No. 09-50367

In the United States Court of Appeals for the Fifth Circuit

RAUL MEZA,
Plaintiff - Appellee - Cross-Appellant

v.

DIRECTOR BRAD LIVINGSTON, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, IN HIS OFFICIAL CAPACITY; JOSE ALISEDA; CHARLES AYCOCK; CONRITH DAVIS; JACKIE DENOYELLES; LINDA GARCIA; JUANITA GONZALES; RISSI L. OWENS; STUART JENKINS; BARBARA LORRAINE,
Defendants - Appellants - Cross-Appellees

On Appeal from the United States District Court
Western District of Texas, Austin Division

BRIEF OF APPELLANTS

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for
Civil Litigation

JAMES C. HO
Solicitor General

THOMAS M. LIPOVSKI
Assistant Solicitor General
Texas Bar No. 00791121

BRUCE R. GARCIA
Assistant Attorney General

CELAMAINE CUNNIFF
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1827
[Fax] (512) 474-2697

COUNSEL FOR DEFENDANTS - APPELLANTS - CROSS-APPELEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff - Appellee - Cross-Appellant

Raul Meza

Counsel for Plaintiff - Appellee - Cross-Appellant

James C. Harrington
Scott Medlock
Texas Civil Rights Project

Defendants - Appellants - Cross-Appellees

Brad Livingston, in his official capacity as Executive Director of the Texas Department of Criminal Justice; Stuart Jenkins, in his official capacity as Director of the Texas Department of Criminal Justice Parole Division; and Rissie L. Owens, Charles Aycock, Conrith Davis, Jackie DeNoyelles, Barbara Lorraine, and Juanita M. Gonzales, in their official capacities as Members of the Texas Board of Pardons and Paroles.

Counsel for Defendants - Appellants - Cross-Appellees

Thomas M. Lipovski
Peter Hansen
Celamaine Cunniff
Bruce Garcia
Office of Attorney General, State of Texas

_____

Thomas M. Lipovski
ATTORNEY OF RECORD FOR DEFENDANTS-APPELLANTS - CROSS-APPELLEES

STATEMENT REGARDING ORAL ARGUMENT

Raul Meza was required by State law to be released to mandatory supervision in September 2002. A number of conditions were eventually placed upon his mandatory supervision, including sex-offender treatment, polygraph, and other conditions of "Special Condition X"—Texas's sex-offender program. This case presents questions relating to whether due process was required before the other conditions of Special Condition X were imposed, and relating to the level of process required before imposing the sex-offender treatment and polygraph conditions and any other components of Special Condition X found by this Court to merit due-process protections. Resolving these questions will require the Court to examine the nature and extent of the minimum protections required by the Due Process Clause in these circumstances. Because Appellants believe that oral argument would be helpful to the Court in making this determination, they request that this case be set for argument.

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DIRECTOR BRAD LIVINGSTON, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, IN HIS OFFICIAL CAPACITY; JOSE ALISEDA; CHARLES AYCOCK; CONRITH DAVIS; JACKIE DENOYELLES; LINDA GARCIA; JUANITA GONZALES; RISSI L. OWENS; STUART JENKINS; BARBARA LORRAINE,
Defendants - Appellants - Cross-Appellees

On Appeal from the United States District Court
Western District of Texas, Austin Division

BRIEF OF APPELLANTS

Plaintiff - Appellee - Cross-Appellant Raul Meza ("Meza") pled guilty to the murder of a nine-year-old girl and has admitted to sexually assaulting her during the course of the murder. After serving a number of years in prison as a result of his guilty plea to murder and a subsequent conviction of possession of a deadly weapon in a penal institution, Meza was released to mandatory supervision as required by law. A number of conditions were eventually imposed upon his mandatory supervision,

including sex-offender treatment and other components of Special Condition X—the sex-offender program.

Thereafter, in *Coleman v. Dretke*, 395 F.3d 216, 225 (5th Cir. 2004), *reh'g en banc denied*, 409 F.3d 665 (5th Cir. 2005) (per curiam) ("*Coleman II*"), this Court held that when an individual has not been convicted of a sex offense, the State must provide him some process before conditioning his release to mandatory supervision on sex-offender treatment or registration. Accordingly, Meza was provided a statement of the reasons why a panel of the Texas Board of Pardons and Parole had previously imposed sex-offender special conditions (sex-offender treatment and polygraph) upon him, notice that the prior imposition of those conditions was under review, and an opportunity to submit a statement and documentation on his behalf to contest those conditions. This case presents two primary overarching issues. First, was Meza, who was not convicted of the sexual assault he has admitted committing, entitled to process before the components of Special Condition X other than sex-offender treatment and polygraph were imposed? Second, what amount of process was required before imposing the sex-offender treatment and polygraph conditions, and any other components of Special Condition X (if any) that this Court determines merit due-process protections?

The rationale of *Coleman* makes clear that due process is compelled only when setting conditions of mandatory supervision that meet the twin prerequisites of (1) being "qualitatively different" from those characteristically imposed upon persons with similar convictions and (2) having "stigmatizing consequences." 395 F.3d at 221, 223 (quoting *Sandin v. Conner*, 515 U.S. 472, 479 n.4 (1995)). None of the components of Special Condition X imposed upon Meza other than the sex-offender treatment and polygraph meets both of the aforementioned requirements, and therefore no due process was necessary before attaching them as conditions of Meza's mandatory supervision. And consideration of the due process factors set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), establishes that Meza was provided adequate due process prior to the imposition of those two conditions, and that in any event the Constitution does not compel the extension of essentially the full spectrum of due process required when much more significant liberty interests are at stake, such as those involving the termination of parole or the involuntary transfer of a prisoner to a mental hospital. The district court's contrary decisions should be reversed.

STATEMENT OF JURISDICTION

Meza brought suit in federal district court, alleging violations of his Fourteenth Amendment due-process rights under 42 U.S.C. § 1983 and seeking both a

declaratory judgment and injunctive relief. R.2854-63.[1] The district court had subject-matter jurisdiction over the case under 28 U.S.C. §§ 1331 and 1343. Final judgment was entered on March 24, 2009. R.3102-05. Defendants - Appellants - Cross-Appellees ("Appellants") timely filed a notice of appeal on April 22, 2009. R.3243-45. Because this is an appeal from a final judgment disposing of all the parties' claims, the Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Does Meza have a constitutional liberty interest in being free from components of Special Condition X that are not both qualitatively different from those characteristically imposed upon persons with similar criminal convictions and stigmatizing to Meza?

2 Before a decision was made as to whether to continue sex-offender treatment and polygraph as conditions of Meza's mandatory supervision, Meza was provided with written notice that explained why those conditions had previously been imposed and that the prior imposition of those conditions was under review. Meza was also allowed thirty days to submit a statement and any documentation on his behalf to contest those conditions. Does this procedure satisfy constitutional due-process requirements?

3. Does the Due Process Clause require that Meza be provided essentially the full panoply of process afforded in proceedings involving parole revocation or the involuntary transfer of an inmate to a mental hospital before sex offender treatment and polygraph (and any other "sex-offender" conditions the Court finds worthy of due process protection) are imposed as conditions of mandatory supervision?

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1. Citations to "R.__" refer to particular pages of the district court record.

4. May officials of the Texas Department of Criminal Justice Parole Division ("Parole Division") be sued for failing to provide an adequate hearing and ordered to provide such a hearing when they have no authority to do so?

STATEMENT OF THE CASE

Meza filed this suit under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") and 42 U.S.C. § 1983, alleging that agents of Travis County had violated his rights under RLUIPA by requiring him to wear a prison uniform and that the imposition of certain conditions of confinement and parole violated his Fourteenth Amendment rights. R.39-47. He brought the action against Travis County, individual parole officers in their individual and official capacities, the Sheriff of Travis County in his official capacity, the Executive Director of the Texas Department of Criminal Justice in his official capacity, and the Director of the Texas Department of Criminal Justice Parole Division in his official and individual capacities. R.39.

During the course of litigation there were a number of changes to the defendants named in the suit as a result of amended pleadings, the district court's rulings on several motions to dismiss, a stipulation of dismissal, and the substitution of parties. R.453-54, 790-92, 2148-50, 2222, 2281-83, 2944-45. Eventually, the defendants included Brad Livingston, Executive Director of the Texas Department of Criminal Justice, Stuart Jenkins, Director of the Texas Department of Criminal Justice Parole

Division, and Rissie L. Owens, Jose Aliseda, Charles Aycock, Conrith Davis, Jackie Denoyelles, Barbara Lorraine, and Juanita M. Gonzales, members of the Parole Board, each in their official capacities.[2] R.3073.

