

**No. 25-1858**

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

---

MARSHALL AUSTIN,

*Plaintiff-Appellant,*

-v.-

CHARLESTON DAY SCHOOL, CDS; EMMIE G. HERSHEY;  
JUDITH FOLEY ARNSTEIN,

*Defendants-Appellees.*

---

**BRIEF OF DEFENDANTS-APPELLEES**

---

Alice F. Paylor, Federal ID #3017  
Isabelle S. Young, Federal ID #14209  
Bijan K. Ghom, Federal ID #12918  
Saxton & Stump, LLC  
151 Meeting Street, Suite 400  
Charleston, SC 29401  
(843) 414-5080  
afp@saxtonstump.com  
iyoung@saxtonstump.com  
bkg@saxtonstump.com

ATTORNEYS FOR APPELLEES

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 25-1858Caption: Marshall Austin v. Charleston Day School, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Charleston Day School

(name of party/amicus)

who is \_\_\_\_\_ Appellee \_\_\_\_\_, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?  YES  NO  
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim?  YES  NO  
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: s/Alice F. Paylor

Date: March 31, 2026

Counsel for: Appellees

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 25-1858Caption: Marshall Austin v. Charleston Day School, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Judith Foley Arnstein

(name of party/amicus)

who is Appellee, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?  YES  NO  
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim?  YES  NO  
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: s/Alice F. Paylor

Date: March 31, 2026

Counsel for: Appellees

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 25-1858Caption: Marshall Austin v. Charleston Day School, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Emmie G. Hershey

(name of party/amicus)

who is \_\_\_\_\_ Appellee \_\_\_\_\_, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?  YES  NO  
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim?  YES  NO  
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: s/Alice F. Paylor

Date: March 31, 2026

Counsel for: Appellees

## TABLE OF CONTENTS

	<b>Page:</b>
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE .....	1
I.    Factual Background .....	2
a. Federal COVID Funds, COVID Protocols at CDS, and the Austins’ Conduct .....	2
b. The Board Dismisses Austin as a Member .....	6
c. Bylaws, Confidentiality, and Expectations Regarding Conduct ....	8
d. The Cause for Austin’s Removal from the Board .....	10
SUMMARY OF ARGUMENT .....	11
STANDARD OF REVIEW .....	12
ARGUMENT .....	13
I.    Austin Did Not Have an Agency Relationship with CDS .....	14
II.   Austin Did Not Carry His Burden of Proof on the Elements of Retaliation .....	22
a. Austin Failed to Demonstrate He Engaged in Protected Activity..	22
i. The Evidence Fails the “Distinct Possibility” Test .....	24
ii. The Evidence Fails the Objectively Reasonable Test .....	38
b. Austin Cannot Satisfy the Notice Prong .....	39
c. Austin Cannot Prove Causation .....	43

CONCLUSION .....51

CERTIFICATE OF COMPLIANCE .....53

## TABLE OF AUTHORITIES

### Page(s):

#### Cases:

<i>Allen v. Greenville Hotel Partners, Inc.</i> , 409 F. Supp. 2d 672, 678 (D.S.C. 2006).....	18
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 252 (1986) .....	13, 51
<i>Ashland Facility Operations, LLC v. N.L.R.B.</i> , 701 F.3d 983, 990 (4th Cir. 2012).....	16, 17, 18
<i>Carlson v. DynCorp Int'l LLC</i> , 657 Fed. Appx. 168, 171 (4th Cir. 2016).....	22
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 322 (1986) .....	12
<i>Evans v. Int'l Paper Co.</i> , 936 F.3d 183, 191 (4th Cir. 2019) .....	12
<i>Gillins v. Berkeley Elec. Coop.</i> , 148 F.3d 413, 415 (4th Cir. 1998).....	13
<i>Ickes v. NexCare Health Sys., L.L.C.</i> , 178 F. Supp. 3d 578, 591 (E.D. Mich. 2016)	16
<i>Krakauer v. Dish Network, LLC</i> , 925 F.3d 643, 659-60 (4th Cir. 2019).....	19
<i>Lemon v. Myers Bigel, P.A.</i> , 985 F.3d 392, 396 (4th Cir. 2021).....	19
<i>Mann v. Heckler &amp; Koch Defense, Inc.</i> , 630 F.3d 338, 344 (4th Cir. 2010)....	<i>passim</i>
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973).....	22
<i>Pitts v. Jackson Nat. Life Ins. Co.</i> , 574 S.E.2d 502, 507 (S.C. App. 2002).....	20
<i>Shenoy v. Charlotte-Mecklenburg Hosp. Auth.</i> , 521 Fed. Appx. 168, 174 (4th Cir. 2013).....	22, 39, 43
<i>Skibo on behalf of United States v. Greer Lab'ys, Inc.</i> , 841 Fed. Appx. 527 (4th Cir.	

2021).....	22
<i>Teamsters Joint Council No. 83 v. Centra, Inc.</i> , 947 F.2d 115, 119 (4th Cir. 1996)....	13
<i>United States ex rel. Abu-Hussein v. Science Applications Int’l Corp.</i> , No. 2:09–cv–1858–RMG, 2012 WL 6892716 (D.S.C. May 3, 2012).....	14, 15
<i>United States ex rel. Bias v. Tangipahoa Parish School Board</i> , 816 F.3d 315, 324 (5th Cir. 2016).....	15, 17, 18
<i>United States ex rel. Cody v. ManTech International, Corporation</i> , 746 Fed. Appx. 166 (4th Cir. 2018) .....	44
<i>United States ex rel. Dillard v. Fluor Corp., Inc.</i> , No. 6:16-CV-02948-JD, 2022 WL 993667 (D.S.C. Apr. 1, 2022).....	40, 44
<i>United States ex rel. Grant v. United Airlines Inc.</i> , 912 F.3d 190, 200-01 (4th Cir. 2018).....	<i>passim</i>
<i>United States ex rel. Parks v. Alpharma, Inc.</i> , 493 Fed. Appx. 380, 388 (4th Cir. 2012).....	39, 41
<i>United States ex rel. Potter v. CASA de Md.</i> , No. 16-0475, 2018 WL 1183659 (D. Md. Mar. 6, 2018).....	40
<i>Vander Boegh v. EnergySolutions, Inc.</i> , 772 F.3d 1056, 1063 (6th Cir. 2014). 14, 15	
<b>Statutes and Other Authorities</b>	
31 U.S.C. § 3729 .....	13, 29
31 U.S.C. § 3730(h).....	<i>passim</i>
31 U.S.C. § 3730(h)(1) .....	<i>passim</i>
Fraud and Enforcement and Recovery Act of 2009 Pub.L. No. 111–21, § 4, 123 Stat. 1617, 1624 (2009) .....	14
Fed. R. Civ. P. 56(a) .....	12

Restatement (Third) of Agency § 1.01 (2006)..... 17, 20

Restatement (Third) of Agency § 1.02 (2006)..... 16, 18, 21

Restatement (Third) of Agency § 2.01 (2006)..... 17, 19

Restatement (Third) of Agency § 3.01 (2006).....17

## STATEMENT OF THE CASE

Appellant Marshall Austin (“Austin”) and his wife Frances are parents of students who attended Appellee Charleston Day School (“CDS”) during the COVID-19 pandemic.<sup>1</sup> Like most schools operating during the pandemic, CDS implemented and enforced a masking policy. By the fall of 2021, the Austins, like many parents during that time, no longer wanted their children to wear masks while at school. When CDS’s Board of Trustees (“the Board”) implemented a mask optional policy in early December 2021, the Austins were pleased; but when the Board delegated authority over the policy to the Head of School, Judith Arnstein, who again required masks consistent with community health data, the Austins were incensed. Austin, who was on the Board at the time, started looking for evidence of Board impropriety; Mrs. Austin meanwhile started her campaign to challenge Ms. Arnstein’s authority, which culminated in Mrs. Austin’s refusal to mask her children. As a result of the Austins’ disruptive conduct, which the Board agreed seriously interfered with the school’s ability to accomplish its educational purpose, and amidst concerns that Austin was not upholding his duties as trustee, the Board voted not to reenroll the Austins’ children and voted to dismiss Austin

---

<sup>1</sup> Austin noticed this appeal as to Emmie G. Hershey and Judith Foley Arnstein but has since abandoned his claims as to those two individuals. Opening Br., 3 n.1.

from the Board. When the dust settled, Austin had filed the underlying lawsuit asserting one claim for retaliation under the False Claims Act.

### FACTUAL BACKGROUND

In the spring and summer of 2020, CDS applied for federal financial assistance and received funds under both the Emergency Assistance to Non-Public Schools (“EANS”) and the Payment Protection Program (“PPP”) (collectively, “Federal COVID Funds”), in an approximate amount of \$600,000.

Three of Austin’s children were admitted to and enrolled at CDS from at least the 2019-2020 school year until the end of the 2021-2022 school year. In March of 2020, CDS suspended in-person learning due to the COVID pandemic. At that time the entire world was dealing with the pandemic and the school’s future was unknown. CDS subsequently reinstated in-person learning for the 2020-2021 school year, subject to COVID protocols and certain restrictions, including masking. At the beginning of the 2021-2022 school year, CDS imposed the same COVID restrictions and protocols, including the requirement that all individuals present on school grounds wear masks.

