UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLUE CROSS AND BLUE SHIELD OF MASSACHUSETTS, INC. et al., Plaintiffs, **ROBERT F. KENNEDY, JR.**, in his official capacity as Secretary of Health and Human Services, U.S. Department of Health and Human Services, and **MEHMET OZ**, in his official capacity as Administrator, Centers for Medicare and Medicaid Services, Defendants.	Case No. 1:25-cv-00693 (TNM)

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Medicare Advantage Star Ratings determine whether Medicare Advantage Organizations ("MAOs") like Plaintiffs and scores of other MAOs receive billions of dollars in quality bonus and other payments. Those payments must be used to directly benefit Medicare beneficiaries through improved benefits and reduced premiums. Notwithstanding that the stakes involve billions of dollars to improve beneficiary experiences, Defendants have calculated Star Ratings in ways that are divorced from plain regulatory text.

First, Defendants violated the plain text of 42 C.F.R. § 422.166(a)(3) by applying "case-mix adjustments" to the CAHPS data used to calculate Star Ratings, improperly lowering various measure scores and the overall Star Ratings for Plaintiffs' contracts H2230 and H2261. The plain text of this regulation does not permit case-mix adjustments to the CAHPS-based measure scores—in fact, it makes no mention of "case-mix adjustments," despite that it outlines the process for calculating measure star ratings for CAHPS scores. In their response, Defendants fail to identify a single statute or regulation that authorizes case-mix adjustments to CAHPS measures. Instead, Defendants suggest that because the term is defined and used elsewhere in the regulatory scheme, they have discretion to case-mix adjust CAHPS measures. But the opposite is true. If Defendants wish to case-mix adjust CAHPS measures, they must follow the Administrative Procedure Act's ("APA") notice-and-comment rulemaking procedures to amend the regulations to authorize that action. They are not permitted to circumvent the text of codified regulations by seizing upon regulatory silence or stray remarks in a rulemaking preamble (which has neither the force nor effect of law) to apply adjustments however they deem appropriate without any legal authorization.

Second, Defendants used a national weighted average contrary to the regulatory requirements for calculating Star Ratings. The applicable regulations require Defendants to

calculate measure-specific Star Ratings by comparing Plaintiffs' contracts to the "national average" contract score. *See* 42 C.F.R. § 422.166(a)(3)(i)–(v). Instead of using the "national average" as the regulation requires, Defendants used a "national *weighted* average"—a fundamentally different concept. But neither Defendants' sub-regulatory guidance nor their *post hoc* rationalizations can override the plain regulatory text.

Agencies may not deviate from the plain text of their regulations to expand their authority and effectuate their policy preferences. Here, Defendants' actions, which were contrary to law, arbitrary, and capricious, damaged Plaintiffs by at least $35 million. They must be set aside and Plaintiffs' scores should be recalculated consistent with the regulations.

ARGUMENT

I. DEFENDANTS ACTED CONTRARY TO THE LAW AND ARBITRARILY AND CAPRICIOUSLY IN THEIR CALCULATION OF CAHPS MEASURE SCORES BY APPLYING A CASE-MIX ADJUSTMENT

A. Defendants Cannot Identify A Single Statute Or Regulation That Authorizes Them To Apply Case-Mix Adjustments To CAHPS Measure Scores

Defendants' lead argument in support of case-mix adjusting CAHPS measure scores is that "regulations authorize case-mix adjustments." Defs.' Br. at 13. But they do not. A review of the regulations Defendants cite belies this argument.

1. The Regulatory Definition Of "Case-Mix Adjustment" Does Not Authorize Defendants To Case-Mix Adjust CAHPS-Based Measures

Defendants first point to the regulatory definition of "case-mix adjustment" and contend that it "authorizes CMS to case-mix adjust certain measures." Defs.' Br. at 14. But the mere existence of a regulatory definition for a term does not confer authority on the agency to implement the defined concept *ad hoc*, particularly when the applicable regulations do not even use the term.

