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 OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and amici. The parties before the Court are appellant Alignment Healthcare, Inc.; and appellees U.S. Department of Health and Human Services; Robert F. Kennedy, Jr., in his official capacity; the Centers for Medicare and Medicaid Services; and Mehmet Oz, in his official capacity.

Rulings under review. The ruling under review is *Alignment Healthcare, Inc. v. U.S. Department of Health and Human Services, et al.*, D.D.C. No. 1:25-cv-74, Dkt. No. 22 (June 9, 2025).

Related cases. This case has not previously been before this Court, and there are no related cases currently pending in this or any other court.

/s/ *Michael B. Kimberly*

CORPORATE DISCLOSURE STATEMENT

Alignment Healthcare, Inc. is a publicly traded company, which has no parent companies, subsidiaries, or affiliates which have outstanding securities in the hands of the public. Alignment sponsors Medicare Advantage plans, using advances in technology to provide customized health care designed to meet the needs of a diverse array of seniors.

/s/ *Michael B. Kimberly*

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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
HPMS	Health Plan Management System
MA	Medicare Advantage
MAO	Medicare Advantage organization

INTRODUCTION

This appeal concerns implementation of the Medicare Advantage (MA) Star Ratings system. Medicare is the federal health insurance program for seniors and people with disabilities. *See* 42 U.S.C. § 1395, *et seq*. Medicare beneficiaries can receive fee-for-service coverage directly from the federal government in what is known as traditional Medicare, or they can obtain coverage instead from semi-private health insurance plans that are subsidized by the government. *See UnitedHealthcare Insurance v. Becerra*, 16 F.4th 867, 872 (D.C. Cir. 2021). The semi-private option is known as Medicare Advantage, and the plans offered under it are called MA plans.

"Every year, CMS rates [MA] plans on a one-to-five-star scale as part of its Star Ratings program." *Elevance Health, Inc. v. Becerra*, 736 F. Supp. 3d 1, 4 (D.D.C. 2024). The Star Ratings not only are designed to help inform beneficiaries' shopping decisions during open enrollment, but they also determine plans' eligibility for various program features and the size of the "bonus" payments that plans are entitled to receive. *Id*. at 5. Given its central importance to the MA program, CMS has formalized the Star Ratings system with a series of detailed rules and regulations. *Id*. at 6.

The question presented in this case is a simple one: When an MA plan's data is collected by a CMS-approved survey vendor in a manner that violates the agency's express guidelines for survey administration, may CMS nonethe-

less use the data to calculate the plan's Star Ratings, even when the plan demonstrates without dispute that the error unfairly produced a lower Star Rating? To pose that question is to answer it: *of course not*.

At issue here are CMS's rules for a consumer satisfaction survey (the CAHPS survey), used in the Star Ratings. CMS once administered the survey itself, but it has since outsourced administration to agency-vetted, agency-approved survey vendors. Among other things, these vendors must agree to abide by CMS's rules and guidelines as a condition of program participation. Recognizing the importance of response rates and that some MA enrollees prefer a language other than English, CMS rules encourage MA plans to share language preference data with their survey vendors. When an MA plan does so, the rules direct the survey vendor to administer the survey in the specified language to each enrollee who has a preference other than English.

Appellant Alignment Healthcare is a leading Medicare Advantage organization (MAO) offering coverage throughout the West and Southwest, among other regions. Many of its enrollees are Spanish speakers, and Alignment produced its language-preference data to ensure the CAHPS survey would be administered in Spanish to those enrollees. But the administrative record now confirms a concern that Alignment repeatedly raised with CMS during the "plan preview period" for the Star Ratings: The CAHPS surveys for two of Alignment's plans were administered *in English* to a substantial portion of

enrollees designated as preferring Spanish. CMS has never denied this basic fact. And the error was highly prejudicial to Alignment because the company's internal data show that Spanish speakers receiving Spanish-language surveys respond with materially greater satisfaction than Spanish speakers (or, for that matter, English speakers) receiving English-language surveys. CMS has never denied that basic fact, either.

In rejecting Alignment's challenge to CMS's use of the data from the mis-administered CAHPS survey, the district court treated the claim as a challenge to the agency's reasoning only. That is to say, it held that CMS had given a sufficient explanation for rejecting Alignment's objections.

That was error for two distinct reasons.

First and more fundamental, Alignment's claim was not that CMS's reasoning was lacking, but that agencies must "follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions." *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003). Setting aside the inadequacy of CMS's investigation of the issue, the fact is undisputed: The CMS-approved survey vendor, administering the survey in CMS's name, did not follow the mandatory protocols for administration of the survey. And to refuse to enforce the rules for survey administration uniformly across all MA plans is to decline to "treat like cases alike." *Consolidated Edison Company of New York v. FERC*,

45 F.4th 265, 279 (D.C. Cir. 2022). That is an APA violation, no matter the extent of the agency's rationalization for ignoring it.

Second, and separately, CMS's explanation for rejecting Alignment's concerns was manifestly insufficient. To investigate the objection, CMS asked the survey vendor if it followed the rules. The vendor, unsurprisingly, promised that it had (despite that it hadn't). CMS then eye-balled the survey *results* (but not the underlying data) and concluded that they looked close enough to the expected outcomes that they required no further investigation.

What CMS did *not* do—and what it alone was permitted to do—was obtain Alignment's survey-administration data set from the vendor to confirm whether or not Alignment's Spanish-speaking enrollees actually received English-language surveys. (Alignment, for its part, was barred by confidentiality rules from reviewing the data.) This would not have been a major undertaking. Indeed, when the data was disclosed under a protective order in this litigation, Alignment's third-party consultant determined in a matter of just a couple of hours that approximately 15% of enrollees in contract H3443 and designated by Alignment as Spanish speakers—29 out of 200—had received surveys in English. For contract H3815, the number was approximately 10%—20 Spanish-speaking enrollees received English-language surveys, out of 201 designated. Both numbers were sufficient to materially impact each contract's Star Ratings.

Confronted with these facts, the district court issued an alternative holding, concluding that the survey vendor *did* make Spanish-language surveys available. The vendor supposedly did so by giving survey respondents a phone number to request Spanish-language materials. That is wrong three times over: First, it reflects a litigation-inspired, post hoc rationalization that the agency did not give Alignment in the regulator proceedings below. It therefore is not one that the Court may consider. Second, it misconstrues the agency's own protocols. And third, it has no foundation in the administrative record. It therefore offers no basis for affirming.

In short, this appeal is not a complicated one. It asks only whether CMS was required to enforce its own protocols for administering the CAHPS survey. It plainly was, and the Court therefore should reverse.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. It entered an appealable final judgment on June 9, 2025 (JA86), and Alignment noticed a timely appeal on June 30, 2025 (JA87-88). This Court's jurisdiction rests on 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether CMS violated the APA when it rejected Alignment's objection during the plan preview period to the utilization of data for purposes of the Star Ratings from a mis-administered CAHPS survey.

