, Richardson has notice that the Ordinance applies to him since the Ordinance applied to his first dog, and as the district court noted, during the hearing Richardson himself presented evidence that both were “muscular dogs with large heads and short coats[,]” characteristics aligning with the restricted breeds. *Richardson*, No. 10cv00416 at *10. From the first action, Richardson knew the statute applied to him, so he cannot now challenge it as vague.

Furthermore, any argument that Winthrop acted capriciously or in a discriminatory manner fails, as the City held the requisite statutory hearing for the first dog and allowed Richardson to put on any and all evidence to show the dog was not of the types regulated. *Id.* at 5. Although a hearing has not yet occurred for the second dog, the state court reviewed the hearing for the first dog and found that no genuine issue of material fact was raised in respect to the first dog falling under the statute. *Id.* at 10. Richardson’s argument that he has no proof of the dogs’ breed, and therefore the second dog does not fall under the statute resembles willful negligence: failing to provide any evidence to counter the City claim, he merely claims it is not so. Again, the Ordinance allows for a fair hearing where parties put on evidence. WINTHROP, MASS., MUN. CODE § 6.04.090 (D). Here, the town manager found the first dog resembled the

dogs the statute targets and the City conducted the appropriate procedures set forth in the Ordinance, which the state court later upheld, and the federal district court endorsed.

B. THE ORDINANCE DOES NOT IMPLICATE THE DOCTRINE OF OVERBREADTH UNDER THE FOURTEENTH AMENDMENT, BECAUSE THE DOCTRINE APPLIES ONLY TO INSTANCES WHERE A PROTECTED RIGHT IS AT ISSUE.

Courts have limited challenges to statutes based on the theory of overbreadth. The Supreme Court explained that, “a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.” *Village of Hoffman Estates*, 455 U.S. at 495. The Court recently recognized this long-standing principle when Chief Justice Roberts, writing for the majority in *United States v. Stevens*, explained: “A party seeking to challenge the constitutionality of a statute generally must show that the statute violates the party's own rights.” ___ U.S. ___, ___, 130 S.Ct. 1577, 1593 (2010) (citing *New York v. Ferber*, 458 U.S. 747, 767 (1982)); cf. *Schall v. Martin*, 467 U.S. 253, 268 n. 18 (1984) (“outside the limited First Amendment context, a criminal statute may not be attacked as overbroad.”). The *Sentell* decision stands for the proposition that this area of activity falls squarely within the regulatory power of the states and is not explicitly protected by the Constitution. *Sentell*, 166 U.S. at 706. Beyond showing that some never-before-recognized constitutional right to own a dog exists, this Ordinance remains immune from a challenge on overbreadth grounds.

Indeed, numerous courts have addressed the overbreadth issue and all found the doctrine inapplicable to these types of ordinances. One court phrased the overbreadth argument as “the city ordinance treats all pit bulls and substantially similar dogs as inherently dangerous and is, therefore, unconstitutionally overbroad.” *Colorado Dog Fanciers*, 820 P.2d at 650. The Colorado Supreme Court first addressed the limited application of the overbreadth doctrine—“first amendment rights of speech or association”—and second, did “not agree with the dog owners’

contention that the ordinance is underinclusive.” *Id.* The Kansas Supreme Court ruled plaintiffs’ activities did not fall within the scope of guaranteed rights that the doctrine of overbreadth and due process clause of the Fourteenth Amendment protect. *Hearn v. City of Overland Park*, 244 Kan. 638, 645, 772 P.2d 758, 764 (Kan. 1989). Furthermore, a court of appeals from Wisconsin held that the overbreadth doctrine “has no application outside the First Amendment context.” *Dog Fed’n of Wisconsin*, 178 Wis.2d at 365, 504 N.W.2d 375, 380 (citing *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)). And in *Vanatar*, the federal district court found an ordinance constitutional, acknowledging that “[w]hile identification of a Pit Bull may be difficult in some situations, there are other methods to determine with sufficient certainty whether a dog is a Pit Bull within the meaning of the Ordinance to survive the overbreadth challenge.” *Vanatar*, 717 F. Supp. at 1246. This catalogue of cases elucidates the limited application of the overbreadth doctrine and the inappropriateness of application in this context. For these reasons we submit that Richardson’s overbreadth challenge to the Ordinance fails.

