**No. 09-50367**

United States Court of Appeals
Fifth Circuit

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Raul Meza
Plaintiff-Appellee

v.

Brad Livingston, Executive Director of the Texas Department of Criminal Justice, in his official capacity; and David Gutierrez, Charles Aycock, Conrith Davis, Jackie Denoyelles, Juanita Gonzalez, Rissie L. Owens, Stuart Jenkins, and Thomas Leeper, in their official capacities as members of the Texas Board of Pardons and Paroles
Defendants-Appellants

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

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# CROSS REPLY BRIEF OF APPELLEE/CROSS-APPELLANT RAUL MEZA


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For the past seven years, Appellants/Cross Appellees the Texas Board of Pardons and Paroles ("the Board") and the Texas Department of Criminal Justice Parole Division ("the Department") (collectively "the State") have imprisoned Appellee/Cross Appellant Raul Meza in the Travis County Jail, even though his release on mandatory supervision was required by law in 2002. The State imposes and enforces conditions on Mr. Meza's release that *de facto* extend his

incarceration without providing him due process, and in violation of his equal protection rights.

## I. THE ATYPICAL CONDITIONS OF RELEASE IMPOSED ON MR. MEZA CREATE A SIGNIFICANT HARDSHIP

Despite Mr. Meza's relative success when he was released on mandatory supervision in 1993, the State imposed three extremely onerous restrictions on his liberty when his release was again required in 2002 that effectively prevent him from leaving the jail: 1) Mr. Meza is required to live in the jail until he can form a viable "residence plan"; 2) Mr. Meza is only allowed to leave the jail under the escort of a parole officer; and, 3) Mr. Meza cannot enter, be near, or travel past any location arbitrarily determined to be somewhere "children commonly gather." These conditions "exceed[] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause" and are "atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

### *A. Requiring Mr. Meza to live in the jail for seven years is an atypical and significant hardship*

The State has required Mr. Meza to live in the Travis County Jail for over seven years. The State maintains this condition on his mandatory release is not "atypical" because some other *pro se* parolees have unsuccessfully argued a

requirement they live in a *halfway house* after their release is unconstitutional.[1] The district court was "unpersuaded" that the facts surrounding Mr. Meza's residence at the Travis County *jail* "[did] not amount to confinement." (R. 3079.) The judge specifically found Mr. Meza lives in a residence bay of the jail "identical" to where "prison inmates" are housed, must comply with jail rules, must wear a jail uniform when he leaves the residence bay (such as to attend worship services, see visitors, or confer with his attorneys), and has very limited opportunities to visit with his family. *See id.* When Mr. Meza is allowed to leave the jail, he is transported in a caged van. *Id.* There is a fundamental difference between the halfway houses for parolees in the cases cited by the State and the jail where Mr. Meza lives.

The parolees in the State's cases also complained about much shorter periods of confinement. The parolees in each of these cases appear to have the same written conditions as Mr. Meza — that he reside at the jail for the first 180 days of his release. *Id.* Mr. Meza's complaint is not strictly with how these conditions are written in his certificate of mandatory supervision — it is with how

[1] *See Jackson v. Johnson*, 475 F.3d 261, 263 (5th Cir. 2007) (plaintiff "resides at a Fort Worth, Texas halfway house"); *Neu v. Quarterman*, No. 08-CV-273-Y, 2009 WL 1285855, *2 (N.D. Tex. Apr. 8, 2009) (habeas corpus applicant was "required . . . to reside at a halfway house"); *Uresti v. Collier*, No. H-04-3094, 2005 WL 1515386, *2 n.2 (S.D. Tex. June 23, 2005) (plaintiff complained of placement at "half-way house"); *Ex Parte McCurry*, 175 S.W.3d 784, 786 (Tex. Crim. App. 2005) (habeas corpus applicant failed to show conditions at a "community correction facility" were not "'qualitatively different' from conditions . . . characteristically imposed on many other convicted sex offenders who are placed on mandatory supervision").

the State implements these conditions.[2] In *Neu v. Quarterman*, No. 4:08-CV-273-Y, 2009 WL 1285855, *2 (N.D. Tex. May 8, 2009), for example, the habeas corpus applicant had spent only five months in a halfway house, as opposed to the seven years the State has forced Mr. Meza to live in the jail. None of the opinions cited by the State reflect a time period as long as Mr. Meza has spent at the Travis County Jail.

