No. 25-5239

In the

United States Court of Appeals

for the

District of Columbia Circuit

ALIGNMENT HEALTHCARE, INC.,

Plaintiff-Appellant,

– v. –

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants-Appellees.

On appeal from a final judgment of the
United States District Court for the District of Columbia
Case No. 25-cv-74 (U.S. District Judge Cooper)

PLAINTIFF-APPELLANT'S REPLY BRIEF

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GLOSSARY

APA	Administrative Procedure Act
CAHPS	Consumer Assessment of Healthcare Providers & Systems
CMS	Centers for Medicare and Medicaid Services
HHS	U.S. Department of Health and Human Services
MA	Medicare Advantage
MAO	Medicare Advantage organization

INTRODUCTION

The survey-administration-error claim that Alignment alleged in its complaint and briefed to the district court is not the same claim that CMS has addressed in its brief to this Court. The agency has entirely reconceptualized the substance of its response to Alignment's objections, and it mischaracterizes the gravamen of Alignment's claim.

Here is what the case is *actually* about: Alignment alleged in proceedings before both the agency and the district court that DataStat—one of the third parties to which CMS delegates survey-administration responsibilities under the Star Ratings program—had mis-administered the 2024 CAHPS survey for two of Alignment's Medicare Advantage plans, adversely affecting those plans' 2025 Star Ratings. It explained that the survey response rates of its Spanish-speaking enrollees were materially lower than expected, compared with the response rates in recent past CAHPS surveys and internal company surveys. It posited that either CMS had under-sampled Spanish speakers for the two contracts at issue or—more likely—DataStat had improperly sent English-language surveys to a substantial number of enrollees designated by Alignment as preferring Spanish. *E.g.*, JA131.

Alignment is prohibited by regulation from seeing the CAHPS survey-administration data because the identities of the respondents are confidential. Not being able to verify its suspicions itself, it raised them (and their factual

bases) to CMS, asking the agency to confirm whether a data-sampling or survey-administration error had occurred.

CMS gave two responses. ***First***, it denied that any error had taken place. On that front, it first confirmed that no sampling error had occurred, which Alignment has not contested. Beyond that, it asked DataStat for—and DataStat gave—a generic confirmation that the company followed the survey-administration requirements laid out in the CAHPS survey Protocols & Specifications. CMS also reviewed the anonymized survey *results* (but not the survey *data* underlying those results) and concluded that the response rates were within the normal range. Despite the deviation from Alignment's recent past response rates, it refused to investigate further; thus, it declined to review DataStat's actual survey data. *E.g.*, JA112-113.

Second, when Alignment pressed the agency on the question of whether DataStat had mishandled Alignment's enrollee language-preference data, CMS simply disavowed an obligation to supervise DataStat. It told Alignment that it "does not get involved in how survey vendors implement language preference data" and insisted that the question of "[w]hether or not [Alignment's] Spanish-speaking members received surveys in English despite their preference [for Spanish] is outside of CMS control." JA117.

Dissatisfied with that response and confident that a prejudicial survey-administration had in fact occurred, Alignment sued CMS under the APA.

CMS, in turn, produced (under an attorneys-eyes-only protective order) the survey data that it previously had refused to review. That data confirmed beyond dispute that DataStat had sent English-language surveys to 29 of 200 enrollees designated by Alignment as preferring Spanish for contract H3443, and 20 of 201 for contract H3815.

That should be an end to the matter. The agency's insistence that the CAHPS surveys were properly administered for contracts H3443 and H3815 simply "r[an] counter to the evidence before the agency." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance*, 463 U.S. 29, 43 (1983). It does not matter how thorough or cursory an explanation CMS gave in the regulatory proceedings—an agency cannot blinder itself to the relevant facts and evidence, and no explanation can justify an administrative decision that is contradicted by irrefutable evidence. CMS said no error occurred, but that is simply wrong.