III. THE DISTRICT COURT WAS CORRECT IN DISMISSING APPELLANT’S SUBSTANTIVE DUE PROCESS CLAIM AND FOLLOWING WELL-ESTABLISHED CASE LAW.

States possess substantial authority to regulate private behavior under the police powers reserved to them. *Fischer v. St. Louis*, 194 U.S. 361, 370 (1904); *Sentell*, 166 U.S. at 705; *Crowley v. Christensen*, 137 U.S. 86, 91 (1890); *Stone v. Mississippi*, 101 U.S. 814, 818 (1880). This authority is only limited by the due process clauses of the Fifth and Fourteenth Amendments, and the equal protection clause of the Fourteenth Amendment. U.S. CONST. amends. V & XXIV. All property rights are subject to reasonable control and regulation, vested in the legislatures of the states for the purpose of securing public health and welfare. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006); *Munn v. Illinois*, 94 U.S. 113, 145–46 (1876); *Blair v. Forehand*, 100 Mass. 136, 141, 1868 WL 5523 at *4 (Mass. 1868). Municipalities may also

enact rules and ordinances under the authority of their police powers reserved to the states as long as those regulations do not conflict with the general laws of the state. *Stone*, 101 U.S. at 818; *Munn*, 94 U.S., 145–46. Municipalities, however, cannot infringe fundamental rights unnecessarily, nor are they permitted to deny their citizens equal protection of the law. U.S. CONST. amend. XXIV. The extent of a government’s authority to regulate depends on the type of regulation and what restrictions it imposes on personal liberty. When evaluating the legitimacy of a regulation, courts apply varying degrees of scrutiny. When a fundamental right is at issue, a court will apply a heightened level of review for an alleged due process violation. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (opinion of O’Connor, J., joined by Rehnquist, C.J., and Ginsburg and Breyer, JJ.) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). Courts also apply heightened scrutiny for equal protection claims. *Exxon v. Governor of Maryland*, 437 U.S. 117, 140–42 (1978). In this case, Richardson has demonstrated neither a fundamental right nor a suspect class is at issue. Accordingly, the court should only impose the lesser standard of review, rational basis. Under this standard, the Winthrop Ordinance is valid.

A. RICHARDSON RAISED NO CONSTITUTIONALLY PROTECTED RIGHTS, SO THIS COURT SHOULD ONLY APPLY RATIONAL BASIS REVIEW.

A due process claim lies where a citizen’s rights of privacy, liberty, or property have been unreasonably infringed by a governmental entity. Depending on what type of right is infringed, the regulation will be subjected to varying degrees of scrutiny. *Id.* For example, fundamental rights have generally been recognized to include the right to marry, privacy, and liberty in creating and raising a family. *See Glucksberg*, 521 U.S. at 728 (listing cases which support these areas as fundamental rights embodied in the constitutional framework). The *Glucksberg* Court identified the Fourteenth Amendment’s liberty guarantee as embracing only

those rights “so rooted in our history, tradition, and practice as to require special protection.” 521 U.S. at 721.

Property rights are generally reviewed under heightened scrutiny, and they implicate a fundamental right. However, no property right is absolute, and all are susceptible to reasonable regulations. *Munn*, 94 U.S. at 145–46. One of the longest standing reasons supporting the regulation of private property is for the protection of safety and public health. *Id.* Dogs are imperfect property. *Sentell*, 166 U.S. at 701. Courts have historically upheld various regulations dictating the maintenance or destruction of dogs. *Id.* at 703; *Blair*, 100 Mass. at 139, 1868 WL 5523 at *3. These types of laws are reviewed with great deference to the locality enacting the provision, and many such ordinances have been affirmed.

