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; DAVID GUTIERREZ; CHARLES AYCOCK; CONRITH DAVIS; JACKIE DENOYELLES; JUANITA GONZALEZ; RISSIE L. OWENS; STUART JENKINS; THOMAS LEEPER,
Defendants - Appellants - Cross-Appellees

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

APPELLANTS' RESPONSE TO BRIEF OF APPELLEE - CROSS-APPELLANT RAUL MEZA AND REPLY BRIEF

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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

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Scott Medlock
TEXAS CIVIL RIGHTS PROJECT

Defendants - Appellants - Cross-Appellees

Director Brad Livingston, Executive Director of the
Texas Department of Criminal Justice, in his official capacity;
David Gutierrez; Charles Aycock; Conrith Davis; Jackie Denoyelles;
Juanita Gonzalez; Rissie L. Owens; Stuart Jenkins; Thomas Leeper,
in their official capacities as Members of the Texas Board of
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STATEMENT REGARDING ORAL ARGUMENT

Defendants - Appellants - Cross-Appellees contend that the district court's decision to dismiss without prejudice the due-process and equal-protection claims that are the subject of the cross-appeal should be affirmed without oral argument. Nevertheless, in the event the Court decides to hear oral argument on the cross-appeal, Defendants - Appellants - Cross-Appellees request that they be given the opportunity to participate.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

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DIRECTOR BRAD LIVINGSTON, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, IN HIS OFFICIAL CAPACITY; DAVID GUTIERREZ; CHARLES AYCOCK; CONRITH DAVIS; JACKIE DENOYELLES; JUANITA GONZALEZ; RISSIE L. OWENS; STUART JENKINS; THOMAS LEEPER,
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Less than nine months after being released on parole following a conviction for aggravated robbery, Plaintiff - Appellee - Cross-Appellant Raul Meza ("Meza") pled guilty to the murder of a nine-year-old girl. He has admitted to sexually assaulting her during the course of the murder. Thereafter, while serving his sentence for murder, he was convicted of possession of a deadly weapon in a penal institution.

After his release to mandatory supervision in 2002 Meza, who describes himself as indigent, had a number of conditions effectively assigned to his supervised

release. The conditions include requirements that Meza: (1) reside in the Travis County Correctional Complex ("TCCC") until he submits a suitable residence plan; (2) be supervised by the Parole Division when outside the TCCC; and (3) avoid going within a specified distance of places where children commonly gather.

Meza claims that he had a right to procedural due process before these conditions were assigned and that imposition of these conditions violated his equal-protection rights. These claims are without merit. The conditions Meza complains of do not constitute a dramatic departure from the ordinary incidents of mandatory supervision, and therefore Meza does not have a liberty interest in avoiding them, as is required to prevail upon his procedural-due-process claim. Further, an individualized, subjective, and discretionary governmental decision such as determining which conditions to impose upon a person's mandatory supervision cannot be challenged on "class-of-one" equal-protection grounds. And even if such a claim was cognizable, it fails because Meza cannot identify a similarly situated individual and, given his heinous criminal history, it was not irrational to impose these conditions upon his release. The dismissal of these claims without prejudice should be affirmed.

STATEMENT OF JURISDICTION

Appellants agree that this Court has jurisdiction over Meza's cross-appeal. This Court has jurisdiction over appeals "from 'final decisions' under 28 U.S.C. §

1291[.]" *Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enters., Inc.*, 170 F.3d 536, 538-39 (5th Cir. 1999). "A decision is final when it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Askanase v. Livingwell, Inc.*, 981 F.2d 807, 810 (5th Cir. 1993) (internal quotation omitted). The "Final Judgment" of the district court meets this standard. *See* R.3102-05. And the fact that some claims were dismissed without prejudice does not deprive this Court of jurisdiction. *See Linn v. Chivatero*, 714 F.2d 1278, 1280 (5th Cir. 1983); *Prewitt v. City of Greenville, Miss.*, 202 F.3d 265, 265 (5th Cir. 1999) (per curiam) (not designated for publication).[1]

1. *But see Swope v. Columbian Chems. Co.*, 281 F.3d 185, 192-93 (5th Cir. 2002) (summarizing a prior decision, *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298 (5th Cir. 1978) (overruled on other grounds), as a decision in which the Court found "it lacked appellate jurisdiction because a dismissal without prejudice 'cannot be regarded as terminating the litigation between the [ ] parties'"). But the rule set out in *Ryan* typically "operates when a plaintiff has filed multiple claims . . . and the district court has dismissed some but not all of the claims. Then, in an effort to preserve his remaining claims while simultaneously appealing the adverse dismissal, the plaintiff implores the district court to dismiss his remaining claims without prejudice and enter a final judgment." *Marshall v. Kan. City S. Ry. Co*., 378 F.3d 495, 500 (5th Cir. 2004). These are not the circumstances present here.

STATEMENT OF ISSUES ON CROSS-APPEAL

1. Meza was convicted of aggravated robbery, pled guilty to murdering a nine-year-old girl less than nine months after being released on parole (and has admitted to sexually assaulting her during the course of the murder), and was subsequently convicted of possession of a deadly weapon in a penal institution. Does Meza have a constitutional liberty interest in avoiding conditions of mandatory supervision that: (1) require him to reside at the TCCC until he forms a suitable residence plan; (2) have resulted in him being escorted by a parole officer when outside the TCCC facility; and (3) require him to avoid being within 500 feet of premises where children commonly gather? If so, what level of due process is required before these conditions may be imposed upon him?

2. Is a class-of-one theory of equal protection cognizable in the context of the government's individualized, discretionary, subjective decision to assign particular conditions to an individual's mandatory supervision?

3. If a class-of-one claim is cognizable, has Meza established: (a) that he was treated differently than individuals similarly situated to him; and (b) that there is no conceivable rational reason for assigning the challenged conditions of mandatory supervision?

STATEMENT OF THE CASE

Appellants' Statement of the Case may be found in the Brief of Appellants at 5-8.

STATEMENT OF FACTS RELEVANT TO CROSS-APPEAL

In 1977 the Texas Legislature enacted a law that required the release of a prisoner 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). Such a release is not

unconditional. Rather, it is "under such conditions and provisions for disciplinary supervision as the Board of Pardons and Paroles may determine." *Id*. at sec. 2(d).

In January 1977 Meza received a twenty-year prison sentence for aggravated robbery. P Ex. G, p. 2.[2] Less than nine months after being released on parole he pled guilty to the murder of a nine-year-old girl, whom he has admitted to sexually assaulting during the course of the murder. R.2840; P Ex. A, p. 5; P Ex. G, p. 2. Meza received a thirty-year sentence as a result of his guilty plea to murder, and was later sentenced to an additional four years imprisonment for possession of a deadly weapon in a penal institution. R.2840.

Meza was eventually released on mandatory supervision in May 1993. *Id*. At that time, Meza was placed on the highest level of supervision an offender could receive in Texas. R.3442. In August 1994 Meza's mandatory supervision was revoked and he was returned to prison. R.2840.

Subsequently, the Legislature found that "the release of dangerous inmates from the Texas Department of Criminal Justice sentenced under prior Texas law creates the potential for a continuing threat to public safety[,]" that there was a "compelling state interest in placing inmates released on parole and mandatory supervision under the kind of supervision that will best protect public safety[,]" and

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2. Citations to "P Ex. _" refer to trial exhibits offered by Meza and admitted into evidence. Citations to "D Ex. _" refer to trial exhibits offered by Defendants Livingston and Jenkins and admitted into evidence.

that there was "a need for a program of intensive supervision of certain inmates whose histories indicate a propensity for violence." 3rd Senate Amendment, Notes, p. 3, H.B. 2918, 75th Leg., R.S. (1997); *Uresti v. Collier*, No. Civ. H-04-3094, 2005 WL 1515386, at *5-6 (S.D. Tex. June 23, 2005). Accordingly, the Legislature required the establishment of a program "to provide super-intensive supervision to inmates released on parole or mandatory supervision and determined by parole panels to require super-intensive supervision" that included "the highest level of supervision provided by the department." TEX. GOV'T CODE § 508.317(d). The Legislature also specifically permitted child safety zones to be imposed as a condition of mandatory supervision upon persons convicted of certain offenses, including murder. TEX. GOV'T CODE §§ 508.187, .221, .225; TEX. CODE CRIM. PROC. art. 42.12, § 13D.

