

IN THE SUPREME COURT OF OHIO

City of Toledo,

Appellant,

Supreme Court Case No. 06-0690

v.

Paul Tellings,

Appellee.

On Appeal from the Lucas County
Court of Appeals,
Sixth Appellate District

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MERIT BRIEF OF *AMICUS CURIAE*
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS
(ASPCA) IN SUPPORT OF APPELLEE PAUL TELLINGS

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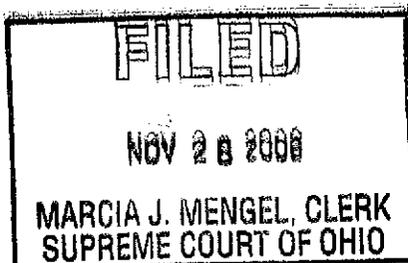


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INTRODUCTION

"My name is Andrea Miller, and I own an 8 year old black and white, male...fixed, pit bull named Ali...I've had Ali since the day he was born; the runt of a litter of 10, he had to be bottle fed and I became attached. He's been my best friend all his life, my only friend at times. I had a baby 8 months ago and we did all the training and adjusting to the new situation, he took to it well and we decided it would work....He is such a great dog, a huge baby who loves scratches and any attention. I call him 'my little butt shaker'Ali...enjoy[s] playing with other dogs. I frequently take him to my Grandmother's to play with her two dogs. He has also been through socialization classes and frequents pet stores with us.

"After all he's done I just can't bear to give up with out a fight and let them put him to sleep. He is literally my child and I am just devastated by this....He gets along with cats too; one of our cats, KiKi, he is particularly fond of. They take turns cleaning each other. I'm afraid she will be devastated as well once she realizes he is no longer around....I would prefer to call [you]...but every time I try to talk about it I get choked up and start crying. I was hoping you could offer me some direction and/or hope. If it was possible I'd even move to a pit bull friendly city, unfortunately it is out of my reach [sic].

"I'd be willing to drive any distance to save him and give him the comfort of a loving home that he deserves, or at least a chance at one. NO one at city hall or the health department seems to care how heart wrenching this is and I just can't understand how they can be so cold hearted. I apologize to take your time [sic], but I don't know what to do, I'm just trying to do everything I can.

"I just can't believe this is happening. I've wondered sometimes what life would be like when Ali passed on of old age, but I always assumed I didn't need to worry about that for many years. I never would have imagined something like this could be possible. He's been the one reliable, stable friend for so long I don't know how I will manage with out [sic] him. But I can guarantee it will be easier if I know he is alive, happy, and cared for. I've lived in and supported this city almost my whole life, but I can't help but feel betrayed and very bitter. I would appreciate any advertising you could do for Ali, and again, greatly appreciate your time either way."

— E-mail from Andrea Miller, Florissant, MO resident to the ASPCA concerning a local health department directive to seize and kill her dog Ali pursuant to a municipal breed specific law

Although Andrea Miller is a Missouri resident, her anguish over the possible summary destruction of her dog and companion as the result of a law targeting her dog's breed is a sentiment that has no doubt been shared by many Ohio residents. Every day, Ohio citizens unable to afford the prohibitively expensive liability insurance required by state law solely

because the dog warden has deemed their dogs to be pit bulls (R.C. 955.22) are faced with the prospect of criminal liability for failure to purchase insurance and/or the seizure and killing of their canine companions. Anna Hamilton, whose affidavit is attached, is one such Ohio resident from Licking County. Because the local dog warden deemed Baby, a badly abused but extremely sweet dog whom Anna and a friend had rescued, and with whom they had closely bonded, to be a pit bull, Baby was placed in jeopardy; she narrowly escaped death only due to the happenstance of some repairs being made to the pound and Anna's chance finding of a third party willing and able to purchase the required liability insurance. Neither Anna nor her friend had wanted to sign Baby over to the dog warden when warned of the insurance mandate, but the friend – who had previously decided to adopt Baby – feared the imposition of criminal liability if she refused to do so. *See* Affidavit of Anna Hamilton. In this instance, the questionable utility, morality, equity, and ultimately constitutionality, of this mandate, which can pose such dire consequences for both dog and owner alike, are particularly illuminated by the fact that while the dog warden determined Baby to be a pit bull, he deemed one of her puppies not to be. *Id.* As the Sixth District noted, in the court's discussion of the pit bull law's procedural infirmities:

Without documentation to prove the dog's breed origins, a non-pit bull owner could easily be ensnared under the statute, even though unaware that his or her dog could "fit the description" of his local dog warden agency. Dog Warden Skeldon addressed the difficulties in identifying pit bulls and acknowledged that some persons who obtained what they thought were pit bulls as pups, later discovered the dogs were not pit bulls. **On the other hand, we suggest that a puppy which does not look much like a pit bull, may exhibit more "pit bull characteristics" after it has become full-grown and a part of the family. Thus, if an owner did not think his dog looked like a pit bull, he or she might believe they could not be charged under the law (emphasis added).**

Toledo v. Tellings, 2006-Ohio-975 at ¶ 74. Notwithstanding any bond that in the future might develop between Baby's puppy and the puppy's new owner, it will not be a defense under the pit bull law that the Lucas County dog warden previously declined to classify the puppy as a pit

bull. If a subsequent dog warden disagrees with this assessment upon the puppy's maturation, the owner will be required to purchase liability insurance or face criminal liability and the dog's forfeiture and likely death. Such inevitably arbitrary and patchwork enforcement of the pit bull law is wholly antithetical to the procedural and substantive demands of due process and equal protection, being neither fair nor rational.