Defendants' reliance on the definition of "case-mix adjustments" in 42 C.F.R. § 422.162(a) is unavailing. *See id.* at 13–14. The structure of section 422.162(a), which lists various definitions

applicable to the Medicare Advantage Quality Ratings System, makes clear that the definitions listed in that section apply only when the defined terms are invoked in the regulatory scheme. Section 422.162(a) states: "*In this subpart* [Subpart D, 42 C.F.R. §§ 422.152–422.166] the following terms have the meanings [set forth below]." 42 C.F.R. § 422.162(a) (emphasis added). In other words, a definition applies when the term is invoked *"[i]n this subpart*." The definitions themselves, however, are not operative regulatory provisions. Nor does the language of the "case-mix adjustment" definition independently authorize a "case-mix adjustment" for CAHPS-based measures. Specifically, under section 422.162(a), a "case-mix adjustment" means:

> [A]n adjustment to the measure score made prior to the score being converted into a Star Rating to take into account certain enrollee characteristics that are not under the control of the plan. For example age, education, chronic medical conditions, and functional health status that may be related to the enrollee's survey responses.

In sum, the definition applies only when the term is invoked and nothing in the substance of the definition "authorizes" a case-mix adjustment.

Against this backdrop, Defendants flip common sense on its head and argue that the definition's "use of the past-participle of 'make' serves to codify in regulations the existing practice of case-mix adjusting CAHPS measures . . . " Defs.' Br. at 14. It does not. As Defendants acknowledge, "[i]n interpreting an agency's regulation, this Court's analysis should begin and end with the text." *Id.* (citing *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019) ("A court must carefully consider the text.")). Here, the text is clear. The definition of "case-mix adjustment" applies only when used "in this subpart"—i.e., Subpart D of Part 422—and nothing about the substance of the definition confers blanket authority for Defendants to case-mix adjust at will, as they suggest.

2. Defendants Know How To Invoke The Term "Case-Mix Adjustments," But Did Not Do So To Authorize Case-Mix Adjustments For CAHPS Measures

In contrast to regulations (and statutes, *see* Plaintiffs' Opening Brief ("Pls.' Br.") at 14–15) that invoke "case-mix adjustments," the absence of any such invocation for CAHPS-based measures carries legal significance—Defendants are not authorized to apply them. *Nakshian v. Claytor*, 628 F.2d 59, 68 (D.C. Cir. 1980) ("Where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.") (internal quotations omitted); *see also Smith v. Comm'r of Soc. Sec.*, 482 F.3d 873, 876 (6th Cir. 2007) ("When an agency includes a requirement in only one section of a regulation, we presume the exclusion from the remainder of the regulation to be intentional.").

Defendants know exactly how to invoke the term "case-mix adjustments," as they used the term in other regulatory provisions within Subpart D of Part 422. But those provisions do not authorize Defendants to case-mix adjust CAHPS-based measures. Indeed, 42 C.F.R. § 422.166(a)(3) fully sets forth the methodology by which CAHPS-based measure scores are calculated for any contract and makes no mention of the term "case-mix adjustment." The regulation expressly provides that, to calculate measure scores for CAHPS-based individual measures, Defendants use the relative distribution and significance testing methodology to determine whether any CAHPS-based measure receives a score of 1, 2, 3, 4, or 5 Stars. 42 C.F.R. § 422.166(a)(3). The regulation further sets forth a specific formula to be followed for each Star Rating. As an example, the regulation expressly establishes the following formula for any CAHPS-based measure score to receive a rating of 5 Stars:

> (v) A [measure score for a] contract is assigned 5 stars if both of the following criteria in [subparagraphs (A) and (B)] of this section are met plus at least one of the criteria in [subparagraphs (C) or (D)] of this section is met:
>
> (A) Its average CAHPS measure score is at or above the 80th percentile; and

(B) Its average CAHPS measure score is statistically significantly higher than the national average CAHPS measure score;

(C) The reliability is not low; or

(D) Its average CAHPS measure score is more than one standard error above the 80th percentile.

42 C.F.R. § 422.166(a)(3)(v). Variations of this formula are followed to assign 1, 2, 3, or 4 Stars for any CAHPS-based measure. The plain regulatory text never invokes the term "case-mix adjustments," much less authorizes them for CAHPS-based measures.

Unable to find a reference to case-mix adjustments in the regulations applicable to calculating Star Ratings for CAHPS measures (i.e., 42 C.F.R. § 422.166(a)(3)), Defendants look outside the operative regulations and point to two instances in which "case-mix adjustments" *are* referenced elsewhere in Subpart D of Part 422. *See* Defs.' Br. at 13–14 (citing to 42 C.F.R. §§ 422.166(f)(2) and 422.166(f)(3) (the Categorical Adjustment Index ("CAI") and Health Equity Index ("HEI") respectively)). Despite initially characterizing these references as "explicit regulatory authorizations" for case-mix adjusting (*see* Defs.' Br. at 14), Defendants concede the very same regulations "*do not authorize case-mix adjustments per se;* they simply describe how to account for measures that have already been case-mix adjusted" (*see* Defs.' Br. at 17 (emphasis added)).