The State further incorrectly argues Texas law allows the State to "confine" Mr. Meza as a condition of his release. *See* Tex. Gov't Code Ann. § 508.221 (Vernon 2004); Tex. Code Crim. Proc. Ann. art. 42.12 (Vernon 2009). In fact, the State is only permitted to require "confinement" as a condition of "community supervision" for a maximum of 24 months. *See* Tex. Code Crim. Proc. Ann. art. 42.12, § 12(b) (Vernon 2009). At best, the State has "confined" Mr. Meza for five years too long.

The State must provide due process to Mr. Meza before imposing this condition because requiring him to live in jail when he qualifies for mandatory supervision is not "within the normal limits or range of custody which the conviction has authorized the State to impose." *Richardson v. Joslin*, 501 F.3d 415, 419 (5th Cir. 2007) (quoting *Sandin*, 515 U.S. at 478). *Richardson*, cited by

[2] Mr. Meza would not object to a condition requiring him to live in a true halfway house, for example. Similarly, this litigation would not have been necessary if the State had allowed him

the State, is instructive. There, the plaintiff complained he was not released to parole after completing a drug treatment program. This court held Richardson was not entitled to release to parole because there was "no mandatory language requiring that inmates be released upon completion of the drug-treatment program." *Id.* at 420 (internal quotation marks omitted). In contrast, Mr. Meza's release to mandatory supervision is required by statute. Act of May 29, 1977, 65th Leg. R.S., ch. 347, § 1, art. 42.12, sec. 1, 1965 Tex. Gen. Laws 925 (Vernon). The "normal range of custody" which Mr. Meza's conviction authorized required his supervised release in 2002.

Moreover, continuing to confine Mr. Meza in the jail is "sufficiently different from the typical punishment" someone would have suffered upon conviction in 1982. *Richardson*, 501 F.3d at 419. The Due Process clause protects a prisoner when "the State's action will inevitably affect the duration of his sentence." *Sandin*, 515 U.S. at 487. A "typical punishment" for someone convicted in 1982 would include release to mandatory supervision like Mr. Meza experienced when his release was required in 1993. Then, Mr. Meza "lived a relatively normal life within the community." (R. 3077.) In 1993, the State recognized his release "is required by law, and there is no choice, discretion, or appeal in the matter." (R. 2785.) The conditions he lives under today at the jail

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the opportunity to become employed, build the nest egg necessary to secure housing, and move

could not have been "normally expected" at his conviction in 1982. *Sandin*, 515 U.S. at 487.

*B. The parole officer escort condition is highly atypical and unconstitutionally infringes on Mr. Meza's freedom*

When Mr. Meza leaves the jail, a parole officer accompanies him everywhere. At trial, the State could only identify one other parolee, out of 78,000 people, who had a similar condition. *See* (R. 3080; R. 3561.) When Mr. Meza was allowed to visit his ailing mother, for example, "at least six" parole officers accompanied him. (R. 3356.) The State argues parole officer "supervision" is an ordinary feature of parole. The provisions of the law the State relies on, however, contemplate "supervision" radically different from how it actually monitors Mr. Meza. Texas Code of Criminal Procedure article 42.12, §§ 11(a)(4)-(5) allows a probation department to require a defendant to "report to the supervision officer as directed . . . " and "permit the supervision officer to visit the defendant at the defendant's home or elsewhere." The condition placed on Mr. Meza is far different from scheduled office appointments and random home visits. A parole officer is always with Mr. Meza when he is outside the jail. *See* (R. 3080.) In fact, the Department only provides the escort officer for a few hours each week, greatly limiting his time outside the jail. *Id.*

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out of the jail — how people on parole are typically treated.

