

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

Young America's Foundation,

Plaintiff,

v.

Matthew Sitman, *et al.*,

Defendants.

Case No. 1:24-cv-00923-RDA-LRV

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

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Date: August 5, 2024

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Defendants Know Your Enemy, Inc., Matthew Sitman, Sam Adler-Bell, and the Foundation for the Study of Independent Social Ideas, Inc., d/b/a Dissent Magazine (collectively “Defendants”), submit this Memorandum in Support of their Motion to Dismiss the Complaint of Plaintiff Young America’s Foundation (“Plaintiff”), which asserts nine types of trademark infringement claims concerning their “YOUNG AMERICANS FOR FREEDOM” and “YAF” trademarks (collectively the “YOUNG AMERICANS FOR FREEDOM Marks”).

I. INTRODUCTION

Americans are free to critique their political adversaries. Such political commentary is the purpose of Defendants’ “Know Your Enemy” podcast, billed as a “leftist’s guide to the conservative movement.” Compl. ¶ 16 (June 5, 2024), ECF No. 2 (“Compl.”). Listeners can support the podcast by becoming a “member” at three levels: “Young Americans for Freedom” (\$5/month), “West Coast Straussians” (\$10/month), or “John Birchers” (\$25/month). *Id.*, Ex. C at 1 (ECF No. 2-4) (“Ex. C”). These membership tiers are each ironically named after conservative groups Defendants have dubbed their “enemies.”

Plaintiff’s claims are facially inconsistent with the fair use doctrine, the U.S. Constitution’s First Amendment, and common sense. No reasonable consumer of political content would think that supporting the leftist Know Your Enemy podcast somehow also supports “enemy” organizations advocating rival ideologies, such as the John Birch Society or the venerable “conservative youth organization” Young Americans for Freedom. *See id.*, Exs A, B (ECF Nos. 2-2, 2-3). The basis for this lawsuit, which Plaintiff originally filed and then voluntarily dismissed last year, is not the sort of consumer confusion that animates trademark law. Rather, it is Plaintiff’s inability to take a joke. But litigation is not politics by other means, and this Court should not countenance Plaintiff using the judicial process to bully an ideological adversary. Because Plaintiff’s Complaint fails to state a claim, it must be dismissed.