#### Federal COVID Funds, COVID Protocols at CDS, and the Austins’ Conduct

As was the case with most private schools and many small businesses across the country, CDS was eligible for PPP funds when the federal government implemented the Coronavirus Aid, Relief, and Economic Security Act (“CARES

Act”) in April of 2020. CDS received PPP funds during the summer of 2020 and used those funds for payroll purposes only, as required by the CARES Act. On September 1, 2020, the Board voted to apply for PPP loan forgiveness, as did most small businesses and private schools in South Carolina. The federal government granted CDS’s request for forgiveness of the loan. At all times herein at issue, the school faced great uncertainty as to its future due to the pandemic. (JA935, JA109-115, JA156-157, JA1050-1058).

Austin, who identified himself in the Complaint as a former federal prosecutor, had no involvement with or knowledge of CDS’s application for PPP funds, use of those funds, or request for forgiveness of the funds. (JA198-203). Austin testified that he had no reason to be concerned about the school’s use of PPP funds until he learned that the school intended to take adverse actions against him. *See* (JA337).

Austin’s children wore masks and followed the rules set by the school during the 2020-2021 school year with no complaints made. (JA214). Austin joined the Board in June of 2021 and attended a Board meeting the same month, where he voted with the majority to transfer CDS’s surplus funds to its endowment. Those surplus funds were primarily the result of the PPP funding. (JA237). There were no concerns about COVID funds being mishandled or misused at this time. In fact,

Austin testified that he and his family had “no problem” with CDS, until November of 2021. (JA214).

In November of 2021, Mrs. Austin became concerned about her son’s continuing health conditions, which she believed the masking exacerbated. She began emailing her concerns to Ms. Arnstein and Emmie Hershey, the Chair of the CDS Board, and began questioning the requirement that her son should continue to wear a mask. Mrs. Austin did not respond when she was asked to provide medical documentation supporting her concerns. Rather, she merely repeated her requests that the school permit her son to attend class without a mask. *See* (JA491-565).

During this time, Ms. Arnstein and Ms. Hershey operated CDS in a manner that supported the school as a whole, without specific consideration given to any one student or family’s preference. They issued recommendations they considered to be for the good of the school based on information the medical community gathered and disseminated. As such, they informed Mrs. Austin that CDS could not make an exception for her child. (JA152); *see* (JA563).

As the number of active COVID cases began decreasing, the Board decided to revisit its COVID protocols, including the school’s masking requirement. On December 6, 2021, Ms. Hershey called Austin and advised him that the Board had set a special meeting for the following day to discuss the COVID protocols. (JA152, JA270-271).

On December 7, 2021, the CDS Board met and discussed the status of COVID within the community and specifically whether they could lift the masking requirement. Based on the prevalent data and recommendations of the medical community at that time, the Board voted to implement a “mask optional” policy, beginning on December 13, 2021. The policy was subject to the Head of School’s discretion to reimpose the masking requirement in the event COVID conditions worsened. (JA963).

Mrs. Austin learned of the Board’s decision to implement the mask optional policy prior to when the school announced it to the CDS community. Then, when CDS again required masks, Mrs. Austin immediately began raising questions. Mrs. Austin confronted school staff, Ms. Hershey and Ms. Arnstein, and CDS’s then-legal counsel, Cherie Blackburn, over the school’s authority to take action regarding COVID-related concerns. (JA491-565); *see* (JA947-50, JA62-63).

Mrs. Austin threatened lawsuits, speculated as to consequences for staff members, and generally created a hostile environment for those individuals charged with operating the school and educating the students. Members of the Board reached out to Austin concerning his wife’s actions, but her conduct continued unabated. Ultimately, Austin joined his wife in calling for the removal of Ms. Arnstein and Ms. Hershey.

### The Board Dismisses Austin as a Member

Finally, at the end of January 2022, the Executive Committee of the Board reached the decision to remove Austin from the Board on account of his conduct, and to not issue re-enrollment contracts to Austin's children for the 2022-2023 school year. Austin learned of the decision during a phone call with Board member Jamie Hood on February 3, 2022, during which call Mr. Hood told Plaintiff that "the tenor and tone of Francie's communications was making it hard for the executive committee to do their business . . . ." Austin responded, "if that's the case, if you're telling me I haven't done anything wrong and they – they are going to kick my kids out, then I'm going to sue." This was the first time Austin threatened to sue the school. (JA313). In lodging this threat, Austin did not mention the Federal COVID Funds nor did he mention anything about retaliation. (JA313-314). Nor did he specify any theory on which he intended to sue the school or any theory under which he thought the school was civilly or criminally liable. *See* (JA314).

During his deposition, Austin testified that he talked about COVID policy with Mr. Hood in late January and/or early February of 2022, but not about the Federal COVID Funds. (JA314-318). Austin suggested to Mr. Hood that he, Austin, compile CDS's COVID policies and make them available on the school's website. (JA314-318). And Austin suggested that he look at the school's

applications for the Federal COVID Funds. Austin never approached the Board with these suggestions and Mr. Hood never asked or directed Austin to either compile the policies or review the applications. (JA314-318).

Although Austin testified that he harbored certain concerns about the Federal COVID Funds, he could not remember if or when he told either Ms. Hershey or Ms. Arnstein about these concerns. Austin did not share his concerns with the Board. (JA324).

On February 5, 2022, Austin contacted an Assistant United States Attorney (“AUSA”) because he “was scared about what people were doing to [his] family . . . I was certainly, certainly mad . . . it was a very, very harsh reaction.” He told AUSA Derek Shoemake “what was going on [with his kids]” and “that I was just hearing a lot of complaints about [PPP funds].” Austin recalled telling AUSA Shoemake that he assumed “things [at the school] were done correctly given the caliber of the people that were involved.” (JA338-340). Austin never informed anyone at CDS that he was considering bringing a *qui tam* action or action for retaliation. (JA346-347).

The Board held a special meeting on February 11, 2022, to discuss Austin’s tenure as a trustee and whether to issue re-enrollment contracts for his children. During this meeting, Austin did not mention Federal COVID Funds or any concerns related thereto. Nor did Austin convey to the Board his suspicion that the

Board was removing him as a trustee and declining to re-enroll his children in retaliation for any questions or comments he may have raised related to the school's use of Federal COVID Funds. (JA347-349).

Bylaws, Confidentiality, and Expectations Regarding Conduct

The CDS Bylaws state in relevant part as follows:

Section 3.1. The direction and control of the Corporation shall vest in a Board of Trustees, consisting of not more than fifteen (15) members . . . .

Section 3.2. The Board of Trustees may exercise all such powers of the Corporation and do all such lawful acts and things as are not proscribed by statute, by the articles of incorporation, or by these By-Laws. The Board of Trustees may delegate to the Executive Committee, Head of School, or such other officer or employee, such authority as shall from time to time be necessary or desirable in the determination of the Board of Trustees.

. . . .

Section 3.9. A majority of the existing Board being present shall constitute a quorum for the transaction of business at any meeting of the Board of Trustees. **Each member of the Board of Trustees shall have one vote on any motion presented to the Board of Trustees and, unless otherwise stated herein, the vote of a majority of the Board of Trustees members present at the time of the vote, if a quorum is present, shall be an act of the Board of Trustees.** The Board of Trustees shall have the authority to act without a duly called meeting of the Board of Trustees upon the affirmative unanimous action of the Board, duly noted in minutes contained in the corporate records of the Corporation . . . .

. . . .

Section 9.1. The Board of Trustees may delegate to an Executive Committee such of its powers, duties, and obligations as determined by

the Board of Trustees from time to time. The Executive Committee shall consist of the Chair, Vice-Chair, Treasurer, Secretary and the immediate past Chair, if she or he is a member of the Board. The Head of School employed by the school shall participate, ex officio, in all meetings of the Executive Committee, but shall have no vote . . . .

. . . .

Section 10.1 The Committee on Trustees shall consist of the Chair of the Board of Trustees and not less than two (2) or more than four (4) other members of the Board of Trustees, all of whom shall serve for a period of one (1) year upon appointment. The Head of School employed by the school shall participate, ex officio, in all meetings of the Committee on Trustees, but shall have no vote . . . .

(JA566-574) (emphasis added).

During the Rule 30(b)(6) deposition for CDS, Rutledge Young testified as follows in response to the question, “[w]hat role did the bylaws have in the operation of Charleston Day?”: “[t]he bylaws are part of the governing documents of the corporation, and that’s the role they played. . . . they govern all the things that they speak to.” (JA937).

Mr. Young also testified that incoming Board members are presented with the Board’s confidentiality policy and conflict of interest policy. (JA938, JA942). Mr. Young testified that all Board meetings are confidential: “there was a concern about keeping board decisions, board deliberations, all of the finances of the school – you know, there’s a lot of stuff that goes on in a board meeting that you don’t want being disseminated to parents, to teachers, to the community at large just for

the potential for disruption.” (JA939-940). “[C]onfidentiality . . . is a big and very real concern for the sort of orderly operation of the school.” (JA941).