Significantly, like Baby, Paul Tellings' dogs were "family pets and had no history of aggressive or unlawful behavior," and yet their lives were endangered when a "health inspector, checking for lead paint, saw the dogs inside the Tellings residence and reported them." *Id.* at ¶ 2. Indeed, this disturbingly un-American event – in which a government agent breached the presumptive sanctity of Paul Tellings' home for the purpose of facilitating his and his dogs' punishment not for what they had done but solely due to their membership in a disfavored group – led directly to the dog warden's killing of one dog and Mr. Tellings being forced to give away another.

The Sixth District noted the extensive favorable testimony regarding the temperament and behavior of dogs identified as pit bulls both in Ohio and elsewhere:

Jed Mignano, a Toledo Humane Society cruelty investigator, testified that pit bulls had been taken in at the shelter, did not require special cages or treatment, and were adopted out without problems. He further stated that he had never been bitten by a pit bull and did not experience them to be "vicious" in comparison to other breeds. The state's expert, Dr. Borchelt, testified that he had never been bitten by a pit bull, that his investigations for housing complaints against pit bulls in New York did not reveal any vicious pit bulls, and that most pit bulls brought to animal shelters were adopted out without hesitation. Karla Hamlin testified that some pit bulls taken into the Lucas County Dog Pound exhibited aggressive behavior, chewing on mesh fencing and through aluminum water buckets. She acknowledged, however, that she had never been bitten by a pit bull and did not think pit bulls, as a breed, were any more likely to bite or to fight than other dogs.

Id. at ¶ 24. In addition, the court observed that "[r]ecent statistics from reports supplied by 44 Ohio county health departments indicated very few bites by pit bulls in 2001-2002, with chows,

German shepherds, Rottweilers, and Labrador retrievers at higher overall percentages of bites than pit bulls.” *Id.* at ¶ 29. And on direct examination, Lucas County dog warden Tom Skeldon admitted that bites by chows tend to be the most serious in the county (requiring “more sutures than any other dog”), while bites by the catch-all “shepherd mix” are the most numerous. *See* Skeldon Transcript at 101.

Yet, despite the foregoing data, which ideally should inure to the benefit of dogs deemed to be pit bulls, Ohio animal control agencies have overseen a substantial increase in the destruction of such dogs: specifically, in 1996, 101 Ohio agencies reported handling 2,141 of these dogs, while in 2004, 68 agencies reported handling 8,834 of them, of whom 1,425 (16%) were reclaimed by their original owner or adopted by a new owner and 7,409 (84%) were killed.¹ Given these numbers, it is hard to imagine that Paul Tellings and Anna Hamilton’s experiences are not being replicated throughout Ohio – that is, good dogs and people who love them caught up in the harsh and inexorable wheels of the state’s pit bull law. This has certainly been borne out in Prince Georges County, Maryland where, according to Animal Management Division Chief, Rodney Taylor, of the 900 pit bulls handled annually, 720 are “nice family dogs; however, all of them under the ban, must be euthanized unless a legal challenge is successful.” The Ohio pit bull law – which imposes criminal liability on owners who have not obtained the costly liability insurance and subjects uninsured dogs to death – operates as a *de facto* ban, forcibly separating people who cannot afford the required insurance from their beloved canine partners and equally preventing thousands of other good dogs deemed to be pit bulls from being adopted or otherwise finding homes.

¹ Lord L., DVM, MS; Wittum, T.E., PhD; Ferketich, A.K., PhD; Funk, J.A., DVM, PhD; Rajala-Schultz, P., DVM, PhD; Kauffman, R.M., BS. Demographic trends for animal care and control agencies in Ohio from 1996 to 2004. *JAVMA* 2006; 229: 48-54.

And to what end? The trial court and the Sixth District agreed that the most current research indicates that dogs deemed to be pit bulls are not more dangerous than dogs of other breeds, so temperament cannot provide the rationale for the Ohio pit bull law and the other challenged statute, Toledo's ordinance prohibiting ownership of more than one adult dog deemed to be a pit bull (T.M.C. §505.14(a)). Surely, then, these laws regulating pit bulls as vicious dogs must have a positive impact on public safety, their touted purpose. However, this, too, is not the case: while in 1996, 14.6% of animal control agencies reported local problems with dogfighting, by 2004, the number of agencies reporting local problems with dogfighting had skyrocketed to 29%.² Further, Lucas County's own data indicates a similar spiking in dog bite numbers (approximately 640 bites) in 2001 – more than a decade after the enactment of Ohio's pit bull law and the Toledo ordinance.³

Given the absence of evidence to support the notion that dogs deemed to be pit bulls are more dangerous than other dogs and should be regulated on this basis, as well as the failure of the Ohio and Toledo pit bull laws to address canine aggression in any meaningful way, these laws appear to have only two outcomes: (1) the unavoidably arbitrary enforcement of irrational policy, including the unreasonably disparate treatment of different classes of persons, and (2) the consequent grievous harm to property and liberty that flows from such wholesale compromise of procedural and substantive due process rights.