By the time of trial, Meza's suit had been amended to complain that the Texas Board of Pardons and Paroles ("Parole Board") and Parole Division defendants had imposed conditions of confinement upon Meza that were qualitatively different from those imposed upon other similarly situated parolees, and that the Parole Division defendants had enforced additional informal restrictions on his liberty that were not justified by due process or provided for in any of his conditions of parole, and had treated Meza differently from other similarly situated employees so as to deny Meza the opportunities afforded to others. R.2861. Meza also alleged that the Parole Board imposed sex-offender conditions and "irrational, arbitrary and capricious" conditions that were qualitatively different from conditions imposed on other parolees without due process of law. *Id*. Meza requested a "declaratory judgment to vindicate his rights under Section 1983 with respect to Defendants' violation of his due process

2. Although Linda Garcia is listed as an Appellant in the style of the case, she is no longer a party, and for that reason was not listed in the certificate of interested persons. Barbara Lorraine was substituted for Ms. Garcia as a party to this suit by order of the district court dated November 10, 2008. R.2944-45. Appellants anticipate filing a motion to correct the case caption reflecting this substitution and to correct the misspelling of Rissie L. Owens' name. Appellants also note that Mr. Aliseda is no longer a member of the Parole Board and for that reason was not included in the certificate of interested persons, and anticipate filing a motion to substitute another individual for Mr. Aliseda as a party to this suit after that individual becomes a member of that Board.

rights[,]" an injunction enjoining the Defendants from "[c]ontinuing to subject [Meza] to qualitatively different conditions of confinement without due process of law" and "[i]mposing sex offender conditions upon his parole without due process of law[,]" and reasonable attorneys' fees and costs. R. 2861-62.

The district court conducted a bench trial which began on November 10, 2008 and, after several recesses, concluded on December 9, 2008. R.3073. On March 24, 2009, the district court issued its Findings of Fact and Conclusions of Law and its Final Judgment. R. 3073-98, 3102-05. The court declared "that the State failed to afford Meza 'a hearing meeting the requirements of due process' when it imposed sex-offender conditions on his parole." R.3104. The court also ordered that the State "provide Meza with an appropriate hearing regarding imposition of sex-offender conditions on his parole" that included a number of specific procedural components. R.3095, 3097, 3104. Meza was also "awarded costs for the prosecution of this cause." R.3105. Meza's other claims were ordered dismissed, some with prejudice and some without. R. 3102-05.

Appellants filed objections to the findings of fact and conclusions of law. R. 3106-3121. While those were pending, Appellants timely filed their notice of appeal, followed by an opposed Motion for Stay of Judgment Pending Appeal. R.3243-46, 3247-52. The Motion for Stay of Judgment was denied by the court below, and the

objections were overruled. R.3288-89, 3291-92. On July 23, 2009, Appellants filed in this Court a Motion for Stay of Judgment and Suspension of Injunctive Relief Pending Appeal, which is pending.

STATEMENT OF FACTS

I. TEXAS'S PROCEDURES FOR IMPOSING CONDITIONS OF MANDATORY SUPERVISION

Under the law applicable to this case, a person convicted of a crime was required to be released to "mandatory supervision" when his calendar time in prison combined with good-conduct time amounted to the total length of his sentence. *See* Act of May 30, 1977, 65th Leg., R.S., ch. 347, § 1, sec. 15(c), 1977 Tex. Gen. Laws 925, 927-28 (current version at TEX. GOV'T CODE §§ 508.147-.149). "Mandatory supervision" meant "the release of a prisoner from imprisonment but not on parole and not from the legal custody of the State, for rehabilitation outside of prison walls under such conditions and provisions for disciplinary supervision as the Board of Pardons and Paroles may determine." *See* Act of May 30, 1977, 65th Leg., R.S., ch. 347, § 1, sec. 2(d), 1977 Tex. Gen. Laws 925, 926 (current version at TEX. GOV'T. CODE § 508.001(5)).[3] The Parole Board was not empowered to determine whether Meza

3. In 1995 the law was amended to provide the Parole Board some discretion to deny release to mandatory supervision. *See* Act of May 29, 1995, 74th Leg., R.S., ch. 263, § 2, sec. 8(c-1), 1995 Tex. Gen. Laws 2592, 2592-93 (current version at TEX. GOV'T. CODE § 508.149(b)).

should be released to mandatory supervision, but was authorized to set conditions of release with which he had to comply. TEX. GOV'T CODE § 508.0441(a)(2).

Special Condition X ("Condition X") is the sex-offender program. R.3868. The request to impose Condition X is initiated by a parole officer and transmitted to the Parole Board, R. 2561, which acts in panels of three persons and makes decisions by majority vote, R.2603. After the Court's *Coleman* decision, a procedure was developed to provide individuals who have not been convicted of a sex offense with notice and an opportunity to respond before Condition X is imposed. R.3867-68. Under this procedure, the individual was provided written notice of the reasons the Parole Board may be requested to impose or continue Condition X and an opportunity to respond by giving materials to the parole officer. R.3869-70. The prisoner then received an evaluation by a licensed sex-offender treatment provider to determine treatment needs. R.3871. That information, along with the notice, the response from the offender or his attorneys, support letters, any polygraph that has been taken, and a "[c]ase summary, which includes the criminal history[,]" was placed in a packet and provided to the Parole Board along with the "entire file[.]" R.3873.

After the Parole Board panel votes the offender is notified as to whether Condition X is imposed. R.3877. This procedure was applied retroactively to review

situations that arose prior to *Coleman* in which Condition X had been imposed upon persons who had not been convicted of a sex offense. R.3869-71.

II. MEZA'S CRIMINAL HISTORY AND RELEASE TO MANDATORY SUPERVISION

In January 1977 Meza received a twenty-year sentence for aggravated robbery. P Ex. G, p. 2.[4] He was released on parole in July 1981. *Id*. Less than nine months later, in March 1982, Meza pled guilty to the murder of a nine-year-old child. R.2840; P. Ex. A, p. 5. He has admitted to sexually assaulting the child during the course of the murder. R.2840. As a result of his guilty plea he was sentenced to thirty years imprisonment. *Id*. Thereafter, Meza was sentenced to an additional four years of imprisonment for possession of a deadly weapon in a penal institution. *Id*.

As required by law, Meza was eventually released on mandatory supervision in May 1993. *Id*. In August 1994 his mandatory supervision was revoked and he was returned to prison. *Id*. In September 2002 Meza was again required by law to be released to mandatory supervision. R.2841.

III. MEZA'S CONDITIONS OF MANDATORY SUPERVISION

The Parole Board imposed a number of conditions on Meza's September 2002 release to mandatory supervision, including sex-offender registration and sex-

4. Citations to "P Ex. _" refer to specific trial exhibits offered by Meza and admitted into evidence. Similarly, citations to "D Ex. _" refer to particular exhibits offered by Defendants Livingston and Jenkins and admitted into evidence.

offender treatment. D. Ex. 1, pp. 2-3. After *Coleman* was decided, Meza was provided written notice that the prior imposition of "sex offender treatment special conditions (sex offender treatment and polygraph)" was under review and that he had thirty days to submit any materials in response. R.2845; D Ex. 4, p. 2. The document provided to Meza was entitled "NOTICE AND OPPORTUNITY TO RESPOND" and its subject was "SEX OFFENDER SPECIAL CONDITION REVIEW[.]" D. Ex. 4, p. 2. The document read, in pertinent part, as follows:

> A Board of Pardons and Paroles panel has previously imposed sex offender treatment special conditions (sex offender treatment and polygraph) in your case for the following reason(s):
>
> You were convicted of Murder. In the course of the offense, you sexually assaulted a nine year old female. You strangled her causing her death. A sex offender treatment provider has indicated that you should attend sex offender treatment and should not be allowed contact w/children.
>
> The prior imposition of these conditions is under review. You have the right to submit a statement and any documentation on your behalf to contest these conditions. All documentation submitted on your behalf shall be in writing and received by your supervising officer no later than 30 days from your receipt of this notice, which is: [March 25, 2005]. After this notice period, a Board of Pardons and Paroles Panel will consider whether sex offender treatment special conditions will remain in effect. After the review for sex offender conditions is completed, you will be notified in writing of the Board's decision.

Id.

After Meza's thirty-day period to respond had passed, the Parole Board imposed a number conditions that included sex-offender treatment and polygraph and a number of other components of Condition X including conditions that (unless in some instances permission was obtained) generally required him to avoid children age seventeen and younger and areas where children commonly gather, not leave his approved county of residence, not enroll in institutions of higher learning without approval and notice to the guardian of his victim, not own or operate computer or photographic equipment, not participate in volunteer activities, notify prospective employers of his criminal history, be evaluated for sex-offender counseling, avoid certain adult businesses and sexually explicit media, avoid the guardian of his victim, submit to searches at any time, be electronically monitored, and abide by a curfew. D Ex. 3, pp. 11-13. The previous requirement that Meza register as a sex offender had been withdrawn. D Ex. 3, pp. 9-14, R.3746, 3772-73.