In *Blair*, a Massachusetts state law required town constables to destroy dogs found within the town which were not licensed and collared according to the provisions in the act. 100 Mass. at 137, 1868 WL 5523 at *1. In a challenge to the validity of the law, the Supreme Judicial Court of Massachusetts noted that all property rights are subject to reasonable control and regulation under the police power vested in the State’s constitution. *Id.* at 139, 1868 WL 5523 at *3. Further, the court affirmed legislative authority to provide for certain kinds of property to be seized on proper process or hearing and even destroyed without further notice to the owner. *Id.* at 140, 1868 WL 5523 at *4. The court cited examples—of buildings which are structurally unsound and decaying or infected food which both pose risk to public health and safety—to illustrate how far such a law may infringe without raising serious constitutional concerns. *Id.* The court also noted that a frequent subject of similar regulations are domesticated animals, and in regulating such animals, these laws make distinctions based on the function of the animal, providing lesser protections to household pets. *Id.* Specifically, the court commented that

although dogs and cats may be domesticated, they never lose their “wild natures and destructive instincts.” *Id.* For these reasons, the court held that the Massachusetts law was a valid exercise of the State’s police power.

In *Sentell*, the United States Supreme Court went one step further in their analysis of a dog-destruction statute on review than the court in *Blair*. In *Sentell*, the Supreme Court reviewed a New Orleans ordinance which required dogs to be registered with the city and obtain a tag to prove registration. 166 U.S. at 700. This registration then vested a property right in the owner of the dog. *Id.* In *Sentell*, A dog owner was walking his registered Newfoundland in a public space, and the dog was hit by an electric trolley car. *Id.* The dog died, and the owner sought recovery. *Id.* At the Supreme Court, the only question remaining on appeal was the constitutionality of the statute. *Id.* The Court, in analyzing the statute, noted that dogs are imperfect property because they are not protected from injury or death by criminal laws, and laws for the protection of domestic animals only have limited applicability to dogs and cats. *Id.* at 701. However, the court further stated, that even if dogs were protected as property in the “fullest sense of the word,” they would still be subject to the police power of the state to be seized, destroyed, or otherwise disposed in any way the legislature deemed necessary for the protection of the community. *Id.* at 704. Similar to *Blair*, the *Sentell* Court compared dogs to produce. *Id.* (“meats, fruits, and vegetables do not cease to become private property by their decay but it is clearly within the power of the state to order their destruction . . . whenever they . . . be deleterious to the public health.”). The Court also cited a number of different jurisdictions which upheld similar ordinances, including the Massachusetts law at issue in *Blair*, a Texas statute, a Wisconsin licensing law, and a Utah law which authorized ordinances to prohibit dog ownership outright. *Id.* In upholding the rationality of dog-regulation laws, the Court commented that communities

often find it difficult to regulate the natural instincts of animals. *Id.* at 706. Thus, regulating animals by licensing, tag requirements, and other more stringent means is not uncommon. *Id.* Accordingly, the Court upheld the New Orleans licensing provision. *Id.*

In both of these cases, the courts identified the rights which inure to dog owners as “imperfect.” Dog ownership is not a protected right fundamental to the notions of liberty and property inherent in our Constitution. In fact, property rights inherent in our constitution specifically limit their applicability to dogs. *Id.* at 703. Richardson has not demonstrated that one of his fundamental rights is infringed. At most, a dog may be considered property in the “truest sense of the word,” as the court in *Sentell* elaborated. *Id.* at 704. And, under that theory alone, Richardson may have a protected right in owning a dog. However, the Supreme Court has never held that dog ownership is a constitutional right which must be protected under the strictest scrutiny. *FCC v. Beach Comm.*, 508 U.S. 307, 313 (1993). Accordingly, Richardson’s claim that the Winthrop Ordinance is unconstitutional is only entitled to rational basis review.