STATEMENT OF FACTS

A. Statutory and regulatory background

1. The Medicare Advantage program

The Medicare program provides federally funded insurance to Americans who are 65 and older, have received federal disability benefits for at least 24 months, or have end-stage renal disease. *See Becerra v. Empire Health Foundation*, 597 U.S. 424, 428–29 (2022). The Medicare program is administered by CMS on behalf of the Secretary of HHS. 42 U.S.C. § 1395kk(a); *Health Care Financing Administration Reorganization Order*, 42 Fed. Reg. 13262 (Mar. 9, 1977).

Medicare comprises Parts A, B, C, and D. *See Medicare Program; Establishment of the Medicare Advantage Program*, 70 Fed. Reg. 4588, 4589 (Jan. 28, 2005). Part A covers inpatient hospital treatment, and Part B covers outpatient services. Together, Parts A and B are known as "traditional" or "original" Medicare. Traditional Medicare use a fee-for-service payment model. *See* 42 U.S.C. § 1395w-22(a)(1). Under this model, CMS reimburses providers directly for the services they provide to Medicare beneficiaries. *United–Healthcare*, 16 F.4th at 872.

Medicare Part C, also known as Medicare Advantage or MA, uses a different model. *See generally* Medicare Prescription Drug, Improvement, and Modernization Act, Pub. L. No. 108-173, 117 Stat. 2066 (2003) (codified at

42 U.S.C. §§ 1395w-21 to 1395w-28); 70 Fed. Reg. 4588. The program avoids the pitfalls of traditional Medicare and its single-payer, one-size-fits-all approach by offering plans sponsored by private companies (like Alignment) called Medicare Advantage organizations, or MAOs. These companies must cover at least the same services as traditional Medicare. 42 U.S.C. § 1395w-22(a). But, to attract enrollees, MA plans typically include additional benefits not covered by traditional Medicare, such as dental and vision benefits. *UnitedHealthcare*, 16 F.4th at 872.

Under this public-private partnership model, MAOs do not receive fee-for-service reimbursements from CMS for the healthcare services their enrollees receive. *See generally* 42 U.S.C. § 1395w-23(a). Instead, they receive a per-enrollee monthly allowance, which they use to provide coverage to the beneficiaries enrolled in the plan. In turn, MAOs pay healthcare providers for the services they provide to MA enrollees. *Id.* § 1395w-23(a)(1); *see UnitedHealthcare*, 16 F.4th at 874.

CMS determines a plan's monthly payment by comparing the plan's "bid" (its risk adjusted estimated cost of providing Medicare-covered services to a particular patient population) (42 U.S.C. § 1395w-24(a)), to a "benchmark" (the maximum amount the federal government will pay to provide coverage in the plan's service area) (*id.* §§ 1395w-23(b)(1)(B), (n)). If the MAO's bid is below the benchmark, CMS pays the MAO its bid rate, while also

returning a specified percentage of the difference between the benchmark and the bid as a "rebate," which the MAO must return to plan participants through additional benefits, lower premiums, or cost sharing. 42 U.S.C. §§ 1395w-23(a)(1)(B)(i), (E); 1395w-24(b)(1)(C). If, in contract, an MAO's plan bid is at or above the benchmark, the MAO receives monthly payments at the benchmark rate and must charge enrollees an additional premium to cover the shortfall. *Id.* §§ 1395w-23(a)(1)(B)(ii); 1395w-24(b)(2)(A); *see also MMAPA v. Emanuelli Hernández*, 58 F.4th 5, 8 n.1 (1st Cir. 2023).

2. The Star Ratings system

a. Each MAO is required by statute to establish "ongoing quality improvement program[s]." 42 U.S.C. § 1395w-22(e)(1)(3). The MA statute prescribes a system of "quality rating[s]" for plans using a "5-star rating system" that is based on the data collected under MAOs' quality improvement programs. *Id.* § 1395w-23(o)(4)(A).

To implement this statutory mandate, and to assist would-be enrollees in choosing the plans best suited to their needs, CMS established the Star Ratings system early in the MA program's existence. CMS evaluates plans on a range of quality, compliance, and other "measures," and develops ratings on a five-star scale based on the scores that plans earn on those measures. *See* 42 C.F.R. §§ 422.166(a)(4), 423.186(a)(4). A 1.0 Star Rating is the worst rating, and 5.0 Star Rating is the best. *Id.* §§ 422.166(a)(4), (c)(3), (d)(2)(iv),

423.186(a)(4), (c)(3), (d)(2)(iv). The system is intended to reflect the quality and performance of each plan. 42 C.F.R. §§ 422.162(b)(1), 423.182(b)(1).

To develop the Star Ratings, CMS first determines each plan's numerical score for each of more than three-dozen measures. It then converts these raw scores into "measure-level" Star Ratings. Measure-level ratings use four thresholds, or "cut points," to divide the measure scores into five "whole star increments." 42 C.F.R. §§ 422.166(a)(4), 423.186(a)(4). From the measure-level Star Ratings, CMS calculates Part C and Part D "summary" ratings, which reflect the weighted average of a contract's measure-level Star Ratings (meaning that some measures are given more weight than others). *Id.* §§ 422.166, 423.186.

b. The Star Ratings system is integral to the MA program. It serves three primary functions, each of which requires the ratings to "accurately . . . reflect true performance." *Medicare Program; Contract Year 2019 Policy and Technical Changes to the Medicare Advantage, Medicare Cost Plan, Medicare Fee-for-Service, the Medicare Prescription Drug Benefit Programs, and the PACE Program*, 83 Fed. Reg. 16440, 16519 (Apr. 16, 2018).

First, the system is designed to provide Medicare beneficiaries with "comparative information on plan quality and performance," allowing them to make "knowledgeable enrollment and coverage decisions in the Medicare program." 42 C.F.R. §§ 422.160(b)(1), 423.180(b)(1). To this end, CMS main-

tains the Medicare Plan Finder website, which displays information about available plans, including each plan's Star Rating. Star Ratings thus influence each plan's position in the marketplace by affecting how prospective enrollees, and the agents and brokers who advise them, perceive the comparative quality of various plans.

Second, the system is designed to help CMS perform "oversight, evaluation, and monitoring of MA and Part D plans" and compliance with regulatory and contract requirements. 83 Fed. Reg. at 16520-16521; *see also* 42 C.F.R. §§ 422.160(b)(3), 423.180(b)(3). For that reason, CMS conditions certain aspects of a plan's status within the MA program on its Star Rating.

The Star Ratings program's *third*, more recent, purpose is to provide "quality ratings on a 5-star rating system" to be used in administering the scheme of additional payments for high quality MA plans, known as quality bonus payments (QBPs). 42 C.F.R. § 422.160(b)(2). The statute, as amended in 2010, provides that an MA plan is entitled to QBPs depending on the "quality rating" of the plan, which "shall be determined according to a 5-star rating system." 42 U.S.C. § 1395w-23(o)(4)(A).

