

# MAILING IT IN: DUE PROCESS REQUIRES TECHNOLOGY- DRIVEN SAFEGUARDS IN PUBLIC BENEFITS

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## ABSTRACT

*Due process in safety net public benefit programs requires agencies to employ modern technology in providing notice that is reasonably likely to reach participants. The Supreme Court has held that due process is dependent on the time, place, and circumstances in which it operates. Scholars have further argued that due process is adaptable to changing facts and circumstances over time. Yet, mailed paper notices remain the standard in providing notice to participants in public benefit programs.*

*Living in poverty today looks significantly different than it did nearly fifty years ago at the time of Mathews v. Eldridge, where the Court established the balancing test for adequate notice in such programs. Low-income individuals today face more unstable housing and other stressors that affect health and mental wellbeing, all of which create more extreme constraints on their time, and which make receiving and responding to a mailed notice difficult. Individuals' and agencies' use of technology has also rapidly increased. By examining a sample of public benefit programs across three states, it becomes clear that the existing notice is inadequate and additional procedural safeguards are due.*

*Thus, given the changed circumstances, as well as the reasonable capabilities of modern government agencies, reweighing the Mathews factors today would find mailed-only notices constitutionally inadequate and demand some form of electronic notice, such as email and text message. A "reasonably available technology" test may be the appropriate new baseline for evaluating the adequacy of a chosen mode of sending notices.*

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## INTRODUCTION

Scholars have argued that due process is adaptable not only to the context to which it is applied, but also to changing facts and circumstances over time. Some have argued that due process requires updating procedural safeguards in the administration of anti-poverty safety net public benefits<sup>1</sup>—specifically around hearings. Others have argued for the expansion of notice by electronic means as an adequate substitute for

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<sup>1</sup> In this note, the term “public benefits” is used narrowly to refer to programs that target individuals based on their income and provide assistance meeting basic needs to support their survival, such as food (e.g., Supplemental Nutrition Assistance Program), housing (e.g., Housing Choice Vouchers), and health care (e.g., Medicaid). These programs are in contrast to those that target all individuals regardless of income, such as Social Security’s retirement and disability benefits, which can also be considered “safety net” benefits, but are not specifically targeted to those in or near poverty despite their important role in keeping individuals out of poverty. See, e.g., Kathleen Romig, *Social Security Lifts More People Above the Poverty Line Than Any Other Program*, CTR. ON BUDGET POL’Y PRIORITIES, <https://perma.cc/D85Z-3R5Y> (last updated Jan. 31, 2024).

traditional means of delivery. However, there has yet to be an extensive look at whether due process *requires* sending notices via modern technology in public benefit programs.<sup>2</sup> This note builds on the scholarship in this area, focusing on the changing circumstances of poverty, technology usage, and the practical capabilities of contemporary administrative agencies. It argues that, to meet constitutional requirements, the delivery of notice in public benefit programs must be updated to employ modern technology to be reasonably likely to reach applicants and enrollees.

Since *Goldberg v. Kelly* was decided in 1970, modern due process in the administration of safety net programs that help people meet their basic needs—where a person’s very survival is at stake—has required providing individuals timely and adequate notice of administrative decisions and an opportunity for a hearing before such changes take effect.<sup>3</sup> This seemingly simple dictate belies the complexity and variety of administrative procedures across a range of agencies, states, and counties. For each safety net program—such as food subsidies, health insurance, housing vouchers, assistance with paying for utilities, and cash assistance, among several others at the federal level—some procedures are statutorily defined, some have been promulgated by the agency tasked by Congress

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<sup>2</sup> See Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1317, 1361, 1363-64 (2012) (arguing due process requires different things at different times under different circumstances, and due process has already evolved in some areas, such as in personal jurisdiction); see also Yvonne A. Tamayo, *Are You Being Served?: E-mail and (Due) Service of Process*, 51 S.C. L. REV. 227, 257 (2000) (“As methods of communication improve and individual mobility increases, mechanisms for serving process should evolve to allow for more convenient methods of serving process on a defendant . . . .”); Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1281 (2008) (evaluating the rise of automated decision making and noting deficiencies in adequate notice fueled by the use of technology); Ronald J. Hedges et al., *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4 FED. CTS. L. REV. 55, 74 (2010) (arguing that electronic service of process should be treated as an equal to paper media by the Federal Rules of Civil Procedure); Sovereign Hager & Ty Jones, *What Does Due Process Mean for State Notices on Receiving Public Benefits?*, 2016 CLEARINGHOUSE REV. 1, 7 (2016) (noting that states are moving to electronic notices for public benefit programs and that due process requirements on paper notices also apply to electronic ones); Christine P. Bartholomew, *E-Notice*, 68 DUKE L.J. 217, 238 (2018) (providing a roadmap for how courts could embrace evolving due process by providing new modes of notice to potential members in a class action); Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1139 (2019) (discussing agencies’ experimentation with electronic notices in SNAP benefits). *But see* Matthew R. Schreck, *Preventing “You’ve Got Mail”™ From Meaning “You’ve Been Served”*: *How Service of Process by E-Mail Does Not Meet Constitutional Procedure Due Process Requirements*, 38 J. MARSHALL L. REV. 1121, 1146 (2005) (arguing “[c]ourts should continue to prefer traditional methods of service to non-traditional methods”); Robin J. Effron, *Taking Notice and Service of Process Digital*, BROOK. L. LEGAL STUDIES PAPER NO. 741, 111, 116-17 (Markus Ludwigs et al. eds., 2023) (arguing that, while allowing electronic service of process has advantages, it also has several drawbacks).

<sup>3</sup> *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

with implementing the program, some procedures are defined at the state and county level, and some are merely unwritten practices that have been adopted by front-line workers over time. Not every procedure involved in the administration of programs potentially deprives individuals of benefits. But for ones that do—when an agency denies, decreases, or terminates benefits—it must comport with the Constitution’s requirements.

Whether an agency’s exact process meets the test was not answered in *Goldberg*, but rather in *Mathews v. Eldridge* where the Supreme Court set forth a balancing test to evaluate the constitutionality of specific procedures.<sup>4</sup> Both before and since *Mathews*, the Court has maintained that due process is dependent on the time, place, and circumstances in which it operates.<sup>5</sup> Moreover, what process is due to individuals *changes* with the dictates of changing circumstances. We need to look no further than the differing outcomes of *Goldberg* and *Mathews* to see how the Court molds the requirements of due process to different circumstances.<sup>6</sup> There is also ample evidence in the Court’s precedents that the requirements of due process change over *time*. Outside the context of public benefits, requirements have changed over time in other arenas, such as with the development of personal jurisdiction. What started as a requirement to be physically present in a state under *Pennoy v. Neff* evolved into a minimum contacts test in *International Shoe Co. v. Washington*.<sup>7</sup> By contrast, procedural due process when it comes to public benefits has yet to evolve.

This note builds on previous scholarship that has convincingly argued that administrative due process in safety net benefits is adaptable to changing times.<sup>8</sup> It starts with the premise that the Court *may* reweigh *Mathews* factors as facts and circumstances change, and then turns to the questions of *whether* and, if so, *how* current administrative procedures are required to change.

Although *Goldberg*’s central focus was the timing of the fair hearing, it also reiterated the due process requirement—deeply rooted in the history and tradition of the United States and Court precedent—that, before a deprivation of property on an individualized basis, the government must give “timely and adequate notice.”<sup>9</sup> The Court has repeatedly reaffirmed

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<sup>4</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

<sup>5</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951); *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991).

<sup>6</sup> *Compare Goldberg*, 397 U.S. at 264 (finding that due process requires a pre-termination hearing for welfare benefits), *with Mathews*, 424 U.S. at 340-43 (finding that due process does not require a pre-termination hearing for disability benefits).

