

[ORAL ARGUMENT NOT SCHEDULED]

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 final judgment of the
United States District Court for the District of Columbia
Case No. 25-cv-74 (Judge Cooper)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The parties to this case are plaintiff Alignment Healthcare, Inc., and defendants the United States Department of Health and Human Services, Centers for Medicare & Medicaid Services, Robert F. Kennedy, Jr., in his official capacity as Secretary of Health and Human Services, and Mehmet Oz, in his official capacity as Administrator of the Centers for Medicare & Medicaid Services.

B. Rulings Under Review

The final judgment 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), JA86.

C. Related Cases

This case has not been before this Court or any other court, and counsel is not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Jack Starcher
Jack Starcher

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GLOSSARY

CMS

Centers for Medicare & Medicaid Services

INTRODUCTION

This lawsuit concerns the Medicare Part C and D Quality Star Rating system, which allows Medicare beneficiaries to comparison shop among hundreds of available private health insurance companies offering benefit plans under Part C (also known as Medicare Advantage) and prescription drug plans under Part D. Mandated by Congress and implemented by the Centers for Medicare & Medicaid Services (CMS), the Star Ratings system rates health plans on dozens of measures of health outcomes, health care processes, patient experience, and other plan performance measures. The Star Ratings are calculated based on health records, CMS administrative data, and survey data collected from millions of Medicare beneficiaries covered under these plans. Each October, CMS publishes the Star Ratings, which assign to each health plan a rating on a one through five-star scale on each performance measure and provides an overall rating that is a weighted average of the contract's star scores on the various individual measures.

Plaintiff Alignment Healthcare – an insurance company offering Medicare Advantage plans – challenges the 2025 Star Ratings that two of its contracts received because it is disappointed by unexpectedly unfavorable

survey results for those contracts. Before the agency, plaintiff blamed the disappointing results on slight decreases in the percentage of survey respondents who completed the survey in Spanish as compared to the prior year's survey.

Over the course of almost a month, plaintiff engaged in an extended back and forth with CMS where plaintiff repeatedly insisted that the lower percentage of survey respondents that completed the survey in Spanish was *ipso facto* evidence that there had been an error in the administration of the survey. Even a cursory review of that extended exchange between CMS and plaintiff, which appears in the joint appendix in reverse chronological order from JA105-135, makes clear that CMS reasonably considered and responded to plaintiff's conclusory assertion of error. CMS repeatedly explained to plaintiff – drawing on both the agency's experience and the data before it – why CMS did not see any evidence to suggest that there had been some error in the survey administration, let alone an error that would justify throwing out the survey results.

The district court correctly rejected plaintiff's challenge to the agency's response. Before this Court, plaintiff's arguments to the contrary rest entirely on assertions that are easily disproved by the record. First,

plaintiff suggests that CMS survey protocols required the survey vendor to ensure that every person whom plaintiff flagged as preferring Spanish both received and completed the survey in Spanish. But the protocols plaintiff invoke require no such thing. As the district court concluded, the protocols require only that Spanish-language surveys be made available to survey respondents. Before the agency, plaintiff never disputed that Spanish-language surveys were made available to survey participants.

Even if they had, there was nothing in the record before the agency to suggest that requirement had not been satisfied. Plaintiff says that the survey data demonstrate that the survey vendor clearly did not administer the survey consistent with CMS protocols. But as CMS explained below, the opposite is true: All of the evidence before the agency suggested that the survey was properly administered. The survey vendor affirmed that it followed CMS guidance in administering the survey, and that affirmation was confirmed by CMS's review of the response rates and other data before the agency. Plaintiff's assertion that it is an "undisputed" "fact" that there was some error in the survey administration is simply incorrect.

Finally, plaintiff says that CMS did not take their concerns seriously. Thirty pages of substantive emails containing repeated, detailed responses and explanation bely that assertion.

Plaintiff's arguments fall far short of establishing that the agency acted arbitrarily in responding to its concerns. The district court's decision should be affirmed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. On June 9, 2025, the district court issued an appealable final judgment (JA86), and plaintiff filed a timely notice of appeal on June 30, 2025 (JA87-88). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly held that CMS reasonably declined to discard the survey data at issue and reasonably responded to plaintiff's concerns about Spanish-language response rates.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. Medicare Advantage Program: The Social Security Act, 42 U.S.C. § 1395 *et seq.* (Medicare statute), establishes the Medicare program, a

federally funded and administered health insurance program for eligible elderly and disabled persons and certain individuals with end stage renal disease. *See id.* § 1395c. CMS, a component agency of the United States Department of Health and Human Services, administers the Medicare program. The Medicare program is divided into four major components. As relevant here, under Part C, the Medicare Advantage program, a Medicare beneficiary can elect to receive his or her Medicare benefits through a public or private healthcare plan. *See id.* § 1395w-21 *et seq.*

This case concerns two Medicare Advantage contracts. Under Medicare Advantage or Medicare Part C, private insurers provide Medicare coverage that beneficiaries would otherwise receive directly from the federal government. 42 U.S.C. § 1395w-22(a). These insurers, known as Medicare Advantage Organizations, contract to provide coverage in a particular geographic area. Eligible beneficiaries can then choose among the plans available where they reside. *Id.* § 1395w-21(b). Medicare Advantage Organizations receive a predetermined sum for providing coverage to each beneficiary, based in part on the demographic and health characteristics of that beneficiary. *Id.* § 1395w-23(a)(1)(A), (C).