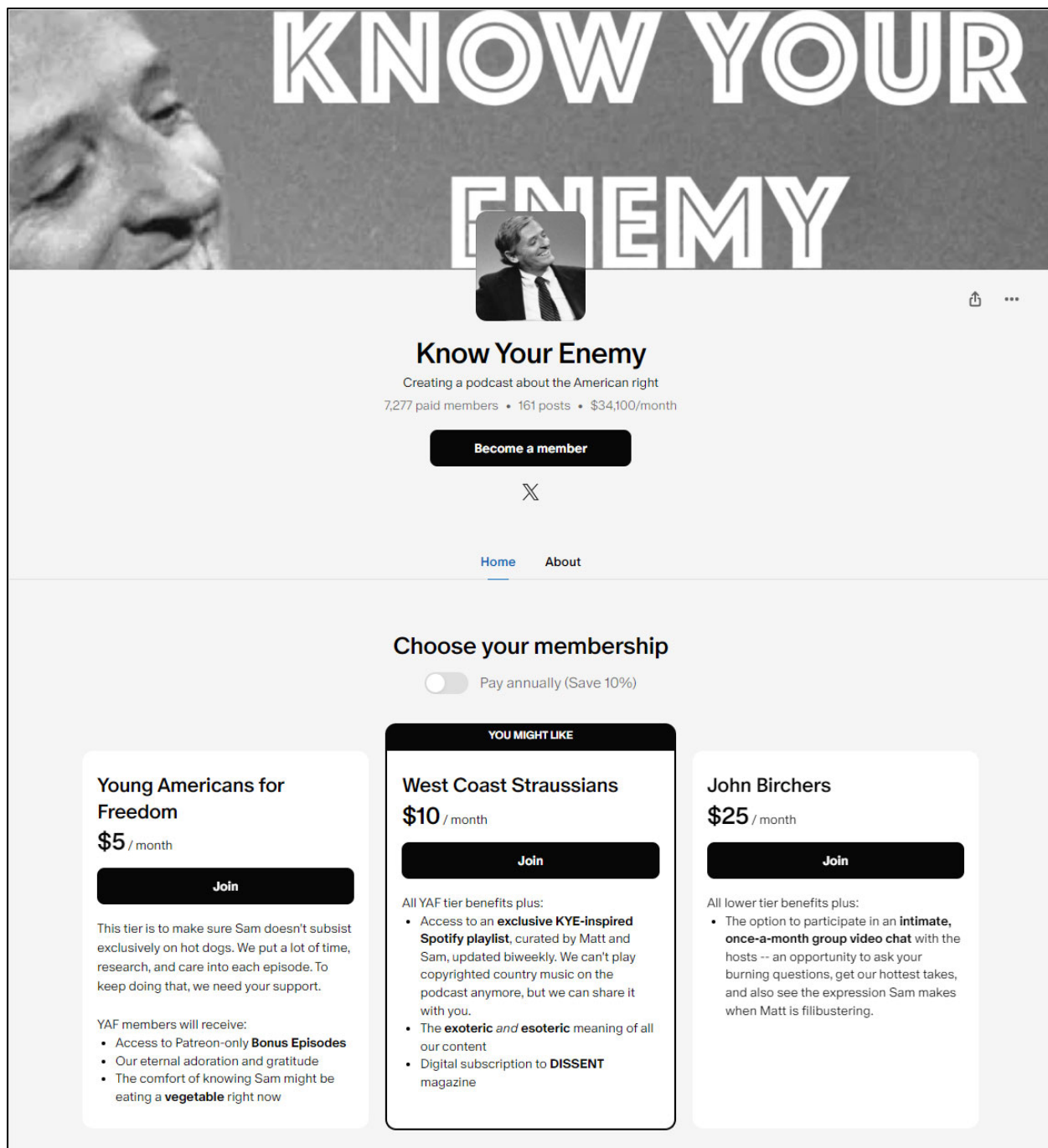
II. FACTUAL BACKGROUND

A. The Know Your Enemy podcast offers subscriptions to support its leftist commentary on the conservative movement.

Know Your Enemy, Inc. “sponsors, produces and hosts” the Know Your Enemy podcast. Compl. ¶ 19. Know Your Enemy is “a podcast about the American right” hosted by Defendants Matthew Sitman and Sam Adler-Bell. *Id.* ¶¶ 5, 14, Ex. C at 1. Know Your Enemy styles itself as a “leftist’s guide to the conservative movement.” *Id.* ¶ 16. The podcast publishes interviews and commentary exploring the history of the American political right. *See, e.g., id.* ¶ 7, Ex. C at 2. Along with its hosts Sitman and Adler-Bell, the Know Your Enemy podcast is “well known in the field of political commentary[.]” *Id.* ¶ 41.

Know Your Enemy has bonus content available through the internet platform Patreon, specifically at www.patreon.com/knowyourenemy. *See id.* ¶ 6 n.1, Ex. C. Supporters of Know Your Enemy may contribute at membership levels of \$5, \$10, or \$25 a month to receive extra episodes and other supplemental content. *Id.*, Ex. C at 1. Know Your Enemy labels its three Patreon membership levels with ironic references to three conservative “enemies”—“Young Americans for Freedom,” “West Coast Straussians,” and “John Birchers.” *See id.* at 1 (pictured on the next page).¹

¹ For resolution and readability, the picture on the next page was re-captured from www.patreon.com/knowyourenemy. *See* Compl., Ex. C at 1.



The Know Your Enemy podcast’s Patreon page is rife with other jokes that complement its playful tone. For example, under the “Young Americans for Freedom” membership tier, Know Your Enemy quips that the lowest tier membership is “to make sure Sam [Adler-Bell] doesn’t subsist exclusively on hot dogs.” Compl., Ex. C at 1. Right below, Defendants promise that “YAF

members will receive . . . [o]ur eternal adoration and gratitude” and “[t]he comfort of knowing Sam might be eating a **vegetable** right now.” *Id.* (emphasis added). The description under the “West Coast Straussians” tier also offers “[t]he **exoteric and esoteric** meaning of all our content,” *id.* (emphasis in original)—a humorous reference to Leo Strauss’s distinction between the public and secret meanings of certain premodern texts. *See generally* Leo Strauss, PERSECUTION AND THE ART OF WRITING (1st ed. 1952).

B. Dissent Magazine sponsors the “Know Your Enemy” podcast.

Defendant Foundation for the Study of Independent Social Ideas, Inc. publishes “Dissent Magazine,” available at www.dissentmagazine.org. Compl. ¶ 6. Dissent Magazine allegedly “sponsors and hosts” the Know Your Enemy podcast. *Id.* ¶¶ 19, 21.² Listeners can access Know Your Enemy through Dissent Magazine’s website, in addition to Patreon. Compl. 6, 17. Some Know Your Enemy supporters also receive a “[d]igital subscription to DISSENT magazine.” *Id.*, Ex. C at 1.

C. Plaintiff files, dismisses, re-files, and amends its lawsuits.

Plaintiff previously filed trademark litigation against Defendants Sitman, Adler-Bell, and Dissent Magazine on February 24, 2023. Compl. ¶ 42. Plaintiff voluntarily dismissed that litigation in July 2023, when it realized YAF Foundation, a defunct Delaware entity, owned the YOUNG AMERICANS FOR FREEDOM trademarks Plaintiff purported to assert. *See id.* ¶ 43, Exs. A, B (registration certificates issued to “YAF Foundation”). After dismissal, Plaintiff-affiliated personnel resurrected the defunct Delaware entity in order to assign the trademarks to Young America’s Foundation. *See* Motion to Dismiss Ex. A (State of Delaware Certificate for Revival of Charter dated July 11, 2023); *id.* Ex. B (U.S. Patent & Trademark Office assignment

² Should this case proceed to discovery, Defendants will dispute some of the Complaint’s allegations about the relationship between Dissent Magazine and the Know Your Enemy podcast.

dated October 10, 2023).³ Nearly a year later, Plaintiff re-filed suit on the basis that it “is the owner by assignment” of the YOUNG AMERICANS FOR FREEDOM Marks. Compl. ¶¶ 24, 28, 48, 55. Plaintiff then amended its Complaint to name different Defendants. *Compare* ECF No. 1, *with* ECF No. 2 (removing the defunct Dissent Publishing Corp. and adding Know Your Enemy, Inc.).

Plaintiff’s operative Complaint objects to Defendants’ ironic references to “Young Americans for Freedom” and “YAF.” *See generally* Compl., & Ex. C at 1. The Know Your Enemy podcast uses the term “Young Americans for Freedom” twice on the Patreon page, as the label for the lowest-level \$5/month paid supporter tier for the podcast. *See id.* ¶ 35, Ex. C at 1. The Patreon page also uses the acronym “YAF” twice, as shorthand to describe the benefits of the “Young Americans for Freedom” tier. *See id.*, Ex. C at 1; *see also id.* ¶¶ 35, 37.

Based on Defendants’ limited use of the term “Young Americans for Freedom” and acronym “YAF,” Plaintiff Young America’s Foundation asserts nine related trademark infringement counts against all Defendants. Compl. ¶¶ 47–91. These include two federal infringement claims (Counts 1–2), two federal counterfeiting claims (Counts 3–4), one federal false designation of origin claim (Count 5), one federal false advertising claim (Count 6), and three Virginia common law trademark and unfair competition claims (Counts 7–9). *Id.* Plaintiff does not allege that any members of either its or Defendants’ target audiences have actually been confused by Know Your Enemy’s ironic references.

