Case No. 21-3794

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RACHAEL DANKER, ET AL.,
Plaintiffs-Appellants,

v.

THE CITY OF COUNCIL BLUFFS, IOWA,
Defendant-Appellee.

On Appeal from the United States District Court
Southern District of Iowa
Western Division

Honorable John A. Jarvey
(1:20-CV-00016-JAJ)

BRIEF OF DEFENDANT-APPELLEE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants are owners and former owners of dogs commonly identified as "pit bulls." The Complaint in United States District Court for the Southern District of Iowa challenges the constitutionality of the City of Council Bluffs, Iowa municipal ordinance banning such animals from the City. App. 0001-20; R. Doc.1, at 1-20.

The district court granted summary judgment in favor of the Defendant City. It is undisputed that the City has a legitimate government purpose in the public health, safety and welfare to reduce or protect its community against dog bites. Based on the standards and evidence presented, it is not reasonably disputed that dogs can be visually identified. Additionally, under rational scrutiny, the City's demonstrable decline in reported dog bites overall since enactment of the ordinance, made dog owners' claims, even taken as true, immaterial to the City's legitimate purpose in the Ordinance. Thus, the district court correctly applied the traditional limited judicial principles of rational basis scrutiny in finding the City ordinance constitutional.

Defendant-Appellee City requests 15 minutes of oral argument.

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STATEMENT OF THE ISSUES

Whether the district court properly granted Defendant City's Motion for Summary Judgment because rational basis scrutiny supports the breed ban ordinance on both substantive due process and equal protection claims.

F.C.C. v. Beach Commc'ns, Inc., 508 U. S. 307 (1993).

Birchansky v. Clabaugh, 955 F.3d 751 (8th Cir. 2020).

Gallagher v. City of Clayton, 699 F.3d 1013 (8th Cir. 2012).

STATEMENT OF THE CASE

I. THE ORDINANCE

Defendant-Appellee City of Council Bluffs, Iowa ("City") is a municipal corporation in Iowa. In 2004, after debate, the City originally enacted Ordinance 5821; more recently, in October 2018, the City enacted Ordinance 6357. App. 0084, R. Doc. 40-3, at 17-19; App. 0088-0139, R. Doc. 40-3, at 23-74. The Ordinance at issue is known as City of Council Bluffs Municipal Code [CBMC] § 4.20.112, Pit Bulls Prohibited. App. 0104-0106, R. Doc. 40-3, at 39-41.

The Ordinance makes it unlawful to own, possess, maintain, harbor or keep a pit bull dog. App. 0104; R. Doc 40-3, at 39 at CBMC § 4.20.112(a). Also, Appellee's Addendum. The City Ordinance 6357 defines "pit bull" in § 4.20.112(a)(2) as:

> Any dog that is an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying the majority of physical traits of any one or more of the above breeds (more so than any other breed), or any dog exhibiting those distinguishing characteristics which substantially conform to the standards established by the American Kennel Club or United Kennel Club for any of the above breeds. The A.K.C. and U.K.C. standards for the above breeds are on file in the office of the administrative authority.

CBMC § 4.20.112(a)(2). App. 0104, R. Doc. 40-3, at 39; App. 0041, R. Doc. 40-1, at 3 ¶6.

In the event a dog is identified as being subject to the ban, the Council Bluffs Municipal Code further provides for a procedure for disputing the classification of a dog as a pit bull. App. 0402-0403, R. Doc. 46 at 7-8 ⁋⁋7-8; App. 0104-0106, R. Doc. 40-3, at 39-41 at §4.20.112. Thus, the ordinances provide procedural due process for violations. App. 0106, R. Doc 40-3, at 37 at §§ 4.20.112 (e) and (f); App. 0102, R. Doc. 40-3, at 37 at §4.20.010(a); App. 0142, R. Doc 40-3, at 77 at §8.02.020.

The Ordinance prohibiting pit bull type dogs has been in effect since January 2005.