IV. MEZA FILES SUIT AND THE DISTRICT COURT HOLDS THAT THE STATE VIOLATED HIS RIGHTS UNDER THE DUE PROCESS CLAUSE

Meza subsequently filed this lawsuit alleging, *inter alia*, that he was not provided with adequate due process before the sex-offender conditions were imposed. R.39-47. After conducting a bench trial, the court below rejected the argument that *Coleman* only applied to the sex-offender treatment component of Condition X, and

instead found that *"Coleman*'s due-process requirement applies to any sex-offender condition imposed and thus to all components of Special Condition X." R.3073, 3087. In doing so, the court relied on a passage from *Coleman* stating that prisoners not convicted of a sex offense have a liberty interest "'in freedom from sex offender *classification* and conditions'" and found that "Special Condition X-the 'Sex Offender Program' condition-is stigmatizing regardless of its components." R.3087 (emphasis added by district court).

Next the court turned to the three factors to be analyzed when determining the process due to Meza. First, it found that "Meza's interest in freedom from sex-offender conditions is significant[]" because he had been labeled a sex offender, a label that carried with it "adverse social consequences[,]" and because his "sex-offender status and related stigma have likely contributed to his inability to secure employment" without which, he cannot "form a viable residence plan, leave [the Travis County Correctional Complex], or be with family and friends and [] form the other enduring attachments of normal life." R.3077, 3089 (internal quotations omitted). Second, the court determined that, because Meza was not informed of the evidence to be used against him, and because the "subtleties and nuances of the expert psychologist and therapist opinions and reports involved in sex-offender determinations justify adversary hearings," the *Coleman* review in place created an

unquantified risk of erroneous deprivation, and that additional procedural protections would "help prevent such risk[]" to an unspecified degree. R.3089-90 (internal quotation omitted). And third, the court found that while the State had an "obviously significant" interest in "identifying, supervising, and rehabilitating sex offenders[,]" it "[did] not obviate the need to protect Meza's private interest[,]" and that the additional "administrative and financial burden" borne by the State as a result of increased procedural protections in these types of cases was not a "significant burden[.]" R.3090.

Having made these findings, the court determined that the process that had been afforded to Meza was insufficient and, looking to cases that determined the amount of process required before parole revocation or involuntary transfer of an inmate to a mental hospital, held that Meza must be provided:

(1) written notice in advance of the hearing;
(2) disclosure of the evidence on which the State is relying;
(3) a hearing, scheduled sufficiently after the notice to permit Meza to prepare, at which he will have the opportunity to be heard in person, represented by counsel, and to present documentary evidence in his support;
(4) an opportunity at the hearing to call witnesses and confront and cross examine State witnesses, "except upon a finding**,** not arbitrarily made, of good cause for not permitting each as to a particular witness";
(5) an independent decision maker; and

(6) a written statement by the fact-finder as to the evidence relied upon and the reasons for the decision.

R.3087-88, 3095 (citation omitted).

SUMMARY OF ARGUMENT

In *Coleman* this Court held that prisoners are entitled to some process before conditions may be imposed that are "'qualitatively different' from the punishment characteristically suffered by a person convicted of [the] crime, and [which have] 'stigmatizing consequences.'" *Coleman*, 395 F.3d at 221 (quoting *Sandin*, 515 U.S. at 479 n.4). The Court applied this principle to conditions of parole and held that an individual was entitled to due process before the government could impose sex-offender registration and treatment as conditions of parole. *Id*. at 223.

Meza has been convicted of aggravated robbery and possession of a deadly weapon in a penal institution, has pled guilty to the murder of a nine-year-old girl, and has admitted to sexually assaulting her during the course of the murder. Given his criminal history, it was not surprising that, when Meza was required by law to be released to mandatory supervision, the Parole Board imposed a number of conditions upon his release that furthered the Parole Board's objectives of protecting the public and aiding Meza in his reintegration into society, including sex-offender treatment.

After *Coleman* was decided, Meza was provided written notice explaining why sex-offender treatment special conditions (sex-offender treatment and polygraph) had previously been imposed, that these conditions were under review, and that he had thirty days to submit any written statement or other documentation contesting these conditions. The Parole Board subsequently decided to impose a number of conditions upon Meza's mandatory supervision, including sex-offender treatment and a number of other conditions under Condition X requiring that he, for example, avoid children under age seventeen and be electronically monitored.

The court below found not only that Meza was entitled to due process before sex-offender treatment or any other component of Condition X could be imposed, but also that Meza must receive essentially the full panoply of due process afforded to persons facing some of the most draconian deprivations of liberty: revocation of parole and involuntary transfer from prison to a mental hospital. The district court's decision is flawed in several respects.

First, when determining whether due process was required before imposing specific conditions of mandatory supervision under Condition X, the district court incorrectly began and ended its analysis with the title of the overall program under which the conditions were applied: "Special Condition X—the 'Sex Offender Program[.]'" R.3087-88. *Coleman* requires more than this superficial analysis—it

mandates an examination of whether the specific conditions of Meza's mandatory supervision are "qualitatively different" from those imposed upon persons with similar criminal convictions and are themselves stigmatizing. A review of the specific conditions imposed as part of Condition X other than those referenced in the notice provided to Meza (sex-offender treatment and polygraph) reveals that they do not meet these twin prerequisites for due-process protection, and therefore that Meza was not entitled to any further due process before they were imposed.

Second, as to the sex-offender treatment and polygraph conditions, the court below incorrectly determined that the process accorded to Meza prior to the continuation of these conditions (after *Coleman* was decided) was insufficient. Meza was given a description of the reasons for the prior imposition of the sex-offender treatment and polygraph conditions, notice that the imposition of these conditions was under review, and an opportunity to respond with a written statement and materials opposing the imposition of these conditions. Given Meza's minimal private interest in avoiding such treatment, the government's significant interest in rehabilitating sex offenders and using existing procedures to determine whether sex-offender treatment is an appropriate condition of mandatory supervision, and the negligible risk of error and benefits of additional procedure, the process that was provided to Meza satisfies constitutional due-process requirements.

Third, compounding its second error, the district court mandated that Meza be given essentially the full array of due-process protections required in circumstances where the private interests at stake, risk of error, and benefits of additional procedure are far greater: revocation of parole and involuntary transfer of an inmate to a mental hospital. The precedent of the Supreme Court, this Court, and the Texas Court of Criminal Appeals establishes that the process required by the district court far exceeds the requirements of the Due Process Clause.

For these reasons, the trial court's judgment should be reversed and its injunction requiring that Meza be provided extensive additional process should be vacated.[5]

STANDARD OF REVIEW

"The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de novo." *Grilletta v. Lexington Ins. Co.*, 558 F.3d 359, 364 (5th Cir. 2009) (citing *Bd. of Trs. New Orleans Employers Int'l Longshoremen's Ass'n v. Gabriel*, 529 F.3d 506, 509 (5th Cir. 2008)). Constitutional issues are also reviewed *de novo*. *United States v. Locke*, 482 F.3d 764, 766 (5th Cir. 2007). Thus, the Court reviews *de novo* the district court's

5. The judgment of the district court should be reversed and the injunction vacated to the extent it requires Parole Division officials Livingston and Jenkins to provide Meza "an appropriate hearing" for an additional reason. Those Appellants do not have the authority to provide Meza a "hearing"—constitutionally adequate or otherwise. That authority lies solely within the purview of the Parole Board. As such, Livingston and Meza enjoy Eleventh Amendment immunity as to that aspect of Meza's claim.

conclusions that the Due Process Clause applies to Condition X regardless of its components and that Meza was entitled to, in essence, the full panoply of due process afforded in proceedings involving parole revocation and involuntary transfer of a prisoner to a mental hospital.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE PROTECTIONS OF THE DUE PROCESS CLAUSE APPLY TO ALL COMPONENTS OF CONDITION X.

Coleman is the seminal Fifth Circuit case addressing when a liberty interest in avoiding a condition of mandatory supervision exists such that the Due Process Clause is implicated. In that case, Coleman was indicted for "aggravated sexual assault of a child and indecency with a child by contact[,]" but "was convicted of only misdemeanor assault." *Coleman*, 395 F.3d at 219. After he had been released on parole, two additional conditions were placed on Coleman's release: (1) that he register as a sex offender, and (2) that he attend sex-offender therapy. *Id*. The petitioner asserted that "the parole panel's imposition of sex offender registration and therapy as conditions of parole, without providing him the opportunity to contest his sex offender status, violated his right to due process." *Id*. at 221.

The Court recognized that "some process" must be given before the government imposes conditions upon a prisoner that are "'qualitatively different' from the

punishment characteristically suffered by a person convicted of [the] crime, and [which have] 'stigmatizing consequences.'" *Id*. (quoting *Sandin*, 515 U.S. at 479 n.4). After determining that the state had "imposed stigmatizing classification and treatment on Coleman without providing him any process[,]" and specifically finding that "Texas's sex offender therapy program is 'qualitatively different' from other conditions which may attend an inmate's release[,]" the Court held that Coleman was entitled to procedural protections before the sex-offender registration and treatment conditions could be imposed. *Id*. at 223.