Defendants argue that the HEI and CAI regulatory provisions provide "support for the notion that the regulations authorize case-mix adjustments." *See* Defs.' Br. at 16. For starters, the HEI provisions upon which Defendants rely do not even go into effect until 2027. 42 C.F.R. § 422.166(f)(3). Likewise, the CAI simply exemplifies instances in which CMS invokes the term "case-mix adjustment" as defined at 42 C.F.R. § 422.162(a), but it certainly does not expressly authorize case-mix adjustments for CAHPS-based measures.

Accordingly, because Defendants know exactly how to invoke or require case-mix adjustments, and they clearly did not invoke or require case-mix adjustment of CAHPS measures, making case-mix adjustments applicable to CAHPS measures would be inconsistent with Defendants' regulatory scheme, which outlines a rigorous scoring methodology for CAHPS measures. Agencies may not engage in action that is inconsistent with their own regulations, and thus Defendants may not apply case-mix adjustments to CAHPS measures.

3. Defendants' Remaining Arguments Also Fail To Support Their Mistaken Claim That "Regulations Authorize Case-Mix Adjustments"

Without any regulatory authorization for applying case-mix adjustments to CAHPS-based measures, Defendants resort to sub-regulatory guidance and argue that "CMS properly specified in its guidance . . . that some CAHPS measures will be case-mix adjusted." Defs.' Br. at 15. According to Defendants, "CMS lists the measures used for each particular Star Rating year 'in the Technical Notes or similar guidance document with publication of the Star Ratings.'" *Id.* (quoting 42 C.F.R. § 422.164(a)). Defendants state that "[w]hen CMS adds new case-mix adjusted measures through rulemaking, it specifies that 'more specific identification of a measure's . . . case-mix adjustment' will be provided in the [Technical Notes]." *Id.* (citations omitted). In other words, Defendants argue that because they are permitted to select the measures used for each Star Rating year, they are given *carte blanche* to determine whether a measure is case-mix adjusted and to announce it only through sub-regulatory guidance. But the fundamental flaw in Defendants' argument is that is presupposes regulatory authorization to case-mix adjust the CAPHS calculations in the first instance. The regulations applicable to CAHPS-based measures simply do not authorize case-mix adjustments, instead requiring relative distribution and significance testing for CAHPS measures. *See* 42 C.F.R. § 422.166(a)(3).

Finally, Defendants point to the text of a 2018 rulemaking preamble, which states that CMS "reproposed and finalized all of its existing case-mix adjusted measures, including eight CAHPS measures that were case-mix adjusted and on which [Plaintiffs] were evaluated for the 2025 Star Ratings year." Defs.' Br. at 16. Defendants argue that commentary from the 2018 rulemaking preamble somehow constitutes the legal authorization for case-mix adjusting CAHPS-based measures. But as explained in Plaintiffs' Opening Brief and more fully below, *see infra* section I.B., courts across the country have continuously held that preamble language does not have the force and effect of law and cannot be used to contradict plain regulatory text. *See, e.g., Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 237 (D.D.C. 2014) (holding "a preamble does not create law; that is what a regulation's text is for."). The preamble language that Defendants cite and the accompanying language from their sub-regulatory guidance is inconsistent with the applicable regulatory requirements to calculate CAHPS-based measure scores. The applicable regulation does not authorize "case-mix adjustments" in connection with calculating measure scores for CAHPS-based measures. *See* 42 C.F.R. § 422.166(a)(3). Defendants cannot credibly rely on a couple of sentences in the preamble to expand or modify the regulatory text.

Under Defendants' logic, they would have boundless authority to case-mix adjust any measures, year after year, based only on stray remarks in a regulatory preamble or in sub-regulatory guidance. Such an approach is not only inconsistent with the rulemaking procedures required under the APA but also would lead to unpredictability from one year to the next and arbitrary decisions as to which measures are case-mix adjusted. Indeed, Defendants have demonstrated they are not even consistent as to which CAHPS measures they case-mix adjust. For example, while CMS case-mix adjusted certain CAHPS-based measures for 2025 Star Ratings, it did not case-mix adjust Measure C03, a CAHPS measure which surveys plan members on whether

they received a flu shot. CTRS. FOR MEDICARE AND MEDICAID SERVICES, Medicare 2025 Part C and D Star Ratings Technical Notes ("2025 Technical Notes") at 34, A.R. 42. It is unclear from the Administrative Record the basis upon which CMS purports to case-mix adjust *some* but not *all* CAHPS-based survey response measures. These inconsistent actions are contrary to law and arbitrary and capricious.