Each parent of a child enrolled at CDS signs a contract whereby the parent agrees not to engage in behavior, communications, or interactions that are disruptive, intimidating, or otherwise seriously interfere with the school’s accomplishment of its educational purpose. (JA575-577). The Board voted to not re-enroll Austin’s children due to Mr. and Mrs. Austin’s breach of the enrollment contract. (JA171-172, JA54-55, JA952-953).

#### The Cause for Austin’s Removal from the Board

The motion to remove Austin from the Board was based on his “repeated failure to act in the best interests of the school, to cause disruption to school operations, to question authority of the head of school and the executive committee of the board of trustees, to threaten legal action against board members and school employees.” (JA171); *see* (JA965).

Additionally, CDS removed Austin as a trustee, after consulting the Bylaws and outside legal counsel, due to concerns that Austin had not maintained confidentiality of Board proceedings and discussions, which breach of confidentiality greatly disrupted the school’s operations. (JA946-947, JA949-950). The decision to remove Austin was also in part due to his and his wife’s conduct during the relevant time, which the Board perceived as an “objective, opposition to

carrying out the function of the board”; as well as due to what the school considered to be Austin’s breach of the fiduciary duty he owed CDS as a trustee. (JA953).

The Board is comprised of a group of volunteers who act together in the best interest of the school. Austin served CDS as a volunteer trustee. There is no evidence that he acted as the school’s agent or even that any individual trustee could act as the school’s agent. There is no evidence that Austin engaged in protected activity. There is no evidence that CDS removed him from the Board as a result of any purported protected activity. And there is no evidence that CDS misused Federal COVID Funds. *See, e.g.*, (JA313-314, JA364-365). CDS is not aware of any internal complaints by anyone within the school concerning financial mismanagement or malfeasance from January 1, 2020 until present. (JA943-944). Other than the present lawsuit, CDS is not aware of any external complaints from anyone outside the school concerning financial mismanagement or malfeasance from January 1, 2020 until present. (JA945).

### **SUMMARY OF ARGUMENT**

Austin is not entitled to avail himself of the protections offered under the False Claims Act’s (“FCA”) anti-retaliation provision because he is not a covered individual. Austin served CDS as a volunteer trustee, not as an employee,

contractor, or agent. On this basis alone, the Court can affirm the district court's entry of judgment in CDS's favor.

Second, Austin failed his burden of proof to establish the three elements of a retaliation claim under the FCA. Austin did not act in furtherance of an FCA action and therefore cannot demonstrate protected activity. The Board was not on notice that Austin was engaged in action in furtherance of an FCA suit and therefore Austin cannot demonstrate the requisite notice. And the Board took the "adverse" action of dismissing Austin as trustee and not offering re-enrollment to his children due to legitimate, non-retaliatory reasons.

The district court properly found no triable issue of fact as to these four issues and appropriately entered judgment in CDS's favor. The district court's order and judgment should be affirmed.

### **STANDARD OF REVIEW**

This Court reviews a district court's grant of summary judgment de novo. *Evans v. Int'l Paper Co.*, 936 F.3d 183, 191 (4th Cir. 2019). Summary judgment is appropriate when there is no genuine dispute of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When a party fails to establish the existence of an element essential to that party's case, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

“[A]ny permissible inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.” *Gillins v. Berkeley Elec. Coop.*, 148 F.3d 413, 415 (4th Cir. 1998). However, “where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate.” *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1996). The mere existence of a scintilla of evidence in support of the non-moving party’s position is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

### **ARGUMENT**

The FCA is an anti-fraud statute that imposes liability for those who make false statements and submit false claims to the Government. 31 U.S.C. § 3729. The FCA’s retaliation provision is intended to protect individuals who are in an employment-type relationship with the alleged perpetrator and who seek to expose violations of § 3729. The retaliation provision states:

Any employee, contractor, or agent shall be entitled to all relief necessary to make that [individual] . . . whole . . . if that [individual] . . . is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the [individual] . . . in furtherance of . . . efforts to stop [one] or more violations of this subchapter.

31 U.S.C. § 3730(h)(1). Protection under § 3730(h) is not available where the plaintiff was not attempting to investigate or prevent fraud against the government. *See Mann v. Heckler & Koch Defense, Inc.*, 630 F.3d 338, 344 (4th Cir. 2010).

**I. Austin Did Not Have an Agency Relationship with CDS.**

Austin was not CDS's employee. (JA373). He was not Ms. Hershey's employee or Ms. Arnstein's employee. (JA373). And he was not engaged by CDS as a contractor. (JA373). Thus, to avail himself of § 3730(h), Austin had to prove he served CDS as its agent. As the district court properly found, Austin failed on this burden of proof.

In 2009, Congress amended the FCA retaliation provision by omitting the word "employer" as the only potentially culpable party and adding "contractor" or "agent" to "employee," as identifiers of a possible aggrieved party. Fraud Enforcement and Recovery Act of 2009, Pub.L. No. 111–21, § 4, 123 Stat. 1617, 1624 (2009) . The predominance of federal courts to consider the question have found that the amendment expanded the range of plaintiffs in FCA retaliation actions while still requiring that a defendant have an employment-type relationship with the plaintiff. *See, e.g., United States ex rel. Abu-Hussein v. Science Applications Int'l Corp.*, No. 2:09–cv–1858–RMG, 2012 WL 6892716, at \*2 (D.S.C. May 3, 2012) (collecting cases) *aff'd* 475 Fed. Appx. 851 (4th Cir. 2012) (per curium); *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1063

(6th Cir. 2014) (citing 155 Cong. Rec. E1295–03, 2009 WL 1544226 (June 3, 2009) (statement of Rep. Howard L. Berman) (stating, as the House sponsor of the amendment, that the purpose of the amendment was to “cover[ ] . . . retaliation against contractors and agents of the discriminating party who have been denied relief by some courts because they are not technically ‘employees’” and to “protect persons who seek to stop [FCA violations] regardless of whether the person is a salaried *employee*, an *employee* hired as an independent contractor, or an *employee* hired in an agency relationship”).

The expanded scope of protection notwithstanding, Congress “did not intend to grant a federal right of action against anyone and everyone.” *United States ex rel. Bias v. Tangipahoa Parish School Board*, 816 F.3d 315, 324 (5th Cir. 2016). Indeed, “[t]here is no indication in the revised statutory language of the 2009 amendments or in the legislative history that indicate a Congressional intent to broaden the scope of § 3730(h) to include potential defendants who have no *employer type relationship* with plaintiffs.” *Abu-Hussein*, 2012 WL 6892716, at \*3 n.4 (emphasis added).

Accordingly, courts still “require[] some employment relationship acts as a continuing limiting principle,” in assessing liability under § 3730(h). *Bias*, 816 F.3d at 324 (determining that the 2009 amendment requires that courts expand the class of defendants beyond just employers but that courts should not interpret the

amendment as a license to sue just anyone). “Defendants [] must be those by whom plaintiffs are employed, with whom they contract, or for whom they are agents”; and “the retaliatory action must be related to ‘terms and conditions of *employment*,’ or the contract or agency relationship.” *Id.* (emphasis in original) (citing 31 U.S.C. § 3730(h)(1)); *see also Ickes v. NexCare Health Sys., L.L.C.*, 178 F. Supp. 3d 578, 591 (E.D. Mich. 2016) (““[I]n addition to an employee’s actual employer, the current version of the statute also covers independent contractors and *other employment-like relationships*”) (emphasis added).

Austin has never alleged he served CDS as an employee or contractor and in fact his testimony confirms he served as neither, (JA373); therefore, § 3730(h) extends to Austin only if he served as an agent of CDS in an *employment-like relationship*. As the party asserting an agency relationship exists, he carried the burden of proof. *See, e.g.*, Restatement (Third) of Agency § 1.02, cmt. d (2006). The evidence plainly reflects no such agency relationship existed and certainly no employment-like relationship.

Courts examining whether an agency relationship exists within the context of the FCA look to common law agency principles. *See Reid*, 490 U.S. at 740-41 (instructing courts to rely on “the general common law of agency, rather than on the law of any particular state,” when attempting to give meaning to terms used in a federal statute”). *See also Ashland Facility Operations, LLC v. N.L.R.B.*, 701

F.3d 983, 990 (4th Cir. 2012) (applying common law of agency to petition for review of NLRB order); *Bias*, 816 F.3d at 325 (applying common law agency doctrine to FCA matter).

The Restatement (Third) of Agency defines agency as “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” Restatement (Third) of Agency (“Restatement”) § 1.01 (2006). The Restatement specifies the elements of agency as follows: “. . . a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person ***with power to affect the legal rights and duties of the other person.***” *Id.* at § 1.01, cmt. c (emphasis added).

“Actual agency exists ‘when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.’” *Ashland Facility Operations*, 701 F.3d at 990 (quoting Restatement § 2.01). See Restatement § 3.01, cmt. b (“As defined in § 2.01, an agent’s actual authority originates with expressive conduct by the principal toward the agent by which the principal manifests assent to action by the agent with legal consequences for the

principal”). “A putative agent has apparent authority ‘when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.’” *Ashland Facility Operations*, 701 F.3d at 990 (quoting Restatement § 2.03).

Although the existence of an agency relationship is typically a question of fact, where the facts concerning degree of control are not in dispute the existence of an agency relationship “is a question of law for the court.” *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 678 (D.S.C. 2006). *See* Restatement § 1.02, cmt. a (“[w]hether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts”). As the district court properly concluded, the facts concerning degree of control are not in dispute.