In particular, if an MA plan receives a Star Rating of 4.0 Stars or higher, its benchmark amount is increased, in turn increasing the rebates that CMS will pay by increasing the difference between the plan sponsor's benchmark and its bid. *Id.* § 1395w-23(o)(1), (3)(A). Star Ratings also determine the

percentage of the difference that is returned as a rebate. Plans with a 4.5 Star Rating or higher receive 70% of the difference between the benchmark and the bid; plans with a Rating between 3.5 and 4.5 Stars receive a 65% rebate, and plans with a rating under 3.5 Stars receive a 50% rebate. *Id.* § 1395w-24(b)(1)(C)(v); 42 C.F.R. § 422.266(a)(2)(ii).

3. The CAHPS survey

The measures that underlie plans' Star Ratings fall into two categories. The first category—the only category at issue in this appeal—is based on data from the so-called Consumer Assessment of Healthcare Providers & Systems (CAHPS) survey. This patient-experience survey asks enrollees (and in some cases their family members) about their experiences with, and assessments of, the healthcare and insurance services they receive. Plans' scores on the CAHPS measures reflect enrollees' responses to the survey questions.[1]

A measure-level CAHPS Star Rating is a function of a plan's raw performance relative to other plans, adjusted for the "significance" and "reliability" of the plan's survey data. 42 C.F.R. §§ 422.166(a)(3), 423.186(a)(3). Because numerical measure scores are converted to measure-level Star Ratings with

[1] The second category includes plan-generated or agency-generated data concerning performance and outcomes. These data reflect such issues as the plan's success in delivering preventative care, the health outcomes of plan participants with certain conditions, and the accuracy and speed of plan administration. This appeal concerns only the CAHPS surveys.

whole-star increments, even minuscule fluctuations in CAHPS data can change a contract's base group assignment and lead to a whole-star change in the contract's Star Rating on that measure.

The "CAHPS Survey is conducted with a sample of Medicare enrollees" on a plan-by-plan basis. JA148. The respondents must be "at least 18 years of age and currently enrolled in an MA contract . . . for six months or more" and they must "live in the United States." *Id.* "Prior to 2011, CMS paid for all data collection activities and contracted with a single survey vendor for data collection." *Id.* But "[b]eginning in 2011, CMS required" MA plans to assume this cost by requiring them "to contract with approved . . . CAHPS Survey vendors to collect and report . . . CAHPS Survey data." *Id.* Of course, "[c]ollection of . . . CAHPS Survey data follows a specific data collection timeline and protocol established by CMS." *Id.*

The CAHPS Survey is administered in compliance with the *Quality Assurance Protocols & Technical Specifications* published by CMS. *See* JA143-182 (excerpts). This document enumerates the detailed "requirements for the administration of the . . . CAHPS Survey" by survey vendors. JA143.

CMS has recognized that the language in which CAHPS surveys are administered has important implications for response rates and data quality. In a 2023 memorandum concerning "administering the survey in other languages," the agency expressly acknowledged that "[e]nsuring that . . .

enrollees have the opportunity to compete the survey in the language with which they are most comfortable provides the most accurate picture of patient experience." JA136, 141. Moreover, "[m]aximizing response rates" ensures "more robust information about patient experience." JA141.

To that end, CMS "provides the translations of . . . CAHPS Surveys and supporting materials in Spanish, Chinese, Korean, Tagalog, and Vietnamese." JA167. The Protocols & Specifications state that "Spanish language questionnaires must be made available to all Spanish-speaking enrollees (in web, mail, and telephone administration)." *Id.* To that end, the survey vendor "must mail a pre-notification letter to all sampled enrollees residing in any of the 50 U.S. states or the District of Columbia that is printed in English on one side and in Spanish on the reverse side." JA168.

CMS instructs survey vendors to undertake a number of additional measures "at the request of the [MA plan]" (and at its expense), including sending "web survey invitations in Spanish only to enrollees known to prefer Spanish" and "a Spanish language questionnaire only in all mailings of the survey to enrollees known to prefer Spanish," identified using "language preference data received from the" MA plan. JA167-168. The decision whether to send Spanish-language questionnaires to particular enrollees is the plan's decision (and the plan's expense), not the vendor's. JA167.

4. Plan preview periods

Given the importance of Star Ratings to the MA program, and the sensitivity of the system to erroneous or unreliable data, CMS's regulations establish an administrative process through which MAOs and other plan sponsors can review and comment on, and challenge the adequacy of, the agency's preliminary calculations. The regulations call this administrative process "plan preview" periods: "CMS will have plan preview periods before each Star Ratings release during which MA organizations can preview their Star Ratings data in HPMS prior to display on the Medicare Plan Finder." 42 C.F.R. § 422.166(h)(2); *see also id.* § 423.186(h)(2).

The plan preview process is the only administrative process available to a plan permitting it to comment on and participate in the Star Ratings process before Star Ratings are finalized and published by CMS.

CMS holds two preview periods. During the first plan preview, CMS "expect[s]" MAOs to "closely review the methodology and their posted numeric data for each measure." 83 Fed. Reg. at 16588. During the second plan preview, CMS will post to its website "any revisions made as a result of the first plan preview," as well as the "preliminary Star Ratings for each measure, domain, summary score, and overall score." *Id.* CMS again "expect[s]" plan sponsors to "closely review the methodology and their posted data for each measure, as well as their preliminary Star Rating assignments." *Id.*

A core purpose of the plan preview period is data validation. The two plan previews allow "sponsors to review and raise any questions about their own plan's data prior to the public release of data for all plans," so that if there are any errors, "necessary corrections" can be made prior to the Star Ratings being announced to the public. *Id.* The plan preview process is rooted in CMS's view that, for Star Ratings to be a "true reflection of the quality, performance and experience of the beneficiaries enrolled" in MA, the data and analysis underlying measure scores must be "complete, accurate, and unbiased." *Id.* at 16567. "Data validation is a shared responsibility among CMS, CMS data providers, contractors, and Part C and D sponsors." *Id.* at 16562.

Reflecting the importance of integrity and accuracy, CMS imposes harsh penalties on MAOs for submitting inaccurate data. For example, CMS will "reduce a contract's measure rating when CMS determines that" the data reported to it "are inaccurate, incomplete, or biased," which can result from "mishandling" and "inappropriate processing" of data. 42 C.F.R. §§ 422.164(g)(1), 423.184(g)(1). For measures based on data that an MAO must submit to CMS, each affect's plan's Star Rating will be cut to 1.0 Stars if CMS determines that a contract "was not compliant with CMS data validation standards." *Id.* §§ 422.164(g)(1)(ii), 423.184(g)(1)(ii).