For all these reasons, the Court should uphold the decisions of the Sixth District vacating appellee's convictions and declaring the Ohio and Toledo pit bull laws to be unconstitutional.

² 1996 Ohio Survey of Animal Care and Control Agencies and 2004 Ohio Survey of Animal Care and Control Agencies, Ohio State University College of Veterinary Medicine.

³ <http://www.co.lucas.oh.us/DogWarden/2002statsrelease.asp> ("Lucas County Dog Warden Sets Record for Pit Bull Seizures").\

STATEMENT OF AMICUS INTEREST

The American Society for the Prevention of Cruelty to Animals (ASPCA) enjoys the support of over 18,900 Ohio residents who endorse its mission to “provide effective means for the prevention of cruelty to animals throughout the United States.” In tandem with this mission, the ASPCA opposes laws – such as the Ohio and Toledo pit bull laws – that discriminate against specific dog breeds or breed mixes without regard to the temperament and behavior of individual dogs. While failing to curtail illegal activities such as dog fighting, breed-based regulation threatens the integrity of families who count among their members dogs deemed to belong to the regulated breed. It also dims the prospects of shelter dogs deemed to belong to the regulated breed, making destruction more likely than adoption.⁴

Breed-specific laws need not be *de jure* bans to have a deleterious impact on human and animal welfare. The Ohio pit bull law is ostensibly only regulatory but in actuality imposes a harmful *de facto* ban. Like the Toledo ordinance banning ownership of multiple adult dogs deemed to be pit bulls, the Ohio law’s costly liability insurance requirement for such dogs is, as discussed above, equally capable of ripping apart families and impeding the adoption of the targeted dogs from shelters. Further, by classifying pit bulls as vicious, the Ohio and Toledo laws encourage the insurance industry to deny homeowners’ coverage to people whose dogs have been deemed pit bulls (e.g., State Farm, which will ensure dogs identified as pit bulls elsewhere in the country, will not insure them in Ohio because of the per se vicious classification), forcing responsible homeowners and dog guardians to choose between beloved companions and insurance for their home. (Lest the elevation of dogs to the status of family appear overblown, the Best Friends Animal Society conducted a poll in June 2006 revealing that

⁴ Lord L., DVM, MS, et al. Demographic trends for animal care and control agencies in Ohio from 1996 to 2004. *JAVMA* 2006; 229: 48-54.

69% of Americans view their pets as family members.⁵) Moreover, like the Ohio law's liability insurance requirement, the threat of no homeowner's coverage virtually guarantees destruction of adoptable pit bull-type dogs in shelters.

In light of these factors – that is, the inability of breed-specific laws to address public safety concerns in any meaningful fashion and the detrimental impact of such laws on human and animal welfare – the ASPCA seeks to ensure that the Sixth District decision is upheld and the Ohio and Toledo pit bull laws are deemed unconstitutional.

STATEMENT OF THE CASE AND FACTS

As noted in appellee's statement of the case, in 2003, Paul Tellings – a Toledo resident with a family including two young children – was charged with four criminal counts pursuant to the Ohio and Toledo pit bull laws. At the time, Mr. Tellings owned two American Pit Bull Terriers and one American Bull Dog not related to the American Pit Bull Terrier. In his defense before the Toledo Municipal Court, Mr. Tellings challenged the constitutionality of Toledo's limit on the ownership of dogs deemed to be pit bulls (T.M.C. §505.14) and Ohio's pit bull law, encompassing both its liability insurance requirement (R.C. 955.22) and classification of pit bulls as per se vicious (R.C. 955.11).

Despite agreeing with Mr. Tellings' contention that dogs deemed to be pit bulls are not inherently dangerous or vicious, the municipal court held, in a decision dated July 4, 2004, that the Toledo and Ohio pit bull laws are not unconstitutional. As a result, Mr. Tellings withdrew his prior plea of not guilty, pleaded no contest, and appealed the trial court decision to the Sixth District Court of Appeals, which, on March 3, 2006, ruled that the Ohio and Toledo pit bulls

⁵ <http://network.bestfriends.org/Campaigns/BFDay/KindnessIndex.aspx?g=02399b9cba6b4ebd809b2dc6e3d931fc> (Summary of Best Friends Animal Society Kindness Index Poll).

laws are, in fact, unconstitutional and vacated Mr. Tellings' convictions. Specifically, the Sixth District held that the Ohio and Toledo laws are unconstitutionally vague and violated Mr. Tellings' right to procedural and substantive due process and equal protection under the law.

The City of Toledo filed a Notice of Appeal to this Court on April 5, 2006 and its Merit Brief on October 9, 2006. The City of Cleveland and the Ohio Attorney General filed amicus briefs in support of appellant.

ARGUMENT

Amicus Curiae ASPCA's Proposition of Law No. 1:

Although protecting public health and safety is a legitimate government function, the Ohio and Toledo pit bull laws are not rationally related to this goal and therefore violated appellee's right to substantive due process.

