Case No. 21-3794

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RACHAEL DANKER, ET AL.,
Plaintiffs-Appellants,

v.

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

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

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

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiff dog owners filed this action challenging the rational relationship between Council Bluffs' legitimate governmental interest in public safety and its ban of "pit bull" type dogs. The district court granted summary judgment based solely on the city's conceivable basis for the ban. The district court held that once it found a conceivable basis for governmental action, the facts raised by the Plaintiffs showing the irrationality of the conceivable justification were irrelevant.

This holding departs from traditional principles of rational basis review which require a plaintiff submit evidence that the law is not rationally related to the government's legitimate interest. Plaintiffs' evidence created genuine issues of material fact which precluded the district court from granting summary judgment on Plaintiffs' equal protection and substantive due process claims.

Plaintiffs request 20 minutes of oral argument.

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JURISDICTIONAL STATEMENT

Plaintiffs brought a civil rights action for declaratory and injunctive relief under 42 U.S.C. § 1983, 28 U.S.C. § 2201, and the laws of the State of Iowa in the United States District court for the Southern District of Iowa. The district court had jurisdiction over this controversy under 28 U.S.C. §§ 1331, 1343, 2201, and 2202. The district court entered an Opinion and Order granting Defendant's Motion for Summary Judgment on October 29, 2021 and Final Judgment on November 1, 2021. App. 1393-1418; R. Doc. 63, at 1-26; App. 1419; R. Doc. 64, at 1. Plaintiffs filed a timely appeal on November 29, 2021. App. 1420-1421; R. Doc. 65, at 1-2. This Court has jurisdiction under 28 U.S.C. § 1291, which provides appellate jurisdiction over a final judgment from a United States District court.

STATEMENT OF ISSUES

Did the district court err in granting Defendant Council Bluffs' Motion for Summary Judgment on Plaintiffs' substantive due process and equal protection claims?

Apposite Cases:

- *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993).
- *Planned Parenthood of Minn. v. Minnesota*, 612 F.2d 359 (8th Cir. 1980), *aff'd sub nom. Minnesota v. Planned Parenthood of Minn.*, 448 U.S. 901 (1980).
- *Dias v. City and Cnty. of Denver*, 567 F.3d 1169 (10th Cir. 2009).

STATEMENT OF THE CASE

I. FACTS

This action was brought challenging the rational relationship between Council Bluffs' legitimate governmental interest in public safety and its ban of "pit bull" type breeds under Council Bluffs Municipal Code ("CBMC") § 4.20.112 ("Pit Bull Ban"). App. 0017-0020; R. Doc 1, at 17-20. The Plaintiff dog owners[1] are residents or former residents of Council Bluffs against whom the city has enforced the Pit Bull Ban. App. 0001-0020; R. Doc 1, at 1-20; App. 0404-0405; R. Doc. 46, at 9-10, ¶¶ 11-13; *see also* App. 0146; R. Doc. 40-3, at 81, Danker Dep. at 4:11-15; App. 0152-0154; R. Doc. 40-3, at 87-89; App. 0166; R. Doc. 40-3, at 101, S. Johnson Dep. at 4:10-24; App. 0171-0173; R. Doc. 40-3, at 106-108; App. 0192; R. Doc. 40-3, at 127.

A. The Plaintiff Dog Owners' Evidence of Irrationality

The Plaintiff dog owners offered evidence from experts in canine and behavioral genetics, animal and canine behaviorists, professionals

[1] Plaintiffs do not appeal the district court's finding that Don Williams, Julie Williams, and Stephanie Nelson lack standing. "Plaintiffs," or "the Plaintiff dog owners" refer to the remaining plaintiffs in the case: Rachael Danker, Jesse Johnson, Samantha Johnson, and Aubrey Wilhite.

in public health issues related to dog bites, and experts in the validity of visual identification of dog breeds. The district court described the dog owners' evidence as establishing:[2]

- "[C]anine 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." App. 1407; R. Doc. 63, at 15;[3]
- "[S]cientists 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

[2] *See also* Plaintiffs' Response to Defendant's Statement of Undisputed Material Facts and Plaintiffs' Statement of Additional Material Facts and Appendix of Evidence. App. 0396-0711; R. Doc. 46, at 1-34; R. Doc. 46-1, at 1-282.

