UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLUE CROSS AND BLUE SHIELD OF MASSACHUSETTS, INC., *et al.*,

Plaintiffs,

v.

ROBERT F. KENNEDY, JR., Secretary of Health and Human Services, et al.,

Defendants.

Civil Action No. 25-0693 (TNM)

REPLY IN SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Opposition and Reply of Plaintiffs Blue Cross and Blue Shield of Massachusetts ("BCBSMA") underscores that its arguments are predicated on a series of basic errors and misunderstandings about how the Centers for Medicare & Medicaid Services ("CMS") calculates Star Ratings. First, to support its contention that the Secretary's regulations do not authorize CMS to case-mix adjust Consumer Assessment of Healthcare Providers and Systems ("CAHPS") measures, BCBSMA cites the part of the Secretary's regulations that prescribe rules governing the general calculation of measure Star Ratings—not the calculation of numerical CAHPS measure scores that are used to determine measure Star Ratings—and contends that because this section does not mention case-mix adjustment, it must not be authorized. But measure Star Ratings are not case-mix adjusted; numerical measure scores are. Nor do BCBSMA's other arguments cast doubt upon CMS's authority to case-mix adjust CAHPS measure scores, as it has done since 1998. Moreover, CMS has done so for good reason—the case-mix adjustment performs an important statistical role: without it, contracts that serve enrollees who are more likely to give positive responses would be advantaged, and contracts that serve enrollees who are more likely to give fewer positive responses would be disadvantaged.

Second, BCBSMA contends that CMS should have calculated "the national average CAHPS measure score" by simply averaging contract-level scores without accounting for enrollment in those contracts. Neither the statute nor the regulations compel the calculation of the national average this way, and CMS's method, which accounts for contract enrollment in what is a customer satisfaction measure, is not arbitrary or capricious. In contrast, BCBSMA's argument would read the word "contract" into what the regulation directs, giving the 600 plan enrollees in Medicare Advantage's smallest contract significantly greater weight in the national average than

the 2,044,735 enrollees in the largest contract. The regulations do not support such a reading or result.

BCBSMA's arguments are aimed only at nudging their scores over the line into the next half-star category to increase their Medicare payment. As part of this pursuit, BCBSMA asks this Court to endorse rule changes to the calculation of Medicare Advantage Star Ratings that BCBSMA did not challenge before it knew its overall scores. The Court should reject these efforts.

ARGUMENT

I. CMS Case-Mix Adjusted BCBSMA's CAHPS Measures in Accordance with Applicable Regulations and Guidance.

A. The Secretary's Regulations and Guidance Authorize CMS to Case-Mix Adjust CAHPS Measures.

BCBSMA's contention that the Secretary's regulations do not authorize CMS to make case-mix adjustments to CAHPS measure scores—as it has done since 1998—is wrong. In three separate places, the Secretary's regulations unambiguously endorse the case-mix adjustment of measure scores. The regulations state that: (1) case-mix adjustments "to the measure score [are] 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 a plan," 42 C.F.R. § 422.162(a); (2) "[i]n determining the categorical adjustment index values, a measure will be excluded from adjustment if the measure . . . is already case-mix adjusted for socioeconomic status," *id.* § 422.166(f)(2)(ii)(A); and (3) "[m]easures that are case-mix adjusted in the Star Ratings are adjusted using all standard case-mix adjustors" in calculating the health equity index, *id.* § 422.166(f)(3)(i)(A). Each of these regulations explicitly contemplates CMS making case-mix adjustments to measure scores.