II. THE PROCEDURAL HISTORY

On May 12, 2020, Plaintiff dog owners[1] brought this action asserting a single claim for violation of the United States Constitution pursuant to 42 U.S.C. §1983; App. 1-20; R. Doc. 1, at 1-20. In making the complaint, Plaintiff dog owners included claims of vagueness; over- and under-inclusiveness; lack of rational relationship to a legitimate government interest in health, safety or welfare in violation of their rights to substantive due process and equal protection; and violation of procedural due process rights. *Ibid.*

The City filed its Answer and Affirmative Defenses on June 26, 2020. App. 0021-0029; R. Doc. 9, at 1-9. Among its affirmative defenses, the City asserted the rational relationship of the ordinance to

[1] For purposes of this appeal, Plaintiffs-Appellants are Rachel Danker, Jesse Johnson, Samantha Johnson and Aubrey Wilhite ("Plaintiff dog owners"). Initially, nine plaintiffs filed suit. Plaintiffs Amanda Jungman and John Doe were voluntarily dismissed pre-judgment. App. 0030; R. Doc. 21, at 1. Plaintiffs Stephanie Nelson, Don Williams and Julie Williams did not appeal the District Court's findings they did not have standing and were dismissed from this Appeal on or about March 4, 2022.

regulating, opposing or combating dog attacks and dog bites generally. App. 0027-28; R. Doc 9, at 7-8 ⁋⁋11-12. After conducting discovery, the City timely filed a Motion for Summary Judgment on all claims on September 10, 2021. App. 0036-38; R. Doc. 40, at 1-3.

The district court issued its order and opinion granting the City's Motion for Summary Judgment on October 29, 2021. App. 1393-1418; R. Doc. 63, at 1-26. Judgment was entered on November 1, 2021. App. 1419; R. Doc. 64, at 1. This Appeal was filed November 29, 2021. App. 1420; R. Doc. 65, at 1.

Plaintiff dog owners do not appeal the district court's order granting summary judgment against their procedural due process and the void for vagueness claims. (Opening Brief of Plaintiffs-Appellants at 16). Additionally, while not stated, the appellate brief does not argue the over- and under-inclusive assertions which were included in the summary judgment. App. 1406; R. Doc. 63, at 13. Thus, Plaintiff dog owners pursue only the substantive due process and equal protection claims of a lack of rational relationship to the legitimate government interest.

III. THE FACTS

A. The City's Rational Basis Facts.

In the early 2000s, the City encountered increased reports of dog bites and attacks, reportedly due to pit bull type dogs. App. 0331-332, R. Doc. 40-3, at 266-267 ¶¶3-7. [2] In 2003, the City's animal control department began compiling the information reported and gathered in its office, including licenses, complaints and dog bites, among other things. App. 0360-61; R. Doc. 40-3, at 295-96, at ¶¶3-7. This information was available at the time the Ordinance was passed, and has been continued to be compiled in the usual course of operations since 2003. *See* App. 0215-0258; R. Doc. 40-3, at 150-193.

For instance, in 2003, the licensed dog population in the City had approximately 2.9% pit bull dogs; however, pit bull dogs were reported as being responsible for 12.4% of the dog bites reported to animal control. App. 0040; R. Doc 40-1, at 2. App. 0331-0332; R. Doc 40-3, at 266-267 ¶6. App. 0215, R. Doc. 40-3, at 150.

[2] The district court specifically overruled the foundation objections made. App. 1396, R. Doc. 63, at 4 ("the dog owners dispute the mayor's affidavit on foundation grounds, but the court overrules that objection.").

Then, in 2004, the licensed dogs registered as pit bulls accounted for only 2.3% of the total number of licensed dogs; however, as reported to Animal Control, pit bulls accounted for 22.1% of the total number of reported bites in Council Bluffs. *Ibid.* App. 0216, R. Doc 40-3, at 151. So, based on the information available to the City, the City shows that pit bulls were disproportionately responsible for dog bites reported in the City. Based on the available information, the reports involving pit bull dogs accounted for almost ten times as many bites as should have occurred based on the licensed number of pit bulls. In contrast, Labrador retrievers represented approximately 11% of the licensed population, and accounted for approximately 11% of the dog bites reported. App. 0216; R. Doc. 40-3, at 151; App. 0328; R. Doc 40-3, at 263.

Plaintiff dog owners assail this information under their presumption that not all dogs are licensed, so in their view, there is no way to reasonably assess how many dogs are truly in a population. (Opening Brief of Plaintiffs-Appellants at 15). Yet, Plaintiff dog owners claims are speculative supposition and generalizations; none of Plaintiffs' witnesses conducted any review or analysis the City's

information. Regardless, the City can only use the information reported to it from its citizens for its reporting. The animal control ordinances regulating dogs and dog licensing are not irrational because some citizens may not licenses their dog or may not report other activity. Likewise, using the information reported and collated provides the City some ability to track its information. App. 0210-11; R. Doc. 40-3, at 145-6 (Depo. 9:14-15:3). App. 0211-14; R. Doc. 40-3, at 146-149 (Depo. 15:19-18:9). The information is what it is. Presumptively de-valuing it without anything more than conjecture does not alter reasonableness.