[3] App. 0417; R. Doc. 46, at 22, ¶ 11; App. 0419-0420; R. Doc. 46, at 24-25, ¶¶ 18, 20-23; *see also* App. 0454-0459; R. Doc. 46-1, at 25-30; App. 0596, R. Doc. 46-1, at 167, Lockwood Dep. at 73:21; App. 0653; R. Doc. 46-1, at 224; App. 0670-0671; R. Doc. 46-1, at 241-242, Irizarry Dep. at 129:11-130:4; App. 0685-686; R. Doc. 46-1, at 256-257, Hekman Dep. at 32:5-33:5; App. 0689; R. Doc. 46-1, at 260, ¶ 6; App. 0699; R. Doc. 46-1, at 270.

unknown origin." App. 1406-1407, R. Doc. 63, at 14-15;[4]

- There is no valid correlation "between dangerous behavior and 'pit bull' dogs, as determined by genetics or by visual inspection of physical traits associated with 'pit bull' dogs." App. 1399-0400; R. Doc. 63, at 7-8;
- "[C]laims that certain breeds pose a greater risk of dangerousness to humans are based on out-of-date studies and misinterpretations of other studies." App. 1400; R. Doc. 63, at 8;[5] and
- "[V]isual breed identification is inaccurate and inconsistent." App. 1407; R. Doc. 63, at 15.[6]

The Plaintiff dog owners also submitted evidence that (1) no well-designed, peer-reviewed study has ever shown that a breed ban has

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[4] App. 0420-0424; R. Doc. 46, at 25-29, ¶¶ 23, 26-39; *see also* App. 0445; R. Doc. 46-1, at 16; App. 0516-0526; R. Doc. 46-1, at 87-97; App. 0650; R. Doc. 46-1, at 221; App. 0675; R. Doc. 46-1, at 246; App. 0689; R. Doc. 46-1, at 260, ¶¶ 6-7; App. 0697; R. Doc. 46-1, at 268.

[5] App. 0426-0427; R. Doc. 46, at 31-32, ¶¶ 46-49; *see also* App. 0460-0468; R. Doc. 46-1, at 31-39; App. 0689; R. Doc. 46-1, at 260, ¶ 6.

[6] App. 0421-0424; R. Doc. 46, at 26-29, ¶¶ 26-39; *see also* App. 0445; R. Doc. 46-1, at 16; App. 0516-0526; R. Doc. 46-1, at 87-97; App. 0650; R. Doc. 46-1, at 221; App. 0675; R. Doc. 46-1, at 246; App. 0689; R. Doc. 46-1, at 260, ¶ 7; App. 0697; R. Doc. 46-1, at 268.

reduced the number of dog bites or the incidents of dog bite-injury hospitalizations in jurisdictions adopting bans, and (2) breed bans are not a rational approach to addressing public health concerns of dog bites. App. 0419; R. Doc. 46, at 24, ¶ 18; App. 0425; R. Doc. 46, at 30, ¶ 44; App. 0427; R. Doc. 46, at 32, ¶ 49.[7] The evidence offered by the Plaintiff dog owners is well accepted by the canine scientific community. The American Veterinary Medical Association, the American Veterinary Society of Animal Behavior, and other animal advocacy organizations have rejected breed bans as ineffective and scientifically misguided. App. 0427-29; R. Doc. 46, at 32-34, ¶¶ 50-51; App. 0469-0508; R. Doc. 46-1, at 40-79. These organizations have concluded that breed is not predictive of dangerousness and visual inspection is an unreliable method of determining breed.