³ The Court may take judicial notice of the official government records attached as Exhibits A–B to this motion pursuant to Fed. R. Evid. 201. *See, e.g., Va. Innovation Scis., Inc. v. Samsung Elecs. Co.*, 983 F. Supp. 2d 700, 707 (E.D. Va. 2013).

III. ARGUMENT

Defendants move to dismiss Plaintiff’s Complaint for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). The fair use doctrine and the First Amendment protect Defendants’ activities. Further, Plaintiff’s claims are implausible because Defendants’ ironic use of the YAF marks is not likely to create any confusion about the source or sponsorship of the Know Your Enemy podcast. Even now, more than a year after their original attempt at this lawsuit, Plaintiff has not (and cannot) allege any actual confusion resulting from Defendants’ use of the YAF marks. Plaintiff’s state law unfair competition claims “rise and fall” with its federal claims, and therefore the same analysis governs. *See Lamparello*, 420 F.3d at 312 n.1; *see also AM Gen. LLC v. Activision Blizzard, Inc.*, 450 F. Supp. 3d 467, 486–87 (S.D.N.Y. 2020) (dismissing New York unfair competition claims under the *Rogers* test). Plaintiff’s state law claims also violate Virginia’s Anti-SLAPP Law because they are aimed at the suppression of protected political commentary.

A. All of Plaintiff’s trademark claims are barred by fair use and the First Amendment.

Defendants’ references to “Young Americans for Freedom” constitute nominative fair use and are protected by the First Amendment. Plaintiff alleges that Defendants’ ironic humor may trick Know Your Enemy podcast listeners into confusing their support for a “leftist’s guide to the conservative movement[.]” with “membership in a conservative youth organization.” *Compare* Compl. ¶ 16, *with id.* ¶¶ 25, 33. “Generally, however, parodies of trademarks do not state a claim for trademark infringement.” *Prasad v. City of Richmond*, No. 3:17-cv-00039, 2018 WL 3016288, at *5 n.9 (E.D. Va. June 15, 2018) (citation omitted). To encourage robust public discourse and to guard against chilling of protected expression, both the Lanham Act and the First Amendment countenance some consumer confusion in the context of ironic or critical uses of others’ marks.

Radiance Found., Inc. v. NAACP, 786 F.3d 316, 328 (4th Cir. 2015) (rejecting “the paradox that criticism equals confusion, thereby permitting companies to shield themselves from adverse assessments”). Under these doctrines, Plaintiff’s federal and derivative state claims should be dismissed. *See, e.g., Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 613 (6th Cir. 2009) (affirming dismissal of Lanham Act claim pursuant to the fair use doctrine); *Louis Vuitton Malletier S.A. v. Warner Bros. Ent. Inc.*, 868 F. Supp. 2d 172, 184 (S.D.N.Y. 2012) (dismissing Lanham Act claims pursuant to the First Amendment).

1. Defendants use “Young Americans for Freedom” nominatively, and not to identify the Know Your Enemy podcast’s own goods or services.

Trademark enforcement “must be balanced by the concern that trademark protection [does] not become a means of monopolizing language.” *Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc.*, 405 F. Supp. 2d 680, 688 (E.D. Va. 2005) (citation omitted), *aff’d*, 227 F. App’x 239 (4th Cir. 2007). It is well-established that trademarks are designed to prevent consumer confusion. *See, e.g., McLean v. Fleming*, 96 U.S. 245, 251 (1877) (“[N]o trader can adopt a trade-mark, so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution, are likely to be misled.”). “But protections against unfair competition cannot be transformed into rights to control language.” *Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir. 2005) (internal quotation marks and citations omitted). Thus, trademark law permits accurate references to other marks for purposes of comparison and criticism. *See id.* (citing *CPC Int’l, Inc. v. Skippy Inc.*, 214 F.3d 456, 462 (4th Cir. 2000)).

The doctrine of nominative fair use protects against claims “in which the defendant uses the plaintiff’s trademark to identify the plaintiff’s own goods[.]” *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 154 (4th Cir. 2012) (citation omitted). Use is permissible where defendants “do not convey, but, on the contrary, exclude, the notion that they are selling the plaintiff’s

goods[.]” *Saxlehner v. Wagner*, 216 U.S. 375, 380 (1910). Courts may dismiss trademark infringement claims at the pleading stage where the complaint and exhibits demonstrate “that the fair use defense conclusively applie[s] as a matter of law.” *Hensley*, 579 F.3d at 613 (citation omitted).

Know Your Enemy’s Patreon page does not reference the conservative organization Young Americans for Freedom to identify that organization as the source behind Know Your Enemy, or otherwise to suggest affiliation, sponsorship, or endorsement. *Cf. Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 157 (2023) (“Confusion is most likely to arise when someone uses another’s trademark as a trademark—meaning, again, as a source identifier—rather than for some other expressive function.”). Plaintiff acknowledges as much: it pleads that the Know Your Enemy podcast is a “leftist’s guide to the conservative movement.” Compl. ¶ 16. Viewing the Patreon page in context, Defendants identify “Young Americans for Freedom” and “YAF,” along with “West Coast Straussians” and “John Birchers,” as “enemy” members of the conservative movement, which the podcast critiques from a leftist perspective. *Id.*, Ex. C.

Know Your Enemy’s ironically labeled membership tiers thus do not serve any source-identifying function for Defendants’ *own* goods and services. Indeed, it would be absurd for visitors to conclude that three conservative organizations are jointly behind a leftist podcast that identifies them as enemies—therein lies the Patreon page’s joke. This humorous juxtaposition is reinforced by the entertaining nature of the membership tier descriptions (*e.g.*, “make sure Sam doesn’t subsist exclusively on hot dogs”). *See id.*, Ex. C. Far from serving a source identifying function, Defendants use the names of these various organizations for comedic effect. Trademark law permits those jokes, which are not likely to cause any consumer confusion, especially since Defendants clearly identify the podcast’s source through the prominent “Know Your Enemy”

branding in the website address, banner, title, about page, and recent post highlights. *See id.* ¶ 16, Ex. C; *see also Radiance Found.*, 786 F.3d at 328 (rejecting likelihood of confusion based on “the full context in which the mark was used,” including “domain names and webpage headings [which] clearly denote other organizations”).