That other parolees have "tight schedules," as the State argues, is irrelevant to the constitutionality of the parole officer escort condition. (Appellant's Reply Br. 19.) These other parolees are not accompanied at all times while adhering to their "tight schedule." Moreover, this argument is only persuasive as to the *amount* of time the State allows Mr. Meza outside the jail, not the typicality of being accompanied everywhere by a parole officer.[3] No other parolee, even those with very "tight schedules," is trailed to all his appointments by a parole officer.

In fact, the State's own witness described circumstances very different from Mr. Meza's when discussing these "tight schedules": "When first released, those offenders 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.) Mr. Meza has never even had a "residence" for a parole officer to meet him at after his "first release," and can only theoretically be "away" when accompanied by an officer. The district court put it best when the State argued it did not need to take Mr. Meza out of the jail because all his needs were met there: "That smacks of incarceration and not supervised release . . . I can be provided with everything I need in the courthouse and not ever go outside, but what have I gotten? It's still incarceration." (R. 3530.)

[3] At the time of trial, the State only regularly provided an escort for Mr. Meza four hours per week, and only to accompany him to Project RIO — a parolee job search program. On few rare occasions, such as to attend a construction course, and the two weeks he was employed in

Even if the Department provided the officer to escort Mr. Meza for more hours per week, the officer would still be present and the condition would still be highly atypical and impose a hardship on Mr. Meza. Aside from the obvious logistical problems and privacy deprivations caused by the escort requirement, employers have declined to hire Mr. Meza because they would have to put up with the escort. (R. 3430-31.) In fact, the employer who did hire Mr. Meza for a short time while this appeal was pending could not continue to employ him because she could not accommodate the escorts.

*C. The "child safety zone" condition as applied to Mr. Meza is atypical and a significant hardship*

Even if the "child safety zone" condition is typically imposed on people convicted before 1997, which Mr. Meza's own 1993 experience belies, its current application to him is an atypical and significant hardship. The State applies the condition inflexibly. At trial, one of the State's witness testified Mr. Meza could not go to a potential employer's office to undergo urinalysis because the office was in a "child safety zone," even though, if hired, Mr. Meza would not be working at that location. (R. 3843.) The State denied Mr. Meza an employment opportunity because of its inflexible application of the condition. Application of the "child safety zone" condition has repeatedly been used to prevent Mr. Meza from finding

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summer 2009, Mr. Meza was granted additional time outside the jail. Presently, a parole officer

employment, which makes it impossible to accumulate the money necessary to formulate a "residence plan" to leave the jail. (R. 3357-58) (not allowed to accept employment on the tenth floor of an office building because a day care center was across the street); (R. 3358) (not allowed to accept employment as a "carpenter's helper" because he would have to *pass through* a child safety zone on the way to work); (R. 3445) (told by parole officers "numerous" jobs would not be available because arriving at work would require him to "drive . . . through a child safety zone").

The "child safety zone" statute specifically allows a variance when a zone "interferes with the releasee's ability to . . . hold a job and consequently constitutes an undue hardship." Tex. Gov't Code Ann. § 508.187(d)(1) (Vernon 2007). The State has never made such a modification for Mr. Meza. *See* (R. 3082) (Department failed to respond to requests from Mr. Meza's attorney for a variance to allow urinalysis).

Moreover, the State applies this condition arbitrarily to Mr. Meza. When Mr. Meza identified a potential residence, the State refused to allow him to live there because of an alleged "child safety zone," even though the residence was not within 500 feet of any identifiable "child safety zone."[4]

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takes Mr. Meza to Project RIO for four hours, four times a week.

[4] After the residence was identified, the proprietress was told by Mr. Meza's parole officer the location was within 500 feet of a crosswalk. (R. 3069.) This determination was arbitrary for two

*D. The combination of these conditions is a significant and atypical hardship*

The district court found these conditions, in combination, result in Mr. Meza's continued incarceration.

> [T]he restrictiveness of Meza's parole conditions have prevented him from securing employment. The 180-day initial residency period has long since expired, but Meza remains in [the Travis County Correctional Complex, TCCC]. Theoretically, Meza's conditions do not prevent him from living in the community, attending church, visiting his family, or obtaining employment, but practically, his conditions prohibit him from leaving TCCC, a jail.