In September 2002 Meza was again required by law to be released to mandatory supervision. R.2841. The conditions of mandatory supervision required, among other things, that Meza not go within 500 feet of premises where children commonly gather,[3] that he reside in a "Travis County jail work release program for a period of up to 180 days for the purpose of temporary housing until employment and financial resources have been obtained for development of a suitable residence

3. Prior to 2005 this particular condition was imposed under SISP, the super-intensive supervision program, and, apparently, Special Condition "O" (referencing a "CHILD SAFETY ZONE"). D Ex. 1, pp. 3,16; Appellee's Br. 50-51. In 2005 it was imposed under Conditions O.06 and X. D Ex. 3, pp. 9, 11.

plan," and that he not leave the TCCC "without approval of the supervising parole officer[,]" nor "unless such departure is under the supervision of the TDCJ Parole Division" (the "Parole Division"). R.2841; D Ex. 3, p. 5 (all caps in original).

Meza, who describes himself as indigent, R.3376, was unable to formulate a viable housing plan and thus, arrangements were made for him to continue to reside at TCCC. R.2841. Meza continues to reside in a bay of the TCCC that houses "all parolees, mandatory releasees," where he is provided room and board at no cost to him, wears civilian clothes, and enjoys access to a pay washer and dryer, pay telephones, copy and fax machines, bathroom facilities "which are very different from TDCJ[,]" and a television. R.3347-48, 3351, 3376, 3427-28. Meza may reside outside the TCCC once he presents a suitable residence plan. R.3442-43; Appellee's Br. 23.[4]

4. Later issued conditions of release did not mention the 180-day period or the suitable residence plan, *see* D Ex. 1, p. 3, D Ex. 3, p. 10, but there is no dispute that Meza will be permitted to leave the TCCC once he submits such a plan. *See* Appellee's Br. 23 (referencing his need to develop a "'residence plan' necessary to live outside the jail.").

SUMMARY OF THE ARGUMENT

Meza received a twenty-year prison sentence for aggravated robbery. Less than nine months after being released on parole for that offense he pled guilty to the murder of a nine-year-old girl, whom he has admitted to sexually assaulting during the course of the murder. Meza received a thirty-year sentence as a result of his guilty plea to murder, and was later sentenced to an additional four years imprisonment for possession of a deadly weapon in a penal institution. Given his criminal history and the Parole Board's responsibility to help offenders reintegrate into society while simultaneously protecting Texas citizens, it is not surprising that, when released to mandatory supervision in 2002 as required by law, Meza was assigned a number of conditions of mandatory supervision.

On due-process and equal-protection grounds, Meza has challenged conditions of mandatory supervision that required him to: (1) reside in the TCCC until he submitted a suitable residence plan, (2) be supervised by the Parole Division when traveling outside the TCCC (a condition that has resulted in personal supervision by a parole officer), and (3) avoid areas where children commonly gather. The district court dismissed these claims without prejudice, and did not err in doing so. Meza has not established a right to due process prior to assignment of these conditions because they are not a "dramatic departure" from conditions typically assigned to persons released to mandatory supervision, particularly when they are in Texas's super-

intensive supervision program. And Meza cannot prevail on his class-of-one equal-protection claim because the Supreme Court's decision in *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008), establishes that individualized, subjective, and discretionary governmental decisions such as these are not subject to such a constitutional attack. This claim also fails because Meza cannot identify a similarly situated individual who has been treated differently, and rational reasons exist for the imposition of the challenged conditions. Accordingly, the decision of the district court to dismiss these claims without prejudice should be affirmed.

STANDARD OF REVIEW

The Standard of Review is set out in the Brief of Appellants at 18-19.

RESPONSE TO CROSS-APPEAL

I. THE DISTRICT COURT DID NOT ERR WHEN IT DISMISSED WITHOUT PREJUDICE MEZA'S CLAIM THAT HE WAS ENTITLED TO DUE PROCESS BEFORE CERTAIN CONDITIONS COULD BE PLACED UPON HIS MANDATORY SUPERVISION.

The Due Process Clause of the United States Constitution protects against deprivations of life, liberty or property without due process of law. *Zinerman v. Burch*, 494 U.S. 113, 125 (1990). "Liberty interests may be circumscribed . . . when an individual has been convicted of a crime," as "[c]onvicted criminals' liberty interests are subject to the nature of the regime to which they have been lawfully committed." *Coleman v. Dretke*, 395 F.3d 216, 221 (5th Cir. 2004). Restrictions on

liberty interests "also attend parole, 'an established variation on imprisonment of convicted criminals.'" *Id*. at 222 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)).

Prisoners do not, however, "shed all constitutional rights at the prison gate." *Sandin v. Conner*, 515 U.S. 472, 485 (1995). "[T]he Due Process Clause guarantees a prisoner some process before the government can impose conditions 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, *e.g.*, *Sandin*, 515 U.S. at 479 n.4). And States may create liberty interests which are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 483-84. These principles also apply in the context of parole. *See Coleman*, 395 F.3d at 222 (" . . . as in the prison context, a condition may present such a 'dramatic departure from the basic conditions' of a parolee's sentence that the state must provide some procedural protections prior to its imposition.") (citation omitted). "So long, however, as the punishment is 'within the normal limits or range of custody which the conviction has authorized the State to impose,' there is no violation of a protected liberty interest conferred by the Due Process Clause."

Richardson v. Joslin, 501 F.3d 415, 419 (5th Cir. 2007) (quoting, *e.g.*, *Sandin*, 515 U.S. at 478).

Meza contends that he has a constitutionally protected liberty interest in freedom from conditions of mandatory supervision that: (1) require him to reside at the TCCC until he forms a suitable residence plan; (2) have resulted in him being escorted by a parole officer when outside the TCCC facility; and (3) require him to avoid being within 500 feet of premises where children commonly gather. However, Meza is unable to cite to any decision holding that parolees have a constitutionally protected liberty interest in avoiding any of these conditions. And for good reason—as shown below, none of the conditions present such a dramatic departure from the basic conditions of mandatory supervision so as to require due process protections.

A. Meza Does Not Possess a Liberty Interest in Avoiding the Challenged Conditions.

Constitutionally protected liberty interests have been recognized in very few situations involving mandatory supervision or parole. To the knowledge of Appellants, those situations only include: actual revocation of parole, *Morrissey*, 408 U.S. at 480-81; loss of good-time credits affecting eligibility for parole, *Wolff v. McDonnell*, 418 U.S. 539 (1974); release on parole, *Bd. of Pardons v. Allen*, 482 U.S.

369 (1987);[5] release on mandatory supervision, *Boss v. Quarterman*, 552 F.3d 425 (5th Cir. 2008) (recognizing that said liberty interest was not contested on appeal); loss of good-time credits affecting date of release on mandatory supervision, *Teague v. Quarterman*, 482 F.3d 769, 776-77 (5th Cir. 2007); and the imposition of stigmatizing sex-offender conditions, *Coleman*, 395 F.3d 216. As shown below, none of the three conditions complained of by Meza may be considered "such a dramatic departure from the basic conditions of a parolee's sentence" that they should be added to this short list.

1. Residence at the TCCC

Meza asserts that the "trial court erred by not requiring the State to provide [him] a due process hearing before . . . requiring him to live in jail for almost seven years following his mandatory release." Appellee's Br. 16. However, no such condition of mandatory supervision was imposed. Rather, Meza was initially required to reside in a "Travis County Jail work release program for a period up to 180 days for the purpose of temporary housing until employment and financial resources have been obtained for development of a suitable residence plan." D Ex. 3, p. 5 (all caps in original). Unfortunately, Meza was unable to formulate a viable housing plan and thus arrangements were made for him to continue to reside at

5. But not in Texas. *See Allison v. Kyle*, 66 F.3d 71 (5th Cir. 1995).

TCCC. R.2841. And no other suitable housing option for Meza in Travis County was identified at trial.[6] Meza's initial conditions of mandatory supervision permitted him to reside outside the TCCC once he presents a proper residence plan, and there is no dispute that this is still the case. R.3442-43; Appellee's Br. 23.

The condition that Meza be housed at the TCCC until he presents a suitable residence plan does not constitute a "dramatic departure" from basic conditions of mandatory supervision. Texas law authorizes the Parole Board to impose 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, including "any reasonable condition that is designed to protect . . . the community . . . or punish, rehabilitate, or reform the defendant[.]" TEX. GOV'T CODE § 508.221; TEX. CODE

6. The evidence at trial failed to establish the existence of another facility in Travis County, Meza's legal county of residence, R.3773, at which he could be housed. Meza testified that he cannot live with his mother because she periodically takes care of grandchildren under age 17. R.3346-47. Although the parties have stipulated that Meza's conditions include a requirement that he reside in a halfway house, R.2841, Appellants agree that Meza would be permitted to live with his mother if doing so did not conflict with other conditions of his mandatory supervision. But living with his mother would violate the condition of mandatory supervision that he "[n]ot have any unsupervised contact with any person 17 years of age or younger." D Ex. 3, p. 11. Meza does not complain of this condition in this lawsuit. And the only other facility in Travis County that the Parole Division contracts with is not a suitable residence for Meza because it is too close to a school and thus there is a child-safety-zone issue. R.3773-74. The court below, apparently based on the submission of a declaration filed two weeks after the last day of trial, concluded that "housing options exist that comply with Meza's conditions." R.3096. But the filed declaration does not establish that, at the time of trial, Appellants were aware of availability at the facility referred to therein, does not establish that the Parole Division contracted with the facility (and given Meza's characterization of himself as indigent, it would appear he could not afford the $450 per month fee for rent and utilities), and states that by the time the declaration was signed (thirteen days after the declarant discussed with Meza the possibility of residence there) the facility had reached maximum capacity. R.3099-3101.