Since the pit bull prohibition took effect in 2005, the number of reported dog bites has generally declined and has remained approximately 25% less, from a high of 131/132 to varying 70-102 in the years 2007 through 2020. App. 0362; R. Doc. 40-3, at 297 at ¶9. App. 0365-366; R. Doc. 40-3, at 300-301.

In addition to the information and reports gathered by the City personnel, the City's expert epidemiologist reviewed and analyzed the City information. Epidemiologists study patterns for public health, identify trends; one component to do this is by collecting data or analyzing date that has already been collected by health officials. App.

0300; R. Doc. 40-3, at 235. The public health perspective provided by Dr. Trembath provides further context as to the rational basis for the City's Ordinance. *See*. e.g. App. 0302-0305, R. Doc. 40-3, at 237-240.

The objections by Plaintiff dog owners regarding reliability of the information does not change the reasonableness of the City's perception based on the reports received. App.1397; R. Doc. 63, at 5. The City is entitled a presumption even without empirical data or mathematical certainty.[3]

B. No Genuine Issue of Material Facts Presented.

In the facts portrayed in their Opening Brief, Plaintiff dog owners overstate that the district court accepted Plaintiff dog owners as "establishing" various assertions.[4] However, a review of the district

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[3] See, *Birchansky v. Clabaugh,* 955 F.3d 751, 758 (8th Cir. 2020).

[4] Plaintiff dog owners also argue that their motion in limine was filed but not fully briefed, so the opinions of the City's expert were not reliable as part of the motion for summary judgment. (Opening Brief of Plaintiffs-Appellants at 13, fn 8). It should be noted that the City likewise timely filed a motion in limine concerning the experts proffered by Plaintiff dog owners, on the grounds of Plaintiffs' experts known bias and their failure to meet scientific admissibility standards. App. 1013-1014, R. Doc. 60, at 1-2; App.1017-1021, R. Doc. 61, at 2-6. Regardless, for purposes of summary judgment, the district court did not need to determine the motions in limine. The court gave the Plaintiff dog owners the benefit of reasonable inferences.

court's order demonstrates that each "established" claim is prefaced by the district court merely acknowledging that it was merely "the dog owners argue" or "contend." *See*, App. 1407; R. Doc. 63, at 15; App. 1406-1407, R. Doc. 63, at 14-15; App. 1399-0400; R. Doc. 63, at 7- 8; App. 1400; R. Doc. 63, at 8; App. 1407; R. Doc. 63, at 15.

Still, in the appeal, the Plaintiff dog owners impermissibly assert hearsay evidence of various position statements as fact to give weight to their proffered experts. (Opening Brief of Plaintiffs-Appellants at 12) The City timely objected to the improper hearsay and foundation. App. 0724; R. Doc. 50-1, at 1. App.0712-713; R. Doc. 50, at 1-3. *See also,* App. 0743-0745; R. Doc. 50-1, at 20-22 (objections to ⁋⁋46-48, 50-51. In its order, the district court stated "the court finds many of their factual allegations are irrelevant or immaterial or are legal conclusions or legal arguments." App. 1393; R. Doc. 63, at 1. Accordingly, under *de novo* review, this Court likewise should not be swayed by the improper position statements.

In a nutshell, the Plaintiff dog owners relied upon their proffered expert witnesses, all of whom relied upon the same two studies incorporating a sample of twenty dogs to indorse the theory that visual

identification of all dogs inconsistent and unreliable. Undeniably, though, the studies own conclusions and limitations conclude nothing more than that additional studies, with different dogs and different researchers should occur. App. 0560; R. Doc. 46-1, at 131, at § 4.1 (Limitations of the Study). App. 0551-552; R. Doc. 46-1, at 122-123 (Conclusion). No such studies have been introduced.