B. Council Bluffs' Expert Opinions

In support of the Pit Bull Ban's rationality, Council Bluffs offered the testimony of Felicia Trembath, Ph.D., an epidemiologist with a

[7] *See also* App. 0592; R. Doc. 46-1, at 163, Lockwood Dep. at 39:6-17; App. 0653; R. Doc. 46-1, at 224; App. 0670-0671; R. Doc. 46-1, at 241-242, Irizarry Dep. at 129:11-130:4; App. 0689; R. Doc. 46-1, at 260, ¶ 6; App. 0696-0699; R. Doc. 46-1, at 267-270.

master's degree in public health.[8] Dr. Trembath opines that:

- Pit bulls can be accurately identified based on visual inspection of physical characteristics. App. 0044-45; R. Doc. 40-1, at 6-7, ¶¶ 20-21;
- Pit bulls are disproportionately responsible for dog bites and dog bite fatalities. App. 0042; R. Doc. 40-1, at 4, ¶ 9; *Id.* at 0045; R. Doc. 40-1, at 7, ¶ 23;
- Pit bulls are more likely than other breeds of dogs to inflict severe injuries by biting victims in more than one anatomical area. App. 0045; R. Doc. 40-1, at 7, ¶ 25;
- Pit bulls are disproportionately responsible for attacks on other animals. App. 0045; R. Doc. 40-1, at 7, ¶ 24; and
- The Pit Bull Ban is correlated with a reduction in reported dog

[8] The Plaintiff dog owners contend Dr. Trembath lacks expertise in canine genetics, behavioral genetics, animal behavior, and the accuracy of visual identification of breeds necessary to opine on such topics. *See* App. 0375; R. Doc. 45, at 2 at fn. 1. Accordingly, the Plaintiff dog owners timely filed a motion in limine to exclude Dr. Trembath's expert opinions, which was not fully briefed at the time the district court granted Council Bluffs' Motion for Summary Judgment. App. 0812-1012; R. Doc. 59, at 1-2; R. Doc. 59-1, at 1-22; R. Doc. 59-2, at 1-126; R. Doc. 59-3, at 1-26; R. Doc. 59-4, at 1-10; R. Doc. 59-5, at 1-5; R. Doc. 59-6, at 1-3; R. Doc. 59-7, at 1-4; R. Doc. 59-8, at 1-3 (Plaintiffs' Motion in Limine to Exclude Expert Testimony of Felicia Trembath, supporting brief, and evidence).

bites in Council Bluffs. App. 0045-46; R. Doc. 40-1, at 7-8, ¶ 26.

The city also relied on (1) an affidavit from the current mayor of Council Bluffs, Matthew Walsh, who was serving as a city council member when the Pit Bull Ban was enacted in 2004, and (2) records compiled by animal control starting in 2003 to support the Pit Bull Ban's rationality. Mayor Walsh testified Council Bluffs encountered increased reports of dog bites, reportedly due in part to pit bull type dogs, in the years preceding 2004. App. 0331; R. Doc. 40-3, at 266, ¶ 5; App. 0039-0040; R. Doc. 40-1, at 1-2, ¶ 2. The Plaintiff dog owners objected to Mayor Walsh's affidavit based on a lack of foundation for his testimony, including how the dogs involved in the bite reports were identified as "pit bull dogs." App. 0397; R. Doc. 46, at 2, ¶ 2. This evidence was also contested by the Plaintiff dog owners to the extent the dogs involved were identified as "pit bull dogs" through visual identification, based on evidence that visual identification of breeds is inconsistent and inaccurate.

The city alleges its animal control records support that (1) pit bull type dogs were disproportionality responsible for dog bites in Council Bluffs and (2) that since the enactment of the Pit Bull Ban, the number

of reported dog bites has declined in Council Bluffs by approximately 25%. App. 0040; R. Doc. 40-1, at 2, ¶¶ 3-5; App. 0042; R. Doc. 40-1, at 4, ¶ 9-10. The Plaintiff dog owners deny the accuracy of the animal control records because the breed identifications contained in the records were admittedly based primarily on visual identification. App. 0398; R. Doc. 46, at 3, ¶ 3. Further, the records used dog licensing as a proxy for dog population, which the Plaintiff dog owners' experts reject as flawed. App. 0399-0401; R. Doc. 46, at 4-6, ¶¶ 4-5; App. 403; R. Doc. 46, at 8, ¶ 9. As the city's own expert acknowledged, the animal control records cannot accurately be used for the purposes sought by the city due to a lack of historical data and recognized discrepancies in the data. App. 0403-404; R. Doc. 46, at 8-9, ¶ 10.