In this case, as in *Coleman*, the Parole Board imposed sex-offender treatment as a condition of release. D Ex. 3, pp. 9-14. Appellants do not dispute that, under *Coleman*, some process was required before the imposition of this condition and another condition deemed by the Parole Board to be part of the treatment program—participation in polygraph examinations. *See id*. at 13. However, unlike *Coleman,* a variety of other components of Condition X were considered by the court below, including conditions that (unless in some instances permission was obtained) generally required Meza to avoid children age seventeen and younger and areas where children commonly gather, not leave his approved county of residence, not participate in volunteer activities, not enroll in institutions of higher learning without approval and notice to the guardian of his victim, not own or operate computer or

photographic equipment, notify prospective employers of his criminal history, be evaluated for sex-offender counseling, avoid certain adult businesses and sexually explicit media, avoid the guardian of his victim, submit to searches at any time, be electronically monitored, and abide by a curfew. *See* D Ex. 3, pp. 9-14.

The court below held that *Coleman*'s due-process requirement applied to *all* components of Condition X. R.3087. In so holding, the district court erred—the components of Condition X not associated with sex-offender therapy do not meet both required elements of *Coleman*. They cannot be considered both "qualitatively different" from conditions characteristically imposed upon a person with Meza's criminal convictions—murder, aggravated robbery, and possession of a deadly weapon in a penal institution—and stigmatizing to Meza.

A. Many of the Condition X Restrictions Cannot Be Considered "Qualitatively Different" from Those Characteristically Imposed Upon Persons with Meza's Criminal Convictions.

The district court determined that "*Coleman*'s due-process requirement applies to any sex-offender condition imposed and thus to all components of Special Condition X" because "Special Condition X—the 'Sex Offender Program' condition—is stigmatizing regardless of its components." R.3087. By stopping at the title ("Special Condition X") of the program under which the conditions were imposed, and failing to analyze each component of Condition X to determine whether

it is qualitatively different from conditions typically imposed upon persons who have Meza's criminal convictions, the district court erred. This is borne out by the fact that, despite generally stating that it was being called upon to determine "whether Coleman had a liberty interest in not having sex offender conditions placed on his parole," the *Coleman* Court did not simply note that the petitioner was required to attend "sex offender treatment" and find that compelled participation in treatment with such a title was sufficient to warrant due-process protection. Rather, it examined the nature of the treatment itself, and found that this specific condition was "'qualitatively different' from other conditions which may attend an inmate's release." *Coleman*, 395 F.3d at 223.

The necessity of examining the individual components of Condition X to determine whether they warrant due-process protection is further illustrated by the Court's opinion in *Williams v. Ballard*, 466 F.3d 330 (5th Cir. 2006). There, the Court noted that the district court had held that no due process was required before imposing certain "Special Condition X" restrictions which "may be imposed on any high-risk releasees at the Parole Board's discretion" including avoiding children, photographic equipment, and internet access, and the Court observed that this conclusion was "consistent with *Coleman I* and *Coleman II*, where this court held that the registration and therapy conditions implicated due process, but had no occasion

to address other conditions." *Id.* at 333 n.2. As demonstrated below, a review of the specific components of Condition X imposed upon Meza other than (a) sex-offender treatment and polygraph, (b) evaluation for sex-offender counseling, and (c) avoidance of certain adult businesses and explicit media, reveals that they have not been established as "qualitatively different" from conditions that could be imposed upon persons with Meza's criminal convictions, and that therefore no due-process protections attach.

The Parole Board is responsible for helping offenders reintegrate into society while at the same time protecting Texas citizens. R.3438-39. While not empowered to determine whether Meza should be released to mandatory supervision, the Parole Board is authorized to set the conditions with which he must comply. TEX. GOV'T CODE § 508.0441(a)(2). These include any conditions of supervision that courts could impose on a defendant placed on community supervision under article 42.12 of the Texas Code of Criminal Procedure. *Id.* § 508.221. Thus, the Parole Board may impose any "reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate or reform the defendant." TEX. CODE CRIM. PRO. art. 42.12, § 11(a).

Here, one component of Condition X required that Meza not participate in certain programs that have as participants persons age seventeen or younger and

refrain from going within a certain distance of premises where children commonly gather. D Ex. 3, p. 11. Texas law specifically provides that this condition may be imposed by a judge, and therefore by the Parole Board as well, upon any person who has been adjudged guilty of murder, regardless of whether there is a sexual element of the crime. TEX. CODE CRIM. PRO. art. 42.12, § 13D; TEX. GOV'T CODE § 508.221. Therefore, this component of Condition X cannot be considered "qualitatively different" from parole conditions characteristically imposed upon persons who, like Meza, were found guilty of murder (particularly the murder of a child), and no due process was required before it was imposed upon him.

The Board's general authority to impose conditions designed to "protect . . . the community . . . or . . . rehabilitate, or reform a defendant" compels a similar finding with respect to the other components of Condition X not involving sex-offender treatment, evaluation for sex-offender counseling, or avoiding certain adult businesses and explicit media. Meza pled guilty to the murder of a child, and has other convictions for aggravated robbery and possession of a deadly weapon in a penal institution. R.2840, P Exs. A, p. 5, G, p. 2. Even his attorney has conceded that Meza "has a heinous criminal history, and I don't think there's anything disputing that[.]" R.3992-93. One would expect the Board to impose upon such an

individual significant conditions of mandatory supervision designed both to rehabilitate him and to protect Texas citizens.

Thus, based solely on Meza's criminal convictions and ignoring any sex-offender issues, one might well expect the Board to effectively impose upon Meza the components of Condition X requiring that he not leave his approved County of Residence, not enroll in institutions of higher learning without approval and notice to the guardian of his victim, not own or operate computer or photographic equipment, not participate in volunteer activities, notify prospective employers of his criminal history, avoid the guardian of his victim, submit to electronic monitoring, submit to searches at any time, and abide by a curfew. *See* TEX. CODE CRIM. PRO. art. 42.12, § 11(a); TEX. GOV'T CODE § 508.221 (permitting the imposition of any reasonable condition designed to "protect or restore the community . . . or punish, rehabilitate, or reform a defendant" including, but not limited to, conditions that the individual "provide public notice of the offense for which the defendant was placed on community supervision in the county in which the offense was committed[,]" "remain in a specified place[,]" and "[s]ubmit to electronic monitoring[.]"); *Lambeth v. Quarterman*, No. G-08-0225, 2008 WL 4850197 at *4 n.7 (S.D. Tex. 2008) ("Electronic monitoring is a condition of parole typically imposed on prisoners

subject to the Super Intensive Supervision Program ("SISP") of early release.") (citing TEX. GOV'T CODE § 508.317).

In light of the foregoing, these components of Condition X cannot be considered "qualitatively different" from conditions characteristically imposed upon persons with Meza's criminal convictions, and therefore no due process was required before their imposition. *See Williams*, 466 F.3d at 333 n.2 (noting the district court had held that no due process was required before imposing certain "Special Condition X" restrictions which "may be imposed on any high-risk releasees at the Parole Board's discretion" including avoiding children, photographic equipment, and internet access, and that the court's conclusion was "consistent with *Coleman I* and *Coleman II*, where this court held that the registration and therapy conditions implicated due process, but had no occasion to address other conditions.").

B. The Condition X Components Other Than Sex-Offender Treatment and Polygraph Do Not Have "Stigmatizing Consequences" for Meza.

"Stigma" is necessarily predicated on state action imposing false or unproven classifications on individuals. *See Coleman II*, 409 F.3d at 668 ("[A] statement causes stigma if it is both false and implies that the plaintiff is guilty of serious wrongdoing[.]") (citing *Vander Zee v. Reno*, 73 F.3d 1365, 1369 (5th Cir. 1996)). Here, many of the Condition X restrictions, including but not limited to conditions

that he generally avoid children age seventeen and under and areas where children commonly gather, stay within his approved County of Residence, not participate in volunteer activities, not enroll in institutions of higher learning without approval and notice to the victim's guardian, not own or operate computer or photographic equipment, notify prospective employers of his criminal history, avoid the guardian of his victim, submit to searches, abide by a curfew, and be electronically monitored, do not indicate Meza committed a sex offense, and therefore do not "label" him a sex offender.[6] This fact is illustrated in part by the testimony of Silvestre Villareal, Jr., a program coordinator for construction with Gateway who works with ex-offenders to place them in jobs, and who had worked with Meza for more than a year to assist him in finding employment. R.3448-51. Villareal was aware that Meza had a monitor, R.3464, and that Meza was not allowed to work within a child safety zone,

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6. It is possible that the reference to "Special Condition X" itself may stigmatize an individual in the eyes of anyone who obtains information indicating that it was imposed upon that individual *and* knows that it is a sex-offender program. However, if this is the case, the injunctive relief ordered by the court below should be narrowly tailored to eliminate any stigma associated with such a designation before due process has been provided, but not interfere with the imposition of the specific conditions of mandatory supervision that themselves carry no stigma. The government's ability to impose specific conditions of parole to protect the public and aid in the reintegration of the offender into society should not be burdened by such overly broad injunctive relief. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (recognizing "the general rule, quite apart from First Amendment considerations, 'that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" (citation omitted)); *United States v. McMillan*, 946 F.Supp. 1254, 1269 (S.D. Miss. 1995) ("An injunction must be narrowly tailored so as not to burden the defendant any more than necessary to provide relief to the plaintiff." (citing *Madsen*, 512 U.S. at 765)).