Unable to avoid these facts, CMS now shifts position. It does not defend (or even acknowledge) its prior claim that DataStat's survey-administration work is "outside of CMS control." JA117. That's likely because the Supreme Court has since reaffirmed that "agencies may rely on . . . assistance from private actors" to implement regulatory programs only when they "function subordinately to the agency and are subject to its authority and surveillance." *FCC v. Consumers' Research*, 606 U.S. 656, 692 (2025) (cleaned up).

Instead, CMS's lawyers have contrived two new, litigation-inspired positions that CMS did not give to Alignment in the regulatory proceedings and, indeed, didn't even fully develop before the district court.

One—rejecting the premise underlying its rationale during the plan preview periods—it now says that DataStat had no duty at all under the Protocols & Specifications to follow Alignment's direction concerning survey language preferences. Instead, according to this new argument, regulatory delegees such as DataStat are free—pursuant to their own, unchecked discretion—to disregard a plan's instruction concerning language preferences as long as they make Spanish-language surveys "available" to Spanish speakers by some other method of their choosing. *See* CMS Br. 26-27. As CMS sees it, DataStat may meet that obligation however it likes—including by merely instructing Spanish speakers on how to request Spanish-language materials.

***Two*,** CMS says that even if the Protocols & Specifications do require DataStat to comply with Alignment's direction concerning language preferences, DataStat has discretion to adopt (and did adopt) an "especially conservative" approach to data matching (CMS Br. 33 & n.3), virtually guaranteeing that a substantial portion of Alignment's Spanish-speaking enrollees would receive survey materials in English. The premise of this second newly developed position is that the agency has no obligation to supervise survey administrators to ensure that "like cases are treated alike" (*Consolidated*

Edison Company of New York v. FERC, 45 F.4th 265, 279 (D.C. Cir. 2022))—sometimes an MA plan may receive the assistance of an "especially conservative" survey administrator, and sometimes it may receive the assistance of a more permissive one. Regardless of how wildly survey results may vary as a consequence, CMS implies, this again is not its concern.

There are two problems with each argument. To start, both run headlong into the private nondelegation doctrine. As a private delegee of CMS, DataStat must function "subordinately" to CMS in all pertinent respects. *Consumers' Research*, 606 U.S. at 692. It "may not make policy," and it cannot ever be the "final authority" on issues of administrative discretion or judgment. *Id.* at 693. Yet before this Court, CMS takes the position that delegees such as DataStat *are* the final authority on multiple discretionary issues essential to administration of the CAHPS surveys and Star Ratings program, including the questions of *whether* to use an MA plan's language-preference data and *how* to use the data if it chooses to do so. But those are regulatory judgments for CMS to make, which it must do consistently for all plans.

Moreover, and perhaps more simply, the Court "cannot affirm based on a post hoc litigation rationalization pressed by agency counsel" in court. *Gulf Restoration Network v. Haaland*, 47 F.4th 795, 804 (D.C. Cir. 2022). At no time in the administrative proceedings did CMS take the position that DataStat was free to ignore Alignment's direction with respect to administration

of the CAHPS survey in Spanish. In fact, its responses assumed the opposite, as did its briefs below. Nor did CMS take the position that it was appropriate and acceptable for DataStat to send English-language survey materials to scores of enrollees designated by Alignment as preferring Spanish simply because DataStat, in its own discretion, preferred an "especially conservative" approach to data-matching. Its only explanations were that (1) no administration problem had occurred (*wrong*), and (2) even if it had, CMS had no obligation to supervise DataStat (*also wrong*). CMS conspicuously declines to defend either of those rationales before this Court.

Against this background, the appropriate course is to reverse the district court and remand with instructions to send the matter back to CMS for recalculation of Alignment's Star Ratings without consideration of the defective CAHPS survey results. A remand with instructions to send the matter back to CMS for the *agency officials* to explain themselves (as opposed to their lawyers) would be pointless; categorically, CMS cannot justify DataStat's material, unsupervised exercises of agency discretion under the Star Ratings program without violating the APA and private nondelegation doctrine.