C. The Pit Bull Ban

The Pit Bull Ban provides, "[i]t 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." App. 0104; R. Doc. 40-3, at 39 at § 4.20.112(a). A "pit bull" 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 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.

Id. at § 4.20.112(b)(2).

II. PROCEDURAL HISTORY

A. Suit Challenging the Pit Bull Ban

This action was filed pursuant to 42 U.S.C. § 1983 on May 12, 2020, asserting the Pit Bull Ban violates the Plaintiff dog owners' substantive due process, equal protection, and procedural due process rights under the United States Constitution and is unconstitutionally vague.[9] App. 0001-0020; R. Doc. 1, at 1-20. The Plaintiff dog owners seek prospective declaratory and injunctive relief. *Id.* Council Bluffs filed its Answer and Affirmative Defenses on June 26, 2020. App. 0021-0029; R. Doc. 9, at 1-9.

B. Motion for Summary Judgment

On September 10, 2021 the city filed a Motion for Summary Judgment on all claims. App. 0036-38; R. Doc. 40, at 1-3. The district

[9] Plaintiff dog owners do not appeal the district court's grant of summary judgment against their procedural due process or void for vagueness claims.

court entered an order and opinion on October 29, 2021, granting the Motion for Summary Judgment. App. 1393-1418; R. Doc. 63, at 1-26. Judgment was entered on November 1, 2021. App. 1419; R. Doc. 64, at 1.

The Plaintiff dog owners timely filed their notice of appeal on November 29, 2021. App. 1420; R. Doc. 65, at 1.

SUMMARY OF THE ARGUMENT

The district court's grant of summary judgment on Plaintiffs' substantive due process and equal protection claims ignored genuine issues of material fact which precluded judgment for the city. The district court erred by deeming Plaintiffs' evidence of the irrationality of the Pit Bull Ban irrelevant and ending its inquiry after accepting Council Bluffs' plausible reason for adopting the ordinance. The dog owners' evidence properly challenged the rationality of the Pit Bull Ban and the district court was required to consider that evidence in determining whether a genuine issue of material fact exists regarding the constitutionality of the ordinance.

STANDARD OF REVIEW

This Court reviews summary judgment rulings de novo, "viewing

all the evidence and drawing all reasonable inferences in the light most favorable to the non-moving party." *Odom v. Kaizer*, 864 F.3d 920, 921 (8th Cir. 2017). "This court reviews questions of law de novo." *Bhosale v. Mukasey*, 549 F.3d 732, 735 (8th Cir. 2008).

ARGUMENT

The dog owners demonstrated there are genuine issues of material fact which preclude summary judgment on their equal protection and substantive due process claims.

Summary judgment is proper only when the evidence shows "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011). The evidence submitted on summary judgment must be viewed in the light most favorable to the nonmoving party and the court must not weigh evidence or make credibility determinations. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also Cottrell v. Am. Fam. Mut. Ins. Co., S.I.*, 930 F.3d 969, 971 (8th Cir. 2019) ("We view facts in the light most favorable to the nonmoving party, and we make no determinations of credibility; nor do we weigh the evidence or draw inferences, as those functions

belong to the jury.").

Because summary judgment avoids a trial, "it should not be granted unless the moving party has established the right to a judgment with such clarity that there is no room for controversy." *Meyers by Walden v. Reagan*, 776 F.2d 241, 244 (8th Cir. 1985) (internal citations omitted). On appeal, the nonmoving party is entitled to "the benefit of all favorable inferences that can reasonably be drawn from the evidence." *Id.*

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFFS' SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAIMS.

