

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

**KEVIN N. BASS,
Plaintiff,**

v.

**TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.**

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Civil Action No. 5:25-cv-00244-H-BV

**PLAINTIFF'S BRIEF IN SUPPORT OF OBJECTIONS TO THE FINDINGS,
CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES
MAGISTRATE JUDGE**

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Use of Generative Artificial Intelligence (N.D. Tex. LR 7.2(f)). Plaintiff used generative artificial intelligence as a research and drafting aid in preparing this brief. Plaintiff has reviewed the content and accepts full responsibility for it.

Pursuant to N.D. Tex. Local Rule 72.2(a), Plaintiff Kevin N. Bass submits this brief in support of his contemporaneously filed specific written objections (the "Objections") to the Findings, Conclusions, and Recommendation entered July 14, 2026 (Dkt. No. 54) ("FCR"). Each numbered section corresponds to the same-numbered Objection. "Exhibit A" is the proposed Second Amended Complaint attached to the Objections, which pleads, within the Rule 8 limits this Court has enforced, every fact the FCR identified as missing.

INTRODUCTION

1. These objections center on a single, verifiable procedural fact. On March 27, 2026, this Court denied leave to file Plaintiff's proposed amended complaint — 215 paragraphs of detailed factual allegations — because it contained too much detail, faulting its "minute details about incidents forming the bases of his claims," Dkt. No. 42 at 5-6, and expressly resting the denial on Rule 8 alone, declining to reach Defendants' merits-futility arguments. *Id.* at 5. Plaintiff complied: his next proposed pleading (Dkt. No. 43-1) was drafted, as his motion stated on its face, "to comply with Rule 8," because "[t]he sole basis for this Court's prior denial was Rule 8 noncompliance — not substantive futility." Dkt. No. 43 at 2-3.

2. The FCR now recommends that leave be denied as futile because the Rule 8-compliant pleading lacks the very details whose inclusion the Court's order faulted — the accommodations requested, the content of the speech, the disability's limitations — concluding that Plaintiff "has pleaded his best case," FCR at 45, and "has not shown that he can plead sufficient facts to overcome the deficiencies," FCR at 55. Each of those facts is pleaded at Dkt. No. 32-1. The FCR quotes the motion's own statement that the pleading was drafted "to comply with Rule 8," FCR at

46, but nowhere mentions Dkt. No. 42 or engages the fact that the prior denial rested on Rule 8 alone.

3. A plaintiff has not "pleaded his best case" when the court has denied leave to file his detailed pleading because of its detail and he has responded by removing detail. Exhibit A demonstrates that the two orders can be satisfied simultaneously: it supplies every fact the FCR found missing, in twenty-five pages. Plaintiff asks the Court to decline to adopt the futility recommendation and grant leave to file it.

STANDARD OF REVIEW

4. The district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). Futility is a legal conclusion reviewed de novo under the Rule 12(b)(6) standard: all well-pleaded facts accepted as true, viewed most favorably to the plaintiff. *Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 378 (5th Cir. 2014); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Courts also "hold pro se plaintiffs to a more lenient standard than lawyers when analyzing complaints," *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. 2016) (per curiam) — the FCR quotes Chhim's burden clause, FCR at 43, but nowhere states this construction rule.

4A. Several recommendations rest on discretionary choices, not compelled conclusions — the evidence question ("complete discretion to either accept or exclude the evidence," FCR at 9), judicial notice, FCR at 8, reaching futility rather than permitting repleading, Rule 15(a)(2) leave, and prejudice. Rule 72(b)(3) commits the disposition to the district judge, who "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions" — and may reach a different disposition on any of these points without concluding that the Magistrate Judge committed error.

OBJECTION 1: THE RECOMMENDATION TO DENY LEAVE TO AMEND AS FUTILE (FCR § 3.F, pp. 45-56; Recommendation, p. 56)

A. The futility finding cannot be reconciled with the Court's March 27 Rule 8 order.

5. The FCR's amendment analysis treats Plaintiff's pleading history as voluntary choices to omit facts; the docket shows the opposite. Plaintiff moved for leave on January 20, 2026 — one day **before** Defendants' motion to dismiss, Dkt. Nos. 26, 27 — and on February 15, 2026 attached a 215-paragraph pleading supplying the very details the FCR now identifies as missing. Dkt. No. 32-1 ¶¶ 38-39, 49, 86. On March 27, 2026, this Court denied leave solely under Rule 8, faulting precisely that factual detail and declining to reach futility. Dkt. No. 42 at 5-6. Four days later, Plaintiff tendered the shortened pleading, Dkt. Nos. 43, 43-1; the FCR now recommends denying leave because the shortened complaint lacks those very details. FCR at 45, 55.

6. The two orders, taken together, describe a closed loop: the detailed pleading was denied for its detail, and the compliant pleading is now found futile for lacking detail. The denial order itself recorded that the excess was not claim expansion — "[d]espite this remarkable increase in length, Bass adds only one new claim and one new defendant," Dkt. No. 42 at 6 — so the volume struck was factual support for the same claims now found insufficiently pleaded. If adopted, the result would be that neither pleading Plaintiff tendered — detailed or concise — was permissible, and the case would end on an operative pleading the FCR itself describes as one that "lacks basic facts, making it difficult to construct a narrative." FCR at 2. That is not the Rule 15(a)(2) standard, under which leave is "freely" given and denied only for "a substantial reason." Dkt. No. 42 at 3 (quoting *Clark v. Dep't of Pub. Safety & Corr.*, 141 F.4th 653, 661 (5th Cir. 2025)). The same recommendation also closes the evidentiary record: the FCR declined to consider any submitted material, FCR at 8-10, including the General Counsel's statement that the removal was "prompted by the Social Media post," Ex. A ¶ 32; FCR at 44 n.6 — then found the

causation allegations conclusory. The consequence is that the documented facts can be neither pleaded nor proved; the Court retains authority to avoid that outcome. See ¶ 10, *infra*.

