No. 09-50367

United States Court of Appeals
Fifth Circuit

Raul Meza
Plaintiff-Appellee

v.

Brad Livingston, Executive Director of the Texas Department of Criminal Justice, in his official capacity; Stewart Jenkins, Director of the Texas Department of Criminal Justice Parole Division, in his official capacity; and Rissie L. Owens, Jose Aliseda, 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
Defendants-Appellants

On Appeal from the United States District Court, Western District of Texas, Austin Division
(Civil Action No. 1:05-CV-1008-LY)

BRIEF OF APPELLEE/CROSS-APPELLANT RAUL MEZA

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellee/Cross-Appellant requests oral argument and believes oral argument would be helpful to the Court to understand the arguments presented by this appeal.

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BRIEF OF APPELLEE/CROSS-APPELLANT

The law required Appellants to release Plaintiff/Appellee/Cross-Appellant Raul Meza in 2002 from prison under mandatory supervision "for rehabilitation outside prison walls under such conditions and provisions for disciplinary supervision as the Board of Pardons and Parole may determine." Act of May 29, 1977, 65th Leg., R.S., ch. 347, § 1, art. 42.12, sec. 1, 1965 Tex. Gen. Laws 925. Despite this requirement, the State of Texas, through Defendants/Appellants Board of Pardons and Parole ("the Board"), and Texas Department of Criminal Justice Parole Division ("the Department") (collectively, "the State"), continues to incarcerate Mr. Meza in the Travis County jail. The State imposes conditions on

Mr. Meza's "release" that effectively prevent him from rejoining society "outside prison walls."

After a bench trial, the district court required the State to provide Mr. Meza a due process hearing before imposing sex-offender conditions on his release, because Mr. Meza had not been convicted of a sex offense. The judge relied on this Court's opinion in *Coleman v. Dretke* and required the State provide Mr. Meza "an appropriate hearing and find that he possesses this offensive characteristic [of lack of sexual control] before imposing [sex offender] conditions." 395 F.3d 216, 225 (5th Cir. 2004). The district judge, further, expressed certainty "the State will use the hearing and review process ordered . . . to reevaluate all of Meza's parole conditions and restrictions on his freedom … and consider such reasonable changes as will enhance Meza's opportunity to safely reintegrate into society." (R.3097.)

This appeal presents two issues: (1) did the trial court correctly determine Mr. Meza is entitled to a parole-revocation-type hearing before the state may impose sex-offender conditions, when Mr. Meza was not convicted of a sex offense; and (2) did the district court err by failing to order a similar immediate review of the non-sex-offender conditions that have imprisoned Mr. Meza for nearly seven additional years? Mr. Meza asks the Court to uphold the district court's order below as to the sex-offender conditions, and on cross-appeal, he asks

this Court require parole-revocation-type protections before the State may continue to impose non-sex-offender conditions, such as those that persistently confine him.

STATEMENT OF JURISDICTION

Mr. Meza does not contest Appellants' statement of jurisdiction.

The basis of the Court's jurisdiction over Mr. Meza's cross-appeal is identical. Mr. Meza brought suit challenging the process provided to him before the State can impose both sex-offender and certain non-sex-offender conditions on his mandatory supervision, pursuant to 42 U.S.C. § 1983. The final judgment, entered March 24, 2009, dismissed the non-sex-offender conditions claims without prejudice, after requiring the State to provide Mr. Meza with an appropriate hearing on the sex-offender conditions. The State filed its notice of appeal on April 22, 2009 and Mr. Meza filed his notice of cross appeal on April 24, 2009. Thus, this Court has jurisdiction over the cross appeal, pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Does Mr. Meza have a constitutional liberty interest in freedom from the conditions of his mandatory supervision which (a) require him to be accompanied by a parole officer at all times; (b) prohibit him from living outside of the Travis County Correctional Complex ("the jail"); and (c) prohibit him from entering any location within 500 feet of where "children commonly gather"? If so, what level of due process protections does the Constitution require before the State may impose these conditions?

2. Did the district court err by dismissing Mr. Meza's equal protection "class of one" claims, without prejudice, when the State treats Mr. Meza radically different from virtually all other people released on mandatory supervision, despite granting Mr. Meza substantially greater liberty when previously releasing him in 1993?

3. Did the district court properly find Mr. Meza is entitled to due process protections similar to those in *Vitek v. Jones*, 445 U.S. 480 (1980) (transfer from prison to psychiatric facility) before labelling him a "sex offender" and requiring him to participate in invasive, involuntary psychiatric therapy?

STATEMENT OF THE CASE

Mr. Meza largely agrees with the State's description of the trial proceedings. The trial court required the State provide Mr. Meza with a hearing before imposing "Condition X," Texas's "sex-offender conditions," on his supervision. The trial court found Condition X includes the following components:

- Participate in a sex-offender-treatment program;
- Be evaluated to determine the need for sex-offender counseling;
- Enroll and participate in a treatment program for sex offenders;
- Submit to polygraph examinations (as part of sex-offender treatment);
- Avoid child-safety zones;
- Wear an electronic monitoring device; and,
- Otherwise comply with sex-offender conditions.

(R.3078.[1])

Before imposing these conditions on Mr. Meza's supervision, the trial court required "the State afford Meza an appropriate hearing, including: (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 …; (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.3095.)

At trial, Mr. Meza also alleged three other conditions of his release,[2] as promulgated by the Board and enforced by the Department, prevent him from leaving the jail for more than a few hours each week, developing a "residence plan" to live outside the jail, securing employment, attending church in the community, and, for the limited times he is allowed outside the jail, escorting him everywhere with (often armed) parole officers. (R.2856-2860.)

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[1] Citations to "R.___" refer to particular pages of the district court record on appeal. Citations to "P.Ex. ___" or "D.Ex. ___" refer to the particular exhibits of Plaintiff or Defendants, respectively, admitted at trial.

[2] The complained of conditions are: (1) reside in the jail; (2) be accompanied at all times he leave the jail by a parole officers; and, (3) "child safety zone" conditions that prohibit him from entering within 500 feet of any place "children commonly gather."

As if the written conditions were not onerous enough, the Department chooses to enforce them in a manner that creates additional, severe restrictions on Mr. Meza's liberty. For example, while the Board requires Mr. Meza be accompanied by a parole officer every time he leaves the jail, the Department was only providing this escort for four hours per week, and only to accompany Mr. Meza to a job search program.[3] In addition to the relief granted at trial, Mr. Meza asks this Court to require the State provide him with due process and equal protection guarantees before imposing these three additional non-sex-offender conditions on his release.

STATEMENT OF FACTS

Mr. Meza pleaded guilty to murder in 1982. (R.2840.) At trial, he admitted he "feel[s] terrible" about his crime. "I feel I destroyed a life. I destroyed a family. … There's nothing I can do or say that can undo what I committed." (R.3344.) When he was convicted, Texas's "mandatory supervision" parole scheme required the State release any person when the sum of calendar time spent in prison plus good conduct time earned in prison equaled the total length of the sentence. (R.2840.) *See* Act of May 29, 1977, 65th Leg., R.S., ch. 347, § 1, art.

[3] After the trial, the State expanded the number of hours Mr. Meza is allowed to attend the job search program. He is now allowed to attend the program fifteen hours per week. The Department has also promised to allow Mr. Meza a once-a-month visit with his mother for one hour per month at her home.

42.12, sec. 1, 1965 Tex. Gen. Laws 925. Mr. Meza was sentenced to thirty years imprisonment for the crime. (R.2840.[4])

I. MR. MEZA'S 1993 RELEASE FROM PRISON ON MANDATORY SUPERVISION

In 1993, the law required Mr. Meza's release on mandatory supervision for the first time. (R.2840.) The Department admitted in a press release "mandatory supervision release is required by law, and there is no choice, discretion, or appeal in the matter." P.Ex.G, p.2.

For the first few weeks of his release, the Department shuttled him around Texas, transferring him from El Paso, to Wichita Falls, to San Antonio, to Mineral Wells (near Ft. Worth), to Brownfield (near Lubbock), to Sweetwater (near Abilene), to Baytown (near Houston), to Uvalde (west of San Antonio), and finally, to Austin. (R.3362-66.) Protestors picketed at Mr. Meza's homes in Uvalde, San Antonio, and El Paso. (R.3363-66.) There was intense media coverage of his release and odyssey around the state. (R.3367.) Mr. Meza filed lawsuits challenging his constant relocation. (R.3368.) Those cases settled, and he was allowed to live with his family in Austin. (R.3370.)

[4] While incarcerated in 1985, Mr. Meza committed the additional offense of possession of a weapon in a penal institution. (R.2840.) In 1989, Mr. Meza pleaded guilty to this additional offense, and four additional years were added to his sentence to run consecutively. *Id.* Mr. Meza's total sentence expires in 2016.

Following those settlements, Mr. Meza successfully worked and lived in the community for a number of months.