In response to Council Bluffs' Motion for Summary Judgment, the dog owners offered evidence that (1) Pit Bull type dogs are no more or less dangerous than other breeds of dogs; (2) neither breed nor physical characteristics are predictive of a dog's aggressiveness or propensity to bite; and (3) the city's method of identifying dogs as Pit Bulls is inherently unreliable.[10] *See* The Plaintiff Dog Owners' Evidence of

[10] The opinions offered by Plaintiffs' expert witnesses are consistent with the canine scientific community including the American Veterinary Medical Association, the American Veterinary Society of Animal Behavior, the Humane Society of the United States, and the ASPCA. App. 0427-0429; R. Doc. 46, at 32-34, ¶¶ 50-51; App. 0469-0508; R. Doc. 46-1, at 40-79.

Irrationality *supra* pp. 9-12. The district court failed to find a genuine issue of material fact from this evidence because it mistakenly interpreted its rational basis review as complete once the city offered its conceivable basis to justify the challenged ordinance—*i.e.*, that city officials believed Pit Bulls were responsible for a disproportionate number of dog bites. The court failed to analyze whether Plaintiffs' evidence refuted Council Bluffs' conceivable justification for the Pit Bull Ban.

The burden in rational basis litigation requires a successful plaintiff to negate the rationality of each *conceivable basis* which could support the legislation. *See e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[A]lthough rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality."). Where a challenger brings forth evidence to dispute the rationality of a government's justification for a law, the court's analysis does not stop at the government's offered justification.

Appellate courts have never held that evidence challenging the rationality of legislation is irrelevant under rational basis review. If

that were the case, complete deference would be given to legislatures, making rational basis review an insurmountable obstacle.[11]

A. Rational Basis Review Standard

Plaintiffs' substantive due process challenge to the Pit Bull Ban is subject to rational basis review. In cases that do not implicate a fundamental liberty interest, the Constitution requires legislation "be rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *see also Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009) (applying rational basis review to a challenge of Denver's pit bull ban). The same rational basis standard applies to Plaintiffs' equal protection claim. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Rational basis review requires that governmental classifications bear an actual, factually plausible, and rational relationship to a legitimate government end.

[11] While rational basis review is deferential to governmental policy choices, it is not impotent. Plaintiffs can and have prevailed in rational basis litigation. *See* Dana Berliner, *The Federal Rational Basis Test - Fact and Fiction*, 14 GEO. J.L. & PUB. POL'y 373, 378 (2016) (plaintiffs have prevailed in at least twenty rational-basis cases before the Supreme Court from 1970 to 2016 and "have won rational-basis cases in nearly every circuit.").

"Application of the rational basis test requires a two-step analysis." *United Paramedics of Los Angeles v. City of Los Angeles*, 936 F.2d 580 (9th Cir. 1991). First, the legislation must serve a legitimate government purpose. *Id.* Second, the means employed must be *rationally related* to that legitimate government interests. *Id.*; *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002) ("The rational basis test has two components: (1) the state legislation must have a legitimate government purpose; and (2) there must be a rational relationship between that purpose and the means chosen by the State to achieve it.").[12]

Under rational basis review, laws are presumed valid and will be upheld as rationally related to a legitimate government interest if *any* conceivable or plausible reasons for the legislature's action survive a plaintiff's challenge. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313

[12] *See also* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'y 401, 410 (2016) ("[The rational basis test] has two parts, as do all levels of scrutiny. This entails an inquiry into the ends the government seeks to achieve, which must be legitimate, and an inquiry into the means used, which must be rationally related to the goal.").

(1993). A challenger can rebut the presumption of validity by negating each conceivable or plausible basis which might support the law. *Beach Commc'ns*, 508 U.S. at 314-15 ("those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it."); *Heller v. Doe by Doe*, 509 U.S. 312, 320-21 (1993) ("'[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record.") (internal citations omitted).[13]

Construing all facts in the light most favorable to Plaintiffs, the dog owners' evidence negates Council Bluffs' conceivable basis for the Pit Bull Ban creating genuine issues of material fact to be decided at trial. The decision below should be reversed for this reason alone.