CRIM. PROC. art. 42.12, § 11(a). These provisions specifically permit requiring the individual to "[r]emain under custodial supervision in a community corrections facility"[7] and "obey all rules and regulations of such facility[,]" TEX. CODE. CRIM. PROC., art. 42.12, § 11(a)(12), and even confinement in a county jail, *see id*. at § 12(a). In light of Meza's testimony that he resides in a separate bay of the TCCC that houses "all parolees, mandatory releases [sic] [,]" R.3347, and other testimony that "agencies have contracts with jails all over Texas . . . for people to reside there[,]" R.3610, the evidence presented at trial indicates that residence at a county jail facility while on parole or mandatory supervision is not a unique condition of release.[8]

And even if Meza was the only individual housed in such a facility, Meza has not pointed to evidence suggesting his residence at the TCCC, where he lives in a bay that houses "all parolees, mandatory releasees," wears civilian clothes, and enjoys access to a pay washer and dryer, pay telephones, copy and fax machines, bathroom

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7. A "[c]ommunity corrections facility" is defined as "a physical structure . . . that is operated by a department or operated for a department by an entity under contract with the department, for the purpose of treating persons who have been placed on community supervision . . . . and providing services and programs to modify criminal behavior, deter criminal activity, protect the public, and restore victims of crime. The term includes: . . . a custody facility or boot camp . . . ." TEX. GOV'T CODE § 509.001.

8. In the Brief of Appellee, Meza cites testimony from Troy Fox in support of an assertion that he "is the only person in Texas 'released' on mandatory supervision who is *de facto* required to live in a jail." Appellee's Br. 18; R.3540. However, the better reading of the testimony at issue is that Fox indicated that Meza was the only person *Fox knew of* who both (a) resided *at the TCCC*, *and* (b) was not permitted to leave the TCCC without a parole officer escort. R.3609-10. Fox also testified that "there may be others . . . living in a jail somewhere." R.3610.

facilities "which are very different from TDCJ[,]" and a television, R.3347-48, 3351, 3376, 3428, is a "dramatic departure" from living conditions in other types of facilities where persons on mandatory supervision live. Indeed, other court decisions suggest that mandatory supervision releasees have been required to live under restrictive conditions at such facilities. *See Jackson v. Johnson*, 475 F.3d 261, 263-64 (5th Cir. 2007) (plaintiff released to mandatory supervision in a halfway house asserted he was "locked up in the facility 16 to 24 hours per day and [was] prohibited from leaving the facility except to go to or to search for employment"); *Neu v. Quarterman*, No. 4:08-CV-273-Y, 2009 WL 1285855, at *2, 5 (N.D. Tex. May 8, 2009) (person released to mandatory supervision asserted "that the halfway house operated in the same manner as an institutional prison[,]" that "he effectively remained under constraint and his release was nothing more than a transfer between two confinement facilities[,]" and that he was "punished" for violating house rules by being assigned to "physical labor"); *Ex parte Campbell*, 267 S.W.3d 916, 919 (Tex. Crim. App. 2008) (describing a "sponsor house [that] did not have hot water" where the parolee was "under home confinement" and "permitted to leave his residence only for work, church, medical emergencies and sex offender treatment[.]").

Further, Meza has testified that, even after he finds employment, he would like to continue to reside at the TCCC for up to an additional 180 days because he "would still be indigent" and "wouldn't want to subject [himself] from not having enough

capital so that [he] would be able to viably live out in the community without any more assistance." R.3447. In other words, Meza desires exactly what the State has provided him—free room and board at the TCCC (presumably unless other suitable housing options become available) until he obtains employment for a period sufficient to save enough money that he can support himself. This belies Meza's argument that such a condition constitutes such a "dramatic departure" from conditions of mandatory supervision that it violates his constitutional rights. *See Sandin*, 515 U.S. at 486 n.9 ("The State notes, ironically, that Conner requested that he be placed in protective custody after he had been released from disciplinary segregation. Conner's own expectations have at times reflected a personal preference for the quietude of the SHU. *Although we do not think a prisoner's subjective expectation is dispositive of the liberty interest analysis, it does provide some evidence that the conditions suffered were expected within the contour of the actual sentence imposed*.") (emphasis added, internal citation omitted).

In light of the foregoing, Meza has failed to establish the existence of a constitutional liberty interest in avoiding residence at the TCCC until he submits a suitable residence plan.

2. Condition O.99

Meza's complaint about Special Condition O.99 can be broken down into two parts. First, Meza objects to being escorted by a parole officer when outside the

TCCC. Of course, general supervision by a parole officer is a typical condition of parole. *See Morrissey*, 408 U.S. at 478 (noting that parolees typically must seek permission from parole officers before engaging in certain specified activities, "regularly report to the parole officer to whom they are assigned[,]" and sometimes "must make periodic written reports of their activities."). Further, Texas law specifically permits the Parole Board to require that a parolee "report to the supervision officer" and that the supervision officer be permitted "to visit him at his home or elsewhere[,]" without any limitation on the number or frequency of those reports or visits.[9] TEX. CODE CRIM. PROC. art. 42.12, §§ 11(a)(4), (5). And even Meza himself, through counsel, has indicated that he has no problem with any general requirement that he be accompanied at all times by a parole officer:

> Again, there are a lot of conditions on Mr. Meza's release that he doesn't have a quarrel with. Even if some of these conditions were enforced fairly, Mr. Meza may not have a quarrel with them, such as the condition 99. If he was actually provided with a parole officer, he's told me, 'Bring it on. I'd be glad to have somebody follow me around because they are not going to see that I'm doing anything wrong.'

R.3991. Accordingly, it cannot be said that Meza's accompaniment by a parole officer while away from his residence constitutes such a "dramatic departure" from

9. Meza asserts that "[e]mployers have refused to hire [him] because they cannot accommodate the escort." Appellee's Br. 19. But Meza's testimony reflects that only one employer has done so, and that one other employer had "reservations" about having people armed on the premises, but nevertheless said he would hire Meza. R.3430-32.

the basic conditions of his sentence that Meza has a constitutional liberty interest in avoiding that condition.

The second aspect of Special Condition O.99 that Meza objects to is that, at the time of trial, he was only provided with a parole officer for escort purposes eight hours each week, thus restricting him to his residence at the TCCC for the remainder of the week.[10] But since Texas law specifically permits "confinement" in a county jail, community corrections center, or halfway house during mandatory supervision, *see* TEX. GOV'T CODE § 508.221; TEX. CODE CRIM. PROC. art. 42.12, §§ 1, 12(a), 12(b); *Jackson*, 475 F.3d at 267, restrictions permitting a releasee to leave his residence in only limited circumstances cannot be considered atypical. And similar restrictions have indeed been applied in other instances. *See Jackson*, 475 F.3d at 263-64 (plaintiff released to mandatory supervision asserted he was "locked up in the facility 16 to 24 hours per day and [was] prohibited from leaving the facility except to go to or search for employment[.]"); *Campbell*, 267 S.W.3d at 922 (parolee under "home confinement" was "permitted to leave his residence only for work, church, medical emergencies and sex offender treatment[.]"); *Ex parte McCurry*, 175 S.W.3d

10. As noted by Meza, who indicated that he is now allowed to attend a job search program for fifteen hours each week, Appellee's Br. 6 n.3, there have been some changes to the conditions of his mandatory supervision since the trial. Meza is now permitted to travel to a job search program four times each week from 9:00 A.M. until he has finished his job search for the day, and is permitted monthly visits with his mother and step-father. Additionally, Meza is now prohibited from entering Williamson County.

784, 785 (Tex. Crim. App. 2005) ("Applicant was confined at the Ben Reid Correctional Facility (a private correctional facility) as a condition of mandatory supervision.").[11] Indeed, testimony at trial revealed that all SISP offenders, such as Meza, have "tight schedules" and "[w]hen first released . . . are not allowed to even be away from their residence until their parole officer visits with them in their home and starts giving them their schedule to be away." R.3590. And even if they live in a home (provided they have someone living there who can buy items for them) SISP offenders are generally not allowed to leave their residence except for employment, medical appointments, and treatment. R.3775.