7. The Fifth Circuit's remedy for prolixity is repleading in conforming form — not the end of the case, *Gordon v. Green*, 602 F.2d 743, 746-47 (5th Cir. 1979) (cited at Dkt. No. 42 at 4) — and a pro se plaintiff should ordinarily receive an opportunity to amend once deficiencies have been identified, unless incurable. *Brewster v. Dretke*, 587 F.3d 764, 767-68 (5th Cir. 2009); *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002).

Plaintiff has never received one. The FCR concludes the contrary:

"Bass has had ample opportunity to plead his best case. He amended his complaint once. And despite being put on notice of deficiencies . . . via Defendants' motion to dismiss, Bass's proposed second amended complaint does not cure those deficiencies."

FCR at 55. Both propositions are refuted by the docket: the one amendment was filed as of right under Rule 15(a)(1), before service and before any deficiency had been identified — an entitlement, not an opportunity to cure, Dkt. No. 42 at 1-2 — and the notice given by the motion to dismiss was answered: the 215-paragraph cure was tendered within the month and denied for being one. This Court's own dispositions confirm the point. *Wells v. Texas Tech University* denied leave because the plaintiff had "given no indication of how she would fix any defect," had already amended after the first motions to dismiss, and "is not pro se, and there is no reason to think she has not already pled her best case." No. 5:23-CV-060-H, Dkt. No. 39 at 38 (N.D. Tex. May 7, 2024). Every factor points the other way here: Plaintiff is pro se, his sole amendment preceded any identified deficiency, and he has tendered the fix. *Zapata Hincapie v. Texas Tech University* granted leave sua sponte to a plaintiff who "did not request leave to amend," because "he has not yet amended his complaint in this case." No. 5:23-CV-299-H, Dkt. No. 23 at 26-27 (N.D. Tex. Oct. 29, 2024). See also *Stewart v. Tex. Tech Univ. Health Scis. Ctr.*, No. 5:23-

CV-007-H, Dkt. No. 57 at 38 (N.D. Tex. July 17, 2024) (leave at first dismissal); Stollings v. Tex. Tech Univ., No. 5:20-CV-250-H, Dkt. No. 38 at 27 (N.D. Tex. Aug. 25, 2021) (same); Reddy v. Tex. Tech Univ., No. 5:25-CV-242-H, Dkt. No. 21 at 24 (N.D. Tex. July 15, 2026) (leave granted the day after this FCR issued). Plaintiff has located no case in this Division in which a pro se plaintiff was denied any post-motion opportunity to amend at the first Rule 12 dismissal.

B. Every fact the FCR identified as missing exists in the record at Dkt. No. 32-1.

8. The FCR's conclusion that Plaintiff "has not shown that he can plead sufficient facts," FCR at 55, is refuted by the docket. Each deficiency the FCR identified maps to a paragraph of Dkt. No. 32-1 — filed three and a half months before the FCR — and to the paragraph of Exhibit A where it now appears in Rule 8-conforming form — the post's verbatim text (FCR at 43, 54; Dkt. No. 32-1 ¶ 86; Ex. A ¶¶ 1, 31) and the accommodations requested (FCR at 47; Dkt. No. 32-1 ¶¶ 38, 49; Ex. A ¶ 36) among them. The full fourteen-deficiency mapping is set out in the table in the brief supporting Plaintiff's renewed motion for leave, filed today.

9. "Plaintiff cannot plead them" is not among the available conclusions: they were pleaded, and leave was denied because of that detail. Dkt. No. 42 at 5-6. Public records obtained since — Gibson's outside-counsel contract records, see Objection 4 ¶ 21A and Exhibits B-C — supply further concrete facts, confirming that "Bass has pleaded his best case" is not an available conclusion either.

C. Exhibit A demonstrates that cure is achievable within Rule 8.

10. Exhibit A is a proposed Second Amended Complaint of twenty-five pages — the Dkt. No. 43-1 pleading with the facts identified in the FCR restored in summary form, at less than half the length of the pleading the Court's March 27 order faulted (roughly 12,800 words against 31,400 — a reduction of nearly sixty percent), without the quotations and exhibit volume Dkt.

No. 42 found objectionable. It moots the futility finding on its own terms: an amendment is futile only "if it would fail to survive a Rule 12(b)(6) motion," FCR at 46 (quoting Marucci, 751 F.3d at 378), and Objections 2-7 show Exhibit A states at minimum a Rehabilitation Act claim against TTUHSC — as to which no immunity defense applies, see FCR at 11 n.3 — and an RA retaliation claim. Exhibit A responds to deficiencies articulated with specificity for the first time in the FCR; no scheduling order would be disturbed, and the district judge may receive it. 28 U.S.C. § 636(b)(1); Freeman v. County of Bexar, 142 F.3d 848, 852-53 (5th Cir. 1998). A contemporaneous renewed motion for leave accompanies the Objections. In the alternative, Plaintiff requests that any dismissal be without prejudice. See Great Plains, 313 F.3d at 329.

10A. Three per-claim futility determinations warrant separate objection. Count 7 against Gibson is held futile "for the same reasons" as the due process claim, FCR at 55 — Objection 4 applies equally, and Count 7 additionally pleads structural-independence facts the FCR did not address. Ex. A ¶ 101. The determinations that the amended retaliation allegations fail, FCR at 51-52, measure the termination of Plaintiff's only institutional support relationship days before a dismissal hearing against an employment-context material-adversity standard, FCR at 51, and reject the debt-escalation claim for want of but-for facts while citing only nonpayment duration — without addressing the pleaded Final Account Statement balance of \$30,458.20 and placement with a new collection agency within weeks of records requests directed at Plaintiff's own disability proceedings, which supports a but-for inference on the student-context facts alleged. Ex. A ¶¶ 62, 97. And the FCR acknowledges but never analyzes the request to add David Trotter, FCR at 46; relation back turns on what Trotter knew or should have known within the Rule 4(m) period, not Plaintiff's diligence. Fed. R. Civ. P. 15(c)(1)(C); Krupski v. Costa Crociere S.p.A., 560 U.S. 538, 548-49 (2010); Ex. A ¶ 10.