2. Medicare Advantage Quality Star Ratings: Congress has instructed that “[t]he quality rating for a [Medicare Advantage] plan shall be determined according to a 5-star rating system (based on the data collected under section 1395w-22(e) of this title).” 42 U.S.C. § 1395w-23(o)(4)(A). Star Ratings are a means by which CMS measures the quality of Medicare Advantage plans on a scale of one to five “stars” based on Medicare Advantage data collected by CMS. *Id.*; *see also id.* § 1395w-22(e)(3). Star Ratings reflect the experiences of beneficiaries in these plans and assist beneficiaries in finding the best plans for their needs. *Advance Notice of Methodological Changes for Calendar Year (CY) 2026 for Medicare Advantage (MA) Capitation Rates and Part C and Part D Payment Policies* 109 (Jan. 10, 2025), <https://perma.cc/KWB8-VLWK>.

Star Ratings are assigned to each individual contract held by a Medicare Advantage Organization. The overall Star Ratings are based on a five-star scale, set in half-star increments, with one star being the lowest rating and five stars being the highest. *See* 42 U.S.C. §§ 1395w-23(o)(4)(A), 1395w-24(b)(1)(C)(v); 42 C.F.R. §§ 422.162(b), 422.166(h)(1)(ii). Star Ratings are important to Medicare Advantage Organizations because they affect consumer behavior and can increase the amount of money the

Organization is paid by the Department. CMS publishes the Star Ratings each October for the upcoming year at the contract level, with each plan offered under that contract assigned the contract's rating. See 42 C.F.R. §§ 422.162(b), 422.166, 423.182(b), 423.186. CMS published the 2025 Star Ratings in October 2024. CMS, *Fact Sheet: 2025 Medicare Advantage and Part D Star Ratings* (Oct. 10, 2024), <https://perma.cc/247C-RT8F>. The agency has since released the 2026 Star Ratings, but the Quality Bonus Payments at issue in this litigation are based on the 2025 Star Ratings.

To calculate Star Ratings, CMS scores each Medicare Advantage contract on approximately 30 to 40 quality measures. To calculate these measures, CMS uses a variety of different data sources. 83 Fed. Reg. 16,440, 16,520, 16,525 (Apr. 16, 2018). As relevant here, one important means by which CMS gathers these data are through a survey of current beneficiaries who are covered by the plan – the Consumer Assessment of Healthcare Providers & Systems (the Survey).

3. The Survey: The Survey is conducted by generating a sample of eligible people enrolled in the Medicare Advantage contract and then surveying them about their experiences. For contracts that have at least 600 eligible enrollees, CMS requires the insurance provider to contract with

a CMS-approved survey vendor to conduct the Survey. Those vendors must follow specific protocols established by CMS. *Medicare CAHPS Fact Sheet 1* (Mar. 2024), <https://perma.cc/4E8A-C8VT>. And as part of the process of obtaining CMS approval, each vendor goes through a rigorous review process, including by submitting for CMS review a Quality Assurance Plan specifying how the survey vendor will follow CMS protocols and ensure that the survey results are reliable. The “surveys are administered using a web-mail-phone data collection protocol that includes emailed or mailed invitations to complete a web survey, up to two survey mailings for non-respondents to the web survey, and phone follow-up with non-respondents to the web and mail survey administration.” *Id.* at 3.

CMS ensures the surveys are available in English, Spanish, Chinese, Korean, Tagalog, and Vietnamese. Health Servs. Advisory Grp., *Current Data Collection Materials, Medicare Advantage & Prescription Drug Plan CAHPS Survey*, <https://ma-pdpcahps.org/en/Current-Data-Collection-Materials/> (last visited Nov. 25, 2025). Spanish-language “questionnaires must be made available to all Spanish-speaking enrollees (in web, mail, and telephone administration).” JA167. Under the Quality Assurance

Protocols and Technical Specifications, sampled enrollees must be able to select their preferred language, including Spanish, when initiating the web-based version of the survey. JA154. CMS also requires that the pre-notification letter mailed to sampled enrollees must be printed in English on one side and in Spanish on the reverse. JA156-157. 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. JA158, 168. Vendors are also “required to administer the web survey in English and Spanish.” JA152. And survey participants “must be able to select their preferred language from English, Spanish, and any offered optional translations” upon initiating the survey. JA154.

CMS survey protocols also provide a list of optional strategies that the vendor “may” use “at the request of” the insurance provider to assist in administering the survey in other languages. JA167. Those strategies include providing instructions in all mailings and web surveys about how to request a Spanish-language questionnaire, providing all survey recipients with both a Spanish- and English-language questionnaire, and sending only a Spanish-language questionnaire to participants known to prefer Spanish. JA167-168.

4. Plan Preview Process: CMS provides for two plan preview periods before the annual release of Star Ratings in October. *See* 42 C.F.R. § 422.166(h)(2). During the first plan preview in August, CMS asks Part C and D plan sponsors to closely review the Star Ratings methodology and their posted numeric data for each measure. The second plan preview in September includes any revisions made as a result of the first plan preview and provides a preview of the preliminary Star Ratings for each measure, domain, summary rating, and overall rating. During the second plan preview, CMS asks insurance providers again to closely review the methodology and their posted data for each measure, as well as their preliminary Star Rating assignments. This is an informal administrative process in which Medicare Advantage Organizations send any comments or questions to CMS by email and CMS responds in kind.

B. Factual background

During the second plan preview period for the 2025 Star Ratings, plaintiff emailed CMS to raise concerns about the survey results for two of

its contracts.¹ JA131-132. In particular, plaintiff claimed that fewer surveys were completed in Spanish for those contracts than it had expected.

Plaintiff believed the lower-than-expected Spanish completion numbers harmed the contract scores because plaintiff believed “that non-native English speakers often provide lower scores when responding in English.”

JA128. In its initial email to CMS, plaintiff identified two possible problems with the survey administration that, in its view, could have caused the lower-than-hoped-for Spanish-language response rate: (1) a sampling error caused a lower percentage of Spanish-speaking members to be selected to take the survey or (2) some Spanish-speaking members selected to participate for the survey “may have received the survey in English.” JA128.