<sup>7</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (partially quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *Pennoy v. Neff*, 95 U.S. 714, 723-24, 733 (1877).

<sup>8</sup> See Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1317 (2012).

<sup>9</sup> See *Goldberg*, 397 U.S. at 267.

that notice should look different depending on the context. In the context of safety net public benefits—government programs serving those in poverty to help them meet their basic needs—notice has generally taken the form of sending a letter in the mail.<sup>10</sup> While there are exceptions, and many agencies have more recently adopted electronic notice as optional alternatives in certain cases, mailed notices remain the standard and, importantly, the default.<sup>11</sup>

Yet living in poverty today looks significantly different than it did fifty years ago. The way people of all income levels communicate has rapidly changed. Rich and poor individuals alike have access to cell phones, smartphones, and high-speed Internet, either at home, at work, or in a public setting. Furthermore, government agencies themselves have the capability to reach program applicants and participants electronically. Reweighing the *Mathews* factors against this backdrop of modern poverty and the existing technological capabilities of government agencies, it is clear that the current practice of sending mailed notices without an electronic counterpart is constitutionally inadequate. By examining the statutory and regulatory requirements of the programs, as well as reviewing a sample of how government agencies are implementing them, this note illustrates the ability of—and reality of—agencies to go above and beyond mailed notices. This is a crucial question for evaluating the burden of requiring additional administrative procedures, such as simultaneous electronic notice. By taking a broad look at both the environment and behavior of individuals living in poverty, the inadequacy of current procedures becomes clear.

Part I of this note reviews the history of notice requirements as it relates to due process. First, it reviews the baseline of *when* notice is due under the Fifth and Fourteenth Amendments. Although perhaps not revelatory for those familiar with the topic, this review serves to lay the groundwork for the meaning of “notice” in the context of this note. Next, we look at the Court’s precedents in terms of *what* notice is due. While the Court does not provide a detailed list of the attributes that make notice adequate, it has been able to identify when notice has fallen short in meaningful ways and shows its willingness to adapt due process to different circumstances. Lastly, this part examines notices that have been required in public benefits administration in particular.

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<sup>10</sup> See, e.g., W. CTR. ON L. & POVERTY, RETURN TO SENDER: HOW AN UNRELIABLE MAIL SYSTEM HARMS CALIFORNIANS LIVING IN POVERTY 22 (2023) (on file with CUNY Law Review).

<sup>11</sup> See, e.g., Dep’t of Agric., Food and Nutrition Serv., *Electronic Notice Waivers and Options*, (Nov 3, 2017), <https://perma.cc/PQ8Z-SMBH>; Bartholomew, *supra* note 2, at 223.

Part II looks at the administration of three major programs—Medicaid, the Supplemental Nutrition Assistance Program, and Housing Choice Vouchers (focusing on waitlists)—across three states as illustrative of safety net benefits overall, each helping low-income individuals meet different basic needs. Although these three programs are quite different, the consequences of missing notices from any of them are similar in that the household’s “situation becomes immediately desperate.”<sup>12</sup> This part concludes by examining the deficiencies in the programs’ notice practices.

The context of poverty has dramatically changed since the tests in *Goldberg* and *Mathews* were adopted. These changes must be taken into account in evaluating what notice is due to individuals in public benefit programs. Part III walks through the changing norms of housing instability and involuntary mobility, technology access and usage, and the lack of time and cognitive bandwidth among low-income individuals across the United States.

Part IV examines how state and local governments have already been incorporating some technology into their processes, meeting low-income individuals where they are. These changes showcase the dramatically different capabilities of government agencies in the 2020s to reach individuals as compared to their capabilities in the 1970s. Lastly, this Part argues that, given the changed facts and circumstances of poverty as well as the reasonable capabilities of modern government agencies, reweighing the *Mathews* factors would find mailed-only notices constitutionally inadequate and would demand some form of electronic notice in addition to traditional notice. This note concludes by offering a *reasonably available technology* test as a new baseline for evaluating the adequacy of a chosen mode of sending notices.

## I. NOTICE AND THE CONSTITUTION

Providing notice to a person before denying life, liberty, or property has been recognized as an integral part of due process under the Fifth and Fourteenth Amendments<sup>13</sup> to the Constitution since the time of their adoption. Yet what exactly constitutes *adequate* notice in the context of due process has been disputed for just as long.<sup>14</sup> The Supreme Court requires

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<sup>12</sup> *Goldberg*, 397 U.S. at 264.

<sup>13</sup> U.S. CONST. amend. V, § 1; *id.* amend. XIV, § 1.

<sup>14</sup> *See, e.g.*, *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 710 (1884) (finding notice to be adequate where statute implementing a tax on property prescribed the time when complaints could be heard); *Connecticut v. Doeher*, 501 U.S. 1, 23 (1991) (holding statute authorizing prejudgment attachment of real estate without prior notice or a hearing violates due process requirements).

the government to notify individuals *before* the denial in some contexts while simultaneously recognizing in other cases that merely having the opportunity for a hearing *after* the fact is sufficient.<sup>15</sup> It has also held that notice may be skipped entirely in the case of a generalized change in government policy that is not targeted to an individual.<sup>16</sup> However, when the government acts on an individualized basis in a way that affects the interests protected under the due process requirements, notice and an opportunity for a hearing—either before or after the government’s action—are baseline requirements.<sup>17</sup> This part reviews when notice is required, what form and substance it must take, and what notice looks like in the context of means-tested safety net public benefits.

A. *When and What Notice Is Due*

The Supreme Court has long recognized the role that notice plays in due process, which is required when the government acts in a way that affects a specific person who would suffer a “grievous loss,”<sup>18</sup> regardless of whether there is a “right” or “privilege” at stake.<sup>19</sup> When such a loss would result, the Court has recognized that “notice and opportunity for hearing” are the minimum requirements.<sup>20</sup> The Court has recognized that notifying a person before an action against them is final is a key component of due process, not just at common law, but also of the “principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result.”<sup>21</sup>

When due process requires notice, the Court has been clear that it must be more than performative or a “mere gesture.”<sup>22</sup> What constitutes “adequate” notice is essentially on a spectrum; in some situations, no practical notice may even be possible.<sup>23</sup> But when it is, the Court prefers

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<sup>15</sup> Compare *Goldberg*, 397 U.S. at 261-62 (holding due process requires an adequate hearing before termination of welfare benefits), with *Mathews*, 424 U.S. at 348-49 (“[A]n evidentiary hearing is not required prior to the termination of disability benefits”).

<sup>16</sup> See, e.g., *Spencer v. Merchant*, 125 U.S. 345, 356 (1888); *Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441, 445-46 (1915).

<sup>17</sup> *Londoner v. Denver*, 210 U.S. 373, 385 (1908); see generally, *Twining v. New Jersey*, 211 U.S. 78 (1908) (discussing fundamentals of due process, including notice and opportunity to be heard).

<sup>18</sup> *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 168.

<sup>19</sup> *Graham v. Richardson*, 403 U.S. 365, 374 (1971).

<sup>20</sup> *Twining*, 211 U.S. at 111.

<sup>21</sup> *Lafayette Ins. Co. v. French*, 59 U.S. 404-5 (1856).

<sup>22</sup> *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950).

<sup>23</sup> See *Tamayo*, *supra* note 2, at 244-46 & n.131 (discussing British case that allowed for email notice based on English Rules of the Supreme Court).

it.<sup>24</sup> It has repeatedly<sup>25</sup> reinforced that “what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.”<sup>26</sup> Thus, the content, timing, and format of adequate notice depends entirely on the circumstances.