Indeed, Plaintiff dog owners admitted several facts, which support the City's reasonable and rational basis and remove any genuine issue of material fact. Plaintiff dog owners admit:

- Dog bites are a public health issue, and that there are approximately 4.5 million dog bites per year. App. 0396; R. Doc. 46, at 1. *See also* App. 0466-0468; R. Doc. 46-1, at 37-39. App. 0472-0475; R. Doc. 46-1, at 43-46.
- The City's Animal Control began compiling records available in 2003. App. 0398; R. Doc. 46, at 3.
- The Municipal Code provides procedures to contest a finding that a dog is a pit bull. App. 0401-0403; R. Doc. 46, at 6-8;
- That for the purpose of breed-specific legislation, visual identification is the industry standard. App. 0405, R. Doc. 46,

at 12-13. App. 0304; R. Doc. 40-3, at 239. App. 0274; R. Doc. 40-3, at 209, at 37:17-24. App. 0276; R. Doc. 40-3, at 211, at 42:4-10. App. 267-268; R. Doc. 40-3, at 202-203 at 27:18-28:12.

- There is a general understanding of a pit bull type dog, including the breed standards. App. 266-268; R. Doc. 40-3, at 201-203 at 26:4-9, 27:18-28:12. App. 0406, R. Doc. 46, at 15.
- The City can show a reduction in reported dog bites. App. 0407; R. Doc 46, at 19.[5]

Indeed, the breed standards, generally through the A.K.C. and U.K.C. provide standards which contain both physical and some behavior characteristics. App. 0733-34, R. Doc. 50-1, at 10-11, ¶¶21-22. The record further demonstrates that there are some behavioral characteristics that are heritable in a breed. App. 0281-84; R. Doc. 40-3, at 216-219, at 20:6-23:3. A review of the record cited demonstrates that

[5] While denying, the Plaintiffs merely argue that "even if taken as true," the reduction must be qualified because it is not a "statistically significant reduction." Rational basis review does not mandate such empirical certainty. *Birchansky v. Clabaugh,* 955 F.3d 751, 758 (8th Cir. 2020). The argument in denying did not create a genuine issue of fact.

behaviorists and geneticists are interested in what and how behavior is heritable, but they do not know why or to what extent, just that it is complex and that also environment places a significant role. App. 0596; R. Doc. 46-1, at 167, at 73:9-14. ("The whole area of canine behavioral genetics is really in, you know, in flux…there's so much we don't know. We do know in general, you know, center [sic] set, retrievers retrieve. Fighting dogs fight partly due to behavior genetics…").

Ultimately, Plaintiff dog owners admit that dog bites are a public health concern; the City has a duty to oversee its community's public health and safety; instead of banning all dogs, the City reasonably decided to prohibit pit bull type dogs. Plaintiff dog owners failed to demonstrate any actual change in circumstance sufficient to challenge the Ordinance concerning pit bull type dogs. These salient facts have not changed.

SUMMARY OF THE ARGUMENT

Where there are plausible reasons for the City's action, the court's inquiry is at an end. *F.C.C. v. Beach Commc'ns, Inc.* at 508 U.S. 307, 313 (1993). Breeds of dogs are generally groupings of animals that contain similar physical traits. App. 0417, R. Doc. 46, at 22 ¶10. The

City has the police power to regulate dog ownership. App. 1393, R. Doc. 63, at 24 (citing *Lunon v. Botsford*, 946 F.3d 425, 430 (8th Cir. 2019). And, it is not disputed that health, safety and public welfare are legitimate state interests. Based on the evidence presented at summary judgment, the City's reasonable use of visual identification cannot be irrational in adopting a breed specific ban on pit bull type dogs. *See* App. 1411, R. Doc 63, at 19. "[T]he dog owners cannot genuinely dispute the A.K.C. and U.K.C. breed standards are also based on visual identification of physical traits." App. 1399, R. Doc. 63, at 7. *See also*, App. 0420, R. Doc. 46, at 25 ⁋⁋ 21-22.

While Plaintiff dog owners want to distinguish that the behavior of a dog cannot be predicted just due to breed, this claim is likewise immaterial to whether the City ordinance meets rational basis scrutiny because their own witnesses acknowledged that there is some behaviors associated with breeds generally.

The district court correctly identified the reasonable limitations of Plaintiffs' allegations of irrationality of the pit bull ban. Physical traits define breeds, and reliance on this is reasonable and rationally related to the City's duty and interest in the health, safety and well-being of its

community. App. 0307-0308, R. Doc. 40-3, at 242-243; App. 0674-0676, R. Doc. 46-1, at 245-247; App. 0044, R. Doc. 40-1, at 6 ¶17. Even in the event an individual dog could be mis-identified, there is an appeal process available. App. 0106; R. Doc. 40-3, at 41 § 4.20.112(f).