B. RICHARDSON FAILED TO DEMONSTRATE THE ORDINANCE BORE NO RATIONAL RELATIONSHIP TO THE CITY’S LEGITIMATE INTERESTS.

As elaborated above, laws which simply operate to give effect to a state’s validly exercised police power and do not offend fundamental rights are reviewed under the rational basis standard. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (identifying economic and tax laws as some examples of regulations reviewed under rational basis review); *Exxon*, 437 U.S. at 140–42; *Goodridge v. Dep’t Pub. Health*, 440 Mass. 309, 330, 798 N.E.2d 941, 960 (Mass. 2003) (noting that laws which involve suspect classes or fundamental rights are reviewed under strict scrutiny and all others under rational basis). In *Nebbia v. New York*, 291 U.S. 502, 525 (1934), the Supreme Court explained that the due process requirement for reasonableness “demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means

selected shall have a real and substantial relation to the object sought to be attained.” *See also*, *Cote-Whitacre v. Dep’t Pub. Health*, 446 Mass. 350, 350, 844 N.E.2d 623, 636 (Mass. 2006) (citing *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, 348 Mass. 414, 422, 204 N.E.2d 281, 287 (1965)) (In Massachusetts, for purposes of the due process clause, a rational basis analysis requires that statutes “bear[] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.”). Further, as elaborated above, a statute arrives on review with a presumption of validity. *Sampson*, 486 F.3d at 20. The challenger must demonstrate beyond a reasonable doubt that the legislative enactment is invalid. Here, not only has Richardson failed to demonstrate that the Winthrop Ordinance is not based on legitimate interests, but he has also failed to show that the mechanisms on which the statute operate are unrelated to those interests.

None of the interests on which a community may rely in regulating its population are more fundamental than those of public health and welfare. The purpose underlying the Massachusetts law directly identified by the court in *Blair* and the provision upheld in *Sentell* are significant to a discussion of the Ordinance currently under review. In both cases, courts identified the underlying legislative intent of the regulation to be the control of dog behavior, including tendencies for violence and mischief. *Sentell*, 166 U.S. at 706; *Blair*, 100 Mass. at 139, 1868 WL 5523 at *3. In Winthrop, the legislature specifically considered breed characteristics of uncontrollable violence and the inherent desire of pit bulls to chase and subdue their prey, which may be a human, child, or other dog or animal. *Richardson*, No. 10cv00416 at *10; WINTHROP, MASS., MUN. CODE § 6.04.090 (A–D). These are traits which a community may choose to protect itself from where possible. Recently, courts have largely upheld these interests as valid.

In Ohio, the court was faced with a constitutional challenge to a dog breed-exclusion ordinance substantially similar to the one in question here. *Vanater*, 717 F. Supp. at 1243. In upholding the ordinance, the court ruled that the municipal response to the special threat posed by pit bulls' characteristics of "exceptional aggression, athleticism, strength, viciousness and unpredictability which are unique to the breed" was a reasonable one. *Id.* In Colorado, the district court upheld an ordinance where the city heard testimony that: pit bulls are stronger than other dogs; do not give warning signals before attacking; insurance companies refuse to insure these dogs because of their aggressive nature; the number of bites from pit bulls began increasing in 2000; and bites from pit bulls and other restricted breeds were more severe than from other breeds. *Am. Canine Found. v. City of Aurora*, 618 F. Supp. 2d 1271, 1279 (D. Colo. 2009). In New Mexico, a municipality's experience with several dog attacks in a very small community, in a short period of time, which culminated in a dog severely mauling a nine-year-old girl, led the New Mexico Court of Appeals to conclude the village had legitimate interests and concerns about public safety. *Garcia*, 108 N.M. at 123, 767 P.2d 355, 362. Accordingly, cities have a legitimate interest in protecting their communities from attacks by breeds which are known to be less predictable, more violent, and more aggressive than other breeds.

In all three of these examples, a community found itself in fear of one particular dog type for the same reasons. Thus, restrictions aimed at a particular dog breed have been almost universally upheld. *See, City of Aurora*, 618 F. Supp. 2d at 1278; *Range v. Brubaker*, No. 3:07 CV 480, 2009 WL 857499 at *6 (N.D. Ind. Mar. 31, 2009); *Am. Canine Found. v. Sun*, No. C-06-4713 MMC, 2007 WL 878573 at *5 (N.D. Cal. Mar. 21, 2007); *New York City Friends of Ferrets v. City of New York*, 876 F. Supp. 529, 539 (S.D.N.Y. 1995); *Vanater*, 717 F. Supp. at 1243; *Garcia v. Tijeras*, 108 N.M. 116, 123, 767 P.2d 355, 362. Municipalities may forbid

owning animals altogether to protect public welfare. *Garcia*, 108 N.M. at 123. Accordingly, municipal regulations banning or severely restricting ownership of pit bull breeds can be considered reasonably necessary means to protect public health because evidence shows that incidents resulting in injuries to people and animals only involve one breed of dog, the pit bull.