Defendants' unlawful application of case-mix adjustments to CAHPS-based measures is no small issue: by case-mix adjusting some CAHPS-based measures, Defendants damaged Plaintiffs by tens of millions of dollars. Such a substantive dimension of Defendants' methodology for calculating Star Ratings must be authorized by statute or regulation, not rationalized by stray remarks in a regulatory preamble. Whatever Defendants' unexpressed intentions, they cannot trump the plain language of the regulations, which plainly do not authorize case-mix adjustments for CAHPS-based measures. *See Exportal Ltda. v. United States,* 902 F.2d 45, 51 (D.C. Cir. 1990) (observing that the court "cannot permit an agency to rely on its unexpressed intentions to trump the ordinary import of its regulatory language"); *see also Air Prods. & Chems. v. Quigg*, 709 F. Supp. 1, 4 (D.D.C. 1998) (holding that "[i]t is not for the Court to rewrite regulations to effect a policy change desired by the agency; administrative regulations cannot be construed to mean what an agency might have intended but did not adequately express"). Defendants failed to adhere to their own regulations and applied sub-regulatory guidance inconsistent with applicable law. *Reuters, Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986) ("[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned[.]") (citation omitted); *Panhandle E. Pipe Line Co. v. Fed. Energy Regul. Comm'n.*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (explaining that it is "axiomatic that an agency is bound by its own regulations" and agencies do not "have authority to play fast

and loose with [their] own regulations."); *Eric Blvd. Hydropower, LP, v. FERC*, 878 F.3d 258, 269 (D.C. Cir. 2017) ("[I]f an agency action fails to comply with its regulations, that action may be set aside as arbitrary and capricious."). Their unlawful actions should be set aside.

B. This Court Should Reject Defendants' Attempt To Exalt Language From A 2018 Rulemaking Preamble Over The Applicable Regulations

Defendants' attempt to rely on the language of the 2018 rulemaking preamble fails. First, Defendants argue that the discussion from a 2018 rulemaking preamble "informs the interpretation of CMS's regulations as permitting case-mix adjusting of CAHPS measures." Defs.' Br. at 18. In support, Defendants rely on *Texas v. HHS*, citing "CMS does not rely on text of a preamble alone—the Secretary's preamble language 'inform[s] the interpretation of a regulation.'" *Id.* (quoting *Texas v. HHS*, Civ. A. No. 24-348, 2025 WL 818155, at *9 (E.D. Tex. Mar. 13, 2025)) (citation omitted). However, in *Texas v. HHS*, the court was unpersuaded by the government's attempt to introduce language from a preamble. Instead, the court followed the plain language of the applicable regulation to rule against the government. Moreover, Defendants neglected to include the full sentence from *Texas v. HHS* that it selectively excerpted. The full quote reads: "[W]hile the preamble can inform the interpretation of the regulation, it is not binding and cannot be read to conflict with the language of the regulation itself." *Texas v. HHS*, 2025 WL 818155, at *9 (internal quotations omitted). The same rationale applies here.

Despite their claim that the 2018 rulemaking preamble "informs the interpretations of CMS's regulations" and "accords with the reasonable reading of the regulatory text as authorizing case-mix adjustments," Defendants are unable to identify which "regulatory text" the preamble supposedly "informs" or how it could. Defs.' Br. at 18-19. There are only three options in Subpart D of Part 422 (the operative regulations) that Defendants can rely on: (i) the definition of "case-mix adjustment" at 42 C.F.R. § 422.162(a), (ii) the reference to the term "case-mix adjusted" in

the CAI regulation at 42 C.F.R. § 422.166(f)(2)(ii)(A), and (iii) the reference to the terms "case-mix adjusted" and "case-mix adjustors" in the HEI regulation at 42 C.F.R. § 422.166(f)(3)(i)(A) (which is not even in effect). Defendants do not explain how the 2018 preamble "informs the interpretation" of any of these regulations. Indeed, Defendants fail to identify which aspect(s) of those regulations require "interpretation" through the preamble, how any such interpretation(s) bear upon 42 C.F.R. § 422.166(a)(3) (which does not even mention "case-mix adjustments"), or how any such interpretation(s) could have the effect of expressly authorizing case-mix adjustments of CAHPS measures. Defendants merely reference isolated language from a 2018 rulemaking preamble and gesture in the general direction of "regulations" it supposedly "informs." Defendants offer nothing that would justify exalting language from a rulemaking preamble over the language of codified regulations.