R.3466. Nevertheless, up until the time of trial he did not know that Meza was a sex offender. R.3454, 3461.

Taken together, these specific conditions may imply that Meza has a heinous criminal history, including a crime against a child. But as noted above, this is not a false categorization of Meza. Accordingly, these conditions of release cannot be considered stigmatizing to Meza.[7]

In light of the foregoing, the district court erred when it held that due process was required prior to the imposition of Condition X in its entirety, regardless of its components.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE DUE PROCESS CLAUSE REQUIRED MORE THAN THE NOTICE AND OPPORTUNITY TO RESPOND THAT WAS PROVIDED TO MEZA.

"[D]ue process 'is not a technical conception with a fixed content unrelated to time, place and circumstance,' but is 'flexible and calls for such procedural

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7. Also not stigmatizing to Meza are two other components of Condition X that admittedly are only imposed when there is a sex-offense component to a case. The requirement that Meza "be evaluated to determine the need for sex offender counseling" by its very terms leaves open the possibility that no sex-offender counseling may be required. And the conditions that Meza avoid certain adult businesses and sexually explicit media, though perhaps permitting an inference that the government is concerned with how an individual reacts to such stimuli, do not "label" an individual a sex offender to a member of the general public who becomes aware of such a condition in the same way that the "sex-offender counseling" and "sex-offender registration" conditions in *Coleman* did. In any event, should the Court find that these components do warrant due-process protection, the extremely minimal private interest involved in avoiding these conditions would not alter the analysis conducted when determining the amount of process required set out in Parts II and III, *infra*.

protections *as the particular situation demands*.'" *Boss v. Quarterman*, 552 F.3d 425, 428 (5th Cir. 2008) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)) (emphasis original in *Boss* but added to *Mathews*). "When determining the amount of due process required, the Court must consider '[f]irst, 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 requirements would entail.'" *Mathews*, 424 U.S. at 334-35.

Here, Meza was given a document dated February 23, 2005, entitled "NOTICE AND OPPORTUNITY TO RESPOND" whose subject was "SEX OFFENDER SPECIAL CONDITION REVIEW[.]" D Ex. 4, p. 2. The document explained that a panel of the Parole Board "has previously imposed sex offender treatment conditions (sex offender treatment and polygraph)[,]" and explained the reasons for doing so:

> You were convicted of Murder. In the course of the offense, you sexually assaulted a nine year old female. You strangled her causing her death. A sex offender treatment provider has indicated that you should attend sex offender treatment and should not be allowed contact w/ children.

Id. The document explained that the prior imposition of these conditions was under review, that Meza had the right to submit a statement and any documentation to

contest these conditions, and that any such documentation needed to be provided to his supervising officer no later than March 25, 2005. *Id*. Under the procedures in place, this documentation, including "the response from the offender or attorneys or support letters, whatever that offender decides to submit[,]" was provided to the Parole Board. R.3873. Thus, Meza was provided written notice of the possible continuation of sex-offender treatment conditions and an opportunity to provide a response that would be considered by the Parole Board—the very "core of due process." *See LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard." (citation omitted)). As shown below, a balancing of the minimal private and significant State interests against the marginal value of additional process in this case establishes that this procedure satisfied constitutional due-process requirements with respect to the imposition of sex-offender treatment as a condition of mandatory supervision.

A. Meza Does Not Have a Significant Interest in Avoiding Sex-Offender Treatment.

The court below found that Meza had a "significant" interest in being free from all of the Condition X restrictions. R.3089. The district court arrived at this conclusion by (1) relying on *Coleman II* to conclude that, by being required to participate in sex-offender therapy, Meza had been "labeled" by the state as a sex

offender, a designation which can cause "adverse social consequences[;]" and (2) finding that "Meza's sex-offender status and related stigma have likely contributed to his inability to secure employment[,]" which he needs to form a viable residence plan, leave the jail complex at which he resides, and "'be with family and friends and [] form the other enduring attachments of normal life.'" *Id*. (quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)). The district court's conclusion is flawed in multiple respects.

As an initial matter, the district court erred to the extent it considered Meza's interest in avoiding *all* the components of Condition X. *See* R.3089 ("The Court first considers Meza's private interest in freedom from sex-offender conditions."). As noted *supra* at pp. 19-28, the conditions other than sex-offender treatment and polygraph do not qualify as both (1) qualitatively different from conditions one would expect to be imposed upon a person convicted of such a crime, and (2) potentially stigmatizing as required to establish a threshold liberty interest mandating due-process protections under *Coleman*.

Second, the Court's reliance on the *Coleman* line of cases to determine the *weight* of the liberty interest in avoiding sex-offender treatment is misplaced—those

cases only addressed the *existence* of such a liberty interest.[8] To the extent this Court has spoken on the *weight* to be accorded that interest, it has indicated that sex-offender evaluation and possible treatment constitute a significantly lesser imposition on a person's liberty interest than sex-offender registration, which is not at issue in this case. *See United States v. Jimenez*, 275 F.App'x 433, 442 (5th Cir. 2008) (per curiam) (not designated for publication) (characterizing a sex-offender registration requirement as "a significantly more serious deprivation of liberty" than sex-offender evaluation and possible treatment), *cert. denied*, 129 S.Ct. 897 (2009); *see also United States v. Ybarra*, 289 F.App'x 726, 732 (5th Cir. 2008) (per curiam) (not

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8. Although the *Coleman* court did state that the petitioner had to be given "an appropriate hearing," *Coleman*, 395 F.3d at 225, it did not specify the actual procedures required, *id.*; *see also Williams*, 466 F.3d at 332-33 (5th Cir. 2006) ("After this decision, we decided [*Coleman* and *Coleman II*], agreeing that people like Williams were entitled to *some process* before being required to register or pursue therapy.") (emphasis added). And the Court's precedent confirms that the term "hearing" does not necessarily require an oral presentation of any kind, and frequently encompasses proceedings conducted entirely through written papers. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969) ("Parties are normally assured a 'hearing' but that term does not demand that the communication be oral and audible. By long practice, and frequently by express rules important substantive or procedural issues are fully and finally disposed of by the highest of tribunals wholly on written papers without oral argument of any kind." (internal footnote omitted)); *see also Ex parte Campbell*, 267 S.W.3d 916, 926 (Tex. Crim. App. 2008) ("Assuming *Coleman* articulates the correct rule of law with respect to the due process right to some manner of hearing, we conclude that this due process right was not violated in applicant's case because he was in fact provided with notice and an opportunity to respond. Even when a liberty interest exists in the early release context, due process does not require a live hearing at which the convicted person may be present. Rather, due process requires simply that the convicted person be given timely notice in advance of the parole panel's consideration of the matter and that he be given an opportunity to submit any information that he feels may be relevant to the parole panel's decision." (footnote citation omitted)); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1270 (1975) ("Although the term 'hearing' has an oral connotation, I see no reason why, in some circumstances, a 'hearing' may not be had on written materials only." (footnote omitted)).

designated for publication) ("Courts have held that sex offender registration involves a more serious liberty deprivation than does sex offender counseling."), *cert. denied*, 129 S. Ct. 751 (2008).[9]

Third, the record does not support a conclusion that Meza's treatment "labeled" him a sex offender to such an extent that he has a significant interest in avoiding treatment. Meza has not alleged, much less adduced evidence that his participation in sex-offender therapy was known, or likely to become known, to prospective employers or anyone other than the government and his therapist.[10] In fact, Texas

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9. Indeed, in *Jimenez* the Court went so far as to leave open the possibility that mere allegations of a sex offense (much less the admission to committing one present in this case) could be sufficient for a judge to require sex-offender treatment. *Jimenez*, 275 F.App'x at 442. ("The evidence presented here-allegations of sex offense-may possibly . . . support a sex-offender evaluation and possible treatment in order to provide the defendant medical diagnosis and care . . . .")