In his Opening Brief, Austin suggests he falls within the FCA’s zone of interests and cites examples of “evidence demonstrating that he acted on CDS’s behalf and subject to [sic] the CDS’s control.” Opening Br., 26, 31; *see id.* at 31-33. Each example is limited to how the Board purportedly controlled Austin. *See id.* But the Board’s purported control of Austin in and of itself does not establish an agency relationship. Rather, “[a]ctual authority is a consequence of a principal’s expressive conduct toward an agent, through which the principal manifests assent to be affected by the agent’s action, and the agent’s reasonable

understanding of the principal’s manifestation.” Restatement § 2.01. Critically, a necessary element of agency is one person’s “power to affect the legal rights and duties of the other person.” *Id.* at § 1.01 cmt. c. There is *no* evidence that Austin had the power to affect the legal rights and duties of CDS or its Board.<sup>2</sup>

Indeed, the CDS Bylaws foreclose any argument that Austin had the power to affect the legal rights of CDS or its Board. Section 3.9 of the Bylaws state that “[e]ach member of the Board of Trustees shall have one vote on any motion presented to the Board of Trustees and, unless otherwise stated herein, the vote of a majority of the Board of Trustees members present at the time of the vote, if a quorum is present, shall be an act of the Board of Trustees.” (JA567). The Bylaws do not create an agency relationship between CDS and a member of the Board. Of significance, no single trustee can act on behalf of the Board or on behalf of CDS. Therefore, Austin cannot show he had the “power to affect the legal rights and

---

<sup>2</sup> Austin asserts in his Opening Brief that “[t]he CDS Board of Trustees manifested assent to Austin acting on the Board’s behalf and subject to the CDS Board’s control,” and for support cites to *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 659-60 (4th Cir. 2019). Opening Br., 33. *Krakauer*’s relevance to this appeal is limited to its approval of the Restatement’s definition of agency relationship, particularly its requirement that the principal “manifests assent.” *Krakauer* does not offer factual support for Austin’s assertion of manifested assent. Nor does *Lemon v. Myers Bigel, P.A.*, 985 F.3d 392, 396 (4th Cir. 2021), also cited by Austin, which applied a six-factor balancing test focused on the common law element of control to determine whether a shareholder was an employee of her law firm for purposes of Title VII. As stated, control is but one element of common law agency. Moreover, the district court applied the *Lemon* test to determine that all but one factor “pointed away from employee-like control.” (JA890).

duties” of the Board.<sup>3</sup> The Bylaws thus foreclose any argument that Austin served as an agent of CDS or its Board simply by virtue of his position as trustee.

Furthermore, to the extent Austin owed a fiduciary duty to CDS as a Board member, this is not dispositive of an agency relationship. While an agent owes a fiduciary obligation to the principal, Restatement § 1.01 cmt. e, an individual “may be subject to a fiduciary duty of loyalty even when the [individual] is not acting as an agent,” *id.* § 1.01 cmt. c.<sup>4</sup> Such is the case between CDS and its Trustees. Nor is the inclusion of phrases “alter ego,” “employment-type,” and “job description” in the Trustee Handbook dispositive of an agency relationship between any one trustee and CDS or its Board. “[P]arty characterization” and “nonlegal usage” do not control whether an agent has an agency relationship with a particular person as

---

<sup>3</sup> Austin asserts he “provided evidence demonstrating he acted on behalf of the Board and subject to the CDS Board’s control when he served on the Committee on Trustees, the Property Committee, and the Strategic Planning Committee as part of his service as a Trustee.” Opening Br., 31 (citing JA569, JA570-572, JA825). The evidence cited is to the sections of the CDS Bylaws that govern those committees. These sections do not reflect the Board or CDS’s manifest of assent to be affected by a *single* trustee’s action nor do they otherwise contradict or supersede Section 3.9.

<sup>4</sup> Indeed, South Carolina courts find a fiduciary relationship exists “when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” *Pitts v. Jackson Nat. Life Ins. Co.*, 574 S.E.2d 502, 507 (S.C. App. 2002) (citation omitted). While this definition provides some overlap with that of agent, the two terms (and relationships) clearly are not synonymous.

principal—“[h]ow the parties characterized the relationship is not dispositive, nor is popular usage.” Restatement § 1.02, cmts. a, c.

Thus, at best, Austin marshaled evidence that CDS and/or the Board exercised some degree of control over him in his position as trustee but, critically, not control “in like manner to an employee.” (JA891). Austin plainly falls outside the zone of interests the FCA protects. Furthermore, he produced no evidence that CDS or the Board manifested assent to his taking action that would result in legal consequences for CDS or the Board. And the CDS Bylaws expressly foreclose the notion that Austin had the power to affect CDS or the Board’s legal rights (or that Ms. Hershey or Ms. Arnstein had the authority to delegate such power to Austin). Accordingly, Austin failed to prove an element of common law agency. As such, the district court properly ruled on the question as a matter of law.

Where no agency relationship existed between Austin and CDS, he cannot as a matter of law claim retaliation under § 3730(h). Therefore, the district court could have entered summary judgment for CDS and its co-defendants on this basis alone and this Court can affirm on this basis alone. Nonetheless, the district court elected to address, and properly ruled on, several other issues, which matters CDS turns to next.

## II. Austin Did Not Carry His Burden of Proof on the Elements of Retaliation.

Liability for FCA retaliation lies only where a plaintiff can prove (1) he took acts in furtherance of a *qui tam* suit (i.e., plaintiff engaged in “protected activity”); (2) his employer knew of these acts; and (3) his employer discharged him as a result of these acts. *Shenoy v. Charlotte-Mecklenburg Hosp. Auth.*, 521 Fed. Appx. 168, 174 (4th Cir. 2013) (citing *Zahodnick v. IBM Corp.*, 135 F.3d 911, 914 (4th Cir. 1997)).<sup>5</sup>

### A. Austin Failed to Demonstrate He Engaged in Protected Activity.

Following the 2009 and 2010 amendments to the statute, for a plaintiff to satisfy the first element—acts in furtherance of a *qui tam* suit—he must show he engaged in either (a) conduct in furtherance of an FCA action or (b) conduct in an effort to stop one or more FCA violations. *Skibo on behalf of United States v. Greer Lab'ys, Inc.*, 841 Fed. Appx. 527, 534 (4th Cir. 2021) (referencing 31 U.S.C. § 3730(h)(1)) (emphasis added); *see generally Carlson v. DynCorp Int'l LLC*, 657 Fed. Appx. 168, 171 (4th Cir. 2016).

This Court applies the “distinct possibility” standard to whether a plaintiff engaged in conduct in furtherance of an FCA action: “employees engaged in

---

<sup>5</sup> CDS agrees with Austin that the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies to the third element of FCA retaliation. CDS disagrees that Austin demonstrated a *prima facie* case of retaliation.

protected activity when ‘litigation is a distinct possibility, when the conduct reasonably could lead to a viable FCA action, or when . . . litigation is a reasonable possibility.’ *United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 200-01 (4th Cir. 2018) (quoting *Mann*, 630 F.3d at 344) (further citation omitted)).

“Whether the distinct possibility standard is met is determined from the ‘perspective of the facts known by the employee at the time of the protected conduct.’” *Id.* at 201 (quoting *Mann*, 630 F.3d at 345).

This Court applies the “objective reasonableness” standard to whether a plaintiff engaged in conduct in an effort to stop one or more FCA violations. *Grant*, 912 F.3d at 201. “Under this standard, an act constitutes protected activity where it is motivated by an objectively reasonable belief that the employer is violating, or soon will violate, the FCA.” *Id.* “A belief is objectively reasonable when the plaintiff alleges facts sufficient to show that he believed his employer was violating the FCA, that this belief was reasonable, that he took action based on that belief, and that his actions were designed to stop one or more violations of the FCA.” *Id.* at 201-02.

Austin contends he engaged in protected activity “by investigating CDS’s application for, and request for forgiveness of Federal COVID Funds at a time CDS was running a budget surplus”; and further argues that his conduct “raised a distinct possibility of FCA litigation,” “reasonably could have led to a viable FCA

action,” and was motivated by his belief “that CDS would soon violate the FCA if it continued to accept EANS II funding . . . .” Opening Br., 37.<sup>6</sup> Because there is no reasonable basis on which Austin could have believed CDS had engaged in fraud, the district court properly found no triable issue.

### **1. The Evidence Fails the “Distinct Possibility” Test.**

Austin contends he investigated CDS’s application for and request for forgiveness of Federal COVID Funds at a time when CDS was running a budget surplus and that his conduct “raised a distinct possibility of FCA litigation” and “reasonably could have led to a viable FCA action.” Opening Br., 37.

However, there is no evidence of fraud; and to the extent Austin had concerns about certain facts as represented in the applications CDS submitted, the basis for those concerns post-date the purported protected activity. Finally, Austin testified that he never considered litigation as a possibility before he was removed from the Board. As such, he failed to show he engaged in conduct in furtherance of an FCA action.