R.C. 955.11(A)(4)(a)(iii) provides that the term "vicious dog" includes any dog which "[b]elongs to a breed that is commonly know as a pit bull." R.C. 955.22 states: "No owner, keeper or harbinger of a vicious dog shall fail to obtain liability insurance with an insurer authorized to write liability insurance in this state providing coverage in each occurrence, subject to a limit, exclusive of interest and costs of not less than one hundred thousand dollars because of damage or bodily injury to or death of a person caused by the vicious dog." T.M.C. §505.14(a) states: "No person...shall own, keep, harbor or provide sustenance for more than one vicious dog, as defined by Ohio R.C. 955.11, or a dog commonly known as a Pit Bull or Pit Bull mixed breed dog, regardless of age, in the City of Toledo, with the exception of puppies...for which the owner has filed an ownership acknowledgement form in person with the Dog Warden of Lucas County, prior to reaching seven (7) days of age."

“Substantive due process proscriptions dictate that a state or local legislative measure is judicially voidable on its face if it necessarily compels results in all cases which are ‘arbitrary and capricious, bearing no relation to the police power’[I]f any conceivable legitimate governmental interest supports the contested ordinance, that measure is not ‘arbitrary and capricious’ and hence cannot offend substantive due process norms.” *Sam & Ali, Inc. v. Ohio Dep’t of Liquor Control* (6th Cir. 1998), 158 F.3d 397, 403-404 (quoting *Eastlake v. Forest City Enterprises, Inc.* (1976), 426 U.S. 668, 676, and citing *Curto v. Harper Woods* (6th Cir. 1992), 954 F.2d 1237, 1243). In the realm of the police power, an “enactment comports with due process ‘if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it’s not unreasonable or arbitrary.’” *Desenco, Inc. v. Akron* (1999), 84 Ohio St.3d 535, 545 (quoting *Benjamin v. Columbus* (1957), 167 Ohio St. 103, 110).

Significantly, however, the “constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.” *United States v. Carolene Products Co.* (1938), 304 U.S. 144, 153 (citing *Chastleton Corporation v. Sinclair* (1924), 264 U.S. 543). As noted by the Sixth District, “...in exercising the power of judicial review, no amount of deference to a legislative enactment should force a court to concede that something is that which it is not.” *Tellings*, 2006-Ohio-975 at ¶54 (citing *Marathon Oil Co. v. Bd. of Zoning Adjustment* (1975), 44 Ohio App.2d 402 (finding that a municipal ordinance declaring abandoned service stations a public nuisance was arbitrary and unconstitutional). Thus, although “in the past, courts and legislatures considered it to be a ‘well-known fact’ that ‘pit bulls are ‘unpredictable,’ ‘vicious’ creatures owned only by ‘drug dealers, dog fighters, gang members,’ or other undesirable members of society” (*Id.* at ¶61, quoting *State v. Anderson* (1991), 57 Ohio St.3d 168), this perspective is not owed absolute fealty if the Court

agrees with appellee that there is no “real and substantial” connection between the Ohio and Toledo pit bull laws and the promotion of public welfare. While the various briefs submitted on behalf of appellant imply that this Court would improperly be acting as a “super-legislature” if it were to determine that the Ohio and Toledo pit bull laws are irrational and arbitrary, such a determination would actually accord with precedent if the “facts” previously supporting the opposite conclusion have been demonstrated not to exist. Indeed, it is not “fair to characterize the conflicting expert testimony as being a debate over [these laws],” as appellant would have the Court believe. *See* Toledo Merit Brief at 2. Rather, the weight of the evidence presented at trial established beyond a reasonable doubt that dogs deemed to be pit bulls are not vicious by virtue of their membership in this class – that just as with other dogs, there is a range of behavior – and that consequently, regulating dogs on the basis of breed is arbitrary and unreasonable.⁶ Further, it is now also clear that the Ohio and Toledo pit bull laws have not contributed to improved public safety, casting additional doubt on the possibility that there is “any conceivable governmental interest” justifying their existence.

As previously discussed (*see* Intro. at 3-4), the Sixth District cited in its opinion the ample favorable trial testimony regarding the temperament and behavior of dogs identified as pit bulls both in Ohio and elsewhere. The gist of this testimony, succinctly laid out by the appeals court, bears repeating:

Jed Mignano, a Toledo Humane Society cruelty investigator, testified that pit bulls had been taken in at the shelter, did not require special cages or treatment, and were adopted out without problems. He further stated that he had never been bitten by a pit bull and did not experience them to be “vicious” in comparison to other breeds. The state’s expert, Dr. Borchelt, testified that he had never been bitten by a pit bull, that his investigations for housing complaints against pit bulls in New York did not reveal any vicious pit bulls, and that most pit bulls brought to animal shelters were adopted out without hesitation. Karla Hamlin testified that some pit bulls taken into the Lucas

⁶ As appellant noted in its Merit Brief, a party challenging the constitutionality of an ordinance or statute must prove this beyond a reasonable doubt. *Hilton v. Toledo* (1980), 62 Ohio St.2d 394.

