IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

RACHAEL DANKER, JESSE JOHNSON, SAMANTHA JOHNSON, STEPHANIE NELSON, AUBREY WILHITE, DON WILLIAMS, and JULIE WILLIAMS,

Plaintiffs,

vs.

THE CITY OF COUNCIL BLUFFS, IOWA,

Defendant.

No. 1:20-cv-00016-JAJ-SHL

OPINION AND ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Current, former, and prospective owners of dogs identified as "pit bulls" challenge the constitutionality of a municipal ordinance banning such animals from the city. Their challenge is now before the court on the city's September 10, 2021, Motion For Summary Judgment [Dkt. No. 40]. The dog owners filed their Brief In Opposition To Defendant's Motion For Summary Judgment [Dkt. No. 45] on October 1, 2021, and the city filed its Reply In Support Of Motion For Summary Judgment [Dkt. No. 50] on October 8, 2021. For the reasons set forth below, the city's September 10, 2021, Motion For Summary Judgment [Dkt. No. 40] is **GRANTED**.

I. INTRODUCTION

A. Factual Background

This statement of the factual background is drawn from the parties' statements of purportedly "undisputed" facts in support of and resistance to summary judgment. Unfortunately, few of the facts that the parties allege appear to be undisputed. Also, the court finds that many of their factual allegations are irrelevant or immaterial or are legal conclusions or legal arguments. Hence, gleaning *genuine* issues of *material* fact from the

parties' submissions has presented the court with some challenges. *See, e.g., Villanueva v. City of Scottsbluff*, 779 F.3d 507, 510 (8th Cir. 2015) ("'Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.'" (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986))). Despite these challenges, the court provides this factual background focusing on facts or factual disputes that the court finds are material in the present case. Unless otherwise indicated, the facts that follow are undisputed. The court has not necessarily offered the facts in precisely the form the parties offered them. Instead, where possible, the court has limited or rephrased the parties' statements to avoid language that appears to the court to be the basis for an opposing party's objection.

1. The ordinance at issue

Central to this lawsuit is an ordinance of the defendant City of Council Bluffs that originally became effective on January 1, 2005, identified as Ordinance 5821 and codified at Council Bluffs Municipal Code (CBMC) § 4.20.112. *See* Pls.' App., 15-17. The ordinance provides, "It shall be unlawful for any person to own, possess, keep, exercise control over, maintain, harbor, transport or sell within the city of Council Bluffs, Iowa any pit bull." CBMC § 4.20.112(a).

The "definitions" portion of the ordinance provides in pertinent part as follows:

> A "pit bull" for purposes of this section, is defined 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 (1) 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 director of public health.

CBMC § 4.20.112(b)(2).

A violation of the ordinance may be treated as a municipal infraction, subject to a scheduled fine, *see* CBMC §§ 1.95.010, 1.95.020(B, Pls.' App. at 73; by impoundment and an administrative proceeding, which includes a procedure to dispute the classification of such dog as a pit bull, *see* CBMC §§ 4.20.112(f), Pls.' App. at 39; or by seizure, impoundment, and a misdemeanor citation, *see* CBMC § 4.20.010(a), Pls.' App. at 21, which could subject a defendant to penalties pursuant to IOWA CODE § 903.1, *see* CBMC § 8.02.020, Pls.' App. at 75. The ordinance also provides for destruction of such animals, as follows:

> Notwithstanding any provisions to the contrary, the director of public health is authorized to immediately impound any pit bull found in the city of Council Bluffs which does not fall within the exceptions listed in subsection (c) above, and the Council Bluffs Animal Shelter may house or dispose of such pit bull in such manner as the director of public health may deem appropriate, except as the procedures in subsection (f) below otherwise require.

CBMC § 4.20.112(e), Pls.' App. at 16.

Finally, for present purposes, the ordinance provides a procedure to challenge the classification of a dog as a pit bull, as follows:

> When the director of public health has impounded any pit bull dog pursuant to this section, and the owner of such dog disputes the classification of such dog as a pit bull, the owner of such dog may file a written petition with the director of public health for a hearing concerning such classification no later than seven (7) days after impoundment. Such petition shall include the name and address, including mailing address, of the petitioner. The director of public health will then issue a notice of hearing date by mailing a copy to the petitioner's address no later than ten (10) days prior to the date of the hearing. When no written request from the owner for a hearing is received by the director of public health within seven (7) days of impoundment, the pit bull shall be humanely destroyed.
>
> The hearing, if any, will be held before the director of public health or a hearing officer designated by the director. The appellant-owner of such dog shall bear the burden of proof. Any facts that the petitioner wishes to be considered

> shall be submitted under oath or affirmation, either in writing or orally at the hearing. The director of public health or hearing officer shall make a final determination whether the dog is a pit bull as defined in subsection (b)(2) of this section. Such final determination shall be considered a final order of the director of public health subject to review as provided in Section 4.20.132.
>
> If the dog is found to be a pit bull, it shall be humanely destroyed, unless the owner produces evidence deemed sufficient by the director of public health that the pit bull is to be permanently taken out of Council Bluffs, and the owner pays the cost of impoundment. If the dog is found not to be a pit bull, the dog shall be released to the owner.
>
> The procedures in this subsection shall not apply, and the owner is not entitled to such a hearing with respect to any dog that was impounded as the immediate result of an attack or bite. In those instances, the dog shall be handled, and the procedures governed by the provisions of Section 4.20.120.