---

<sup>6</sup> Austin acknowledged during his deposition that CDS did not apply for EANS II funding. (JA257-258).

a. No evidence of fraudulent conduct

Austin has consistently been unable to identify any example of fraud. With respect to the PPP funds, which Austin agreed CDS used solely to cover payroll expenses (JA201), he engaged in the following exchange during his deposition:

Q: From your review, did CDS commit any fraud or wrongdoing when it applied for and accepted the PPP funds?

A: I still have some questions about the application process for the PPP loans. You know, I don't know for sure whether they have committed any fraud, but I have some suspicions.

Q: Okay. What are your questions?

A: So here in these minutes it talks about Terry Moore advising them on the PPP loan. And, you know, I'm familiar with a lot of guidance that Charleston Day's accrediting agency was giving to schools, including Charleston Day and the advisors like Terry Moore to get the PPP funds and some of the strategies for -- for what to focus on in the applications, and my understanding is that Terry Moore helped the school develop a strategic plan. And from my review of the strategic plan, there had been some questions. I had heard some during -- when I was on the board I heard a lot of chatter amongst parents about suspicions that COVID funding was driving decision-making, and when I looked at the strategic plan and saw that Terry Moore had presented two options, one with PPP and one without PPP, and a big part of their plan was to expand their footprint, I was curious if that was part of that -- getting PPP funds was merely a vehicle to be able to expand their physical footprint.

And I was concerned, too. I had heard a lot of rumors about self-dealing. One of the rumors I heard was that Emmie Hershey's husband's financial advisory group was investing the funds that were in the endowment, and I was concerned that there might be a conflict of interest issue there and some impropriety and -- but -- so.

(JA202-203). Austin could not remember when he began having these concerns, premised on rumors; he recalled only that people “were coming to [him] constantly” in the fall and winter of 2021. (JA203). But, when asked to explain precisely what his concern was with the PPP application, Austin could not:

Q: You said you had some questions about the application. So why don’t you look at the application and tell me what your concerns were.

A: I don’t know where I’d point to specifically the application, but I do know that the school has a surplus of around \$95,000, which was rare for the school in the year that they applied, and that was the . . . main factor for a lot of people opposing it – or the four people on the board opposing it at the time of the application.

Again, I didn’t know about it when they applied. So I’m nervous that I’m not answering your question exactly. That [] was the nature of my concern later on, but, of course . . . I didn’t know about the application at the time.

. . . .

Q: So did they misstate anything on this application?

A: I don’t know that they did.

(JA204-205). In Austin’s summation, his “suspicions would be mostly related to the true need for it and the intended purpose of it.” (JA207). But on review of the PPP application, Austin acknowledged that the school’s certifications consisted of true statements, to the extent of his knowledge. *See* (JA209-210).

At the September 1, 2020 Board meeting, the Board voted 8 to 4 to apply for PPP Loan forgiveness. (JA214). Austin acknowledged that CDS, like many, was

“facing uncertainty”; he testified, “I just think that [] Charleston Day in particular was overstating the uncertainty because I think they wanted to get the money.” (JA215). Austin’s concerns “track[ed] basically everything that was said within the minutes at the time by people like Chad Walldorf and John Hand”; in other words, CDS’s “expenses went down with COVID and they [] had what [Walldorf] called a rare surplus.” (JA216). But, Austin emphasized, “I just want to be clear that I’m not saying that that necessarily means that they were committing fraud . . . .” *Id.*<sup>7</sup>

With respect to EANS funds, Austin testified that he did not disagree with any of CDS’s affirmations as set forth in the application. (JA260-261, JA264-266). Rather, Austin disagreed with CDS’s assertion on the application that of 258 students, 131 are from low-income families. (JA261). In making this assertion, CDS wrote, “[t]his number or estimated number is from the following accepted data sources, proportionality data.” *Id.* As Austin acknowledged, a school’s reliance on proportionality data in this way was allowed and acceptable according to EANS guidance. (JA262).

Austin further testified: “I still to this day do not know whether it was proper or not, and that’s kind of the point. Like, I was looking into it.” (JA360).

---

<sup>7</sup> Austin was not aware of Mr. Walldorf’s email when Austin joined the Board and it is not entirely clear when Austin first read the email. *See* (JA243-244).

Indeed, on December 20, 2021, Austin sought access to Board materials that pre-dated his time as trustee. When asked to describe the type of documents on CDS's portal, which documents he persisted in asking to review, he engaged in the following exchange:

A. I mean, I don't know for sure since I could not look through everything, but . . . all of the meeting minutes that we have requested in discovery have gotten roped there is my understanding, and, you know, there [] are things in those documents that I think further point to, you know, issues that support being concerned about the decision-making.

Q. Like what?

A. Like the fact that Rutledge and Judith had already applied for the loan—for EANS, I mean, before they told the board. I think that's suspicious.

Q. So did the board have to get permission to apply for grants?

A. [] I disagree with it being characterized as a grant. I don't know that it matters, but I think that was somewhat misleading on purpose.

Q. You think it was. Do you know it?

A. I don't. That's why I'm not making, like, more definitive accusations. I don't have access to everything.

JA361-362. But by the time he gave this testimony, during a deposition held July 18, 2024, Austin *did* have access to “everything.” CDS and its co-defendants finished serving responses to Austin's requests for production in or around May 2024. Yet during his deposition, Austin could offer nothing more than conjecture about the purported fraudulent activity that served as the cornerstone of his lawsuit.

To date, there is no evidence that would support a claim that CDS engaged in conduct in violation of 31 U.S.C. § 3729.

b. *Any factual basis for Austin's concerns arose after the purported protected activity*

Under the applicable standard, the district court asks not what an objective person knew or thought at the time of the alleged protected activity, but rather what *Austin* knew or thought when he engaged in the “investigation.” *Grant*, 912 F.3d at 201. Austin contends he engaged in protected activities “when he began to investigate his concerns that CDS may have improperly applied for or sought forgiveness of federal COVID-19 relief funds.” Opening Br., 37. But CDS’s application for COVID Funds is not what prompted Austin’s “investigation.”

During his deposition, Austin testified that around December 2, 2022, he became “increasingly suspicious,” “as [he] observed the way [Ms. Hershey] was interacting with people.” (JA230). When asked to elaborate, Austin testified:

[s]he was very heavy-handed in telling us, as trustees, what was going to happen, how things were going to work, and I was hearing complaints from parents that she was very reactive to any [] perception of criticism . . . their concern she wasn’t cut out for or hadn’t had the experience to [] take on a leadership role like that during a time like COVID, and some of the decisions they’re making about some of the COVID protocols didn’t align with what a lot of other schools were doing.

(JA230-231). *See also* (JA231-234) (summarizing the back and forth between Austin and his wife and Ms. Hershey regarding Austin's son and what Austin and his wife considered arbitrary applications of CDS's COVID policies).

On December 6, 2021, the day before a scheduled Board meeting, Ms. Hershey telephoned Austin with "a heads-up" that "the school was going to move to a mask optional policy." (JA270-271). On the same call, Ms. Hershey tried to persuade Austin not to move his son to a different school, anticipating the Austins would be "happy with the [] masking policy change." (JA271). Ms. Hershey shared that the policy change would go into effect on January 4, 2022. (JA272-273). Austin testified: "I told her that I thought that was going to be a problem given [my son's] condition, and he was effectively going to miss the rest of school for the year." (JA273). "I told her I thought that was going to be a problem because . . . we were paying money for school and we weren't allowed to go to school based on a really arbitrary policy decision, and I thought [it] was being [] forced on us in a different way than other people." (JA273). "[W]e had a very, very specific issue, and that was we were paying for [our son] to go to school and they told him he couldn't even Zoom because he didn't have COVID, and [] then we thought [sic] he lied to us or lied about us." (JA320).

During the Board meeting held December 7, 2021, Ms. Hershey called for a vote on whether CDS should implement a mask-optional policy and, if so, a vote

on when to implement the policy. (JA274). During his deposition, Austin recalled that Mr. Hood moved to implement the policy as of December 13, 2021. (JA275). Austin was “excited about that”; he “just wanted [his] son to go back to school.” (JA275-276).

However, CDS did not ultimately move to a mask optional policy on December 13, 2021. Surprised and unhappy, the Austins thereafter began questioning Ms. Arnstein’s authority to implement CDS’s masking policy. (JA521, JA564, JA1065). Beginning no later than December 15, 2021, the Austins began writing Ms. Arnstein and on multiple occasions demanded she answer their questions “immediately” and they “expect[ed] written documentation.” (JA521).

Concerned that Austin had shared the substance of the December 6 phone call with his wife and thereby breached his duty of confidentiality, the Board next held a meeting on December 20, 2021, to talk about confidentiality. (JA290). Austin believes Ms. Hershey called the meeting “to try to embarrass me into resigning from the board.” (JA291). Austin recalled saying, or thinking, at one point: “I have no problem resigning, but . . . increasingly I noticed people were saying things in board conversations about parent complaints that people would not get re-enrolled in contracts and that [] they [] weren’t a good fit, and I thought that was ridiculous because board of trustees aren’t supposed to get involved in operational issues like admissions and all the NAIS guidance says not to[;] [a]nd so

I also knew that I had not breached confidentiality[;] [s]o I was pretty frustrated going into it.” (JA291-292).