County Dog Pound exhibited aggressive behavior, chewing on mesh fencing and through aluminum water buckets. She acknowledged, however, that she had never been bitten by a pit bull and did not think pit bulls, as a breed, were any more likely to bite or to fight than other dogs.

Tellings, 2006-Ohio-975 at ¶ 24. In addition, the Sixth District observed that most experts who testified agreed that the Centers for Disease Control (CDC) data on human fatalities due to dog bites “were simply bare statistics, without reference to the total numbers of dogs in each breed population” and therefore – as the trial court also noted during the hearings – “had no real relevance or meaning.” *Id.* at ¶ 28. (Dr. Randall Lockwood, PhD, one of the authors of the 2000 CDC study – and in the interest of full disclosure, now an ASPCA senior vice president – has actually attributed such attacks to a multiplicity of factors: “A fatal dog attack is ...usually a perfect storm of bad human-canine interactions.... I’ve been involved in many legal cases involving fatal dog attacks, and certainly, it’s my impression that these are generally cases where everyone is to blame. You’ve got the unsupervised 3 year old child wandering in the neighborhood killed by a starved, abused dog owned by the...boyfriend of some woman who doesn’t know where her child is. It’s not old Shep sleeping by the fire who suddenly goes bonkers. Usually there are all kinds of other warning signs.”⁷) The Sixth District also cited Ohio county health department data reflecting the higher bite incidence among dogs not deemed to be pit bulls (e.g., chows, German shepherds, Rottweilers, and Labrador retrievers), *id.* at ¶ 29, and the Lucas County dog warden acknowledged at trial that he has found chows bites to be the most serious (requiring “more sutures than any other dog”), and “shepherd mix” bites the most numerous. *See Skeldon Transcript* at 101. It is true that a law may be underinclusive and, as such, not regulate every conceivable danger (or dangerous dog) to be constitutional. However, given that the evidence firmly establishes that dogs deemed to be pit bulls have no particular

⁷ http://www.gladwell.com/2006/2006_02_06_a_pitbull.html (Gladwell, M. “Troublemakers: What pit bulls can teach us about profiling,” *The New Yorker*, 2/6/06)

claim on viciousness – and can, as much as any other dog, make excellent companions – their classification as per se vicious (with the attendant strenuous conditions on ownership that flow from this classification) is irrational and, indeed, unconstitutional.

The tenuousness of the connection between the Ohio and Toledo pit bull laws and the government's police power has also been made evident by the laws' failure to improve public safety. Particularly relevant in this regard is the doubling of dogfighting complaints by animal control agencies during the laws' tenure (from 14.6% of animal control agencies making complaints in 1996 to 29% in 2004). Further, as noted above, Lucas County data shows dog bites to have reached a record high in 2001 (i.e., about 640 bites), more than a decade after the enactment of Ohio's pit bull law and the Toledo ordinance.⁸ And although the existence of other, better alternatives will not by itself compromise a lesser law's constitutionality, the fact that there are breed-neutral dangerous dog laws having a measurable positive impact on community safety throws into relief the particular failure (and irrationality) of the Ohio and Toledo pit bull laws. For example, while dogfighting and dog bites appear to be on the rise in Ohio, a breed-neutral Lincoln, Kansas ordinance prohibiting most chaining of dogs has significantly reduced the animal cruelty and dog fighting complaints received by animal control.⁹ Similarly, in Multnomah County, Oregon, a breed-neutral ordinance imposing graduated penalties on dogs and owners according to the seriousness of the behavior exhibited by the dogs has reduced repeat injurious bites from 25% to 7%.¹⁰

⁸ <http://www.co.lucas.oh.us/DogWarden/2002statsrelease.asp> ("Lucas County Dog Warden Sets Record for Pit Bull Seizures").

⁹ http://www2.ljworld.com/news/2006/sep/06/dog_fighting_animal_cruelty_cases_decline/ ("Dog fighting, animal cruelty cases on decline").

¹⁰ Bradley, J. *Dog Bites: Problems and Solutions*. Animals and Policy Institute 2006, 11.

Finally, in his amicus brief, the Attorney General proposes that public safety need not be the only plausible (or constitutional) rationale for the Ohio and Toledo pit bull laws. He suggests that the Sixth District defined the scope of what would constitute a legitimate state purpose too narrowly when it stated that the object of “all vicious dog laws is...to prevent injuries to persons and property by dogs,” *Tellings*, 2006-Ohio-975 at ¶ 56, and contemplates other possible rationales such as the promotion “of neighborhood harmony and peace” given the “opinion [of pit bulls] generated by newspaper sensationalism and hearsay,” or “preventing the misuse of these animals by...dog owners who would use them in dog fighting or in the furtherance of crime.” However, the latter proposal still concerns public safety, and there is simply no way to construe the evidence to support the contention that the Ohio and Toledo laws have in fact prevented the “misuse of these animals” by dog fighters and other criminal elements. Indeed, given the increase in dog fighting complaints during the laws’ tenure, and the success of other jurisdictions’ breed-neutral laws in reducing such problems, it is certainly possible that the Ohio and Toledo pit bull laws have inappropriately diverted law enforcement resources from more rational targets (e.g., chained dogs, dogs who have actually displayed aggressive behavior).