OBJECTION 2: DISMISSAL OF THE REHABILITATION ACT CLAIM AGAINST TTUHSC (FCR § 3.B, pp. 11-21)

A. The FCR's causation reasoning conflicts with its own footnote 4.

11. The FCR applies the sole-causation requirement to a claim its own footnote holds exempt: "[u]nder a failure-to-accommodate theory, the cause of the discrimination is irrelevant, so the sole-causation requirement does not apply," FCR at 14 n.4 (citing *Harmon v. Collier*, 158 F.4th 595, 608 (5th Cir. 2025)) — yet the analysis proceeded anyway "because Bass recites the elements of a disability-discrimination claim." That is error: pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted," *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam); see *Groden v. City of Dallas*, 826 F.3d 280 (5th Cir. 2016); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (liberal construction). Having found that the facts describe a failure to accommodate exempt from sole causation, the FCR should have applied the elements it had just recited, FCR at 13, rather than the ones Plaintiff's caption invoked. Exhibit A pleads the claim expressly on the accommodation theory. Ex. A ¶¶ 68-70. The sole-causation analysis is also independently unsound: it treats alternative pleading as a concession — reasoning that because Plaintiff "attributes his denial of meaningful participation in the hearing to much more than his disability," he "asserts that Gibson and/or TTUHSC acted for reasons other than Bass's disability," FCR at 13-14 — but a party may plead alternatively and "regardless of consistency," Fed. R. Civ. P. 8(d)(2)-(3), and allegations supporting one count are not admissions dispositive of another at the Rule 12(b)(6) stage.

A-1. Attendance at the hearing is not meaningful access to it.

11A. The alternative holding — that Plaintiff "arguably was not excluded from the hearing" because he "attended the hearing and was represented by counsel," FCR at 13 — measures the

wrong thing. Section 504 reaches being "denied the benefits of" a program, 29 U.S.C. § 794(a); the measure is meaningful access, and "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Alexander v. Choate*, 469 U.S. 287, 301 (1985). The pleadings allege the distance between presence and access: by the final hours of a fourteen-hour proceeding Plaintiff "was unable to follow the majority of proceedings and could not formulate adequate cross-examination," Dkt. No. 43-1 ¶ 43; Ex. A ¶ 47, and the supports directed at precisely that limitation were requested, documented, and refused, Ex. A ¶¶ 36, 45, 72. As to "represented by counsel," see Objection 4 ¶ 20B. "[A]rguably was not excluded" is a disputed inference, and at this stage it runs the other way.

B. "Written questions" was not the requested accommodation.

12. The finding rests on two contradictions internal to the FCR. First, a single passage holds both that "Bass does not explain what his requested accommodation even means" and that "it appears TTUHSC provided the preferred accommodation." FCR at 16. Those findings are mutually destructive: a request the Court finds unintelligible cannot also be one it finds was satisfied. Second, the FCR states that Plaintiff "does not contend that his attorney was prevented from helping Bass with that questioning," *id.* — but the FCR recites the contention twelve pages earlier: Gibson "barred [Bass's] counsel from questioning witnesses directly even as a communication aid." FCR at 4 (quoting Dkt. No. 14). A communication aid is precisely what the request sought; both defects appear on the face of the FCR.

12A. The finding is also unavailable at this stage, and the substitute does not perform the requested function. Element three asks whether the institution "failed to make reasonable accommodations for such known limitations," *Choi v. Univ. of Tex. Health Scis. Ctr. at San Antonio*, 633 F. App'x 214, 215 (5th Cir. 2015) (*per curiam*) (quoted at FCR at 13); the FCR resolved that question as one of fact on a record it had closed eight pages earlier. FCR at 8-10. A

Rule 12(b)(6) dismissal cannot rest on what "appears" to the court where the pleadings allege the contrary; at this stage every inference belongs to the pleader. Nor does the substitute match the request — real-time communication support ("limited attorney-assisted questioning to cue/clarify," Dkt. No. 14 at 6), predictable breaks, CART/captioning, and written copies of verbal information, Dkt. No. 32-1 ¶¶ 38, 49; Ex. A ¶ 36: questions submitted in writing beforehand cue and clarify nothing during live, multi-party adversarial testimony, and the pleadings allege the result. *Supra* ¶ 11A.

C. Knowledge was pleaded to the very office Pickett requires — and beyond it.

13. The FCR relies on *Pickett v. Texas Tech University Health Sciences Center*, 37 F.4th 1013, 1032-33 (5th Cir. 2022), to hold that requests to "officials unaffiliated with the ADA office" do not impute knowledge. FCR at 18-19. Pickett's dispositive request went verbally to an advisor rather than to the designated accommodations office. *Id.* at 1032. Plaintiff did the opposite: on December 8, 2023 — three days before the hearing — he submitted his formal request to Student Disability Services, the office TTUHSC itself designates, simultaneously notifying the Board Chair and TTUHSC's General Counsel, who then attended the hearing. Dkt. No. 43-1 ¶ 34; Ex. A ¶¶ 36, 45, 69. The hearing officer read the recommendations closely enough to redact them. Dkt. No. 43-1 ¶ 40. Defendants concede the request triggered "the interactive process contemplated by federal law," Dkt. No. 27 at 9 — never completed by anyone with authority — and their reply reads Pickett to "require[] centralization of accommodation request," Dkt. No. 38 at 7, the channel Plaintiff used. In the alternative, the disability and needed accommodations were "open, obvious, and apparent" to TTUHSC's agents after seven months of documented internal recognition. *Valentine v. Collier*, 993 F.3d 270, 290 (5th Cir. 2021); Ex. A ¶ 24. "TTUHSC did not know" is not an available inference.