Because Defendants’ actions constitute nominative fair use of the YOUNG AMERICANS FOR FREEDOM Marks, Plaintiff fails to state any trademark infringement or counterfeiting claims.

2. The First Amendment protects Know Your Enemy’s ironic criticism of Young Americans for Freedom.

Defendants’ expressive use of the YOUNG AMERICANS FOR FREEDOM Marks also enjoys First Amendment protection against Defendants’ federal and state claims. Defendants’ references to Young Americans for Freedom are artistically relevant to the Know Your Enemy podcast’s critiques of the conservative moment, and do not expressly mislead as to source.

a. After *Jack Daniel’s*, the *Rogers* test still applies to expressive commentary on other’s trademarks.

The seminal case on the intersection of First Amendment expression with trademark’s source-identification functions is *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). There, the famous actress and dancer Ginger Rogers brought a Lanham Act claim against the producers and distributors of Federico Fellini’s film “Ginger and Fred.” *Id.* at 997. Ginger Rogers alleged that the film’s title “creat[ed] the false impression that the film was about her or that she sponsored, endorsed, or was otherwise involved in the film[.]” *Id.* In assessing the claim, the Second Circuit recognized that “[t]he title of a movie may be both an integral element of the film-maker’s expression as well as a significant means of marketing the film to the public.” *Id.* at 998. To prevent consumer confusion as to source, and also to accommodate the expressive interests inherent in the choice of title for an artistic work, the Second Circuit held that a Lanham Act claim

will not lie “[1] unless the title has no artistic relevance to the underlying work whatsoever, or, [2] if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.” *Id.* at 998–99 (footnote omitted).

Applying that artistic-relevance test, the Second Circuit in *Rogers* concluded that the Lanham Act could not impose liability on the “Ginger and Fred” filmmakers based on their choice of title. *Id.* at 1001–02. Although Rogers had submitted survey evidence of likely confusion and anecdotal evidence of actual confusion, the Second Circuit rejected that evidence as irrelevant. *Id.* Recognizing that “some members of the public would draw the incorrect inference that Rogers had some involvement with the film[,]” that risk of misunderstanding was “outweighed by the interests in artistic expression.” *Id.* at 1001. Courts nationwide have since adopted the *Rogers* test, applying it to all elements of expressive works which rely on others’ trademarks. *See, e.g., Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 664–65 (5th Cir. 2000) (applying *Rogers* to evaluate Polo Ralph Lauren’s Lanham Act claim based on the magazine “POLO”), *aff’d*, 48 F. App’x 917 (5th Cir. 2002) (*per curiam*); *Parks v. LaFace Records*, 329 F.3d 437, 450–59 (6th Cir. 2003) (applying *Rogers* to a Lanham Act claim based on the Outkast song “Rosa Parks”); *Mattel, Inc. v. MCA Recs., Inc.*, 296 F.3d 894, 902 (9th Cir. 2002) (rejecting Mattel’s Lanham Act claim based on the Aqua song “Barbie Girl”); *Univ. of Ala. Bd. of Trs. v. New Life Arts, Inc.*, 683 F.3d 1266, 1277–78 (11th Cir. 2012) (rejecting a Lanham Act claim based on an unlicensed collage of images of Tiger Woods); *Radiance Found.*, 786 F.3d at 329 (rejecting NAACP’s Lanham Act claim based on Radiance Foundation’s article titled NAACP: National Association for the Abortion of Colored People).

Rogers invites a threshold inquiry: “A trademark infringement claim brought against the use of a mark in an expressive work can be dismissed under the *Rogers* rule by a motion for

summary judgment or a Rule 12(b)(6) motion to dismiss for failure to state a claim.” 4 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 31:144.70 (5th ed. 2024) (footnotes omitted). Because “[c]ourts are cognizant of vindicating First Amendment protections through early dispositive motions to avoid chilling speech[,]” they have acknowledged that “[t]he *Rogers* test is an appropriate one to apply in the early stages of litigation.” *Rebellion Devs. Ltd. v. Stardock Ent., Inc.*, No. 12-cv-12805, 2013 WL 1944888, at *4 (E.D. Mich. May 9, 2013). Dismissal under *Rogers* is warranted when “no amount of discovery will tilt the scales in favor of the mark holder at the expense of the public’s right to free expression.” *Warner Bros.*, 868 F. Supp. 2d at 184 (footnote omitted); *see also Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247–48 (9th Cir. 2013), *abrogated in part on other grounds, Jack Daniel’s*, 599 U.S. at 159–61.

The Fourth Circuit embraced the *Rogers* test in *Radiance Foundation v. NAACP*, 786 F.3d at 328–29. There, Radiance Foundation had published an article titled “NAACP: National Association for the Abortion of Colored People.” *Id.* at 321. After a bench trial, the district court found that Radiance Foundation’s substitution of “Advancement” with “Abortion” was likely to cause confusion and issued a permanent injunction. *Id.* The Fourth Circuit reversed. Relying on *Rogers*, it concluded that “eye-catching and provocative” satire may “induce[] the reader to continue on[,]” but it does not “create[] a likelihood of confusion as to [source].” *Id.* at 329.