The Court has provided few specifics around what notice is adequate in different contexts. To the extent that the Court has clarified what adequacy means, it has focused on content and timeliness of notice rather than the mode of delivery.<sup>27</sup> The Court has said that notice need not be particularly detailed to be adequate, but it should contain enough information to be actionable.<sup>28</sup> For example, in *Memphis Light, Gas & Water Division v. Craft*, the Supreme Court held the utility company missed the mark when it cut off service without clearly informing individual customers of their right to a hearing that could resolve their dispute with the gas company prior to termination. The Court explained that the “purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing.”<sup>29</sup> So while “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation,”<sup>30</sup> a process that fails “to provide notice reasonably calculated to apprise [recipients] of the availability of an administrative procedure” is generally inadequate.<sup>31</sup>

Although the concept is malleable, there are some fundamentals that seem to make up the baseline of what counts as adequate: notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>32</sup> The “means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”<sup>33</sup> To this end, the Court has set out the underlying “desire-to-inform” standard for determining when a chosen method is

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<sup>24</sup> *Mullane*, 339 U.S. at 317-18.

<sup>25</sup> See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.”).

<sup>26</sup> *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

<sup>27</sup> Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1130 (2019) (discussing modern jurisprudence around governmental notice).

<sup>28</sup> *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978).

<sup>29</sup> *Id.* (internal quotations omitted).

<sup>30</sup> *McElroy*, 367 U.S. at 895.

<sup>31</sup> *Memphis Light*, 436 U.S. at 22.

<sup>32</sup> *Mullane*, 339 U.S. at 314.

<sup>33</sup> *Id.* at 315.



constitutionally valid: notice must be “reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.”<sup>34</sup> At the very least, whatever notice looks like, it needs to be reasonably designed to reach the intended target. The reasonability standard means that the agency providing notice need not take extraordinary measures to reach people, but it should take reasonable ones.

Notices need not always be personally delivered to the individual affected when it is impracticable to do so in advance. Notice by publication or posting on real property has been a sufficient substitute for personal delivery for centuries.<sup>35</sup> For example, while the *Pennoyer* Court did not reach the adequacy of the notice at issue, it did not dispute that publication—publicizing information about the pending action in a newspaper of general circulation—was an acceptable form of notice in some cases,<sup>36</sup> even if the intended target individuals were unlikely to see it. As the Court later confirmed in *Mullane v. Central Hanover Bank & Trust Company*, “publication [is] a customary substitute . . . where it is not reasonably possible or practicable to give more adequate warning.”<sup>37</sup> Particularly in situations where personal service would be infeasible, such as with quiet title actions, notice by publication or by posting a notice on property satisfies due process.<sup>38</sup>

The Court seems to be more willing to identify when notice is inadequate. In *Mullane*, the Court held that notice by publication was inadequate when a bank needed to inform beneficiaries of a change in a trust because it had “the names and post-office addresses of those affected.” In other words, to “resort to means less likely than the mails to apprise them of [the] pendency” of the change was inadequate because they already had the beneficiaries’ contact information.<sup>39</sup> However, notice by publication is not appropriate where “under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at

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<sup>34</sup> *Id.*

<sup>35</sup> Jennifer L. Case, *Extra! Read All About It: Why Notice By Newspaper Publication Fails To Meet Mullane’s Desire-To-Inform Standard . . .*, 45 GEORGIA L. REV. 1095, 1109 & n.90 (2011) (discussing publication and posting as alternative methods of service); Tamayo, *supra* note 2, at 242-44 (describing circumstances where publication and posting are allowed); see *Pennoyer*, 95 U.S. at 719.

<sup>36</sup> *Id.* at 727 (“Substituted service by publication . . . may be sufficient to inform parties . . . in all actions which are substantially proceedings *in rem*.”).

<sup>37</sup> *Mullane*, 339 U.S. at 317.

<sup>38</sup> See Tamayo, *supra* note 2, at 244 n.119 (listing circumstances in which states have authorized notice by posting or publication).

<sup>39</sup> *Mullane*, 339 U.S. at 318.

hand.”<sup>40</sup> This calculation also considers the reasonable ability of the party to take more extensive action to inform the target; if it is relatively easy and inexpensive to provide notice to an individual in a way that is more likely to reach them, then that is what is required. When a mode of notice exists that is more effective and not significantly more burdensome than less effective alternatives, it is more likely the Court will require it. As the *Mullane* Court illustrated, postal notification—sending a letter by mail—is not a serious burden on entities needing to notify interested parties for whom they have or could readily obtain a mailing address.<sup>41</sup> Moreover, sending notice by mail, at least historically, has been effective at reaching people and, thus, courts have found it to be adequate, satisfying due process.<sup>42</sup> Although notices need not always be sent through the United States Postal Service (USPS) per se,<sup>43</sup> providing an individualized written instrument (e.g., a letter delivered to a person’s home or a paper posting on their property) is generally the means by which most notice is given to individuals in most administrative contexts even today. Courts have generally considered notice sent by mail and disseminated by publication as the “gold standards,” but they have shied away from allowing—or even prohibited—notice to be sent electronically in some contexts, such as in notifying potential class members.<sup>44</sup>

#### B. Notice Requirements in Public Benefit Programs

The purpose and nature of public benefits has meant that the due process requirements normally imposed on government actions are heightened. The seminal case laying the foundation for this is *Goldberg v. Kelly*, where the New York City Department of Social Services had an administrative regulation in effect that required caseworkers to notify a welfare recipient by mail when their benefits were to be terminated by sending a letter listing the reasons for the termination.<sup>45</sup> Within seven days, the participant was able to request that a higher official review the justification for termination and submit a written statement to rebut the

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<sup>40</sup> *Id.* at 319.

<sup>41</sup> Bartholomew, *supra* note 2, at 223 (discussing the holding in *Mullane* about when individualized notice is realistic).

<sup>42</sup> See also Jason Parkin, *Dialogic Due Process*, 1140 U. PA. L. REV. 1115, 1140 n.131 (2019).

<sup>43</sup> *Schroeder v. New York*, 371 U.S. 208, 210-11 (1962); see also *Greene v. Lindsey*, 456 U.S. 444, 452-53 (1982) (“[I]n most cases, the secure posting of a notice on the property of a person is likely to offer that property owner sufficient warning of the pendency of proceedings possibly affecting his interests.”).

<sup>44</sup> Bartholomew, *supra* note 3, at 223.

<sup>45</sup> *Goldberg*, 397 U.S. at 257-59.

claims against them.<sup>46</sup> If the reviewing official agreed with the termination, aid was then stopped immediately and the participant was informed by another letter.<sup>47</sup> Following this, the participant could then request a post-termination hearing.<sup>48</sup> The primary issue decided in *Goldberg* was “whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits.”<sup>49</sup> As noted previously, the denial of property does not always require notice and hearing beforehand. Yet, the Court pointed to the heightened concerns in the welfare context that make such pre-termination steps constitutionally required.<sup>50</sup> Quoting the Court in *Cafeteria Workers v. McElroy*, the *Goldberg* Court noted that “consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.”<sup>51</sup> In the context of welfare benefits, the private interests at stake are high because the individual receiving such benefits has, by definition, little to no other source of income. The Court differentiated welfare from other instances where the government terminates a private property-related interest by noting that “that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.”<sup>52</sup> While this interest must be balanced against the government’s interest in preventing the inappropriate use of public funds and its interest in a speedy adjudication so as not to waste time and additional money, a hearing before termination does not unduly burden the government—and it certainly does not outweigh the interests of the participant, who “lacks independent resources” making his situation “immediately desperate” upon losing that income.<sup>53</sup>

Later, the Court in *Mathews v. Eldridge* introduced a three-factor balancing test to determine when procedures for a given government action are inadequate and additional or substitute safeguards are required:

[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if

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<sup>46</sup> *Id.* at 259.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 259-60.