CMS responded to both concerns. On the potential sampling error, CMS “confirmed that [it] drew a random sample of 800 eligible enrollees” for each of the plans. JA126. CMS also reviewed the data about Spanish-speaking survey recipients and found that “the proportion of members”

¹ The extended exchange between CMS and plaintiff is the focus of this case, and it appears in full from JA105-135. Because the exchange is formatted as an email chain, the emails appear in reverse chronological order with the first email beginning on JA131.

noted to be Spanish-speaking “in the sample is similar to that proportion among all eligible[]” participants, “consistent with the result of a random sample.” JA127.

As for plaintiff’s suspicion that some Spanish-speaking members did not receive the survey in Spanish, CMS looked at the data and saw no evidence of a problem. It noted that CMS protocols require, “at a minimum, [that] Spanish surveys be made available upon request from members in response to bilingual prenotification materials” and directed plaintiff to the relevant section of the CMS survey administration guidance discussing this requirement. JA127. Upon reviewing the response data, CMS saw no reason to suspect that the survey vendor had not complied with those requirements.

The data showed that about a quarter of respondents for each contract – 23% for one and 22% for the other – reported that they primarily spoke Spanish at home. JA126-127. And about a fifth of respondents for each contract – 19% for one and 20% for the other – completed the survey in Spanish. JA126-127. CMS observed that those results were consistent with normal survey response patterns for Spanish-speaking individuals. JA127 (results “are consistent with choices made by members for whom

both Spanish and English surveys were available”). In response to additional questions from plaintiff, CMS provided comparable data for the same contracts during the 2024 ratings process, which had been administered by a different survey vendor. JA125. Comparing the two years of data showed that the percentage of respondents who completed the survey in Spanish decreased for both contracts – by 5% in one of the plans and 11% in the other. JA125. CMS acknowledged that decrease but saw nothing in the data to suggest that there must have been some problem with the survey. JA120, 125.

Unsatisfied with CMS’s response, plaintiff again insisted that there must have been some error in the sampling or surveying of Spanish-language speakers. In support of this assertion, plaintiff noted that there was a “slight year-over-year increase in the percentage” of members who were flagged as Spanish-speaking in internal records that plaintiff sent to its survey vendor. JA123. Because the total number of respondents who completed the survey in Spanish nevertheless decreased, plaintiff asserted that this “clearly illustrates an issue either with the sample or” the process by which survey recipients were mailed a Spanish-language survey.

JA123. Plaintiff therefore requested that CMS “suppress” the

disappointing survey results for the two contracts and recalculate the overall performance rating for those two contracts. JA124.

CMS responded with additional data. JA120-121. It explained that, after reviewing the data, it again concluded the Spanish-language response rates were not out of the ordinary and did not substantiate plaintiff's assertion that there must have been some error in survey administration. In particular, CMS concluded that it was not surprising that response rates were slightly lower for Spanish-language speakers than for survey recipients as a whole because lower response rates for Spanish-language speakers are typical. JA120. And while the response rates were slightly lower for the 2025 ratings than they were for the 2024 ratings cycle, the decrease was not so significant as to suggest that there was some error in the way the survey was conducted. CMS also observed that it was "typical" and not indicative of any problem that not all Spanish speakers chose to respond in Spanish. JA120.

Plaintiff was still dissatisfied and emphasized what it viewed as three "key observations/concerns." JA117-119. First, it asserted that the "marked reduction in Spanish-language survey completions" itself "compromises the reliability of the [survey] data" and resulted in an

“inaccurate portrayal” of member experience. JA118. Second, it asserted that the fact that some Spanish-speakers chose to complete the survey in English “suggests failures in the survey distribution process” because it suggests that “Spanish-speaking members may have received surveys in English.” JA118. Finally, it asserted that “[t]he significant decline in Spanish completion” from the 2024 ratings cycle to the 2025 ratings cycle “suggests systemic issues” in “sample selection or survey fulfillment” by the vendor. JA119. In light of those “observations/concerns,” plaintiff again insisted that CMS must ignore the results of the survey and recalculate their ratings without them. JA117-119.

CMS responded and again explained that it had “looked extensively into these concerns” and found nothing about the survey results that supported plaintiff’s assertion that the Spanish-language response rates suggested some error in the administration of the survey. JA116. CMS explained that “[w]hether or not Spanish-speaking members received” and took surveys in English is outside of CMS’s control and does not indicate that the vendor did not follow any CMS directives or guidance. JA117.

Plaintiff once again wrote to express its disappointment with the survey results and asserted that the disappointing results were caused by a

“clear issue with the Spanish-language responses” for the two contracts.

JA113. CMS explained why, after a thorough review of the survey response data over the course of several weeks, it still saw no evidence to support plaintiff’s assertion that there was a “clear issue” with the administration of the survey. JA111-113.

First, CMS noted that – in response to plaintiff’s concerns – it had reached out to the survey vendor directly and confirmed that the vendor “followed Quality Assurance Plan & Technical Specifications (QAP& TS) procedures.” JA112. As the vendor explained to CMS, it used a “conservative” approach when matching the language preference data that plaintiff provided with the list of survey recipients generated by CMS.

JA192. The vendor sent a participant a Spanish-language survey only if it was sure – based on an exact match in name and address – that the information provided by plaintiff corresponded to one of the survey participants. JA192.

Second, CMS noted that it was not surprising or concerning that some Spanish speakers completed the survey in English. CMS explained that “[r]espondents who primarily speak Spanish at home are often also able to complete the survey in English and many choose to do so when

both Spanish and English survey options are made available, as was the case here.” JA112. “In fact, among respondents who reported speaking primarily Spanish at home, the proportions choosing to respond in English in H3443 (19%) and H3815 (13%) were lower than [for Medicare Advantage plans] overall (26%), so if anything, this points to unusually good access to Spanish-language” questionnaires for the surveys at issue. JA112.