The U.S. Supreme Court recently addressed the continued vitality of the *Rogers* test in *Jack Daniel’s*, 599 U.S. 140, 143 S. Ct. 1578, 1579. Despite briefing urging the Court to reject or revise *Rogers*, the Court’s unanimous opinion charted a narrower course. *Id.* at 155–56 (noting “we take no position on [the] issue” of *Rogers* writ large). The Court held that the *Rogers* test does not apply when the alleged infringer uses a parodic or satirical mark as a source identifier for the infringer’s own goods. *Id.* at 152–53. “[F]or those uses, the First Amendment does not demand a

threshold inquiry like the *Rogers* test. When a mark is used as a mark . . . the likelihood-of-confusion inquiry does enough work to account for the interest in free expression.” *Id.* at 159. When, however, a mark is used expressively and *not* as a source-identifier for defendants’ products, the *Rogers* test still applies.

As detailed above, Defendants do not use the YOUNG AMERICANS FOR FREEDOM Marks as source identifiers for their own products. *See supra* Section III.A.1. Because *Jack Daniel’s* gating step is not met, the Fourth Circuit’s articulation of the *Rogers* test in *Radiance Foundation* still governs. Under that threshold inquiry, Plaintiff’s claims fail because Defendants’ tongue-in-cheek use of “Young Americans for Freedom,” to underscore the Know Your Enemy podcast’s theme as a “leftist’s guide to the conservative movement,” constitutes artistically relevant expression that does not expressly mislead consumers.

b. The Know Your Enemy podcast is engaged in artistically relevant ironic commentary about Young Americans for Freedom.

The first prong of the *Rogers* test assesses whether Defendants’ alleged use of the YOUNG AMERICANS FOR FREEDOM Marks bears any expressive relevance to the underlying work—in this case, the Know Your Enemy podcast. *See Rogers*, 875 F.2d at 998. Know Your Enemy is “a podcast about the American right” that is “well known in the field of political commentary and fundraising.” Compl., Ex. C at 1; *id.* ¶ 41. *Rogers* asks only whether the allegedly infringing use “has no artistic relevance to the underlying work whatsoever[.]” *Rogers*, 875 F.2d at 999. This “appropriately low threshold,” *id.*, “has the benefit of limiting [the Court’s] need to engage in artistic analysis in this context.” *Brown*, 724 F.3d at 1243 (citation omitted). “[I]t is not the role of the Court to determine how meaningful the relationship between a trademark and the content of a literary work must be; . . . any connection whatsoever is enough.” *Dillinger, LLC v. Elec. Arts Inc.*, No. 1:09-cv-01236, 2011 WL 2457678, at *6 (S.D. Ind. June 16, 2011).

Courts recognize that expressive works may comment on marks for factual, critical, or humorous purposes. For example, the First Amendment also protects the song “Barbie Girl,” *MCA Recs.*, 296 F.3d at 902, and a joke about Louis Vuitton in “The Hangover: Part II,” *Warner Bros.*, 868 F. Supp. 2d at 175, 178 (“Careful that is ... that is a Lewis Vuitton.”) (alteration in original); *see also Radiance Found.*, 786 F.3d at 328-29.

The First Amendment likewise protects Defendants’ humorous critique of Young Americans for Freedom. The Know Your Enemy podcast bills itself as “leftist’s guide to the conservative movement.” Compl. ¶ 16. Meanwhile, the asserted trademark registrations cover membership in a “conservative youth organization.” *Id.*, Exs. A, B. Know Your Enemy’s references to Young Americans for Freedom are thus relevant to the podcast’s work of commenting on conservatism. *See id.*, Ex. C at 2 (describing Know Your Enemy as “a podcast about the American right” and a November 2023 episode as about “teaching conservative history”). By including “Young Americans for Freedom” alongside support tiers labeled “West Coast Straussians” and “John Birchers,” Know Your Enemy signals that the references are humorous because the podcast opposes those organizations’ ideologies. The three tiers are even structured to emphasize the ironic contrasts. The “Young Americans for Freedom” tier is the cheapest at \$5/month, signaling that its reference to a “youth organization” is akin to the “student discount” tier for the podcast. Meanwhile, the top-level support tier at \$25/month jokingly refers to members of the John Birch Society, a more extreme and conspiratorial right-wing organization. These ironic contrasts are artistically relevant speech, even if Plaintiff does not get the joke. After all, “First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.” *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801

(9th Cir. 2003) (quoting *Yankee Publ'g Inc. v. News Am. Publ'g Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992)).

c. Defendants do not explicitly mislead consumers as to any association with Young Americans for Freedom.

The second prong of the *Rogers* test assesses whether Defendants' use of Plaintiff's marks "explicitly misleads as to the source or the content of the work." *Rogers*, 875 F.2d at 999 (footnote omitted). "The key here is that the creator must *explicitly* mislead consumers," and courts "accordingly focus on the nature of the junior user's behavior rather than on the impact of the use." *Gordon v. Drape Creative, Inc.*, 909 F.3d 257, 269 (9th Cir. 2018) (original alterations omitted) (emphasis in original) (internal quotation marks and citation omitted). Thus, "the mere fact that the use of a trademark misleads some consumers does not render it unprotected." *Stewart Surfboards, Inc. v. Disney Book Grp., LLC*, No. 10-cv-02982, 2011 WL 12877019, at *7 (C.D. Cal. May 11, 2011). Likewise, "mere use of a trademark alone cannot suffice to make such use explicitly misleading." *Id.* at *6 (citing *MCA Recs.*, 296 F.3d at 902). Instead, the "relevant question" is whether the use of the mark itself "would confuse" the public "into thinking" that the complainant "is somehow behind" the allegedly infringing product "or that it sponsors" the product. *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008). Social commentary is not "infringing so long as the use of the mark does not create confusion as to source, sponsorship, or affiliation." *Radiance Found.*, 786 F.3d at 329. "Any other holding would . . . propel the Lanham Act into treacherous constitutional terrain." *Id.*