In this case, the statute at issue regulates the individuals who keep dogs within city limits. Certain breeds and breed mixtures related to “pit bulls” are absolutely excluded. The city based the ordinance’s language on unfavorable characteristics found dominantly in pit bull breeds: “powerful instincts for dominance . . . which . . . result in a proclivity for fighting, a strong prey drive, which inspires . . . aggressive pursuit of” small animals and children, “stubbornness that results in . . . unyielding aggressiveness once an attack begins, powerful jaws capable of crushing bones . . . even while the animal withstands . . . injury or pain, [and] a combination of stamina, strength, agility, and ‘gameness.’” *Richardson*, No. 10cv00416 at *13–14. Richardson would have this Court believe Winthrop’s notions about pit bull behavior are based on societal conceptions and fears which are somehow inaccurate and outdated, yet he brings forward no evidence to support his allegation. Further, Richardson does not argue that protecting the public from dog attacks is not a legitimate public interest. Accordingly, Richardson’s only argument is that no reasonable relationship exists between the harm feared and the regulation imposed. However, Winthrop has demonstrated that negative characteristics almost exclusively found in pit bulls directly contribute to diminished public safety, and that by limiting breed mixtures of the pit bull type, the City could achieve its objectives. The City need only demonstrate that prohibiting pit bulls is one method which is likely to achieve its goal of protecting public welfare. Richardson did not demonstrate that utilizing a breed specific provision was somehow

irrational or unrelated to the city's interests. Richardson has failed to sustain his burden that the Ordinance is not rationally related to a legitimate state interest.

The Winthrop Ordinance did not violate Richardson's substantive due process rights under the Fourteenth Amendment because the restrictions imposed are rationally related to the harm which the city has a legitimate interest in eliminating.

C. CLASSIFYING PROHIBITED CONDUCT ON THE BASIS OF DOG BREEDS DOES NOT IMPLICATE AN EQUAL PROTECTION VIOLATION.

The Fourteenth Amendment affords individuals the right to equal treatment under the law. U.S. CONST. amend. XIV. An equal protection claim lies where a governmental regulation infringes a fundamental right or distinguishes classes to be regulated based on a suspect categorization. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). However, every allegation of unequal application of a law does not receive the same level of scrutiny. *Enquist v. Oregon Dept of Agric.*, 553 U.S. 591, 603 (2008); *Friends of Ferrets*, 876 F. Supp. at 539. Some challenges based on a classification appearing to be arbitrary will be reviewed under a lesser standard, rational basis. *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 86 (2000) (citing age discrimination as one example); *see also, United States v. Carolene Products Co.*, 304 U.S. 144, 158 (1938). In many dog-breed-specific-ordinance challenges, plaintiffs who allege equal protection violations do so on the basis of arbitrary classifications. *See, e.g., Fischer*, 194 U.S. at 371. Because dog ownership is not a fundamental right, dog breeds are not a suspect class nor are dog owners; these attacks are almost universally reviewed under rational basis only. *See FCC v. Beach Comm.*, 508 U.S. at 313 ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). Thus, Richardson's only

legitimate argument under an equal protection theory is that the legislature cannot regulate one dog breed without regulating all similarly.

However, this argument also fails. It is a long-held notion that when legislatures choose to regulate one item, they need not regulate similar items similarly. *Carolene Products*, 304 U.S. at 158. Even so, the Winthrop Ordinance also provides a mechanism for identifying non-pit-bull-type dogs which are vicious. In this way, the city utilizes multiple mechanisms for preventing future dog-related injuries to its population, not just those from pit bulls. WINTHROP, MASS., MUN. CODE § 6.04.090 (A–D). Thus, Winthrop is attempting to protect its population from dog attacks by breeds previously identified as vicious or individual dogs later identified as vicious.