ARGUMENT

Many of our disagreements with CMS are laid out fully in the opening brief, and we maintain but do not repeat them here. Instead, we focus this reply on two issues: (1) What did the Protocols & Specifications require DataStat to

do? And (2) would CMS's newfound reading of the Protocols & Specifications violate the private non-delegation doctrine?

The answers to those questions are clear: First, the text and structure of the Protocols & Specifications require survey vendors to follow an MA plan's language-preference instructions. Survey vendors do not have discretion to disregard those instructions and go their own way. Second, constitutional avoidance counsels the same result: The nondelegation doctrine forbids CMS from conferring on a private party the power to make unilateral judgments under a regulatory scheme like the Star Ratings program.

But before getting to those points, we stress that they are new issues raised for the first time in litigation. The Court should reverse for the straightforward reason that "judicial review of agency action is limited to the grounds that the agency invoked when it took action" (*Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 20 (2020) (quotation omitted)), and noting that the grounds invoked by the agency are so plainly wrong that not even the agency defends them here.

A. CMS no longer defends the rationale it gave Alignment during the administrative proceedings, warranting reversal

1. As we explained in the opening brief (at 17-19), CMS rejected Alignment's concern that a survey-administration error occurred on two grounds. ***First,*** it explained that DataStat "attested" that it had appropriately "used the

language preference data shared by the plan" in determining who received Spanish-language materials. JA112. Relatedly, it concluded that the correlation between the percentage of Spanish-language responses and the percentage of Spanish speakers within the sample was "as expected and consistent with the correct administration of the survey." *Id.* Thus, in CMS's view, Alignment's concern that there was a "survey administration" error was unfounded. *Id.* ***Second,*** it insisted that the question of "[w]hether or not Spanish-speaking members received surveys in English despite their preference is outside of CMS control" and not a factor that it was required to address in any event. JA117.

CMS's brief describes the explanation it furnished in the administrative proceedings in similar terms: "Upon reviewing the response data, CMS saw no reason to suspect that the survey vendor had not complied with [the applicable regulatory] requirements." CMS Br. 12. That is to say, CMS concluded that Alignment's "results were consistent with normal survey response patterns for Spanish-speaking individuals." *Id.* The survey results thus "did not substantiate plaintiff's assertion that there must have been some error in survey administration." *Id.* at 14. That was confirmed by CMS staff, who had "reached out to the survey vendor directly and confirmed that the vendor followed Quality Assurance Plan & Technical Specifications (QAP& TS) procedures." *Id.* at 16 (quotation omitted). And anyway, "CMS explained

that whether or not Spanish-speaking members received and took surveys in English is outside of CMS's control." *Id.* at 15 (cleaned up). In sum and substance, *that's all.*

2.a. CMS does not defend either of those rationales before this Court. In Part I.A of its brief before this Court, CMS instead asserts (at 26) that the Protocols & Specifications provide alternative methods to "ensure Spanish-language questionnaires are available to participants in a meaningful way," aside from sending Spanish-language materials to enrollees designated by the plan as preferring Spanish. Because Alignment did not argue, and there was no evidence to suggest, that DataStat failed to make Spanish-language materials technically "available" through these alternative methods, CMS concludes (at 29) that "the district court was correct to hold that plaintiff failed to show that there was any error in the survey administration."

In Part I.B of its brief, CMS argues further (at 31) that the Protocols & Specifications do not "require[] a survey vendor to use any particular method" for distributing Spanish-language surveys to Spanish speakers, "[e]ven if an insurance provider requests that the survey vendor use a particular approach." They then offer (at 31-33) a refutation of Alignment's contrary reading of the Protocols & Specifications.

In other words, CMS's newfound position is that (1) DataStat had no obligation to follow Alignment's instructions concerning Spanish-speaking

members, and (2) as long as DataStat included a phone number in a form prenotification letter (a fact not established in the administrative record), Alignment has no basis to complain.