10. The district court mentioned that the record "reflects that the State informs Meza's potential employers he is a sex offender." R.3089. However, it is not clear that this alleged practice continued after Meza was no longer required to register as a sex-offender:

> Q. Now, has the Parole Division told you you're required to tell employers what offense you committed?
> A. I have been told by my parole officers that I have to give the information pertaining to my offense.
> Q. Do they require you to tell potential offenders that - - potential employers that you're a sex offender?
> A. During the time that they required me to register as a sex offender, yes, sir. *Since then, they have given me no other information on how to proceed other than the fact that I was indicted for murder.*
> Q. Have Parole Division officials told potential employers that you are a sex offender?
> A. Yes, sir.

statutes provide protection for the confidentiality of sex-offender treatment information and restrict its disclosure, *see* TEX. OCC. CODE §§ 109.001-.003, 109.051-.053; TEX. HEALTH & SAFETY CODE §§ 611.002, 611.004, 611.0045, so the law affords Meza a safeguard against improper disclosure of this information and any stigma that could attach. As such, the record does not suggest that any "label" affixed to Meza as a result of sex-offender treatment was likely to become known by others to such an extent that Meza had a "significant" interest in avoiding being required to participate in such treatment.[11]

Finally, even if Meza's sex-offender treatment did effectively label him a "sex offender," the Court must still perform the due-process calculus bearing in mind the liberty interest at issue—here, the right to be free from the "stigma and compelled treatment[,]" *Coleman*, 395 F.3d at 223, on which his mandatory release is

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R.3359 (emphasis added). This exchange suggests that at some point in time, potential employers were told Meza was a "sex offender," but it does not establish when, or whether such a practice existed after he was no longer required to register as a sex offender. Regardless, this finding is not relevant to the issue of whether Meza was afforded sufficient due process before the challenged conditions of mandatory supervision were imposed. There is no allegation, much less evidence, that the 2005 conditions of mandatory supervision included a requirement that employers be notified that Meza was a sex offender as a condition of release.

11. Indeed, the evidence relating to this issue is to the contrary. As noted previously at pp. 26-27, Mr. Villareal, who worked with Meza to locate job opportunities, testified that he was not aware that Meza was a sex offender. R.3448-51, 3454, 3461. And Meza testified about three job offers he had received but not been able to accept, and did not assert that his participation in sex-offender therapy, or any stigma associated with that particular condition, precluded him from employment in these positions. R.3357-58.

conditioned. *See Hewitt v. Helms*, 459 U.S. 460, 473 (1983) (taking into account the stigma that attached to the challenged state action when determining the weight to be accorded to the individual's private interest), *overruled on other grounds by Sandin*, 515 U.S. 472. The district court did not cite Meza's interest in being free from "compelled treatment" as a factor that weighed in favor of its finding that Meza's private interest in freedom from sex-offender conditions was significant. R.3089. Therefore, all that remains to be examined is the "stigma" that could attach to Meza as a consequence of government action. Meza has been convicted of aggravated robbery and possession of a deadly weapon in a penal institution, pled guilty to the murder of a nine-year-old child, and has admitted to sexually assaulting her during the murder. R.2840; P Exs. A, p. 5 and G, p. 2. How much stigma could possibly attach to him as a result of a condition of mandatory supervision that "labeled" him a "sex offender"? Taking into account all the circumstances of this case, Meza's interest in being free from sex-offender treatment as a condition of mandatory supervision is not one of great consequence.

B. The Government Has a Significant Interest in Using Established Procedures to Impose Sex-Offender Treatment as a Condition of Release.

"Sex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality opinion). "When convicted sex offenders reenter society, they

are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id*. at 33. Thus, "States[] have a vital interest in rehabilitating convicted sex offenders." *Id.* And the Supreme Court has recognized the importance of therapy in rehabilitating offenders:

> Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism. See U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988) ("[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%," whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%. "Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals").

Id. As such, the district court was correct when it stated that "[t]he State's interest in identifying, supervising, and rehabilitating sex offenders is obviously significant . . . ." R.3090.[12]

A consideration of "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail[,]" *see Mathews*, 424 U.S. at 334-35, further supports a finding that the government has a significant interest in utilizing existing procedures to determine whether to assign sex-offender treatment as a

12. Imposing sex-offender treatment as a condition of mandatory supervision is consistent with the Legislature's intent in providing for such supervision, to wit, "to aid all prisoners to readjust to society upon completion of their period of incarceration . . . ." *See* Act of May 30, 1977, 65th Leg., R.S., ch, 347, § 1, sec. 1, 1977 Tex. Gen. Laws 925, 925. It is also in line with the Parole Board's responsibilities of helping offenders reintegrate into society while at the same time protecting Texas citizens. R.3438-39.

condition of mandatory supervision. The district court recognized that additional procedures would cause at least "some administrative and financial burden to the State," but "reject[ed] the State's analysis" of those burdens and found that they were not "significant." R.3090. The evidence in the record confirms the former finding and refutes the latter. Troy Fox, the administrator of the Parole Board, R.3541, testified that there are 6,900 offenders currently incarcerated who may at some point have *Coleman* issues, and this figure does not include any future offenders with *Coleman* issues. R.3676-77. Mr. Fox testified that requiring parole revocation type hearings would necessitate the appointment of two new Parole Board members as well as the hiring of four new Commissioners and six administrative assistants at a cost "in the neighborhood of $750,000 just in salary." R.3678. And since this estimate is based on salary alone, it does not take into account the travel that would be required. R.3677-78.[13]

Further, Janet Latham, a program specialist for the Parole Division, R.3865, estimated that there are "about a thousand" individuals who currently have Condition X imposed upon them but "do not have by title a sexual offense." R.3881. She

13. On cross examination, Mr. Fox testified that in his opinion, "not a lot of the offenders submit any documentation" on *Coleman* issues. R.3728. However, this does not necessarily significantly impact Mr. Fox's cost estimates. The district court's order does not contemplate reduced process when the inmate fails to provide documentation in response to a *Coleman* notice.

further testified that her agency would need "significantly more staff" if the process for parole revocation was applied to the *Coleman* process, R.3883, 3887, and estimated the initial cost to the Parole Division to handle the 6,900 cases referenced by Mr. Fox to be "a little over [$]477,000[,]" not including start-up costs and training for new employees. R.3889-90.

The district court, noting that the Board could "write and implement rules regarding the conduct of a . . . mandatory supervision hearing and the conditions to be imposed on a parolee" was "skeptical so many additional employees would be necessary to add elements to extant procedures." R.3090. However, the district court did not suggest how those procedures could be written to significantly reduce the government's burden, nor go so far as to find that the government would not need to add any employees to conduct parole revocation type hearings. In light of the foregoing, even if the additional cost of conducting such hearings turns out to be lower than that estimated by Mr. Fox and Ms. Latham to some degree, the government has established at least a significant interest in using existing procedures to condition mandatory supervision upon participation in sex-offender treatment.

C. The Risk to Meza of Erroneous Deprivation and the Benefits of Additional Procedural Safeguards Are Slight.

"The function of legal process . . . is to minimize the risk of erroneous decisions." *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 13 (1979). "Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." *Id*. (*citing Mathews*, 424 U.S. at 335).

In examining the "particular situation" before the Court, *Hewitt* is instructive. There, the Court examined the process required before inmates could be transferred to administrative segregation. *Hewitt*, 459 U.S. at 469, 472. The Court noted that the decision-makers had to assess the "seriousness of a threat" to institutional security, that in making this evaluation the administrators "draw on more than the specific facts surrounding a particular incident[,]" as they had to consider "the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like." *Id*. at 474. And the Court observed that the decision, "like that of those making parole decisions, turns largely on 'purely subjective evaluations and predictions of future behavior[.]'" *Id*. (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)). "Owing to the central

role of these types of intuitive judgments," the Court held that "a decision that an inmate or group of inmates represents a threat to the institution's security would not be appreciably fostered by the trial-type procedural safeguards suggested by respondent." *Id*.; *see also Greenholtz*, 442 U.S. at 14-16 (holding that where the "parole-release decision is . . . essentially an experienced prediction based on a host of variables[,]" the "hearing as prescribed by the Court of Appeals in all cases would provide at best a negligible decrease in the risk of error.").

The same is true in this case. As in *Hewitt*, the decision-makers are required to engage in the subjective and predictive exercise of evaluating the threat presented by an individual. *See Coleman*, 395 F.3d at 225 (permitting mandatory supervision to be conditioned upon sex-offender therapy when the releasee is "determined to constitute a threat to society by reason of his lack of sexual control."). And, as in *Greenholtz*, the decision-makers here may consider a "host of variables," including a case summary completed by a parole officer who interviewed the offender, the offender's criminal history, police reports, victim and witness statements, a district attorney's statement of facts, documents provided by the county, and the individual's social, educational, employment, and medical history. R.3708-10. Additional possible considerations include "their institutional adjustment, progress in prison, how they obeyed or disobeyed the rules and regulations[,]" evaluations made prior

to, during, and in some cases after incarceration, FBI criminal history, Static-99 assessment tools, letters of support, letters of protest, information relating to any prior revocation proceedings, and the response to the *Coleman* notice submitted by the offender or his attorney. R.3709-10.