> I was able to go to church on Sundays. I was able to just do everything that a normal individual would be able to do during an everyday life. I was able to go to work and drive myself to work and back. I was able to occasionally go to the restaurants with my wife. I was able to go to the laundromat and take care of my special needs, to [go to] the doctor's office. (R.3367.)

Despite the intense scrutiny he faced from the State, the public, and the media, Mr. Meza was relatively successful at reintegrating. His parole officer, Jesus Zapata, told Mr. Meza there was "nothing exceptional" about his case and Zapata felt "the media was not giving [Mr. Meza] an opportunity to reintegrate." (R.3366.) The trial court found Mr. Meza "lived a relatively normal life within the community" between 1993 and 1994. (R.3077.)

Though Mr. Meza had a number of conditions placed on his 1993 mandatory supervision, the State did not require constant supervision by a parole officer; he was not required to live in a jail; nor was he prohibited from going within 500 feet of where "children commonly gather." Further, he was not required to participate in sex-offender therapy. *See* P.Ex.C, p.1-2.

In August 1994, Mr. Meza missed a curfew by fifteen minutes after a long day of work, and his mandatory supervision was revoked. (R.3361.) The State did not base his revocation on a new criminal offense. Rather, the revocation was for a

"technical violation" of failing to strictly comply with the curfew. *See* (R.3618.) The State returned Mr. Meza to prison for another eight years. (R.2841, 3077.)

II. MR. MEZA'S 2002 "RELEASE" FROM PRISON TO THE TRAVIS COUNTY JAIL

In September 2002, the mandatory supervision statute again required the State to release Mr. Meza from prison. (R.2841.) Mr. Meza's 2002 "release" from custody, however, bears little resemblance to the freedom he earned from 1993-1994. For almost seven years, Mr. Meza has lived in the Travis County jail. (R.3078.) The trial court described his living conditions:

> Meza resides in a bay of [the jail's] work-release section with other parolees, surrounded by a razor-wire fence. Meza testified that other bays in the work-release section house prison inmates, he has been in such bays, and they are identical to the bay in which he is housed. Meza must comply with [the jail's] rules, such as going to bed at 10:30 p.m. and rising at 5:00 a.m. When Meza leaves his residence bay, he must wear a jail uniform. Family may visit once a week, and visits are conducted through a glass partition by telephone. A [jail] resident may have one contact visit each month, at which he may hold hands with his guest. Meza's parole officer provides his daily schedule. When the Department allows Meza to leave the jail, it transports him in a cargo van equipped with an interior steel cage. The State throughout the trial argued Meza's living conditions do not amount to confinement; the court is unpersuaded. (R.3079.)

At trial, the State could identify only one other current parolee, out of approximately 78,000 parolees, whose release was similarly restrictive. (R.3561.) Between 2002 and the trial, the State released approximately 3,600 people on

mandatory supervision who were convicted of the same offense as Mr. Meza. (R.2843.)

The State placed a number of new and extremely onerous conditions on Mr. Meza's 2002 release. These conditions included:

- Shall reside in a community residential facility (halfway house) designated by the Department and shall comply with all facility rules and regulations in effect during his period of residence;[5]
- Shall not leave the jail without approval of supervising parole officer, nor unless under supervision of the Parole Division;
- Shall not go within 500 feet of places children commonly gather;
- Shall wear an electronic monitoring device at all times;
- Shall attend sex offender counseling;
- Shall participate in the Sex Offender Program; and,
- Shall otherwise comply with sex offender conditions.

(R.2841.[6]) The trial court found that the cumulative effect of these conditions is "the State has managed to keep Meza incarcerated since 2002, despite the fact that he is on parole and should be able to use this time to readjust to society before his sentence expires . . . ." (R.3096.)

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[5] The "halfway house" designated by the Department is the jail.

[6] In addition to these conditions, the State also imposed a large number of other conditions that are not at issue in this litigation. *See* P.Ex.A, p.1-9.

In 2005, the Department began to take Mr. Meza out of jail to visit Project RIO, a job search center, twice a week for up to four hours per day. (R.3080.[7]) Though a Department witness testified the State would "love" for Mr. Meza to find a job, (R.3832), the State did little to assist him find work. Mr. Meza is required to complete steps not required of other ex-convicts in order to have the Department approve a job offer. (R.3452-53.) The Department's parole officers tell Mr. Meza's potential employers he is a "sex offender," (R.3359), even though a specialist testified at trial it is more difficult for sex offenders to find work than for murderers. (R.3455.[8]) Similarly, the Department erected many barriers to Mr. Meza finding jobs, such as only taking him to look for a job at less than optimal times and requiring the Department chain of command review all job possibilities. (R.3081.) In 2007, Mr. Meza's attorneys complained when the Department declined to take him to have a urinalysis performed as part of a job application.

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[7] Project RIO, "Re-Integration of Offenders," is "a counselor that provides assistance in finding employment, as well as giving [ex-convicts] guidance in areas where they may be able to go in other areas, either training or mostly jobs." (R.3449.)

[8] Silvestre Villareal works for a program called Construction Gateway that teaches ex-convicts construction skills and helps them find employment. He testified it is more difficult for a sex offender to find a job than a murderer. (R.3455.) He taught Mr. Meza in a construction class, and since completion of the class, he has tried to help him find employment. (R.3451.) All of Mr. Meza's classmates found work after attending the program. (R.3455.) Villareal testified Mr. Meza works hard to find a job. (R.3451-52.) Though Villareal has worked with around 500 ex-convicts, including other murderers, he has not seen anyone who has had as difficult a time finding a job as Mr. Meza. (R.3454.) After completing his program, he has never seen anyone unable to find a job two-and-a-half years later, except for Mr. Meza. (R.3455.) Villareal uses Mr. Meza as an example to others in his program for his "perseverance, and he's trying to do the best." (R.3456.)

(R.3082.) The Department did not respond to counsel's complaints, and did not take him to have his urine tested. The trial court "question[ed] the sincerity of all assertions by the State that it desires Meza to find a job . . . ." (R.3096.)

Because Mr. Meza is indigent, he cannot form a "residence plan" without the assistance of the State or without finding a job to pay rent. (R.3446.) Rather than house him at a halfway house, the State houses Mr. Meza in jail. (R.3834.) A deputy director of the Department's Parole Division, Mike Lozito, testified Mr. Meza is ineligible to live in any Austin-area halfway house because the halfway houses will not accept "sex offenders." (R.3773.) The State even prefers to pay three times the cost of housing Meza in a halfway house to house him in the jail. *See* (R.3863.)[9]

Today, Mr. Meza remains unemployed and lives in jail, even though the law required his release almost seven years ago.[10]

III. THE STATE IMPOSED SEX OFFENDER CONDITIONS ON MR. MEZA'S RELEASE WITHOUT "A HEARING"

In 2004, this Court's *Coleman* decision required Texas to provide "a hearing" to determine if parolees who were not convicted of a sex offense "lack of

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[9] The State currently pays Travis County $40 per day to allow Mr. Meza to live in the jail (approximately $1,200 per month). (R.3863.) Lozito testified a private halfway house would charge between $400-500 per month to house someone like Mr. Meza. *Id*.

[10] Mr. Meza briefly found employment for three weeks during the summer of 2009, during the time his counsel was briefing his response to the State's motion to stay enforcement of the district court's judgment. Since that time, Mr. Meza lost his job because the employer could no longer allow the constant presence of the parole officer escorts in her office.

sexual control" before imposing sex offender conditions on their release. *Coleman*, 395 F.3d at 225. As the State previously imposed sex offender conditions on Mr. Meza's 2002 release without any due process when "releasing" Mr. Meza, in 2005, the State processed him through its *Coleman* "administrative review" process. (R.3555.)

The State's "administrative review" provides little procedural safeguards. Under the "administrative review" process, the Department gave Mr. Meza a document informing him the decision to impose sex offender conditions on his supervision was under consideration. *See* P.Ex.B. The Department never provided this notice to Mr. Meza's attorneys, even though the Department knew Mr. Meza was represented at the time.

After thirty days, the Department advised the Board that Mr. Meza's supervision should include sex offender conditions. The Department also made a presentation to the Board and provided the Board with documents, including Mr. Meza's parole file, a psychological evaluation of him, his polygraph test results, and a case summary detailing his social, educational, medical, institutional adjustment, and behavioral history. (R.3086.) The Department provided none of these documents to Mr. Meza or his attorneys; nor were they allowed to appear at

the presentation or make a presentation of their own. (R.3086.[11]) The Board made no written findings: no finding Mr. Meza "lacks sexual control" was made or even required. (R.3903-04.) The Department's sex offender program specialist testified, though she is present during "*Coleman* reviews," she has never heard the Board discuss whether a parolee "lacks sexual control." (R.3904.)

Given Mr. Meza's inability to contest the decision fairly, it is unsurprising the Board re-imposed sex offender conditions on his mandatory supervision.

