September 9, 2024

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
7500 Security Boulevard
Baltimore, MD 21244-1850.

RE: Medicare and Medicaid Programs: Medicare Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems; Individuals Currently or Formerly in Custody of Penal Authorities; Revision to Medicare Special Enrollment Period for Formerly Incarcerated Individuals (CMS-1809-P)

Dear Administrator Brooks-LaSure,

Thank you for the opportunity to provide comments on the Center for Medicare & Medicaid Services' (CMS) CY25 Medicare Outpatient Prospective Payment System proposed rule (CMS-1809-P). The undersigned 117 organizations strongly support the proposal to revise Medicare's custody definition and the Special Enrollment Period (SEP) for formerly incarcerated individuals. 42 C.F.R. §§ 411.4(b)(3), 406.27(d), 407.23(d). These modifications will advance health equity and expand access to high quality and affordable coverage and care for hundreds of thousands of older adults and people with disabilities who are living in the community under supervised release following incarceration, and will make Medicare more consistent with Medicaid and with commercial health insurance.

In 2022, there were at least 340,000 people ages 65 and older on probation and parole. In addition, there are some number of individuals who meet Medicare's current custody definition while living in the community, such as those on bail or home detention, and an additional number under age 65 who may be eligible for Medicare due to disability. Individuals in these conditions who are not currently able to access Medicare benefits but do not qualify for Medicaid could face significant health care costs, needing to either pay out-of-pocket or find other insurance. This harms individuals who must delay or forgo treatment, or who cannot access specialists. Individuals who are dually eligible for Medicare and Medicaid are also impacted if records show they are enrolled in Medicare even when Medicare isn't paying for coverage, leading to Medicaid coverage denials. They may also need to switch providers and treatment plans upon completing parole or similar circumstances that denied them access to Medicare or the SEP.

The broad Medicare custody payment exclusion has a particularly significant impact on the ability of individuals with substance use disorders to access health care. Drug overdose death is the leading cause of death after release from prison, and studies suggest that recently incarcerated people are 10-40 times more likely to die from an overdose than the general public. Approximately 65% of the United States prison population has an active substance use disorder and another 20% were under the influence of alcohol or drugs at the time of their crime. When these individuals are released from the correctional facility, it is critical that they have insurance to pay for care so that they can continue substance use disorder and any other treatment they received while incarcerated or initiate medically necessary treatment. Over 4.6 million adults ages 65 and older have a substance use disorder. We commend CMS for its work over the past several years to improve access to substance use disorder treatment for people with Medicare, including developing strong coverage and payment policies for

opioid treatment programs, office-based substance use disorder treatment, addiction counselors, and intensive outpatient treatment. Older adults and people with disabilities who have been released from incarceration need access to these lifesaving benefits, and these proposed changes would support the Administration's Unity Agenda to beat the overdose epidemic and CMS's Behavioral Health Strategy.

We strongly support CMS's proposal to narrow Medicare's custody definition to no longer include individuals on bail, parole, probation, and home detention. The new proposed definition will promote successful reentry and community integration for people in the criminal legal system. Research has shown that health coverage and access to care, including for those with unaddressed substance use and mental health conditions, has a positive impact on recidivism. For example, a study examining the impact of the Medicaid expansion on arrest rates found that Medicaid expansion produced a 20-32% decrease in overall arrest rates in the first three years, with the largest negative differences (25-41%) for drug arrests. Another study found increased access to Medicaid after incarceration led to lower re-incarceration rates, higher employment rates, and higher earnings. Thus, ensuring people who are eligible for Medicare and under community supervision can enroll in and use Medicare coverage should also decrease the likelihood of re-arrest and re-incarceration.

We further support CMS's proposal to revise the eligibility criteria for the special enrollment period (SEP) for formerly incarcerated individuals so that people under community supervision can enroll in Medicare. We respectfully request that CMS ensure that individuals who were or are released from incarceration under conditions that prevent or hinder their access to the current SEP between the initial implementation of the SEP (January 1, 2023), and the effective date of this proposed rule have an opportunity to enroll in Medicare coverage as well with equitable relief, either by expressly including overlapping effective dates or by establishing an instruction for local Social Security Administration offices.