CBMC § 4.20.112(f), Pls.' App. at 16-17.

The most recent reenactment of the ordinance, in Ordinance 6387, contains no or only minor, non-substantive, editorial changes to these provisions. *See* Pls.' App. at 37-39.

2. Genesis and effect of the ordinance

The parties agree that dog bites are a public health issue. According to the affidavit of the current mayor of Council Bluffs, who was a city council member at the time, Council Bluffs had encountered increased reports of dog bites and some reports regarding threats to persons and animals in Council Bluffs, reportedly due to pit bull dogs, in the years preceding 2004. He also averred that, while there were no fatalities to humans, there were some serious injuries, and there were several animal fatalities. The dog owners dispute the mayor's affidavit on foundation grounds, but the court overrules that objection. Similarly, the dog owners dispute the adequacy and accuracy of any visual identifications of the dogs involved in the purported incidents in Council Bluffs, but that objection does not change the perception of city council members, at the time, that pit bulls were involved. The city

alleges that, in 2003, Animal Control began compiling records concerning animal control, including maintenance of logs and complaint responses, impoundment/quarantine and medical records, licensing records, and other animal control data, such as complaints, dog bite tracking, licenses, and breed complaints. The dog owners dispute the accuracy of such records to the extent that they relied on visual identification of breeds of dogs involved.

The city alleges that, based on records gathered, maintained, and collated by Council Bluffs Animal Control, in Council Bluffs in 2003, approximately 2.9% of the licensed dog population consisted of pit bull dogs, but pit bull dogs were reported as being responsible for 12.4% of the dog bites reported to Animal Control. In 2004, the licensed dogs registered as pit bulls accounted for only 2.3% of the total number of licensed dogs, but as reported to Animal Control, pit bulls accounted for 22.1% of the total number of reported bites in Council Bluffs. Thus, the city contends that, in 2004, the city's records suggested that pit bulls were disproportionately responsible for dog bites in the city, accounting 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 11% of the dog bites. The dog owners dispute these statistics, because of what they contend are the unreliability of visual breed identification and of using licensing as a proxy for dog population.

The city contends that, since the enactment of the pit bull prohibition, the number of reported dog bites in Council Bluffs has declined and has remained approximately 25% less, from a high of 131 or 132, to varying between 70 and 102 in the years 2007 through 2020. The dog owners point out that in 2006, the second year the ordinance was in force, Council Bluffs suffered its highest number of dog bites, 132. The dog owners also allege that the record shows that bites per year fluctuate and that, without historical data prior to 2003, it is impossible to determine accurately the effect of the pit bull ban on dog bites in Council Bluffs.

3. The plaintiffs

Plaintiff Rachael Danker is a resident of Council Bluffs and possessed a registered American Bully named Loki. Danker intentionally selected Loki because he was a "bully breed" dog, that is, she was looking for a dog similar to one owned by a friend, because she had a great experience with that dog. Danker no longer owns Loki. Danker alleges that this is so, because she was forced by the pit bull ban to rehome Loki. On or about November 21, 2019, after a report to Council Bluffs Animal Control, Danker was issued a Notice informing her of the need to license dogs and to remove the pit bull type dog within 30 days.

Similarly, plaintiff Aubrey Wilhite previously owned a dog named Chunk that was identified as a "pit bull type" dog. Wilhite learned that Chunk was at least part American Staffordshire Terrier in 2014. In mid-December 2019—the parties dispute the precise date—after a report of a stray dog to Council Bluffs Animal Control, Wilhite was issued a citation of Municipal Infraction and allowed to claim her dog and move it out of town. Wilhite was issued a citation for "possessing a prohibited dog in city limits" on December 16, 2019. Wilhite appeared in court, admitted the civil infraction, and was fined.

Plaintiffs Jesse Johnson and Samantha Johnson reside in Council Bluffs and own two dogs named Charlie and George identified as "pit bull type" dogs. On or about November 21, 2019, after a report to Council Bluffs Animal Control, Samantha Johnson was issued a Notice informing her of the need to license dogs and to remove the pit bull type dogs, although the parties dispute whether she was told to remove the pit bulls within 30 days or one week. It appears that Samantha Johnson did remove the pit bulls from the city.

Plaintiff Stephanie Nelson moved to Crescent, Iowa, in 2019 and is not a resident of Council Bluffs at this time. Nelson alleges that she moved to Crescent in 2019 because of conflict with her neighbor regarding Nelson's dog and the pit bull ban. Nelson alleges she still brings her dog into Council Bluffs for veterinary appointments and to visit family.

Plaintiffs Don Williams and Julie Williams have had no dogs subject to the ban. However, they contend that there is still a controversy to be decided, because they would want to own a dog with similar physical characteristics to the dogs owned by their daughter, Samantha Johnson, that had to be rehomed outside of Council Bluffs because of the pit bull ban.