<sup>49</sup> *Id.* at 260.

<sup>50</sup> *Id.* at 263-64.

<sup>51</sup> *Goldberg*, 397 U.S. at 263 (quoting *Cafeteria & Rest. Workers Union*, 367 U.S. at 895).

<sup>52</sup> *Id.* at 264.

<sup>53</sup> *Id.* at 264-67.

any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>54</sup>

In contrast to *Goldberg*, the Court in *Mathews* determined in applying this test that recipients of Social Security disability payments do not have the same private interests as those receiving welfare aid.<sup>55</sup> Therefore, due process is satisfied even when a recipient has his benefits terminated before he has notice and a hearing, so long as he can contest it afterwards. According to the Court, the main difference between this case and *Goldberg* is that disability payments are based on the inability to work and not on income or need, putting the private interest at a lower level. In the Court's view, the disability recipient's potential economic desperation was only *possible* rather than *likely* compared with that of the welfare recipient, since the reason the latter is eligible for such a benefit is because of their lack of income and assets.<sup>56</sup>

However, beyond the difference in the reason for the aid provided, there was also a major procedural difference: whereas the welfare recipient was given seven days to respond to a termination notice in *Goldberg*, the disability recipient in *Mathews* would have received another two months of payments after the agency determined that benefits would be terminated.<sup>57</sup> In addition, the disability recipient would have been able to recover any payments retroactively if he were successful in demonstrating he still met the eligibility criteria for the program after being notified about the termination.<sup>58</sup> These factors, in addition to other evidentiary differences,<sup>59</sup> distinguished the cases. But it is not hard to see that had the facts been different—such as if the disability recipient in *Mathews* could have lost benefits upon seven-days' notice without the ability to receive payments retroactively—the Court may have decided differently.

Indeed, the Court has confirmed the central holding of *Goldberg* and applied it to other programs on which participants rely to meet basic needs. In *Atkins v. Parker*, for example, it did so in the food stamps context: “[s]uch entitlements are appropriately treated as a form of ‘property’ protected by the Due Process Clause; accordingly, the procedures that are employed in determining whether an individual may continue to participate in the statutory program must comply with the commands of the

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<sup>54</sup> *Mathews*, 424 U.S. at 335 (summarizing the holding in *Goldberg*, 397 U.S. at 263-71).

<sup>55</sup> *Goldberg*, 397 U.S. at 264; *Mathews*, 424 U.S. at 340-41.

<sup>56</sup> *Mathews*, 397 U.S. at 341-42.

<sup>57</sup> *Goldberg*, 397 U.S. at 268; *Mathews*, 424 U.S. at 338.

<sup>58</sup> *Mathews*, 424 U.S. at 339.

<sup>59</sup> *Id.* at 343-47.

Constitution.”<sup>60</sup> Given that the interests involved are the same as in *Goldberg*—basic subsistence—the property interests are roughly the same for all such public benefit programs and the similar procedural safeguards must therefore apply.

## II. THREE EXAMPLES: NOTICES IN PUBLIC BENEFIT PROGRAMS TODAY

The participation lifecycles of federal public benefit programs that support low- and no-income individuals illustrate the critical role that notice plays in enabling such individuals to successfully enroll and stay in programs to help them meet their basic needs. This Part looks at three examples: the Supplemental Nutrition Assistance Program (SNAP, formerly known as food stamps), Medicaid, and Housing Choice Vouchers (HCV, also known as Section 8 vouchers). (This note examines only tenant-based vouchers and not project-based vouchers.)

Most federal public welfare programs are administered at the state level, including Medicaid, SNAP, and HCV, but the details of states’ implementation vary in both major and minor respects.<sup>61</sup> States appear to have different goals in administering programs, with some states openly seeking to limit or decrease enrollment, while others working to increase enrollment to all who are eligible.<sup>62</sup> To understand these differences and divergent implementations, three states serve as helpful examples: California, a state that has actively attempted to expand access to the safety net for low-income households;<sup>63</sup> Alabama, a state that has actively tried to make it harder for low-income households to access benefits, such as by asking the Federal government to allow it to add additional eligibility requirements;<sup>64</sup> and Wisconsin, a state that has made strides in both directions in recent years, expanding eligibility and implementing additional requirements.<sup>65</sup> These three states are geographically, politically,

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<sup>60</sup> *Atkins v. Parker*, 472 U.S. 115, 128 (1985).

<sup>61</sup> See, e.g., Brian Stacy, et. al., *Using a Policy Index To Capture Trends and Differences in State Administration of USDA’s Supplemental Nutrition Assistance Program*, US DEP’T AGRIC. 3 (Feb. 2018), <https://perma.cc/SQ2K-TD33>; *Federal Requirements and State Options: How States Exercise Flexibility under a Medicaid State Plan*, MEDICAID AND CHIP PAYMENT AND ACCESS COMM’N 1 (Aug. 2018), <https://perma.cc/5TZ3-3WV7>; *Introduction to the Housing Voucher Program*, CTR. ON BUDGET POL’Y PRIORITIES (May 15, 2009), <https://perma.cc/NXB3-HZ7W>.

<sup>62</sup> *Id.*

<sup>63</sup> Dulce Gonzalez & Michael Karpman, *As California Expands Safety Net Eligibility for Immigrants, Community Organizations Are Playing a Pivotal Role*, URBAN INST. (Aug. 4, 2022), <https://perma.cc/2BWH-BA3A>.

<sup>64</sup> See generally STATE OF ALA., *Medicaid Workforce Initiative, Section 1115 Demonstration Application* (Sept. 10, 2018).

<sup>65</sup> See *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, KFF (Sept. 10, 2024), <https://perma.cc/FTW7-3QYQ>.

and demographically divergent, offering a small but illustrative snapshot of state programs across the United States.

For each of these example states and programs, this Part reviews the types of notices applicants and participants are entitled to receive and how states implement such statutory and constitutional notice requirements. We will then evaluate these notices for effectiveness and examine cases where such notices fall short. Lastly, we will review aspects of low-income individuals' lived experience that point to inadequacies in the way notices have traditionally been sent and find opportunities to provide more effective notice.

#### A. *Notices in SNAP, Medicaid, and HCV*

While there are certain baseline requirements set by the Federal government, the details of the procedural safeguards with respect to notice for SNAP, Medicaid, and HCV vary widely by state and county.

##### 1. SNAP

SNAP is a federally-funded program run at the state level that provides participants with money on a debit card that can only be used to buy certain SNAP-eligible foods.<sup>66</sup> Overall, only about 78% of individuals across the United States eligible for SNAP were enrolled as of 2020.<sup>67</sup> While this is significant, it also means that more than one in five eligible individuals are not enrolled (not to mention countless others who are food-insecure but not eligible). The reasons for this vary, but the logistics of applying and staying enrolled without a doubt play a significant role in the participation rate.<sup>68</sup>

To begin an application process under SNAP in general, individuals may submit just a name, address, and signature.<sup>69</sup> However, much more information is needed for a state or county agency to verify an applicant's eligibility, including their income, assets, and the citizenship or noncitizen status that makes them eligible.<sup>70</sup> The SNAP authorizing statute also contains provisions that enable an administering agency to run an online

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<sup>66</sup> *Policy Basics: The Supplemental Nutrition Assistance Program (SNAP)*, CTR. ON BUDGET POL'Y PRIORITIES (June 9, 2022), <https://perma.cc/2TK6-Z2Q5>.

<sup>67</sup> *Reaching Those in Need: Estimates of USDA's State Supplemental Nutrition Assistance Program (SNAP) Participation Rates in 2020 (Summary)*, FOOD AND NUTRITION SERV., U.S. DEP'T AGRIC. (Aug. 2023), <https://perma.cc/Z8T9-3K6H>.