CMS properly case-mix adjusted the CAHPS measure scores at issue here. As explained in the Secretary's opening brief, Defs.' Mot. for Summ. J. ("Defs.' Br.") at 15-16, the 2018 rulemaking that reproposed and finalized all of its existing case-mix adjusted measures made clear: "For CAHPS measures, contracts are first classified into base groups by comparisons to percentile cut points defined by the current-year distribution of *case-mix adjusted* contract means." Contract Year 2019 Policy & Technical Changes to the Medicare Advantage Program, 83 Fed. Reg. 16,440, 16,549, 16,568 (Apr. 16, 2018) (emphasis added); *see also id.* at 16,537 ("[R]esponses are also case-mix adjusted to account for certain respondent characteristics not under the control of the health or drug plan such as age, education, dual eligible status and other variables."); *id.* at 16,581 ("Measures would be excluded as candidates for [CAI] adjustment if the measures are already case-mix adjusted for [socioeconomic status] (for example, CAHPS and HOS outcome measures."). As part of this rulemaking, CMS responded to comments related to case-mix adjustments of CAHPS measures. *See id.* at 16,527, 16,555. Moreover, under 42 C.F.R. § 422.164(a), measures used for a particular Star Ratings year are provided "in the Technical Notes or similar guidance document" and "more specific identification of a measure's . . . case-mix adjustment" will be provided in technical guidance. Medicare Program; Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Program for Contract Year 2024, 89 Fed. Reg. 30,448, 30,636-37 (Apr. 23, 2024) (specifying measures applicable to the 2027 Star Ratings); *see also* Medicare Program; Contract Year 2024 Policy and Technical Changes, 88 Fed. Reg. 22,120, 22,270-71 (Apr. 12, 2023) (same for 2026 Star Ratings). In accordance with this regulatory scheme, the 2025 technical guidance explains that CAHPS measures are case-mix adjusted to "take into account the mix of enrollees." A.R. 114. The 2025 technical guidance further indicated which specific CAHPS measures would be case-mix adjusted. A.R. 70, 71, 72,

74, 75-76, 76-77, 87, 88. In short, BCBSMA's claim that the regulations do not permit case-mix adjusting CAHPS measures is incorrect.

BCBSMA's effort to find in the applicable regulations ambiguity or silence where none exists is baseless. Taken together, the regulations are abundantly clear—they authorize CMS to case-mix adjust CAHPS measures. This should be the end of the Court's analysis. *See Kisor v. Wilkie*, 588 U.S. 558, 574 (2019) ("A court should not afford *Auer* deference unless the regulation is genuinely ambiguous"). Should the Court, however, be inclined to view the regulations as ambiguous (which they are not), the Court "should defer to the agency's construction of its own regulation" so long as the agency's reading is "reasonable." *Id.* at 569, 575. An agency's reading of its regulations merits deference if it is "one actually made by the agency," "implicate its substantive expertise," and reflect a "fair and considered judgment." *Id.* at 577-80. The agency's reading of its regulations is reasonable: as established, the regulations in three separate places endorse the notion that measures will be case-mix adjusted. *See* 42 C.F.R. §§ 422.162(a); § 422.166(f)(2)(ii)(A); 422.166(f)(3)(i)(A). CMS's reading of its regulations was "actually made by the agency"—indeed, CMS has read its regulations as permitting case-mix adjustment since their inception in 2018. CMS's interpretation implicates its substantive expertise. CMS has conducted CAHPS surveys annually since 1998. Administration of CAHPS surveys and analysis of the resulting data are "technical," *Kisor*, 588 U.S. at 578, and CMS is "best positioned to develop expertise" about CAHPS surveys. *Id.* Finally, CMS's reading of its regulations as authorizing case-mix adjusting was "fair and considered." CMS explained its rationale for case-mix adjusting in guidance: the 2025 technical guidance explains that CAHPS measures are case-mix adjusted to "take into account the mix of enrollees." A.R. 114. Before authorizing case-mix adjustments,

CMS considered and responded to comments pertaining to case-mix adjustments. CMS's reading of its regulations as authorizing case-mix adjustments warrants deference.

B. 42 C.F.R. § 422.166(a)(3) Addresses How Star Ratings, Not Numerical Measure Scores, Are Calculated.

BCBSMA repeats its argument that because 42 C.F.R. § 422.166(a)(3) does not mention case-mix adjustment, the Secretary's regulations must not authorize case-mix adjustments. Pls.' Opp'n to Defs.' Cross-Mot. for Summ. J. ("Pls.' Opp'n") 4-5 ("The plain regulatory text never invokes the term "case-mix adjustments," must less authorizes them for CAHPS-based measures."). In BCBSMA's view, section "422.166(a)(3) fully sets forth the methodology by which CAHPS-based measure scores are calculated." *Id.* at 4. This is wrong, as CMS previously explained. Defs.' Br. at 20-21. Section 422.166(a) does not "fully set[] forth the methodology by which CAHPS-based measure scores are calculated," Pls.' Opp'n at 4—it concerns how measure *Star Ratings* are calculated. These are two separate calculations under the regulations.