As *Hewitt* teaches, the benefit of additional safeguards and the risk of error in circumstances such as these, where so many factors may be considered to arrive at a decision that is both subjective and predictive in nature, is not significant. Indeed, the benefits of such additional procedures are even fewer here than in *Hewitt*. If Meza had been convicted of a sex offense, the requirement that Meza be determined to constitute a threat would have been satisfied, and he would not have not been entitled to any due process. *See Coleman*, 395 F.3d at 225 ("The Department may condition Coleman's parole on sex offender registration and therapy only if he is determined to constitute a threat to society by reason of his lack of sexual control. *Absent a conviction of a sex offense*, the Department must afford him an appropriate hearing and find that he possesses this offensive characteristic before imposing such conditions.") (emphasis added). Although Meza has not been convicted of such a crime, he has admitted to committing one—the sexual assault of a nine-year-old girl during the course of her murder. R.2840; P Ex. A, p. 5. As such, the risk of Parole Board error and benefits of additional procedures here are negligible at best.

In summary, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The process afforded Meza satisfies this fundamental requirement. He was given written notice of the action being contemplated and the reasons for it more than thirty days prior to the date a panel convened to decide the issue, and was permitted the opportunity to present a written statement and any documentation that may bear on that decision. The Supreme Court has found procedures of this type to be sufficient in at least one other context involving the liberty interest of a convicted criminal. *See Hewitt*, 459 U.S. at 476 ("An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose . . . So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied." (footnote omitted)). Given the balance of interests present in this case, the Constitution does not require more than that which was afforded to Meza before imposing sex-offender treatment as a condition of

mandatory supervision, and the district court's decision to the contrary should be reversed.[14]

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14. The district court's holding that the Parole Division defendants sued in their official capacity, Livingston and Jenkins, violated Meza's constitutional rights by failing to provide him an adequate hearing should be reversed for an additional reason—they enjoy Eleventh Amendment immunity from this aspect of the suit. "The Eleventh Amendment bars suits by private citizens against a state in federal court[.]" *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (citing *Hutto v. Finney*, 437 U.S. 678, 700 (1978)). Under *Ex parte Young*, 209 U.S. 123 (1908), a narrow exception to this immunity exists when the defendant is a state official who has the ability to act in an unconstitutional manner and threatens to do so. *Okpalobi*, 244 F.3d at 411-12, 416 (citing *Ex parte Young*, 209 U.S. at 157). Thus, key to any determination of whether a state official may be sued for injunctive relief is consideration of whether the official is capable of committing the constitutional violation. *See Okpalobi*, 244 F.3d at 417 (holding that "any probe into the existence of a *Young* exception should gauge (1) the ability of the official to enforce the statute at issue under his statutory or constitutional powers, and (2) the demonstrated willingness of the official to enforce the statutes." (footnote omitted)).

Here, the Parole Division did develop the notice form and was responsible for providing Meza written notice, R.3869, so Appellants Livingston and Jenkins do not contend Eleventh Amendment immunity precludes them from being ordered to provide the aspects of the "appropriate hearing" involving written notice and initial disclosure of the evidence upon which the State was relying. However, the district court did not so limit its order. Instead, it held that "[d]istinctions between the [Parole Board and Parole Division] roles are immaterial for purposes of *Coleman* related due process[,]" R.3085, and ordered the "State" to "provide Meza with an appropriate hearing." R.3095, 3104. Livingston and Jenkins do not have the power to provide Meza with the hearing itself—the Texas Legislature has reserved to the Parole Board the authority to hold a hearing regarding the imposition of Meza's conditions of mandatory supervision. TEX. GOV'T CODE § 508.0441(a). Since Livingston and Jenkins have no authority to commit the constitutional violation found by the court below with respect to the failure to provide an adequate hearing (nor for that matter to implement that aspect of the remedy ordered by that court), they enjoy Eleventh Amendment immunity, and the district court's order finding that they violated the Constitution by not providing him an adequate hearing must be reversed and its injunction mandating that they act to redress that violation by holding an "appropriate hearing" must be vacated for this additional reason. *See Opkalobi*, 244 F.3d at 421 ("[I]f there is no act, or potential act, of the state official to enjoin, an injunction would be utterly meaningless. Here, there is no act, no threat to act, and no ability to act."), 423 (holding that since there was no enforcement connection between the named defendants that satisfied *Ex parte Young*, those defendants enjoyed Eleventh Amendment immunity from suit).

III. THE DISTRICT COURT ERRED IN REQUIRING ESSENTIALLY THE FULL PANOPLY OF DUE PROCESS PROTECTIONS TYPICALLY AFFORDED IN PROCEEDINGS INVOLVING PAROLE REVOCATION AND INVOLUNTARY TRANSFER OF AN INMATE TO A MENTAL HOSPITAL.

Even if Meza was entitled to more process than he was afforded, the district court erred by requiring an initial disclosure of evidence relied upon by the State, a hearing he can attend in person represented by counsel, an opportunity to call witnesses and to confront and examine state witnesses (absent good cause for not permitting a particular witness), and a written statement by the fact-finder outlining the evidence relied upon and reasons for the decision. R.3095. These are in essence the same procedures required before the revocation of parole or the transfer of an inmate to a mental hospital. R.3092 (citing *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), and *Vitek v. Jones*, 445 U.S. 480, 494-96 (1980)).[15] But the due-process considerations involved in such matters are dramatically different from those in this case.

In a parole-revocation matter the private interest involved is extremely weighty, as "many of the core values of unqualified liberty" are at stake, and "its termination

15. In *Vitek*, the Court also held that "qualified and independent assistance must be provided to an inmate who is threatened with involuntary transfer to a mental hospital[,]" but did not compel the government to provide an attorney for this purpose. 445 U.S. at 497. The due process required by the court below differs slightly from that ordered in *Vitek* in that, while it required that Meza be given the "opportunity to be heard in person, represented by counsel," R. 3095, it apparently did not mandate that the State provide counsel or another person to assist Meza in the proceedings it ordered.

inflicts a 'grievous loss' on the parolee . . . ." *Morrissey*, 408 U.S. at 482 (citation omitted). Likewise, the transfer to a mental hospital at issue in *Vitek* involved a substantial private interest because the transferred inmates were forced to take medication and were subjected to markedly different conditions of confinement affecting many aspects of daily life:

> [Inmates transferred to the hospital] are frequently required to participate in behavior modification programs and to take whatever medication may be prescribed for them. Confinement conditions are substantially more restrictive than those at the Penal Complex in that the patients have less freedom of movement, are under constant supervision, have substantially fewer recreational and vocational opportunities, are unable to earn money, and must spend most of their time in their wards.

Miller v. Vitek, 437 F.Supp. 569, 572 (D. Neb. 1977). And the private interest at issue in *Vitek* was intensified by the fact that the segregation and transfer of an inmate due to mental illness would not pass unnoticed by fellow prisoners, and thus the stigma associated with such a transfer could very well adversely impact the transferred prisoner's standing in his community upon his return.

In contrast, the trial testimony reflects that Meza's sex-offender treatment thus far has included the completion of paperwork, attendance at classes, and participation in polygraphs. R.3483-84.[16] And, unlike in *Vitek,* there is no indication that his

16. In response to questioning regarding what is required to move to the second phase of treatment, a "compilation of behavior, paperwork, polygraphs" was mentioned, R.3483, but there was no further elaboration on the reference to "behavior[,]" *id*.

participation in treatment was likely to become known to anyone other than the government and those involved in providing his treatment. Granted, such treatment may involve discussions that are uncomfortable to its participants. But Meza's interest in avoiding such treatment, with its relatively minimal impact on daily life and apparent absence of forced medication, is not nearly as substantial as that at issue in *Morrissey* and *Vitek*.

Moreover, the risks and benefits of additional process are more pronounced in the contexts of parole revocation hearings and transfer to a mental hospital. Parole revocation hearings often involve a critical fact issue, whether "the individual has in fact breached the conditions of parole." *Morrissey*, 408 U.S. at 483-84. Thus, "[w]hat is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Id*. at 484. It follows then that in such cases "[t]he parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Id*. at 488. The risk of error and benefits of an evidentiary hearing in such a matter are self-evident.

The same is true where a transfer to a mental hospital is contemplated. The questions that must be answered relate to whether an individual in fact has a medical condition and the potential treatment options , i.e., "whether an individual is mentally ill and cannot be treated in prison[.]" *See Vitek*, 445 U.S. at 495. This question necessarily "turns on the meaning of facts which *must* be interpreted by expert psychiatrists and psychologists." *Id*. (citing *Addington v. Texas*, 441 U.S. 418, 429 (1979)) (emphasis added). Indeed, who else but a medical expert could make such a diagnosis and determine whether treatment was feasible in a particular facility?