That stunning new rationale has been devised, not by CMS, but by its attorneys. It is not reflected anywhere in the reasoning that CMS gave in the plan preview period. Even before the district court, CMS took the opposite position, asserting (correctly) that sponsors of MA plans "such as Alignment," *not* third-party survey vendors, "retain discretion over how to promote enrollee participation, including how to accommodate enrollees who speak languages other than English" by selecting among the options for making Spanish-language materials available. JA27 (CMS Opp. & Cross-Mot. 31). It noted that MA plans "may promote participation among non-English speaking members . . . by providing the vendor with enrollee-level language preference data *and instructing the vendor* to send translated surveys based on those preferences." JA28 (CMS Opp. & Cross-Mot. 32) (emphasis added).[1]

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[1] CMS insists (at 37-38) that it argued otherwise before the district court, even if not during the plan preview period. Although nothing turns on it, it bears noting that CMS is wrong. True, it explained to the district court that there are multiple approaches allowed in the Protocols & Specifications for making surveys available in Spanish, and no one approach is mandatory. But the question here is *who* gets to decide which approach to use: the MA plan or the survey vendor? CMS did not previously take the position, in either the plan preview period or in its briefing below, that the survey vendor has ultimate and unilateral decisionmaking power on this point.

CMS says (at 38) that "it is not surprising that CMS did not say more about the protocol requirements below," because Alignment "made clear to CMS that its concerns were not with whether the vendor sent the required bilingual prenotification materials or whether Spanish-language surveys were available on request, but with whether some Spanish speakers" identified by Alignment as preferring Spanish "had been mailed English-language surveys" by DataStat. But that is *our* point: An agency cannot present in court an all-new rationale responsive to a different theory that the plaintiff never raised in the underlying administrative proceedings, and then blame the plaintiff for not anticipating the change in position.

b. CMS's lawyers assert (at 33) alternatively that DataStat did follow Alignment's instructions, except that it did so using "a conservative approach to matching the data it received" with the CMS sample. And, according to CMS (at 34), "there is nothing in the CMS protocols that required the vendor to use any particular method for matching those two data sets." Thus, CMS "acted reasonably when it concluded that the evidence before it established that the vendor abided by plaintiff's request" and correctly "used the language preference information [plaintiff] provided." *Id.*

Once more, that was not an explanation given to Alignment during the administrative plan preview process. The administrative record shows that CMS received an ambiguous reference from DataStat to its "conservative"

matching approach (JA192), but there is no evidence that the agency inquired further. And regardless, it did not rely on any such factor as a ground for rejecting Alignment's concerns.

3. CMS's change in position reflects a substantial shift in policy that it is precluded from relying on here. "When an agency's initial explanation indicates the determinative reason for the final action taken," the agency "may not provide new" explanations in litigation—or even following a voluntary remand without vacatur. *Regents*, 591 U.S. at 21 (cleaned up).

Here, during the plan preview period, the agency's initial explanations for rejecting Alignment's objections were (1) an inference in light of the survey results that DataStat had *not* committed a language-administration error and (2) an insistence that the problem was not its to solve regardless. When Alignment filed this lawsuit, CMS's option was either to defend those two lines of reasoning in court, or to withdraw Alignment's Star Ratings voluntarily, reconsider its position, and issue an entirely new decision "bolstered by new reasons." *Id.*

CMS chose the first option, to stand on its original reasoning. Its defense on appeal is therefore "limited to [those] original reasons," which must be "viewed critically" on their own terms, and without regard for "impermissible post hoc rationalization." *Id.* (quotation omitted). Put more directly, CMS's "explanation to this court [simply] cannot substitute for reasoned decision-

making at the agency level." *Constellation Mystic Power, LLC v. FERC*, 45 F.4th 1028, 1055 (D.C. Cir. 2022) (quoting *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 329 (D.C. Cir. 2006)).