BCBSMA claims that "[t]he entire purpose of [section] 422.166(a) . . . is to set forth the methodology for assessing how a contract will be scored across various measures and how those measures will be converted into Star Ratings."[1] *Id.* at 11. BCBSMA is again incorrect. Section 422.166(a) sets out the steps for converting numerical measure scores into measure Star Ratings. It does not provide any specifications for calculation of measure scores. Instead, section 422.164 entitled, "Adding, updating, and removing measures," governs the calculation of measure scores. Section 422.166(a) assumes that "numeric measure scores" have already been calculated and explains how those numeric measure scores will be converted into measure Star Ratings. *See, e.g.*, 42 § 422.166(a)(1) ("CMS will determine cut points for the assignment of a Star Rating for each

[1] Section 422.166(a) is not entitled "Calculation of Star Ratings," as BCBSMA suggests. It is entitled "Measure Star Ratings."

numeric measure score . . ."); (a)(2)(ii) (describing cases "where multiple clusters have the same measure score value range"); (a)(3)(i) (describing the "average CAHPS measure score"). Nowhere does section 422.166(a) or the broader section 422.166 provide any instruction about how measure scores are to be calculated—this is the province of section 422.164. Consequently, it is not surprising that section 422.166(a) "is utterly silent as to case-mix adjustments," Pls.' Opp'n at 11. Case-mix adjustments play no role in the process for converting measure scores into Star Ratings.

Courts are required to "begin [their] interpretation of the regulation with its text," *Kisor*, 588 U.S. at 628 (Gorsuch, J., concurring) (quoting *Green v. Brennan*, 578 U.S. 547, 553 (2016)). Section 422.166(a)(3) explains how to convert CAHPS measure scores into measure Star Ratings. That regulatory provision does not explain how measure scores are calculated. CMS's Star Ratings aggregate disparate data sources, including survey responses, to generate a single overall Star Rating for each plan; that process is consequently nuanced and complicated. But it is not "Orwellian" as BCBSMA claims. *See* Pls.' Opp'n at 11.

More importantly, the text and structure of the Secretary's regulations support this distinction. Section 422.164 governs CMS's authority to develop measure specifications, and section 422.166 governs the conversion of measures into measure Star Ratings and, in turn, Star Ratings. While section 422.166 is prescriptive, as discussed, the regulations allow, but do not mandate, that CAHPS measures be case-mix adjusted because the regulations themselves do not prescribe the measures CMS adds or the sources of data those measures use. *See* 42 C.F.R. § 422.164(c).

C. The Regulatory Definition of Case-Mix Adjustment Authorizes CMS to Case-Mix Adjust CAHPS Measures.

BCBSMA represents to this Court that the term "case-mix adjustment" is defined in 42 C.F.R. § 422.162(a) and is not subsequently used anywhere else in Subpart D, 42 C.F.R.

§§ 422.152–422.166. Plaintiffs state that "applicable regulations do not even use the term [case-mix adjustment]." Pls.' Opp'n at 2. This is wrong. As explained above, case-mix adjustment is invoked twice in the regulations of Subpart D, *see* 42 C.F.R. § 422.166(f)(2)(ii)(A) and (f)(3)(i)(A), as well as in the technical guidance cross-referenced by these regulations, A.R. 70, 71, 72, 74, 75-76, 76-77, 87, 88, 114. In subsections 422.166(f)(2) and (f)(3), pertaining to the categorical adjustment index and the health equity index, the regulatory provisions use the past tense verb form of the noun, i.e., "case-mix adjusted" instead of "case-mix adjustment"; however, these terms should be understood to have the same ordinary meaning. *See Adjustment*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/adjustment (last visited June 18, 2025) (defining adjustment as "the state of being adjusted"); *Adjustment*, Dictionary.com, https://www.dictionary.com/browse/adjustment (last visited June 18, 2025) (same). Additionally, the Secretary's use of the past tense verb in these provisions further supports that the Secretary intended to codify in regulations the existing practice of case-mix adjusting CAHPS measures. Contrary to BCBSMA's representation, the definition of case-mix adjustment does not "merely exist[]." Pls.' Opp'n at 2. Rather, it informs the understanding of "case-mix adjusted" as that term it is subsequently used in Subpart D.

BCBSMA asserts, without any further citation or elaboration, that "definitions themselves . . . are not operative regulatory provisions." Pls.' Opp'n at 3. BCBSMA does not explain why, but the argument appears to be that because the Secretary's codification of the existing practice of case-mix adjustments appears in the definitional section, that codification alone is insufficient to authorize CMS's case-mix adjustment of measures scores. BCBSMA points to the phrase in section 422.162(a) that states "[i]n this subpart [Subpart D, 42 C.F.R. §§ 422.152-422.166] the following terms have the meanings [set forth below]." Pls.' Opp'n at 3 (quoting § 422.162(a)).

Why this language supports BCBSMA's contention that "definitions themselves . . . are not operative provisions" is puzzling at best and contrary to the plain language of the provision. Pls.' Opp. Br. 3. After all, section 422.162(a) resides within Subpart D, not outside of it, as BCBSMA appears to suggest. BCBSMA cites no case law for the proposition that regulatory definitions cannot authorize agencies to act. Regulatory definitions set the perimeters of agency action so long as those definitional provisions accord with the statute. *See, e.g.*, *Bondi v. VanDerStok*, 145 S. Ct. 857, 864-65 (2025) (discussing and affirming the Bureau of Alcohol, Tobacco, and Firearms and Explosives' expansion of the definition of "firearm" to include weapon parts kits "that [are] designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive."); *Linden v. SEC*, 825 F.3d 646, 648-53 (D.C. Cir. 2016) (discussing and affirming the SEC's preemption of all state registration and qualification requirements for a certain subset of securities by redefining in its regulations the term "qualified purchaser").

At bottom, BCBSMA's chief complaint appears to be that the regulatory provision stating that a case-mix adjustment is "[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" appears in the section of the regulations setting forth regulatory definitions and not elsewhere in Subpart D. This Court's role is not to prescribe the particular language, structure, and style of an agency's regulation but to "exhaust all the 'traditional tools' of construction," "carefully considering the text, structure, history, and purpose of a regulation," to "reach a conclusion about the best interpretation of the regulation at issue." *Kisor*, 588 U.S. at 632 (Kavanaugh, J., concurring). The text of the Secretary's regulations, taken together, supports CMS's case-mix adjustments to measure scores.

D. Plaintiffs Fail to Explain Why the Categorical Adjustment Index and Health Equity Index Provisions Do Not Support CMS's Authority to Case-Mix Adjust CAHPS Measures.

BCBSMA does not engage with the text of the regulatory provisions that explicitly assume case-mix adjustments. *See* 42 C.F.R. § 422.166(f)(2)(ii)(A) (categorical adjustment index), (f)(3)(i)(A) (health equity index). BCBSMA only contends that the Court should discount these provisions because, in Plaintiffs' view, they appear "outside of the operative regulations." Pls.' Opp'n at. 5. BCBSMA does not explain why these provisions are not operative. The categorical adjustment index is an adjustment that was applied to BCBSMA's contracts Star Ratings, and the provision explicitly references measures that were "already case-mix adjusted." 42 C.F.R. 422.166(f)(2)(ii)(A). And while BCBSMA points out that the health equity index provisions "do not even go into effect until 2027," *id.*, this observation does not explain why the Court should discount the health equity index provision as providing interpretive support for CMS's reading of the Secretary's regulations.

In the Secretary's opening brief, CMS questioned what purpose these references to case-mix adjustments would serve in a regulatory scheme that does not authorize case-mix adjustments. Defs.' Br. at 16-18. Given the chance to respond in its opposition and reply, BCBSMA tellingly has provided no answer. The only way for the Court to make sense of provisions stating explicitly that some measure scores are "already case-mix adjusted," 42 C.F.R. § 422.166(f)(2)(ii)(A), and affirming that "[m]easures that are case-mix adjusted in the Star Ratings," *id.* § 422.166(f)(3)(i)(A) is to interpret the Secretary's regulations as authorizing case-mix adjustments.