Second, Defendants spill significant ink attempting to distinguish this case from *Elevance* and *Scan*, on the basis that in those cases, "the courts found that the preamble and regulations text were in conflict," whereas here, Defendants argue, "the preamble of the 2018 rule accords with the reasonable reading of the regulatory text as authorizing case-mix adjustments." Defs.' Br. at 18–19. But Plaintiffs' case is not predicated on being on all fours with that of *Elevance* and *Scan*. Here, the applicable regulation governing CAPHS calculation *does not even mention* "case-mix adjustments." Indeed, Defendants acknowledge (as they must) that "subsection 422.166(a)(3) makes no mention of case-mix adjustments." *Id.* at 19. Defendants' position is inconsistent with section 422.166(a)(3) which could have—but does not—make any reference to case-mix adjustments, despite that the term is defined and used elsewhere in the same regulatory scheme. And while Defendants attempt to contort section 422.166(a)(3)'s silence as to case-mix adjustments into meaning that "[n]othing in subsection 422.166(a)(3) forecloses CMS from case-

mix adjusting CAHPS measure scores," *see* Defs.' Br. at 19, Defendants fail to identify how the language from the 2018 preamble somehow "accords" with the regulatory text. If CMS wished to authorize case-mix adjustments, all it needed to do was to authorize them by regulation. But courts cannot "permit an agency to rely on its unexpressed intentions" or to contort silence into a blank check to do through sub-regulatory fiat what it elected not to do through promulgation of a regulation. *See Exportal Ltda.*, 902 F.2d at 51.

Faced with the reality that 42 C.F.R. § 422.166(a)(3) does not mention case-mix adjustments, much less expressly authorize them for CAHPS-based measures, Defendants attempt a "Hail Mary." They attempt to beg off the relevance of that regulation altogether by arguing that it applies only to Star Ratings and not measure scores. That is, Defendants contend that "[s]ection 422.166(a) . . . does not 'explicitly outline the methodology that Defendants must use to calculate CAHPS-based measure scores'" (as Plaintiffs argued), but instead "it concerns how measure *Star Ratings* are calculated." Defs.' Br. at 20 (emphasis in original). Such an Orwellian distinction cannot withstand scrutiny. The entire purpose of § 422.166(a) (Calculation of Star Ratings) is to set forth the methodology for assessing how a contract will be scored across various measures and how those measure scores will be converted into Star Ratings. Section 422.166(a)(3) specifically governs how CAHPS measure scores translate to Star Ratings. It is utterly silent as to case-mix adjustments as a component of that process. Moreover, taken as true, the government's argument would mean that Defendants are unchecked by regulation and have complete discretion to adjust, manipulate, and transform measure scores into Star Ratings however they deem appropriate in any given year based on the agency's unexplained whims. That would be an untenable result.

At bottom, the preamble language that Defendants cite and the accompanying language from their sub-regulatory guidance is not consistent with the applicable regulatory requirements.

The applicable regulation does not authorize "case-mix adjustments" with respect to calculating the measure scores for CAHPS-based measures, *see* 42 C.F.R. § 422.166(a)(3), and Defendants cannot rely on a few sentences in the preamble to expand or modify the regulatory text.

C. Defendants' Final Argument That They Have Previously Case-Mix Adjusted CAHPS Measures Without Being Sued By Plaintiffs Is Unavailing