(R. 3079.) Like the conditions at issue in *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005), the combination of these conditions is extreme — they have prevented Mr. Meza's statutorily required release for seven years.

The State intentionally overlaps conditions of release to build in redundancy. (R. 3077-78.) Given Mr. Meza's conditions are designed to restrain his freedom in combination, it is impossible to analyze them individually. The State is correct that many of Mr. Meza's individual conditions apply to many other parolees. Mr. Meza is the only parolee, however, with this onerous combination of conditions that interlock to prevent his release from custody. *See* (R. 3079-80.)

Though Mr. Meza's living situation at the jail might seem preferable to the conditions the prisoners in *Austin* experienced, that is not the baseline for the due

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reasons: 1) the crosswalk was not within 500 feet of the residence (according to Google Maps it was 0.1 miles, or at least 528 feet from the residence), (R. 3069); and 2) crosswalks are not specifically identified anywhere as a child safety zone. *See* (R. 3761-62.)

process inquiry. The inquiry into when prison or parole conditions require additional due process begins with "the nature of those conditions themselves in relation to the ordinary incidents of prison life." *Austin*, 545 U.S. at 223 (citing *Sandin*, 515 U.S. at 484) (internal citations omitted). In noting the protections provided the prisoners in *Austin* were sufficient, the Supreme Court reasoned prisoners "have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all." *Id.* at 225. The Fifth Circuit applied this same approach to parole conditions in *Coleman v. Dretke*, 395 F.3d 216, 222 (5th Cir. 2004): when the issue is parole conditions, not prison conditions, *Coleman* mandates examining the difference between typical and expected conditions of parole and the challenged conditions.

A parolee can make this showing by demonstrating the conditions "exceed[] the sentence in . . . an unexpected manner." *Sandin*, 515 U.S. at 484. When Mr. Meza was sentenced in 1982, he expected to be released on parole when he accumulated enough good conduct time to qualify for release on mandatory supervision. Indeed, Mr. Meza did so qualify in 1993, and the State allowed him to spend several months living outside any correctional facility under conditions far less restrictive than he experiences today. *See* (R. 3077.)

The difference between Mr. Meza's two experiences on mandatory supervision illustrates how his 2002 release constitutes a "dramatic departure from the basic conditions of [his] sentence." *Coleman*, 395 F.3d at 222 (quoting *Felce v. Fielder*, 974 F.2d 1484 (7th Cir. 1992) (requiring additional due process protections before parole could be conditioned on taking antipsychotic medications). Other circuits have adopted a similar approach. *See Felce*, 974 F.2d at 1484; *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004) (cannot require involuntary medication as condition of supervised release without additional procedural protections); *Bundy v. Stommel*, 168 F. App'x 870 (10th Cir. 2006) (not designated for publication) (cannot condition parole eligibility on involuntary medication without due process).

The State makes grossly unreasonable assumptions about circumstances that could allow Mr. Meza's release. For the first time in its reply brief, the State concedes Mr. Meza could live with his mother if she ceased occasionally caring for her grandchildren. (Appellants' Reply Br. 13.) This new concession rings as false as the time the State arbitrarily denied his residence plan after he identified a housing option that complied with his conditions of mandatory supervision in 2008. *See supra* note 4. Further, it is patently unfair to require Mr. Meza's elderly mother to care for him (he has no job and is unable to contribute to the household), *and* prohibit her from helping her other children by caring occasionally for her

grandchildren. The State acknowledges the overlapping conditions of his parole prevent him from having unsupervised contact with minors, and thus, living with his family. (Appellant's Reply Br. 13 n.6.) If Mr. Meza had no family, presumably the only option would be for him to live at the jail until his sentence expires in 2017, which appears to be the State's desired result. When the State imposes such overlapping conditions, it must first provide procedural protections.

The differences between Mr. Meza's current living condition in jail and life a State prison are insubstantial. *See* (R. 3079.) He spent 164 of 168 hours each week in the jail for the three years before trial.[5] Though the State emphasizes Mr. Meza's ability to wear civilian clothes while in his residence bay,[6] watch television, and use different restrooms, requiring him to live in the jail remains a significant hardship other parolees do not experience. His current life more closely resembles a convict's than a parolee's.