In response to CMS's specific requests for comments, we offer the following recommendations:

- **Explicit Statement**: We encourage CMS to explicitly state in the regulatory text that individuals on bail, parole, probation, or home confinement are not considered to be in custody, as this would provide much needed clarity to individuals, providers, and advocates who are navigating these circumstances.
- **Pre-Trial Release**: We encourage CMS to remove the proposed exclusion of individuals under arrest ((§ 411.4(b)(3)(i)) as it is overly broad, insofar as it could encompass people who are on bail or pre-trial release and whose services are not covered or provided by a carceral setting. To the extent that the population CMS is trying to exclude are those that are confined to jail, that population is already represented in the § 411.4(b)(3)(ii).
- **Halfway Houses**: We encourage CMS to adopt Medicaid's interpretation and approach to individuals residing in halfway houses. If individuals have "freedom of movement," they should be entitled to have Medicare pay for their care.

Thank you for your commitment to advancing health equity and expanding access to quality and affordable care for individuals who are reentering and living in the community following incarceration.

Sincerely,

Addiction Policy Forum
Aging Life Care Association

AIDS Foundation Chicago
Alabama Appleseed Center for Law & Justice
American Academy Of Addiction Psychiatry
American Civil Liberties Union
American Foundation for Suicide Prevention
American Geriatrics Society
American Medical Association
American Muslim Health Professionals
American Psychiatric Association
American Society of Addiction Medicine
Anxiety and Depression Association of America
Asian & Pacific Islander American Health Forum
Association of University Centers on Disabilities
Autistic Self Advocacy Network
Banana Kelly Inc
BestSelf Behavioral Health Inc
Brooklyn Community Services
California Consortium of Addiction Programs & Professionals
California Elder Justice Coalition
California Pan-Ethnic Health Network
CalPACE
CASES
Caz Recovery
Center for Medicare Advocacy
Clarity Wellness
Clinical Social Work Association
Coalition for Asian American Children and Families
Colorado Consumer Health Initiative
Community Access
Community Advocacy Resource Enterprise U-CARE
Community Catalyst
Community Legal Services of Philadelphia
Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces
Council of State Governments Justice Center
Community Service Society New York
Disability Belongs
Disability Rights Education and Defense Fund (DREDF)
Diverse Elders Coalition
Dream.org
Drug Policy Alliance
Empire Justice Center
Edwin C Chapman MD PC
Epilepsy Foundation
Faces & Voices of Recovery
Florida Justice Center
Gerontological Society of America
Global Alliance for Behavioral Health and Social Justice
Greater Mental Health of New York

Health Care for All New York (HCFANY)
HIV Medicine Association
Housing Works
International Certification and Reciprocity Consortium (IC&RC)
Illinois Alliance for Reentry and Justice NFP
Innocence Project
Institute for Responsive Government
International Community Justice Association
Justice in Aging
Kelly Street Block Association
Lawyers for Good Government
League of United Latin American Citizens (LULAC)
Legal Action Center
Maine Prisoner Advocacy Coalition
Make the Road NY
Massachusetts Law Reform Institute
Medicare Rights Center
NAADAC, the Association for Addiction Professionals
NASTAD
National Advocacy Center of the Sisters of the Good Shepherd
National Alliance on Mental Illness
National Association for Behavioral Healthcare
National Association of Addiction Treatment Providers
National Association of Councils on Developmental Disabilities
National Association of County Behavioral Health and Developmental Disability Directors
National Association of Social Workers
National Association of State Mental Health Program Directors
National Behavior Health Association of Providers
National Center for Advocacy and Recovery, Inc.
National Center for Medical-Legal Partnership
National Consumer Voice for Quality Long-Term Care
National Council for Mental Wellbeing
National Council on Alcoholism and Drug Dependence-Maryland Chapter
National Disability Rights Network (NDRN)
National Health Law Program
New Hour Long Island
New Jersey Association of Mental Health and Addiction Agencies, Inc.
New York Presbyterian Columbia
New York State Council for Community Behavioral Healthcare
NYC Against Segregated Healthcare (NYCASH)
One Touch Ministry, Inc.
Overdose Prevention Initiative at the Global Health Advocacy Incubator
Pinnacle Community Services
Public Justice Center
REDF
Reentry Working Group
Religious Society of Friends (Quakers), Brooklyn Monthly Meeting
Safe & Just Michigan

ServiconCares
Shriver Center on Poverty Law
St. Mary's Center
StoptheDrugWar.org
TASC (Treatment Alternatives for Safe Communities)
Technical Assistance Collaborative, Inc.
The Alliance for Positive Change
The First 72+
The Fortune Society
The Kennedy Forum
The Legal Aid Society (New York City)
The Leukemia & Lymphoma Society
Transgender Law Center
Treatment Communities of America
Triple Track Treatment
United Church of Christ
Vivent Health
Western Center on Law and Poverty
Women on the Rise GA