B. The Plaintiff Dog Owners' Evidence Created a Genuine Issue of Material Fact on the Rationality of the Pit Bull Ban.

The district court misapplied the rational basis review framework

[13] *See also* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'y 401, 402 (2016) ("Under the rational basis test, the challenger of a law has the burden of proof. That is, the law will be upheld unless the challenger proves that the law does not serve any conceivable legitimate purpose, or that it is not a reasonable way to attain the intended end.").

by ending its analysis with the city's offered justification for the ordinance without considering the dog owners' evidence that could negate the rationality of that justification. As explained by the Fifth Circuit in *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013), "although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality."[14]

On rational basis review, the *Beach* court explained the presumption of validity and the requirement that a plaintiff overcome every conceivable basis which might support the challenged legislation. The court made clear that a legislative body need not "articulate its reasons for enacting a statute" because it is "irrelevant for

[14] As explained by the Supreme Court in *Borden's Farm Prod. Co. v. Baldwin*, a precursor to its adoption of the rational basis standard, when a legislative classification is called in question, "if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and *one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary*." 293 U.S. 194, 209 (1934) (emphasis added) (internal citations omitted).

constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315.[15] Nor is the "absence of legislative facts" explaining any distinctions drawn by the enactment "of significance in rational basis analysis." *Id*. That is so because the "legislative choice" to regulate on a given topic "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* Yet *Beach* made clear that laws subject to rational basis review could be overturned by negating "every conceivable basis which might support it." *Id*.

Consistent with *Beach*, this Court allows a rational basis plaintiff

[15] The D.C. Circuit remanded for the F.C.C. to provide "additional legislative facts to justify the distinction" the Cable Communications Policy Act of 1984 made between (1) facilities that serve separately owned and managed buildings and (2) those that serve one or more buildings under common ownership or management. *Beach Commc'ns*, 508 U.S. at 309, 312. Following an F.C.C. report stating it was "unaware of any desirable policy or other considerations ... that would support the challenged distinctions," the appeals court found the Act violated equal protection because the rationale provided by the F.C.C. was "a naked intuition, unsupported by conceivable facts or policies." *Id.* at 313. The Supreme Court reversed, rejecting the court of appeal's requirement for "legislative facts" to explain the distinction "on the record." *Id.* at 315.

to offer evidence attacking the rationality of a challenged law. In *Planned Parenthood of Minn.*, Minnesota appropriated funds to be disbursed to nonprofit corporations to provide pre-pregnancy family planning services. *Planned Parenthood of Minn. v. Minnesota*, 612 F.2d 359, 360 (8th Cir. 1980), *aff'd sub nom. Minnesota v. Planned Parenthood of Minn.*, 448 U.S. 901 (1980). Planned Parenthood challenged the disbursement procedures because, other than hospitals or HMOs, nonprofits that provided abortion services were precluded from receiving funding. *Id*. At trial, Planned Parenthood offered evidence refuting each basis proposed by the state to exclude non-hospital or non-HMO abortion providers from receiving funding. *Id*. at 361-62. On appeal, this Court agreed that the "detailed findings of fact" and evidence introduced by Planned Parenthood at trial sufficiently refuted each of the justifications offered by the state rendering the exclusions irrational. *Id.*; s*ee also Miller v. Ackerman*, 488 F.2d 920, 922 (8th Cir. 1973) (finding no rational basis for the proscription of short-hair wigs in military reservists' weekend training program based on evidence in the record of the wigs' neatness and presentability).

The district court erred in holding that evidence challenging the

rationality of Council Bluffs' Pit Bull Ban was irrelevant. Viewing the dog owners' evidence in its most favorable light, dog breeds are not predictive of aggressiveness, dangerousness, or propensity to bite; pit bull type dogs are not more dangerous or prone to bite than other breeds of dogs; and the city's method of identifying dog breeds is inherently unreliable. These facts sever any rational relationship between the city's interest in public safety and its ban of pit bull type dogs. At the least, the evidence deemed irrelevant by the district court created genuine issues of material fact regarding the rationality of the Pit Bull Ban.