<sup>68</sup> Joey Prestley & Sam Watson, *Federal Food Aid in Wisconsin has Evolved, but Users Still Face Decades-old Barriers*, WIS. WATCH, PBS WIS. (Aug. 8, 2022), <https://perma.cc/5XD9-WAB2>.

<sup>69</sup> 7 U.S.C. § 2020(e)(2)(B)(iv).

<sup>70</sup> *See id.* § 2020(e)(2)(B)(v)(II).

application and management system.<sup>71</sup> Agencies can also collect telephonic signatures—verbal assents over the phone—and conduct interviews telephonically.<sup>72</sup> The regulations are explicit that an “application” can be a paper record, an online application, or a telephone conversation.<sup>73</sup>

There are ten defined notices to individuals that state SNAP agencies are required to send to applicants and participants throughout the lifecycle of the application and enrollment process: termination, consolidated work requirements, denial, eligibility, expedited approval with postponed verification, expiration, interview scheduling, missed interview, requested verification, and required verification.<sup>74</sup> For notices that are for “adverse actions”—that is, actions such as a denial where the individual has the right to appeal—notice must be sent “at least 10 days from the date the notice is mailed to the date upon which the action becomes effective.”<sup>75</sup> There are certain exemptions to the notice timing requirements, such as when an agency believes, based on reliable information, that a participant has moved out of the service area.<sup>76</sup> Implicit in the SNAP regulations is the understanding that “reliable information” may include the fact that mail to the participant’s known address has been returned undeliverable,<sup>77</sup> even though this may have been the result of a person being evicted or otherwise becoming homeless despite still living within the service area. In these instances, an agency can terminate benefits immediately without notice.

SNAP also involves a scheme of monthly reporting requirements, although some participants are not required to report as frequently and states can opt to make its reporting requirements less onerous.<sup>78</sup> Participants in the program must report their income to state agencies to maintain enrollment.<sup>79</sup> However, states have significant flexibility in how to implement this (e.g., some implement a quarterly rather than monthly reporting system).<sup>80</sup> There is also a recertification process which generally occurs annually and includes another form of application and an interview.<sup>81</sup> During the recertification process, the agency verifies the

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<sup>71</sup> *Id.* §§ 2020(e)(C)(i), 2020(e)(16).

<sup>72</sup> *Id.* § 2020(e)(C)(i)(ii).

<sup>73</sup> 7 C.F.R. § 273.2(b)(1) (2024).

<sup>74</sup> *SNAP Model Notice Toolkit*, FOOD AND NUTRITION SERV., U.S. DEP’T AGRIC. (May 16, 2024), <https://perma.cc/KU9M-FYLE>.

<sup>75</sup> 7 C.F.R. § 273.13(a)(1) (2024).

<sup>76</sup> *Id.* § 273.13(b)(3).

<sup>77</sup> *Id.* § 273.13(c).

<sup>78</sup> *Id.* §§ 273.12(a)(1), 273.21(b).

<sup>79</sup> *Id.* §§ 273.21(h)(1)(ii)-(i).

<sup>80</sup> *Id.* §§ 273.12(a)(4), 273.21(b).

<sup>81</sup> *See* 7 C.F.R. §§ 273.14(b)(B)-(I).

information provided by the applicant, such as household income, and notifies the participant if they need to submit any missing information.<sup>82</sup> Agencies need only provide participants ten days to respond to a notice requesting such information.<sup>83</sup> While currently forty-six of fifty-three state agencies (including non-state jurisdictions) accept online applications from new applicants, only thirty-three states allow participants to recertify their benefits online.<sup>84</sup>

The Food and Nutrition Services (FNS), which administers SNAP at the federal level, provides clear guidance for content, comprehension, format, readability, and presentation of SNAP notices used throughout the program. FNS states in its guidance that, in general, a “good notice complies with SNAP policy and can be read easily, understood quickly, and used to take appropriate action.”<sup>85</sup> While the rule that notice must be sent by “Mail—Return Receipt Requested” was originally promulgated in 1978,<sup>86</sup> modern regulations allow for the delivery of notice by other means. For example, when an agency suspects an individual of intentionally violating SNAP program rules and wishes to terminate benefits, it must send a notice at least 30 days in advance of a disqualification hearing, and “[i]f mailed, the notice shall be sent either First Class mail or certified mail-return receipt requested. But the notice may also be provided by any other reliable method. If the notice is sent using First Class mail and is returned as undeliverable, the hearing may still be held.”<sup>87</sup> The agency does not specifically require notices to be sent electronically, but it does provide some guidance on how to present electronic notices if an agency chooses to do so.<sup>88</sup> It also offers worksheets and other materials to suggest that the deliverability of notices are an important performance indicator of program efficacy.<sup>89</sup>

In 2017, FNS issued nonbinding guidance for agencies administering SNAP encouraging them to allow applicants and participants to opt into electronic notices, and then send notices by the person’s preferred modality thereafter unless delivery fails.<sup>90</sup> For example, if a person opts in to

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<sup>82</sup> *Id.* §§ 273.21(j)(i)-(v)

<sup>83</sup> *Id.* § 273.14(b)(4).

<sup>84</sup> *Understanding the Use of SNAP Online Application*, FOOD AND NUTRITION SERV., U.S. DEP’T AGRIC. (July 23, 2024), <https://perma.cc/38JL-LVVL>.

<sup>85</sup> *Introduction to the SNAP Model Notice Toolkit*, FOOD AND NUTRITION SERV., U.S. DEP’T AGRIC. (May 16, 2024), <https://perma.cc/7X3U-5SN2>.

<sup>86</sup> 43 Fed. Reg. 47,877 (Oct. 17, 1978).

<sup>87</sup> 7 C.F.R. § 273.16(e)(3) (2024).

<sup>88</sup> *SNAP Model Notice Toolkit*, FOOD AND NUTRITION SERV., U.S. DEP’T AGRIC., <https://perma.cc/7X3U-5SN2> (last updated May 16, 2024).

<sup>89</sup> *See id.*

<sup>90</sup> Lizbeth Silbermann, *Electronic Notice Waivers and Options*, FOOD AND NUTRITION SERV., U.S. DEP’T AGRIC., <https://perma.cc/D527-68X5> (last updated Apr. 15, 2022).



receive electronic notices but the agency's email to the person bounces back, the agency must then resort to sending a mailed notice.<sup>91</sup> But, as discussed later, some agencies examined in this note simultaneously promote an online application system and also note that individuals should expect notices to be sent by mail. Since SNAP beneficiaries must use a physical Electronic Benefits Transfer (EBT) card to purchase food through the program, and the provision of an EBT card can happen fairly quickly (within thirty days, or a maximum of seven days in emergency cases where a person has little or no assets available with which to purchase any food<sup>92</sup>) there is a clear rationale for requiring a deliverable mailing address. However, agencies are also required to set up procedures to issue benefits to applicants who are homeless,<sup>93</sup> so mail delivery is not a practical requirement. Yet, as noted, eligibility for SNAP benefits must be recertified at least once annually, and notices are sent to applicants before expiration of benefits, so having a deliverable address later becomes a necessity.<sup>94</sup>

California's SNAP program, CalFresh, is operated at the county level.<sup>95</sup> As of 2020, about 66% of eligible state residents were enrolled in the program.<sup>96</sup> California enrollees receive \$196 on average in monthly benefits.<sup>97</sup> Individuals may apply for CalFresh through the same statewide online application system it maintains for Medi-Cal, its Medicaid program, but applications are processed at the county level.<sup>98</sup> Applicants also have a right to file "in writing" rather than electronically, although agencies are not required to accept applications electronically by email or fax.<sup>99</sup> For example, San Francisco's Human Services Agency accepts the traditional application document only by postal mail, in person drop-off, and by fax.<sup>100</sup> Similarly, Los Angeles County accepts traditional

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<sup>91</sup> *Id.* at 2.