*E. Mr. Meza is entitled to significant procedural protections*

The State provided Mr. Meza no procedural protections before imposing these conditions. The State asks this Court to limit any protections it would

[5] After the trial, the State began to allow Mr. Meza to spend additional time outside the jail at Project RIO. He now only spends 152 of 168 hours per week in the jail. From 2002 until 2005, however, Mr. Meza was not even taken to Project RIO — during those three years he left the jail only to go to the emergency room and for one job interview. (R. 3080.)

[6] Mr. Meza is still required to dress in a jail uniform to do anything outside the residence bay, such as meet with his attorneys, or attend worship services.

require, relying in part on *Austin*. In *Austin*, prison inmates challenged their placement at an Ohio "Supermax" facility. Prior to their placement, however, the prisoners, in fact, had fairly extensive procedural safeguards. *See Austin*, 545 U.S. at 216.[7] In fact, the district court concluded the *Austin* prisoners were given greater protections than the mere "notice and opportunity" form Mr. Meza received before the State imposed sex offender conditions on his release.[8] (R. 3091.)

Because the effect of these conditions is continued confinement, Mr. Meza is entitled to protections similar to the parole revocation context. Though his situation is slightly better than confinement in a prison, it is not as radically different as the State posits. Indeed, given the very limited amount of time allowed outside the jail, Mr. Meza's condition more closely resembles incarceration than release. The district court observed "it doesn't sound like supervised release to me. It sounds like incarceration." (R. 3531.) In approving the procedural protections in *Austin*, the Supreme Court noted "[the State] is not, for example, attempting to

[7] Prisoners received written notice summarizing why they were being considered for Supermax placement; allowed to attend a hearing where they could present written evidence; allowed to see the written decision of the prison authorities, which specified why they were being placed in Supermax confinement; afforded an "appellate" review by additional prison authorities; and given an annual review of the placement. The State did not provide Mr. Meza any similar protections.

[8] Though the State provided the "notice and opportunity" form to Mr. Meza before imposing the sex offender conditions on his release, he did not receive even this limited process before the other conditions were levied.

remove an inmate from free society . . . ." *Austin*, 545 U.S. at 228. Here, the State's goal seems to be preventing Mr. Meza's release.

## II. ENFORCEMENT OF THESE CONDITIONS VIOLATES MR. MEZA'S EQUAL PROTECTION RIGHTS

The Supreme Court has long recognized the Equal Protection Clause creates a cause of action on behalf of a "class-of-one." *See, e.g.*, *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The State's radically disparate treatment of Mr. Meza violates his equal protection rights.

### *A. Engquist does not control Mr. Meza's equal protection claim*

The State's argument against Mr. Meza's "class-of-one" claim relies on an incorrect reading of the Supreme Court's very limited holding in *Engquist v. Oregon Dep't of Agric.*, 128 S. Ct. 2146 (2008). Ms. Engquist sued her employer, a state agency, when she was laid off because she could not accept a lateral transfer. The Court narrowly held "the class-of-one theory of equal protection does not apply in the public employment context." *Id.* at 2151. The majority rejected the "class-of-one" theory only in the employment context because of "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 2156. The Court was careful to note the application of the "class-of-one" theory to the employment context was "all we decide." *Id.*

Obviously, Mr. Meza is not complaining about employment with the State. In *Engquist*, the Court drew a "crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Id.* at 2151 (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)). "[G]overnment has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Id.*

Other circuits have rejected applying *Engquist* outside the government employment context. In *Franks v. Rubitschun*, 312 F. App'x 764, 766 (6th Cir. 2009) (not designated for publication), the Sixth Circuit specifically declined to apply *Engquist* to the parole context: "*Engquist*'s holding was specifically limited to the public-employment context, the concerns of which the Court described as 'unique.' And its reliance on the 'crucial difference' between government acting as sovereign and government acting as employer suggests *Engquist*'s discussion of discretionary decisionmaking should not control the case at hand."