Plaintiff has not plausibly alleged that Defendants' use of the asserted marks explicitly misleads the public into believing that Young America's Foundation is a source, sponsor, or affiliate of the leftist podcast. As in *Radiance Foundation*, "the briefest familiarity" with the Know Your Enemy podcast would "quickly create the impression the [podcast] was no friend" of

prominent conservative movements like Young Americans for Freedom. *Id.* at 328. Because the Patreon page describes the Know Your Enemy podcast as a “leftist’s guide to the conservative movement[,]” the unavoidable inference is that Young Americans for Freedom is one of the “enemies” referred to in the show’s title. Compl. ¶ 16, Ex. C at 1. Furthermore, the text under the Young Americans for Freedom membership tier states the subscription tier “is to make sure [Defendant Adler-Bell] doesn’t subsist exclusively on hot dogs[,]” and declares that “YAF members will receive[]” (1) “Access to Patreon-only **Bonus Episodes**,” (2) “Our eternal adoration and gratitude,” and (3) “The comfort of knowing [Defendant Adler-Bell] might be eating a **vegetable** right now.” *Id.*, Ex. C at 1 (emphases added). The descriptive text beneath the “Young Americans for Freedom” tier does not mention membership in, support for, or recognition by Young Americans for Freedom. *Id.* Under these circumstances, Plaintiff cannot plausibly allege that Defendants’ use of the YOUNG AMERICANS FOR FREEDOM Marks is explicitly misleading as to affiliation or source. Young Americans for Freedom is the “enemy,” not the “friend.” *See Radiance Found.*, 786 F.3d at 328.

* * *

Defendants refer to “Young Americans for Freedom” and “YAF” nominatively, for purposes of ironic criticism and commentary protected by the First Amendment. Plaintiff’s Complaint must be dismissed in its entirety.

B. Plaintiff does not plausibly allege confusion.

All of Plaintiff’s claims are governed by a likelihood of confusion test, and therefore all of them must be dismissed for failure to allege actionable confusion.

1. The Know Your Enemy podcast’s ironic references to Young Americans for Freedom are unlikely to cause confusion.

Even if the nominative fair use doctrine and the First Amendment did not bar Plaintiff’s claims, an “infringement claim [still] rises or falls on likelihood of confusion.” *Jack Daniel’s*, 599 U.S. at 153. The Supreme Court recently acknowledged that courts may address the likelihood-of-confusion analysis for parodic uses of trademarks through Rule 12(b)(6) motions to dismiss. *Id.* at 157 n.2. When a “parody . . . create[s] contrasts, so that its message of ridicule or pointed humor comes clear[,] . . . [the] parody is not often likely to create confusion.” *Id.* at 161.

The Fourth Circuit considers seven factors to assess likelihood of confusion:

- (1) the strength or distinctiveness of the plaintiff’s mark;
- (2) the similarity of the two marks;
- (3) the similarity of the goods or services the marks identify;
- (4) the similarity of the facilities the two parties use in their businesses;
- (5) the similarity of the advertising used by the two parties;
- (6) the defendant’s intent; and
- (7) actual confusion.

Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 259 (4th Cir. 2007) (citing *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984)). “Not all of these factors are of equal importance, ‘nor are they always relevant in any given case.’” *CareFirst of Md., Inc. v. First Care, P.C.*, 434 F.3d 263, 268 (4th Cir. 2006) (quoting *Anheuser-Busch, Inc. v. L. & L. Wings, Inc.*, 962 F.2d 316, 320 (4th Cir. 1992)). In satire or parody cases, these factors must be applied with special sensitivity to the particular ways in which humor is used to draw distinctions rather than create confusion. *See Radiance Found.*, 786 F.3d at 324–25.

No confusion is likely here. As an initial matter, Plaintiff’s factual allegations related to the *Pizzeria Uno* confusion factors are either missing or conclusory. *See, e.g.*, Compl. ¶¶ 27, 31 (conclusorily alleging “distinctive[ness]”); Compl. ¶¶ 50, 51, 58, 59, 71, 72, 76, 77, 80, 83, 84, 85, 90, 94 (conclusorily alleging confusion). “[U]nsupported, conclusory allegation[s] . . . fail[] to state a claim for trademark infringement.” *Southgate v. Facebook, Inc.*, No. 1:17-cv-00648, 2017

WL 6759867, at *4 (E.D. Va. Nov. 14, 2017), *aff'd*, 714 F. App'x 301 (4th Cir. 2018) (per curiam); accord *JTH Tax LLC v. DM3 Ventures, Inc.*, No. 3:20-cv-00176, 2020 WL 6551214, at *6 (E.D. Va. Nov. 6, 2020).

Plaintiff has not pleaded specific instances of actual confusion, nor has it pleaded facts sufficient to support an inference that such confusion is likely to arise. Plaintiff does not allege that any visitors to the Know Your Enemy page on Patreon have believed that clicking on the \$5/month Patreon support tier for a leftist podcast would sign them up as card-carrying members of Young Americans for Freedom, the conservative youth organization. *See, e.g., Lang v. Ret. Living Publ'g Co.*, 949 F.2d 576, 583 (2d Cir. 1991) (“[T]rademark infringement protects only against mistaken purchasing decisions and not against confusion generally.”) (citation omitted). Nor would such an allegation be plausible given Plaintiff’s and Defendants’ conflicting goals: Why would a leftist podcast enroll its audience in an “enemy” conservative organization? And why would a conservative youth organization like Young Americans for Freedom sponsor a leftist podcast that critiques the conservative movement? In the context in which “Young Americans for Freedom” appears on the Know Your Enemy page, Plaintiff cannot credibly allege confusion.

To the extent Plaintiff does plead facts in support of some confusion elements, those facts are irrelevant in the irony and parody context. For example, Plaintiff notes the similarity between its and Defendants’ uses of “Young Americans for Freedom” in the sphere of politics. *See* Compl. ¶¶ 7, 29, 41. Plaintiff also pleads that Defendants made an intentional choice to use the “Young Americans for Freedom” phrase. *See, e.g., id.* ¶ 52. But both similarity and intent weigh against, rather than support, a likelihood of confusion in the irony or parody context. *See, e.g., Haute Diggity Dog*, 507 F.3d at 261–62. “An intent to parody is not an intent to confuse the public.” *Id.* at 263 (quoting *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1486 (10th Cir. 1987)).