<sup>92</sup> 7 U.S.C. §§ 2020(e)(3), (e)(9).

<sup>93</sup> 7 U.S.C. § 2020(e)(2)(B)(vi).

<sup>94</sup> 7 C.F.R. §§ 273.10(f)(1), (4) (2024).

<sup>95</sup> *CalFresh*, CAL. DEP'T SOC. SERVS., <https://perma.cc/66HJ-JP5V> (last visited Sept. 1, 2024).

<sup>96</sup> *SNAP Participation Rates by State, All Eligible People (FY 2020)*, FOOD AND NUTRITION SERV., U.S. DEP'T AGRIC., <https://perma.cc/548X-FNV9> (last visited Nov. 27, 2023).

<sup>97</sup> Lauren Hall & Catlin Nchako, *A Closer Look at Who Benefits from SNAP: State-by-State Fact Sheets*, CTR. ON BUDGET AND POL'Y PRIORITIES, (Feb. 13, 2023) <https://perma.cc/MWY8-SUZ7>.

<sup>98</sup> *Steps to Medi-Cal*, CAL. DEP'T HEALTH CARE SERVS., <https://perma.cc/X6FL-NSYX> (last visited Dec. 12 2024).

<sup>99</sup> 7 C.F.R. § 273.2(c)(1)(ii) (2024).

<sup>100</sup> *Apply for CalFresh*, S.F. HUM. SERVS. AGENCY, <https://perma.cc/2PVH-4QZ3> (last visited Nov. 11, 2023).

applications only by phone and in person.<sup>101</sup> California allows individuals to get CalFresh benefits under “expedited service,” which means they will receive aid within just three days in certain circumstances where an individual’s assets and income are at or nearly \$0.<sup>102</sup> California’s combined paper application form for CalFresh, Medi-Cal, and cash aid, in addition to the statewide online application, asks for an email address and whether the applicant wishes to receive information about their case by email.<sup>103</sup> Both this combined form and the state’s uniform CalFresh-only form ask if the applicant is homeless so that the administering agency may arrange for the delivery of notices to the individual through some other means rather than by mail.<sup>104</sup> Yet, while San Francisco plainly states that it will conduct the applicant interview process “by phone, mail, or electronic means whenever possible,” it will only commit to mailing the approval or denial, and appeals to a denial must be made by phone or by submitting a written document by mail to the Appeals Unit.<sup>105</sup>

Presumably to comply with the federal requirements that agencies must have procedures to best serve homeless individuals,<sup>106</sup> some California counties also hold benefits-related notices at agencies so that the intended recipient may pick it up himself. However, this service is not universal and its implementation varies. There is no clear data on the effectiveness of this service; those counties that do provide it keep records of mail they hold for intended recipients, but they do not keep track of whether the mail was picked up.<sup>107</sup>

Since 2013, California has formally allowed counties to send electronic notices pursuant to waivers approved by FNS.<sup>108</sup> These e-notifications, as prescribed in the state guidance to counties, are emails to CalFresh applicants and participants informing them that they have a pending notification within their online account, which they can view upon logging in.<sup>109</sup> Thus, e-notifications are actually notices *about* notices, which ensures that no sensitive case information is contained in email. For reasons that remain unclear, email is treated as less secure than

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<sup>101</sup> *Adults without Children*, L.A. CNTY. DEP’T PUB. SOC. SERVS., <https://perma.cc/C9UC-HNVX> (last visited Nov. 11, 2023).

<sup>102</sup> *Application for CalFresh, Cash Aid, and/or Medi-Cal/Health Care Programs*, CAL. DEP’T OF SOC. SERVS. 1 (Apr. 2015), <https://perma.cc/W42F-5VUE>.

<sup>103</sup> *Id.* at 1.

<sup>104</sup> *Id.* at 2.; *Application for CalFresh Benefits*, CAL. DEP’T OF SOC. SERVS. (Apr. 2021), <https://perma.cc/2KK2-LAV5>.

<sup>105</sup> S.F. HUM. SERVS. AGENCY, *supra* note 101.

<sup>106</sup> 7 C.F.R. § 273.2(a)(1) (2024).

<sup>107</sup> W. CTR. ON L. & POVERTY, *supra* note 10, at 28.

<sup>108</sup> *All County Letter No. 13-61*, CAL. DEP’T SOC. SERVS. (July 24, 2013), <https://perma.cc/7UKN-89ZA>.

<sup>109</sup> *Id.* at 1.

postal mail delivered to a mailbox.<sup>110</sup> To start receiving e-notifications, applicants and participants must opt in, at which point the agency sends them by postal mail a confirmation of having opted in to e-notifications.<sup>111</sup> Applicants and participants can also opt out of e-notifications at any time.<sup>112</sup> If an e-notification is undeliverable to the email address the agency has on file, the county is required to resend the notice by postal mail.<sup>113</sup> As written, the State of California's guidance appears to instruct counties that individuals must receive all electronic or all paper notices, but not necessarily both, although individuals may also proactively request a paper version of any document at any time.<sup>114</sup> It also specifically notes that "Notices of State Hearings to appeal adverse determinations] will not be sent electronically," which seems to defeat some of the benefit of electronic notices to begin with.<sup>115</sup>

Alabama's SNAP participation is somewhat higher than that of California: about 81% of eligible Alabama residents were enrolled in SNAP as of 2020.<sup>116</sup> Alabama households participating in the program receive about \$183 on average in monthly benefits.<sup>117</sup> Like California, Alabama has an online application for SNAP, and does not require an email address to use it.<sup>118</sup> The online system is statewide,<sup>119</sup> although the SNAP program itself is administered at the county level. However, in contrast to California, Alabama's traditional paper application for SNAP does not contain a form field for an email address, nor does it contain a field for the applicant to opt in to receive electronic notifications.<sup>120</sup>

Alabama sends notices by mail to applicants and program participants beginning at the initial interview stage in the enrollment process.<sup>121</sup> Consistent with the federal requirement to best serve applicants and

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<sup>110</sup> This notice-about-notices scheme is also common among state Medicaid electronic notification systems. However, this adds an unnecessary additional barrier to getting the information in notices to the intended recipient, requiring individuals to go through the hassle of keeping track of credentials and needing to login to view the content of notices. Since countless physical mailboxes are unsecured, reachable by anyone wishing to snoop on neighbors' mail, treating email as somehow less secure than physical mail is irrational.

<sup>111</sup> CAL. DEP'T SOC. SERVS., *supra* note 108, at 2.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> *Id.* at 3.

<sup>116</sup> FOOD AND NUTRITION SERV., U.S. DEP'T AGRIC., *supra* note 96.

<sup>117</sup> Hall & Nchako, *supra* note 97.

<sup>118</sup> MyDHR, ALABAMA.GOV, <https://perma.cc/4C2E-AA5W> (last visited Dec. 3, 2023).

<sup>119</sup> *Id.*

<sup>120</sup> *Food Assistance Application*, DEP'T OF HUM. RES., STATE OF ALA. 1 (May 2023) (on file with CUNY Law Review).

<sup>121</sup> *Food Assistance Division Frequently Asked Questions*, DEP'T OF HUM. RES., STATE OF ALA., <https://perma.cc/G9VE-WQBV> (last visited Nov. 11, 2023).

participants experiencing homelessness, Alabama has a written policy for helping participants who “do not reside in a permanent dwelling or of a fixed mailing address,” but it is nonspecific as to what that help entails on a county-by-county basis.<sup>122</sup> As noted, while Alabama’s paper application does not collect an email address, the application can be mailed, faxed, emailed, or delivered in person to county offices,<sup>123</sup> unlike in at least some California counties.