C. The Pit Bull Ban must be Rationally Related to a Legitimate Government Purpose at the Time of Enforcement.

The district court declined to consider current scientific evidence that pit bull type dogs are no more dangerous than other breeds, at least in part, because "such arguments invite[] the kind of 'courtroom fact-finding,' years later, that the court is not permitted to engage in under rational basis review." App. 1412-1413; R. Doc. 63, at 20-21 (citing *Beach Commc'ns*, 508 U.S. at 315). *Beach* does not stand for the proposition that district courts cannot engage in fact finding regarding

the rationality of legislation. Rather, *Beach* makes clear that a "legislative choice" to regulate in an area and the *accuracy* of "legislative facts" or motives are "not subject to courtroom fact-finding" because legislation may be initially adopted "based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315.

The district court's interpretation of *Beach* leads to the premise that new information could never be used to challenge the rationality of legislation—if a law appeared rational when passed, the law will *always* be rational no matter how compelling the evidence of its subsequent irrationality becomes. *But see United States v. Carolene Prods.*, 304 U.S. 144, 153 (1938) ("[T]he 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."); *cf.*, *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 535 (2013) (stating "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions" in finding the coverage formula of the Voting Rights Act unconstitutional).

The Tenth Circuit rejected this rationale in a challenge to

Denver's pit bull ban. *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009). In *Dias,* the Tenth Circuit reversed the dismissal of plaintiffs' substantive due process challenges to Denver's pit bull ban because the complaint could be interpreted to allege that "although pit bull bans sustained twenty years ago may have been justified by the then-existing body of knowledge, the state of science in 2009 is such that the bans are no longer rational." *Id.*

On remand, the District of Colorado denied the city's motion for summary judgment. The district court recognized plaintiffs' burden to "'negative every conceivable basis which might support' the Ordinance," but found that based on the plaintiffs' experts' opinions that pit bulls are not more dangerous than other breeds, "a reasonable trier of fact may find that Plaintiffs' experts are correct and there exists no rational basis for a breed specific ordinance." *Dias v. City & Cty. of Denver*, No. 07-CV-00722-WDM-MJW, 2010 WL 3873004, at *7 (D. Colo. Sept. 29, 2010) (unpublished opinion); *see also, Droll v. City of Keota, Iowa*, No. 4:20-CV-00088, 2021 WL 7081411 at *6-7 (S.D. Iowa July 30, 2021) (unpublished opinion) (in a factually similar case challenging a pit bull ban, the district court denied a motion for summary judgment following

the reasoning of *Dias* because current scientific evidence called into question the rationality of ban).

Viewing the evidence in the light most favorable to the Plaintiff dog owners, a trier of fact could reasonably conclude that (1) a dog's breed or physical characteristics is of no predictive value in determining aggressiveness or propensity to bite; (2) pit bull type dogs are no more or less dangerous than similarly sized dogs of other breeds; (3) claims that pit bulls pose a greater risk of dangerousness to humans are based on out-of-date studies and misinterpretations of other studies; (4) using visual identification to identify the breed of a dog of unknown origin is inherently unreliable; and (5) breed bans do not reduce the number of dog bites or the incidents of dog bite-injury hospitalizations. These facts dissolve the purported rational relationship between Council Bluffs' interest in protecting public safety and the city's ban of pit bull type dogs.

The district court failed to find a genuine issue of material fact because it mistakenly believed it was precluded from relying on scientific evidence which may not have been known at the time the Council Bluffs ordinance was adopted. Precedent from this Court and

the Supreme Court invites challengers like the Plaintiffs to present such evidence in a challenge to the rational basis of legislation. Because the Plaintiffs offered evidence which created genuine issues of material fact on their substantive due process and equal protection claims, the district court erred in granting the city's motion for summary judgment.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted this 2nd day of March 2022.

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I certify that on March 2, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

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