Defendants' remaining attempts to justify their unlawful conduct fare no better. Defendants argue that they have applied case-mix adjustments to CAHPS measure scores for many years and that "to CMS's knowledge, no Medicare Advantage Organization has suggested that case-mix adjustments are not authorized by CMS's regulations." Defs.' Br. at 21–22. According to Defendants, "[c]ase-mix adjusting is not a policy to which [Plaintiffs have] objected to previously or would have objected before [Plaintiffs] knew their overall contract scores." *Id*. at 22. But the fact that Defendants have acted contrary to law and arbitrarily and capriciously in the past without facing legal action is irrelevant, particularly given that Plaintiffs were harmed this year. Notably, Defendants do not challenge Plaintiffs' case as untimely, because they cannot. *See Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys*., 603 U.S. 799, 825 (2024) (holding that "[a]n APA claim does not accrue for purposes of [28 U.S.C.] § 2401's 6-year statute of limitations until the plaintiff is injured by final agency action"). And the fact that Plaintiffs have now sued Defendants on this issue when Defendants' unlawful actions caused them harm underscores Plaintiffs' credibility. Plaintiffs have not raised frivolous lawsuits in the past. Rather, Plaintiffs sued Defendants with respect to their 2025 Star Ratings because those improperly calculated ratings caused Plaintiffs a cognizable injury. Lastly, whether case-mix adjusting CAHPS-based measures is a reasonable policy has no bearing on this dispute. What is relevant is that Defendants acted contrary to law and arbitrarily and capriciously in violation of the APA, harming Plaintiffs to the tune of tens of millions of dollars.

II. CMS IMPROPERLY CALCULATED CAHPS-BASED MEASURE SCORES BY USING A NATIONAL WEIGHTED AVERAGE

Defendants further violated the plain text of 42 C.F.R. § 422.166(a) when calculating Plaintiffs' CAHPS-based measure scores by comparing Plaintiffs' measure scores to national *weighted* average scores. Although Defendants agree that 42 C.F.R. § 422.166(a)(3)(i)–(v) requires Defendants to compare each contract's measure scores to the "national average," *see* Defs.' Br. at 22, Defendants concede that they disregard the plain regulatory text in calculating the national average of CAHPS-based measure scores. *See* Defs.' Br. at 23 ("CMS takes the contract-level scores for each CAHPS measure, *weights those scores* by beneficiary enrollment, and then averages those scores.") (emphasis added).

Defendants do not dispute that the regulation at 42 C.F.R. § 422.166(a) does not define "national average," and therefore its plain meaning controls. *See NRDC, Inc. v. Raimondo*, No. 23-982, 2024 WL 4056653, at *17 (D.D.C. Sept. 5, 2024) ("[W]hen a term is not defined, the plain meaning controls."). The plain meaning of national average is a simple average in which all the contracts are assigned equal weight. *See* Pls.' Br. at 20–21; *see also* Abernathy Decl. ¶ 22 (explaining that a simple or non-weighted national average where each contract is weighted equally would be the default average absent a specific instruction to use weighting). Defendants entirely fail to demonstrate how the plain meaning of "national average" as used in the regulations calls for weighting of contract-level CAHPS-based measure scores. Defendants' use of a weighted average to assign Star Ratings for CAHPS measures is thus directly contrary to the plain language and meaning of the regulation and therefore contrary to law, arbitrary and capricious. *See Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512 (1994) (holding an agency's interpretation that is contrary to "the regulation's plain language" is invalid as a matter of law) (internal quotations omitted); *Scott & White Health Plan v. Becerra*, 693 F. Supp. 3d. 1, 10 (D.D.C. 2023) (holding an

agency's interpretation was contrary to law "[g]iven that the controlling regulation is clear on the matter, the Court finds no reason to defer to the agency's contrary interpretation"); *ItServe All., Inc. v. Cissna*, 443 F. Supp. 3d 14, 34 (D.D.C. 2020) ("An agency interpretation is substantively invalid when 'it conflict[s] with the text of the regulation the agency purported to interpret.'") (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 104–05 (2015)).

Unable to support their calculation of a weighted national average in the text of the regulations, Defendants resort to *post hoc* rationalizations based on the alleged purpose of CAHPS surveys. According to Defendants, "CAHPS is a survey of Medicare Advantage enrollees, meaning that the population of interest is Medicare Advantage enrollees." Defs.' Br. at 26. Defendants baldly assert that "[t]he national average CAHPS score is therefore the average of the Medicare advantage enrollees nested in contracts." *See id.*; *id.* at 23–24 ("[T]he national average CAHPS measure score is the average across enrollees in Medicare Advantage contracts, not the average contract scores."). Defendants' after-the-fact explanations are unmoored from the regulatory scheme and unsupported by the Administrative Record. CAHPS surveys are designed so that existing and prospective enrollees can compare plans (i.e., contracts), which further supports a national average capturing the performance of plans and not one based on the number of enrollees in each plan.