4. Dog breed identification and behavior

The city contends that the "industry standard" for identifying dogs is by using visual inspection and comparing the dog's characteristics to published breed standards. The dog owners admit only that visual identification is the "industry standard" *for the purpose of breed-specific legislation*, but they deny that visual identification is accurate. The court concludes that the dog owners cannot genuinely dispute that the A.K.C. and U.K.C. breed standards are also based on visual identification of physical traits. *See* Pls.' Stmt. of. Facts, ¶¶ 21-22 (including links to online statements of standards). Furthermore, the dog owners admit that "breeds" are groupings of animals that contain similar physical traits, thus effectively conceding that breeds are identified by such physical traits. The city's expert, an epidemiologist, has opined that it is a myth that "pit bulls" cannot be identified accurately based upon a visual inspection of physical characteristics. The dog owners dispute this opinion as outside of the expert's area of expertise, which does not involve animal behavior, and as lacking sufficient supporting facts or data, citing contrary opinions from their experts.

The parties agree that there is no dog breed that is a "pit bull"; rather, "pit bull" is a term used to describe generally a collective of different types of dog breeds, specifically, the American Pit Bull Terrier, the American Staffordshire Terrier, and the Staffordshire Bull Terrier. The parties vehemently disagree, however, on the extent to which reliable information supports statistics purportedly showing that "pit bulls" are involved in a disproportionate number of dog bite cases and on the extent to which there is any correlation between "pit bull" dogs and vicious or aggressive behavior. In particular, the dog owners point to testimony of their experts disputing the validity of any correlation

between dangerous behavior and "pit bull" dogs, as determined by genetics or by visual inspection of physical traits associated with "pit bull" dogs. The dog owners argue that claims that certain breeds pose a greater risk of dangerousness to humans are based on out-of-date studies and misinterpretations of other studies. The parties also dispute the extent to which any dog breed bans have been effective in reducing the number of dog bites.

B. Procedural Background

The dog owners filed their Complaint in this matter challenging the pit bull ordinance on May 12, 2020. There were originally nine plaintiffs, but two voluntarily dismissed their claims. The dog owners assert a single claim for violation of the United States Constitution, pursuant to 42 U.S.C. § 1983. In that single claim, however, they assert several constitutional challenges: vagueness; over- and under-inclusiveness; lack of a rational relationship to any legitimate governmental interest in health, safety, or welfare in violation of their rights to substantive due process and equal protection; and violation of their procedural due process rights. They seek prospective declaratory and injunctive relief, as well as attorney's fees and costs, and such other relief as the court deems just and proper.

The city filed its Answer And Affirmative Defenses on June 26, 2020. This case is set for a bench trial beginning on November 29, 2021. Nothing else of current significance occurred in this case until the city filed its September 10, 2021, Motion For Summary Judgment now before the court.

II. LEGAL ANALYSIS

The city asserts that it is entitled to summary judgment on each of the dog owners' challenges to the constitutionality of the pit bull ordinance, and the city also suggests that some of the dog owners lack standing to pursue such challenges. First, the court will consider the city's contention that some of the dog owners lack standing, then the court

will consider whether the city is entitled to summary judgment on each of the dog owners' constitutional challenges in turn.

A. Standing And Mootness

In its Statement of Facts, if not directly in its brief supporting its Motion For Summary Judgment, the city asserts that certain of the dog owners do not have standing. Because standing is a dimension of subject matter jurisdiction, the court must address that issue. *See, e.g., Sisney v. Kaemingk*, No. 20-2460, 2021 WL 4840836, at *6 (8th Cir. Oct. 15, 2021) (explaining that courts have an obligation to consider the threshold question of subject matter jurisdiction, even if the parties do not raise it, and also explaining that a party must show constitutional standing and that its claim is not moot to assert a challenge to the constitutionality of a law); *Mitchell v. Dakota Cty. Soc. Servs*., 959 F.3d 887, 896 (8th Cir. 2020) (explaining that lack of standing to make a facial challenge to the constitutionality of a statute requires dismissal for lack of subject matter jurisdiction).

As the Eighth Circuit Court of Appeals has explained,

> To establish standing, a plaintiff must show an injury in fact traceable to the defendant's conduct that will likely be redressed by a favorable decision. *Frost [v. Sioux City]*, 920 F.3d [1158], 1161 [(8th Cir. 2019)]; *see also Town of Chester v. Laroe Estates, Inc*., —— U.S. ——, 137 S. Ct. 1645, 1650, 198 L.Ed.2d 64 (2017). Plaintiffs seeking prospective relief based on past actions must show "a real and immediate threat that [they] would again suffer similar injury in the future." *Mosby v. Ligon*, 418 F.3d 927, 933 (8th Cir. 2005) (internal quotation marks omitted). Speculative future harm does not establish a real and immediate threat of injury and is insufficient to confer standing. *Frost*, 920 F.3d at 1161.

Mitchell v. Dakota Cty. Soc. Servs., 959 F.3d 887, 896 (8th Cir. 2020).

Here, the city alleges that, because Don Williams and Julie Williams have had no dogs subject to the ban, they have no controversy to be decided. The dog owners contend that, if it were not for the pit bull ban, Don and Julie Williams would want to own a dog with similar physical characteristics to their daughter's dogs Charlie or George that had to

be rehomed outside of Council Bluffs because of the pit bull ban, so that they present a "live" controversy. The court finds that the dog owners' contention regarding the Williamses' standing is the sort of speculative claim of future harm that does not establish a real and immediate threat of injury and is insufficient to confer standing. *Id.* Thus, the city is granted summary judgment on any claims by the Williamses.