Nonetheless, in virtually all jurisdictions which have addressed ordinances worded similar to the Winthrop Ordinance at issue in this case, courts have held that classifications based on breed type are rationally related to the government's interest in public safety. These courts uphold statutes based on breed distinctions for substantially similar reasons to those used in upholding an ordinance under a substantive due process attack. *See, Am. Canine Found. v. Sun*, 2007 WL 878573 at * 5 (classifying dogs by breed is rationally related to the city's interest in protecting public welfare); *Friends of Ferrets*, 876 F. Supp. at 540 (holding similarly except as applied to ferrets); *Starkey v. Chester Twp.*, 628 F. Supp. 196, 197 (E.D. Pa. 1986) (holding similarly as applied to pit bulls); *Garcia*, 108 N.M. at 123, 767 P.2d 355, 362 (holding similarly, except approving a complete and total ban as to pit bulls). Accordingly, the Winthrop Ordinance makes classifications that are rationally related to legitimate interests and Richardson has failed to demonstrate contrary.

CONCLUSION

The Federal District Court of Massachusetts did not err in upholding the Winthrop Ordinance strictly regulating pit bull owners within the City. This law is rationally related to legitimate municipal interests in protecting the community from violent encounters with vicious dogs. In exercising a legitimate police power the City concluded, based on substantial evidence and experiences across the country, that one breed poses a special risk to public safety. In so regulating, the City was neither vague in defining “pit bull” nor overly broad in including three breeds of pit bull or their mixes. This is a permissible use of governmental authority, which does not draw lines based on a suspect class, nor does a regulation limiting dog ownership raise concerns of fundamental rights. Accordingly, the Ordinance is valid, and the District Court should be upheld.

APPELLEE'S APPENDIX

WINTHROP, MASS., MUN. CODE Title 6 Animals, Chapter 6.04 Animal Control Code³

6.04.090 Nuisance dogs--Vicious dogs--Potentially vicious dogs.

A. Nuisance Dogs. The definition of nuisance dogs includes but is not limited to dogs whose owners repeatedly allow them to:

1. Bark excessively;
2. Roam free or unrestrained;
3. Trespass on private property;
4. Damage property;
5. Molest passersby;
6. Chase vehicles; and/or
7. Disturb the peace in any way.

B. Vicious Dogs.

1. Vicious dogs are defined as dogs who unprovoked have attacked or bitten a human being or animal or have a known propensity, tendency or disposition to attack unprovoked, to cause injury or to endanger the safety of human beings or animals.
2. No dog shall be declared vicious if injury or damage is sustained by a person who was willfully trespassing or committing or attempting to commit a crime or committing other tort upon the premises occupied by the owner or keeper of the dog. Also exempted are dogs who were teased, tormented, abused or assaulted by the injured person or animal prior to attacking or biting. No dog shall be declared vicious if the dog was protecting or defending a human being in its immediate vicinity from attack or assault.
3. The definition of vicious dog also includes dogs who are trained or kept for dogfighting or 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. No person shall own, keep or have the custody, care or control of any of these breeds or mixtures thereof in the town.

C. Potentially Vicious Dogs. Potentially vicious dogs are defined as dogs who, when unprovoked, in a vicious or terrorizing manner approach any person or animal in an apparent attitude of attack in any public place in Winthrop.

³ Available at http://library1.municode.com/default-test/home.htm?infobase=16728&doc_action=whatsnew (Last visited Jan. 21, 2011).