As demonstrated in the record, "[e]ven if the information was anecdotal or flawed by the imperfections of visual identifications of dog breeds, the city had information that Council Bluffs had encountered increased reports of dog bites…reportedly due to pit bull dogs." App. 1410; R. Doc 63, at 18. Given all reasonable inferences, the dog owners could not negative every conceivable basis for the Ordinance. Summary judgment was proper.

STANDARD OF REVIEW

The district court's granting of the summary judgment must be reviewed *de novo*, viewing the record in the light most favorable to the non-moving party and giving that party the benefit of all reasonable inferences. Fed. R. Civ. P. 56.

Not every claim or assertion is reasonable. Reasonable inferences are "those inferences that may be drawn without resorting to

speculation." *Mathes v. Furniture Brands Int'l, Inc.*, 266 F.3d 884, 885-86 (8th Cir. 2001).

Accordingly, summary judgment is appropriate where there is no genuine dispute of material fact and reasonable fact finders could not find in favor of the nonmoving party as a matter of law. *Pals v. Wkly*, 12 F.4th 878, 881 (8th Cir 2021). An issue of fact is material for summary judgment purposes if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Likewise, a factual dispute is genuine when "a reasonable jury could return a verdict for the nonmoving party" on the question. *Id.* Only disputes over facts that might affect the outcome will properly preclude summary judgment. *Id.*

The court of appeals may affirm the district court's grant of summary judgment on any grounds supported by the record. *Woods v. Daimler Chrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005).

ARGUMENT

I. COUNCIL BLUFFS' ORDINANCE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS OR EQUAL PROTECTION RIGHTS

Over the years, several jurisdictions in both federal and state courts have reviewed and upheld breed ban ordinances and statutes on substantive due process and equal protection grounds. [6]

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[6] *See*, *Buchda v. Vill. of Fall River*, No. 15-CV-120-WMC, 2016 WL 2997512 (W.D. Wis. May 23, 2016) not reported in Fed. Supp.) (no violations as to vagueness, substantive due process and equal protection); *Am. Canine Found. v. City of Aurora*, 618 F. Supp. 2d 1271 (D. Colo. 2009)(denying claims of violations of substantive due process, equal protection and regulatory taking)*; Am. Dog Owners Ass'n, Inc. v. Dade Cty., Fla.*, 728 F. Supp. 1533 (S.D. Fla. 1989)(denying a vagueness challenge); *Vanater v. Vill. of S. Point*, 717 F. Supp. 1236 (S.D. Ohio1989)(no violations of substantive due process, equal protection and regulatory taking); *Starkey v. Chester Twp.*, 628 F. Supp. 196 (E.D. Pa. 1986) (no equal protection violation); *Toledo v. Tellings*, 871 N.E.2d 1152 (Ohio 2007)(no violation of substantive due process); *Bess v. Bracken Cty. Fiscal Ct.*, 210 S.W.3d 177 (Ky. Ct. App. 2006) (substantive and procedural due process, and privileges and immunities); *Colorado Dog Fanciers, Inc. v. City & Cty. of Denver, By & Through Its City Couns.*, 820 P.2d 644 (Colo.1991) (vagueness challenge but denying, substantive due process, equal protection, procedural due process, regulatory taking); *Holt v. City of Maumelle*, 307 Ark. 115, 817 S.W.2d 208 (1991)(denying vagueness claim); *Greenwood v. City of N. Salt Lake*, 817 P.2d 816 (Utah 1991)(denying vagueness and equal protection claims); *State v. Anderson*, 566 N.E.2d 1224 (Ohio 1991)(denying vagueness challenge); *Am. Dog Owners Ass'n v. City of Yakima*, 113 Wash. 2d 213, 777 P.2d 1046 (1989)(vagueness challenge denied); *Hearn v. City of Overland Park*, 244 Kan. 638, 772 P.2d 758

A. Rational Basis Scrutiny

The Due Process Clause of the Fourteenth Amendment contains a substantive sphere which serves to bar certain government actions which are undertaken arbitrarily regardless of whether the procedures used to implement them were fair. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). The substantive component of the Fourteenth Amendment guards against arbitrary legislation by requiring the existence of some rational relationship between the statute being challenged and a government interest sought to be advanced. *Dias v. City and Cty. of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009). When no fundamental right is implicated, courts apply a rational basis test to determine whether a challenged ordinance is rationally related to a legitimate government interest. *Id.* at 1182.