The city also alleges that Stephanie Nelson moved to Crescent, Iowa, in 2019 and is not a resident of Council Bluffs, so she is not subject to the pit bull ban and presents no controversy to be decided. The pet owners counter that Stephanie Nelson presents a "live" controversy, because she moved to Crescent, Iowa, in 2019 because of conflict with her neighbor regarding Nelson's dog and the pit bull ban and because she still brings her dog into Council Bluffs for veterinarian appointments and to visit family. The pet owners appear to be on firmer ground as to Nelson's standing, where she asserts an intention to transport her dog into the city, because the ordinance expressly applies, *inter alia*, to anyone who "exercise[s] control over [or] transport[s] . . . within the city of Council Bluffs, Iowa any pit bull." CBMC § 4.20.112(a). Nevertheless, the Eighth Circuit Court of Appeals has held that a party's speculative return to the jurisdiction that imposes the law at issue is insufficient to show a real and immediate threat of repeat injury, when parties seek only prospective relief, as is the case, here. *Mitchell*, 959 F.3d at 896. Thus, the city is granted summary judgment on any claims by Stephanie Nelson.

B. Summary Judgment

The court turns to the city's contention that it is entitled to summary judgment on the remaining pet owners' challenges to the constitutionality of the pit bull ordinance. The court begins this part of its analysis with the standards for summary judgment.

1. Summary judgment standards

Rule 56 of the Federal Rules of Civil Procedure provides that "[a] party may move for summary judgment, identifying each claim or defense—or part of each claim or defense—on which summary judgment is sought." FED. R. CIV. P. 56(a). It provides,

further, that a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id*. Summary judgment decisions usually focus on whether the non-moving party has generated a genuine issue of material fact precluding entry of judgment as a matter of law. *See, e.g., Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). As mentioned, above, "'[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.'" *Villanueva*, 779 F.3d at 510 (8th Cir. 2015) (quoting *Liberty Lobby, Inc*., 477 U.S. at 248). The court may grant summary judgment only "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Torgerson*, 643 F.3d at 1042-43 (internal quotation marks and citations omitted).

The "governing law," here, is the constitutional standards applicable to each of the dog owners' challenges to the pit bull ordinance. The court turns, next, to those challenges.

2. Vagueness

In their Complaint, the remaining dog owners allege, first, that the pit bull ban is unconstitutionally vague because it fails to provide fair warning of exactly what actions and what animals it prohibits. This is so, they allege, because the identification of the animals subject to the ban lacks sufficient definiteness and because such identification would allow for, and has resulted in, arbitrary, inconsistent, and discriminatory enforcement by the city.

In support of summary judgment, the city argues that the pit bull ordinance's definition of a "pit bull" gives fair warning to any person that possession of certain dogs is prohibited. More specifically, the city argues that the dog breeds expressly prohibited are identified by objective standards, where the ordinance provides the knowable objective physical characteristics to which visual identification, the industry standard, can be applied

using the characteristics set out by the American Kennel Club and the United Kennel Club dog associations. The dog owners offer no response to this part of the city's Motion.

As the Eighth Circuit Court of Appeals has explained,

> The void-for-vagueness doctrine "rests on the twin constitutional pillars of due process and separation of powers." *See United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 2325, 204 L.Ed.2d 757 (2019). "Vague laws contravene the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them." *Id*. (quoting *Connally v. Gen. Constr. Co*., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)).
>
> "Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect." *Id*. While only elected representatives can criminalize conduct, *see id*., "[v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable" officials in the judicial and executive branches, which "erod[es] the people's ability to oversee the creation of the laws they are expected to abide." *Id*. Vague, "standardless" statutes also "invite[ ] arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015).

Mumad v. Garland, 11 F.4th 834, 838 (8th Cir. 2021).

Here, because the dog owners have failed to respond to the city's argument that the pit bull ordinance is not unconstitutionally vague, they have plainly failed to generate a genuine issue of material fact that might preclude entry of judgment as a matter of law as to this challenge. *Torgerson*, 643 F.3d at 1042. Moreover, the court finds that the city has pointed to objective criteria for identification of pit bull dogs, including reference to the standards set out by two major dog associations for identification of pertinent breeds based on visual inspection of physical traits, so that the ordinance gives people "of common intelligence" fair notice of what the law demands of them, that is, what dogs are banned from the city. *Mumad*, 11 F.4th at 838 (citation omitted). Thus, the record taken as a whole could not lead a rational trier of fact to find that the pit bull ordinance is unconstitutionally vague. *Torgerson*, 643 F.3d at 1042-43.

Therefore, summary judgment in the city's favor is granted on the dog owners' vagueness challenge to the pit bull ordinance.