Because the survey vendor confirmed that it had followed the relevant procedures, and because the data confirmed that survey recipients in fact were able access and complete Spanish-language surveys at rates that were higher than average for similar Medicare Advantage plans, CMS found “no support for the contention that survey sampling or survey administration differed from standard protocols or adversely affected scores in any way.” JA112.

Still unsatisfied, plaintiff responded again to complain that CMS was not accepting its assertion that the Spanish-language response rates alone clearly indicated that there must have been some error in survey administration. Acknowledging that they had no direct evidence that there had been any error in the administration of the survey, plaintiff asked for permission to conduct an additional survey of its Spanish-speaking

members to ask them whether they received the survey and, if so, what language they received it in. JA108. CMS responded explaining that, after reviewing the data exhaustively over the course of several weeks and considering each of plaintiff's concerns, CMS's "analyses have established that the [survey] sample represented Spanish-preferring members, used the language preference information you provided, and resulted in Spanish-preferring members choosing to respond in Spanish and rates that were high and higher than average." JA107. In light of that analysis, "[n]o further validation [wa]s needed" and the additional survey of Spanish-language members that plaintiff proposed was neither permissible nor likely to be informative. JA107.

C. Proceedings below

Plaintiff filed this action raising numerous challenges to CMS's calculations of the 2025 Star Ratings for three of its Medicare Advantage contracts. As relevant here, plaintiff challenged CMS's refusal to throw out the survey results for two of its contracts due to alleged errors in the administration of the survey in Spanish. As before the agency, plaintiff claimed in their complaint that the "vendor did not provide Spanish-language questionnaires" to plan enrollees that plaintiff had designated as

Spanish-speakers. JA9. Plaintiff claimed that, by refusing to throw out the survey results based on that supposed error, CMS had impermissibly treated plaintiff worse than other insurance providers because CMS “effectively did not permit [plaintiff] to designate Spanish-speaking enrollees” for the two contracts at issue. JA9.

The parties cross-moved for summary judgment, and on June 9, 2025, the district court granted the government’s motion for summary judgment in relevant part. JA80-81, 85.² The district court held that CMS reasonably responded to plaintiff’s concerns about Spanish-language survey administration. JA80. First, the district court observed that plaintiff had not “shown that the survey was administered erroneously” in violation of CMS guidance because CMS protocols require only “that Spanish-language surveys be ‘made available to all Spanish-speaking enrollees.’” JA80 (alteration omitted) (quoting JA167). The court noted that, even if plaintiff was right that some “Spanish speakers received English-language surveys

² The district court granted summary judgment in plaintiff’s favor on their challenge concerning how CMS accounted for adverse determinations in two coverage-denial appeals in calculating one contract’s 2025 Star Rating. JA82-84. The government did not appeal that decision. The district court granted summary judgment in the government’s favor on the remaining issues, only one of which plaintiff raises on appeal. *See* JA78.

initially,” various requirements of the survey protocols ensured that “they would have been informed in Spanish, either on the survey itself or separately, that Spanish versions were available upon request.” JA80. And plaintiff “point[ed] to no evidence in the record that [those] requirements were not followed here.” JA80.

Second, the district court concluded that CMS did not “arbitrarily ignore [plaintiff]’s concerns.” JA81. CMS reached out to the vendor to confirm that they had used the language preference data that plaintiff provided, confirmed that the samples CMS drew for the surveys were consistent with the population from which they were drawn, and reviewed “survey response patterns among predicted Spanish speakers and concluded that they were in line with expected responses.” JA81. CMS thus “took [plaintiff]’s concerns seriously and responded reasonably. Nothing more was required.” JA81.

Plaintiff timely appealed the district court’s summary judgment decision. JA87.

SUMMARY OF ARGUMENT

I. The district court correctly held that CMS reasonably declined to discard survey results because the agency found no evidence to

substantiate plaintiff's assertion that the survey vendor did not follow CMS protocols with respect to Spanish-language surveys. CMS protocols require that Spanish-language surveys be made available to survey participants, and the protocols impose a number of requirements to ensure that Spanish-language surveys are available in a meaningful way. As reflected in the record, plaintiff never disputed before the agency that the vendor complied with those requirements. Because there was no evidence before the agency suggesting that the vendor failed to follow any requirement in CMS's protocols, plaintiff failed to show that the survey was administered erroneously.

Plaintiff's contrary arguments largely turn on a clear misreading of CMS's protocols. Plaintiff relies on a section of the CMS protocols that allow – but do not require – survey vendors to mail a Spanish-language questionnaire, and only that questionnaire, to enrollees known to prefer Spanish at the request of the insurance provider. Plaintiff argues that, because it submitted its own Spanish-language data to the vendor and asked the vendor to send Spanish-language surveys to any survey participant who was marked as a Spanish-speaker in plaintiff's internal

records, the vendor violated CMS protocols by not sending some Spanish speakers a Spanish-language survey.

There are two independent problems with that argument. First, the protocols that plaintiff relies on make clear that the vendor was not required to abide by plaintiff's request at all. The protocols say only that "[s]urvey vendors *may*" send known Spanish-speakers only a Spanish-language questionnaire "at the request of the [provider]." JA167 (emphasis added). That permissive language, particularly when contrasted with mandatory language used elsewhere in the protocols, makes clear that vendors are not required to deploy any of the listed strategies even if the insurance provider asks.

Second, even assuming plaintiff is correct that a vendor could be required to use any of those optional strategies under some circumstances, the record shows that the vendor *did* follow that optional section of the protocols. What plaintiff refers to as a "clear survey administration error" is really a dispute about the method that the survey vendor used to match data plaintiff provided about Spanish-language preferences to the data set that CMS provided about survey participants. That dispute is several layers removed from any mandatory requirement contained in CMS

guidance. Plaintiff is therefore demonstrably wrong to suggest that this dispute triggers any concerns about whether the agency followed its own rules or failed to treat like cases alike. The agency was under no obligation to throw out unfavorable survey results based on plaintiff's dissatisfaction with the vendor's data-matching methods.