13A. The "limitations" finding is answered by Defendants' own exhibit. The FCR finds that "Bass pleads no facts showing he notified TTUHSC of his disability's limitations." FCR at 16-17. The SDS application described those limitations in Plaintiff's own words — "difficulty with information processing, interpersonal interactions, nonverbal social cues, understanding assignments, objectives, goals, expectations" — and is Defendants' own exhibit. Dkt. No. 27-3; Ex. A ¶¶ 36, 69. Counsel's contemporaneous email disclosed the diagnoses and that "this impacts our hearing on Monday." Ex. A ¶ 36. The evaluation likewise explained the limitations, Ex. A ¶ 23; a recommendation for communication support is not severable from the communication limitation that generates it, and to the extent its explanatory content did not reach the Board, that is because the hearing officer redacted it. Ex. A ¶ 42; Dkt. No. 43-1 ¶ 40.

13B. Pickett cannot carry the weight placed on it: the FCR applies its holding to "Bass's requests for accommodation at the hearing to officials unaffiliated with the ADA office — i.e., SDS." FCR at 19. The apposite concedes the premise: SDS is the ADA office — elsewhere, "the centralized entity tasked with processing such requests," FCR at 16. Pickett therefore reaches only the separate, morning-of request to Gibson — not the December 8 submission to the very office Pickett requires a plaintiff to use.

14. The FCR's related reliance on timing, FCR at 17-18 (citing *Grodman v. Tex. Tech Univ. Health Scis. Ctr.*, 816 F. Supp. 3d 602 (N.D. Tex. 2025) (Hendrix, J.)), does not fit. Grodman's request came the same day a board voted to terminate, based on predating incidents; here the request came three days before the hearing and sought accommodations for the hearing itself — a future proceeding whose date TTUHSC alone controlled. The FCR faults Plaintiff for not asking "for a continuation," FCR at 17, but the interactive-process obligation belonged to the institution: its own policy (HSC OP 77.14) allots up to two weeks; TTUHSC controlled the

calendar, chose a schedule under which that process could not run, and responded with silence. Dkt. No. 32-1 ¶ 46; Ex. A ¶¶ 37-38. An entity that receives a specific, documented request and responds by proceeding as though it had not been made has failed to engage in the interactive process. *Cutrer v. Board of Supervisors of Louisiana State University*, 429 F.3d 108, 112-13 (5th Cir. 2005). The timing ground is also not properly presented: as the FCR acknowledges, TTUHSC "only expressly mentions Bass's accommodation claim in its reply," FCR at 15 — the one-business-day argument appears for the first time at Dkt. No. 38 at 8, after Plaintiff's response was on file. Plaintiff preserves the objection that a claim should not be dismissed with prejudice on a ground first articulated in a reply brief, to which he had no opportunity to respond.

D. Intentional discrimination is pleaded as conscious rejection, not inattention.

15. The FCR finds no facts showing TTUHSC had "actual knowledge that failing to provide those accommodations would cause Bass to be effectively 'excluded.'" FCR at 20. Exhibit A pleads deliberate acts by actors with actual notice: the December 8 submission to SDS, the Board Chair, and General Counsel; the General Counsel's personal attendance at the hearing where the supports were denied; the hearing officer's redaction of the accommodation recommendations specifically, Ex. A ¶ 42; a mid-hearing break convened to address accommodations at which only generic comforts were granted; and the Board's rejection of the request as "retroactive leniency." Ex. A ¶ 72; Dkt. No. 32-1 ¶¶ 48-49. A break convened to consider accommodations, followed by selective denial of every disability-specific one, is a considered refusal — the intentional conduct *Delano-Pyle v. Victoria County*, 302 F.3d 567, 574 (5th Cir. 2002), requires.

15A. The futility analysis repeats the error: it rejects the intentional-discrimination allegations because "alleging that the Board intentionally discriminated... does not impute the requisite knowledge to TTUHSC." FCR at 50. The Board is not a third party; it is the TTUHSC organ that

took the challenged action, Dkt. No. 43-1 ¶¶ 42, 66; Ex. A ¶ 72 — and Delano-Pyle, the authority the FCR itself cites, holds that "the public entity is liable for the vicarious acts of any of its employees" under the ADA and RA. 302 F.3d at 574-75. Nor was the Board the only actor alleged. Supra ¶ 15; Dkt. No. 43-1 ¶¶ 34, 40.

16. Separately, the FCR does not address *A.J.T. v. Osseo Area Schools*, 605 U.S. 335 (2025), raised at Dkt. No. 33 at 12, in which a unanimous Supreme Court rejected heightened intent standards for disability-discrimination claims in educational settings — an intervening decision on the governing intent standard that should be addressed, not resolved sub silentio, before a claim is extinguished with prejudice. Plaintiff further preserves the position that nominal damages do not require the heightened intentional-discrimination showing — a question the FCR acknowledges the Fifth Circuit has not decided. FCR at 20.

OBJECTION 3: DISMISSAL OF THE RA RETALIATION AND INTERFERENCE CLAIMS — PLAINTIFF'S RESPONSE TO THE SUA SPONTE GROUNDS (FCR § 3.D, pp. 25-29)

17. Posture. Defendants moved against these claims solely on sovereign immunity, FCR at 26; the FCR correctly rejected that defense under the § 2000d-7 waiver, *id.*, then evaluated the elements sua sponte, designating Plaintiff's objections as his "notice and an opportunity to respond." FCR at 27 (citing *Jones v. City of Dallas*, 2025 WL 2491127, at *6 (5th Cir. Aug. 29, 2025)). This is that response. The two designations cannot both control: if these objections are the "notice and an opportunity to respond" on unbriefed elements, FCR at 27, a cure responsive to that notice cannot already have been exhausted by "ample opportunity to plead his best case," FCR at 55. This Court's own practice on the same posture is a pre-ruling order inviting briefing, not a post-ruling objection window. *Reddy v. Tex. Tech Univ.*, No. 5:25-CV-242-H, Dkt. No. 18 (N.D. Tex. May 7, 2026) (declining to dismiss sua sponte "without prior notice and opportunity to respond" (quoting *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006))).