3. Over- and under-inclusiveness

Second, in their Complaint, the dog owners allege that, as a safety regulation, the pit bull ban is over-inclusive, because it bans animals that do not pose a risk of harm to others, and under-inclusive, because it fails to ban animals that do pose a risk of harm to others. The city argues that the ordinance is not over-inclusive or under-inclusive, because it is rationally related to the city's legitimate public welfare concerns. Again, the dog owners offer no response to this part of the city's Motion, so they have plainly failed to generate a genuine issue of material fact that might preclude entry of judgment as a matter of law as to this challenge. *Torgerson*, 643 F.3d at 1042.

Furthermore, it does not appear that either the Supreme Court or the Eighth Circuit Court of Appeals has applied an over-inclusiveness or under-inclusiveness test to the constitutionality of an ordinance subject only to rational basis scrutiny rather than strict scrutiny or some form of heightened scrutiny. Indeed, the Eighth Circuit Court of Appeals has held that the fact that an ordinance banned some kinds of air pollution—specifically, smoking in public places—yet did not ban other possible air contaminants, did not mean that the ordinance failed rational basis review. *See Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012). That decision and authority stating similar principles leads this court to conclude that over-inclusiveness and under-inclusiveness are irrelevant in the context of an ordinance subject only to rational basis review, *see Birchansky*, 955 F.3d at 758 ("A law supported by some rational basis does not offend the constitution merely because it is imperfect, mathematically imprecise, or results in some inequality." (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)), and the dog owners concede that rational basis review is the applicable scrutiny, here. Thus, a challenge based on over-inclusiveness and under-inclusiveness is not legally cognizable. The dog owners have not argued otherwise in response to the city's Motion.

Therefore, summary judgment in the city's favor is granted on the dog owners' over-inclusiveness and under-inclusiveness challenge to the pit bull ordinance.

4. Substantive due process and equal protection

The dog owners allege, as the third constitutional infirmity of the pit bull ordinance, that the pit bull ban bears no rational relationship to any legitimate state interest in health, safety, or welfare and, consequently, violates their substantive due process rights and right to equal protection, even under rational basis scrutiny. This is the challenge on which the parties have focused their greatest attention.

a. Arguments of the parties

In support of its Motion For Summary Judgment on the dog owners' substantive due process and equal protection challenges, the city contends that the dog owners' argument that visual identification of dog breeds is unreliable to determine whether a dog is a regulated breed—an important prong of their argument that the ordinance is irrational—is misplaced and irrelevant. This is so, the city contends, because there are no genuine issues of material fact that visual inspection can accurately identify dogs that *look like* pit bull type dog. The city argues that there is also significant evidence showing the disproportionate danger that dogs identified as pit bulls posed at the time that Council Bluffs enacted the pit bull ordinance and that the ordinance reasonably defines the dogs to which it applies based on standards involving physical characteristics of the relevant breeds. The city also argues that there is no dispute that behavioral traits as well as physical traits are heritable. Furthermore, the city argues, it has demonstrated that by removing the disproportionate danger of pit bull type dogs, overall dog bites in Council Bluffs have declined and have remained lower.

The dog owners respond that, while deferential, rational basis scrutiny is not a rubber stamp of legislation. They argue that the city's pit bull ban is premised on outdated and now scientifically refuted assumptions that pit bulls are more dangerous, more likely to bite, and more likely to inflict severe injuries than other similarly sized breeds. Indeed, the dog owners argue, scientists in canine genetics and behavior now widely acknowledge

that (1) pit bulls are no more or less dangerous than similarly sized dogs of other breeds; and (2) visual identification is an inherently unreliable method of determining the breed of a dog of unknown origin. Indeed, the dog owners contend that canine genetic and behavioral experts now agree there is no predictive value from a dog's particular breed or physical characteristics about its aggressiveness or propensity to bite. This flaw, they argue, is even more glaring, where their experts have opined that visual breed identification is inaccurate and inconsistent. The dog owners argue these flaws make all the city's animal control records unreliable, because those records were based on visual identifications of dog breeds. The dog owners also argue that an ordinance, once rational, can be rendered irrational by changes in circumstances, which they assert is the situation, here.

In reply, the city argues that the dog owners' "current science" and "change in circumstances" arguments are without merit. This is so, the city contends, because the dog owners' arguments essentially ask the court to impose a burden of proof upon the city to show how the Ordinance remains justified, but that is not the applicable standard. Instead, the city argues that legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. The city argues that the ordinance was based on contemporaneous observations of an increase in dog bite cases for which pit bull type dogs were responsible. Furthermore, the city reiterates, records show that, since the ban was enacted, Council Bluffs has seen and maintained a reduced number of reported dog bites.

b. Applicable standards

As the Eighth Circuit Court of Appeals has explained, when a law that "does not draw a suspect classification or restrict a fundamental right" is subjected to "an equal protection or substantive due process challenge," the court "will uphold [the] state law . . . if it is rationally related to a legitimate state interest." *Birchansky v. Clabaugh*, 955 F.3d 751, 757 (8th Cir. 2020) (citing *F.C.C. v. Beach Comms., Inc*., 508 U.S. 307, 313 (1993)). There is no contention, here that the pit bull ordinance draws any suspect classification or restricts any fundamental right, so rational basis review applies.