Austin acknowledged that by December 20, 2021, his wife had submitted a lot of complaints to the Board. (JA293). Austin and his wife felt that Ms. Hershey had “placated” them with the new mask optional policy when they were ready to pull their son from CDS and then, they believed, arbitrarily postponed implementing the policy and arbitrarily enforced it. (JA293-394). In the meantime, they had “missed the chance” to move their son to another school. (JA294). Austin also heard around this time that Ms. Hershey “was saying things about us that were not good, particularly [Mrs. Austin][;] characterizing her as anti-science and anti-mask, and . . . projected that on to me, too.” (JA294).

Against this testimony, Austin asserts that in December 2021, he “began to research the history of CDS’s initial application and subsequent request for forgiveness of these federal COVID-19 relief funds by accessing historical financial information, records, Board minutes, and other information available to the Board in the Board’s online portal.” Opening Br., 37 (citing JA547, JA691-692, JA707). He contends he “looked into applications, PPP applications specifically, what I could find online about it, and I talked to people that ended up getting in touch with Chad Walldorf.” *Id.* at 37-38. On December 20, 2021, Austin “went through all of [CDS’s] [B]oard documents looking through the finances, and

that’s where I saw the strategic plan that only contemplated scenarios with or without PPP... And then I looked back and realized that we were asked to vote on the surplus, and I did not know that the PPP funds were at all tied to that surplus.” *Id.* at 38 (citing JA360).

Regarding EANS funding, Ausitn testified: “I know that in the April 2021 board meeting Rutledge and Judith told the board about it after they had gotten it. They characterized it as a grant, and that stood out to me when I got it in discovery . . . because I think that’s misleading.” (JA248). But Austin did not have this information until document discovery in this case, in 2024. Indeed, Austin “really did not know any of the specifics about EANS until really after I got kicked off the board and my kids were told they couldn’t come back.” (JA249-250).

Austin’s testimony reveals that by December 20, 2021, he had become upset with Ms. Hershey due to what he considered was her arbitrary application of COVID policy and the sense that she had maligned him in the school community. *See* (JA311). *See also* (JA320-321) (“But the masking issues started all of the back and forth between you and your wife and Emmie [Hershey]—”; “I think Emmie lying about us is what started it. And then, sure, it surrounded a masking issue, but I thought[,] we thought they [Ms. Hershey, Ms. Arnstein, and Ross Hostetter] were lying”). For this reason, on the morning of December 20, 2021, Austin used the portal to access Board materials—all of which pre-date his tenure on the Board—

so as to search for nefarious activity. *See* (JA295). Austin’s testimony confirms as much.

When asked why he sought access to Board materials on December 20, 2021, Austin testified: “I thought it was really weird the way that Emmie [Hershey] was acting.” (JA296). “[S]he’s accusing me of doing things I hadn’t done, and . . . [t]hey were acting so formal and, like, just serious about me, but then they were also breaching confidentiality left and right and doing things that contradicted what they said they cared about and what was so important to them.” (JA296). “I thought they had lied about several things, and they had lied about me in particular and tried to embarrass me, and so I was poking around.” (JA296-297). When asked what he was “hoping to get on the board portal that day,” Austin testified: “I didn’t go in with, like, this very certain idea of what I was looking for, but I wanted to know what was going on with the decision-making and COVID, and that’s why I wanted to look at it, whatever they had going back to beginning of COVID.” (JA298).

The evidence shows that Austin accessed the Board materials searching for ammunition—not out of concern for the federal fisc, but to protect the interests of his family. *See Mann*, 630 F.3d at 344 (“the protected activity element . . . excludes those [situations] in which an employee . . . fabricates a tale of fraud to extract concessions from the employer . . .”) (citations omitted).

c. *Austin never considered the possibility of litigation during the relevant time period*

Austin’s deposition testimony forecloses any argument that in the months leading up to his dismissal from the Board he believed FCA litigation was a distinct or even a reasonable possibility. During his deposition, Austin testified: “I wasn’t considering a lawsuit until my kids were on the chopping block.” (JA347). The earliest Austin knew that CDS would not offer reenrollment to his children was February 3, 2022, when he spoke with Mr. Hood. (JA311). By his own admission, this conversation indisputably took place *after* the alleged “protected activity” of December 2021 and January 2022. Austin also testified: “Jamie [Hood] told me they thought I was going to sue the school, and I kept telling them . . . I thought that was crazy[;] I had not mentioned lawsuit one time, not even to [Mrs. Austin].” (JA308). Thus, while Austin was seeking access to and reading over CDS Board materials, FCA litigation was not a reasonable let alone distinct possibility—at least not as far as he was concerned, which is the only perspective that matters here. *See Grant*, 912 F.3d at 201.

Austin contends nonetheless that his efforts to access and review CDS Board materials reasonably could have led to a viable FCA action. Opening Br., 36. But again, the “distinct possibility” test focuses on what Austin knew *at the time* he engaged in those efforts. Austin started rooting around in the Board’s materials in December 2021 because he did not like how Ms. Hershey was leading the Board

and did not agree with how she was enforcing COVID policies. Austin certainly did not believe (and surely did not *know*) his efforts could lead to an FCA action, because he did not consider the possibility of litigation until February 3, 2022, at the earliest. (JA313). Rather, he simply took it upon himself to “look[] into it.” (JA360).

Considering that as of July 2024, well after the completion of document discovery, Austin could not bring to mind a single substantiated reason for his speculations, he cannot persuasively maintain that in December 2021 and January 2022, based on what he then knew, his efforts to access and review CDS Board materials reasonably could have led to a viable FCA action. *Cf. Mann*, 630 F.3d at 345 (“Mann cannot meet the distinct possibility standard because of one undeniable fact: there was no fraud. Therefore, based on the facts known to Mann at the time of his conduct, there was no reasonable possibility that his efforts could lead to a viable FCA action”).

d. *Subjective perspective must account for personal experience*

Austin is a former federal prosecutor who oversaw prosecutions of PPP fraud. (JA20). Austin was familiar with the grand jury process, the evidence necessary to secure an indictment, and the burdens of proof involved in obtaining a conviction for defrauding the government; he was also familiar with the differences between civil and criminal fraud and he had worked on civil FCA

cases. (JA185-186). Austin’s professional experience in addition to the facts known to him in December 2021 and January 2022 comprised his perspective at that time.

The controlling question is whether Austin, based on his personal knowledge and experience, knew that his review of CDS Board materials *reasonably* could lead to a viable FCA action or that FCA litigation was a distinct or reasonable possibility. Austin had, and continues to have, no substantiated basis on which to accuse CDS of engaging in fraudulent activity—indeed, throughout the lawsuit he has conspicuously avoided lobbing an outright accusation against CDS. *See, e.g.* (JA216, JA230, JA313-314, JA364). The absence of any evidence of fraud is sufficient in and of itself to foreclose the argument that Austin engaged in conduct in furtherance of an FCA action. *See Mann*, 630 F.3d at 345. But here the evidence also shows that Austin initiated his investigation of the Board due to his and his family’s deteriorating relationship with Ms. Hershey—not because of reasonable suspicions that the Board had engaged in fraudulent conduct—and Austin considered litigation only once he learned CDS would not renew his family’s contract for the next school year. (JA313). In fact, Austin pursued this lawsuit because he “want[ed] them not to mess with [his] family again.” (JA366-367). Moreover, Austin testified: “Jamie [Hood] told me they thought I was going

to sue the school, and I kept telling them . . . I thought that was crazy[;] I had not mentioned lawsuit one time, not even to [Mrs. Austin].” (JA308).

The district court properly considered the facts as Austin knew them to be in December 2021, as seen through the eyes of a former federal prosecutor familiar with the elements of proving fraud on the government, and correctly concluded there was no issue of material fact to support finding that Austin engaged in conduct in furtherance of an FCA action.

## **2. The Evidence Fails the Objectively Reasonable Test.**

The evidence likewise fails to show that Austin engaged in conduct in an effort to stop one or more FCA violations. An act constitutes protected activity “where it is motivated by an *objectively reasonable* belief that the employer is violating, or soon will violate, the FCA.” *Grant*, 912 F.3d at 201 (emphasis added). “A belief is objectively reasonable when the plaintiff alleges facts sufficient to show that he believed his employer was violating the FCA, that this belief was reasonable, that he took action based on that belief, and that his actions were designed to stop one or more violations of the FCA.” *Id.* at 201-02. Thus, Austin had to show he believed CDS was violating the FCA, this belief was reasonable, he took action based on that belief, and his actions were designed to stop one or more FCA violations.

First and foremost, as discussed above, there is no evidence that CDS violated the FCA. *See* (JA216, JA230, JA313-314, JA364-366). Therefore, even *if* the evidence showed that Austin believed in December of 2021, when he started “poking around” (JA296-297), that CDS was engaged in fraud, such belief was not objectively reasonable. Second, the evidence reflects that Austin started poking around because he disagreed with how Ms. Hershey was running the Board (and, more specifically, with how she was enforcing COVID policy) and he felt she and others had mistreated him and his family, (JA295-296, JA311, JA320-321), not because he thought the Board was committing FCA violations.

In sum, Austin failed to carry his burden of proof that he engaged in conduct in furtherance of an FCA action or in an effort to stop one or more FCA violations.