Wisconsin has a much higher participation rate than both California and Alabama, with 93% of all eligible residents enrolled in the benefit.<sup>124</sup> Wisconsin’s SNAP program is called FoodShare and is run at the consortium level, consisting of multiple counties and tribal organizations working together.<sup>125</sup> On average, households enrolled in FoodShare receive \$164 in monthly benefits.<sup>126</sup> The state has an online application portal streamlined similarly to that of California, whereby an individual can apply for multiple benefits at once in one application. Generally, participants can update their contact information, including their address, in the online portal.<sup>127</sup>

Wisconsin’s ACCESS website and MyACCESS mobile app enable residents to apply, upload documents, and manage benefits using a smartphone.<sup>128</sup> Yet, notice and benefits are still delivered to a physical mailing address by default.<sup>129</sup> The guidance that Wisconsin distributes provides details about what an applicant should expect, and it explicitly states that the applicant will get letters in the mail for the notices required throughout the process unless they create an online account and opt in to electronic notifications.<sup>130</sup> The traditional paper FoodShare application also contains a form field for an email address and the option to opt in to notifications by email.<sup>131</sup> Such notices would then need to be viewed in an online portal,<sup>132</sup> just like California’s approach—leading to notices

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<sup>122</sup> *POE Online Manual*, DEP’T OF HUM. RES., STATE OF ALA., § 213(A), <https://perma.cc/4H7P-GT55> (last visited Dec. 3, 2023).

<sup>123</sup> DEP’T OF HUM. RES., *supra* note 121.

<sup>124</sup> FOOD AND NUTRITION SERV., *supra* note 96.

<sup>125</sup> *Income Maintenance and Tribal Agency Contact Information*, WIS. DEP’T OF HEALTH SERVS., <https://perma.cc/PD6M-CUE8> (last visited Sep 1, 2024).

<sup>126</sup> FOOD AND NUTRITION SERV., *supra* note 96.

<sup>127</sup> *See* WIS. DEP’T OF HEALTH SERVS., P-16091, GUIDE TO APPLYING FOR WISCONSIN’S HEALTH, NUTRITION, AND OTHER PROGRAMS 14 (Mar. 2023).

<sup>128</sup> *See Access*, STATE OF WIS., <https://perma.cc/3NH4-TZBK> (last visited Dec. 3, 2023).

<sup>129</sup> *Foodshare Resources*, HUNGER TASK FORCE, <https://perma.cc/BWE3-VQQZ> (last visited Dec. 3, 2023).

<sup>130</sup> WIS. DEP’T OF HEALTH SERVS., *supra* note 127.

<sup>131</sup> *F-16019, Wisconsin FoodShare Application*, DIV. MEDICAID SERVS., WIS. DEP’T HEALTH SERVS. (Oct. 2023) (on file with CUNY Law Review).

<sup>132</sup> *Guide to Applying for Wisconsin’s Health, Nutrition, and Other Programs*, WIS. DEP’T OF HEALTH SERVS. 14 (2023), <https://perma.cc/U969-V7TX>.

about notices. The application also states that if the applicant is currently homeless and does not have a mailing address, their mail will go to their local agency.<sup>133</sup> Whether someone applies for FoodShare benefits online, in person, or over the phone, the EBT card is mailed to newly enrolled participants within 30 days (or potentially within seven days for those applying for expedited benefits), with warning and termination notices sent by mail.<sup>134</sup>

The exact implementation of SNAP by each state and county varies, with one throughline: even without a Federal mandate to do so, agencies are employing a variety of modern technologies to enroll and communicate with participants, although they still largely rely on traditional modes of notice delivery: through the mail.

## 2. Medicaid

Medicaid, including the related program for children, the Children's Health Insurance Program (CHIP), provides health insurance to about 93 million low-income individuals,<sup>135</sup> and is administered at the Federal level by the Centers for Medicare & Medicaid Services (CMS). Individuals applying to and enrolled in state Medicaid programs are granted some baseline due process under the Federal authorizing statute and regulations. Applicants and those attempting to use their benefits after enrollment are guaranteed "an opportunity for a fair hearing before the State agency" when their application or claim is "denied or is not acted upon with reasonable promptness."<sup>136</sup> CMS regulations specify that state agencies administering Medicaid "must provide all applicants and beneficiaries with timely and adequate written notice of any decision affecting their eligibility, including an approval, denial, termination or suspension of eligibility, or a denial or change in benefits and services."<sup>137</sup> Such notice must be "written in plain language[,] . . . accessible to persons who are limited English proficient and individuals with disabilities," and comply with other requirements around posting information to state Medicaid websites and providing that information in an accessible format.<sup>138</sup> An individual must also be informed of their right to request a fair hearing (among other rights) at many stages in the process, including when they apply, are denied eligibility, benefits or services, or receive an adverse

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<sup>133</sup> WIS. DEP'T OF HEALTH SERVS, *supra*, note 131.

<sup>134</sup> HUNGER TASK FORCE, *supra* note 129.

<sup>135</sup> See *Medicaid State Fact Sheets*, KFF (June 2023), <https://perma.cc/EYV6-4UMN>.

<sup>136</sup> 42 U.S.C. § 1396a(a)(3).

<sup>137</sup> 42 C.F.R. § 435.917(a).

<sup>138</sup> *Id.*

determination by the state Medicaid agency regarding not having met residency or other eligibility requirements.<sup>139</sup>

Beyond the application process itself, applicants and participants may be able to sign up to receive text messages and emails from their state Medicaid agency when they apply through their state's online systems. But online applications do not necessarily guarantee the ability to be able to opt in to electronic notices; it is up to each state. For example, as of January 2022, forty states and the District of Columbia allowed individuals to opt in to electronic notices for Medicaid, but they needed to proactively do so.<sup>140</sup> However, ten states had yet to implement this capability.<sup>141</sup> Such statewide systems are also at times entirely separate from systems that county administrators use to actually administer a program. For example, an individual may sign up for Medicaid via a statewide application system, but that application is then sent to the county level for processing and eventual enrollment.

State Medicaid agencies are required to send written notices to beneficiaries at least ten days in advance of taking actions that affect their eligibility—such as a denial of or decrease in benefits, or termination of enrollment—although this may be shortened to five days if the agency is taking action due to fraud that the agency has been able to verify, and it may be able to skip sending notices in advance altogether under certain other conditions, such as when the action is being taken following a request by the beneficiary.<sup>142</sup> When a “beneficiary’s whereabouts are unknown and the post office returns agency mail directed to him indicating no forwarding address,” agencies can immediately take action without the person receiving advanced notice.<sup>143</sup> This ability by states to take immediate action when mail is returned undeliverable has enabled agencies to terminate coverage when even just one piece of mail is returned. In 2018, for example, Colorado enacted this policy and saw an 8.5% decline in enrollment in Medicaid and CHIP compared with the national average.<sup>144</sup> Even more dramatic results were seen after the continuous enrollment provision expired in March 2023, which is discussed further in this Part.

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<sup>139</sup> *Id.* § 431.206(c).

<sup>140</sup> Tricia Brooks et al., *Medicaid and CHIP Eligibility and Enrollment Policies as of January 2022: Findings from a 50-State Survey*, KFF (Mar. 16 2022), <https://perma.cc/UF6G-RU8K>.

<sup>141</sup> *Id.*

<sup>142</sup> 42 C.F.R. §§ 431.211, 431.213, 431.214. There are myriad other notice requirements under the regulations relating to the administration of benefits for Long Term Care Facilities, but this note focuses on the medical assistance health insurance coverage component of Medicaid.