Plaintiff alternatively responds by claiming that the district court was not allowed to consider what the protocols do (and do not) require either because the district court's analysis differed from that deployed by the agency below, or because CMS forfeited those points in its district court briefing. Those arguments are baseless. Before the agency, CMS clearly articulated to plaintiff the difference between what the protocols require and what is merely optional. And CMS emphasized exactly the same distinction – including by relying on the same mandatory provisions – in its initial brief opposing plaintiff's motion for summary judgment and cross-moving for summary judgment.

II. The district court also correctly concluded that the agency reasonably considered and responded to the concerns that plaintiff raised before the agency. Plaintiff claims that CMS erred by ignoring or misconstruing plaintiff's concerns before the agency. But as reflected in the

extensive back-and-forth between plaintiff and CMS below, the agency understood and reasonably responded to plaintiff's concerns about Spanish-language participation in the survey. Before the agency, plaintiff repeatedly asserted – without any direct evidence – that the Spanish response rates for the survey necessarily demonstrated that there must have been some problem with the sampling or administration of the survey. Over the course of several weeks, CMS took those concerns seriously and thoroughly responded to plaintiff's concerns. It acknowledged the decrease in Spanish-language responses but explained why that decrease alone was not so surprising or anomalous as to suggest that there was necessarily an error in survey administration. As the district court held, CMS “took [plaintiff]’s concerns seriously and responded reasonably. Nothing more was required.” JA81.

STANDARD OF REVIEW

The agency’s decision must be upheld unless it is “arbitrary, capricious, an abuse of discretion, ... otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); see *City of Santa Monica v. FAA*, 631 F.3d 550, 554 (D.C. Cir. 2011). Under that standard, the Court “must consider whether the [agency’s] decision was based on a consideration of the relevant factors

and whether there has been a clear error of judgment.” *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989) (quotation marks omitted). In Medicare cases, the “tremendous complexity of the Medicare statute ... adds to the deference which is due to the Secretary’s decision.” *District Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 60 (D.C. Cir. 2015) (quoting *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1229 (D.C. Cir. 1994)). The question is not whether the agency’s policy is the “best” or only solution, but whether it is a “reasonable” solution. *See Petal Gas Storage, LLC, v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007).

ARGUMENT

I. CMS Reasonably Concluded There was No Evidence the Survey Vendor Committed Any Error in Administering the Surveys.

In litigation and before the agency, plaintiff’s principal argument has been that the survey results at issue should have been thrown out because evidence before the agency demonstrated that the survey was administered in violation of mandatory CMS survey protocols. *See* Br. 28-33; *supra* pp. 10-18. But as the district court correctly concluded, JA80, plaintiff has never pointed to any evidence suggesting that the vendor failed to follow any requirement contained in those protocols.

A. CMS protocols require only that a Spanish-language version of the survey is available upon request.

As the district court observed, JA80, CMS protocols require, in relevant part, that “Spanish-language questionnaires must be made available to all Spanish-speaking enrollees (in web, mail, and telephone administration).” JA167. The protocols include several other requirements that ensure Spanish-language questionnaires are available to participants in a meaningful way. For example, CMS commits to sending survey vendors data about survey participants, which includes fields intended to help the vendors identify Spanish speakers. JA150. When conducting the survey by mail, all vendors must send each survey participant a pre-notification letter, and that “pre-notification letter is required to be printed with English on one side and Spanish on the other.” JA156-157; *see also* JA168 (requiring that “vendors must mail a pre-notification letter to all sampled enrollees” “that is printed with English on one side and Spanish on the other”). And all survey cover letters similarly “must contain Spanish text inviting Spanish speaking enrollees to call the survey vendor’s toll-free telephone number to request the Spanish translation of the questionnaire.” JA158. Vendors are also “required to administer the web

survey in English and Spanish.” JA152. And survey participants “must be able to select their preferred language from English, Spanish, and any offered optional translations” upon initiating the survey. JA154.

The district court correctly concluded that plaintiff “points to no evidence in the record” suggesting that those “requirements were not followed here.” JA80. Indeed, at no point before the agency did plaintiff ever claim that the vendor failed to follow any of these requirements. *See supra* pp. 10-18 (summarizing JA105-135). Plaintiff never contested that the survey vendor had made Spanish-language surveys available, either by providing a Spanish-language option for web surveys, mailing Spanish-language paper surveys to survey participants directly, or by providing survey recipients information about how to request a Spanish-language paper survey if they did not automatically receive one. And the record makes clear that Spanish-language questionnaires were more than just available: About one-fifth of all survey participants received and completed the survey in Spanish. *See* JA126-127.

In their opening brief, plaintiff suggests in passing (Br. 41-42) that providing recipients instructions in Spanish about how they can request or otherwise access a Spanish-language survey is insufficient to satisfy the

requirement that Spanish-language surveys be made “available” to Spanish speakers. That argument is meritless. As plaintiff acknowledges, the plain meaning of “available” is “obtainable.” Br. 41 (quoting *Available*, Webster’s Third New International Dictionary of the English Language 150 (2002)). Being prepared to offer an accommodation, telling someone that the accommodation is offered, and then instructing them on how to obtain it makes that accommodation “available” to that person under any reasonable understanding of that word.