In this case, Meza has been permitted to leave the TCCC to go to medical appointments, to attend a program twice each week that assists persons released on parole and mandatory supervision in their efforts to find employment, to travel to job interviews, and on one occasion to visit his mother. R.3346, 3354-55. He has also been allowed to leave his residence to take a seven-week class, five days a week, at Austin Community College where he studied welding, HVAC, masonry, carpentry, and plumbing, and to attend a job fair at a hotel. R.3372-73, 3404-05. And, given Meza's statement that he was employed for a period of time during the summer of

11. In *McCurry,* the Texas Court of Criminal Appeals was "unable to conclude that [confinement to the facility] is 'such a dramatic departure from the basic conditions of parole' for many other convicted sex offenders that due process mandates procedural protections." *Id*. at 785-86.

2009, *see* Appellee's Br. 12 n.10, Meza must have been permitted to leave the TCCC during that time as well. In light of the foregoing, it cannot be said that the conditions under which Meza has been permitted to leave his residence are such a "dramatic departure" from the basic conditions of mandatory supervision that they give rise to a constitutional liberty interest in avoiding them.

3. Child Safety Zone

A child safety zone condition prevents Meza from going within 500 feet of premises where children commonly gather. D Ex. 3, p. 9. Texas law specifically permits such a condition to be imposed upon an individual adjudged guilty of murder. TEX. CODE CRIM. PROC. art. 42.12, § 13D; TEX. GOV'T CODE §§ 508.221, .225. As such, this condition of mandatory supervision cannot be considered a "dramatic departure" from conditions of mandatory supervision imposed upon persons who, like Meza, were found guilty of murder (particularly the murder of a child). *See Williams v. Ballard*, No. 3-02-CV-0270-M, 2004 WL 1499457, at *1, 6 n.6 (N.D. Tex. June 18, 2004) (holding that conditions including those prohibiting individual from "[g]oing in, on, or within 500 feet of premises where children commonly gather . . . ." did "not impose 'atypical and significant hardships' in relation to the ordinary incidents of parole supervision"), *report and recommendation adopted by* , No. CIV.A.3:02-CV-

0270-M, 2004 WL 2203250 (N.D. Tex. Sept. 30, 2004), *aff'd*, 466 F.3d 330 (5th Cir. 2006).[12]

Meza appears to concede as much with respect to persons who have been convicted after article 42.12 was enacted in its present form, but argues that child-safety-zones are nevertheless atypical for persons who, like him, were convicted before its enactment. Appellee's Br. 21-22.[13] But Meza points to no evidence that would support a position that child safety zones are not typically applied to persons with convictions dated prior to 1997. And the legislative history of the statute authorizing the super-intensive supervision program pursuant to which the child safety zone condition was previously assigned, D Ex. 1, p. 3,[14] suggests the exact opposite—that SISP conditions were specifically intended to apply to individuals such as Meza who were required by prior law to be released to mandatory supervision, but warranted a high level of supervision:

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12. This aspect of the decision was not challenged on appeal. 466 F.3d at 333 n.2.

13. Meza also relies upon *Coleman* to assert that he should have been given the opportunity to contest the imposition of the child safety zone condition. Appellee's Br. 22. However, had the *Coleman* petitioner been convicted of a sex offense, there would have been no due process issue. *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."). Here, Meza pled guilty to murder and thus, as noted above, Texas law permits assignment of the child safety zone as a condition of release to mandatory supervision. *Coleman* does not compel further process in such circumstances.

14. The Parole Board no longer assigns child safety zones as a "SISP" condition.

> The legislature finds that current Texas law eliminates that chance that dangerous inmates will be automatically released from Texas prisons. However, many inmates sentenced under prior Texas law are eligible for various forms of early release. Because the United States Constitution precludes increasing the sentences of dangerous inmates after their convictions, and because prior Texas law allows the release of these inmates before the completion of their sentences, there is a need to better supervise these inmates on release.

3rd Senate Amendment, Notes, p. 3, H.B. 2918, 75th Leg., R.S. (1997); *Uresti*, 2005 WL 1515386, at *5. Thus, "[t]he legislative history plainly shows that . . . the Texas Legislature . . . intended for the SISP conditions of release to apply retroactively to eligible inmates who had been sentenced 'under prior Texas law.'" *Uresti*, 2005 WL 1515386, at *6. And, consistent with this legislative intent, child-safety-zone conditions have been imposed upon other individuals who have been convicted prior to 1997. *See id.* at *1, 5; *Davenport v. Dir. - TDCJ-CID*, No. 6:06cv16, 2007 WL 190778, at *1 (E.D. Tex. Jan. 12, 2007); *Brown v. Cockrell*, No. 3-02-CV-2433-N, 2003 WL 21458751, at *1, 4-5 (N.D. Tex. Apr. 29, 2003); *Williams v. Cockrell*, No. 3:01-CV-0240-P, 2002 WL 432977, at *1-2 (N.D. Tex. Mar. 18, 2002); *Campbell*, 267 S.W.3d at 918. As such, Meza has failed to show that he has a liberty interest in avoiding assignment of the child-safety-zone condition.

4. The conditions considered together

As a last resort, Meza argues that even if the individual conditions are constitutional, they impermissibly restrict Meza's liberty when combined. In

Wilkinson v. Austin, 545 U.S. 209 (2005), the Supreme Court recognized that it is possible for such circumstances to exist with respect to segregated confinement. In that case, the Supreme Court considered the process by which Ohio determined whether to place prisoners at the Ohio State Penitentiary ("OSP"), known as a "Supermax" facility. *Id*. at 213, 214. The Court described conditions in such a facility as follows:

> For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration.

Id. at 223-24. The Supreme Court held that, "[w]hile any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context[,]" and therefore a liberty interest existed in avoiding assignment to the OSP. *Id*. at 224. This Court has categorized the conditions in *Wilkinson* as "extreme[,]" *Hernandez v. Velasquez*, 522 F.3d 556, 563 (5th Cir. 2008), and, to the knowledge of Appellants, *Wilkinson*'s cumulative conditions approach has never been applied in the context of parole conditions.

Assuming that *Wilkinson* can be applied to parole conditions, it still does not aid Meza's cause. Meza complains his conditions combine to prevent him from leaving the TCCC as much as he would like and finding employment so that he can stop residing at the TCCC. Appellee's Br. 23. But as noted *supra* at 12-16, Meza has not shown that his residence at TCCC is a dramatic departure from housing conditions of others released to parole or mandatory supervision, and conditions restricting offenders from leaving their residence except for employment related purposes, medical appointments, or treatment are common for SISP releasees such as Meza, who has been permitted to leave the TCCC for these and other purposes.[15]

Moreover, while the child-safety-zone condition does prohibit employment in certain geographic areas, and has apparently precluded Meza from accepting two offers of employment, R.3357-58, Meza has not shown that it effectively prohibits him from ever becoming employed. To the contrary, Meza found employment in the summer of 2009. Appellee's Br. 12 n.10. And, in any event, Meza has not shown

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15. The district court was "unpersuaded" that Meza's conditions did not amount to confinement. R.3079. While a period of confinement in a county jail may not exceed 180 days and confinement in a community corrections facility may not be for more than 24 months, *see* TEX. CODE CRIM. PROC. art. 42.12, § 12(a), (b), a mandatory supervisee may be confined to a halfway house for the amount of time remaining on his sentence. *See Jackson*, 475 F.3d at 263-64, 267 (characterizing release to halfway house where releasee could leave only to go to or search for employment as a release "to a different form of confinement, albeit with additional liberties"). Here, the original conditions of mandatory supervision only required Meza to live at the TCCC for "up to 180 days for the purpose of temporary housing until employment and financial resources have been obtained for development of a suitable residence plan . . . ." D Ex. 3, p. 5. Meza has been, and today remains free to move out of the TCCC as soon as a suitable residence plan is developed.

that employment is a necessary precondition to being allowed to reside outside the TCCC—for example, he could live with his mother if she elected to stop caring for children under age 17 at her residence. R.3346-47. Thus, even taken together, the conditions complained of by Meza do not amount to an "atypical and significant hardship" within the context of mandatory supervision that could vest Meza with a constitutional liberty interest.

B. If Meza Has a Constitutional Liberty Interest in Avoiding the Non-Sex-Offender Conditions, Only Minimal Due Process Is Required.

If a constitutional liberty interest is found, the amount of process is determined through a consideration of three factors: the private interest affected, the risk of erroneous deprivation and probable value of additional safeguards, and the government's interest including the function at issue and the administrative burdens additional procedures would cause. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). A balancing of these interests reveals that Meza would be entitled to minimal process if a liberty interest is found.

