July 24, 2017

The Honorable Mitch McConnell
Majority Leader, United States Senate
Washington, D.C. 20510

Re: Repeal of the Affordable Care Act

Dear Majority Leader McConnell:

On behalf of the American Bar Association, which is the largest voluntary membership organization of legal professionals in the United States, consisting of more than 400,000 members from all 50 states, the District of Columbia, and other jurisdictions, I am writing to share our concerns about pending legislation that would repeal the Affordable Care Act (ACA) and – whether or not a partial replacement is adopted – potentially make significant changes to Medicaid. We urge you to maintain strong support for Medicaid in Senate legislation on health care reform because of the importance of this program to our nation’s most vulnerable populations.

The ABA has long recognized the financial burden and responsibility of maintaining the Medicaid program, as well as the need for innovation in shaping more cost-effective health care systems. But we strongly oppose structural or financial changes in the Medicaid program that would weaken the current entitlement nature of the program or the shared legal obligation that the federal and state governments have to provide comprehensive benefits to all individuals who meet eligibility criteria.

The proposal to repeal the ACA is expected to increase the number of uninsured Americans and increase health care costs—especially for older adults with low incomes or pre-existing conditions and children who comprise a significant proportion of the Medicaid program (43% of all Medicaid enrollees), but cost very little to treat (19% of Medicaid spending). ACA repeal could have a devastating effect on our senior population and struggling families, as well as adults and children with disabilities. In fact, the Congressional Budget Office (CBO) reported that the Senate bill would increase the number of people who are uninsured by 22 million in 2026 relative to the number under current law, sligher fewer than the increase in the number of uninsured estimated for the House-passed legislation.

Medicaid is a lifeline for millions of low-income seniors, children, and parents in the United States who cannot otherwise afford quality health care, including preventative care. Significant cuts could impact a large swath of vulnerable Americans across the country, including those who have already spent down their resources paying out of pocket for long-term care and who rely on Medicaid for critical home- and community-
based services, nursing home care, or other services for a family member with disabilities. Medicaid covers two out of every three nursing home residents, and, with nursing home care costing about $100,000 a year in some states, seniors often quickly run through their life’s savings before turning to Medicaid.

We oppose the conversion of federal funding for Medicaid into block grants and per capita caps on federal contributions. Under per capita caps, the federal government would provide states with a fixed, limited payment based on a preset formula. This proposed formula would inevitably fail to reflect differing service needs among states and their residents during fluctuating periods of economic growth and recession, as well as the real growth in long-term care costs.

Converting the cost index from CPI-Medical to CPI-Urban in 2026, as some reform proposals would require, only accelerates the deficiencies in funding down the road. The latter typically rises more slowly than medical costs. Thus, after 2025, the increases to Medicaid would no longer keep pace with the expanding gap each year. After a decade or two, that discrepancy would add up to of hundreds of billions of dollars, leading states inevitably to cut health services to this vulnerable population.

Per capita caps are also likely to provide uneven funding to states. This unequal distribution could mean vastly different federal contributions as a result of spending variations on policy choices, demographics, population health, and provider market competition. Fixed caps would result in perverse incentives by penalizing both efficient states with low spending per person, as well as states with higher than average growth rates. Given the Medicaid spending cuts that could result from ACA repeal, states may struggle with the greater risks they will be forced to bear, and some states may fare worse than others.

While a per capita cap structure would make it easy for the federal government to dial down Medicaid growth rates to achieve savings, this in turn will shift added burdens onto the states. There is no reason to believe that currently proposed growth rates in spending would remain stable. This burden shift will therefore likely lead states to ration care by reducing services and provider payments. Additionally, allowing the states to apply for a waiver that would permit insurance plans to deny coverage for pre-existing conditions would be but one example of such rationing. Removing the obligation to allow for portability of health insurance without regard for pre-existing conditions would undo what was a valuable bipartisan requirement dating back to 1996.

Home- and community-based services (HCBS), which are not covered by Medicare or private health insurance, enable older Americans and people with disabilities to stay in their own homes. HCBS are cost-effective and help keep families together. But these vital services are at greatest risk of major cuts because they are optional under Medicaid, whereas nursing home care is mandatory. On average, Medicaid dollars support nearly three older people and adults with disabilities with HCBS for every one person in a nursing home.
Repeal of the ACA would end the supplemental Federal Medical Assistance Percentage for the Community First Choice (CFC) state option (§ 1915(k) of the ACA). This will further reduce access to HCBS. The ABA believes that Congress should expand the availability of HCBS as a cost-effective long-term option by, among other things, making HCBS mandatory under Medicaid, available to anyone who would otherwise qualify for institutional long-term care. Reducing CFC funding undermines the current, extremely beneficial, trend toward expanded HCBS.

Cutting Medicaid could also devastatingly diminish health care coverage for children, including those with disabilities who depend on the healthcare infrastructure that Medicaid supports to access services in their communities. Of the 73.8 million children living in the United States, 30 million have health care coverage through Medicaid. Proposals to cut Medicaid and dismantle that system of health care could harm roughly four out of every ten children in the United States.

Medicaid coverage is particularly important for survivors of violence, who are more likely to be living with chronic pain and other chronic health conditions that require continuing screening and services. According to the Centers for Disease Control and Prevention, one out of four women in the United States has experienced severe physical violence by an intimate partner during her lifetime, with 70 percent of victims first experiencing abuse before the age of 25. Nearly 23 million women have been the victim of rape or attempted rape in their lifetimes, with 40 percent experiencing the assault before the age of 18. Many survivors also struggle with mental and behavioral health consequences stemming from their abuse.

Recently, the Administration proposed reducing growth rates to cut Medicaid by an additional $610 billion. These cuts would leave giant holes in state budgets, forcing them to choose between health care funding and other vital services such as education and emergency responders.

Our concerns about Medicaid per capita cap also include the following:

- The caps fail to account for the growing aging population and the fact that seniors aged 85+ have 2½ times higher Medicaid costs than people aged 65-74, resulting in higher costs per person that will dangerously stretch state budgets. The 85+ population is the nation’s fastest growing age group and is projected to triple by 2050.

- Proposed Medicaid cuts will likely result in significant job losses and reduced wages for health and long-term care workers and correspondingly lower economic growth. Many of the estimated 4.4 million nursing facility and home care workers that Medicaid pays for would lose their jobs or have their salaries cut. Indeed, Moody’s Investors Service recently concluded that cuts would negatively affect the credit ratings of many states.
• Medicaid costs per beneficiary are much lower than costs for private insurance and have been growing slower than under private employer coverage. For example, CBO also recently lowered its 2010 Medicaid spending projection for 2011-2020 by $311 billion, or 9.3%.

In summary, if implemented, proposals to repeal the Medicaid expansion will harm the most vulnerable portions of our population, including parents and children, the elderly, victims of violence, and people with disabilities. The expansion of Medicaid under the ACA provides health security to 11 million previously uninsured Americans in 31 states, including about 1.6 million older adults aged 50-64, who struggle to find affordable coverage.

We appreciate your consideration of these comments and look forward to working with you and your colleagues to positively impact the health and long-term care of Americans and their families. If the ABA can provide any additional information, please contact ABA Governmental Affairs Legislative Counsel David Eppstein, at 202-662-1766 or david.eppstein@americanbar.org.

Sincerely,

Thomas M. Susman

cc: The Honorable Chuck Schumer, Senate Minority Leader