- D. Dogs who have violated any of the conditions of subsections A through C of this section can be declared to be a nuisance, vicious or potentially vicious by the town council upon written complaint of a citizen or by the animal control officer, police department or other public safety agent. A hearing by the town manager or the town manager's designee will determine whether the dog in question is a nuisance, vicious or potentially vicious dog. Investigation of the matter may be made by the animal control officer, and the animal's owner will be notified of the hearing by certified mail. The hearing must be open to the public and must be held within two weeks of the service of notice upon the owner or keeper of the dogs.
- E. Prior to the hearing, if the dog is believed to be a potential threat of serious harm to people or to other animals, the town manager may require the dog to be impounded during the hearing and appeal process. The owner or keeper is liable for any boarding and impounding fees incurred.
- F. The owner will be notified of the findings of the town manager, in writing. If the dog is declared a nuisance, vicious or potentially vicious dog, the town manager may impose any and all penalties and fines allowed under MGL c. 140. Furthermore, the town manager may require that the dog be removed from the town or that the owner or keeper comply with the provisions of this section as stated below. Any owner or keeper who feels that they have been aggrieved by the decision of the town manager may appeal the determination in district court.
- G. Confinement of vicious or potentially vicious dogs; restrictions outside of confinement.
- H. Dogs found to be vicious or potentially vicious as a result of a hearing before the town manager or the town manager's designee must be confined within a dwelling or within a fence or structure at least six feet high and may additionally be required to be tethered within the confines of such a fence or structure. The enclosure must be securely constructed and locked, with secure sides, top and bottom, to prevent the animal from escaping and suitably to prevent the entry of young children.
- I. Dogs found to be vicious or potentially vicious as a result of a hearing before the town manager or the town manager's designee must be muzzled and restrained by a substantial leash and collar and must be accompanied by a responsible person at all times when outside the enclosure as stated above. The muzzle must not interfere with the dog's vision or respiration, but it must prevent it from biting any person or animal.
- J. The owner or keeper of a vicious dog shall present to the town manager proof that the owner or keeper has procured liability insurance in the amount of at least one hundred thousand dollars (\$100,000.00), covering any damage or injury which may be caused by the vicious dog during the twelve (12) month period for which licensing is sought. The policy shall contain a provision requiring the town to be named as an additional insured for the sole purpose of the town manager to be notified by the insurance company of any cancellation, termination or expiration of the liability insurance policy.

- K. The owner or keeper of a vicious or potentially vicious dog shall display a sign on his or her premises warning that there is a dog on the premises. Such sign shall be visible and capable of being read from any adjacent public way.
- L. The owner or keeper of a vicious or potentially vicious dog shall notify the police department immediately if the dog is on the loose, is unconfined, has attacked a person or another animal or has died or been sold or given away.
- M. If the animal has been sold or given away, the town manager shall be provided with the new owner's name, address and telephone number.
- N. Vicious and potentially vicious dogs will not be issued licenses until the requirements stated by the town manager are met. If the requirements are not met, the following penalties apply:
 - 1. Failure to license a vicious dog, failure to secure the animal by enclosure in the required structure or to muzzle and leash or restrain; and failure to obtain and maintain required insurance: the animal shall be confiscated by the animal control officer and held for a period of ten (10) business days or until the license and liability insurance is obtained, and the owner or keeper shall be fined one hundred fifty dollars (\$150.00). If the owner or keeper fails to obtain the required license and/or insurance within the ten (10) day period, the animal will be humanely euthanized.
 - 2. Violations as stated above that result in the unprovoked worrying, wounding or killing of any domestic animal: the animal shall be confiscated by the animal control officer and humanely and expeditiously euthanized, and the owner or keeper shall be fined three hundred dollars (\$300.00).
 - 3. Violations as stated above that result in the unprovoked worrying, wounding or killing of a human being: the animal shall be confiscated by the animal control officer and humanely and expeditiously euthanized, and the owner or keeper shall be fined three hundred dollars (\$300.00).
- O. No person shall be charged with the penalties outlined above unless the dog, prior to the offense alleged, shall have been declared a vicious or potentially vicious dog pursuant to the provisions of this chapter.
- P. The town manager shall provide notice of the impoundment and/or pending destruction of the vicious or potentially vicious dog to the registered owner or keeper of such dog.
- Q. If the owner or keeper of a dog impounded for allegedly violating this chapter believes the violation did not occur, such owner may petition a court of competent jurisdiction praying that the dog not be destroyed. The impounded dog shall not be destroyed pending resolution of such owner's or keeper's petition. The dog shall remain impounded pending a hearing on the petition and any subsequent appeal.