In *F.C.C. v. Beach Communications*, the Supreme Court explained why rational basis review is restrained and limited:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. 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. Where there are plausible reasons for Congress' action, our inquiry is at an end. This standard of review is a paradigm of judicial restraint. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.
>
> On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of legislative facts explaining the distinction [o]n the record has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.
>
> These restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing. Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—inevitably requires that some persons who have

> an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration. The distinction at issue here represents such a line: By excluding from the definition of "cable system" those facilities that serve commonly owned or managed buildings without using public rights-of-way, [the statute at issue] delineates the bounds of the regulatory field. Such scope-of-coverage provisions are unavoidable components of most economic or social legislation. In establishing the franchise requirement, Congress had to draw the line somewhere; it had to choose which facilities to franchise. This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.
>
> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Beach Comms., Inc., 508 U.S. at 313–16 (footnotes, internal quotation marks, and citations omitted).

The Eighth Circuit Court of Appeals summarized as follows the specific requirements of rational basis review when a substantive due process or equal protection challenge is mounted to an ordinance:

> "Where there are plausible reasons for [the legislature's] action, our inquiry is at an end." *F.C.C*., 508 U.S. at 313–14, 113 S.Ct. 2096 (quotation marks omitted). The law's rational relation to a state interest need only be conceivable, and supporting empirical evidence is unnecessary. *Id*. at 315, 113 S.Ct. 2096. We are not required to consider the legislature's stated purpose as long as the law

> could rationally further some legitimate government purpose. *Id*.; *Kansas City Taxi Cab Drivers Ass'n*, 742 F.3d at 809.

Birchansky, 955 F.3d at 757.

As to the reasonableness of the relationship between the law and the legitimate interest, the court in *Birchansky* added, "We note that some degree of imprecision is constitutionally permissible under rational relationship review." 955 F.3d at 758 (citing *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970)). Indeed,

> States are 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, 90 S.Ct. 1153. 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.

c. Discussion

i. Rational basis review

Here, the dog owners concede that health, safety, and public welfare are legitimate state interests. *See, e.g., Mills v. City of Grand Forks*, 614 F.3d 495, 501 (8th Cir. 2010) (holding that, where a city offered the legitimate interest in protecting the health and safety of the city's residents as the basis for an ordinance, no constitutional equal protection claim existed); *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1015 (8th Cir. 2006) (recognizing a legitimate government interest in protecting the health, safety, and welfare of citizens of the jurisdiction). Thus, the question is the reasonableness of the relationship between the pit bull ban and those legitimate interests. *Birchansky*, 955 F.3d at 757.

As to the reasonableness of the relationship between the ordinance and the legitimate interest, the court finds that neither the dog owners' contention that pit bulls are no more or less dangerous than similarly sized dogs of other breeds nor their contention that visual identification is an inherently unreliable method of determining the breed of a dog of unknown origin is relevant. Even if visual identification of "pit bulls" is "imperfect," that does not mean the ordinance, which defines "pit bulls" by visual

identification, fails rational basis review. *Id*. at 758 ("A law supported by some rational basis does not offend the constitution merely because it is imperfect."). This is so, because "[t]he law's rational relation to a state interest need only be conceivable, and supporting empirical evidence is unnecessary." *Id.* at 757. Where, for example, the AKC and the UKC define "pit bull" breeds by visual inspection of physical traits, it cannot be irrational for the city to do so, as well, in framing an ordinance to ban such animals.

Similarly, whether "pit bulls" are really more dangerous than similarly sized dogs (or any sized dogs) of other breeds is also beside the point. The question is whether the city could have conceivably found a relation between "pit bulls" and its health, safety, and welfare concerns with dog bites; "supporting empirical evidence is unnecessary." *Id*.; *see also Beach Comms.*, 508 U.S. at 315 ("[A] legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data."). Even if the information was anecdotal or flawed by the imperfections of visual identification of dog breeds, the city had information that Council Bluffs had encountered increased reports of dog bites and some reports regarding threats to persons and animals in Council Bluffs, reportedly due to pit bull dogs, in the years preceding enactment of the ordinance. In such circumstances, it was not irrational for the city to take steps to reduce the perceived threat that pit bulls posed by banning such dogs. *Id.* (explaining that a law must only rationally further some legitimate government purpose to survive rational basis review); *see also Beach Comms.*, 508 U.S. at 313 (explaining that an ordinance subject to rational basis review "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"). "Where [as here] there are plausible reasons for [the city's] action, [this court's] inquiry is at an end." *Id*.

Therefore, the pit bull ordinance had the required rational relationship to the health, safety, and public welfare interests of the city to survive rational basis review.

ii. Change of circumstances

The dog owners contend that, even if there *was* a rational basis for the pit bull ordinance, a law that once was rational can be rendered irrational due to changed

circumstances. In support of that contention, the dog owners first cite *United States v. Carolene Products*, 304 U.S. 144 (1938), which recognized that, under rational basis review, "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." 304 U.S. at 153. The case before the court in *Carolene Products* did not involve that circumstance, however. Rather, it involved an "as applied" challenge to the constitutionality of a facially valid statute, where the article to which the statue had been applied, "although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition." *Id.* at 153-54. Here, the dog owners' dogs were not only within the prohibited class but the same as others in the class, based on visual identification of physical traits, so that they were within the reason for the prohibition.