SUMMARY OF THE ARGUMENT

On cross appeal, Mr. Meza argues the trial court erred by failing to require the State to provide him with due process before imposing three onerous conditions on his mandatory supervision: (1) the requirement he live in the jail; (2) the requirement that a parole officer escort him whenever he leaves the jail; and, (3) the condition that prohibits him from entering any place within 500 feet of where "children commonly gather." These three conditions, especially in combination, seriously restrict Mr. Meza's liberty as a person on mandatory supervision. The State provided no due process, not even its weak "administrative review," before imposing these conditions. Thus, the trial court erred by dismissing Mr. Meza's due process claims regarding these conditions.

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[11] In fact, the Department has *never* provided these documents to Mr. Meza. During this litigation, the Department asserted the so-called "parole file privilege," which makes all documents in a person's parole file confidential under state law. *See* Tex. Gov't Code § 508.313.

Similarly, Mr. Meza argues the district judge erred by dismissing his equal protection "class of one" claim. The State irrationally treats Mr. Meza radically different from the almost 78,000 other people released on mandatory supervision. Despite his relative success while released in 1993, the State now denies him the same liberty it afforded him in the past.

Nevertheless, the trial court correctly required the State to provide Mr. Meza a parole-revocation-type hearing before imposing sex-offender conditions, since Mr. Meza was not convicted of a sex offense. This Court required Texas provide "an appropriate hearing" to persons similarly situated to Mr. Meza in *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004). *Coleman* extensively relied on *Vitek v. Jones*, 445 U.S. 480 (1980), where the Supreme Court required parole-revocation-type due process protections on facts this Court found "materially indistinguishable" from *Vitek*. *Coleman*, 395 F.3d at 223. Thus, the trial court properly required the State provide Mr. Meza the same due process protections the Supreme Court mandated in *Vitek*.

STANDARD OF REVIEW

Issues of constitutional law are reviewed *de novo*. *United States v. Locke*, 482 F.3d 764, 766 (5th Cir. 2007). The trial court's findings of fact, however, are reviewed only "for clear error." *Lewis v. Quarterman*, 541 F.3d 280, 283 (5th Cir. 2008). The "clear error" standard "precludes reversal of a district court's findings

unless [the Court is] left with the definite and firm conviction that a mistake has been committed. … [An appellate court] may not reverse for clear error so long as the district court's findings are based on a plausible account of the evidence considered against the entirety of the record." *Rodriguez v. Bexar County*, 385 F.3d 853, 860 (5th Cir. 2004) (internal quotations and citations omitted).

CROSS APPEAL

I. THE DISTRICT COURT ERRED IN NOT GRANTING MR. MEZA A HEARING BEFORE ALLOWING THE STATE TO IMPOSE THREE NON-SEX-OFFENDER CONDITIONS ON HIS MANDATORY SUPERVISION.

The State failed to provide Mr. Meza any form of due process, not even its limited "administrative review," before imposing three onerous restrictions on his release unrelated to the sex-offender conditions this Court addressed in *Coleman*. The trial court erred by not requiring the State to provide Mr. Meza a due process hearing before: (1) requiring him to live in the jail for almost seven years following his mandatory release; (2) prohibiting him from leaving the jail without a parole officer escort; and (3) prohibiting him from entering so-called "child safety zones." These conditions are qualitatively different from the conditions of release imposed on people similarly situated to Mr. Meza, and create a significant hardship for him. To determine Mr. Meza has a due process interest in freedom from these conditions, the Court must: (1) find he has "a liberty interest in not having … conditions placed on his parole"; and (2) find the State failed to provide

"constitutionally sufficient procedures before imposing [the conditions]." *Coleman*, 395 F.3d at 221.

A. The Conditions on Mr. Meza's Release Implicate a Liberty Interest

This Court consistently recognizes people convicted under Texas's mandatory supervision regime, as enacted at the time of Mr. Meza's conviction, have a liberty interest in release from prison. "[T]here is a constitutional expectancy of early release created by Texas's mandatory supervision scheme in place prior to September 1, 1996 for earned good time credits." *Malchi v. Thaler*, 211 F.3d 953, 957-58 (5th Cir. 2000). "The liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a grievous loss on the parolee and often on others." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (internal citations omitted).

Even prisoners have a constitutionally protected "freedom from restraint[s]" which "impose[] atypical and significant hardship[s] on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). In *Coleman*, this Court applied this analysis to people released from prison on mandatory supervision. *Coleman*, 395 F.3d at 222. If a condition presents a "dramatic departure from the basic conditions of a parolee's sentence … the state must provide some procedural protections prior to its imposition." *Id*. (internal quotations omitted).

At trial, Mr. Meza proved the below conditions of his mandatory supervision are "dramatic departures" that "impose atypical and significant hardships" on his release.

1. Reside at the Travis County Jail

The district court explains how the State requires Mr. Meza to live in jail:

> Meza's parole conditions require he reside at [the jail] for the first 180 days of his parole. To leave [the jail] and reside elsewhere, Meza's parole conditions require he form a viable residence plan. To form a viable residence plan, Meza must demonstrate that he has the income to live elsewhere. To obtain income, he must secure employment. However, the restrictiveness of his conditions have prevented him from securing employment. The 180-day initial residency period has long since expired, but Meza remains in [the jail]. Theoretically, Meza's conditions do not prevent him from living in the community … but practically, his conditions prohibit him from leaving [the jail].

(R.3079.) The trial court found Mr. Meza is not "released" as required by law—he is still required to live in the jail. Mr. Meza is the only person in Texas "released" on mandatory supervision who is *de facto* required to live in a jail. *See* (R.3610.) Though other residential options exist in Austin, the State prefers to continue housing Mr. Meza at the jail. *See* (R.3773, 3863.)

The statute mandates release and "rehabilitation outside prison walls." Act of May 29, 1977, 65th Leg., R.S., ch. 347, § 1, art. 42.12, sec. 1, 1965 Tex. Gen. Laws 925. It is well-established a "constitutional expectancy of early release" exists for Mr. Meza. *See Malchi*, 211 F.3d at 957. For Mr. Meza, this "expectancy" has remained a mirage for almost seven years. The State has

"released" him from prison, only to require he live in a jail. Despite finding the State continues to confine him in jail when his release to be rehabilitated "outside prison walls," the District Court erred by not requiring the State to provide additional due process protections to Mr. Meza.

2. Special Condition 0.99 – The Parole Officer Escort Condition

If the condition Mr. Meza live in the jail were not burdensome enough, "Special Condition 0.99" prohibits him from leaving the jail without a parole officer escort. (R.3077.) At the time of trial, the Department only provided Mr. Meza with an officer-escort for eight hours a week. (R.3080.) The escort would have to accompany Mr. Meza in order for him to attend church, or visit with his family. (R.3816-17.) When Mr. Meza is taken from the jail, the escort drives him in a caged van. (R.3355.) The State could only identify one other parolee, besides Mr. Meza, who has ever had this condition. (R.3771-72.) The State currently supervises more than 78,000 people on parole or mandatory supervision.

The escort condition prevents Mr. Meza from enjoying the hallmarks of parole: an opportunity to be "gainfully employed and … free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey*, 408 U.S. at 482. Employers have refused to hire Mr. Meza because they cannot accommodate the escort. (R.3430-31.) The trial court found the Department, by refusing to provide an escort, "is inhibiting or preventing Meza's securing

employment." (R.3097.) At the time of trial, the Department had only provided an escort once to allow him to visit his family outside the jail. (R.3355.[12]) Mr. Meza is allowed only extremely limited opportunities to visit with his family at the jail. (R.3079.) Further, Mr. Meza essentially lacks privacy when allowed to leave the jail. Even if the State regularly provided the escort, nothing about this situation resembles the "normal life" *Morrissey* instructs parolees are entitled to.

3. "Child Safety Zones"

The State prohibits Mr. Meza from going within 500 feet of any place "children commonly gather," which includes, but is not limited to, schools, day-care facilities, playgrounds, public or private youth centers, public swimming pools, or video arcades. (R.2841-42.) These public place prohibitions can include stores, malls, and parks. (R.3549.) Someone subjected to "child safety zone" conditions cannot even pass in transit through an area within 500 feet of these areas. (R.3445.) No maps exist showing which areas are or are not within these exclusionary zones. (R.3803.) Rather, a parole officer must physically go to the location to determine whether an area is within these zones. (R.3803-04.) Mr.

[12] In 2007, Mr. Meza was allowed to visit his mother for one hour. He was accompanied by "at least six" parole officers. (R.3356.)

Meza has been prohibited from accepting employment because of these zones. (R.3080.[13])

Currently, a judge sentencing a criminal defendant to "community supervision" (probation) for certain offenses is required to impose child safety zone conditions.[14] *See* Tex. Code Crim. Proc. Art. 42.12, § 13D. The Board may currently, *but is not required to,* impose any condition permitted by Article 42.12 on a person's mandatory supervision. Tex. Gov't Code § 508.221 ("A parole panel *may* impose as a condition … any condition that a court may impose on a defendant placed on community supervision") (emphasis added). These conditions did not exist when Mr. Meza was convicted in 1982, or released for the first time in 1993. (R.3586.)

Thus, though "child safety zone" conditions may be "typical" for people convicted after 1997 when the current version of Texas Code of Criminal Procedure § 42.12 was enacted, they are decidedly "atypical" for people similarly situated to Mr. Meza — people convicted before the enactment of the current

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[13] The "child safety zone" conditions prevented Mr. Meza from accepting a clerical position in the tenth floor of an office building across the street from a "zone," and a construction job that would require him to pass through a "zone" to get to work. (R.3358.)

[14] "Community supervision" is "placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which: (A) criminal proceedings are deferred without an adjudication of guilt; or (B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part." Tex. Code Crim. Proc. Art. 42.12, § 2(2).

version of § 42.12. In *Coleman*, this Court found it significant the petitioner had "never had [an] original procedurally safeguarded opportunity to contest" imposition of sex-offender conditions. *Coleman*, 395 F.3d at 224, n.30 (internal quotations omitted). Similarly, Mr. Meza never had an opportunity to contest the arduous "child safety zone" conditions. Indeed, no "child safety zone" conditions were imposed on his 1993 release, permitting him considerably greater freedom.

Furthermore, this condition is extremely burdensome because it is inherently unknowable. Mr. Meza cannot know what areas might fall within a "child safety zone" because this determination is left entirely to the discretion of the parole officer who inspects the location on that particular day. "A penal statute is void for vagueness unless it 'defines the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement'." *Buckley v. Collins*, 904 F.2d 263, 266 (5th Cir. 1990) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

This Court has not examined what due process is required before imposition of "child safety zones" when the parolee was convicted before enactment of Article 42.12.[15] In a footnote in *Williams v. Ballard*, a habeas corpus action by a

[15] The Southern District of Texas held these conditions were not violative of the *ex post facto* clause in *Uresti v. Collier*, No. Civ.A. H-04-3094, 2005 WL 1515386, *7 (S.D. Tex. 2005), but did not examine whether any process was required before their imposition.

pro se inmate, the Court did discuss "child safety zones" in dicta, noting the zones were not considered under *Coleman*. *Williams v. Ballard* 466 F.3d 330, 332 n.2 (5th Cir. 2006). The Court noted, however, the petitioner did not challenge the trial court's conclusions regarding the zones because the *pro se* inmate failed to present the issue on appeal. *Id*. Thus the issue of whether someone convicted before the legislative creation of onerous "child safety zones" can be subjected to this condition without some due process is one of first impression.

4. The Conditions Restrict Mr. Meza's Liberty in Combination

Even if these conditions might be constitutionally firm individually, when combined they impermissibly restrict Mr. Meza's liberty. For example, even if it were permissible to require him to live in the jail, his liberty becomes unconstitutionally limited when he is only allowed to leave the jail when the Department deigns to provide an escort. Similarly, because the "child safety zone" condition has been used to prevent Mr. Meza from accepting employment, that condition also contributes to his *de facto* incarceration by preventing him from developing the "residence plan" necessary to live outside the jail. Theoretically, if the Department were to reasonably provide an officer to accompany him to leave the jail his freedom would be considerably greater. In reality, as the district court found, the cumulative conditions have allowed the State to "manage[] to keep Meza incarcerated … despite the fact that he is on parole . . . ." (R.3096.)

B. The State Failed to Provide Mr. Meza Any Process Before Imposing These Conditions

It is undisputed Mr. Meza received no process, not even an "administrative review," before these conditions were imposed. (R.2844-45.) If Mr. Meza has a liberty interest in freedom from continued confinement, the condition he reside at the jail, the parole officer escort condition, and the child safety zone conditions (alone or in combination), the State must provide him at least some process before imposing them.

Because the effect of these conditions is continued confinement, Mr. Meza is entitled to the protections required in *Morrissey*. Parolees are entitled to live under "condition[s] … very different from that of confinement in a prison." *Morrissey*, 408 U.S. at 482. "The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked." *Id*. "[T]he State has no interest in revoking parole without some informal procedural guarantees." *Id*. at 483.

Because the ultimate effect of these conditions on Mr. Meza — confinement at the jail — is the same as the effect of parole revocation, Mr. Meza is entitled to the same due process protections in a parole revocation hearing. *Morrissey* commands when a parolee faces revocation he is entitled to: "a) written notice of the claimed violations of parole; b) disclosure to the parolee of the evidence

against him; c) opportunity to be heard in person and present witnesses and documentary evidence; d) the right to confront and cross-examine witnesses … ; e) a neutral and detached hearing body … ; and f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Id*. at 489.

C. Conclusion: The District Court Erred in Dismissing Without Prejudice Mr. Meza's Non-Sex-Offender Condition Due Process Claims

The district court erred in not ordering the State to immediately provide him with due process before continuing to impose and enforce these conditions. The district court's "certaint[y] … the State will use the hearing and review process ordered today to reevaluate all of Meza's parole conditions and restrictions on his freedom" is insufficient. (R.3097.) The State must be required to immediately provide him due process or cease enforcing these conditions.

II. THE DISTRICT COURT ERRED IN DISMISSING MR. MEZA'S EQUAL PROTECTION CLAIMS WITHOUT PREJUDICE

The Supreme Court has held repeatedly the Equal Protection Clause creates a cause of action on behalf of a "class of one." *See, e.g.*, *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id*.

The Board's disparate treatment of Mr. Meza is irrational and vindictive.[16] In 1993, the law required Mr. Meza's release on mandatory supervision. The Board released him with much less restrictive conditions than were imposed in 2002. In fact, Mr. Meza could live in the community, marry, attend church, and hold a job, just like the hundreds of mandatory supervision releasees convicted of the same crime who are released each year.

Mr. Meza's 1993 release, however, was accompanied by a public firestorm. The Board and TDCJ were roundly criticized by politicians and citizen groups for following the law and releasing him. In fact, in 1993, Mr. Meza had to file suit against the state to ensure he was treated fairly.

In 1994, the Board revoked Mr. Meza's mandatory supervision after he was fifteen minutes late returning home after a long day of work, and he returned to prison. During his 1993 release, Mr. Meza did not commit any further violations of the penal code — he was sent back to prison for eight years for a "technical" violation.

Determined not to make the same "mistake" in 2002 when Mr. Meza's release was required again, the Board intentionally imposed the rigorous conditions that now prevent him from leaving the Travis County Jail. Troy Fox, the Board's designated representative, testified the Board considered Mr. Meza a "high profile"

[16] *See Mikeska v. City of Galveston*, 451 F.3d 376, 381 n.4 (5th Cir. 2006). *See also Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000) (Posner, J.).

parolee. (R.3570.) The Board was mindful of the 1993 protests when imposing Mr. Meza's 2002 conditions of release. *Id*. The district court found "there has been an outcry from the public" surrounding Mr. Meza's required release. (R.3576.)

Approximately 3,600 people who committed the same crime as Mr. Meza have left prison on mandatory supervision since Mr. Meza's 2002 "release." Fox only recalled a "handful" of inmates convicted of any offense in the past thirty years who had conditions of mandatory supervision as restrictive as Mr. Meza's. (R.3579.) Mr. Meza was the only current releasee Fox knew of with similarly restrictive conditions. *Id*. As heinous as his 1982 offense was, Mr. Meza was very successful while at liberty in 1993 — in addition to holding down a job and living in the community, he was convicted of no additional offenses at all.[17] (R.3618.) In fact, his 1993 parole officer told him he was no different from the many other parolees he supervised. (R.3366.)

Moreover, the State's restrictions on Mr. Meza's freedom contravene the purpose of the mandatory supervision statute — "rehabilitation outside prison walls." Act of May 29, 1977, 65th Leg., R.S., ch. 347, § 1, art. 42.12, sec. 1, 1965

[17] Though Mr. Meza, as a 15-year-old, committed an offense (aggravated robbery, where there were no allegations of sexual misconduct) in 1975 for which he was on parole when he committed the 1982 offense, he has not committed any violation of the law in 24 years, including the time he was released from 1993 to 1994. Further, his conduct while imprisoned since his re-incarceration in 1994 has been exemplary — if he had forfeited any "good conduct" time this litigation would not be taking place today because he would have lost his eligibility for mandatory supervision.

Tex. Gen. Laws 925. The State's actions regarding him are irrational because they thwart the intent of the legislature. A state's "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The State's classification of Mr. Meza has no "substantial relation to the object of the legislation" because the State continues to confine Mr. Meza in a jail — not rehabilitate him "outside prison walls."

The Board's disparate treatment of Mr. Meza is not based on a genuine concern for public safety, but is rooted in the political backlash against his 1993 release. A "bare desire to harm a politically unpopular group … [is] not [a] legitimate state interest[]." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985). Mr. Meza is indisputably treated radically differently than other similarly situated mandatory releasees, including other releasees convicted of similar crimes. This Court, however, does not need to consider how Mr. Meza is treated relative to other offenders — the State's current treatment of Mr. Meza is irrational because it treated *him* radically differently in 1993. In short, his current conditions exist because of public protest, not because of a genuine threat to the community.

RESPONSE TO STATE'S APPEAL

The district court correctly required the State to provide Mr. Meza a hearing similar to those required by the Supreme Court in *Vitek*. When this Court required Texas in *Coleman* to provide due process to people who were not convicted of a sex offense before subjecting them to sex-offender conditions of release, it relied heavily on *Vitek*. *Coleman*'s plain language required the State provide "an appropriate hearing" — not the secretive "administrative review" to which Mr. Meza was subjected. The district court correctly applied the Supreme Court's formula in *Mathews v. Eldridge*, 424 U.S. 319 (1975), in determining the "administrative review" was constitutionally infirm and requiring a *Vitek*-type hearing. Because the State labels him a "sex offender" Mr. Meza is unable to secure a residence outside the jail, and is required to undergo invasive, involuntary psychiatric treatment. The State assessed these conditions in a fundamentally flawed proceeding that failed to hold the State to the burden assigned in *Coleman*.

A. The Plain Language of Coleman Requires "An Appropriate Hearing"

Tony Ray Coleman was not convicted of a sex offense. When he was released from prison on mandatory supervision, Texas required him to register as a sex offender and undergo sex-offender treatment. *Coleman*, 395 F.3d at 219. The State provided no due process protections before imposing these conditions. *Id.* at 225. Mr. Meza's circumstances are identical.

Coleman filed a *habeas corpus* action challenging sex offender conditions when he had not been convicted of a sex offense. This Court held:

> [The State] 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 [State] must afford him an appropriate hearing and find that he possesses this offensive characteristic before imposing such conditions.

Id. This Court further emphasized it was requiring "a hearing meeting the requirements of due process." *Id*.

Coleman demands a more robust procedural protection than the "administrative review" Texas has since provided people like Mr. Coleman and Mr. Meza. The State, arguing "notice and a meaningful opportunity to be heard" satisfies due process concerns, relies on *LaChance v. Erickson*, 522 U.S. 262 (1997) and *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158 (5th Cir. 1969). Both are readily distinguishable.

In *LaChance*, the Supreme Court held government employees did not have a right to lie to investigators during adverse employment actions: "a meaningful opportunity to be heard" does not include "a right to make false statements with respect to the charged conduct." *LaChance*, 522 U.S. at 266. The employees' interest in lying to keep their jobs is far less than Mr. Meza's interest in release from the invasive sex offender conditions on his supervision.

Groendyke is even less persuasive. In that case, this Court held appellants had no right to oral argument in an appeal from a district court. The Court reasoned oral argument was unnecessary, in part, because a record had been developed in the district court for the Circuit to review. *Groendyke*, 406 F.2d at 1162. Moreover, appellate litigation does not constitutionally mandate oral argument in part because "the requisites of due process described as 'hearing' are satisfied by providing the parties with the opportunity of affirmatively advancing argument with supporting authority and a like opportunity for response and counter-argument by the adversary." *Id.* Mr. Meza did not have this opportunity. He never saw the evidence presented against him at the "administrative review." He never had an "opportunity for response and counter-argument." He never had the opportunity to call and cross-examine witnesses presumably available to the litigants in *Groendyke*.

Conversely, the district judge correctly required the State to provide Mr. Meza the same due process required by the cases analyzed in *Coleman*.

> [T]he facts of the present case are materially indistinguishable from *Vitek*. As in *Vitek*, the state imposed stigmatizing classification and treatment on Coleman without providing him any process. The state's sex offender therapy, involving intrusive and behavior-modifying techniques, is also analogous to the treatment provided for in *Vitek*.

Coleman, 395 F.3d at 223. The trial court correctly concluded because *Coleman* and *Vitek* present "materially indistinguishable" liberty interests, the protections they provide must also be "materially indistinguishable."

Aside from the plain language of the opinion and the reliance on *Vitek*, the burden *Coleman* assigns the State also strongly suggests *Vitek*-type hearings are required. *Coleman* requires the State prove Mr. Meza "constitute[s] a threat to society by reason of his lack of sexual control." *Id*. at 225. *Coleman* thus requires a factual finding. As the district court noted, "[t]he record in this case is utterly devoid of findings regarding Meza." (R.3093.[18]) Moreover, to fairly test this burden Mr. Meza needs the opportunity to review the evidence against him and cross-examine the State's witnesses.[19]

Moreover, denying rehearing in *Coleman*, a per curiam opinion noted the State never proved the sexual allegations against Coleman "in a criminal trial or other proceeding." *Coleman v. Dretke*, 409 F. 3d 665, 667 (5th Cir. 2005)

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[18] Indeed, Mr. Meza's treating sex offender therapist, Robert Butler, testified Mr. Meza does not lack sexual control. (R.3479.) Butler further testified Mr. Meza has no sexual interest in children, and "has the capacity to control his behavior." *Id.*

[19] For example, the sex offender therapist who treated and evaluated Mr. Meza at the time of his "administrative review," Vivian Heine, was unable to produce his file after it became lost in her garage. Tr. of Pre-Trial Hr'g of June 26, 2007, pp. 16, 21:24-23:3. Mr. Meza had subpoenaed Heine's records. The State failed to produce the file to the district court for *in camera* inspection because, as the district court noted, "I [got] a call telling me, well, perhaps there are copies of some of [the documents] already in the State's file and the rest of them may or may not be in somebody's garage." *Id*. p.31:18-20. Mr. Meza should be entitled to test the credibility of a "professional" who keeps official, confidential state records in her garage and cannot produce them despite a court order.

("*Coleman II*"). The full Fifth Circuit at least contemplated providing people like Mr. Meza even more robust protections than the district court required. A fair opportunity to conduct the fact finding *Coleman* requires demands nothing less.

In *Vitek*, the plaintiffs' interest was far slighter than Mr. Meza's. The *Vitek* plaintiffs objected to being transferred from prison to a psychiatric hospital without due process. Unlike Mr. Meza, the *Vitek* plaintiffs were already legally incarcerated in a prison — not "released" on mandatory supervision. The *Vitek* plaintiffs rightly objected to invasive, involuntary psychiatric treatment. Mr. Meza is suffering not only the invasive psychiatric treatment related to sex-offender counseling, he is also incarcerated in a jail.

The district court recognized "the Fifth Circuit relied on *Vitek v. Jones* in determining that parolees have a liberty interest in freedom from sex-offender treatment." (R.3092.) This Court made this reliance for an obvious reason: because the interests at issue are "materially indistinguishable" the procedural protections should be as well. The other circuits which have considered this question have also concluded people who were not convicted of a sex offense are entitled to stronger protections than the "administrative review" affords.[20]

[20] *See Neal v. Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997) ("an inmate whom the prison intends to classify as a sex offender is entitled to a hearing at which he must be allowed to call witnesses and present documentary evidence in his defense"); *Mariani v. Stommel*, 251 Fed. App'x. 536, 540 (10th Cir. 2007) (requiring same process as *Neal*). Two other district judges have also found the State's *Coleman* review process is unconstitutional. *Graham v. Owens*, A-08-CA-006-SS (W.D. Tex. Aug. 6, 2009) (order granting permanent injunction and requiring

B. The Mathews Factors Favor a Vitek-type Hearing

The Supreme Court stated in *Mathews v. Eldridge* "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." 424 U.S. 319, 333 (1976) (internal quotations and citations omitted). *Mathews* laid out a three-part test to determine the proper quantum of due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The district court correctly weighed these factors and determined Mr. Meza was entitled to *Vitek*-type protections.

1. Mr. Meza has a Strong Private Interest in Not Being Labeled a "Sex Offender" and Not Attending Sex Offender Therapy

This Court held in *Coleman* that people like Mr. Meza have "a liberty interest in freedom from the stigma and compelled treatment on which his parole was conditioned[.]" *Coleman*, 395 F.3d at 223. *Coleman* defines "stigma" as "a phenomenon creating 'adverse social consequences to the individual.'" *Id*. at n.27 (quoting *Vitek*, 445 U.S. at 492). "We can hardly conceive of a state's action

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State to provide meaningful hearing) (Sparks, J.); *Jennings v. Owens*, A-06-CA-990-RP (W.D. Tex. 2008) (Pittman, Mag. J., pursuant to 28 U.S.C. § 636(c)) (order granting plaintiff's motion for summary judgment).

bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender." *Id*. (citing *Neal*, 131 F.3d at 829). Several courts have held there is significant interest in not being labeled a "sex offender" by Texas.[21]

Mr. Meza cannot find employment or reside outside the jail because of the State's stigmatizing "sex offender" label. The district judge found employers will not hire Mr. Meza because his parole officers tell potential employers he is a sex offender. (R.3359.[22]) He cannot live outside the jail because other residential facilities in Travis County will not accept a "sex offender." (R.3773.)

Additionally, Mr. Meza must attend invasive, humiliating sex offender treatment. The State requires him to attend hour-and-a-half weekly group sex offender therapy. *See* (D. Ex. 15, p. 3.) To participate, he is required to waive confidentiality, allowing parole officers (who may or may not include his own

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[21] *See Creekmore v. Attorney Gen. of Tex.*, 341 F. Supp. 2d 648, 667 (E.D. Tex. 2004) (private interest in sex offender conditions is "large"); *Williams v. Ballard*, 2004 U.S. Dist. LEXIS 11857 (N.D. Tex. 2004) (Kaplan, Mag. J., recommendations), *adopted by* 2004 U.S. Dist. LEXIS 22260 (N.D. Tex. 2006), *aff'd in relevant part by* 466 F.3d 330 (5th Cir. 2006); *Branch v. Collier*, 2004 U.S. Dist. LEXIS 12386 (N.D. Tex. 2004).

[22] In its brief, the State posits the district court misconstrued Mr. Meza's testimony, and that the State may have ceased telling employers he was a sex offender when the State chose not to pursue requiring Mr. Meza to submit to the sex offender registry. This supposition is not "clear error" allowing the overruling of the district court's factual findings on appeal. Moreover, the deputy director of the Department's parole division, Mike Lozito, testified at the time of trial that Mr. Meza lives at the jail because "the only place we have in Travis County that will take an individual that has a sex offense is the [jail]." (R.3773.) Lozito's testimony indicates the State still labels Mr. Meza a "sex offender" despite not requiring him to register. Finally, Department policy requires parole officers to inform some employers and recommends other employers be "notified" a person is a "sex offender." (D. EX. 13, P. 11.) Because the Department policy labels everyone who has Condition X imposed on their release a "sex offender," the parole officers likely still inform potential employers Mr. Meza is a "sex offender." *See* (D. Ex. 12, p. 1.)

officer) to observe his therapy. (D. Ex. 15, p. 4-5.) An "observing officer" must "share information regarding offenders' participation in the group with other specialized officers." (D. Ex. 15, p. 5.) In front of a group of sex offenders, his therapist, and any "observing officers," Mr. Meza is required to discuss his sexual history, substance abuse history, "deviant cycle," and otherwise "disclos[e] appropriately in group." (D. Ex. 21, p. 2-3.) Department policy contemplates confidential medical matters, such as substance abuse, and mental illness, will be discussed during this therapy. *See* (D. Ex. 15, p. 6.) As part of the treatment, the State requires him to submit to an annual polygraph, and discuss candidly his sexual history "cover[ing] [his] lifetime prior to the most current sexual offense." (D. Ex. 15, p. 8.) Should he become employed, Mr. Meza must pay for this treatment. (D. Ex. 15, p. 4.)

In *Coleman*, this Court concluded "Texas's sex offender therapy program is 'qualitatively different' from other conditions which may attend an inmate's release." *Coleman*, 395 F.3d at 223. *See also Coleman II*, 409 F. 3d at 667 (Texas sex-offender program is "intrusive and behavior-modifying treatment"). Similarly, the Supreme Court recognized in *Vitek* that people have a liberty interest in protection from "compelled treatment in the form of mandatory behavior modification programs[.]" *Vitek*, 445 U.S. at 492.

Though the parolee in *Coleman* was required to register as a sex offender, and Mr. Meza was not, he is still "stigmatized" by the "sex offender" label. As the district court correctly noted, *Coleman* provides people like Mr. Meza "freedom from sex offender *classification* and conditions." *Coleman*, 395 F.3d at 222 (emphasis added). Regardless of whether or not he is required to register as a sex offender, the Department "classifies" Mr. Meza as one because the Board imposed "Special Condition X" on his release. *See* (D. Ex. 12, p. 1.) This classification creates stigmatizing "adverse social consequences" by preventing him from finding employment and housing.

Coleman II specifically rejected the State's argument that the stigma created by sex-offender treatment alone is insubstantial. Though the State argues Mr. Meza's "sex offender" label is not well known because (in part) the State does not list him on the sex offender registry, this Court observed "*Vitek* does not require publication to establish stigma."

> In fact, the plaintiff in *Vitek* had not been required to register the fact of his classification as mentally ill, and the Court nowhere indicated that his treatment providers would not keep his records confidential. The Court nevertheless found it 'indisputable' that commitment to the mental hospital alone could cause 'adverse social consequences to the individual' and stated that 'whether we label this phenomena 'stigma' or choose to call it something else, we recognize that it can occur and that it can have a very significant impact on the individual. Whether or not Coleman must now list his name on an official roster, by requiring him to attend sex offender therapy, the state labeled him a sex offender — a label which strongly implies that Coleman has been

> convicted of a sex offense and which can undoubtedly cause 'adverse social consequences.'

Coleman II, 409 F.3d at 668 (internal citations omitted). In fact, unlike the *Vitek* plaintiffs, Mr. Meza's treatment providers are expressly prohibited from keeping his records confidential — "observing officers" are required to attend his therapy sessions and discuss what goes on between him and his therapist. This Court determined in *Coleman II* these facts "are in line with *Vitek*'s stigma element." *Id*.

The State further incorrectly argues Mr. Meza is not "stigmatized" by the "sex offender" label because he admitted to committing a sex offense during sex offender therapy. He admitted to committing a sex offense because this admission is a requirement of participating in sex offender treatment. *See* (R.2840.) If Mr. Meza refused to make this admission in treatment, his mandatory supervision would have been revoked and he would have been returned to prison.[23]

Following the Supreme Court's opinion in *McKune v. Lile*¸ 536 U.S. 24, 38 (2002) (Kennedy, J.) (plurality opinion) this practice is constitutionally questionable at best (refusal to incriminate oneself in sex offender counseling may violate Fifth Amendment rights if doing so would "extend [one's] term of

[23] *See* Tex. Dep't of State Health Svcs., Council on Sex Offender Treatment, Treatment of Sex Offenders – Difference Between Sex Offender Treatment and Psychotherapy, http://www.dshs.state.tx.us/csot/csot_tdifference.shtm. The Court may take judicial notice of a state agency's website. *See Coleman II*, 409 F.3d at 667.

incarceration").[24] The State's argument that Mr. Meza suffers no stigma because he admitted to committing a sex offense in therapy places him in an unenviable Catch 22 — but for the State requiring him to participate in sex offender therapy, he would not have been required to admit to the sex offense, now allowing the State to argue he has little interest in not participating in sex offender therapy because he confessed to a sex offense in therapy.

Moreover, even if the sex offender label itself were not stigmatizing, the treatment requirement alone is an invasion of a protected liberty interest. This Court noted people, who were not convicted of a sex offense, have a protected interest in "freedom from the stigma *and* compelled treatment." *Coleman*, 395 F.3d at 223 (emphasis added). In *Vitek*, the Supreme Court held while "a criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, … they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections." *Vitek*, 445 U.S. at 493-94. A liberty interest attaches to both components.

Mr. Meza's interest in freedom from these conditions is far weightier than the interests in the cases relied on by the State. The State improperly relies on

[24] Justice Kennedy wrote for a plurality of four justices: Scalia, Thomas, Rehnquist and himself. Justice O'Connor joined in the judgment, while Justices Stevens, Breyer, Souter, and Ginsberg would have found requiring confessions as part of sex-offender treatment unconstitutional in any circumstance.

Hewitt v. Helms, 459 U.S. 460 (1983), a prison disciplinary case where the plaintiff argued the process he was provided before placement in administrative segregation was insufficient. The Supreme Court determined the plaintiff's "private interest is not one of great consequence" because "[h]e was merely transferred from one extremely restricted environment to an even more confined situation." *Id*. at 473. The Court specifically noted "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." *Id.* at 468.

The contrast between *Hewitt* and *Coleman* is striking. In *Hewitt*, the Supreme Court found the liberty interest insubstantial because administrative segregation was an anticipated part of prison life. In *Coleman*, the Fifth Circuit found "Texas's sex offender therapy program is 'qualitatively different' from other conditions which may attend an inmate's release." *Coleman*, 395 F.3d at 223 (citing *Morrissey*, 408 U.S. at 478). Of course, Mr. Meza is (theoretically) free from the type of confinement inherent to the circumstances involved in *Hewitt*.

2. The "Administrative Review" Creates a Great Risk of an Erroneous Deprivation

Coleman mandates sex-offender conditions can only be imposed on the parole of someone who was not convicted of a sex offense after the person is shown to be "a threat to society by reason of his lack of sexual control." *Id*. at 225. The current "administrative review" process does not require the Board to make

such a finding. Janet Latham, the Department's sex offender program specialist, who has attended dozens of "administrative reviews," could never recall the Board even discussing whether *anyone* "lacks sexual control." (R.3904.)

Another judge hearing a case challenging the State's current *Coleman* "administrative review" process found "the undisputed evidence establishes (unbelievably) that ***never*** in the entire *Coleman* process was a knowing, explicit finding made by anybody that [the plaintiff] constituted a threat to society by reason of his lack of sexual control." *Graham v. Owens*, A-08-CA-006-SS, at 5 (W.D. Tex. Aug. 6, 2009) (emphasis in original). The district court's requirement that the Board make such a finding ensures erroneous deprivations will not continue.

Moreover, an erroneous deprivation actually occurred in Mr. Meza's case because his state-assigned sex-offender therapist testified Mr. Meza *does not* "lack sexual control."

> Q: From your observations of Mr. Meza, do you believe he presently lacks sexual control?
>
> A: I believe Mr. Meza has that capacity to control his behavior, yes.
>
> Q: Yes, you believe that he has the capacity to control his behavior, just to clarify?
>
> A: Yes.

Q: Have you ever seen any indications from him that he lacks sexual control?

A: No.

(R.3479.) Because the "administrative review" does not allow Mr. Meza to call witnesses in his defense, or to cross-examine State witnesses, he never had the opportunity to present this evidence to the Board.[25] Though it is true Mr. Meza committed a terrible crime over 27 years ago, when he was just 22 years old, the undisputed testimony at trial was he no longer "lacks sexual control." The procedures required by the district court would allow him to correct this erroneous deprivation.

Butler's testimony further shows why adversarial hearings are required when making the subjective determination someone "lacks sexual control." The Supreme Court specifically found "it is precisely 'the subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings." *Vitek*, 445 U.S. at 495.[26] In considering the issue of what process is due before requiring sex offender registration, the Massachusetts Supreme Judicial Court recognized

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[25] The risk of an erroneous deprivation is magnified when one considers the sex-offender therapist the State relied on in 2002 when imposing Mr. Meza's sex-offender conditions was unable to produce these records because they were lost in her garage. *See supra* n. 19.

[26] *See also Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) ("Psychiatry is not, however, an exact science. … Perhaps because there is often no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party").

"uncertainties surround many aspects of the subject of sex offender recidivism." *Doe v. Attorney Gen.*, 715 N.E.2d 37, 44 (Mass. 1999). This problem is amplified by the State's failure to make the "lack of sexual control" finding required by *Coleman*. *See also United States v. Jimenez*, 275 F.App'x 433, 442 (5th Cir. 2008) (vacating requirement criminal defendant register as sex offender when no evaluation by sex offender therapist existed).

The Supreme Court criticized a procedure similar to Texas' "administrative reviews" in *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993). The Court specifically held "[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. … No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Id*. at 55 (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951)). The "administrative review" is, in essence, such a "secret, one-sided determination of facts decisive of rights." Mr. Meza was informed the review would take place, but was not given an opportunity to see the evidence against him or "an opportunity to meet it." He was not allowed to attend the proceeding, and could not cross-examine his accusers.

The State's reliance on *Hewitt* is again misplaced because both the circumstances and nature of the inquiry in this case are fundamentally different. *Hewitt*, an internal prison disciplinary case, required the Court to balance several

factors not at issue here, such as the "volatile atmosphere of a prison," and "protect[ion] [of] possible witnesses." *Hewitt*, 459 U.S. at 474, 476. In *Wolff v. McDonnell*, the seminal Supreme Court case on internal prison due process protections, the Court specifically drew a distinction between prison and parole due process protections. Unlike prison disciplinary proceedings, which "take place in a closed, tightly controlled," parole proceedings "do not themselves threaten other important state interests, parole officers, the police, or witnesses." *Wolff v. McDonnell*, 418 U.S. 539, 561 (1974). *Hewitt* also did not present issues regarding the "subtleties and nuances of psychiatric diagnoses" at issue in *Vitek* and *Coleman*. Moreover, the inquiry in *Hewitt* was largely predictive. The inquiry *Coleman* requires — does Mr. Meza presently lack sexual control? — is not. *Coleman* does not call for a prediction of "future dangerousness" — it mandates a present determination of whether Mr. Meza "lacks sexual control."

Similarly, the State unsuitably relies on *Ex Parte Campbell*, 267 S.W.3d 916 (Tex. Crim. App. 2008), to contend the "administrative review" is adequate due process. The majority of the opinion is spent discussing whether the Board has the statutory authority to impose sex offender conditions *at all* on a man who was not convicted of a sex offense, not whether the process he was provided before such an imposition was constitutional. The petitioner's due process argument was disposed of in a scant two paragraphs, where there is no indication the required *Mathews*

analysis was conducted. *Id*. at 926. The Texas Court of Criminal Appeals appears to be reconsidering this portion of the *Campbell* decision. In a recent unpublished order in *Ex Parte Williams*, No. 2003-CR-6219-W (Tex. Crim. App. Aug. 19, 2009), the Court of Criminal Appeals remanded a writ challenging imposition of sex-offender conditions when the parolee had not been convicted of a sex offense for the trial court to find "whether Applicant was given an opportunity to contest the validity of the conditions at a hearing, and, if so, shall detail when such hearing was held." In contrast, the two other federal judges who have examined this issue and actually performed the required analysis concluded the "administrative review" process was unconstitutional. *Graham v. Owens*, A-08-CA-006-SS (W.D. Tex. 2009); *Jennings v. Owens*, A-06-CA-990-RP (W.D. Tex. 2008).

Finally, the district court required the State to disclose to Mr. Meza the evidence that will be presented to the Board before deciding if he should be labeled a "sex offender." Mr. Meza never had the opportunity to view any of the evidence presented against him at the "administrative review." (R.2843.) Because he was not permitted to attend the "administrative review" in person, he never was able to learn what evidence the Board relied upon. *See* (R.2843, 3904.) Even during this litigation, the Board refused to produce this evidence. Thus, the "administrative review" denied Mr. Meza a touchstone of due process: the opportunity to examine and test the evidence against him.

3. The State's Interest in the "Administrative Review" Process is Insubstantial

The district court correctly decided the fact issue that "affording additional procedural protections to Meza and others similarly situated would not be a significant burden on the State." (R.3090.) The trial judge was "skeptical" the burden on the State would be very extensive. (R.3090.) Absent "the definite and firm conviction that a mistake has been committed" the district court's assessment should stand. *See Rodriguez*, 385 F.3d at 860.

At trial, the State only argued it would incur costs and administrative burdens if Mr. Meza was granted an appropriate hearing. "Inadequate resources can never be an adequate justification for depriving any person of his constitutional rights." *Smith v. Sullivan*, 553 F.2d 373, 378 (5th Cir. 1977) (citing *Rozecki v. Gaugham*, 459 F.2d 6, 8 (1st Cir. 1972)).

The State argues it has a great interest in supervising sex offenders, *not* that providing a hearing to people like Mr. Meza is itself overly burdensome. The State does have a significant interest in supervising people convicted of a sex offense upon their release on parole. It does not automatically follow, however, this interest is so great it overrides the relatively modest administrative burden that would be created by requiring due process before imposing sex-offender conditions on people not convicted of a sex offense. Testimony at trial showed the State annually conducts more than 30,000 parole revocation hearings similar to

what the district court required the State provide Mr. Meza. (R.3559.) In contrast, only 2,000 total people presently have sex offender conditions imposed on their release, the majority of whom were presumably actually convicted of a sex offense. *See* (R.3558.)

The cost figures cited by the State presumed the *Coleman* hearings would be conducted in substantially the same manner as the present "administrative reviews" — with a "program specialist" making a presentation to a complete panel of the Board in Austin, rather than a parole officer making a presentation to a hearing officer as occurs in 30,000 parole revocation hearings each year around the State without a Board panel present. The district court did not require what the State speculates.

The Board's administrator, Troy Fox, admitted at trial the Board never considered another method for conducting *Coleman* reviews. (R.3733.) Fox was unable to explain why the Board could not conduct hearings under Texas Government Code § 508.0441(c), which allows the Board to adopt procedures "relating to … the conduct of a parole or mandatory supervision hearing; or conditions to be imposed on a releasee." (R.3734-35.) Under this section, the State could easily conduct the *Coleman* hearings required by the district court in the same manner as the 30,000 parole revocation hearings are conducted each year. A State witness admitted there was no compelling reason parole officers could not

fulfill the role of the program specialists. (R.3895.) The State offered no evidence or argument at trial why it had a particularized interest in the *Coleman* process hypothesized. If a parole revocation hearing is sufficient to protect both a parolee's liberty and the State's interest in revoking parole, the same process (as envisioned by the district court) is sufficient for *Coleman* hearings.

The trial court's skepticism was well-founded about the burden on the State. The State has identified 6,900 total people with a "*Coleman* issue" — people on whom the State would like to impose sex offender conditions but were not convicted of a sex offense. (R.3676.) Of these, the Board could not estimate how many would actually be released each year and need to be reviewed. (R.3723.) Fox testified he could not "even begin to guess" when these people would even become eligible for release from custody, and admitted some may not be eligible for twenty years. (R.3724-25.) No empirical evaluation was conducted over time to determine which people would be eligible for parole on what timetable. (R.3726.) Moreover, Fox conceded between "50 and 100 percent" of people notified the State is seeking to impose sex offender conditions on their release never reply. (R.3729.) This reality would cut the State's costs estimates in half. (R.3729.) In short, the State's cost estimates were not based on "projections of how many people of the 6,900 over that ten, 20 years" would actually become eligible for release and actually request a hearing. (R.3727-28.)

Moreover, Mr. Meza is not asking for a hearing for all 6,900 people. He seeks only a hearing for himself. The district court did not require 6,900 hearings — it required one. The State could not answer what the cost of a single hearing would be. (R.3899.) In fact, in a similar case, a district judge recently ordered the State to provide another person a hearing similar to what was required for Mr. Meza. *See Graham v. Owens*, A-08-CA-006-SS (W.D. Tex. Aug. 6, 2009). Moreover, the costs of providing a single hearing to Mr. Meza are *de minimis* when compared to the cost of requiring a parole officer to accompany Mr. Meza at all times, and housing him in the jail.

Finally, the State also has an interest in making sure parole determinations are fair. "Society … has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions." *Morrissey*, 408 U.S. at 496. The State's interest in fair *Coleman* proceedings is identical. In balance with the district court's factual finding the procedures ordered would not constitute a "significant burden," (R.3090), the State's slight burden is not strong enough to trump Mr. Meza's constitutional rights.

C. The State Misreads the District Court's Opinion to Require Due Process Protections Before Any Component of Condition X is Imposed

The district court only required the State to provide Mr. Meza *Vitek*-type due process protections when some components of "Condition X" are imposed. The

State is correct that many restrictions on Mr. Meza's supervision are identified as part of "Condition X," the State's sex offender conditions. The State cherry picks some of these components for scrutiny, such as conditions prohibiting Mr. Meza from interacting with children under age seventeen, leaving his county of residence, participating in volunteer activities, attending school, operating computer and photographic equipment, avoiding adult businesses, submitting to random searches, abiding by electronic monitoring, obeying a curfew and avoiding the guardian of his victim. None of these conditions were considered by the district court, and are certainly not the core components of Condition X considered in *Coleman*. 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.

At trial, a deputy director of the Department's parole division testified Mr. Meza was subject to an array of overlapping conditions. (R.3769-70.) These are the conditions the State now argues are part of Condition X.

In fact, the district court only examined the elements this Court concluded in *Coleman* were "qualitatively different" from typical conditions of parole. The district judge carefully laid out the various conditions imposed on Mr. Meza, including the conditions that were imposed both as part of Condition X and the remaining overlapping conditions. (R.3078.) Both Condition X and the Super

Intensive Supervision Program (SISP), for example, require Mr. Meza to, among other things, avoid "places children commonly gather" and wear an electronic monitor. (R.3078.) The district court found "the Board purposely overlaps certain conditions … so that there will be a backup in case the State ever withdraws SISP as a condition." (R.3077-78, n.9.) These conditions do not label Mr. Meza a "sex offender" because they can be, and have been, imposed under the SISP program.[27] Even if the district court determined these overlapping conditions could not be imposed as part of Condition X without due process, the State would still be permitted to impose these conditions on Mr. Meza as part of the SISP program. It is the Condition X label, not the conditions themselves, which are unconstitutional, without a *Vitek*/*Coleman* hearing.

A fair reading of the district court's order only requires the State to provide due process to Mr. Meza before the State requires him to: (1) participate in a sex-offender treatment program; (2) be evaluated for sex-offender counseling; (3) submit to polygraph examinations; and (4) generally label him a "sex offender." Mr. Meza would not object to such a reading. If the other conditions the State

[27] *See* P.Ex. 1. For example, the SISP condition requires Mr. Meza to "not reside with, contact or cause to be contacted, any person under seventeen (17) years of age or younger without approval of the supervising [parole] officer." Condition X prohibits him from "hav[ing] unsupervised contact with children under 17 years of age" unless "the supervising parole officer shall approve the supervision of the contact." The *only* components of Condition X that are not otherwise imposed on his release are "participate in the sex offender program," "be evaluated to determine need for sex offender counseling," and "not enroll in, attend, or enter an institution of higher learning … without Board panel approval." The prohibition on attending "institutions of higher learning" was not challenged by Mr. Meza or considered by the district court.

identifies cannot be imposed without due process under the district court's order, it is because the State assigns these conditions the label "sex-offender conditions" — not the subject matter of the conditions themselves. *See* (R.3087.) At most, the State is merely required to re-label these conditions "SISP" (or anything other than "Condition X") since these conditions would be placed on Mr. Meza's release under an SISP theory in either case.

Finally, Mr. Meza's *cumulative* conditions are indisputably "qualitatively different" than those imposed on all but a small handful of other parolees. Even if a condition were permissible in isolation, in Mr. Meza's case the combined conditions are restrictive enough that due process protections are warranted. The district court correctly refused to examine the individual conditions in isolation — thus the court's "certain[ty] that the State will use the hearing and review process ordered today to reevaluate all of Meza's parole conditions and restrictions on his freedom." (R.3097.)

D. The Eleventh Amendment Does Not Protect Department Officials from Mr. Meza's Claims

The Department, through its officials Livingston and Jenkins, is a proper party to provide redress to Mr. Meza. The Department argues in a footnote an Eleventh Amendment bar exists to his claims for injunctive relief. Under the *Ex Parte Young*, however, Mr. Meza can seek injunctive relief against state officials in their official capacity without violating an Eleventh Amendment bar. *See Will v.*

Mich. Dep't of State Police, 491 U.S. 58, 71 (1989); *Ex Parte Young*, 209 U.S. 123, 159-60 (1908).

The Department played a significant role in imposing sex offender conditions on Mr. Meza without due process. As the district court recognized "the Department and the Board are Texas state agencies that work closely together." (R.3076-77.) When asked to explain the difference between the Board and the Department, the Board's administrator conceded that was "not as easy to answer." (R.3682.)

Many of the functions the Department fulfills are critical to the relief ordered by the district court. Among other things, the Department gave the deficient notice to Mr. Meza, and collected the evidence presented against him to the Board (from a file the Department, not the Board, has access to).[28] (R.3686.) Similarly, as the Department is responsible for Mr. Meza's "supervision," its involvement would be required to allow Mr. Meza to actually appear at the hearing. *See* Tex. Gov't Code § 508.112. As the Department controls the assignments of the parole officer escorts, the Board cannot fulfill this requirement

[28] Fox testified at deposition the Department, not the Board, has custody of Mr. Meza's file. Deposition of Troy Fox, 11:8-13. The Board cannot be required to produce the relevant portions of Mr. Meza's file, as it does not have custody of the file. *See also* Tex. Dep't of Criminal Justice, Central File Coordination Unit, *available at* http://www.tdcj.state.tx.us/parole/parole-central-file-coord-unit.htm ("The Central File Coordination Unit coordinates the movement and maintenance of approximately 257,735 case files of offenders under Parole Division jurisdiction…").

without Department cooperation. *See* (R.2842.) Similarly, the Department is responsible for "the activities necessary to identify and conduct parole reviews," including "gather[ing] all pertinent data available for each offender … and complet[ing] detailed Case summaries of the offender's social, criminal, medical, psychological, institutional adjustment, and alcohol and drug histories. The Board … uses this report as the primary source document in the parole decision-making process."[29] Mr. Meza could not receive the required relief from the Board alone. Unless there is "clear error," the district court's finding that the Department plays a role in the violations of Mr. Meza's civil rights should stand.[30] By suing the officials, as he did, Mr. Meza, under *Will* and *Ex Parte Young*, effectively reaches the Department.

CONCLUSION

For these reasons, Mr. Meza asks this Court to affirm the district court's judgment regarding the quantum of due process he is entitled to under *Coleman*. Mr. Meza further requests this Court to reverse the district judge's decision to dismiss his remaining due process and equal protection claims without prejudice, and enter a judgment requiring the State to provide the same due process

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[29] Tex. Dep't of Criminal Justice Parole Div., "Review and Release Processing," *available at* http://www.tdcj.state.tx.org/parole/parole-rvwrelease.htm (last updated March 18, 2009).

[30] Moreover, for purposes of the cross appeal, the Department is even more central. It is the Department, not the Board, which allocates the parole officer "escort" to Mr. Meza, and decides when and under what conditions the escort will be available. (R.2842.)