Though *Engquist* uses a police officer selecting which speeder to pull over as an example of discretionary decision-making that would not be subject to class-of-one scrutiny, the Seventh Circuit explained why *Engquist* should not apply to law enforcement:

> Although the police enjoy broad freedom of action, their discretion is much narrower than the discretion given public employers. First, in contrast to an employer, who is entitled to make decisions based on factors that may be difficult to articulate and quantify, an officer must justify her decision to stop a suspect by pointing to "articulable facts." And while employment decisions are inherently subjective, "[s]ubjective intentions play no role" in evaluating police seizures under the Fourth Amendment. Second, police officers, in contrast to public employers, exercise the government's sovereign power. Accordingly, constitutional constraints on police power are the norm. Finally, although courts are reluctant to subject routine employment decisions to constitutional scrutiny, asking a court to determine whether a police officer's act was constitutional is not at all unprecedented. For all these reasons, *Engquist* does not support the officers' argument that malicious police conduct is off-limits from class-of-one claims.

*Hanes v. Zurick*, 578 F.3d 491, 495 (7th Cir. 2009) (citations omitted). Prison and parole authorities acting as sovereigns, like the police in *Hanes*, are also constrained by constitutional norms.

Moreover, the decision to release Mr. Meza to mandatory supervision was *not discretionary* like the employment decision in *Engquist*. Though the Board has discretion in selecting which conditions to apply to Mr. Meza's release, it had no discretion not to release him. *See* Act of May 29, 1977, 65th Leg. R.S., ch. 347, § 1, art. 42.12, sec. 1, 1965 Tex. Gen. Laws 925 (Vernon). The State has imprisoned Mr. Meza by formulating conditions of release so onerous that it is impossible for him to leave the jail. This action is subject to constitutional scrutiny. The *Hanes* Court recognized "[n]ot all discretion is absolute . . . and we are concerned with the constitutional limits on official authority." *Hanes*, 578 F.3d at 495.

Caselaw recognizes "the class-of-one theory is better suited to those contexts involving 'a clear standard against which departures, even for a single [individual], could be readily assessed.'" *United States v. Moore*, 543 F.3d 891, 901 (7th Cir. 2008) (quoting *Engquist*, 128 S. Ct. at 2153). In Mr. Meza's case, a "clear standard" for appropriate conditions of release does exist — the conditions applied during his 1993-94 release. Similarly, thousands of parolees are at liberty in Texas with far less restrictive conditions of release. Only one other parolee, for example, is required to be escorted every time he leaves a jail. (R. 3771-72.) Similarly, no other parolee has spent seven years living in a jail after their "release." *See* (R. 3610.)

*B. Mr. Meza is similarly situated to other people convicted of murder*

Mr. Meza is similarly situated to the 3,600 other people convicted of murder who have been released on mandatory supervision since 2002. *See* (R. 2843.)[9] The State argues Mr. Meza is not similarly situated to these 3,600 people because of his criminal record before the 1982 murder. Presumably, the vast majority of

[9] Texas releases approximately 600 people convicted of murder each year on mandatory supervision. Given the additional time that has passed since the trial, it is now likely Texas has released approximately 4,200 people convicted of murder since Mr. Meza was placed on mandatory supervision in 2002. *See, e.g.*, Tex. Dep't of Criminal Justice, Statistical Report Fiscal Year 2008, p. 44, *available at* http://www.tdcj.state.tx.us/publications/executive/FY08%20Stat%20Report.pdf (last visited November 13, 2009) (583 people convicted of murder released on parole in fiscal year 2008). The Court may take judicial notice of a state agency's website. *See Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (en banc).

people convicted of murder have some prior criminal history, and many have previously been convicted of violent crimes.[10]

*C. No rational basis exists for treating Mr. Meza differently*

The large number of other people convicted of murder released each year also negates any rational basis for the State's treatment of Mr. Meza. A rational basis must "rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). That Mr. Meza was also convicted of other offenses is, in and of itself, insubstantial.