B. Factual background

1. The data that CMS posted during the plan preview periods for Alignment's 2025 Star Ratings showed a sharp and unexpected decline in the Spanish-language response rates to the CAHPS survey.

The disparities were most pronounced for contracts H3815 and H3443. According to CMS's own analysis, the percentage of completed Spanish-language surveys for contract H3815 dropped from 31% of overall responses in 2023 to 20% in 2024; for contract H3443, it fell from 24% of total responses in 2023 to 19% in 2024. JA121, 125. These marked declines in Spanish-language responses occurred against the backdrop of modest *increases* for both contracts in the percentage of CAHPS survey-eligible enrollees who should have received Spanish-language surveys. JA123, 131.

The declines were anomalous. For example, Alignment's CAHPS scores for contracts H4961 and H9686—which are highly similar to contracts H3815 and H3443 in terms of provider network structure, member experience, and member demographics—both showed significant *improvements* in overall performance from 2023 to 2025. JA89-90, 98-104.

The lower response rates among Alignment's Spanish-speaking enrollees materially impacted its 2025 Star Ratings. CAHPS surveys and Alignment's internal 2025 surveys consistently show that its Spanish-speaking members report approximately 10% higher satisfaction compared with

English-speaking members. JA131. Contracts H3815 and H3443, which have the highest concentration of Spanish-speaking members among all of Alignment's contracts, were therefore disproportionately affected by the underrepresentation of this population in the responses to the CAHPS survey. JA131-132.

2. Alignment called CMS's attention to the unexplained declines in Spanish-speaking enrollee responses (JA118, 123-24, 132), but CMS declined to conduct a meaningful review of the issue and thus declined to discard the CAHPS measure scores for H3815 and H3443. Alignment explained:

> Our internal surveys consistently show high satisfaction, particularly among our Spanish-speaking members, with at least 10% higher satisfaction rates compared to English-speaking members. The results were particularly surprising because these two contracts [H3815 and H3443] have the highest number of Spanish-speaking members. So, we have done a thorough analysis to investigate our results for these contracts. We believe the CAHPS results for these contracts reflect sampling bias or language mismatches, as many Spanish-speaking members may not have received the Spanish version of the survey, despite this being their preferred language.

JA131. CMS did not take the objection seriously. It responded that it is "typical" and "common" in CAHPS and other patient surveys for the proportion of Spanish speakers among respondents to be lower than the proportion among enrollees sampled "due to a lower response rate." JA120. The agency also implicitly faulted Alignment for the drop in Spanish-language responses,

asserting (incorrectly) that Alignment had not furnished the company's own Spanish-speaker data to its contracted survey vendor. JA127.

Alignment explained that it *had* shared its foreign-language designations with the CMS-approved survey contractor, "providing consistent member preference data year after year, particularly for our Spanish-speaking membership." JA113.

In response, the agency changed tack, acknowledging that Alignment had in fact shared its language data with the survey vendor, but asserting that the vendor had "attested" that it had "used the language preference data shared by the plan." JA112. CMS concluded that there was "no support for the contention that . . . survey administration . . . adversely affected scores in any way." *Id.* CMS maintained that the statistical relationship between the percentage of responses that were in Spanish and the percentage of Spanish speakers within the sample, as well as the relationship between the percentage of Spanish-language responses and the percentage of Spanish speakers among CAHPS-eligible enrollees, was "as expected and consistent with the correct administration of the survey." *Id.* But CMS provided no evidence for these assertions, simply reporting that they had been "verified." *Id.*

Beyond that, CMS disclaimed responsibility for implementing language preferences rules in the administration of the CAHPS surveys, insisting that it "does not get involved in how survey vendors implement language preference

data." JA117. In apparent explanation, it asserted that "[w]hether or not Spanish-speaking members received surveys in English despite their preference is outside of CMS control" and thus not a factor it has any obligation to address. *Id.*

3. CMS's position during the plan preview period is not consistent with the data that the agency later produced in the district court. That data (which are confidential and were produced subject to a protective order) showed that a material number of enrollees designated by Alignment as Spanish speakers received surveys in English, contrary to Alignment's language preference designation. Approximately 15% of enrollees designated by Alignment as Spanish speakers—29 out of 200—received surveys in English for contract H3443. For contract H3815, the number is approximately 10%, or 20 out of 201. These data thus showed that CMS did not, in fact, adequately verify that the survey contractor correctly distributed Spanish-language surveys to Alignment's expressly designated Spanish-speaking enrollees.

Consistent with Alignment's internal data (JA131), the survey data show further that enrollees who (1) were identified by Alignment as having a preference to receive the survey in Spanish but (2) nonetheless received the survey in English were by far the least likely to complete the survey. In fact, the response rate was less than one half of the response rate of Spanish speakers who received Spanish-language surveys, and less than one third the

response rate of English speakers who received English-language surveys. And again, Alignment's internal quality-control programs show that its Spanish-speaking members receiving surveys in Spanish report notably higher satisfaction compared with English-speaking members. JA131.

C. Procedural background

1. Alignment filed this action under the APA, seeking judicial review of its 2025 Star Ratings. As relevant to this appeal, Alignment alleged that, though it was entitled to have Spanish-language surveys provided to its designated Spanish-speaking enrollees, CMS and its approved survey vendor denied Alignment that right. JA9 (Compl. ¶ 159). CMS acted arbitrarily and capriciously to calculate the company's Star Ratings without requiring the survey vendor to follow "Alignment's directions, the vendor's own guidelines, or CMS's own rules" with respect to Spanish-language surveys. *Id.* (Compl. ¶ 160). And CMS's refusal to fix its mistake violated "a fundamental norm of administrative procedure requir[ing] an agency to treat like cases alike" because other plans received the full benefit of foreign-language surveys while Alignment did not. *Id.* (Compl. ¶ 158) (quoting *Consolidated Edison*, 45 F.4th at 279).

On cross-motions for summary judgment, Alignment explained that CMS guidance states survey vendors "must" make "Spanish language questionnaires available to all Spanish-speaking enrollees" (JA15-16 (Alignment

Mot. Summ. J. 36–37 (citing JA167-168))), "and the agency must require compliance uniformly for all plans" (JA16 (*id.* at 37)). "[T]he agency has unlawfully relieved the contractor of compliance with agency guidelines and subjected Alignment to different treatment," and "[i]n refusing to correct the problem, CMS arbitrarily treated Alignment differently from other MAOs by grounding Alignment's Star Ratings on CAHPS survey data based on English-language surveys sent to Spanish-speaking enrollees." JA16 (*id.* at 37).