Defendants' calculation of a national average is part of a broader regulatory scheme to determine the CAHPS-based measure scores and overall Star Ratings assigned to *individual contracts* for purposes of assessing the quality of a contract. *See, e.g.*, § 422.166(a)(3)(i) (providing that "[a] *contract* is assigned 1 star if," among other requirements, "[i]ts average CAHPS measure score is statistically significantly lower than the national average CAHPS measure score); *see also* §§ 422.166(a)(3)(ii)–(v). Here, this regulatory context reinforces the plain meaning of "national

average" as the simple average across contracts where each contract is assigned an equal weight. *See HealthAlliance Hosps., Inc. v. Azar*, 346 F. Supp. 3d 43, 56 (D.D.C. 2018) ("There can be no question that, like the words of a statute, the words of a regulation must be viewed in context."); *see Radford v. Colvin*, 734 F.3d 288, 293 (4th Cir. 2013) ("[T]he Court may discover the plain meaning of a regulation by looking at its structure") (internal quotations omitted); *see Williams v. Chu*, 641 F. Supp. 2d 31, 39 (D.D.C. 2009) ("The rules of statutory construction apply when interpreting an agency regulation.") (internal quotations omitted); *State v. United States DOI*, 363 F. Supp. 3d 45, 65 (D.D.C. 2019) ("In interpreting the [statute] . . . this Court must start with the plain meaning of the text, looking to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.") (internal quotations omitted).

In Defendants' own words, CAHPS surveys produce data that "allow objective and meaningful comparisons between MA and PDP contracts" and "the measures derived from the surveys are used by beneficiaries to help choose an MA or PDP contract." *See* HEALTH SERVICES ADVISORY GROUP, *Medicare Advantage and Prescription Drug Plans CAHPS Survey*, https://www.ma-pdpcahps.org/ (Public Reporting and Use of the Medicare CAHPS Survey Data), A.R. 265, 328 (emphases added). Further, the 2025 Technical Notes provide instructions for analyzing data from CAHPS surveys related to the calculation of and comparison to the national average and recommend using "the *unweighted* mean of entities (equivalent to equal entity level weights) as the appropriate standard of comparison." *See* A.R. 338 (providing hyperlink to instructions for analyzing CAHPS survey data). The instructions explain that for purposes of comparing entities (i.e., contracts) for "quality reporting, incentives, and similar purposes," the unweighted mean is most appropriate. *Id.* The Administrative Record shows that contract measure scores and overall Star Ratings are designed so enrollees can compare the quality of contracts and

select the contract (or plan) that is best for them. Therefore, Defendants' *post hoc* argument in support of a weighted national average premised on the fact that CAHPS is a survey completed by enrollees fails when set against the Administrative Record.

Fundamentally, Defendants fail to explain why the plain meaning of the express term "national average," in the context of regulations setting forth how to calculate and determine CAHPS-based measure scores and overall Star Ratings for *individual contracts*, somehow calls for an average across beneficiaries or provides for weighting for beneficiary enrollment in calculating the national average. Accordingly, Defendants' use of a weighted national average that weights for beneficiary enrollment is contrary to law, arbitrary, and capricious.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for summary judgment and deny Defendants' motion for summary judgment, set aside Defendants' unlawful actions in applying a case-mix adjustment to Plaintiffs' CAHPS measure scores and comparing those scores to the *weighted*—instead of the simple, unweighted—national average as "not in accordance with law" and "arbitrary" and "capricious" under 5 U.S.C. § 706(2)(A), and order Defendants to recalculate Plaintiffs' 2025 Star Ratings for contracts H2230 and H2261.

Dated: June 12, 2025

Respectfully submitted,

By: */s/ Lesley C. Reynolds*

Lesley C. Reynolds (D.C. Bar No. 487580)
Lara E. Parkin (D.C. Bar No. 475974)
David A. Bender (D.C. Bar No. 1030503)
REED SMITH LLP
1301 K Street, N.W.
Suite 1000 – East Tower
Washington, D.C. 20005
(202) 414-9200
lreynolds@reedsmith.com
lparkin@reedsmith.com
dbender@reedsmith.com

Steven D. Hamilton
(*pro hac vice forthcoming*)
Bryan M. Webster
(*pro hac vice forthcoming*)
REED SMITH LLP
10 South Wacker Drive
40th Floor
Chicago, IL 60606
(312) 207-1000
shamilton@reedsmith.com
bwebster@reedsmith.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2025, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Lesley C. Reynolds
Lesley C. Reynolds