(Amended during 2007 codification; prior code § 13-9)

6.04.100 Fines.

The following fines shall apply:

- A. Failure to license between July 1st and August 15th of each year: first offense twenty-five dollars (\$25.00); second offense fifty dollars (\$50.00); third and each subsequent offense one hundred dollars (\$100.00).
- B. Violation of animal waste disposal: twenty-five dollars (\$25.00) first offense; fifty dollars (\$50.00) second offense; one hundred dollars (\$100.00) third and each subsequent offense.
- C. Impoundment: ten dollars (\$10.00) administrative fee daily plus all fees assessed by the facility housing the dog.
- D. Dog running at large: twenty-five dollars (\$25.00) first offense; fifty dollars (\$50.00) second offense; one hundred dollars (\$100.00) third and each subsequent offense.
- E. Violation of restraint of dogs off premises: twenty-five dollars (\$25.00).
(Prior code § 13-10)

6.04.110 Quarantining of dog that bites.

Any dog which bites a person shall be quarantined for ten (10) days if ordered by the animal control officer. During quarantine, the dog shall be securely confined and kept from contact with any other animal. At the discretion of the animal control officer, the quarantine may be on the premises of the owner. If the animal control officer requires other confinement, the owner shall surrender the animal for the quarantine period to an animal shelter or shall, at his or her own expense, place it in a veterinary hospital or, if deemed appropriate, have the animal humanely euthanized and tested for rabies.

(Prior code § 13-11)

6.04.120 Animals suspected of being rabid.

No police officer or other person shall kill or cause to be killed any dog suspected of being rabid, except after the dog has been placed in quarantine and the diagnosis of rabies is made by a licensed veterinarian. If a veterinarian diagnoses rabies in a dog in quarantine, then the animal shall be humanely killed.

(Prior code § 13-12)

6.04.130 Noisy or biting animals and birds.

No person shall keep any animal or bird which by biting or by causing frequent or continued noise shall injure or disturb the quiet, comfort or repose of any person in the vicinity.
(Prior code § 13-13)

6.04.140 Barking dogs.

- A. Nighttime Repetitive Barking. It is unlawful for a dog owner to allow a dog within the town to bark in the open, outside of any building or inside a building in such a manner as to be heard beyond the premises where the dog is quartered, repetitively for more than ten (10) minutes during the quiet hours between nine p.m. and seven a.m.
- B. Daytime Repetitive Barking. It is unlawful for a dog owner to allow a dog within the town to bark in the open, outside of any building or inside a building in such a manner as to be heard beyond the premises where the dog is quartered, repetitively for more than thirty (30) minutes during the hours between seven a.m. and nine p.m.
- C. Multiple Violations. Multiple violations of this section shall be deemed a nuisance and subject to a hearing as stated in Section 6.04.090 of this chapter.
- D. Fines. The owner of any dog found by the animal control officer or the police department to be in violation of this section shall be subject to a fine as follows:
 - 1. Twenty-five dollars (\$25.00), first offense in a three hundred sixty-five (365) day period.
 - 2. Fifty dollars (\$50.00), second offense in a three hundred sixty-five (365) day period.
 - 3. One hundred dollars (\$100.00), third and each subsequent offense in a three hundred sixty-five (365) day period.

(Prior code § 13-17)

6.04.150 Enforcement.

Any animal control officer shall have police powers in the enforcement of this chapter, and no person shall interfere with or hinder, molest or abuse any animal control officer in the exercise of such powers.

(Prior code § 13-14)

6.04.160 Severability--Conflict with statutory provisions.

If any part of this chapter shall be held invalid, such part shall be deemed severable and the invalidity thereof shall not affect the remaining parts of this chapter. No provision or interpretation of a provision of this chapter is intended to be either in conflict with or an attempt to change any statutory provision in MGL c. 140 pertaining to dogs.

(Prior code § 13-16)

6.04.170 Violation--Penalty.

Any person violating any provision of this chapter shall be deemed guilty of a misdemeanor and, except as otherwise provided by law or this chapter, shall be punished by a fine. If any violation shall be continuing, each day's violation shall be deemed a separate violation. Complaints will be sought in a district court according to MGL c. 140, § 173A.

(Prior code § 13-15)