Alignment's arguments touched on the inadequacy of CMS's investigation during the plan preview period. The data produced below "show[ed] that CMS simply was incorrect when it stated that the data were 'consistent with the correct administration of the survey' and that it had 'verified' correct administration." JA16 (*id.* at 37 (quoting JA112)). But Alignment's position was clear: "Setting aside whether [CMS gave] a sufficient response to Alignment's concerns," the undisputed evidence shows "the surveys *were* improperly administered" and needed to be corrected. JA36 (Alignment Opp. & Reply 13); *accord* JA28-29 (CMS Opp. & Cross-Mot. 32–33). The agency's decision violated the APA because CMS failed "its obligation to address the substantive problems with the survey by discarding the results." JA37 (Alignment Opp. & Reply 14); *accord* JA61-62 (Hearing Tr. 34:6-7, 9-14; 35:4-8, 15-17).

2. As it did during the plan preview period, CMS attempted to justify the agency's investigation and deflect blame to Alignment and the survey vendor.

JA24-31 (CMS Opp. & Cross-Mot. 28–35). CMS noted that the survey vendor attested to following all CMS procedures and using Alignment's supplied language preferences. JA24-26 (*id.* at 29–30). It also claimed that the survey results were reliable based on the assumptions that (1) enough Spanish speakers still responded to ensure proportional participation in the CAHPS survey compared to all enrollees; (2) Spanish speakers respond less frequently to surveys than other language speakers; and (3) some Spanish speakers responded in English anyway. JA26-27 (*id.* at 30–31). For CMS, the data were good enough, and Alignment's issues were with the vendor, not the agency. JA27-28 (*id.* at 31–32).

CMS further asserted that the CAHPS survey protocol ensures that "there are multiple opportunities to complete the survey in Spanish." JA29 (*id.* at 33). It identified online versions and "pre-notification letters" as examples. *Id.* For the pre-notification letter, CMS explained that it generally "requires that the pre-notification letter mailed to sampled enrollees be printed in English on one side and in Spanish on the reverse side." *Id.* "This letter provides a toll-free number that enrollees can call to request a Spanish-language survey, and survey vendors are required to send such surveys within two days of the request." *Id.* Deviating from the explanation it had given Alignment during the plan preview periods, it then argued for the first time in its reply brief:

> The protocol does not mandate that every Spanish-speaking enrollee automatically receive the initial mailing in Spanish. It requires that the Spanish-language version of the CAHPS survey be made available. That requirement was met. For enrollees who received the prenotification letter in English, those letters included instructions in Spanish for requesting a Spanish-language mail survey. For the web-based version, respondents could select Spanish directly when accessing the survey.

JA44 (CMS Reply 13 (citations omitted)). CMS did not cite for support any evidence in the administrative record, which did not include any "initial mailing" or "prenotification letter" that was sent to Alignment's enrollees. CMS offered only the assertions of its lawyers in a reply brief, which assumed that the survey vendor had complied with the Protocols & Specifications.

3. The district granted summary judgment to CMS with respect to the language administration error.[2] Its reasoning followed two tracks:

One, the district court treated Alignment's substantive challenge as if it were a procedural challenge instead, focusing on the adequacy of CMS's response to Alignment's concerns, rather than the unrebutted survey administration error. JA81 (Op. 6). It found, in particular, that CMS did not "arbitrarily ignore Alignment's concerns" but took them "seriously and responded reasonably." *Id.* The district court noted that CMS checked with the survey vendor, reviewed the survey results, and compared response patterns to CMS's

[2] The district court rejected several of Alignment's other claims, granting relief on two. No other claims are relevant to this appeal.

expected response rates. *Id.* Ultimately, the district court found the agency action was not arbitrary and capricious because CMS "took a sufficiently . . . hard look at the issue." *See* JA61 (Hearing Tr. 34:6-7, 9-10).

Two, the district court adopted CMS's argument, not given during the plan preview period, that there was no error to correct because Spanish-speaking enrollees had access to Spanish-language surveys either way. JA80 (Op. 5). For support, the court cited the Procedures & Specifications, a generic pre-notification letter produced by CMS at the hearing, and the oral argument transcript. *Id.* "[E]ven if Spanish speakers received English-language surveys," the court concluded, "they would have been informed in Spanish, either on the survey itself or separately, that Spanish versions were available upon request." *Id.* The district court emphasized that "Alignment points to no evidence in the record that the requirements were not followed here." *Id.* Yet the district court did not directly address the data showing that the survey vendor did not send Spanish-language surveys to all of the enrollees designated by Alignment as preferring Spanish.

SUMMARY OF ARGUMENT

A. It was arbitrary and capricious for CMS not to discard CAHPS survey data infected by a clear survey administration error. A federal agency must adhere to self-adopted rules by which the interests of the public are regulated. Moreover, an agency must treat like cases alike. Here, the Protocols &

Specifications required the CMS-approved survey vendor to send Spanish-language surveys to enrollees that Alignment identified as preferring Spanish. The record shows that the survey vendor failed to do so for a substantial portion of Alignment's enrollees. Yet the agency refused to set aside Alignment CAHPS survey data. By refusing to enforce its own protocols, it treated Alignment differently from the other MA plan sponsors whose scores relied on properly administered surveys. And that difference caused Alignment material harm in the 2025 Star Ratings. This inconsistent treatment was arbitrary and capricious, and it violated the APA.

B.1. The district court gave two rationales for denying relief to Alignment, neither of which holds up to scrutiny. The district court's first rationale—that CMS adequately explained itself—misunderstands the gravamen of the claim and is, in any event, wrong.

Alignment's claim was not that CMS failed to give a sufficient explanation for rejecting Alignment's concerns, but rather that a survey administration error *did* occur and that reliance upon the data in CMS's calculation of Alignment's Star Ratings was thus inherently arbitrary. An agency cannot overcome an objective, proved error by explaining why it does not believe an error took place. Put another way, CMS's decision ran counter to the evidence before it and was therefore arbitrary and capricious.

Beyond that, even if it were relevant to Alignment's claim, CMS's explanation for rejecting the company's concerns was inadequate. The agency did not review the relevant data (to which it had easy access), and it disclaimed responsibility to enforce its own protocols. Either way, the agency should have set aside the CAHPS survey results when calculating Alignment's 2025 Star Ratings for contracts H3443 and H3815.

2. The district court's second rationale—that the survey vendor did make Spanish-language surveys available—is not before the Court and is unsupported by the record. To start, that was not a rationale supplied by CMS during the plan preview periods. It never said that survey vendors may disregard plan instructions for Spanish-language surveys as long as they include certain instructions in pre-notification letters. Nor did it assert (or provide evidence) that Spanish-language surveys were made available in pre-notification letters in this case, as a matter of fact. Those are therefore not grounds for affirming—especially since CMS's counsel did not even raise them until the agency's reply brief below.

Beyond that, the district court was wrong that an MA plan discharges its obligation to make Spanish-language surveys available simply by reporting a phone number where they can be requested. Nor is there any evidence that letters with such phone numbers were sent in this case, let alone that calling a (hypothetical) number actually would have resulted in receipt of a Spanish-

language survey. For each of those reasons or any one of them, the district court's alternative holding is wrong.