#### **B. Austin Cannot Satisfy the Notice Prong.**

Austin also cannot prove the second element of FCA retaliation, which requires he show the Board knew of the purported protected activity. *Shenoy*, 521 Fed. Appx. at 174.

This second prong of the FCA retaliation test, known as the “notice” prong, is “appropriately viewed from ‘the employer’s perspective’ and turns on whether ‘the employer is aware of the employee’s conduct.’” *U.S. ex rel. Parks v. Alparma, Inc.*, 493 Fed. Appx. 380, 388 (4th Cir. 2012) (quoting *Mann*, 630 F.3d at 344). “This element is met when the employee’s words and acts are ‘sufficiently

suggestive of fraud or falsity’ such that the employer knew or should have known that the FCA litigation was a reasonable possibility.” *United States ex rel. Potter v. CASA de Md.*, No. 16-0475, 2018 WL 1183659, at \*8 (D. Md. Mar. 6, 2018). “Statements by an employee ‘clearly couched in terms of concerns and suggestions, not threats or warnings of FCA litigation’ do not constitute notice as required to make out an FCA retaliation claim.” *Id.* To establish causation under § 3730(h)(1), the plaintiff must show that the final decision-maker who approves or implements the adverse employment action knew about the plaintiff’s protected conduct. *See United States ex rel. Dillard v. Fluor Corp., Inc.*, No. 6:16-CV-02948-JD, 2022 WL 993667, at \*4 (D.S.C. Apr. 1, 2022), *aff’d*, No. 22-1450, 2023 WL 8618545 (4th Cir. Dec. 13, 2023).

Austin argues that “*every single Trustee* was aware of Austin’s protected activity as of February 11, 2022, when each Trustee voted to remove him and declined to renew his children’s enrollment,” and for support references the packet of materials that each trustee received from the Executive Committee prior to the February 11 Board meeting (“Packet”). Opening Br., 39. *See* (JA492-565).

Necessarily putting aside the fact that Austin did not serve as an agent (or employee or contractor) and did not engage in protected activity, he cannot satisfy the notice prong. First, the purportedly protected activity of which Board members were aware consists primarily of Austin’s requests to access Board materials. *See*

Opening Br., 40 (“ . . . Austin was engaging in protected activities as he had been requesting . . . access to Board minutes and financial records relating to federal COVID relief funds . . .”). Austin’s requests for Board materials were, if anything, indicative of his “concerns” and the desire to offer “suggestions,” which are plainly insufficient to satisfy the notice prong. *See, e.g., Parks*, 493 Fed. Appx. at 389.<sup>8</sup>

Second, Austin’s testimony establishes that he did not contemplate a lawsuit—let alone an FCA action—until *after* he knew the Board did not intend to offer reenrollment to his children. During his deposition, Austin testified: “I wasn’t considering a lawsuit until my kids were on the chopping block.” (JA347). The earliest Austin knew that CDS would not offer reenrollment to his children was February 3, 2022, when he spoke with Mr. Hood. (JA311). Almost every instance of communication Austin cites to as evidence of notice to a Board member, *see* Opening Br., 39-43, occurred *prior to* the February 3 phone call with Mr. Hood.

Third, Austin took pains to reassure his fellow Trustees that his interest in the Board materials was not in furtherance of any interest in litigation. Austin testified: “Jamie [Hood] told me they thought I was going to sue the school, and I kept telling

---

<sup>8</sup> In a similar vein, Austin references the phone call between him and Ms. Blackburn as evidence of notice imputed to the Board. Opening Br., 41. But Austin testified that during that call, he merely offered to facilitate an audit of the COVID funding. (JA329-331).

them . . . I thought that was crazy[;] I had not mentioned lawsuit one time, not even to [Mrs. Austin].” (JA308).

Where Austin did not contemplate an FCA action, did not mention an FCA action, and, rather, amidst concerns that he was acting in a litigious manner responded that such concerns were “crazy,” he cannot show beyond a scintilla of evidence that the Board, as of February 3, 2022, reasonably believed he was contemplating or acting in furtherance of an FCA action. Austin never even told the Board he had concerns about CDS’s use of Federal COVID Funds. (JA324).<sup>9</sup>

With respect to events that occurred after February 3, 2022, leading up to the February 11 vote, the Packet shows that Austin lashed out at Board members in reaction to learning that CDS would not re-enroll his children. Austin cites the Packet as evidence that “every single member of the Board was aware of [his] protected activities,” Opening Br., 42 (citing JA492-565), but the correspondence

---

<sup>9</sup> Austin references his January 26, 2022 phone call with Ms. Blackburn as “notice of [his] protected activities” to the “entire CDS Board.” Opening Br., 41. However, Austin testified that during that call, he and Ms. Blackburn talked about his request to access Board materials and an idea to create a “COVID policy page.” (JA328-JA330). When asked if he made an offer to facilitate an audit of CDS’s use of PPP funds, Austin testified: “It was just not, like, the priority focus of the call,” and “I don’t know if I would have even used the term ‘audit’ . . . I probably would have . . . offered to look into it, like, and mentioned belt and suspenders.” (JA330-JA331). To the extent notice of anything discussed during this call can be imputed to the Board, it is notice of mere concerns (if that) and suggestions; it is certainly not notice of threats or warnings of FCA litigation or any other conduct that could reasonably be considered protected activity.

contained in the Packet reflects that Austin threatened litigation so as to create leverage<sup>10</sup>—not out of concern for the federal fisc. *See Mann*, 630 F.3d at 344 (“the protected activity element . . . excludes those [situations] in which an employee . . . fabricates a tale of fraud to extract concessions from the employer . . .”) (citations omitted).

For these reasons, the district court properly determined no issue of triable fact exists to support the second element of retaliation.

### **C. Austin Cannot Prove Causation.**

Finally, Austin cannot prove the third element of FCA retaliation, which requires he show the Board took adverse action against him as a result of the purported protected activity. *Shenoy*, 521 Fed. Appx. at 174. For the reasons stated above, the record does not reflect that Austin acted in furtherance of an FCA action or that the Board had notice of those acts. Thus, Austin failed to establish a *prima facie* case of FCA retaliation. Regardless, the record conclusively demonstrates that the Board removed Austin for legitimate, non-retaliatory reasons. Therefore, Austin cannot show that “but for” his purported protected activity, CDS

---

<sup>10</sup> For example, Austin sent the following text message to Ms. Hershey on February 5, 2022: “It has become increasingly evident to me that this is retaliation for my asking about the PPP loans and for the meeting minutes going back to the beginning of the pandemic. As I told Jamie, this is a salvageable situation. Happy to discuss over the phone or in person like adults.” (JA495). What could Austin have hoped to salvage if he thought fraud on the government hung in the balance?

would have re-enrolled his children and he would have continued to serve on the Board as trustee.

“To show pretext and survive summary judgment, the plaintiff must point to admissible record evidence that the employer’s stated justification is ‘dishonest or not the real reason for his termination.’” *Dillard*, 2022 WL 993667, at \*5 (internal citations and quotations omitted). But ultimately, Austin “must show the articulated reason is false *and* ‘that retaliation was the real reason for the challenged conduct.’” *United States ex rel. Cody v. ManTech International, Corporation*, 746 Fed. Appx. 166, 178 (4th Cir. 2018) (quoting *Foster v. University of Maryland-Eastern Shore*, 787 F.3d 243, 252 (4th Cir. 2015)). “A plaintiff who can show that retaliation was the real reason for the adverse employment action will necessarily be able to show that the harm would not have occurred in the absence of—that is, but for—the defendant’s conduct.” *Id.*

Austin concedes he presented no evidence of direct retaliatory conduct and acknowledges “CDS produced evidence sufficient to shift the burden back to [him].” Opening Br., 45. He argues instead that the Board’s reasons for dismissing him and declining to re-enroll his children were pretextual. *Id.* In the face of CDS’s affirmative evidence, Austin failed on his burden of proof and the district court properly so found.

With respect to the decision not to offer re-enrollment to Austin's children, the evidence reflects that Austin and his wife breached their contract with CDS. Each parent of a child enrolled at CDS signs a contract whereby the parent agrees not to engage in behavior, communications, or interactions that are disruptive, intimidating, or that otherwise seriously interfere with the school's accomplishment of its educational purpose. (JA171). *See* (JA575-577). The contract is between the school and the parent (or legal guardian). *See* (JA575-577). The contract expressly contemplates that the student "may be suspended, dismissed or expelled from the School at any time if, in the opinion of the School's administration, and at its sole discretion . . . [the] student's parent/guardian conduct at the School or away from the School is unsatisfactory or is detrimental to good order and discipline in the School . . . ." *Id.*

When asked why CDS did not offer re-enrollment to Austin's children, Rutledge Young, responding as a Rule 30(b)(6) witness for CDS, testified that the Austins breached the enrollment contract with CDS. (JA952-953). Mr. Young testified that Board members were concerned about Austin's aggressive behavior towards Ms. Hershey, in her role as Chairwoman of the Board, and Ms. Arnstein, as head of school. (JA947-950). Fellow trustee Ross Hostetter gave similar testimony. (JA54-55) ("Our decision to remove and separate from [the Austins] was a decision about the behavior of the parents, not about the children"). *See*

(JA56-57) (“I think you bring up a good point of distinction here [] between the way [the Austins] behaved and the way that the rest of the community behaved, and what’s expected of a parent explicitly in the contract about participation, cooperation, not undermining the school”); *see also* (JA62-63) (“We observed a . . . sustained pattern of behavior from [Mrs. Austin] that was making it very difficult for Judith, as head of school, Emmie, as board chair, to conduct the operations of the school”).