The private interest at stake in a condition of prison confinement case "must be evaluated . . . within the context of the prison system and its attendant curtailment of liberties." *Wilkinson*, 545 U.S. at 225. So too with conditions of mandatory supervision. As noted *supra* at 15-16, Meza has indicated that he would like to continue to live at the TCCC even after he finds employment. Thus, his interest in

avoiding living at that facility cannot be deemed substantial. And as discussed *supra* at 17-18, Meza has suggested that the "parole escort" condition itself does not present much of a burden—his primary complaint in this regard is the limited number of hours he has been permitted to have the escort. But SISP releasees such as Meza usually have tight supervision including limitations as to when they may leave their residences. *See supra* at 19. As such, Meza's interest in avoiding these conditions during the term of his mandatory supervision cannot be deemed significant. The interest in being permitted to travel through child safety zones is somewhat greater, but certainly does not outweigh the government's interest in imposing the condition discussed below.[16]

Meza has presented no argument regarding the risk of erroneous deprivation with respect to these conditions. Perhaps this is because little can be said in his favor. Meza received a twenty-year sentence for aggravated robbery, pled guilty to murdering a nine-year-old girl less than nine months after his release on parole, and

16. Meza argues that the conditions under which he lives are the equivalent of those of a person whose parole is revoked, and that therefore he is entitled to the full panoply of due-process protections afforded persons prior to the revocation of parole. This argument flows from a flawed premise—there is little comparison between Meza's circumstances and those of a person whose parole has been revoked and who has been sent back to prison. Meza is permitted to wear civilian clothes, has traveled twice weekly to seek employment, and since trial has engaged in outside employment. R.3346, 3351, 3372-73, Appellee's Br. 12 n.10. Moreover, the opportunity remains for him to reside with his mother if she takes action to eliminate a conflict with a condition requiring him to avoid unsupervised contact with children under 17, or elsewhere once he submits a suitable housing plan. R.3346-47, 3442-43, Appellee's Br. 23. Meza does not suggest that these options would be available to an individual whose parole is revoked. As such, Meza's parole revocation analogy fails.

has admitted to sexually assaulting her during the course of the murder. R.2840; P Ex. A. P. 5; P Ex. G, p. 2. The Parole Board has full discretion to impose child-safety-zone conditions under these circumstances, and to assign any other reasonable conditions to protect the community. TEX. GOV'T CODE §§ 508.221, .225; TEX. CODE CRIM PROC. art. 42.12, §§11(a), 13D. Thus, it cannot be said that the Parole Board erroneously required Meza to avoid places where children commonly gather, reside in a facility he does not need to pay for until he is able to provide for himself (thus preventing any possible pressure to turn to crime to support himself), and be tightly supervised by the Parole Division when outside TCCC grounds.

And finally, the State's interest in taking precautions during Meza's mandatory supervision to protect the public from an individual who, shortly after being released on parole, pled guilty to the murder of a child, is undeniably compelling. Given these considerations, Meza cannot be entitled to more process than written notice of the reasons why such conditions may be imposed and an opportunity to respond in writing before the decision is made.

II. THE DISTRICT COURT DID NOT ERR IN DISMISSING MEZA'S EQUAL-PROTECTION CLAIMS WITHOUT PREJUDICE.

A. A Class-of-One Claim Cannot Be Based on a State Official's Individualized, Subjective, Discretionary Decision to Impose Certain Conditions of Mandatory Supervision.

The Supreme Court's *Engquist* decision has effectively established that a class-of-one theory cannot be brought in the context of a discretionary decision to impose particular conditions of mandatory supervision. In *Engquist*, a public employee sued her employer on the ground that her dismissal was motivated by arbitrary and irrational action. *See* 128 S. Ct. at 2149-50. Specifically, she alleged that irrational conduct—judging her by a different standard than that applied to similarly situated persons—stated a class-of-one equal-protection violation. *Id*. at 2150 (asserting that "differential treatment of government employees—even when not based on membership in a class or group—violates the Equal Protection Clause unless supported by a rational basis.").

The Supreme Court rejected her claim. It found that "[i]t is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized." *Id*. at 2154. Since "some forms of state action . . . by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments[,]" the usual rule that similarly situated persons be treated

alike was not applicable: "treating like individuals differently is an accepted consequence of the discretion granted." *Id*.

The Court did not expressly extend the principles set out in *Engquist* to other government decisions. *See id*. at 2156 ("In concluding that the class-of-one theory of equal protection has no application in the public employment context-and that is all that we decide . . . ."). But it did not limit the application of those principles to the employment context either, a fact illustrated by the Court's example of a traffic officer giving a speeding ticket to one person and not another "even if for no discernible or articulable reason" as an action for which a class-of-one equal protection claim would not lie. *Id*. at 2154.

And the principles of *Engquist* apply here. Like the public employer in *Engquist*, the Parole Board has broad discretion to factor in "subjective considerations[,]" *id*. at 2154, when deciding whether to impose certain conditions of parole, with no "clear standard against which departures, even for a single plaintiff, could be readily assessed[,]" *id*. at 2153. *See* 3rd Senate Amendment, Notes, p. 3, H.B. 2918, 75th Leg., R.S. (1997); *Uresti*, 2005 WL 1515386, at *6. ("The level of supervision of inmates released . . . should be appropriate based on their likelihood of committing new offenses, the nature of their original offenses, their performance in prison programs designed to rehabilitate inmates, *and any other factor deemed by a parole panel to be relevant to their status*.") (emphasis added); R.3584-85

(testimony that, when determining conditions of mandatory supervision, considerations include the individual's file; documentation provided from the courts, criminal justice agencies, police departments, and prison system; anything the individual's attorneys or supporters wish the Parole Board to review; his institutional adjustment; progress in prison; participation in programs; "where the person is trying to go to and their proposed plan of what they are going to do when they get out[;]" the offense the person is in prison for and how it was conducted; and prior criminal history).

And Meza's class-of-one theory would open the courts to constant challenges whenever a person released on parole or mandatory supervision can identify some other inmate who possesses roughly the same characteristics but was placed on a lesser degree of supervision to some small degree. Thus, as in the employment context, "[t]he practical problem with allowing class-of-one claims to go forward in this context is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place." *Engquist*, 128 S. Ct. at 2157.

In sum, *Engquist* recognizes the authority properly vested in government officials when making discretionary, subjective, individualized determinations. Since the Parole Board's imposition of particular conditions upon an individual released to mandatory supervision falls squarely within this category of decisions, Meza's class-

of-one challenge fails. *See Flowers v. City of Minneapolis*, 558 F.3d 794, 799 (8th Cir. 2009) ("In light of *Engquist*, therefore, we conclude that while a police officer's investigative decisions remain subject to traditional class based equal protection analysis, they may not be attacked in a class-of-one equal protection claim."); *United States v. Moore*, 543 F.3d 891, 898-99, 901 (7th Cir. 2008) (construing *Engquist* to suggest that class-of-one claims "may be inapplicable to any governmental action that is the product of a highly discretionary decision-making process" and holding that "a class-of-one equal protection challenge, at least where premised solely on arbitrariness/irrationality, is just as much a 'poor fit' in the prosecutorial discretion context as in the public employment context. Accordingly, Moore's class-of-one challenge fails for this reason as well."); *Green v. Livingston*, No. 2:08-CV-101, 2009 WL 1788419, at *5 (W.D. Mich. June 19, 2009) ("Parole considerations are the type of discretionary decisions discussed in *Engquist* that typically are "subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify" . . . . Applying *Engquist*, even an arbitrary parole decision would not violate Petitioner's equal protection rights.") (internal citation omitted); *but see Franks v. Rubitschun*, 312 F. App'x 764, 766 n.3 (6th Cir. 2009) (not designated for publication) (restricting applicability of *Engquist* to the government-employment context and declining to extend reasoning to the parole context); *Hanes v. Zurick*, 578 F.3d 491, 495-96 (7th Cir. 2009) (recognizing that "*Engquist* does show that some

discretionary police decision-making is off-limits from class-of-one claims" but holding that an allegation that an officer repeatedly arrests an individual solely due to malice states a class-of-one claim).

B. Even If a Class-of-One Theory Were Cognizable in This Context, Meza Has Failed To Establish an Equal-Protection Violation.

Even if Meza could assert an equal protection challenge, it would fail. To establish such a claim Meza must show he was intentionally treated differently from similarly situated individuals and, since Meza does not claim that he is a member of a protected class, that there was no rational basis for the different treatment. *See Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 348 & n.3 (5th Cir. 2006). Meza cannot do so.

1. Meza has not identified any similarly situated individuals.

Without citing to the record, Meza asserts that "approximately 3,600 people who committed the same crime as Mr. Meza have left prison on mandatory supervision since Mr. Meza's 2002 'release[.]'" Appellee's Br. 27. Meza apparently contends he was similarly situated to these individuals and treated differently because there was testimony that only a "handful of inmates" convicted of any offense in the past thirty years had conditions of mandatory supervision as restrictive as his. *Id*. Assuming Meza is arguing that he is similarly situated to those who committed the

crime of murder, this comparison is flawed because Meza was also serving time for possession of a deadly weapon in a penal institution. R.2840.

Regardless, as noted *supra* at 29-30, the crime for which one is currently serving a prison sentence is but one of a number of factors considered when determining conditions of mandatory supervision. When asked to consider what other offenders matched Meza's characteristics "in terms of his background, his institutional division, history and all the other factors that go into the decisions that were made by the Parole Board[,]" Fox, who had worked in excess of thirty years on the parole side of the criminal justice system, could think of "[f]our, five, or six" offenders in the same category as Meza. R.3579. "Not even many of those" had "the additional aspect of committing the crime while on parole[.]" R.3580. And Meza was the only one of these individuals who had a child victim. R.3580. In light of the foregoing, Meza's equal-protection claim fails because he has not identified a person similarly situated to him with whom he can compare his conditions of mandatory supervision.[17]

17. Even Meza's attempt to use himself as he stood in 1993 as a comparator, which would seem impermissible given that one must show he was "treated differently from *others* similarly situated[,]" *Unruh v. Moore*, 326 F. App'x 770, 772 (5th Cir. 2009) (not designated for publication) (emphasis added), fails because he was not similarly situated in all relevant respects. Since 1993 the number of conditions available to the Parole Board had increased, *see infra* at 35-36, and his initial release to mandatory supervision had been revoked, R.2840.

2. Meza has not demonstrated the absence of a conceivable rational basis for the imposition of the challenged conditions.

Meza argues that the Parole Board treated him "radically differently" in 1993, and that its different treatment of him in 2002 must have been political in nature. *See* Appellee's Br. 28. As shown below, Meza's theory is flawed in two respects. First, it is undercut by the fact that the Parole Board placed Meza on the highest possible level of supervision each time he was released to mandatory supervision, and that there were changes in the law between 1993 and 2002 that specifically permitted child safety zones to be assigned as conditions of mandatory supervision. Second, the actual intent of the Parole Board need not be examined since there is a *conceivable* rational basis for the decision to impose the conditions at issue.

As an initial matter, when Meza was released to mandatory supervision in 1993 he "had a number of conditions placed" on his release, Appellee's Br. 8, and was placed on the highest level of supervision an offender could receive in the State of Texas at that time, R.3442, just as he is now, R.2843. The specific conditions of Meza's 1993 release are lesser than those attached to his 2002 release. But Fox testified that this was because "in 1993, the Board had fewer conditions that they had available to choose to impose." R.3586.[18] The district court apparently found Fox's

18. For example, the child-safety-zone conditions were created after 1993. Act of May 24, 1995, 74th Leg., R.S., ch. 256, § 4, 1995 Tex. Gen. Laws 2190, 2193, *repealed by* art. 42.12, Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 12.22, 1997 Tex. Gen. Laws 327, 443 (current version at TEX. GOV'T CODE § 508.187); Act of May 10, 1999, 76th Leg. R.S., ch. 56, § 2, 1999 Tex. Gen.

testimony in this regard credible, noting in its findings of fact and conclusions of law that conditions of Meza's second release "are more restrictive than those in 1993 due to changes in state law." R.3077.

Regardless, the Parole Board's actual motivation is not the relevant inquiry in this matter. In order to prevail, Meza "must carry the heavy burden of 'negativ[ing] any reasonably conceivable state of facts that could provide a rational basis' for their differential treatment." *Lindquist v. City of Pasadena, Tex.*, 525 F.3d 383, 387 (5th Cir. 2008) (quoting, *e.g.*, *Whiting*, 451 F.3d at 349). Where the claim does not survive this rationality review, there is no need for the Court to inquire into the intent of the decision making officials. *Unruh*, 326 F. App'x at 772 ("[U]nder the correct legal standard, the 'actual' reason provided by the official is immaterial.").

Here, there can be no doubt that a "reasonably conceivable state of facts" exists that would explain the imposition of the challenged conditions upon Meza and not upon others convicted of murder. Meza had also received a twenty-year sentence for aggravated robbery. P Ex. G, p. 2. Less than nine months after being released on parole, he pled guilty to the murder of a child. R.2840; P. Ex. A, p. 5. He has admitted to sexually assaulting her during the course of the murder. R.2840. While

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Laws 118, 119 (current version at TEX. GOV'T CODE § 508.225); Act of May 10, 1999, 76th Leg. R.S., ch. 56, § 2, 1999 Tex. Gen. Laws 118, 118-119 (current version at TEX. CODE CRIM. PROC. art. 42.12 § 13D). And the super-intensive supervision program was authorized by the Legislature in 1997. *See supra* at 5-6.

serving his sentence for murder, Meza was sentenced to an additional four years of imprisonment for possession of a deadly weapon in a penal institution. R.2840. Given these circumstances, the Parole Board's decision to require him to avoid places where children commonly gather, reside within the TCCC facility until he can provide a suitable residence plan (removing any temptation to turn to crime, such as robbery, to support himself), and be supervised when outside the TCCC cannot be found irrational.[19] For this additional reason, the district court did not err when it dismissed Meza's equal-protection claims without prejudice.[20]

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19. Nor do these conditions, as Meza claims, "thwart the intent of the legislature." *See* Appellee's Br. 27-28. The Legislature has recognized a "compelling state interest in placing inmates released on parole and mandatory supervision under the kind of supervision that will best protect public safety[,]" and specifically permitted mandatory supervision to be "under such conditions and provisions for disciplinary supervision as the Board of Pardons and Paroles may determine" including conditions of "super-intensive supervision." *See supra* at 4-6.

20. Additionally, to the extent Meza challenges the length of any "confinement" on equal-protection grounds and contends he is entitled to release from "confinement" as a remedy, such an action is not properly before the Court—it must be brought through a habeas proceeding. *See Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) ("Even if the restoration of the respondents' credits would not have resulted in their immediate release, but only in shortening the length of their actual confinement in prison, habeas corpus would have been their appropriate remedy."); *Coleman v. Dretke*, 409 F.3d 665, 670 (5th Cir. 2005) (per curiam) ("*Coleman II*") (characterizing *Preiser* as "stating that suits attacking the duration of physical confinement are within the core of habeas corpus").

REPLY TO RESPONSE TO BRIEF OF APPELLANT

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

Under *Coleman v. Dretke*, due process is required before imposing conditions that are "'qualitatively different' from the punishment characteristically suffered by a person convicted of [the] crime, and [which have] stigmatizing consequences.'" 395 F.3d at 221 (quoting *Sandin*, 515 U.S. at 479 n.4). In their opening brief, Appellants established that, because many of the Condition X restrictions imposed upon Meza cannot be considered both qualitatively different from those characteristically imposed upon persons with his criminal convictions and stigmatizing to Meza, the district court erred in holding that due-process protections are applicable to all Condition X restrictions. Brief of Appellants at 19-28.

In response, Meza does not argue that he was entitled to due process before all of the restrictions identified as part of Condition X were imposed. Appellee's Br. 49-50 ("Mr. Meza does not contend he must be provided with due process before the imposition of any of these conditions, with the exception of the child safety zone conditions as discussed in his cross appeal."). Instead, Meza asserts that "[n]one of these conditions were considered by the district court . . . ." Appellee's Br. 50.

The plain language of the district court's order belies Meza's reading. The court below noted that Condition X required Meza to not only participate in a sex-

offender treatment program and submit to polygraph examinations, but also to "avoid child safety zones, wear an electronic-monitoring device, and otherwise comply with sex-offender conditions." R.3078. Although the district court recognized that the argument had been made that "*Coleman* applies only to the treatment requirement of Special Condition X, not the entire condition[,]" it "disagree[d] and conclude[d] that *Coleman*'s due process requirement applies to any sex-offender condition imposed *and thus to all components of Special Condition X*." R.3087 (footnote omitted) (latter emphasis added).[21] The district court's erroneous determination that *Coleman* applies to all components of Condition X must be reversed.

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21. Meza is also incorrect when he argues that it is the "Condition X label, not the conditions themselves, which are unconstitutional, without a *Vitek/Coleman* hearing." Appellee's Br. 51. A determination as to whether due process is required cannot begin and end with the title ("Special Condition X") of the program under which specific conditions are imposed. This is borne out by the fact that the *Coleman* Court did not simply note that the petitioner was required to attend "sex offender treatment" and thereby find that compelled participation in treatment with such a title was sufficient to warrant due-process protection. Rather, the Court examined the nature of the treatment itself, and found that such treatment was "'qualitatively different' from other conditions which may attend an inmate's release." *Coleman*, 395 F.3d at 223. And 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) (per curiam). There, the Court observed that it had previously held "that the registration and therapy conditions implicated due process, but had no occasion to address other conditions.'" *Id*. at 333 n.2.

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.

In their opening brief, Appellants established that an analysis of the *Mathews* factors reveals that the district court erred when it held that the notice and opportunity to respond provided to Meza prior to the imposition of the sex-offender treatment conditions did not constitute sufficient due process. *See* Brief of Appellants at 28-43.[22] In response, Meza asserts that the district court correctly weighed these factors in determining that Meza was entitled to the type of protections set out in *Vitek v. Jones*, 445 U.S. 480 (1980). As shown below, neither the facts nor the law support Meza's position.

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

Meza argues that *Coleman* and *Coleman II* establish that there is a stigma attached to being labeled a sex offender and that, in part because of this, persons released to mandatory supervision have a liberty interest in freedom from sex-offender conditions such as compelled sex-offender treatment, regardless of whether

22. Appellants note that, effective June 12, 2009, the Parole Division enacted several changes to procedures followed when requesting the Parole Board to impose sex-offender conditions upon persons not convicted of a sex offense. They include providing individuals greater access to materials considered by the Parole Board when making its decision, changes in the form used to provide notice as to why sex-offender conditions are being considered, and not requiring a representative of the Parole Division to appear before the Parole Board to present each case. The current policy may be found at http://www.tdcj.state.tx.us/policy/parole/3.6.1_parole_policy.pdf. Except in instances involving a court order, this changed policy is not being applied retroactively to individuals who already had sex-offender conditions assigned to them.

such conditions are published. Appellee's Br. 34-35, 37-38. But the general existence of a liberty interest in avoiding such conditions is not at issue here. Rather, it is the weight of Meza's particular interest in avoiding these conditions that must be addressed. This requires an inquiry into the degree to which Meza has been "labeled" a sex-offender as a result of the requirement that he attend sex-offender treatment and to which that label stigmatizes Meza.

Requiring Meza to attend sex-offender treatment does not itself label Meza a sex offender to the community at large as would a requirement that he register as a sex offender. Perhaps this explains why this Court has indicated that sex-offender evaluation and possible treatment constitute a significantly lesser imposition on one's liberty interest than does sex-offender registration, which is not at issue here. *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); *United States v. Ybarra*, 289 F. App'x 726, 732 (5th Cir. 2008) (per curiam) (not designated for publication), *cert.denied*, 129 S. Ct. 751 (2008).[23] The cases cited by Meza in support of his assertion that "there is a significant interest in not being labeled a 'sex offender' by

23. *Jimenez* and *Ybarra* involved conditions of supervised release imposed by a judge. 275 F. App'x at 435; 289 F. App'x at 728, 730.

Texas" only serve to prove this point—they involved sex-offender registration requirements. *See Creekmore v. Attorney Gen. of Tex.*, 341 F. Supp. 2d 648, 666 (E.D. Tex. 2004) (characterizing an individual's private interest in avoiding onerous requirements of sex-offender registration as "large"); *Williams*, 2004 WL 1499457, at *6.

Further, Meza's claim that he "cannot find employment" nor "reside outside the [TCCC]" because of the "sex offender" label is not supported by the evidence. At the time of trial he had received three job offers while on mandatory supervision. R.3357. Meza alleges that one of those employers was informed that an armed parole officer would be present while he worked and "refrained from officially offering that job." *Id*. Meza claims he was not able to accept the other two offers because of the child-safety-zone condition which, as noted *supra* at 20, could be imposed on any person convicted of murder, regardless of whether there was a sexual element to the offense, and was indeed once imposed upon Meza as a SISP condition and later as a condition under O.06 as well as X. R.3358; D Ex. 1, p. 3; D Ex. 3, p. 9. And in any event, after trial Meza was able to find employment. Appellee's Br. 12 n.10.[24] Meza has not identified any employer who specifically refused to hire Meza because of a "sex offender label." As such, Meza's assertion that he "cannot find employment"

24. Though he no longer maintains this employment, his explanation for his discharge is wholly unrelated to any sex-offender condition. *Id*.

because of a "sex offender label" is mere speculation, entitled to no more weight than speculation that many employers will not hire him because he has been sentenced to imprisonment for aggravated robbery and possession of a deadly weapon in a penal institution, and pled guilty to the murder of a nine-year-old girl shortly after being released on parole.

Nor is Meza's contention that he cannot live outside the TCCC because of the "sex offender label" supported by the record. First, Meza could live with his mother if she did not periodically care for children under age 17 at her residence, R.3346-47, thus creating a conflict with a condition of Meza's release prohibiting him from unsupervised contact with children under 17 (a condition he does not object to). Second, the reason that the other available Travis County residential facility that the Parole Division contracts with cannot house Meza has nothing to do with any "stigmatizing sex offender label." The facility cannot accept sex offenders because it is too close to a school, and thus Meza could not live there because it conflicts with his child-safety-zone condition of release. R.3773. As noted above, the child-safety-zone condition may be imposed on any person, such as Meza, adjudged guilty of murder regardless of the possible existence of a sex offense.

And any interest Meza does have in avoiding any "stigma" that is attached to sex-offender treatment is lessened by the fact that Meza has received prison sentences for aggravated robbery, possession of a deadly weapon in a penal institution, and the

murder of a child, whom Meza has admitted to sexually assaulting during the course of that murder.[25] Taking into account all of Meza's circumstances, his interest in being free from sex-offender treatment as a condition of mandatory supervision cannot be deemed significant.

B. The Government's Interest Is Significant.

Meza does not contest that the State has a significant interest in identifying and rehabilitating sex offenders. Instead, he questions the administrative burden the State would shoulder if additional protections are provided, characterizing it as "relatively modest[.]" Appellee's Br. 46. But the evidence and common sense suggest otherwise.

Fox testified that there are 6,900 *Coleman*-eligible offenders currently incarcerated. R.3675-76. Obviously, that number will probably not remain static as future offenders will likely have *Coleman* issues as well. Fox and Janet Latham, a program specialist for the Parole Division, testified as to their estimates of the costs involved with the hiring of additional personnel for the Parole Board and Parole

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25. As suggested by this Court's characterization of sex-offender registration as "a significantly more serious deprivation of liberty" than sex-offender evaluation and possible treatment, *Jimenez*, 275 F. App'x at 442, the mere fact that one is required to attend some form of sex-offender treatment does not warrant a finding that he had a significant interest in avoiding such treatment. And this is particularly true in this case, where Meza objects to treatment involving uncomfortable discussion, but does not appear to complain of any *physically* invasive treatment (unless one considers a polygraph to be physically invasive treatment). *See* Appellee's Br. 35-36. Indeed, though not an issue on this appeal, it is noteworthy that an absence of physically invasive treatment could be grounds for finding that *Coleman* does not require any due process prior to imposing such sex-offender treatment. *See Coleman II*, 409 F.3d at 667 ("The dissent erroneously states that we have required pre-deprivation process whether or not invasive physical treatment is contemplated.").

Division, which combined would exceed one million dollars. R.3678, 3865, 3889-90. Meza takes issue with these figures, asserting that a number of offenders will likely not challenge the imposition of sex-offender conditions and appearing to suggest that the Parole Board could change its procedures such that existing personnel could handle the hearings. Appellee's Br. 46-48. The latter position would strain credulity—even the district court did not go so far, stating that it was "skeptical *so many* additional employees would be necessary to add elements to extant procedures." R.3090 (emphasis added). And common sense dictates that there is a significant difference in the administrative burden that will be borne by the government if it is compelled to move from a procedure involving review of documentation to the proceeding ordered by the court below at which, in potentially thousands of cases, an offender "will have the opportunity to be heard in person, represented by counsel, and to present documentary evidence in his support," and "an opportunity to call witnesses and confront and cross examine State witnesses" unless good cause exists not to present a particular witness. R.3095; *cf*. *Mathews*, 424 U.S. at 347 ("In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. . . . The parties submit widely varying estimates of the probable additional

financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial."). Thus, even if the additional cost of complying with the district court's order ends up somewhat lower than the estimates provided at trial, the government's interest in avoiding the parole-revocation-type procedures ordered by the court below would remain significant.

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

In their opening brief, Appellants established that the issue presented in *Coleman* hearings—whether the offender is "a threat to society by reason of his lack of sexual control[,]"—is one based on a "host of variables" that are both subjective and predictive in nature, and discussed Supreme Court precedent holding that, in such situations, additional procedural safeguards are of little benefit. Brief of Appellants at 39-41. Meza counters that an erroneous deprivation did in fact occur here because Meza's sex-offender therapist supposedly testified that he does not lack sexual control. Appellee's Br. 41-42. But the testimony only reflects that the therapist *believes* Meza has the "capacity to control his behavior" and has not "ever seen any indications from him that he lacks sexual control[.]" R.3479. That same therapist also testified that Meza still made thinking errors that affect a sex offender's ability to control himself:

Q. Okay. Let's talk about Mr. Meza's thinking errors. What thinking errors does he still have?

A. Specialist, power thrusting. These are two that are apparent. Rationalization, uniqueness. Those are three, four that Mr. Meza would be considered - -

Q. Okay.

A. - - to demonstrate.

Q. With those - - I understand that everyone has thinking errors, but whenever you're looking at sex offenders, which particular thinking errors do you - - give you concern about their ability to control themselves?