Further, although constitutional review in this case requires application of the rational basis test, the notion that alternatively, government may base its policies regarding dogs classified as pit bulls on mere rumor or myth strains credibility. Rational review requires not just a purpose, but a *legitimate* purpose, and quelling misguided fears with laws that, not incidentally, result in criminal liability and the rampant destruction of property (dogs), does not constitute such a purpose. Moreover, not only must there be a “plausible policy reason” underlying a law, but also the “relationship of the [law’s] classification to its goal” may not be “so attenuated as to render the distinction arbitrary or irrational.” *Nordlinger v. Hahn* (1992), 505 U.S. 1, 11. Here,

there is no rational relationship between the Attorney General's proposed justification for the Ohio and Toledo pit bull laws (i.e., quieting unreasonable fears) – a justification that implies that pit bulls are not vicious – and the laws themselves, which classify such dogs as vicious and presume their viciousness as fact (a presumption that is, indeed, un rebuttable at trial, *Tellings*, 2006-Ohio-975 at ¶¶ 61, 75, citing *State v. Browning* (Dec. 16, 2002), 5th Dist. Nos. 2002CA42, 2002CA43, 2002CA44, 2002CA45). There is simply no connection between the laws as written and the Attorney's General proposed alternate policy rationale.

Amicus Curiae ASPCA's Proposition of Law No. 2:

The Ohio and Toledo pit bull laws' disparate treatment of persons who own dogs deemed to be pit bulls is also not rationally related to the goal of protecting public health and safety, and thus the laws violated appellee's right to equal protection under the law.

Although the question of whether the Ohio and Toledo pit bull laws violate appellee's right to equal protection under the law merits its own discussion, equal protection analysis is fundamentally identical to that for substantive due process and requires rational review. In his amicus brief, the Attorney General correctly states the test, which was quoted in part in the foregoing section concerning substantive due process:

[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, ...the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, ... **and** the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational (emphasis added).

Nordlinger v. Hahn (1992), 505 U.S. at 11. Although the provisions in this analysis are not disjunctive and must each be equally shown to be true, it bears repeating relative to the second prong – requiring the governmental decisionmaker to have reasonably believed the legislative

facts on which the classification is based to be true – that the “constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.” *United States v. Carolene Products Co.* (1938), 304 U.S. 144, 153 (citing *Chastleton Corporation v. Sinclair* (1924), 264 U.S. 543).

Thus, the possibility that “in the past, courts and legislatures considered it to be a ‘well-known fact’ that ‘pit bulls are ‘unpredictable,’ ‘vicious’ creatures owned only by ‘drug dealers, dog fighters, gang members,’ or other undesirable members of society” (*Tellings*, 2006-Ohio-975 at ¶61, quoting *State v. Anderson* (1991), 57 Ohio St.3d 168), and that the Ohio and Toledo legislatures may have reasonably believed these propositions to be true when they enacted their respective pit bull laws, is not dispositive of the laws’ constitutionality. More important is whether these “facts” noted in *Anderson* can now be shown not to exist, and further, whether Ohio and Toledo’s disparate classification of dogs deemed to be pit bulls and consequent differential treatment of their owners are reasonably connected to the promotion of the public welfare. And indeed, as discussed in detail in the foregoing section, not only did the evidence presented at trial establish beyond a reasonable doubt that dogs deemed to be pit bulls cannot be distinguished by their viciousness – that they can equally be affectionate, loyal companions, making this classification arbitrary and irrational – but also that the public welfare does not in any way benefit from the vicious classification and resultant strenuous regulation of the dogs and their owners. In fact, it is worth emphasizing that far from benefiting the public welfare, the Ohio and Toledo laws have harmed it by likely diverting law enforcement resources from meaningful targets that might, for example, reduce the incidence of dog fighting or animal cruelty (as the breed-neutral dangerous dog policies discussed in the prior section have done in other jurisdictions); burdening shelters with a spiraling supply of dogs deemed to be pit bulls

under the law while failing to enhance public safety; and ripping apart families whose canine members may well have caused no injury and yet who will still likely be killed and their owners subject to criminal liability solely due to membership in a disfavored group,

Amicus Curiae ASPCA's Proposition of Law No. 3:

Because the Ohio and Toledo pit bull laws did not provide adequate procedural safeguards to protect appellee's significant property interest in his dogs, placing this interest at grave risk, and the state and local governments were not justified in failing to provide such safeguards, the laws violated appellee's right to procedural due process.

The assessment of what procedural protections are due when the government deprives private citizens of their private property was dictated by the U.S. Supreme Court in *Mathews v. Eldridge* (1976), 424 U.S. 319.¹¹ Specifically, procedural due process requires that the government provide the individual with an opportunity to be heard “at a meaningful time and in a meaningful manner,” *Mathews*, 424 U.S. at 333, a prescriptive that affords the individual a panoply of rights including the right to an impartial decisionmaker. *Goldberg v. Kelly* (1970), 397 U.S. 254, 271.