That alone requires reversal, for not even CMS defends its original agency-level reasoning. There is little wonder why not. Plainly enough, the agency *does* have an obligation to supervise survey vendors like DataStat. *See Consumers' Research*, 606 U.S. at 692; *see also* CMS, *Medicare Program; Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs*, 75 Fed. Reg. 19678, 19760 (Apr. 15, 2010) (acknowledging that, in delegating survey administration to third parties, CMS retains "oversight of survey vendor activities"). Just as plainly, DataStat *did* send English-language questionnaires to a material number of enrollees flagged by Alignment as preferring Spanish. CMS does not and cannot deny either of those clear-cut points. Its rationale for rejecting Alignment's concerns was thus concededly arbitrary, and the district court was wrong to hold otherwise for reasons not given by the agency.

B. The Protocols & Specifications required DataStat to follow Alignment's direction with respect to Spanish-language survey administration

The Court should reverse and remand to the agency, with instructions not just to reconsider these issues, but to recalculate Alignment's 2025 Star Ratings without consideration of the error-infected CAHPS survey results.

1. The only plausible reading of the Protocols & Specifications requires survey vendors to follow plan instructions

a. As we explained in the opening brief (at 40-42), the only plausible reading of the Protocols & Specifications is that (1) there are multiple ways for making Spanish-language questionnaires available to Spanish-speaking enrollees, and (2) the decision of which method to use belongs to the plan, and not to the third-party survey administrator. This follows from the plain language of the Protocols & Specifications themselves, which state what vendors must do when "the contract has **not** requested use of any of the optional questionnaire translations" and what to do when it has. JA168. The deciding factor is the plan's requested approach, not the vendor's discretion.

As directly relevant here, the specifications state that "at the request of the contract," a vendor "may do any of the following" to make foreign-language surveys available. JA167. Among the options then listed is the method at issue here: The vendor may send a "Spanish language questionnaire only" to individuals "known to prefer Spanish" according to the "language preference data received from the contract." JA168. The clear implication is that a survey vendor may *not* take that approach if it is *not* requested by the plan—and conversely, that it *must* do so when it *is* requested. It would make no sense to say that the vendor is prohibited from sending only Spanish-language survey materials to enrollees known to prefer Spanish unless it is requested to

do so, but that *when* it is requested to do so, it is free to ignore the request and select an alternative approach as it wishes.

The Protocols & Specifications' statement concerning foreign languages other than Spanish resolves any doubt: The specified methods for making different foreign-language surveys available are "optional" but "shall be done at the request of the contract." JA167. There is no rational basis for thinking that CMS intended for Spanish-language surveys to be treated differently.

Accordingly, when Alignment shared its language-preference data with DataStat and instructed DataStat to send Spanish-language-only questionnaires to the enrollees identified by Alignment as preferring Spanish, DataStat was required to follow that instruction. It was not free, in its own arbitrary discretion, to disregard the instruction and use a less effective approach, such as (allegedly) sending English-language questionnaires preceded by prenotification letters containing a toll-free number for requesting materials in Spanish. *See* JA80.

b. Taking its cue from the district court, CMS now disagrees. *See* CMS Br. 31-33. It asserts that the Protocols & Specifications are merely "permissive," and that survey vendors are authorized but "not required to deploy any of the listed strategies even if the insurance provider asks." *Id.* at 22. Indeed, according to CMS (or at least its lawyers on appeal), "CMS protocols leave survey vendors some discretion in how [CAHPS] surveys will be conducted"

and permits them to ignore a plan's instructions altogether. *Id.* at 32-33.

That contention makes no sense operationally. MA plans (not survey vendors) are the entities that are impacted and bound by the annual Star Ratings, and the regulations require them (not survey vendors) to furnish complete and accurate data. *See* 42 C.F.R. §§ 422.164(g)(1), 423.184(g)(1). Consistent with that objective, CMS encourages MA plans (not survey vendors) to expend additional resources on their CAHPS surveys to "promote member participation" by either (1) using "double stuffing," in which case all recipients receive both English and Spanish materials; or (2) providing their survey vendors with detailed language-preference data, to allow tailored delivery of Spanish-language (and other foreign-language) materials. JA138. The reason for this encouragement is clear: "Ensuring that all of your enrollees have the opportunity to complete the survey in the language with which they are most comfortable provides the most accurate picture of patient experience in your contract." JA141.