Plaintiff further posits that sending the required bilingual pre-notification letter alone is insufficient to make Spanish-language surveys “available” because the “phone number could be disconnected” or “the vendor may not keep extra copies” of the survey on hand. Br. 42. But those suppositions only underscore the weakness of their argument. Plaintiff never suggested in its extensive back-and-forth with CMS that anything like that had occurred here. Nor was there any reason for CMS to suspect that anything like that occurred. As the agency repeatedly noted below, for survey respondents “who reported speaking primarily Spanish at home, the proportions choosing to respond in English ... were lower

than [for Medicare Advantage plans] overall.” JA112. That suggested, if anything, “unusually good access to Spanish-language surveys.” JA112.

Because nothing before the agency suggested that the survey vendor failed to follow any of the survey protocols’ requirements, the district court was correct to hold that plaintiff failed to show that there was any error in the survey administration. CMS therefore acted reasonably in refusing to discard the survey results.

B. Plaintiff’s arguments focus on optional methods that the protocols allow but do not require, and that the record reflects were followed in any event.

Rather than identifying any mandatory protocol that the vendor failed to follow, plaintiff’s arguments before CMS and this Court focus on a section of the protocols discussing optional strategies for “administering the survey in other languages.” JA167-168. That section lists a number of strategies that “[s]urvey vendors may” use “at the request” of the insurance provider. JA167. Those optional, insurance-provider-requested strategies vary widely, and many are mutually exclusive. JA167-168. A vendor can do anything from providing instructions in Spanish on all mailings for how to request a Spanish-language questionnaire, to providing all survey recipients with questionnaires in both English and

Spanish, to mailing only a Spanish-language questionnaire to participants “known to prefer Spanish” even if they have not requested one. JA167-168.

Plaintiff asked its vendor to deploy one of these methods – that the vendor “[s]end a Spanish language questionnaire only” to survey participants “known to prefer Spanish” based on “language preference data received” from the insurance provider. JA168. Before the agency, plaintiff claimed that the Spanish-language survey results suggested that the vendor did not abide by that request. *See supra* pp. 10-18. Plaintiff now argues that CMS did not adequately respond to those concerns, misunderstood those concerns, or otherwise provided an arbitrary response. *See* Br. 34-38. The district court reviewed the record and correctly concluded that “CMS took [plaintiff]’s concerns seriously,” “responded reasonably,” and “[n]othing more was required.” JA81. Plaintiff gives no reason to disturb that conclusion.

Plaintiff principally argues that the record shows clear violation of CMS protocols because (1) the vendor was required to mail only a Spanish-language questionnaire to participants known to prefer Spanish once plaintiff requested that the vendor do so and (2) the vendor failed to abide by that request. Plaintiff is wrong on both scores.

1. First, even if the record showed that the vendor refused to honor plaintiff's request (it does not, *see infra* pp. 33-35), that would not establish that the vendor violated any requirement contained in the protocols. Nothing in the list of optional methods for administering the survey requires a survey vendor to use any particular method or any of the listed methods at all. JA167-168. Even if an insurance provider requests that the survey vendor use a particular approach, the protocols do not say that the vendor must abide by the request. To the contrary, as opposed to the various sections of the protocols discussed above that use mandatory language like "must" and "required," *see supra* pp. 26-27, this section of the protocols uses optional words like "may" and "can," *see* JA167-168.

Plaintiff's contrary arguments are without merit. First plaintiff claims that by saying a vendor "may" do any of the following "at the request" of the insurance provider, the protocols must be read both to *prohibit* vendors from using any of the listed strategies unless the vendor requests it and to *require* the vendor to use a particular method once the insurance provider so requests. Br. 40 (quoting JA167). But that is not what the protocols say. The protocols do not say that "vendors may only use the following if the insurance provider requests them," or that

“vendors must do any of the following if the provider requests.” Instead, the protocols use entirely permissive (“optional,” “may”) language. JA167. Plaintiff neither cites any case interpreting that kind of permissive language to impose the kinds of requirements plaintiff proposes, nor gives any valid textual basis to accept their tortured reading.

Plaintiff alternatively argues that, even if unnatural, their reading is nevertheless required because giving vendors some discretion to determine how to ensure that Spanish-language surveys are made available would impermissibly delegate governmental power to a private party. Br. 41. That is plainly incorrect. This Court has recognized that agencies can rely on private parties to assist with fact gathering without triggering private non-delegation concerns. *See Hight v. U.S. Dep’t of Homeland Sec.*, 135 F.4th 996, 1009 (D.C. Cir. 2025). Relying on a private vendor to conduct a survey, the results of which feed into a larger decision-making process over which CMS retains responsibility and control, is exactly the kind of “legitimate outside party input into [an] agency decision-making process[.]” that this Court has long condoned. *Southwest Airlines Co. v. Transportation Sec. Admin.*, 650 F.3d 752, 758 (D.C. Cir. 2011) (quoting *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004)). That CMS protocols leave survey

vendors some discretion in how those surveys will be conducted – cabined by the requirements discussed above, *supra* pp. 26-27 – does not transform the survey process into a “delegation of agency authority to survey vendors.” Br. 41.

2. Second, the record makes clear that the survey vendor *did* “[s]end [only] a Spanish language questionnaire” to survey participants “known to prefer Spanish” based on the data received from plaintiff. JA168. Indeed, in response to plaintiff’s concerns, CMS squarely asked the survey vendor whether it had done so. JA193. The vendor responded and confirmed that it received and used language-preference data provided by plaintiff, but that it took a conservative approach to matching the data it received from plaintiff to the data set that was provided by CMS about the survey participants. JA192. As the vendor explained, it would send a participant a Spanish-language survey only if there was a match between the name and address in two data sets. JA192.³ In other words, even minor

³ The vendor explained that its approach was especially conservative because it only did this matching after it ran participant addresses through a service provided by the United States Postal Service – the Coding Accuracy Support System (CASS). JA192. That system improves mailing accuracy by standardizing and correcting mailing addresses. *See* <https://postalpro.usps.com/certifications/cass>.

differences in a participant's name or address between the language-preferences list that plaintiff provided and the data set that CMS provided would result in the vendor failing to recognize that those two entries as the same person. And if the vendor did not recognize a match, it would default to sending an English-language survey (unless the participant was already flagged as preferring Spanish in the CMS data or had directly requested to receive the survey in Spanish through some other means). *See* JA192.