The dog owners also point to *Seaboard Air Line R.R. Co. v. City of West Palm Beach*, 373 F.2d 328 (5th Cir. 1967), in which the court stated in a footnote that "the slightest reflection would disclose the fallacy of a rule which would require a determination of the reasonableness of a longstanding ordinance in the light of circumstances and conditions that may have existed at the time of its adoption." 373 F.3d at 329 n.3. Again, that action, like *Carolene Products*, was an "as applied" challenge to an ordinance, not a facial challenge.

A case addressing the kind of challenge at issue, here, cited by the dog owners, is *Dias v. City and County of Denver*, 567 F.3d 1169 (10th Cir. 2009), which the dog owners characterize as reversing the dismissal of a challenge to a pit bull ban on the basis that, under the allegations of the Complaint, "although pit bull bans sustained twenty years ago may have been justified by the then existing body of knowledge, the state of science in 2009 is such that the bans are no longer rational." 567 F.3d at 1183. What the dog owners quote from this decision, however, is actually the court's statement of an argument of the plaintiffs in that case. *Id.* Nevertheless, the court in that case found "some support" for that argument, for example, in breed standards from the AKC and the UKC commenting on the friendliness and lack of aggressiveness of certain "pit bull" breeds. *Id*. at 1183-84.

The court concluded, "Without drawing factual inferences against the plaintiffs, the district court could not conclude at this early stage in the case that the Ordinance [banning pit bulls] was rational as a matter of law." *Id*. at 1184. The court held only that the plaintiffs had stated a plausible substantive due process violation. *Id.*

This court's problem with the dog owners' "current science" and "change of circumstances" arguments and any cases that accepted them is not the paucity of authority supporting them. Rather, this court's problem is more fundamental: This court is concerned that accepting such arguments invites the kind of "courtroom fact-finding," years later, that the court is not permitted to engage in under rational basis review, in the first instance. *Beach Comms.*, 508 U.S. at 315. Asking the court to engage in such latter-day fact-finding and to let its determination supplant that of the legislative body that originally enacted the statute, law, or ordinance would give the court a license to judge the wisdom, fairness, or logic of legislative choices long after the fact, when the court would not have been able to do so in a review more nearly contemporaneous with enactment of the law. That, too, violates the principles limiting rational basis review. *Id*. at 313. Indeed, even if the ordinance is "improvident," "[t]he Constitution presumes that [the ordinance] will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the court or the parties] may think [the city] has acted." *Id.* at 314. The ordinance at issue, here, necessarily involved some line-drawing concerning which dogs to ban. Nevertheless, as the Supreme Court recognized in *Beach Communications*, "[t]his necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Id.* at 316. This court is not prepared to short-circuit the democratic process in this case and impose its view of facts better addressed by the legislative body. The proper venue for the dog owners' "current science" and "change of circumstances" arguments to overturn the pit bull ban is the responsible legislative body, not the court.

d. Summary

For the reasons set out above, summary judgment in favor of the city is granted on the dog owners' substantive due process and equal protection claims.

5. Procedural Due Process

The dog owners' last challenge to the pit bull ordinance is that it violates their procedural due process rights in various ways. In their response to the city's Motion, the dog owners point to the following procedural due process failings: (1) placing the burden of proof on the owner to show that a dog is not a pit bull but failing to provide the quantum of evidence that a dog owner must satisfy to prevail at a hearing; (2) providing that owners must submit their facts at the hearing under oath and affirmation without a corresponding requirement on the city; (3) failing to provide a period of time in which a breed-determination hearing must be held while impoundment fees continue to accrue at the owner's expense; (4) providing no mechanism for an owner to receive an official breed determination before a dog is seized; and (5) providing no mechanism to return impoundment fees to an owner whose dog was wrongfully impounded. While the dog owners assert that the procedural due process violations are not limited to these, their failure to address any others in response to the city's Motion waives any other violations, because the dog owners have not met their burden to generate a genuine issue of material fact precluding entry of judgment as a matter of law on those violations. *See, e.g., Torgerson*, 643 F.3d at 1042.

In support of its Motion, the city argues that the pit bull ordinance provides a procedure that permits an appeal of an immediate seizure to the administrative authority. The city also argues that the pit bull ordinance clearly provides owners wishing to challenge a determination that their dog is a prohibited pit bull type dog with a meaningful opportunity to challenge the finding. Also, in the event a municipal infraction or other citation is issued, there is a court proceeding, with all the due process such court proceedings provide. The pet owners contend that the city fails to address most of the procedural deficiencies they have identified. They contend that, at the very least, the

challenged ordinance lacks the quantum of evidence necessary for a dog owner to challenge the city's determination that a dog is a pit bull and requires the owner but not the city to submit their facts under oath and affirmation at the hearing. In reply, the city argues that a reading of the ordinance and the procedures for administrative hearings (in addition to court procedures) demonstrates the pit bull ordinance meets procedural due process requirements.

In a case involving an ordinance for handling of stray dogs, the Eighth Circuit Court of Appeals observed, "Due process is a flexible concept, requiring only 'such procedural protections as the particular situation demands.'" *Lunon v. Botsford*, 946 F.3d 425, 430 (8th Cir. 2019) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). Furthermore, "'[e]ven if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens.'" *Id.* (quoting *Sentell v. New Orleans & C.R. Co*., 166 U.S. 698, 704 (1897)).