Those directions would count for nothing if a plan's survey vendor—at its sole and unreviewable discretion—could decide unilaterally to skip the foreign-language mailings that a plan instructs it to send, and deliver English-language materials to everyone instead. Certainly, nothing in the Protocols & Specifications gives survey vendors that choice, as opposed to the plans for which they are supposed to be working.

2. CMS's contrary position must be rejected because it would violate the APA and the private nondelegation doctrine

CMS's newly minted contrary view, if adopted by the Court, would violate both the APA and the Constitution.

a. As a starting point, CMS's new position would ensure that administration of the CAHPS survey violates the "fundamental norm of administrative procedure requir[ing] an agency to treat like cases alike." *Consolidated Edison*, 45 F.4th at 279. Under CMS's proposed reading, similarly situated MA plans would be treated fundamentally differently with respect to implementation of the CAHPS survey in foreign languages. Some survey vendors might adopt a policy of *never* following a plan's request to use specific foreign-language protocols; others might adopt a policy of *always* following such requests; and others still might base their decision on contingent factors differing from plan to plan, such as the proportion of enrollees identified as preferring a particular foreign language. As CMS sees it (at 32-33), any and all of these varied policies are perfectly acceptable, for CMS has granted "survey vendors some discretion" to conduct the surveys as they like.

The upshot would be unpredictability and wide-ranging variances in the administration of the CAHPS surveys. Two MA plans with similar enrollee demographics, both requesting survey administration using the plan's own language-preference data, could be treated entirely differently, based on the

whim of a private CMS delegee. And the difference would materially impact each plan's CAHPS survey results and, in turn, Star Ratings. The proof of the pudding is in the eating: Alignment's CAHPS survey results for Spanish speakers in the two impacted plans changed meaningfully from 2024 to 2025. *See* JA131-132. That is indefensible as a matter of plain language, common sense, and—as we show next—constitutional law.

b. Our reading of the Protocols & Specifications avoids these problems. It is also consistent with the regulatory history and the private nondelegation doctrine. When CMS moved administration of the CAHPS survey to third-party vendors, it did so to make MA plans "responsible for the cost of the data collection," consistent with "standard industry practice" for "other Medicare quality surveys," no more. 75 Fed. Reg. at 19760. The survey vendor's job was simply "to conduct the survey on [each MA plan's] behalf." *Id.* CMS retained responsibility for providing a list of authorized survey vendors and "oversight of survey vendor activities." *Id.* This was not a shift in regulatory discretion from CMS and MA plans to unaccountable third parties.

A matter of constitutional law, it could not be otherwise. Under the private nondelegation doctrine, CMS is flatly barred from conferring regulatory discretion on DataStat or other vendors to make unreviewable survey administration decisions that materially impact CAHPS survey results. To be sure, "[g]overnment agencies may rely on advice and assistance from private

actors" in the administration of regulatory schemes. *Consumers' Research*, 606 U.S. at 692. But the private delegee must be "subordinate" to the agency, "may not make policy, and must carry out all its tasks consistent with the [agency's] rules, orders, written directives, and other instructions." *Id.* at 692–93 (citation omitted). That is, the delegee's actions can have "legal" and "practical" "effect" only if the agency has an opportunity to review and approve them. *Id.* at 694. The agency, for its part, must in all material respects "retain[] decision-making power" (*id.* at 692) and remain "in control" (*id.* at 695).

CMS's reading of the Protocols & Specifications flouts this rule. If all DataStat were doing was giving "assistance gathering facts" (*Hight v. DHS*, 135 F.4th 996, 1006 (D.C. Cir. 2025)) according to CMS's "rules, orders, written directives, and other instructions" (*Consumer's Research*, 606 U.S. at 693 (citation omitted)), that would be one thing. But here, CMS purports to confer on private third-party survey administrators such as DataStat the unilateral, unreviewable discretion to decide how the CAHPS survey will be administered—to decide, in particular, how foreign-language surveys will be made "available" to enrollees among a menu of several options enumerated in the Protocols & Specifications. And it makes a material difference how that discretion is exercised, directly impacting the completeness and accuracy of the survey results. *See* JA141; JA131-132.