18. Causation is pleaded through targeted, immediate adverse action. The protected-activity element is not in dispute: requesting a reasonable accommodation "constitutes participating in an activity protected under the [RA]." FCR at 27 (quoting *Way v. City of Missouri City*, 133 F.4th 509, 522 (5th Cir. 2025)). The FCR reasoned that the interim removal preceded the accommodation request and that Gibson "is not affiliated with SDS," FCR at 28 — but the retaliation pleaded is not the November removal; it is the treatment of the December 8 request itself in the three days that followed: the hearing officer excluded the accommodation documentation, redacted its recommendations specifically, and barred the evaluator from testifying; the Board then rejected the request as "retroactive leniency" — treating the protected activity itself as a demerit. Ex. A ¶ 96; Dkt. No. 43-1 ¶¶ 66, 91. A three-day interval supports a causal inference on temporal proximity alone — and the adverse action was directed at the very subject matter of the protected activity. The "not affiliated with SDS" point is answered by the pleaded notification chain — SDS, the Board Chair, and the General Counsel, Ex. A ¶¶ 36, 69 — and the claim runs against TTUHSC, which acts through its agents, *Delano-Pyle*, 302 F.3d at 574-75: Gibson was the Board Chair's delegate for the hearing's procedural aspects and, by Defendants' own representation, "acting as a state actor on behalf of TTUHSC." Dkt. No. 27-5 at 2; Dkt. No. 50 at 10-11.

18A. The dissuasion finding, FCR at 51, is answered by allegations already on this docket: the professionalism coach first terminated the coaching relationship in writing, and then, at Plaintiff's own dismissal hearing, warned him:

"Now that you've filed litigation against your medical school . . . I think it makes it much more difficult for you for many reasons."

Dkt. No. 32-1 ¶ 39 (at 14-15); Ex. A ¶¶ 30, 97. Such a warning, at the proceeding that would determine his career, would dissuade a reasonable person from pursuing a protected complaint

— and that objective standard, not actual dissuasion, is the test. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006).

19. Interference. Plaintiff acknowledges the FCR's observation that the availability of an RA interference claim is unsettled, FCR at 28-29, and preserves the theory; its factual predicate is in any event actionable under the rubrics above. The pleading-directed criticism — that Plaintiff "makes no attempt to address the elements," FCR at 28 — is cured by amendment: Exhibit A pleads the interference elements expressly, mapping the statutory verbs of 42 U.S.C. § 12203(b) to specific conduct. Ex. A ¶ 97A.

OBJECTION 4: DISMISSAL OF THE PROCEDURAL DUE PROCESS CLAIM (FCR § 3.E, pp. 30-40, 52-54)

A. The Van Overdam analogy fails on the dispositive fact the FCR does not address.

20. The FCR holds Plaintiff's process sufficient because it was "akin to the ones approved by the Fifth Circuit in *Van Overdam*." FCR at 37. The *Van Overdam* plaintiff "was permitted to call witnesses and submit relevant, non-harassing evidence of his innocence to a neutral panel of administrators." *Van Overdam v. Texas A&M University*, 43 F.4th 522, 530 (5th Cir. 2022) (quoted at FCR at 36). The pleadings allege that Gibson "permitted zero defense witnesses while ten institutional witnesses testified, including three added the morning of the hearing." Dkt. No. 43-1 ¶ 41; Ex. A ¶ 45. The FCR's only engagement with witness exclusion states that "the only information Bass contends was excluded" was testimony from his neuropsychologist and Dr. Trotter, FCR at 35 — although its own recitation records that Gibson "restricted defense witnesses," FCR at 4 — and it nowhere addresses the categorical bar. Dixon defines the clearly established floor: "the opportunity to present . . . his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf." *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961). A hearing at which the defense was

permitted zero witnesses against ten is not "akin to" one at which the accused "was permitted to call witnesses" — it is the denial of the safeguard on which the analogy depends. The excluded evaluation also contained the evaluator's conclusion that dismissal "without being provided with proper intervention specific to an individual with ASD . . . is strongly discouraged" — expert evidence going to the "incapable of remediating" finding on which dismissal rested. FCR at 35-36; Ex. A ¶¶ 42, 47; Dkt. No. 27-8 at 7 (hearing officer "redacted portions of the neuropsychological evaluation").

20A. Plaintiff does not dispute notice of the hearing date; the pleaded deficiency is charge-specificity — the notice identified the professionalism-evaluation referrals only by clerkship name and date, with no description of any conduct, Dkt. No. 27-2 at 6; Ex. A ¶ 48 — a distinct Dixon requirement ("the notice should contain a statement of the specific charges") that the adequate-notice finding, FCR at 33, does not address, and Plaintiff objects to that finding to the extent it reaches charge-specificity.