The district court thus erred in denying summary judgment to Alignment on this claim, and reversal is warranted.

STANDING

Alignment seeks judicial review of CMS's calculation of the company's 2025 Star Ratings. It alleges that a survey administration error wrongfully depressed the Star Ratings for two of its contracts, an injury in fact. Alignment's injury is traceable to CMS's calculation decision and, in particular, its refusal to correct the errors that Alignment has identified. Alignment's injuries are redressable through a judicial vacatur of Alignment's Star Ratings and a remand to the agency for recalculation. The Agency's action calculating Alignment's Star Ratings, and its rejection of Alignment's objections, are contained in the Joint Appendix. *See* JA89-193.

ARGUMENT

This Court must set aside an agency action that is arbitrary and capricious (5 U.S.C. § 706(2)(A)), giving "no particular deference to the judgment of the district court" below (*County of Los Angeles v. Shalala*, 192 F.3d 1005, 1012 (D.C. Cir. 1999) (citing *HCA Health Services v. Shalala*, 27 F.3d 614, 616 (D.C. Cir. 1994))). It should do so here: The district court should not have considered CMS's waived and unsupported argument regarding the

"availability" of Spanish-language surveys by other means, nor should it have treated Alignment's substantive challenge as a procedural one. Taking Alignment's claim on its own terms—was there a survey administration error, and did CMS appropriately account for it?—reversal is warranted.

A. It was arbitrary and capricious for CMS not to discard the data infected by a manifest survey-administration error

1. We begin with two basic ad-law principles. First, "[i]t has long been settled that a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated." *Massachusetts Fair Share v. Law Enforcement Assistance Administration*, 758 F.2d 708, 711 (D.C. Cir. 1985). That is to say, when the interests of the regulated public are at stake, "federal agencies [must] follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions." *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003); *accord Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) ("It is well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit its discretion."); *Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 120 (D.D.C. 2020) ("an agency may be bound by its own policies").

Second, it is another "fundamental norm of administrative procedure" that "an agency [must] treat like cases alike." *Consolidated Edison*, 45 F.4th at 279 (quoting *West Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir.

2007)). "Unexplained inconsistency" in the treatment of similarly situated regulated entities "is a reason for holding [agency action] to be" arbitrary and capricious. 32 Wright & Miller, *Federal Practice and Procedure*, § 8248, at 431 (2006) (citing *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)).

These two principles are mutually reinforcing. When an agency adopts a mandatory protocol or policy for the administration of a regulatory program, it must apply that protocol or policy uniformly to all regulated entities under the program's governance. An agency cannot apply one set of requirements when administering the program for a group of regulated entities, while applying a different set of requirements when administering the program for a different group of entities. On the contrary, it is bound to follow its own self-adopted rules and policies always and uniformly for everyone.

2. The CMS Protocols & Specifications for the CAHPS survey establish a detailed body of "requirements, protocols, and procedures for the administration of" the survey, applicable to both "survey vendors and Medicare Advantage (MA)" plans. JA143. Pursuant to the Protocols & Specifications, CMS requires all MA plans "to contract with approved . . . CAHPS survey vendors to collect and report . . . CAHPS Survey data." JA148. In turn, the collection of data by survey vendors must "follow[] a specific data collection timeline and protocol established by CMS." *Id.*

CMS has adopted detailed requirements for administration of the survey in Spanish to enrollees who prefer Spanish. For example, "[s]ampled enrollees for whom an email address is identified from contract data will receive a web invitation email." JA153. "The default language of the web invitation email is English," but the "web invitation emails should be provided in [other] languages" if indicated. *Id.* In particular, "survey vendors can identify sampled enrollees requiring a Spanish invitation email using" either "language preference data received from the contract" or data received by CMS. *Id.*

Concerning mail protocol, "vendors must be prepared to conduct the mail component of the web-mail-phone mode of survey administration in English and Spanish." JA155. To that end, "Spanish language questionnaires must be made available to all Spanish-speaking enrollees." JA167. To comply with this requirement, survey vendors are authorized by CMS to take a number of different approaches; which approach they use is determined "*at the request of the contract*." *Id.* (emphasis added). Among the available options is sending "a Spanish language questionnaire only," with no English, "in all mailings of the survey to enrollees known to prefer Spanish." JA167-168. Such enrollees should be identified, again solely at the contract's determination, according to "language preference data received from the contract." JA168. And "survey vendors should use name, address, city, and state to confirm a match with the contract's language preference data." JA169.

3. It is undisputed that the CMS-approved survey vendor did not follow the protocol just described. There is no disagreement that Alignment gave its enrollees' language preference data to the survey vendor and instructed the vendor to send Spanish-only materials to enrollees that the company identified as preferring Spanish. JA118, 123-124, 132. Nor is it disputed that a material number of enrollees designated by Alignment as preferring Spanish in fact received surveys in English—about 15% of enrollees designated by Alignment as Spanish speakers for contract H3443 and 10% for contract H3815 received surveys in English. Data disclosed in the litigation prove this, and CMS has never denied it.

This administration error was no triviality. Spanish speakers are a key demographic for Alignment because they respond far more favorably than English speakers on satisfaction surveys. JA131. And among the Spanish-speaking respondents whom the vendor sent English-language surveys, the response rate was less than *one half* of the response rate of Spanish speakers who received Spanish-language surveys and less than *one third* the response rate of English speakers receiving English-language surveys.

The upshot is that at least 25 Spanish-speaking respondents across contracts H3815 and H3443 did not return survey responses. That is a highly significant number, given that the survey is administered to just 800 respondents per contract (JA149) with an overall response rate of just 33% (*see* perma.cc/-

YD6R-RK74). Moreover, given recent methodological changes to the Star Ratings system, it is now extraordinarily sensitive to the tiniest changes in survey results. *See* JA186-187 (summarizing clustering methodology that not only dramatically increased the cut points across multiple measures, but also compressed the spread from one cut point to the next). The net outcome was a marked drop in the CAHPS-based Star Ratings scores for H3815 and H3443, in notable contrast with increases in CAHPS-based Star Ratings scores for other Alignment contracts with similar demographics and no demonstrated survey administration errors (JA89-90, 98-104).

In sum, because the survey vendor did not administer the CAHPS survey for contracts H3443 and H3815 in a manner consistent with Alignment's language designations and CMS protocols, the response rates and survey scores for contracts H3443 and H3815 were adversely impacted. JA113-114, 131-132. CMS violated its obligation to address this survey-administration error, which it should have done by discarding the results and simply not counting the CAHPS survey in the calculation of the 2025 Star Ratings for H3443 and H3815. Indeed, CMS routinely calculates MA plans' Star Ratings without CAHPS survey data. Its failure to correct the error in that manner here violated its own protocols and treated Alignment differently from similarly situated MA plans whose vendors followed the rules. It was therefore arbitrary

and capricious. The 2025 Star Ratings for H3443 and H3815 accordingly should be set aside and sent back to the agency for recalculation.