It is no answer to say (CMS Br. 32) that survey vendors are merely engaged in "fact gathering." Yes, the U.S. Coast Guard can rely on the Pilots Association to gather facts for consideration in its independent evaluation of pilot applications. *Hight*, 135 F.4th at 1009–10. Yes, TSA can hire a consultant to provide factual reports for it to use in setting airline fees. *Southwest Airlines Co. v. TSA*, 650 F.3d 752, 757–58 (D.C. Cir. 2011). But no, CMS cannot give a survey vendor unreviewable discretion to decide *how* it gathers facts among a menu of agency-determined options when the manner chosen materially impacts the results. *See U.S. Telecom Association v. FCC*, 359 F.3d 554, 567 (D.C. Cir. 2004) (rejecting an attempt "to characterize the [party's] role . . . as fact finding" when the party "could make crucial decisions" without oversight, and those decisions do "not remotely resemble nondiscretionary information gathering").

c. This point on this score is a narrow one. We do not dispute that CMS may enlist private third parties to assist it with administration of the CAHPS surveys. The point is only that CMS may not confer material, administrative discretion on those third parties in the execution of their assignments. The agency must either singularly instruct vendors how to make foreign-language materials "available" to survey respondents. Or, if it wishes to permit a range of options, it must leave the decision of which option to use in the hands of the regulated entities (the MA plans) that are impacted by the choice made. Only

by one of those two approaches can it both avoid a private nondelegation problem and ensure that similarly situated plans will be treated alike.

The APA and the rule of constitutional avoidance thus both require the Court to adopt Alignment's reading of the Protocols & Specifications and to reject CMS's. *See Federal Express Corp. v. United States Department of Commerce*, 39 F.4th 756, 772 (D.C. Cir. 2022) ("The 'canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.'") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)).

d. The same goes for the manner in which DataStat and other vendors undertake their data-matching processes.

CMS takes (at 33-35) the fallback position that even if DataStat was required to follow Alignment's survey-language instructions, it did so. Yet, at the same time, the agency admits that "some individuals who were marked as preferring Spanish in plaintiff's internal data did not automatically receive the questionnaire in Spanish only" (at 34)—really, did not *at all*—because DataStat used an "especially conservative" approach (at 33 n.3) to matching addresses—one that other vendors, by clear implication, do not.

On that score, too, it does not suffice for CMS simply to defer to the vendor. If CMS is going to rely on private third parties to do its fact-gathering work for it, it must delegate only "nondiscretionary" tasks (*U.S. Telecom*, 359

F.3d at 567) while furnishing sufficiently detailed "rules, orders, written directives, and other instructions" (*Consumer's Research*, 606 U.S. at 693) to ensure that like cases are treated alike (*Consolidated Edison*, 45 F.4th at 279). By allowing some vendors to take an "especially conservative" approach to data handling while accepting that others will take more permissive approaches, CMS again flunks these tests.

C. It was reversible error for the district court to assume facts not supported by the administrative record

A final point bears mention. Even if a survey vendor could choose for itself a preferred method for making foreign-language materials "available" in derogation of an MA plan's instruction, the district court was wrong to assume that the requirement was satisfied here. As we explained (Opening Br. 42-44), the administrative record simply does not support the district court's conclusion that Alignment's enrollees necessarily were "informed in Spanish" in a prenotification letter "that Spanish versions were available upon request." JA80.

"[I]t is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision,'" and resorting to extra-record evidence is foreclosed. *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam) (quoting *Walter O. Boswell Memorial Hospital v. Heckler*, 749

F.2d 788, 792 (D.C. Cir. 1984)). Here, CMS did not take the position that, as long as it sent an adequate prenotification letter, DataStat was free to ignore Alignment's instructions. It therefore did not obtain (or even request) the relevant prenotification letters from DataStat to confirm whether the letters complied with the Protocols & Specifications. The letters accordingly are not in the AR, and we cannot say what they did or did not say—let alone in what languages they did or did not do so.