Mr. Young testified: “[s]o when the board decided to delegate the authority to reinstitute masks as called for to Judith Arnstein, that’s some kind of board meeting I want to say it’s probably December of 2021 . . . at that time I think [Austin] started to become the most sort of aggressive towards really particularly . . . Emmie Hershey . . . and Judith Arnstein.” (JA949-950). Mr. Young testified that the Austins’ actions led to “disruption of the day-to-day operations of the school.” (JA953-954). The emails and text messages contained in the Packet reflect as much. *See* (JA491-565). At a minimum, the Austins’ dogged demands and questions and at times disrespectful tone objectively ran afoul of the expectations set forth in the enrollment contract.

For example, no later than December 15, 2021, the Austins started pushing back, hard, against how Ms. Arnstein was implementing CDS’s masking policy. (JA521, JA564, JA1065). The Austins demanded that Ms. Arnstein answer their

questions “immediately” and they “expect[ed] written documentation.” (JA521).

On December 16, 2021, Ms. Hershey responded to the Austins’ questions.

(JA564). Not satisfied with Ms. Hershey’s response, Mrs. Austin replied by email, repeatedly. (JA561). On December 20, 2021, Austin first accessed the Board portal, seeking to “poke” around. *See, e.g.*, (JA547).

On January 6, 2022, Mrs. Austin emailed Ms. Arnstein and Ms. Hershey to convey her intention to disobey CDS’s masking policy. (JA565) (“Furthermore, exemptions imply that you, as a corporation or head of school, have authority to mandate masks over my children’s faces. Is that the case? Do you have the legal authority to mandate a mask be placed on my children’s faces? If so, please explain such authority. These are MY children and you do not have medical authority over them. I do”), *see* (JA562) (“... Follow your own rules. If I’ve been wrong in any of this, you would have told me. That’s the problem. I’m not wrong. You both need to start following the rules. I’m beyond over babysitting you”).

Mrs. Austin thereafter sent increasingly antagonistic text messages, *see, e.g.*, (JA508-509, JA555, JA1066-1068), and emails to CDS leadership challenging the Board’s actions and decision-making surrounding implementation of the mask optional policy. On January 21, 2022, Ms. Hershey, in her capacity as Board Chairwoman, responded to Mrs. Austin’s questions regarding CDS’s mask optional policy with a document attached to the email and copied Ms. Arnstein, Mr.

Hostetter, and Ms. Blackburn. (JA505-507, 518). Mrs. Austin replied: “Quick question – has the board seen your response letter? I assume that since the school lawyer is involved, the answer would be yes given that she represents the school and not anyone in their individual capacity . . .” (JA498). At Ms. Hershey’s suggestion, Mrs. Austin then contacted Ms. Blackburn with her questions. (JA498-504). Meanwhile, the Austins emailed someone at CDS, presumably faculty, to complain about masking their children: “. . . [] keep telling me stories about you requesting [sic] the pull their masks up. The board voted mask optional and no matter what Emmie or Judith claims, the policy is still mask optional. I have them masked as a courtesy. Not only is the mask requirement invalid but 1. they don’t work . . . and 3. I am the parent and believe the harm far outweighs any benefit . . .” (JA517).<sup>11</sup>

Austin argues that he presented circumstantial evidence of pretext because his wife testified that her messages “paled in comparison to those sent by other parents during this same period” and Ms. Arnstein “admitted” there was a group of parents “who ideally did not want masks in school.” Opening Br., 48. The

---

<sup>11</sup> Mr. Hostetter referenced this email in his deposition: “that was a pretty hard email for the faculty to receive, one, from a parent, two, from a parent that was a board member that this new policy that had just been enacted, that [the Austins] were not going to comply with it. And understandably alarmed the faculty about what they were supposed to do in that scenario. And it directly undermines the board.” (JA78-79).

Austins' emails and messages speak for themselves and "the mere existence of a scintilla of evidence" in support of their pretext argument is insufficient.

*Anderson*, 477 U.S. at 252. Austin failed to carry his burden of proof on this point.

With respect to the motion to remove Austin from the Board, the vote was based on his "repeated failure to act in the best interests of the school, to cause disruption to school operations, to question authority of the head of school and the executive committee of the board of trustees, to threaten legal action against board members and school employees." (JA171-172). *See* (JA965-966). Mr. Hostetter testified:

There were a number of concerns about [Austin's] behavior, whether he was acting on behalf of the board and in good faith as a board member. There were concerns about confidentiality. There were concerns about communication with faculty, teachers. There were concerns about him supporting in one form or another an effort ultimately to undermine the head of school and the board chair.

(JA72). Mr. Young testified the Board believed that Austin had "an objective, opposition to carrying out the function of the board." (JA954). "Matt Austin was a board member and had a fiduciary responsibility and duty to the school to act in its best interest and to support the decisions of the board once a decision had been rendered." (JA954). And yet:

[a]fter the board had passed this motion to delegate the authority on masks to Judith, Matt was directly opposed to that and began working, I think deliberately, to undermine the implementation of that decision. Some examples are communicating with the school nurse about risks that she might be facing for some sort of criminal violation, I guess, or

HIPAA violation. I think there were some communications made to the school receptionist, Margi Marks, not to enforce the masking policy. Those are a couple of examples that I saw in getting ready for the deposition today.

(JA954). Indeed, the minutes from the February 11, 2022 Board meeting, called for the special purpose of voting on whether to dismiss Austin as trustee, reflect that “Matt Austin had threatened lawsuits against the school and the board, individual trustees, and school employees.” (JA955).

Mr. Young also testified that “part of the problem was that it appears that [Mrs. Austin] was getting the exact same information that [Austin] was from the board room, which was inappropriate.” (JA955). Ms. Hershey testified that a text she received from Austin the night before the December 7, 2021 Board meeting “indicated to me that he might have some conversations with his wife, and then later on it [] seemed that there was a breach of confidentiality.” (JA148-149, JA151). As another example, in an email from the Austins, dated December 9, 2021 (two days after the Board meeting regarding the masking policy), Mrs. Austin wrote: “As we all are aware, The Board of Trustees . . . voted for a ‘Mask Optional’ policy beginning this Monday, and my husband and I plan to exercise this option in full.” (JA513). *See* (JA1079-1080) (“There had been some sharing and, as I understand it, a conversation between [Austin] and [Hood] that [Mrs. Austin] had access to his log-in credentials. Therefore, that’s how you log-in to the board portal. . . . and there was information floating around that had come from the

portal. And so I believe that [Ms. Hershey] felt it would be in the best interests to just restrict use of the portal to all board members”).

Mr. Young testified that “confidentiality of the deliberations and decisions that get made at the board meetings can have a very big impact on the disruption of the school itself. It can lead to a lot of confusion among parents, teachers, administrators, other board members. And so I think that’s what the concern was”: “meetings were publicized either to his wife or to other people that [Austin] was consulting with about sort of the nature of masking at Charleston Day [] before the teachers could be informed of it, before the letter could go out from Judith Arnstein.” (JA950).

The Board plainly had legitimate reasons to remove Austin as trustee and to decline to reenroll his children, which reasons are supported by ample, undisputed evidence. Austin failed to carry his burden of proof to show that concerns regarding his and his wife’s conduct and concerns regarding his ability to uphold his duties as trustee were pretext for the Board’s decision to dismiss him and not re-enroll his children. The district court did not err in finding no issue of triable fact regarding causation.

## CONCLUSION

Austin did not serve CDS as an agent, an employee, or a contractor and therefore 31 U.S.C. § 3730(h) does not extend to him. Furthermore, he failed to

carry his burden of proof to show he took acts in furtherance of an FCA action, that the Board was on notice of those acts, and that such actions were the “but for” reason the Board voted to dismiss him as Trustee and not re-enroll his children. The district court properly entered summary judgment in CDS’s favor and such judgment should be affirmed.

Respectfully submitted,

By: /s/ Isabelle S. Young

Alice F. Paylor, Federal ID #3017

Isabelle S. Young, Federal ID #14209

Bijan K. Ghom, Federal ID #12918

Saxton & Stump, LLC

151 Meeting Street, Suite 400

Charleston, SC 29401

(843) 414-5080

afp@saxtonstump.com

iyoung@saxtonstump.com

bkg@saxtonstump.com

ATTORNEYS FOR APPELLEES

April 9, 2026

Charleston, South Carolina

## CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

This brief contains 12,176 words.

2. This brief complies with the typeface requirements because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

By: /s/ Isabelle S. Young  
Alice F. Paylor, Federal ID #3017  
Isabelle S. Young, Federal ID #14209  
Bijan K. Ghom, Federal ID #12918  
Saxton & Stump, LLC  
151 Meeting Street, Suite 400  
Charleston, SC 29401  
(843) 414-5080  
afp@saxtonstump.com  
iyoung@saxtonstump.com  
bkg@saxtonstump.com

ATTORNEYS FOR APPELLEES