“The extent to which procedural due process must be afforded turns on the extent to which the private citizen may be ‘condemned to suffer grievous loss’ at the hands of the government.” Eck and Bovett, “Oregon Dog Control Laws and Due Process” (*see* footnote 11 below) (quoting *Goldberg v. Kelly*, 397 U.S. at 263). “In other words, [the scope of] due process depends upon the demands of the particular situation,” *id.* at 102 (citing *Mathews*, 424 U.S. at 334), its parameters to be evaluated on the basis of the following three factors: (1) the nature of the private interest that will be affected by the official action; (2) the risk of an erroneous

¹¹ *See also* Eck, C. and Bovett, R. “Oregon Dog Control Laws and Due Process: A Case Study.” *Animal Law* 1998; 4: 95-110.

deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. *Matthews*, 424 U.S. at 335.

State v. Cowan, 103 Ohio St.3d 144, 2004-Ohio-4777, provides a useful guide as to the nature of the additional procedural protections that might have been appropriate in the present case. Cowan's dogs had allegedly attacked a neighbor while roaming the neighborhood, prompting the dog warden to deem them vicious pursuant to R.C. 955.11(A)(4)(a) (which defines "vicious dog" as "a dog that, without provocation, meets any of the following: (i) Has killed or caused serious injury to any person; (ii) Has caused injury, other than killing or serious injury, to any person, or has killed another dog) and charge defendant with several violations of R.C. 955.22 (failure to obtain liability insurance or properly confine a dog).¹² The Ohio Supreme Court struck down R.C. 955.22 as violative of "procedural due process insofar as it fails to provide dog owners a meaningful opportunity to be heard on the issue of whether a dog is 'vicious' or 'dangerous' as defined in R.C. 955.11(A)(1)(a) and (A)(4)(a)." *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777. The Sixth District in *Tellings* explained this holding as follows:

In finding that R.C. 955.22 was unconstitutional, the *Cowan* court reasoned that an owner had no initial opportunity to dispute a dog warden's designation of a particular dog as 'vicious' or 'dangerous'....Since these designations carried specific additional statutory requirements under the law, the owner's only way to challenge the initial 'vicious' dog designation was to break the law by non-compliance with the statute.

Toledo v. Tellings, 2006-Ohio-975 at ¶¶46-47.

¹² R.C. 955.11(A)(4)(a) defines "dangerous dog" as "a dog that, without provocation, has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person, while that dog is off the premises of its owner and not under the reasonable control of its owner or not physically restrained or confined in a locked pen which has a top, locked fenced yard, or other locked enclosure which has a top."

Like Cowan, appellee in this case was charged under R.C. 955.22 (as well as T.M.C. §505.14(a), Toledo's ban on ownership of multiple dogs deemed to be pit bulls) and had no initial opportunity to challenge the dog warden's determination that his dogs were vicious pursuant to R.C. 955.11(A)(4)(a)(iii) (which provides that the term "vicious dog" includes any dog which "[b]elongs to a breed that is commonly know as a pit bull") and could "provoke" such a challenge only by failing to comply with the liability insurance and other requirements of R.C. 955.22 and, as a result, being charged criminally.

Moreover, an application of the U.S. Supreme Court's three-prong test from *Mathews v. Eldridge* to the facts of the current case indicates that appellee should have received at least as much procedural due process as was owed Cowan according to the Ohio Supreme Court – that is, an initial administrative hearing to challenge the dog warden's "dangerous" or "vicious" determination prior to destruction of his property (his dogs) and imposition of criminal liability.

First, as a result of being charged under R.C. 955.22 and T.M.C. §505.14(a), appellee faced the real prospect of grievous harm to his dogs; indeed, one of his dogs was ultimately killed by the dog warden and appellee had to give another away. In his amicus brief, the Attorney General suggests that appellee may have no standing to object to the harm threatened and, in fact, done to his dogs because he had no property interest in them, but this assertion defies precedent and logic. The Ohio Supreme Court has not only recognized a protected property interest in dogs, but has also indicated that the failure to be in full compliance with the laws vis a vis one's dogs does not negate this property interest. *Ohio v. Weekly* (1946), 146 Ohio St. 277. Thus, any failure by appellee to purchase liability insurance or otherwise comply with the terms of the Ohio and Toledo pit bull laws does not render his dogs "contraband" or nullify

his protected property interest in his dogs and, ultimately, his right to object to the harm that befell them as a result of insufficient due process protections.

Second, a hearing at which appellee could have *genuinely* disputed the dog's warden's classification of his dogs as vicious would have gone a long way toward preventing the risk of an erroneous deprivation of his property interest through the procedures used. As pointed out by the Sixth District and briefly noted in the discussion of substantive due process :

The first two subsections of R.C. 955.11(A)(4) require a dog to have caused some injury to persons or another dog in order to be classified as "vicious." Under R.C. 955.11(A)(4)(a)(iii), however, a dog may be deemed to be "vicious" solely if the dog belongs to the breed commonly known as a pit bull, even if the dog has not, without provocation, killed or caused injury to any person, or killed another dog. *State v. Ferguson* (1991), 76 Ohio App.3d 747, 751. **R.C. 955.11(A)(4)(a)(iii) purports to allow a defendant dog owner to rebut the state's prima facie showing that his dog is "vicious" even if he admits that the dog in question belongs to the breed commonly known as a pit bull dog...In actual practice, however, where the dog is admitted to be a pit bull, the absence of the elements contained in R.C. 955.11(A)(4)(a)(i) and 955.11(A)(4)(a)(ii) standing alone, "is insufficient as a matter of law to rebut the state's prima facie showing that the dog is a 'vicious dog' as defined by R.C. 955.11(A)(4)(a)(iii)." Id. See, also, *State v. Browning* (Dec. 16, 2002), 5th Dist. Nos. 2002CA42, 2002CA43, 2002CA44, 2002CA45, 2002-Ohio- 6978 (testimony that pit bull dogs which had done no injury or vicious acts, were not aggressive, were well-behaved, peaceful family pets, and had never attacked anyone, was insufficient evidence to rebut the "prima facie" evidence that the dogs were "vicious") (emphasis added).**