When a deprivation of a property interest is at stake, "what process is due" is a federal question. *Id*. at 431. As the Supreme Court has explained,

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldrid*ge, 424 U.S. 319, 335 (1976); *Hughes v. City of Cedar Rapids, Iowa*, 840 F.3d 987, 994 (8th Cir. 2016).

"'[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action.'" *Walters v. Weiss*, 392 F.3d 306, 314 (8th Cir. 2004) (quoting *Goldberg v. Kelly*,

397 U.S. 254, 263 (1970)); *cf. Matthews*, 424 U.S. at 335 (first and third factors). Here, the *Lunon* decision counsels that a pit bull dog owner's interest is relatively modest, while a municipality's interest in protecting its citizens' health, safety, and welfare from dangerous animals is so substantial that dogs are "'subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens.'" *Lunon*, 946 F.3d at 430 (quoting *Sentell*, 166 U.S. at 704). Similarly, the risk of an erroneous deprivation of the property interest in a pit bull is the destruction of the dog, but the governmental interest plainly permits that result. *Id.*

Moreover, the dog owners have not attempted to demonstrate that additional or substitute procedural safeguards would reduce that risk. *Mathews*, 424 U.S. at 335 (second factor). Although the ordinance places the burden in administrative proceedings on the dog owner to show that the dog is not a pit bull, without specifying the quantum proof, *see* CBMC § 4.20.112(f), there is a right of administrative appeal for an owner aggrieved by a § 4.20.112(f) determination that a dog is a pit bull, and in that appeal "[t]he city shall have the burden to prove by a preponderance of the evidence that the action of the administrative authority or his or her designee should be affirmed," *see* CBMC § 4.20.132(5), Def.'s App. at 42; *see also* CBMC § 4.20.112(f) (stating that appeal of the decision after a breed-determination shall be pursuant to § 4.20.132). Also, because there has been a determination by a city official that a dog is a pit bull, and the pet owner may demand an administrative hearing to "dispute[ ] the classification of such dog as a pit bull," CBMC § 4.20.112(f), the owner may properly be required to present facts under oath in that hearing.

Likewise, the dog owners have not attempted to demonstrate that additional or substitute procedures would reduce the risk imposed by requirements that the owner pay impoundment fees and, indeed, the dog owners misstate the circumstances under which impoundment fees are imposed. The dog owners contend that the ordinance fails to provide a period of time in which a breed-determination hearing must be held while impoundment

fees continue to accrue at the owner's expense and that the ordinance provides no mechanism to return impoundment fees to an owner whose dog was wrongfully impounded. The only provision of the ordinance addressing payment of impoundment fees by the owner imposes such fees *only if*, after an § 4.20.112(f) hearing, the dog is found to be a pit bull, and the owner chooses to take the dog out of Council Bluffs permanently, rather than allow the dog to be destroyed. *See* CBMC § 4.20.112(f) ("If the dog is found to be a pit bull, it shall be humanely destroyed, unless the owner produces evidence deemed sufficient by the director of public health that the pit bull is to be permanently taken out of Council Bluffs and the owner pays the cost of impoundment."). Again, destruction of a dog is within the state's power pursuant to its interest in public safety. *Lunon*, 946 F.3d at 430 (quoting *Sentell*, 166 U.S. at 704). The provision permitting the owner to demonstrate that the dog will be removed from the city and to pay impoundment fees as an alternative to destruction of the animal is an additional *protection* of the owner's property interest in the dog. The ordinance does not impose impoundment fees if the dog owner proves the dog was wrongfully impounded. *See id.* (stating, "If the dog is found not to be a pit bull, the dog shall be released to the owner," and stating no authority to impose impoundment fees in that circumstance).

Finally, the dog owners argue that the ordinance violates procedural due process because it provides no mechanism for an owner to receive an official breed determination before a dog is seized. However, "the 'usual rule' [is] that '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Mickelson v. Cty. of Ramsey*, 823 F.3d 918, 928 (8th Cir. 2016) (quoting *Mitchell v. W.T. Grant Co*., 416 U.S. 600, 611 (1974)). More pointedly, in *Ewing v. Mytinger & Casselberry, Inc*., 339 U.S. 594 (1950), the Supreme Court held that, "where only property rights are concerned," due process is satisfied if "there is at some stage an opportunity for a hearing and a judicial determination." 339 U.S. at 599. In such circumstances, it was sufficient if the owner was afforded prompt and adequate post-deprivation hearings and an

opportunity for judicial review." *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc*., 452 U.S. 264, 303 (1981). This court concludes, as a matter of law, that the process due, here, is only a post-deprivation administrative hearing and an opportunity for judicial review.

Therefore, summary judgment is granted in the city's favor on the dog owners' procedural due process claim.

III. CONCLUSION

Upon the foregoing,

IT IS ORDERED that the city's September 10, 2021, Motion For Summary Judgment [Dkt. No. 40] is **GRANTED.**

Judgment shall enter accordingly.

DATED this 29th day of October, 2021.

JOHN A. JARVEY, Chief Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA