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 25-cv-0693-TNM

PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs submit this response to Defendants' notice of supplemental authority (Dkt. 24) calling the Court's attention to the recently issued decision of the Northern District of Texas in *Elevance Health, Inc. v. Kennedy*, No. 4:24-cv-01064-P, 2025 WL 2394087 (N.D. Tex. Aug. 18, 2025). Respectfully, this Court should decline to follow the reasoning of the *Elevance* court.

First, as it concerns Defendants' use of case-mix adjusting survey data in calculating CHAPS-based measure scores, the *Elevance* court acknowledged that "CMS overstates its case that the regulations clearly authorize case-mix adjustment," slip op. at 9, even going so far as to call Defendants' argument on the point a "fallacy." *Id.* n.1. Nonetheless, the court decided in Defendants' favor because "[a]lthough the regulations do not expressly authorize case-mix adjustments for CAHPS measure scores, they refer to case-mix adjustment in a way that assumes it is taking place already." *Id.* at 10. Plaintiffs respectfully submit that the *Elevance* court erred in assigning greater weight to what it thought the regulations *assumed* than to the plain text of the regulations.

Second, as it concerns Defendants' calculation of the "national average CHAPS measure score" by weighting each contract's score by its total enrollment, the court simply misinterpreted the regulation. Under 42 C.F.R. § 422.166(a)(3)(i)-(iv), for each "contract," CMS is required to calculate a CHAPS measure score. That score is then compared to the "national average CHAPS measure score." The apples-to-apples comparison requires CMS to compare a contract's CHAPS measure score to the national average of CHAPS measure scores for each *contract*. Weighting the national average for contract enrollment makes it an apples-to-oranges comparison. The *Elevance* court credited Defendants' argument that if CMS did not perform this weighting, then it would "be like taking the average of all fifty states' average heights in order to get the national average height, rather than adjusting for each state's population." Slip op. at 14. But even crediting the analogy for the sake of argument, that is a policy argument not rooted in the text of the regulation. In regulatory interpretation, as in statutory interpretation, the words the drafter actually used control. If the regulator desires something different, the solution is to initiate a new rulemaking so the regulated community has an opportunity to comment and (if the rule is finalized) understand the regulation from its actual text.

Dated: August 25, 2025

Respectfully Submitted,

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