E. Plaintiffs' Claim That the Preamble to the 2018 Rule Does Not Support CMS's Authority to Case-Mix Adjust CAHPS Measures Has No Support.

Plaintiffs' claim that that the 2018 final rule's preamble language, which specifically states that CAHPS measures will be case-mix adjusted under the regulations, is inconsistent with the

Secretary's regulations because the regulations allegedly do not authorize case-mix adjustments. Pls.' Opp'n at 7; *see* 83 Fed. Reg. at 16,568. The case law is clear, however, that preamble language should only be discounted if it conflicts or is inconsistent with regulatory text. *See* Defs.' Br. at 19-20 (collecting cases). As previously established, preamble text explicitly authorizing case-mix adjustments did not conflict with any regulatory text. *See id.* at 18-20.

In response, BCBSMA attempts a different tack, asserting that a regulation's purported silence on an issue creates a conflict with a rule's preamble language insofar as the preamble language pertains to that issue and consequently, should be disregarded. *See* Pls.' Opp'n at 11. Yet Plaintiffs marshal no case law that supports this assertion. BCBSMA cites *Exportal Ltda. v. United States,* 902 F.2d 45, 51 (D.C. Cir. 1990), for the proposition that courts cannot permit agencies "to contort silence into a blank check to do through sub-regulatory fiat what it elected not to do through promulgation of a regulation." Pls.' Opp'n at 11. But *Exportal* involved neither preamble text nor regulatory silence. In *Exportal*, the Secretary of Agriculture asserted that he retained discretion under 7 C.F.R. § 47.6(b) to deny a bond waiver in reparation proceedings in the face of clear and explicit regulatory language requiring a bond waiver. *See Exportal*, 902 F.2d at 49 ("[T]he Secretary has adopted [7 C.F.R. §] 47.6(b), under which the Secretary's discretion has been strictly limited by the plain terms of the regulation."). Unlike in *Exportal* or any of the other cases BCBSMA cites, BCBSMA has not pointed to any regulatory language with which the 2018 preamble language conflicts. As discussed above, the regulations authorize CMS to case-mix adjust measure scores. *See* 42 C.F.R. §§ 422.162(a), 422.166(f)(2)(ii)(A), 422.166(f)(3)(i)(A)). The 2018 final rule's preamble language removes any doubt that CAHPS measures will be case-mix adjusted.

F. CMS's Guidance Authorizes CMS to Case-Mix Adjust CAHPS Measures.

While BCBSMA does not challenge CMS's authority to issue guidance specifying how Star Ratings measures are calculated, it contends that CMS's argument "presupposes regulatory authorization to case-mix adjust" CAHPS measures. Pls.' Opp'n at 6. This is wrong. The regulations do not purport to specify and authorize every aspect of measures used to calculate Star Ratings. Instead, section 422.164 provides that CMS will create measures used to calculate Star Ratings, with the details of those measures to be set out in technical guidance. 42 C.F.R. § 422.164(a). That certain specifications, such as the case-mix adjustment of CAHPS measures, are contained in guidance is entirely consistent with this regulatory scheme.

Without applying a case-mix adjustment to CAHPS measures—which are designed to measure enrollee experiences—contracts that serve enrollees who are more likely to give positive responses would be advantaged and contracts that serve enrollees who are more likely to give fewer positive responses would be disadvantaged. *See* A.R. 114 (explaining that case-mix adjustments are designed to address the fact that certain populations may tend to respond more positively or negatively to certain survey question). BCBSMA's attempts to alter the regulatory structure that provides for case-mix adjustments to CAHPS measures simply to nudge its 2025 Star Ratings higher should be rejected.

BCBSMA asserts that CMS is "given *carte blanche* to determine whether a measure is case-mix adjusted," that such authority is "boundless," and further fears that adopting CMS's arguments would mean that it is "unchecked by regulation" and allow "complete discretion to adjust, manipulate, and transform measure scores into Star Ratings however [it] deems appropriate in any given year based on the agency's unexplained whims." Pls.' Opp'n at 6-7. These prognostications prove to be unfounded. The regulations that govern the conversion of measures

scores to measure Star Ratings are comprehensive, exacting, and prescriptive. They do not provide CMS with discretion. *See* 42 C.F.R. § 422.166(a) (requiring CMS to determine cut points, utilize the clustering algorithm for non-CAHPS measures, and utilize relative distribution and significance testing for CAHPS measures).

While the regulations confer significant discretion upon CMS to develop measures—including to determine whether they are case-mix adjusted or not—this discretion is far from unbounded. CMS is required to follow the process set out in the Secretary's regulations, *see* 42 C.F.R. § 422.164, with the goals of developing measures that are "nationally endorsed," "align with the private sector," "appropriate to measure," and "reflect performance specific to the Medicare program." *id.* § 422.164(c)(1). The process of soliciting and incorporating input from stakeholders, *id.* § 422.164(c)(2), (d), safeguards against the kind of "arbitrary decisions" about which BCBSMA expresses concern. Pls.' Opp'n 7. And this is the process that CMS followed in its 2018 rulemaking that reproposed and finalized all of its existing case-mix adjusted measures, including the CAHPS measures at issue here.

II. CMS's Method for Calculating the "National Average" Is Consistent with the Regulations, and Nothing Compels BCBSMA's Preferred Interpretation.

When the regulations refer to the "national average CAHPS measure score," 42 C.F.R. § 422.166(a)(3)(i)-(v), they are referring to the average CAHPS measure scores—which measure customer satisfaction—across enrollees in all of the Medicare Advantage plans, not the average contract-level score for such measures. But Plaintiffs' claim that "the plain meaning of national average is a simple average in which all the contracts are assigned equal weight." Pls.' Opp'n at 13. BCBSMA's reading of the regulation adds in the word "contract" such that it would say: "statistically significantly higher [or lower] than the national average CAHPS measure *contract* score." The word "contract" appears nowhere in the regulation, however. 42 C.F.R.

§ 422.166(a)(3)(i)-(v). The Secretary did not intend CMS to simply calculate the average of contract scores—contracts with drastically different number of enrollees—to determine the "national average" CAHPS measure score.

As the Secretary previously explained, *see* Defs.' Br. at 25, to calculate the national average CAHPS measure score, CMS takes the contract-level scores for each CAHPS measure, weights those scores to account for beneficiary enrollment, and then averages those scores. CMS, *Summary of Analyses for Reporting, MA & PDP CAHPS* 2 (Aug. 2024). In this calculation, the numerator is effectively the sum of the scores for all enrollees across the nation. The denominator is the total number of enrollees in the nation. This approach yields a national average, consistent with the regulation. To illustrate, one CAHPS survey question, entitled C22—Members' Rating of Health Care Quality, asks enrollees, "[u]sing any number from 0 to 10 . . . what number would you use to rate all your health care in the last 6 months?" A.R. 74. CMS's methodology for calculating the national average for this CAHPS measure requires that it find the average beneficiary response rating of the quality of their health care in the last six months for all beneficiaries across the nation. Nowhere do the regulations specify that CMS is required to silo those responses by contract and then calculate the contract-level average ratings of health care in the last six months.

BCBSMA's approach would make little sense. For 2025, 542 contracts across various Medicare Advantage organizations received Star Ratings for CAHPS measures. *See* CMS, *Part C and D Performance Data, 2025 Star Ratings Data Tables*, https://www.cms.gov/medicare/health-drug-plans/part-c-d-performance-data. The smallest contract participating in the survey had 600 CAHPS-eligible enrollees. The largest contract had 2,044,735 CAHPS-eligible enrollees. *Id.* In calculating national average CAHPS measure scores, BCBSMA contends both of those contracts should be counted the same—that is, "weighted equally." Pls.' Opp'nat 13. This would

mean that the experiences of 600 enrollees count the same amount as 2,044,735 enrollees and would have outsized influence on the national average. The results under BCBSMA's approach are therefore skewed. National averages calculated by weighting enrollees equally are much more statistically reliable than those calculated under the very unequal weights of BCBSMA's proposed approach, in which some enrollees are given weights 3,400 times as large as others. Contract size might be a proxy for other factors that could sway the national average one way or another inappropriately. To return to the Rating of Health Care Quality measure previously discussed, perhaps due to chance or other non-random reasons, the 600 enrollees in the smallest contract could have exceptionally high (or exceptionally low) views of their health care in the last six months, which would skew the results under BCBSMA's preferred methodology. Instead, CMS reasonably accounts for contract enrollment to more accurately reflect the national average, as the regulations require. The regulations do not commit CMS to a methodology for calculating the national average that might capture this kind of statistical noise, that is, variability that obscures the underlying truth of what Medicare beneficiaries think about the health care they received over the last six months.