Irony, parody, and satire all “work[] by distorting the familiar with the pretense of reality in order to convey an underlying critical message.” *Radiance Found.*, 786 F.3d at 328 (original alterations omitted) (citation omitted). “The implications for the likelihood of confusion factors are thus obvious: parody or satire or critical opinion generally may be more effective if the mark is strong and the satirical or critical version is similar to the original.” *Id.* Defendants’ ironic use of the YOUNG AMERICANS FOR FREEDOM Marks is humorously effective *because* it accurately identifies a conservative organization as an “enemy.” Compl., Ex. C. This is ironic allusion, not commercial confusion. As the Fourth Circuit recognized in *Lamparello*, commercial confusion “simply does not exist when the alleged infringer establishes a gripe site that criticizes the markholder.” 420 F.3d at 317 (citation omitted).

No prospective listener of the leftist Know Your Enemy podcast is likely to be confused as to source or sponsorship with the conservative youth organization Young Americans for Freedom. Absent confusion, there is no claim. Because Plaintiff “fails to plausibly allege a likelihood of confusion, the district court should dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).” *Jack Daniel’s*, 599 U.S. at 157 n.2 (citation omitted).

2. Plaintiff does not allege actual confusion.

Plaintiff separately asserts that Defendants engaged in false advertising through their ironic use of the YOUNG AMERICANS FOR FREEDOM marks. To state a false advertising claim, a Plaintiff “must allege either (i) that the challenged representation is literally false or (ii) that it is literally true but nevertheless misleading.” *In re GNC Corp.*, 789 F.3d 505, 514 (4th Cir. 2015) (citations omitted). Plaintiff does not, and cannot, allege the reference is literally false. Defendants are accurately referencing Young Americans for Freedom in order to poke fun at that organization. As a result, Plaintiff must instead allege that the representation is both misleading and has caused “*actual* consumer confusion—it is not enough for a court to determine after the fact that a

representation could have misled hypothetical consumers.” *Id.* at 514 (emphasis added) (citation omitted). Because Plaintiff has not alleged any actual confusion, the false advertising claim (Count 6) must be dismissed.

C. Plaintiff does not plausibly allege any counterfeiting claims.

On top of Plaintiff’s failure to plausibly allege consumer confusion, Plaintiff cannot state any counterfeiting claims. Plaintiff’s counterfeiting claims (Counts 3–4) are defective because Plaintiff has not (and cannot) plead that Defendants have used any of the YOUNG AMERICANS FOR FREEDOM Marks on the same goods and services covered by the asserted registrations.

Counterfeiting claims brought under 15 U.S.C. § 1114 require that the allegedly counterfeit use of the mark be used to make a “‘stitch-for-stitch’ copy” of the same goods and services covered by a trademark registration. *Ill. Tool Works Inc. v. J-B Weld Co., LLC*, 469 F. Supp. 3d 4, 11 (D. Conn. 2020) (citation omitted); *Am. Auto. Ass’n v. AAA Auto Glass, LLC*, No. 1:14-cv-01072, 2015 WL 3545927, at *4 (E.D. Va. June 3, 2015). As the leading trademark law treatise explains, counterfeiting claims are intended to “require[] that the accused goods or services must be the same as those for which the plaintiff’s mark is registered.” 3 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 25.15 (5th ed. 2024). Congress included this heightened requirement to discourage “‘boilerplate’ charges of counterfeiting in ordinary trademark infringement suits” and at the same time “encourage[] the assessment of attorney fees for frivolous counterfeiting allegations.” *Id.* § 25.15 & n.12 (citing 130 CONG. REC. H12076, at 12,083 (Oct. 10, 1984)).

The asserted YOUNG AMERICANS FOR FREEDOM and YAF registrations each “indicat[e] membership” in the “conservative youth organization” YAF Foundation. *See* Compl., Exs. A, B. By Plaintiff’s own admissions, Defendants’ “use” of the terms “Young Americans for Freedom” and “YAF” is for membership tiers for the Know Your Enemy podcast, billed as a “leftist’s guide to the conservative movement.” *Id.* ¶¶ 16, 35-37. The products here are not even

close to identical. Membership in a conservative youth organization is different than a listener subscription to a “leftist” podcast. Plaintiff’s counterfeiting claims should therefore be dismissed. *See, e.g., Playboy Enters., Inc. v. Universal Tel-A-Talk, Inc.*, 48 U.S.P.Q.2d 1779, 1782–83 (E.D. Pa. 1998) (dismissing Lanham Act counterfeiting claim where plaintiff could not allege that the defendant used the mark for the goods and services identified in plaintiff’s trademark registration); *see also Boxy, LLC v. Jay at Play Int’l H.K., LTD*, No. 20-cv-80893, 2021 WL 1226388, at *8 & n.3 (S.D. Fla. Mar. 31, 2021) (collecting cases).

Furthermore, it is logically impossible to counterfeit a collective membership mark. Collective membership marks are “designations used by members to indicate they are members of a union, association or any other organization.” 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:98 (5th ed. 2024). Such marks are unique in that they are the “only registrable symbols that are not used by the sellers of anything.” *Id.* In other words, collective membership marks do not cover “goods and services” in the traditional sense. *See* Trademark Manual of Examining Procedure (TMEP) § 1304.01 (“[M]embership marks are not trademarks or service marks in the ordinary sense; they are not used in business or trade, and they do not indicate commercial origin of goods or services.”). Meanwhile, the text of the counterfeiting statute defines a “counterfeit mark” as “a counterfeit of a mark that is registered on the principal register in the United States Patent and Trademark Office for such goods or services sold, offered for sale, or distributed.” 15 U.S.C. § 1116(d)(1)(B); *accord* 15 U.S.C. § 1127. Because counterfeits *must* be used to promote or sell goods and services, and collective membership marks by definition are *not* goods or services, it is impossible to “counterfeit” them.