Cases where this Court found a rational basis for treating a prisoner differently are very distinct from Mr. Meza's circumstances. In *Unruh v. Moore*, 326 F. App'x 770 (5th Cir. 2009) (not designated for publication), a prisoner alleged he not allowed to participate in a prison jobs program because he was a sex offender, though other sex offenders could participate in the program. The prison argued he had "a history of disciplinary problems – including an attempt to escape

[10] Thirty-four percent of people convicted in murder in the seventy-five largest American counties have at least one previous felony conviction. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties 2000*, *available at* http://www.albany.edu/sourcebook/pdf/t553.pdf (last visited November 13, 2009). "Twenty percent of male murderers but only 5 percent of female murderers convicted in state courts in 1986 had a prior conviction for a violent felony." Elizabeth Rappaport, *The Death Penalty & Gender Discrimination*, 25 L. & Soc'y Rev. 367, 372 (1991).

from a police officer as well as assaults on fellow inmates." *Id.* at 772. In other words, his actions in prison disqualified him from the program.

Mr. Meza's case is unique because he was released to live in the community in 1993 and was largely successful. Since his 1993 release, he has no significant prison or jail disciplinary record and has not broken the law since 1985.[11] None of the purported rational bases for treating Mr. Meza disparately took place after his release under substantially less restrictive conditions in 1993. Especially given Mr. Meza's relative success from 1993-1994, the State advances no reason (much less a rational one) for treating him differently upon his 2002 release.

Moreover, the overlapping nature of the conditions is irrational. For example, "redundancy" is the only reason used to require Mr. Meza be excluded from 500 feet from where a child might be found *and* be accompanied at all times by a parole officer. (R. 3077-78.) If there is a rational basis for the escort condition, there is no need to also prohibit Mr. Meza from entering "child safety zones" as the parole officer would interdict any illegal behavior.

*D. Treating Mr. Meza fairly is an available remedy*

Finally, in a footnote, the State incorrectly argues no remedy is available to Mr. Meza because he must bring his equal protection claims through habeas

[11] In 1985, Mr. Meza was found with contraband in prison which lead to his 1989 conviction for possession of a weapon in a penal institution. (R. 2840.) After his 1993 release on mandatory

corpus. Mr. Meza only seeks a rational and fair application of his conditions, not a total release from mandatory supervision.

In *Coleman*, the Fifth Circuit explained 42 U.S.C. § 1983 suits "are the proper vehicle to attack unconstitutional conditions of confinement. . . . A habeas petition, on the other hand, is the proper vehicle to challenge the fact of confinement and seek release from custody." *Coleman*, 395 F.3d at 219 n.2. Mr. Meza does not claim his mandatory supervision should end one day before the expiration of his sentence in 2017. A claimant is only required to seek habeas relief if they seek "immediate or speedier release." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

Rather, Mr. Meza seeks the same type of relief the prisoners in *Dotson* desired: declaratory relief and "an injunction barring future unconstitutional procedures." The Supreme Court held § 1983 is the exclusive avenue to pursue the remedy Mr. Meza desires. *Id.* at 81.

## III. CONCLUSION: THE DISTRICT COURT ERRED IN DISMISSING MR. MEZA'S NON-SEX OFFENDER CONDITIONS DUE PROCESS CLAIMS AND EQUAL PROTECTION CLAIMS WITHOUT PREJUDICE

The State continues to violate Mr. Meza's equal protection and due process rights by applying parole conditions to his "release" which prevent him from living

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supervision, Mr. Meza's release was revoked after he missed a curfew by fifteen minutes. (R. 3077.) The State does not advance the curfew violation as a potential rational basis.

outside the jail. These conditions of "release" create atypical and significant hardships for Mr. Meza, requiring the State to provide procedural safeguards. These conditions place Mr. Meza in a "class–of-one" where he is treated differently from the 78,000 other parolees at liberty in Texas, and the 4,200 other people convicted of murder released since 2002. The Constitution requires intervention to protect Mr. Meza from State action.

Dated: November 23, 2009.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A true copy this document was sent to Thomas M. Lipovski, Assistant Solicitor General, Office of the Attorney General of Texas, P.O. Box 12548, Austin, TX 78711, via certified mail, return receipt requested, on November 23, 2009.

Scott Medlock

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,406 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman size 14 font.

Scott Medlock