BCBSMA contends that calculating national averages of CAHPS measure scores will help enrollees better select a plan: "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." Pls.' Opp'n at 14. This is completely wrong. BCBSMA's contract-level national average methodology would force CMS to compare contracts' measure scores to national averages that, for the reasons described above, would not necessarily be reflective of the average Medicare Advantage enrollee experience. As BCBSMA points out, a goal of the Star Ratings is to "'allow objective and

meaningful comparisons between [Medicare Advantage] and [Prescription Drug Plan] contracts' and [that] 'the measures derived from the surveys are used by beneficiaries to help choose an [Medicare Advantage] and [Prescription Drug Plan] contract.'" Pls.' Opp'n at 15 (citing 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). But Medicare Advantage plan enrollees are afforded the ability to make better and more informed comparisons between plans when those plans are evaluated against the benchmark of a true, national, program-wide average, not one influenced by irrelevant factors, such as contract size, or statistical noise.

As support for the contention that contracts should be weighted equally, BCBSMA cites a provision of the 2025 Technical Notes that includes a hyperlink wherein additional CAHPS reliability calculation details are provided. Pls.' Opp'n at 15 (citing A.R. 338). Neither this portion of the technical guidance nor the linked document, entitled "Instructions for Analyzing Data from CAHPS Surveys in SAS," discusses the national average used in 42 C.F.R. § 422.166(a)(3). The portion of the document BCBSMA cites concerns a specific computation performed by the CAHPS Analysis Program, which employes the statistical software suite SAS "to provide survey users with a flexible way to analyze CAHPS survey data in order to make valid comparisons of performance." CAHPS, *Instructions for Analyzing Data from CAHPS Surveys in SAS* (Aug. 2020), https://www.ahrq.gov/sites/default/files/wysiwyg/cahps/surveys-guidance/helpful-resources/analysis/2020-instructions-for-analyzing-data.pdf. Specifically, BCBSMA quotes from the section pertaining to "calculation of overall mean and significance tests of differences from the overall mean." *Id.* at 40. It sets out three weighting choices for calculation of the overall mean: (1) weight the entity means equally, (2) using weights equal to the sum of the weights for cases within each

entity, which produces an estimate of the combined mean of the entire population of cases, and (3) use weights equal to the number of observations used in the calculation of the mean (or the total of these numbers across the items of a composite measure). *Id.* The document states that "[w]e recommend choosing between these options based on the interpretation that will be given to the reported overall mean and there to the comparison of each entity' adjusted mean to that overall mean." *Id.* The document states that for certain comparisons, namely quality reporting, incentives, and similar purposes, use of unweighted entity means is recommended. *Id.* This document does not pertain to the national average used in 42 C.F.R. § 422.166(a)(3) and does not provide any support for BCBSMA's assertion that the national average should be premised on a contract-level average, in which each contract is weighed equally.

Ultimately, this Court should return to the plain language of section 422.166(a)(3). BCBSMA's reading of the regulation effectively adds in the word "contract," such that the regulation would say: "statistically significantly higher [or lower] than the national average CAHPS measure *contract* score." *See* Pls.' Opp'n at 22. But the word "contract" appears nowhere in the regulation. 42 C.F.R. § 422.166(a)(3)(i)-(v). This Court should reject BCBSMA's reading of the Secretary's regulations, as that reading is at odds with the plain text.

CONCLUSION

For the reasons herein and in Defendants' cross-motion for summary judgment, Defendants respectfully request that the Court grant Defendants' cross-motion for summary judgment and deny Plaintiffs' motion for summary judgment.

Dated: June 20, 2025

Respectfully submitted,

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