Plaintiff’s counterfeiting claims (Counts 3–4) should be dismissed.

D. Plaintiff’s state law claims are barred by the Virginia anti-SLAPP law.

“The test for trademark infringement and unfair competition under the Lanham Act is essentially the same as that for common law unfair competition under Virginia law.” *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 930 n.10 (4th Cir. 1995) (citations omitted). Because Defendants engaged in nominative and First Amendment-protected uses of the YOUNG AMERICANS FOR FREEDOM marks which cannot plausibly cause confusion, *see supra* Sections III.A–B, Plaintiff’s common law claims fail in tandem.

Plaintiff’s common law claims also fail because they are barred by Virginia’s anti-SLAPP law, Va. Code § 8.01-223.2. “A person shall be immune from tort liability if the tort claim is based solely on statements (i) regarding matters of public concern that would be protected under the First Amendment to the Constitution of the United States.” *Id.* Plaintiff’s common law trademark infringement (Count 8) and unfair competition claims (Counts 7 and 9) sound in tort. *See, e.g.*, RESTATEMENT (FIRST) OF TORTS § 717 (1938) (defining common law tort of trademark infringement); *Purcell v. Summers*, 145 F.2d 979, 989 (4th Cir. 1944) (“Unfair competition is a tort governed by the law of the state where it occurs.”).

Strategic lawsuits against public participation (*i.e.*, “SLAPP suits”) are “meritless civil action[s], intended to force upon a political opponent the high cost of defending against a lawsuit.” *ABLV Bank v. Ctr. for Advanced Def. Studies Inc.*, No. 1:14-cv-1118, 2015 WL 12517012, at *2 (E.D. Va. Apr. 21, 2015) (citations omitted). Anti-SLAPP statutes like Virginia Code section 8.01-223.2 serve to “weed out and deter lawsuits brought for the improper purpose of harassing individuals who are exercising their protected right to freedom of speech.” *Fairfax v. CBS Corp.*, 2 F.4th 286, 296 (4th Cir. 2021) (citation omitted). Virginia Code section 8.01-223.2 is intended to “ensure that Virginia courts are not used to silence political discourse protected by the First

Amendment[.]” *Fairfax v. N.Y. Pub. Radio*, No. 1:22-cv-00895, 2023 WL 3303125, slip op. at *5 (E.D. Va. Apr. 4, 2023).

Plaintiff’s state law claims are designed to chill Defendants’ free political expression through claims of trademark infringement and unfair competition, and thus Defendants are entitled to Virginia’s anti-SLAPP immunity under Virginia Code section 8.01-223.2.

First, the speech that Plaintiff targets relates to “matters of public concern.” Plaintiff alleges that Defendants “adopted and began using” the YOUNG AMERICANS FOR FREEDOM Marks in connection with the Know Your Enemy podcast. Compl. ¶ 33. Plaintiff acknowledges that Defendants and their podcast are “well-known in the field of political commentary and fundraising[.]” *Id.* ¶ 41. The ironic use of the YOUNG AMERICANS FOR FREEDOM marks to label the leftist podcast’s Patreon tiers is an expression of humorous political commentary. In the Fourth Circuit, “[s]peech involves a matter of public concern when it involves an issue of social, political, or other interest to a community.” *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc) (citation omitted). Journalists and rival political organizations who criticize others by reference to their trademarks, even in the course of soliciting funds, engage in speech on a matter of public concern. *See, e.g., Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1284 (M.D. Ala. 2019) (granting motion to dismiss trademark claims based on Southern Poverty Law Center’s inclusion of Plaintiff’s trademarks on “Hate Map” used in solicitations), *aff’d*, 6 F.4th 1247 (11th Cir. 2021).

Second, Defendants’ speech is protected by the First Amendment. For the reasons discussed above, *see supra* Section III.A, Defendants’ references to the YOUNG AMERICANS FOR FREEDOM marks are expressive and therefore protected by the First Amendment. Because Defendants use the YOUNG AMERICANS FOR FREEDOM marks to expressively contrast their

podcast’s leftist leanings against their conservative “enemies,” Defendants enjoy First Amendment protection. Indeed, “the risk of impinging on protected speech is much greater when trademarks serve not to identify goods but rather to obstruct the conveyance of ideas, criticism, comparison, and social commentary.” *Radiance Found.*, 786 F.3d at 322. Defendants’ speech is not false and malicious, but rather both truthful and critical: Defendants’ ironic reference to Plaintiff’s marks accurately identify Plaintiff as an “enemy”—*i.e.*, a part of the conservative movement, which the podcast critiques from a leftist perspective.

Plaintiff’s state law claims embody the sort of speech-chilling litigation Virginia’s anti-SLAPP statute was enacted to defeat. Defendants are entitled to immunity because their reference to the YOUNG AMERICANS FOR FREEDOM marks is speech on a matter of public concern protected by the First Amendment, and Plaintiff fails to allege actual malice.

Because Plaintiff’s common law claims should be dismissed, the anti-SLAPP statute further entitles Defendants to reasonable attorneys’ fees and costs. *See* Va. Code § 8.01-223.2(c); *Harless v. Nicely*, 80 Va. App. 6781 693-94 (May 7, 2024) (affirming dismissal of plaintiff’s complaint and remanding to the trial court for a determination on reasonable attorney fees and costs under Va. Code § 8.01-223.2(c)).

IV. CONCLUSION

Defendants respectfully request the Court grant their Motion to Dismiss the Complaint.

Dated: August 5, 2024

Respectfully submitted,

/s/ Abid R. Qureshi

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