20B. The analogy also fails on the compensating safeguard that made Van Overdam sufficient: the ability, with counsel, "to submit an unlimited number of questions to the disciplinary panel." FCR at 36 (quoting Van Overdam, 43 F.4th at 530) (emphasis added). Plaintiff does not object to the holding that the absence of attorney-led cross-examination is not itself a violation, FCR at 39-40 — but the unlimited submission was what made that absence tolerable, and Plaintiff received no such safeguard: Gibson "barred [Bass's] counsel from questioning witnesses directly even as a communication aid," "required counsel's questions to be submitted in writing," and "asserted unilateral authority to limit [Bass's] questioning for 'relevance,'" FCR at 4 (quoting Dkt. No. 14), and "some questions were excluded based on relevance," FCR at 37. A screened, written subset submitted through counsel who could not speak is not the "unlimited" submission

on which Van Overdam rested — a difference in the process actually received, not in "the format or . . . extensiveness that Bass preferred." *Id.*

B. "Gibson was not the decisionmaker" is contradicted by allegations the FCR did not engage.

21. The FCR discounts the bias allegations "particularly given that Gibson was not the decisionmaker." FCR at 35. The pleadings allege that Gibson — an outside attorney contractually obligated to "represent" the Texas Tech University System, TTUHSC's parent, under eight consecutive contracts authorizing \$393,000 — controlled the evidence, remained in the deliberation room, and authored the Board's determination letter, issued under the Chair's signature. Dkt. No. 43-1 ¶¶ 39, 42; Ex. A ¶¶ 41, 46. Taken as true, those allegations negate the premise that the Board decided independently of Gibson — and Defendants' own filings confirm the structure. Dkt. No. 27-5 at 2 (Board Chair "delegated his duties regarding the procedural aspects to Darren Gibson"); Dkt. No. 50 at 10-11 (Gibson "was acting as a state actor on behalf of TTUHSC"). The presumption of adjudicator honesty, *Pham v. Blaylock*, 712 F. App'x 360, 364 (5th Cir. 2017) (*per curiam*), is not a device for rejecting well-pleaded contrary facts at Rule 12. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975), clearly establishes the right to an impartial tribunal; a structure in which the prosecuting institution's contracted representative writes the decision is not one.

21A. Public records obtained after the proposed amendment was filed corroborate these allegations. The Texas Tech University System's outside-counsel contract in force on December 11, 2023 (OCC No. 2024-768-0010, excerpted at Exhibit B, App. 002-005) made Gibson simultaneously a hearing officer and the System's retained counsel under a single instrument — authorizing "[s]erving as a hearing officer for employment and academic grievance hearings" while engaging him as the System's counsel, including for internal investigations of

discrimination claims. App. 005. Its hearing-officer enumeration nowhere names student-conduct proceedings, although the same template names that work when intended: Texas Woman's University's contract with the same attorney adds "student misconduct, faculty terminations." TWU OCC No. 2026-731-0173 (Exhibit C, App. 006-007). These are public records subject to judicial notice, FCR at 8; *Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007), already in the record at Dkt. Nos. 46, 46-1, and they show the structural-bias allegations rest on documented contractual architecture, not speculation. *Walsh v. Hodge*, 975 F.3d 475, 482-83 (5th Cir. 2020).

B-1. The risk-of-error holding requires a showing the Constitution does not, and the "no hint" finding is refuted by the FCR's own recitation.

21B. The FCR dismisses the claim on a further ground: that Plaintiff has not pleaded that additional safeguards "would have lessened the risk of an erroneous deprivation" or "altered the outcome of the hearing," and "has also failed to even hint that these procedures were somehow fundamentally unfair." FCR at 37. Plaintiff objects to both findings. Outcome: a due process claim does not require pleading a different result — "[i]t is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing," and the right's denial "should be actionable for nominal damages without proof of actual injury." *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972)). Probable value: the pleadings identify specific safeguards and their contribution to accuracy, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): defense witnesses — the zero-against-ten exclusion, *supra* ¶ 20, Dixon's floor; the unredacted evaluation — the "strongly discouraged" conclusion bearing on the "incapable of remediating" finding, Ex. A ¶¶ 42, 47; and an adjudicator free of the structural defects Withrow addresses, Ex. A ¶¶ 41, 46; *Withrow*, 421 U.S. at 46-47. "Failed to even hint": the FCR recites the hint on its

own page 4 — the questioning restrictions, *supra* ¶ 20B, plus asymmetric time limits "contrary to the published rules promising equal time limits," denial of separate hearings, restricted defense witnesses, and late/redacted evidence permitted for TTUHSC but not Plaintiff. FCR at 4 (quoting Dkt. No. 14). Those allegations are structural — the absence of Dixon's floor and a defective tribunal — and go to "the presence of fundamentally fair procedures," the very inquiry Plummer directs. FCR at 37 (quoting Plummer, 860 F.3d at 773). That they were pleaded is established by the FCR's own recitation.

C. The yearlong trespass warning received no analysis.

22. The pleadings allege that the criminal trespass warning issued summarily, received no pre- or post-deprivation process, and was enforced for approximately a year — in its early weeks requiring police escort for Plaintiff's daycare pickup of his three-year-old child — while TTUHSC's own threat-assessment paperwork and officials recorded that no threat existed, and TTUHSC's own flowchart mandates, absent "Physical or Other Credible Evidence," the outcome "No Security Hold or Criminal Trespass is Issued." Dkt. No. 43-1 ¶¶ 32-33, 56, 73; Dkt. No. 32-1 ¶¶ 127, 178; Ex. A ¶¶ 33-34, 60. The FCR never analyzes the trespass warning as an independent deprivation, see FCR at 30-40; Plaintiff objects to dismissal of the due-process claim without any determination on that theory.

D. Qualified immunity: the *Schultea* request was never addressed, and the clearly-established analysis does not reach the actual allegations.

23. Plaintiff's response expressly requested that, if the pleadings were found insufficient to negate qualified immunity, the Court order a reply under Rule 7(a) pursuant to *Schultea v. Wood*, 47 F.3d 1427, 1433-34 (5th Cir. 1995) (en banc), rather than dismiss. Dkt. No. 33 at 24. The FCR recommends dismissal with prejudice without addressing that request; the *Schultea*

reply is this Circuit's prescribed intermediate step in precisely this posture, and Plaintiff renews the request.

24. On the clearly-established prong, the FCR frames the question at the level of the questioning restrictions and asymmetric procedures, FCR at 40; the allegations it did not engage frame it differently: the complete denial of defense witnesses and a decision authored by the institution's own contracted representative. Officials do not need a factually identical precedent to know that a student facing expulsion may not be denied all defense witnesses while the prosecuting institution presents ten, or that the institution's paid advocate may not write the tribunal's decision — "obvious" applications of Dixon and Withrow. Plaintiff preserves his argument that the FCR's demanded level of specificity conflicts with Supreme Court authority. Dkt. No. 33 at 22-23 (citing Hope; Taylor).

OBJECTION 5: DISMISSAL OF THE FIRST AMENDMENT RETALIATION CLAIM (FCR pp. 42-45, 54-55)

24A. Listener perception cannot convert protected speech into unprotected speech. The FCR describes the post throughout as one that others "perceived as threatening"; at page 54 it drops the qualifier: the adverse actions "were in response to Bass's post that members of the TTUHSC community perceived as threatening — unprotected speech." FCR at 54. That is legal error, reviewed de novo. Speech is an unprotected true threat only where it is objectively threatening and the speaker had "some subjective understanding of [the] statements' threatening nature," *Counterman v. Colorado*, 600 U.S. 66, 69 (2023) — which rejected even a pure reasonable-person standard as one that "reduces culpability . . . to negligence," *id.* at 79 n.5 (quoting *Elonis v. United States*, 575 U.S. 723, 738 (2015)); the FCR's standard — what particular listeners reported feeling — is less demanding still. *Counterman* predates the post by four months. Neither element appears anywhere in the FCR, and the pleadings allege the opposite of both: the post

names no person and threatens nothing, Ex. A ¶ 31, and the officials who acted on it contemporaneously perceived no threat, Ex. A ¶¶ 32, 34. The FCR repeats the conversion in stating that the Board "found Bass violated the student conduct code for posting a threat," FCR at 28 — but the Board's determination recites only that the tweet was "disruptive and reasonably perceived as a potential threat to members of the TTUHSC community," Dkt. No. 27-8 at 10 — a perception finding, twice hedged, not a finding that Plaintiff posted a threat, and under *Counterman* no substitute for one.

25. The content deficiencies are cured — and the content is dispositive at this stage. The FCR compresses years of published advocacy into a single same-day post "criticizing COVID-19 policies," FCR at 2 — the pleading it cites alleges a sustained course of public commentary, FCR at 43 (quoting Dkt. No. 14 at 9) — then faults Plaintiff for failing to "describe the nature of his other social media posts," FCR at 43, and finds "public concern" "unsupported by fact," FCR at 54. Exhibit A pleads the post verbatim:

"Each and every one of us is going to be dead someday very, very soon... why most people put so much stock into what other people think about them is completely beyond me. These other people, too, are going to be dead very, very soon."

Ex. A ¶ 31; Dkt. No. 32-1 ¶ 86. On its face the post names no person, identifies no target, and threatens nothing. Exhibit A also pleads the course of the other speech — a public voice on health policy to approximately 84,000 followers, published writing including a January 30, 2023 *Newsweek* essay on national COVID-19 policy, and seven formal learner-mistreatment grievances under SOM OP 40.05. Ex. A ¶¶ 22, 56, 89. Sustained public commentary on national pandemic policy is speech "at the heart of the First Amendment's protection," *Snyder v. Phelps*, 562 U.S. 443, 451-53 (2011), and its controversy is "irrelevant to the question whether it deals with a matter of public concern." *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)).

The FCR's reliance on *Bell v. Itawamba* presupposes a reasonable threat perception, FCR at 42; the pleadings allege the officials' own contemporaneous assessments: the Senior Associate Dean who signed the emergency removal said on a recording that he "never sensed threat or danger" and called the post "free speech"; the same official answered "No" on the interim-suspension questionnaire to whether the matter involved terroristic threats; the Counseling Director wrote Plaintiff was "not a danger to anyone"; the professionalism coach testified at the hearing itself, "I don't take that to be a threat from you . . . I get who you are"; and eight officials or witnesses said Plaintiff was not a threat. Ex. A ¶¶ 32, 34. Accepted as true, these allegations foreclose the premise that the speech was reasonably understood as threatening.

26. But-for causation is pleaded through the taint of the asserted independent grounds, FCR at 44, which the pleadings allege were themselves speech-driven — a surveillance program from 2020, an administrator's request for suspension or dismissal five weeks before the post, a threat assessment classifying grievance-filing as "retaliatory harm," and the General Counsel's statement that the removal was "prompted by the Social Media post." Ex. A ¶¶ 26-29, 32, 34; Dkt. No. 43-1 ¶¶ 25-28, 31, 33. The FCR's own record citation carries the same allegation: the passage it quotes — that officials' concerns "contributed to [Defendants'] decision to characterize his November 3, 2023 post as a 'threat,'" FCR at 44 (quoting Dkt. No. 14 at 9) — concludes, in the clause not quoted, that they did so "rather than treating it as protected commentary." Dkt. No. 14 at 9. Under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), once retaliatory motivation is shown, the burden falls on the officials "to demonstrate that even without the impetus to retaliate" they "would have taken the action complained of," *Hartman v. Moore*, 547 U.S. 250, 260 (2006) — a burden Defendants cannot carry on pleadings

alleging the independent grounds were products of the same campaign, with the post itself the fourth charge, found violated by unanimous vote. Dkt. No. 27-8 at 9-10.

27. Clearly established. The right not to suffer official retaliation for protected speech was clearly established well before November 2023, *Keenan v. Tejada*, 290 F.3d 252, 262 (5th Cir. 2002) (retaliation against protected speech "cannot be objectively reasonable"), and no closely analogous case is required where officials' own records refute the asserted justification. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Taylor v. Riojas*, 592 U.S. 7 (2020). The pleadings allege these officials identified the speech as protected while planning action against it: nine months before the emergency removal, the Senior Associate Dean who signed it wrote that Plaintiff's speech "is obviously protected speech . . . we need to discuss an appropriate response"; sixty-three days before the removal, the same official wrote to Plaintiff directly: "We have no problems with your tweets. You are free to post whatever you want." Dkt. No. 32-1 ¶ 134; Ex. A ¶ 89A. An official who records that speech is obviously protected and in the same sentence proposes an "appropriate response" is not a candidate for immunity premised on a reasonable misunderstanding of the law. The pleadings allege the same pattern in the professionalism framing: the coach's contemporaneous notes record that Defendant Cobbs "agreed" Plaintiff had "the right . . . to say anything that he wishes to say (free speech)" — even as "professionalism" became the rubric of evaluation, charge, and dismissal, and the very ground the FCR treats as independent. Ex. A ¶ 89A; FCR at 44. Whether that ground is independent or was itself the vehicle cannot be resolved against the pleader at Rule 12. As to conduct after November 21, 2023 — the January 11, 2024 dismissal and the year-long trespass warning — *Bailey v. Iles*, 87 F.4th 275, 281-85 (5th Cir. 2023) (denying qualified immunity; social-media post not a true threat), was by then decided and directly on point.

OBJECTION 6: DISMISSAL OF THE STIGMA-PLUS CLAIM (FCR pp. 41-42, 54)

28. The FCR evaluates the falsity of the ban's existence ("he was, indeed, banned") and the dismissal's occurrence. FCR at 41-42. The falsity pleaded is different: the BOLO asserted as fact that Plaintiff "has made threatening posts on social media" and directed recipients — including outside clinical affiliates — to summon security on sight and call 911 in a "life-or-death situation." Dkt. No. 32-2; Ex. A ¶ 84. That assertion is alleged to be false and known false when made: the officials' own records disclaimed any threat, *supra* ¶ 25; the complainant who alleged a physical threat later admitted she did not feel threatened; and the Board's determination never found Plaintiff posed a safety threat, using only "disruptive and reasonably perceived as a potential threat" language. Ex. A ¶ 84; Dkt. No. 43-1 ¶ 80. The determination letter's assertion that the disability "was not disclosed until the morning of the hearing" is likewise pleaded as false. Ex. A ¶ 39. These are "concrete, false factual representations . . . of wrongdoing," *San Jacinto Savings & Loan v. Kacal*, 928 F.2d 697, 708 (5th Cir. 1991) — the species of statement the FCR found absent. Plaintiff further objects that the continuing refusal of any name-clearing hearing — despite his formal October 19, 2025 request, which received no response, Ex. A ¶ 63 — alongside continuing republication through enrollment verifications, is a present withholding of constitutionally required process. Ex. A ¶¶ 6, 63, 86.

OBJECTION 7: DISMISSAL OF THE ADA CLAIMS FOR LACK OF STANDING / SOVEREIGN IMMUNITY (FCR § 3.C, pp. 22-25, 50)

29. Plaintiff objects to the finding that no ongoing violation is alleged, FCR at 24-25, and preserves the position that (a) the continuing refusal of a name-clearing hearing is an ongoing violation supporting prospective relief under *Ex parte Young*, and (b) each enrollment-verification response is a new publication rather than the residual effect of a completed act. Ex.

A ¶¶ 6, 63, 75, 86. The FCR's recommended disposition of these claims is without prejudice, FCR at 56; Plaintiff requests that any adoption preserve that designation.

29A. The authorities the FCR relies on address passive retention of a completed act's effects — *James v. Hegar*, 86 F.4th at 1082, and *Ambriz* (per curiam) ("residual effects of a prior [violation]," as quoted at FCR at 24). Neither addresses the conduct Exhibit A alleges: a current official responding to new third-party inquiries with new stigmatizing publications, and a present withholding of process due process presently requires. Ex. A ¶¶ 6, 63, 86. Retention is a condition; republication is conduct. The distinction was squarely presented below — "Each transcript request republishes the stigmatizing status (FAC ¶34A) — a continuing violation," Dkt. No. 33 at 22 — and the FCR addresses the notation only as a continuing injury from a past act, FCR at 24, without engaging the republication theory; its futility treatment is that Plaintiff "seeks injunctive relief to remedy past harms, despite his labeling of the relief as prospective," FCR at 50 — but the ongoing-conduct allegations must be accepted as true, not dismissed as labels. *Marucci*, 751 F.3d at 378.

OBJECTION 8: THE BACKGROUND CHARACTERIZATION (FCR p. 1)

30. The FCR's opening finding states that Plaintiff "apparently engaged in objectionable conduct," FCR at 1 — but the cited pages allege only that complaints were filed, and the pleadings allege the complaints' substance was withheld, one was recanted, and the internal appeals panel itself found a lack of specificity. Dkt. No. 43-1 ¶¶ 44-51; Ex. A ¶¶ 48-51. Accusations cannot be converted at Rule 12(b)(6) into a finding that the conduct occurred; Plaintiff requests that the district judge decline to adopt this characterization.

CONCLUSION

Plaintiff respectfully requests the relief specified in the Objections: decline to adopt the futility recommendation, receive Exhibit A under 28 U.S.C. § 636(b)(1) and grant leave to file it (or

grant the renewed motion for leave, or recommit with instructions); decline to adopt the recommended dismissal of the Rehabilitation Act claims; in the alternative as to the § 1983 claims, order a Rule 7(a) reply under Schulte before resolving qualified immunity; in the further alternative, modify the disposition so that all dismissals are without prejudice; decline to adopt the Objection 8 characterization; and grant such other relief as is just.

Dated: July 28, 2026.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 28, 2026, this Brief was served on all counsel of record via the Court's ECF system. /s/ Kevin N. Bass