Thus, while some individuals who were marked as preferring Spanish in plaintiff's internal data did not automatically receive the questionnaire in Spanish only, the record indicates that this was a result of the method the vendor used to match plaintiff's language-preference data to the participant data provided by the agency, not a failure to abide by plaintiff's request. While plaintiff might have preferred a less conservative matching approach, there is nothing in the CMS protocols that required the vendor to use any particular method for matching those two data sets. And CMS acted reasonably when it concluded that the evidence before it established that the vendor abided by plaintiff's request and "used the language preference information [plaintiff] provided." JA107.

Plaintiff does not meaningfully engage with any of this in its brief. Indeed, plaintiff fails to mention or respond to the vendor's explanation of its matching method at all and has thus waived any argument that the agency erred in accepting that explanation. *New York v. U.S. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005) (per curiam) (appellants waive arguments that they fail to raise in their opening briefs).

C. The district court correctly considered what the protocols do and do not require in rejecting plaintiff's claim.

Plaintiff's principal response to the district court's decision is to argue that, for various reasons, the district court was not allowed to consider what the protocols require. Br. 38-40. Those arguments are baseless.

Plaintiff's entire argument is that the agency acted arbitrarily by refusing to suppress survey results that – according to plaintiff – were collected in violation of mandatory CMS survey protocols. In assessing the agency's decision refusing to throw out those results, the district court was plainly entitled to consider what the protocols do (and do not) require. As already discussed, the district court correctly recognized that CMS protocols require only that Spanish-language surveys be “made available” to survey recipients, including by informing all survey recipients that

Spanish-language surveys were available on request. *Supra* pp. 26-27. And as noted, plaintiff has never pointed to any evidence suggesting that those requirements were not followed here. *Supra* pp. 27-28.

Plaintiff argues that it is a “post hoc litigation rationalization” to conclude that the protocols require only that Spanish-language surveys be “made available” in the ways discussed above. Br. 38-40 (quotation marks omitted). In particular, plaintiff suggests that there is a gap between the district court’s reasoning and the agency’s below, or that the agency somehow forfeited this argument in district court. Neither assertion is correct, for several reasons.

First, plaintiffs’ assertion of daylight between the district court’s and the agency’s rationale is simply wrong. Before the agency, CMS’s very first email responding to plaintiff’s concerns noted that the protocols “require[] that[,] at a minimum, Spanish surveys be made available upon request from members in response to bilingual prenotification materials.” JA127. And the agency contrasted those requirements with the kinds of optional strategies that “survey vendors may employ to promote participation in Spanish,” like the option that known Spanish speakers be mailed only a Spanish-language survey. JA127. And later in its exchange with plaintiff,

CMS again made clear that whether Spanish speaking participants receive or complete the survey in Spanish is not something that CMS's protocols govern. JA117. That contrast – between what the protocols require “at a minimum” and what strategies “vendors may employ” – is exactly the same point the district court made when it concluded that plaintiff failed to show there was any error in the survey administration. JA80.

Plaintiff's suggestion that CMS failed to raise this argument in district court litigation until its reply brief (Br. 39-40) is equally baseless. In its brief cross-moving for summary judgment and opposing plaintiff's motion for summary judgment, CMS clearly explained what CMS protocols do and do not require with respect to Spanish-language survey administration. *See* JA22-23. And CMS directly contrasted those requirements, including the bilingual prenotification letter in particular, with the optional strategies that plaintiff focuses on. JA28 (plaintiff relies on section of protocols listing “optional” “approaches” to “promote participation among non-English-speaking members”); JA29 (CMS does not control “whether Spanish-speaking enrollees initially receive the survey in their preferred language according to [plaintiff]'s own files”); JA29 (the protocols do “require ... that there are multiple opportunities to complete the survey in Spanish”

including “when initiating the web-based version of the survey” and via a “pre-notification letter mailed to sampled enrollees ... printed in English on one side and in Spanish on the reverse”); JA29 (plaintiff’s concern that “a number of enrollees it designated as Spanish-speaking nonetheless received the survey in English” does not implicate any protocol requirement).

Second, and more fundamentally, it is not surprising that CMS did not say more about the protocol requirements below (before either the agency or the district court) because plaintiff never claimed before the agency that the vendor had not followed them. Plaintiff repeatedly made clear to CMS that its concerns were not with whether the vendor sent the required bilingual prenotification materials or whether Spanish-language surveys were available on request, but with whether some Spanish speakers had been mailed English-language surveys or otherwise completed the survey in English. *See* JA131 (survey results may reflect “language mismatches”); JA132 (complaining that “many Spanish-speaking members may not have received the Spanish version of the survey” because of “a language mismatch”); JA128 (complaining “some Spanish-speaking members may have received the survey in English” and

might have either not responded or “responded but did so in English”); JA124 (data “strongly indicates a language mismatch or sampling-bias”); JA123 (claiming data “clearly illustrates an issue either with the sample or the matching process”); JA118 (data “suggests failures in the survey distribution process” because “Spanish-speaking members may have received surveys in English”); JA114 (objecting that “some Spanish-speaking members responded in English”).

At no point did plaintiff ever suggest that Spanish-language materials were not available upon request, that the vendor had failed to send the required bilingual prenotification letter to survey participants, or that the vendor failed to follow any other required protocol. But as the district court noted, even if plaintiff *had* argued before the agency that the vendor failed to make Spanish-language surveys available, including by mailing prenotification letters in both English and Spanish, there was no evidence before the agency to support that assertion. JA80. Before the agency, plaintiff repeatedly asserted that decreased Spanish-language response rates for the two contracts at issue necessarily proved that there had been an issue with the survey administration. *See supra* pp. 10-18. The

agency reasonably responded to that assertion at length and explained in detail why it rejected it.