B. CMS's and the district court's contrary reasoning is wrong

In rejecting Alignment's claim on this score, the district court offered two rationales, neither of which supports affirmance. First, treating Alignment's claim as a complaint that CMS did not adequately explain itself, it held that CMS responded logically to Alignment's concerns. But Alignment's claim was only that a survey administration error *had* occurred and that its CAHPS survey data therefore should not be considered—a theory that CMS could not have explained away.

Second, the district court held that the CMS-approved vendor could lawfully ignore "the request of the contract" to "[s]end a Spanish language questionnaire only in all mailings of the survey to enrollees known to prefer Spanish" (JA167) and comply instead with the Protocols & Specifications by simply sending a "pre-notification letter" that provided a "toll-free telephone number for sampled enrollees to call to request a Spanish language survey" (JA168). But that is not remotely what the Protocol & Specifications say. Moreover, that is not an explanation that the agency gave in the plan preview period or its opening brief below, and there is no evidence in the record to support it anyway.

1. The district court's first rationale—that CMS adequately explained itself—misunderstands the gravamen of the claim and is, in any event, wrong

a. The district court held below that "CMS [did not] arbitrarily ignore Alignment's concerns" but took them "seriously and responded reasonably." JA81 (Op. 6). That reasoning tracks a different rule of administrative law, one that Alignment did not raise: "For an agency's decisionmaking to be rational, it must respond to significant points raised" by the public, providing a rational explanation for changing or declining to change its course. *Allied Local and Regional Manufacturers Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000). That was not the nub of Alignment's claim. Rather, Alignment raised a factual concern that CMS's CAHPS survey data was collected in a faulty way: "[W]e have done a thorough analysis to investigate our results" and "believe the CAHPS results for these contracts reflect . . . language mismatches, as many Spanish-speaking members may not have received the Spanish version of the survey, despite this being their preferred language." JA131.

We now know, based on data disclosed pursuant to a protective order in this litigation, that precisely such language mismatches *did* take place. Those mismatches rendered Alignment's CAHPS data invalid because they were collected without observance of the agency's mandatory Protocols & Specifications for CAHPS survey administration. Thus any reliance upon the data in CMS's calculation of Alignment's Star Ratings was inherently arbitrary and

capricious. CMS could not have explained away an objective survey-administration error by rationalizing why it didn't think an error had occurred. As a matter of undisputed fact, an error *did* occur. Regardless what the agency had to say on that topic, its contrary conclusion simply "r[an] counter to the evidence before the agency." *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance*, 463 U.S. 29, 43 (1983).

b. Even if it were relevant to Alignment's claim (it is not), CMS's explanation for rejecting the company's concerns was plainly inadequate.

When Alignment alerted CMS during the plan preview periods to the unexpected and unexplained decline in Spanish-language responses—and its suspicion that its survey vendor sent English-language surveys to Spanish-speaking enrollees—CMS declined to meaningfully investigate the issue. The agency's purported investigation involved obtaining an attestation from the CAHPS survey vendor that "that they followed the [Protocols & Specifications] procedures and used the language preference data shared by the plan" (JA112) and reviewing a "sample" of the survey *results* but not the underlying administration data (JA105). That is not enough.

Consider first the attestation. When a regulated entity asserts that an agency's third-party contractor has deviated from the agency's mandatory protocols, the agency does not conduct an adequate investigation simply to ask the contractor to attest that it followed the rules. Oversight requires the

agency actually to check the contractor's work, not simply to take the contractor's word for it that everything is on the up-and-up.

As for the sample of survey results, CMS asserted that the results reflected "typical patterns in survey administration and did not suggest any error in how the survey was conducted." JA43 (CMS Reply 12); *see* JA120. On that basis alone, it concluded that "[n]o further validation [was] needed," and it refused to obtain the only evidence that actually would have confirmed whether an error occurred: the survey vendor's administration data. JA105.

The APA demands more. "To withstand review, an agency must have examined *all* relevant facts and data" bearing on the issue at hand (*Hearth, Patio & Barbecue Association v. EPA*, 11 F.4th 791, 805 (D.C. Cir. 2021) (emphasis added)), and its decision may not run "counter to [that] evidence" (*State Farm*, 463 U.S. at 43). If CMS had pulled and reviewed the data that actually mattered here—the vendor's survey administration data—it would have seen with barely an afternoon's work that a material language-mismatch *had* occurred, just as Alignment all along had said.

Yet when Alignment pressed CMS on this point, the agency threw its hands up, insisting that "[w]hether or not Spanish-speaking members received surveys in English despite their preference is outside of CMS control," and it could "not get involved in how survey vendors implement language preference

data." JA117. The agency thus concluded that it could not "suppress CAHPS results for your contracts." *Id.*

That also is not enough. CMS must ensure that its rule that "Spanish language questionnaires must be made available to all Spanish-speaking enrollees" is applied uniformly and according to the protocols requested by the plan. JA167-168. When an MA plan brings a serious survey administration error to CMS's attention, it does not suffice for the agency simply to say "oh well, it's not our fault" and count the survey results anyway.

Nor can CMS legally be correct that implementation of the CAHPS survey "is outside of CMS control" in any event. JA117. As the Supreme Court recently reaffirmed, "agencies may rely on . . . assistance from private actors" to implement regulatory schemes only when they "function subordinately to the agency and [are] subject to its authority and surveillance." *FCC v. Consumers' Research*, 145 S. Ct. 2482, 2508 (2025). In particular, an agency must always retain the authority to "review" the private third party's work and "approve[]" or "reject[]" it before using it. *Id.* at 2509-2510. Simply put, the agency must remain "in control." *Id.* at 2510. Against that backdrop, CMS is plainly wrong that it cannot "get involved in how survey vendors implement" the CAHPS survey (JA117)—in fact, it *must* do so. To say otherwise would be a violation of the non-delegation doctrine.

It also bears repeating that CMS demands much of MA plans in their dealings with the agency on matters related to the Star Ratings. The agency cautions MA plan sponsors that it "expect[s]" them to "closely review the methodology and their posted data for each measure, as well as their preliminary Star Rating assignments." 83 Fed. Reg. at 16588. And it stresses that for Star Ratings to be a "true reflection of the quality, performance and experience of the beneficiaries enrolled" in MA, the data and analysis underlying measure scores must be "complete, accurate, and unbiased." *Id.* at 16567. It thus imposes harsh penalties on MA plans for submitting incomplete or inaccurate data, including data flawed by "mishandling" or "inappropriate processing." 42 C.F.R. § 422.164(g)(1). Well, "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021).

The district court's decision—comprising just a few sentences—did not grapple with these facts and thus was mistaken even on its own terms.

2. The district court's second rationale—that the survey vendor did make Spanish-language surveys available—is not before the Court and is unsupported by the record

The district court held in addition that "Alignment has not shown that the survey was administered erroneously" because, although "CMS survey procedures require that Spanish-language surveys be 'made available to all

Spanish-speaking enrollees,'" that requirement is satisfied if respondents are simply "informed in Spanish, either on the survey itself or separately, that Spanish versions [are] available upon request." JA80 (Op. 5). There are three substantial problems with that holding.

First, that is not the rationale that CMS gave during the plan preview periods. The agency responded to Alignment's concerns by insisting that no language-mismatch error had occurred and that, anyway, CAHPS survey issues were not its problem. *See* JA107, 112, 117, 120, 125, 127. It never suggested that it is acceptable under the Protocols & Specifications for a CAHPS survey vendor to disregard a plan's instructions for handling Spanish-language surveys, and that a generic prenotification letter alone suffices. That is fatal, because "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); *accord State Farm*, 463 U.S. at 50. As this Court has said many times, it "cannot affirm based on a post hoc litigation rationalization pressed by agency counsel." *Gulf Restoration Network v. Haaland*, 47 F.4th 795, 804 (D.C. Cir. 2022) (*SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943)).

That rule has special traction here because CMS's counsel did not even develop this argument in the agency's opening brief before the district court. Opposing counsel instead waited until the reply brief below to argue that, as a

matter of law, the Protocols & Specifications require nothing more than a phone number in a survey prenotification letter—and that, as a matter of fact, Alignment's survey vendor did send a "prenotification letter in English" that "included instructions in Spanish for requesting a Spanish-language mail survey." JA44 (CMS Reply 13). Because it came so late, Alignment had no meaningful opportunity to respond to this all-new, litigation-inspired explanation. *See Rollins Environmental Services (NJ) Inc. v. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991) (a party may not raise a new argument in reply).

Second, CMS is wrong that the Protocols & Specifications permit a survey vendor to disregard an MA plan's direction to use a particular method of distributing Spanish-language surveys. As CMS acknowledged in its opening brief below, 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). And while this approach is indeed "optional" (*id.*), it is optional *for the plan*. But the vendor, for its part, "may" undertake a particular method of distributing Spanish-language surveys only "at the request of the contract." JA167. If the plan does not request a particular method, the vendor may not use it. JA167-168. The inverse follows perforce: If the plan *does* request a particular method, the vendor *must* use it.

Alignment's is the only permissible reading of the Protocols & Specifications. As we noted above, it would violate the non-delegation doctrine for CMS to grant unilateral discretion to survey vendors to override plan instructions pursuant to the Protocols & Specifications. *See Consumers' Research*, 145 S. Ct. at 2508-2510. Exercising judgment to disregard an MA plan's directions does not fall within the "nondiscretionary activities such as compiling, hearing, and transmitting technical information" that a third-party contractor may take. *See International Dark-Sky Association v. FCC*, 106 F.4th 1206, 1216 (D.C. Cir. 2024). A private delegee may not "make crucial decisions" about survey administration, particularly where (as here) the agency admits its "oversight [is] neither timely nor assured." *See U.S. Telecom Association v. FCC*, 359 F.3d 554, 567 (D.C. Cir. 2004). In defending its delegation of agency authority to survey vendors, CMS must ensure that these private third parties follow CMS's guidelines and do not (cannot) exercise their own unilateral discretion. *Cf. Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 395 (2024) (courts must use "independent judgment" to ensure agencies act "consistent with constitutional limits").

CMS is wrong, in any event, that merely informing respondents that they can call a phone number to request a Spanish-language mail survey is sufficient to make Spanish-language surveys "available." *See* JA44 (CMS Reply 13); JA182. The word "available," in the relevant sense, means "obtainable."

Available, Websters Third New International Dictionary 150 (2002). Merely providing contact information to make a request does not satisfy that definition. The phone number could be disconnected or non-operational. The survey vendor might routinely ignore phone requests for Spanish-language surveys. Or the vendor may not keep extra copies of foreign-language translations on hand. In any of these cases, Spanish-language surveys would not be made "available" (obtainable) simply by reporting a phone number on a pre-notification letter. Rather, to make "Spanish language questionnaires . . . available to all Spanish-speaking enrollees" within the meaning of the Protocols & Specifications (JA167), the survey vendor must actually follow through on *mailing* a Spanish-language survey to those who call the number and request it.

But that leads to the ***third*** problem with the district court's holding on this score: There is zero evidence to support the holding. Perhaps most notably, there is no evidence that Alignment's survey vendor actually sent Alignment's enrollees a "prenotification letter" that "included instructions in Spanish for requesting a Spanish-language mail survey." JA44 (CMS Reply 13). For support on this point, CMS's reply brief below pointed only to the Protocols & Specifications themselves, which state that vendors must send the letter. JA44 (CMS Reply 13) (citing JA167). And at the hearing on the cross-motions, it handed up a generic template for the letter, attached as an exhibit

to the Protocols & Specifications. *See* JA182. But there is no evidence that such letters were sent to any of the 49 enrollees who were denied Spanish-language surveys by the survey vendor in this case. Nor is there evidence that respondents would have obtained Spanish-language mail surveys if they had called the hypothetical phone number on the hypothetical letter (the one not in the record).

The vendor's attestation that it followed the Protocols & Specifications assuredly does not fill these evidentiary holes—not least because we know that it did *not* follow the Protocols & Specifications when it sent English-language surveys to enrollees designated by Alignment as preferring Spanish. Nor did the attestation address the functional availability of Spanish-language surveys to those who might actually have called the vendor.

Of course, if CMS had given this explanation to Alignment during the plan preview period, perhaps the parties could have investigated the matter and produced the missing evidence. Or Alignment could have explained why the pre-notification letter, by itself, is insufficient to meeting the "availability" requirement as a legal matter. But the agency did not do so, and thus the parties did not meaningfully explore the issue. Which is all the more reason to reject this element of the district court's holding on the ground that "post hoc litigation rationalization[s] pressed by agency counsel" are off the table. *Gulf Restoration Network*, 47 F.4th at 804.

In summary, Alignment has asked only that CMS enforce its Protocols & Specifications by discarding CAHPS survey data collected in a manner that did not comply with the guidelines for administration of the survey to designated Spanish speakers. Rather than confirming that the survey-administration error had occurred and setting the data aside, CMS obscured the issue with a surface-level investigation and a disclaimer of responsibility to ensure compliance at all. In doing so, it ignored clearcut and contrary evidence that the agency alone could have obtained, violating the APA. The Court accordingly should do what the district court would not: Set aside Alignment's 2025 Star Ratings for contracts HR3815 and HR3443 and remand for recalculation of those Star Ratings without the invalid CAHPS survey data.

CONCLUSION

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

Dated: September 5, 2025

Respectfully submitted,

/s/ *Michael B. Kimberly*

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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 9905 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: September 5, 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: September 5, 2025 /s/ *Michael B. Kimberly*