In contrast, the decision at issue when determining whether to impose sex-offender treatment, like any parole decision, is both subjective and predictive: does Meza "constitute a threat to society by reason of his lack of sexual control"? The testimony of Mr. Robert Butler, a licensed professional counselor and licensed sex-offender treatment provider who has been Meza's therapist for more than two and one-half years and saw him once a week, reflects that while such professionals may form beliefs as to whether individuals have the capacity to control their behavior, they are not capable of determining whether an individual will recidivate and thus pose a threat to society:

Q. Do you consider Mr. Meza a serious risk to the community?

A. I'm not qualified to judge that.

* * * *

Q. Do you think that he'd be capable of living in the community without re-offending?

A. I'm not capable of answering that.

Q. Based on your observations of him?

A. Even with those observations, there is no way that we can determine whether or not an individual will recidivate or not.

Q. So you can't say one way or the other?

A. I cannot say one way or the other.

R.3472, 3475, 3478. And there is no indication in the record that treatment providers are asked by the Parole Board to make such a determination. The record does reflect that a treatment provider's evaluation of an offender's treatment needs is provided to the Parole Board, R.3873, but it is only one of a number of data points before the Parole Board when it makes its decision. R.3708-10, 3867-73. In light of the foregoing, the risks of error and benefits of additional process (such as the right to cross-examine such a treatment provider) are minimal in comparison to those in *Morrissey* and *Vitek*. For this additional reason, the court below erred in ordering that Meza be provided essentially the same extensive due-process protections afforded in *Morrissey* and *Vitek*.

The district court's error is further demonstrated by holdings in several cases involving either more significant private interests or greater benefits from additional process than those implicated here, where courts have nevertheless refused to require several elements of process set out in the district court's order. For example, in *Greenholtz*, the Supreme Court examined the process required when determining whether a Nebraska inmate was to be released to parole, 442 U.S. at 3, a decision that obviously dramatically impacts an offender's everyday existence. The Court held that due process was satisfied where the inmate was "permitted to appear before the Board and present letters and statements on his own behalf" and was informed of the reason for the denial of the conditional release as a "guide to the inmate for his future behavior." *Id*. at 15.[17] The Court summarized: "The Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under the circumstances. The Constitution does not require more." *Id*. at 16. Thus, the Court did not require that the inmate be given a full adversarial hearing, a decision with which even the dissenting justices agreed. *See id*. at 20-21 (Powell, J.,

17. The *Greenholtz* Court did not pass upon the issue of whether due process required an initial disclosure of evidence to the prisoner, noting that the board had the discretion to make available to the inmate information "[w]henever the board determines that it will facilitate the parole hearing" and that the inmates were apparently "satisfied with the way this provision is administered" since no issue was presented to the Court regarding access to their files. *Id*. at 15 n.7.

concurring in part and dissenting in part) ("The Court correctly concludes, in my view, that the Court of Appeals erred in ordering that a formal hearing be held for every inmate . . . ."); *id*. at 36 (Marshall, Brennan and Stevens, JJ., dissenting in part) ("While the question is close, I agree with the majority that a formal hearing is not always required when an inmate first becomes eligible for discretionary parole . . . .") Nor did the Court compel the government to outline the evidence it relied upon in making its final determination. Indeed, the Court specifically found such detail unnecessary. *Id*. at 15 ("[W]e find nothing in the due process concepts as they have thus far evolved that requires the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release . . . .").[18]

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18. The Supreme Court's recent decision in *Wilkinson v. Austin*, 545 U.S. 209 (2005) also supports a conclusion that, except in the extraordinary cases of parole revocation or involuntary transfer of an inmate to a mental hospital, a requirement that the government initially disclose the evidence upon which it is relying exceeds that which is necessary to avoid an erroneous deprivation. In *Wilkinson* the Supreme Court reversed the lower courts' holdings that an inmate faced with assignment to a state's supermax prison was entitled to "a summary of all evidence upon which the Committee would rely" in making the placement decision. *Id*. at 219, 230. In its opinion, the Court explained that the policy at issue "provides that an inmate must receive notice of the factual basis leading to consideration for [placement in the facility] and a fair opportunity for rebuttal. Our procedural due process cases have consistently observed that these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations. . . . Requiring officials to provide *a brief summary of the factual basis for the classification review*[,]" like Meza was provided in this case, "and allowing the inmate a rebuttal opportunity safeguards against the inmate's being mistaken for another or singled out for insufficient reason." *Id*. at 225-26 (emphasis added) (citations, quotations omitted). The risk of error and benefits of additional procedures are no greater here than in *Wilkinson*, and therefore the district court erred in requiring an initial disclosure of evidence.

In *McDonald v. Boydston*, No. 93-1912, 1994 WL 242548 (5th Cir. May 24, 1994) (not designated for publication), this Court considered allegations that an inmate was not provided adequate due process before the prison imposed disciplinary action involving solitary confinement for approximately one week based on allegations that he "'rigged" a device from an electrical cord to heat liquids and had contraband in his cell. *Id*., at *1. The inmate specifically complained that he was not afforded due process because "he was not allowed to call witnesses[.]" *Id*. Certainly, given the factual dispute at issue in such a disciplinary action proceeding, the risk of error and benefits of additional procedures would have been greater than those present here. Nevertheless, based on the nature of the sanction and the fact that it did not increase the plaintiff's prison time, the Court held that "some notice" of the charge, combined with an informal non-adversary hearing before three jail officials where he was allowed to make a "limited statement[,]" satisfied due process. *Id*., at *2 n.3.

Further, in cases addressing the amount of process required before deciding whether to deny a release to mandatory supervision under the present law (a significantly greater private liberty interest than the issue here, which involves only a condition of such release), this Court and the Texas Court of Criminal Appeals have stopped short of requiring the due-process protections mandated by the court below.

In *Boss* the Court addressed a complaint that due process required the parole panel "to specify particular evidence in the inmate's record when denying mandatory supervision[.]" 552 F.3d at 427. The Court rejected this due-process challenge. *Id.* at 429-30. In doing so, the Court relied extensively upon *Greenholtz* to note the difference in process required for, on the one hand, issues that are "essentially factual" such as "requiring a board to determine if the prisoner has, in fact, broken a prison rule," and decisions on the other hand (like those in this case) that are "'necessarily subjective in part and predictive in part,' an 'experienced prediction based on a host of variables.'" *Id*. at 429 (citing *Greenholtz*, 442 U.S. at 13, 16); *see also id.* at 429 n.28 ("Because of the subjective and predictive nature of the conditional release decision, requiring a parole panel to provide evidence to support its decision would not serve the purpose of minimizing the risk of error.").

And the Texas Court of Criminal Appeals has provided a description of the process constitutionally required for such a release decision. In *Ex parte Geiken*, 28 S.W.3d 553 (Tex. Crim. App. 2000) (en banc), that court held that "to comply with due process in making the mandatory release decision, the Board must provide an inmate with timely notice that he will be considered for mandatory supervision release prior to that review taking place[]" as this would "provide eligible inmates with the warning that is necessary to allow them to submit any information that they

feel relevant to the Board decision." *Id*. at 560. And it specifically held that "[d]ue process does not require that the Board provide the particulars in the inmate's file upon which it rested the decision to deny release[,]" and that "[t]he opportunity to be heard does not necessarily include the right to a live hearing before the Board or a Board panel." *Id*.

In summary, the United States Supreme Court, this Court, and the Texas Court of Criminal Appeals have reviewed procedures involving combinations of private interests and risks of error and benefits of additional procedure that appeared to weigh more heavily in favor of additional process than do those interests in this case, and have found that procedures far less involved than those ordered by the court below satisfied the Due Process Clause. As such, should the Court determine that the procedures afforded Meza were constitutionally lacking in some respect, the decision of the district court should nonetheless be reversed and remanded so that it may enter an amended order that significantly reduces the additional process that must be provided, for example requiring only the addition of written reasons for any decision to continue to impose the sex-offender treatment and polygraph conditions.

CONCLUSION

For these reasons, Appellants respectfully request that the Court reverse the judgment of the district court, vacate the injunction against Appellants, and render judgment dismissing Meza's lawsuit.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General

_____
THOMAS M. LIPOVSKI
Assistant Solicitor General

BRUCE R. GARCIA
Assistant Attorney General

CELAMAINE CUNNIFF
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1827
[Fax] (512) 474-2697

COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned counsel of record does hereby certify that two true and correct copies of the Appellants' Brief, along with a computer readable disk copy of the brief, was served via Federal Express (Next Day Delivery), on August 11, 2009, to:

James C. Harrington
Scott Medlock
Texas Civil Rights Project
1405 Montopolis Drive
Austin, Texas 78741

COUNSEL FOR PLAINTIFF - APPELLEE - CROSS-APPELLANT

Counsel also certifies that on August 11, 2009, the original and seven paper copies of the Brief of Appellants, along with a computer-readable disk copy of the brief in Adobe Portable Document Format, was dispatched to the clerk, as addressed below, via Federal Express (Next Day Delivery):

Mr. Charles R. Fulbruge III, Clerk
U.S. Court of Appeals for the Fifth Circuit
600 Maestri Place
New Orleans, Louisiana 70130

_____
Thomas M. Lipovski
Assistant Solicitor General

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Thomas M. Lipovski
COUNSEL FOR APPELLANTS

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