The agency looked at the data and found that the survey results were consistent with normal survey administration. *See* JA116 (finding “no evidence that there is an issue with the reliability” of the response data); JA120 (finding Spanish-language response rates were “typical”); JA127 (results were “consistent” with normal response patterns). In particular, CMS observed that, “among respondents who reported speaking primarily Spanish at home, the proportions choosing to respond in English” for plaintiff’s plans “were lower than [for Medicare Advantage plans] overall.” JA112. Because the proportion of Spanish speakers responding in Spanish was higher than average, the data, “if anything, ... points to unusually good access to Spanish-language surveys.” JA112; *see also* JA107 (CMS analysis established that the survey “resulted in Spanish-preferring members choosing to respond in Spanish [at] rates that were high and higher than average”).

In addition to reviewing the data – which did not suggest an error in survey administration – CMS also reached out to the vendor directly, confirmed that the vendor followed required survey protocols, and

informed plaintiff of the vendor's attestation. JA112. CMS therefore reasonably concluded that there was "no support for the contention that survey sampling or survey administration differed from standard protocols or adversely affected scores in any way." JA112.

That response was more than sufficient. Plaintiff's contrary argument turns on their assertion that there is "zero evidence" in the record to show that the vendor "actually sent" survey participants the required prenotification letter. Br. 42. But as discussed, that gets things backwards. Plaintiff never claimed that the vendor failed to follow the protocols' requirement to send a bilingual prenotification letter, even after the agency directed plaintiff's attention to that requirement. JA127. And even if they had, CMS both (1) reviewed the data and concluded it did not suggest any error in survey administration and (2) directly confirmed with the vendor that the vendor had followed the relevant requirements. Because plaintiff did not dispute that the vendor sent those required materials, and because CMS satisfied itself that there was "no support for the contention that ... survey administration differed from standard protocols or adversely affected scores in any way," JA112, CMS was not required to develop additional evidence on the subject.

II. CMS Reasonably Responded to Plaintiff's Concerns.

Plaintiff's remaining arguments boil down to an assertion that CMS acted unreasonably because it ignored their complaints or "threw its hands up" and refused to engage with plaintiff's concern about possible errors in survey administration. Br. 4, 36. The record squarely belies those arguments.

As the district court concluded, JA81, the record reflects that CMS repeatedly acknowledged and responded to plaintiff's concern that some Spanish-speaking members had not been sent a Spanish-language only questionnaire. JA107 (CMS analysis established that survey "used the language preference information you provided, and resulted in Spanish-preferring member choosing to respond in Spanish [at] rates that were high and higher than average"); JA112 (describing CMS analysis of Spanish-language response rates); JA117 (explaining that CMS protocols do not specify "how survey vendors implement language preference data" and that "[w]hether or not Spanish-speaking members received surveys in English" is not something CMS controls); JA127 (explaining that all the protocols require is that "Spanish surveys be made available upon request"). And indeed, during that extensive back-and-forth plaintiff

repeatedly acknowledged that CMS understood their concern and was taking the issue seriously. *See, e.g.*, JA111 (acknowledging “time invested” and “detailed response”); JA113 (thanking CMS for “time and effort ... put into reviewing our concerns”); JA105 (thanking CMS for “prompt and detailed response” and “ongoing support in addressing our concerns”). Plaintiff never once suggested before the agency, as plaintiff now claims in their brief, that CMS misunderstood their concern or was not providing a coherent response.

Plaintiff is equally wrong to suggest that CMS’s response was substantively deficient. *See* Br. 36. As explained above, the method a vendor uses to match insurer-provided language preference data to the CMS-provided data about survey participants is “outside of CMS control,” JA117, both because CMS does not conduct the survey itself and because nothing in CMS protocols dictate how a vendor conducts that process (or, indeed, whether the vendor agrees to conduct that process at all). *Supra* pp. 29-31. As CMS noted early in its exchange with plaintiff, all that the protocols require is that “Spanish surveys be made available upon request from [survey participants] in response to bilingual prenotification materials.” JA127. Because plaintiff never contested that those

requirements were met there was no evidence of any error in survey administration that would justify throwing out the results. *See supra* pp. 36-41.

If that was all CMS had said, that would have been a complete response to plaintiff's concerns. But CMS did more. CMS reached out to the vendor directly to confirm that it had received plaintiff's language-preference data and used that data to send Spanish-language only surveys to known Spanish speakers. JA193. The vendor responded to confirm that it had and explained the method it used to do so. JA192. CMS conveyed to plaintiff that it had confirmed that the vendor had used plaintiff's language preference data. JA107, 112.

CMS went further still. It did not simply take the vendor's attestation at face value, *contra* Br. 35-36, but instead independently reviewed the Spanish-language response rates to assess whether there was any evidence in the data to suggest an error in Spanish-language survey administration. It concluded there was not. CMS acknowledged that fewer members completed the survey for these plans than in the prior year, but confirmed that the survey sample adequately represented Spanish-preferring plan members, members who preferred Spanish responded to the survey at

rates that were consistent with normal patterns, and members who preferred Spanish completed the survey in Spanish at a rate that was higher than average. *See* JA120, 116, 112, 107. Given that analysis, CMS reasonably concluded that there was no reason to suspect some unknown error suppressed survey responses from Spanish speakers and that “[n]o further validation” of the data was needed. JA107.

CONCLUSION

For the foregoing reasons, the district court's decision granting the government's motion for summary judgment in relevant part should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,544 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Book Antiqua 14-point font, a proportionally spaced typeface.

/s/ Jack Starcher

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ Jack Starcher

Jack Starcher