Nor was it legally acceptable for the district court (or CMS) to assume that DataStat had sent the prenotification letters in Spanish, containing instructions on how to request Spanish-language surveys. To our knowledge, no court has ever extended the presumption of regularity to private parties. *Cf. PETA v. USDA*, 918 F.3d 151, 157 (D.C. Cir. 2019) (the "presumption of regularity" is the assumption that "the official acts of public officers" are "properly discharged"). And the district court's presumption was especially inapt here, since there are in fact circumstances in which prenotification letters will not contain instructions on how to request survey materials in Spanish.[2] Without evidence in the record, the court was simply wrong to

[2] For example, if a plan requests surveys in an alternative foreign language such as Chinese or Korean, "the survey vendor has the option of including" an English-Chinese or English-Korean letter "instead of the English-Spanish" one. JA168.

assume that Spanish-language materials were *necessarily* made "available" even under this new theory.

Before this Court, CMS attempts to flip the script, faulting Alignment for "never point[ing] to any evidence suggesting that those requirements were *not* followed here." Br. 36 (emphasis added). But a regulated entity complaining of arbitrary agency action bears no burden to anticipate the agency's subsequent, litigation-inspired changes in position, or to ensure that the administrative record contains the evidence necessary to refute them.

Again, and as CMS itself openly acknowledges (at 38), Alignment's "concerns were not [that] the vendor [failed to send] the required bilingual prenotification materials," but rather that DataStat did not follow Alignment's instruction concerning administration of the surveys in Spanish, and thus a material number of enrollees identified by Alignment as preferring Spanish were improperly "mailed English-language surveys."

On *that* question—the legal premises of which CMS did not dispute in the plan preview period—the issue of the prenotification letters is wholly irrelevant. The issue came up only after CMS sandbagged Alignment in its district-court reply brief (and at the hearing), introducing a new argument that the district court then adopted. *See* Opening Br. 22-23. That would not be a basis for affirming under any circumstance, let alone in the APA context where an agency's "explanation [in] court cannot substitute for reasoned

decisionmaking at the agency level." *Constellation Mystic*, 45 F.4th at 1055 (quoting *Williams Gas*, 475 F.3d at 329).

CONCLUSION

Against this background, this appeal is easily resolved. CMS does not defend the rationales given in the administrative proceedings for rejecting Alignment's concerns. And the newfound reasoning it offers before this Court, if countenanced by the Court, would violate both the APA and the private nondelegation doctrine by conferring administrative discretion on private third parties and ensuring that similarly situated MAOS will be treated differently.

The Court accordingly should vacate Alignment's 2025 Star Ratings for contracts HR3443 and HR3815 and remand to CMS to recalculate the applicable Star Ratings without the invalid CAHPS survey results.

If for any reason the Court were not inclined to go so far, at minimum it should reverse and remand with instructions to return the case to the agency for the agency to withdraw the affected Star Ratings and consider anew Alignment's objections in light of the full evidentiary record and within the legal constraints of the APA and nondelegation doctrine. *Cf. International Union, UAW v. OSHA*, 938 F.2d 1310, 1313–17 (D.C. Cir. 1991) (remanding a matter to the agency for the agency to consider "other interpretations that conform to nondelegation principles").

Dated: December 19, 2025 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), undersigned counsel for appellant certifies that this brief:

(i) complies with the type-volume limitation of Circuit Rule 32 because it contains 5,760 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface and type style requirements of Rule 32(a) because it is typeset in Century Supra font in 14 points.

Dated: December 19, 2025 /s/ *Michael B. Kimberly*

CERTIFICATE OF SERVICE

Undersigned counsel for appellant certifies that on this date, the foregoing document was served electronically via the Court's CM/ECF system upon all counsel of record.

Dated: December 19, 2025 /s/ *Michael B. Kimberly*