A. Any one can give permission to go out and commit some sort of an offense. So which one or two or three would cause concern? Perhaps rationalization, perhaps power thrusting would be two that would be of most concern concerning most offenders.

* * * *

Q. All right. The last time that you evaluated Mr. Meza, did he still have power thrusting as one of his thinking errors?

A. I don't recall specifically. It wouldn't surprise me if it was still included in that. That's a tough one for Mr. Meza to come to grips with.

R.3504-05. And the therapist made clear that he could not determine whether Meza 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 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 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.3478. In light of the foregoing it cannot be said that an erroneous deprivation occurred when Meza was required to attend sex-offender treatment as a condition of his release.

Meza futilely attempts to distinguish this case from *Hewitt v. Helms*, which teaches that the benefit of additional safeguards is less pronounced when the decision at issue is both subjective and predictive in nature. 459 U.S. 460, 474 (1983) First, contrary to Meza's assertion, *Coleman* matters do present an issue that is predictive in nature—does the individual present a threat to society? Second, while part of the *Coleman* inquiry calls for a determination as to whether the individual "lack[s] sexual control[,]" that determination is indeed subjective and, unlike the situation in *Vitek*, can be made without the aid of an expert medical opinion. *See Vitek*, 445 U.S. at 483 (statute authorized transfer "when a designated physician or psychologist finds that a prisoner 'suffers from a mental disease or defect' and 'cannot be given proper

treatment in that facility[.]'"). Indeed, if Meza had been convicted of a sex offense, the requirement that he be determined to constitute a threat to society by reason of his lack of sexual control would have been satisfied, and he would not have 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.

Meza's remaining arguments that he is at "great risk" of an erroneous deprivation are similarly ineffective. He notes that one individual who attended "dozens" of *Coleman* hearings could not recall the Parole Board discussing whether anyone "lacks sexual control[,]" and that there may have been an erroneous deprivation in another case, Appellee's Br. 41, but as discussed above, Meza has failed to show that *he* is at great risk of an erroneous deprivation. Meza claims the Supreme Court criticized a procedure similar to the *Coleman* hearing afforded Meza in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). But in

that case, unlike here, the individual was deprived of his property "without prior notice[,]" much less a pre-deprivation opportunity to respond. *Id*. at 47. Finally, without citing authority, Meza asserts that the *Coleman* hearing denied him a "touchstone of due process: the opportunity to examine and test the evidence against him." Appellee's Br. 45. But due-process requirements may be satisfied without requiring an opportunity to examine evidence. *See Wilkinson*, 545 U.S. at 219, 225-26, 230 (reversing the lower court's holding 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 since "[r]equiring 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").

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.

In their opening brief, Appellants established that Meza was not entitled to the amount of process required in situations involving parole revocation or involuntary transfer to a mental hospital. In response, Meza does not argue that the interests in this case are similar to those in a parole revocation hearing. But he does argue that the procedures in *Vitek* should be applied for two reasons: (1) *Coleman* is based in

part upon *Vitek*, and (2) the circumstances in *Vitek* are similar to those present before the Court. As shown below, both arguments miss the mark.

A. *Coleman* does Not Compel a *Vitek*-Type Hearing for Meza.

Meza contends that this Court in *Coleman* stated that the facts of that case were "materially indistinguishable from *Vitek*[,]" and that since the same liberty interests are at issue, the same procedures must therefore apply. See Appellee's Br. 31. But this ignores the meaning of the word "materially," which limits the applicability of the case to the issue before the Court at that time—whether a liberty interest existed.[26] With respect to that inquiry, the Court determined that both *Vitek* and *Coleman* involved "stigmatizing classification and treatment" without affording process, and that since the sex-offender treatment at issue in *Coleman* involved "intrusive and behavior-modifying techniques" it was "analogous" (not identical) to the treatment in *Vitek*. *Coleman*, 395 F.3d at 223. Whether a liberty interest exists in avoiding sex-offender treatment, however, is not at issue here.

Instead, this case requires an examination of the extent of the private interest involved. The difference between the two is illustrated by the Court's decision in *Eguia v. Tompkins*, 756 F.2d 1130 (5th Cir. 1985). In that case the Court considered a complaint by a former county justice of the peace that he failed to receive sufficient

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26. "Material" has been defined as "[h]aving some logical connection with the consequential facts" and "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential[.]" BLACK'S LAW DICTIONARY 998 (8th ed. 2004).

process before the county withheld his final paycheck. *Id*. at 1133-35. When analyzing the private interest involved, the Court noted the difference between the interest before it and that involved in a complaint regarding another deprivation of funds paid by the government:

> The plaintiff's interest in the receipt of a single paycheck for his last pay period and expense reimbursement for the month of December is substantial, but we cannot adjudge it to be of the same magnitude as the interest of a person "on the very margin of subsistence" in the receipt of government benefits. The Supreme Court's concern for the privation such persons might suffer from a loss of benefits weighed heavily in the Court's decision in *Goldberg v. Kelly* [397 U.S. 254 (1970)], which established a right to an evidentiary hearing before welfare benefits could be terminated. When the potential deprivation is less severe, less formal predeprivation procedures suffice.

Id. at 1138 (citation omitted). Then, the Court confirmed that even where the type of deprivation involved is identical, the particular circumstances involved may alter the weight accorded to the private interest in each situation:

> We observe, too, that withholding a single last paycheck does not present the same potential for the perpetuation of an erroneous deprivation as does the denial of salary or benefits to one whose employment or entitlement otherwise would have continued indefinitely.

Id. Thus, even if the liberty interest at issue in this case is identical to that in *Vitek*, that is not the end of the inquiry into the private interest affected—that inquiry requires looking at the particular circumstances of each case. And there are dramatic differences between the two cases that favor less process here. *See* Brief of

Appellants at 44-45 (noting differences between the challenged treatment in *Vitek* and that in the present case).[27]

And even if the private interest involved here was identical to that in *Vitek*, Meza is patently incorrect when he asserts that "because *Coleman* and *Vitek* present 'materially indistinguishable' liberty interests, the protections they provide must also be 'materially indistinguishable.'" See Appellee's Br. 32. This conclusion ignores the other factors considered when determining the amount of process due: (1) the risk of erroneous deprivation and benefits of additional safeguards; and (2) the government's interest. *Mathews*, 424 U.S. at 334-35. In *Coleman* this Court did not even mention these *Mathews* factors, much less analyze them so as to determine the amount of process due. Thus, *Coleman* does not in any way compel a holding that Meza was entitled to essentially the full spectrum of process afforded in *Vitek*.

B. Decisions By The Supreme Court, This Court, And The Texas Court Of Criminal Appeals Illustrate The District Court's Error In Requiring Essentially The Full Panoply Of Due-Process Protections Set Out In *Vitek*.

In their opening brief, Appellants discussed a number of cases involving either more significant private interests or greater benefits from additional process than

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27. In his response, Meza argues that his interest is greater than that of the plaintiffs in *Vitek* because he has been "released" to mandatory supervision, yet remains "incarcerated in a jail." Appellee's Br. 33. But his residence at the TCCC is not relevant to the analysis of his private interest in avoiding sex-offender treatment—there is no requirement that he reside at the TCCC during such treatment.

those involved in this case, yet where the courts required lesser due-process protections than those required by the court below. These cases included *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979), *Wilkinson*, 545 U.S. 209, *Boss*, 552 F.3d 425; *McDonald v. Boydston*, No. 93-1912, 1994 WL 242548 (5th Cir. May 24, 1994) (not designated for publication), and *Ex parte Geiken*, 28 S.W.3d 553 (Tex. Crim. App. 2000). Brief of Appellant at 49-53. Meza has no response to those cases. Not a single one of them is cited, much less distinguished or discussed in his brief. These cases make evident that, even if the procedures afforded Meza fell to some degree short of those required by the Constitution, the decision of the court below should be reversed and remanded so that it may enter an amended order significantly reducing the additional process that must be provided—for example, requiring only the addition of written reasons for a decision to continue to impose the sex-offender conditions at issue.

CONCLUSION

Appellants respectfully request that the Court affirm the decision of the district court dismissing without prejudice Meza's due-process and equal-protection claims related to the challenged non-sex-offender conditions, reverse the judgment of the district court that Appellants violated Meza's right to procedural due process by using the process then in place to impose sex-offender conditions, vacate the injunction against Appellants, and render judgment dismissing Meza's lawsuit.

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CERTIFICATE OF SERVICE

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