(1989)(claiming substantive due process and equal protection); *Singer v. City of Cincinnati*, 57 Ohio App. 3d 1, 566 N.E.2d 190 (1990)(claiming substantive due process and equal protection); *State v. Robinson*, 541 N.E.2d 1092 (Ohio Ct. App. 1989)(claiming vague and substantive due process); *State v. Peters*, 534 So. 2d 760, 768 (Fla. Dist. Ct. App. 1988); *Garcia v. Vill. of Tijeras*, 767 P.2d 355 (N.M. Ct. App.1988). Cf, *Am. Dog Owners Ass'n Inc. v. City of Linn*, 404 Mass. 73, 533 N.E.2d 642 (1989) (granting vagueness challenge); *Am. Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416 (Iowa 1991)(granting vagueness challenge).

In challenging a statute under Equal Protection Clause using the rational basis test, a statute (or ordinance in this case) is presumed constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. *Birchansky v. Clabaugh,* 955 F.3d 751, 757 (8th Cir. 2020). Equal protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices. *F.C.C.,* 505 U.S. at 313. The rational basis test only requires a legislature draw a rational line to achieve the government purposes sought, not a perfect line. *Holt v. Howard*, 806 F.3d 1129, 1133 (8th Cir. 2015). The law's rational relation to a state interest need only be conceivable, and supporting empirical evidence is unnecessary. *Birchansky,* 955 F.3d at 757, citing *F.C.C.*, 508 U.S. at 313-14. Where there are "plausible reasons" for the legislative action, the court's inquiry is at an end. *F.C.C.*, 505 U.S. at 313-14. In essence, even if a challenging party may have a rational basis for not having an ordinance, when the governmental body does have one, the ordinance is constitutional.

A legislative actor is "not required to 'choose between attacking every aspect of a problem or not attacking the problem at all.' A law

supported by some rational basis does not offend the constitution merely because it is imperfect, mathematically imprecise, or results in some inequality." *Birchansky*, 955 F.3d at 758 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485-87(1970)).

As admitted by Plaintiff dog owners, *F.C.C.* makes clear that a "legislative choice" to regulate in an area and the *accuracy* of "legislative facts" or motives are "not subject to courtroom fact-finding" because legislation may be initially adopted "based on rational speculation unsupported by evidence or empirical data." *F.C.C*, 508 U.S. at 315. However, the Plaintiff dog owners then misconstrue the tenant of judicial restraint in examining rational basis to an inexcusable extreme, claiming that the district court's restraint in not further scrutinizing the City's rational basis. The basic proposition tendered by the Plaintiff dog owners is that the City was unreasonable and irrational in relying on the reports of dog bites and attacks, and that every report collated since cannot be reasonable because – based on their opinions – visual identification may be unreliable.

The fact is, the Plaintiff dog owners' evidence is not compelling, even for purposes of summary judgment. Although the Court should

not weigh credibility, this is primarily the deference they seek. Neither the decision of the remanded *Dias* opinion, nor the *Droll* decision cited by Plaintiff dog owners, are relevant or binding upon this Court in reviewing the City's rational basis. It is as though, the Plaintiff dog owners want some additional scrutiny to be applied, to require the City to prove how the Ordinance remains justified. This is not rational basis scrutiny. There is no animus, no additional rights at issue that mandate anything other than rational scrutiny.

The Plaintiff dog owners' basic position is that the accuracy of visual identification of dog breeds is unreliable. This is misplaced and irrelevant to the rational basis of the City for two reasons. Visual identification can be accurate. App. 0044-0045; R. Doc. 40-1, at 6-7 ¶¶20-21. More practically, the City has procedures under the ordinance to dispute whether a dog is the regulated breed. *See*, App. 0106; R. Doc. 40-3, at 41 at §4.20.112(f).

Plaintiff dog owners ask the Court to find absolute that visual identification is "inherently unreliable"; this is not the evidence, and the district court applied the reasonable inferences required. Indeed, Plaintiff dog owners presented nothing more than that visual

identification is imperfect. Imperfect does not negate every conceivable basis. There may have been different or better ways to write the breed ban. There just has to be no genuine issue that the City had and has a rational basis for the Ordinance.

B. The City's Legitimate Government Interest in Reducing Dog Bites and Attacks is Rationally Related to the City's Ordinance in Order to Protect the Health and Safety of Its Community.