Tellings, 2006-Ohio-975 at ¶61. An authentic opportunity to contest the determination that his dogs were vicious, in a hearing that placed the burden on the government to prove its case, would have safeguarded appellee's property interests far better than the procedures actually prescribed by law: a trial at which criminal liability had already attached, and two primary elements of the charges against him (i.e., that his dogs were pit bulls and were vicious) were presumed to be true with minimal opportunity by him for rebuttal.

It is not clear, as the Attorney General suggests, that dog wardens have significantly more latitude to make viciousness determinations under the first two subsections of R.C. 955.11(A)(4)

than they do under the third subsection, which classifies dogs deemed to be pit bulls as vicious. Not only are the first two subsections very straightforward in their application (a viciousness determination requiring simply that a dog have caused some injury to persons or another dog), but also, vis a vis the third subsection, the initial subjective determination as to which dogs are pit bulls must be made by the dog warden. As the Sixth District observed, and Ohio resident Anna Hamilton's affidavit attests, such identification is fraught with peril and likely to be highly arbitrary (e.g., dogs who are not deemed to be pit bulls as puppies may be deemed to be pit bulls as adults). At any rate, however, of greater moment to the *Cowan* court than the relative involvement of the dog warden in the range of viciousness determinations or "which definition [of viciousness] was applied," was the "defendant's inability to challenge the initial finding" of viciousness in any meaningful fashion. *Id.* at ¶47.

In addition, it should be noted that appellant's analogizing of the statutory presumption of the viciousness of dogs deemed to be pit bulls to a Ohio criminal law defining intoxication based on blood alcohol levels, is inapposite. *See* Toledo Merit Brief at 7-8. The Fifth District expressly stated in the case cited by appellant, *State v. Wilcox*, (1983) 10 Ohio App. 3d 11, that the drunk driving law "does not presume, it defines" (quoting *State v. Franco* (1982), 96 Wash. 2d 816, 821). By contrast, as observed above, "R.C. 955.11(A)(4)(a)(iii) purports to allow a defendant dog owner to rebut the state's prima facie showing that his dog is 'vicious' even if he admits that the dog in question belongs to the breed commonly known as a pit bull dog." *Tellings*, 2006-Ohio-975 at ¶61. The problem, however, is that in practice, dog owners have not been permitted to exercise the right to rebut this presumption at trial – a problem that must be redressed via additional procedural protections giving dog owners a genuine opportunity to avoid prosecution.

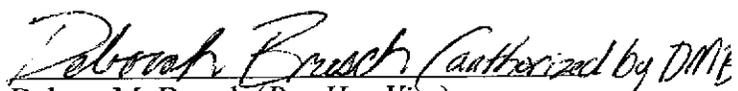
Third and finally, under *Mathews v. Eldridge*, neither Ohio nor Toledo was justified in failing to provide such procedural protections. Given that a full administrative hearing, with all appropriate protections, might well vitiate the need for a criminal trial, such a hearing cannot be said to be too burdensome, administratively or fiscally, to the public weal.

That the *Cowan* defendant, whose dogs caused injury, should have received greater protections than appellee, whose dogs did not and whose only offense was to belong to a disfavored group, appears to fly in the face of fair and equitable process. Thus, because R.C. 955.22 and T.M.C. §505.14(a) did not provide appellee with additional protections due under *Cowan* and *Mathews v. Eldridge* – that is, an initial administrative hearing in which to challenge fully a dog warden’s “dangerous” or “vicious” determination prior to the imposition of criminal liability – these laws violated appellee’s right to procedural due process and, as such, are unconstitutional.

CONCLUSION

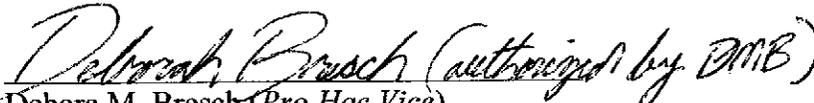
For the above reasons, the Court should uphold the decision below.

Respectfully submitted,


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CERTIFICATION

This is to hereby certify that copy of the foregoing Amicus Brief was sent by ordinary U.S. Mail, postage prepaid, this 28th day of November 2006 to **Stephen P. Carney**, State Solicitor, Counsel of Record, 30 East Broad St., 17th Fl., Columbus, Ohio 43215, and **Adam Loukx**, City of Toledo Law Department, Counsel of Record, One Government Center, Suite 1710, Toledo, Ohio 43604.


~~Debora M. Bresch (Pro Hac Vice)~~