A city has a legitimate government interest in protecting the health and safety of the public by enacting animal control ordinances. *Dias*, 567 F.3d at 1183 ("It is uncontested that [the city] has a legitimate interest in animal control – the protection of health and safety of the public."). *See also,* App. 0379, R. Doc. 45, at 6. Likewise, the City has the police power to regulate dog ownership. *Lunon*, 946 F.3d at 430 (8th Cir. 2019). *See also*, *Sentell v. New Orleans & Carrollton R.R.Co.*, 166 U.S. 698 (1897) (holding that dogs are property subject to government regulation and within the police powers of the state). Accordingly, reducing dog bites is a legitimate government interest for its community.

The stated purpose of the legislation is not required as long as the law could rationally further some legitimate government purpose.

F.C.C., 508 U.S. at 315. The law's rational relationship to a state interest need only be conceivable, and supporting empirical evidence is unnecessary. *Birchansky* 955 F.3d at 757 (citing *F.C.C.*, 508 U.S. at 315; *Kansas City Taxi Cab Drivers Ass'n*, 742 F.3d 807, 809 (8th Cir. 2013).

While not binding on this Court, in a state court review of rational basis, a Connecticut court concisely summarized that:

> For purposes of rational basis review, it is not enough for the challenger to show that the government was actually mistaken in its factual assumptions or reasoning, that the restriction at issue was supported by "rational speculation" rather than empirical evidence, that the "rational basis" for the restriction or classification was not the rationale the legislature had in mind, or that the restriction adopted is over-inclusive or under-inclusive; a statute suffering from all of these flaws may still survive rational basis scrutiny.

Martinez v. Mullen, 11 F.Supp.3d 149,160 (Conn. 2014), aff'd sub nom. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015) (finding rational basis for regulation that only a licensed dentist may shine a LED lamp at consumers to whiten teeth). This reasoning is appropriate and analogous to the present review because even giving the Plaintiff dog owners all reasonable inferences, any flaws in the City's

information when enacting of the Ordinance do not remove the City's rational basis.

Plaintiff dog owners assert their experts' agreement as to the general unreliability of visual identification does not wholly negate the City's means of using visual identification in the Ordinance. There is no genuine question that visual identification is the standard, or that in can be reliable. Indeed, Plaintiff dog owners witnesses acknowledge physical traits are more readily identifiable.

In reviewing smoking bans, this Court has said, "The fact that the city has determined it appropriate to eliminate smoke from certain public places, yet not ban other possible air contaminants, does not cause the Ordinance to fail rational basis review." *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012). "Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993).

Similarly, in the case at bar, the City's means of using visual identification in the Ordinance to identify the pit bull type dog is sufficient. All dogs do not have to be banned. That the City has

determined it appropriate to ban pit bull type dogs, yet no other breed or types of dogs, even based upon visual identification, does not cause the Ordinance to fail rational basis review.

Council Bluffs can demonstrate that by removing the disproportionate danger that had been reported, overall dog bites have declined and remained lower. App. 0042, R. Doc. 40-1, at 4 ¶10; App. 0333, R. Doc. 40-3, at 267. It does not have to be precise, nor mathematically certain, but the City can demonstrate this basis. The City Ordinance was enacted with rational reasons to attempt to reduce the frequency and damage of dog bites by prohibiting ownership of the type of dogs that had been likely to attack others and animals. The means chosen by the City do not have to be absolute. The City can legitimately choose which dogs to ban without any additional scrutiny.

The City's public health and welfare justification for the Ordinance is sufficient, there is no need to analyze any other conceivable rationales or counter arguments. Because the City reasonably could believe the reports to be true, even if flawed, the Ordinance survives a rational basis review. The Plaintiffs, as a matter of law, cannot "negative every conceivable basis which might support"

the Ordinance. *Gallagher at 1020* (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

Summary judgment in favor of the City was proper.

C. Visual Breed Identification of Mixed Breed Dogs is Immaterial Argument to the Rational Basis Scrutiny

"Legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C.*, 508 U.S. at 315. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise, or even "if the rationale for [the ordinance] seems tenuous," *Romer v. Evans*, 517 U.S. 620, 632 (1996).

There is no genuine question that visual identification is the standard. Plaintiff dog owners acknowledge physical traits are more readily identifiable. Additionally, the industry uses visual identification. (*see* A.K.C./U.K.C. standards contain both physical and some behavior characteristics). App. 0733-34, R. Doc. 50-1, at 10-11, ¶¶21-22. At best, the Plaintiff dog owners claim is nothing more than it's possible that some of reports received identifying pit bull type dogs in the attacks

were in error. In this instance, if it were to occur, a dog owner could object to the finding and request further hearing.

The City is not required to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge*, 397 U.S. at 486-87. A law supported by some rational basis does not offend the constitution merely because it is imperfect, mathematically imprecise, or results in some inequality. *Id.* at 485, 90 S.Ct.1153. *Birchansky*, 955 F.3d at 758

The rational basis the City has demonstrated, even if *possibly mistaken*, there is no cause for additional scrutiny to be applied. The Ordinance at issue provides a "dog displaying the majority of physical traits of any one or more of the above breeds" is subject to the Ordinance. Application of the physical characteristics does not make the Ordinance irrational as a matter of law, nor create a genuine issue of material fact for purposes of summary judgment. The industry standard for identifying dogs is by using visual inspection and comparing it to published breed standards. App. 0044-0045, R. Doc. 40-1, at 6-7 ¶20. As much as Plaintiffs assert that the science is evolving or changing, there is a rational basis in regulating the population of dogs with the physical

characteristics of pit bulls, and there remains a legitimate government interest in reducing the number of dog bites or attacks.

Ultimately, the Plaintiff dog owners evidence is only entitled to reasonable inferences, which does not extend to speculation. *Mathes v. Furniture Brands Int'l, Inc.*, 266 F.3d 884, 885-86 (8th Cir. 2001). In this case, the Plaintiff dog owners claims of unreliability or inconsistent visual identification is nothing more than a speculation when visual identification can be accurate, and there is nothing but speculation in applying their claims to the City's information seventeen years after enactment. Despite the opinions offered, the opinions provided no proof; the dog owners provided nothing more than conjecture. As a matter of law, there was no genuine issue of material fact to challenge the City's Ordinance.

D. Breed as a Predictor of Dangerousness Argument Does Not Alter Rational Basis or Create Irrationality.

It is not disputed that dog bites are a significant public health issue with an estimated 4.5 million dog bites occurring nationwide per year. App. 0039, R. Doc. 40-1, at 1 ¶1. So while the Plaintiff dog owners

claim that every pit bull type dog cannot be predicted to be aggressive; the City reasonably defends that it should not have to take that chance.

Even Plaintiff dog owner's experts acknowledge that behavioral characteristics in a breed are heritable to some extent, but they do not know to what extent. App. 0046, R. Doc. 40-1, at 8; App.0281-0284, R. Doc 40-3, at 216-219 at 20:6-23:3. And *see*, App.0596, R. Doc. 46-1, at 167 at 73:9-14. ("The whole area of canine behavioral genetics is really in, you know, in flux…there's so much we don't know. We do know in general, you know, center [sic] set, retrievers retrieve. Fighting dogs fight partly due to behavior genetics…").

That any one dog may not act in accordance with the general characterizations of the dog breed does not negate the public health and safety concerns for dealing with pit bull type dogs and the risks of dog bites for the City as a whole. The City meets rational basis scrutiny standard. The decision of the district court should be affirmed on this reason alone.

Thus, based on the evidence, it remains rational as a matter of law for the City to rely on the physical characteristics and visual identification. Even in the light most favorable to the dog owners,

behavioral traits are heritable to some extent. It is not irrational for the City to ban a breed of dog. The City meets the rational basis standard and summary judgment was proper.

Viewing the dog owners' evidence in the most favorable light with **reasonable** inferences thereto, demonstrates only that (1) dog breed **may not be** predictive of aggressiveness, dangerousness, or propensity to bite; (2) any individual pit bull type dog **may not be** more dangerous or prone to bite than other breeds of dogs; yet, (3) the industry standard is visual identification, and the City's method of identifying dog breeds is definable, reasonable and rationally related to the reported information available; (4) The animal control ordinances regulating dogs and dog licensing are not irrational because some citizens may not licenses their dog or may not report other activity. Using the information reported and collated provides the City some reasonable ability to track its information; and (5) using the information available to the City, is rationally related to the City's legitimate government purpose interest in reducing dog bites. The distinctions, speculative unreliability, and generalizations asserted by the Plaintiffs can be, and was properly deemed irrelevant by the district court once the rational

basis scrutiny was met. Plaintiffs failed to created ***genuine*** issues of ***material fact*** regarding the rationality of the Ordinance.

CONCLUSION

The judgment of the district court must be AFFIRMED.

Respectfully submitted this 4th day of April, 2022.

THE CITY OF COUNCIL BLUFFS, IOWA,
Defendant-Appellee,

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1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains 7,106 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

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/s/ Sara E. Bauer

CERTIFICATE OF SERVICE

I certify that on April 4, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

/s/Sara E. Bauer