<sup>143</sup> 42 C.F.R. § 431.213(d).

<sup>144</sup> Markian Hawryluk, *Return to Sender? Just One Missed Letter Can be Enough to End Medicaid Benefits*, NPR (Nov. 1, 2019), <https://perma.cc/CS7R-RP7V>.

California's Medicaid program, called Medi-Cal, has about 14.66 million residents enrolled, including 4.3 million children.<sup>145</sup> Many adults under the age of twenty-six or over fifty can qualify for Medi-Cal regardless of their immigration status.<sup>146</sup> Following the passage of the *Patient Protection and Affordable Care Act* (*Affordable Care Act* or ACA) in 2010, California expanded its Medicaid program to cover low-income adults with incomes up to 138% of the federal poverty line, pursuant to the new law.<sup>147</sup>

Individuals can apply for Medi-Cal through a statewide online portal, but notices continue to be sent by mail, including renewal notices.<sup>148</sup> California requires participants to return an annual renewal packet containing information about their continued eligibility for the program.<sup>149</sup> However, the state also relies on an automated system to make determinations about individual families.<sup>150</sup> As a result, households that do not return packets on time with documents that verify their continued eligibility status may be unceremoniously dropped from the program without warning—and without human review.<sup>151</sup> For example, a computer glitch during the COVID-19 pandemic led to the automatic and erroneous termination of benefits for about 200,000 Medi-Cal enrollees.<sup>152</sup> Mailed notices came too late for many to resolve the issue in time before losing benefits.<sup>153</sup>

Unlike California, Alabama has not expanded eligibility for its Medicaid program under the ACA, although 1.25 million state residents are already enrolled.<sup>154</sup> The state has both an online application and a paper application that requests an email address from the applicant.<sup>155</sup> While the paper application asks whether the applicant wants “to get information by email,” notices are clearly sent by postal mail, and the state emphasizes

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<sup>145</sup> *Medicaid Works: A State by State Look*, CTR. ON BUDGET POL'Y PRIORITIES, <https://perma.cc/6P6U-UGTH> (last visited Dec. 3, 2023).

<sup>146</sup> Shreya Agrawal, *Thousands of Californians are losing Medi-Cal Every Month. What to do if You Lose Coverage*, CALMATTERS (Sept. 18, 2023), <https://perma.cc/YF8Q-BH5W>.

<sup>147</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 129 (2010) (codified in scattered sections of 42 U.S.C.); *See Medicaid State Fact Sheets*, KFF (June 2023), <https://perma.cc/EYV6-4UMN>.

<sup>148</sup> Agrawal, *supra* note 146.

<sup>149</sup> *Medi-Cal Annual Redetermination Form*, DEP'T HEALTH CARE SERVS., HEALTH AND HUM. SERVS. AGENCY, STATE OF CAL., MC 210 RV (May 2011).

<sup>150</sup> Ana B. Ibarra, *Pandemic Snafu: State Mistakenly Drops Medi-Cal Coverage for Some Low-Income Californians*, CALMATTERS <https://perma.cc/7RLH-FAWQ> (Sept. 29, 2021).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *See also id.*

<sup>154</sup> CTR. ON BUDGET POL'Y PRIORITIES, *supra* note 145.

<sup>155</sup> *Application for Health Coverage and Help Paying Costs*, ALA. MEDICAID (March 2023), <https://perma.cc/2FJ8-HREM> (on file with CUNY Law Review).

that applicants and participants must maintain an up-to-date mailing address.<sup>156</sup>

In Wisconsin, about 1.43 million residents are enrolled in Medicaid, branded BadgerCare Plus for low-income individuals under 65 years old, and Medicaid for the Elderly, Blind, or Disabled.<sup>157</sup> (There are additional brands of Medicaid for other populations, such as pregnant women.) The state has not expanded eligibility under the ACA, leaving out an estimated 97,000 people who would otherwise be eligible for health care.<sup>158</sup> Like both California and Alabama, Wisconsin has an online application for Medicaid, although there are different applications for its various programs. Residents can also apply using a paper form, which has a field for the applicant's email address, and by telephone.<sup>159</sup>

Wisconsin sends renewal notices by postal mail.<sup>160</sup> Its handbook provided to agencies to administer Medicaid details the requirements of notice with respect to its contents.<sup>161</sup> For example, notices of adverse actions must include a "statement describing the intended action; The reason(s) for the intended action, including a citation to the law, regulation, rule, or policy that supports or requires the action; An explanation of the right to a fair hearing and how to request one . . . ."<sup>162</sup> But there are no specific requirements around the mode of delivery (i.e., postal mail or email).<sup>163</sup>

Even more so than SNAP, state Medicaid programs have made great strides in employing technology due to the requirements imposed on states that expanded Medicaid under the ACA,<sup>164</sup> discussed further within this note. Yet, even states that have not expanded Medicaid, including Alabama and Wisconsin, have adopted online portals and some optional email notifications.<sup>165</sup>

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<sup>156</sup> *Id.*; *Update Your Address*, ALA. MEDICAID <https://perma.cc/5NS8-7CT3> (last visited Nov. 11, 2023).

<sup>157</sup> CTR. ON BUDGET POL'Y PRIORITIES, *supra* note 145.

<sup>158</sup> *Id.*

<sup>159</sup> *BadgerCare Plus Application Process F-10182*, DEP'T HEALTH SERVS., STATE OF WISCONSIN 8 (Oct. 2023), <https://perma.cc/S2KL-37UN> (on file with CUNY Law Review).

<sup>160</sup> Steven Walters, *State Asking 1.4 Million on Medicaid in Wisconsin to Reapply*, ISTHMUS (July 31, 2023), <https://perma.cc/JWK8-JCNP>.

<sup>161</sup> *Medicaid Eligibility Handbook P-10030*, DIV. MEDICAID SERVS., DEP'T HEALTH SERVS., STATE OF WIS. § 23.1 (Apr. 2023), <https://perma.cc/2WG3-XR2V> (on file with CUNY Law Review).

<sup>162</sup> *Id.* § 23.1.4.1.

<sup>163</sup> *Id.*

<sup>164</sup> *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 § 1943 (2010) (codified as amended in scattered sections of 42 U.S.C.), <https://perma.cc/QM4P-DX58> (on file with CUNY Law Review).

<sup>165</sup> *Forms for Medicaid Applicants and Recipients*, ALA. MEDICAID AGENCY, STATE OF ALA. <https://perma.cc/7JCJ-LVN5> (last visited Sept. 2, 2024); *ForwardHealth: Apply for*



### 3. Housing Choice Vouchers

HCV is a federal subsidy that may be used by the beneficiary to pay for part of the cost of renting a housing unit on the private market.<sup>166</sup> As of July 2024, there were nearly 2.3 million properties leased with the support of vouchers, providing an average monthly subsidy of \$1,035.<sup>167</sup> Since housing is the biggest cost driver of a household budget,<sup>168</sup> providing rental subsidies alone lifts 3 million people out of poverty.<sup>169</sup> Unlike Medicaid and SNAP, vouchers by definition help provide a stable address where a participant can reliably receive mail. Certainly, there are factors that may preclude mail delivery to an individual within the household, such as a domestic violence survivor who must temporarily (or permanently) leave the home. But, by and large, an HCV-holding tenant can receive mail, so missed notices for those already participating in the program are not the focus of the examination here. Applicants or those on HCV waitlists, however, do need to receive several notices before becoming a voucher holder (if ever),<sup>170</sup> yet an individual or household struggling with housing insecurity will have a harder time reliably receiving such mailed notices in a timely fashion.

To apply for HCV, a household applicant must submit information to verify that they qualify as a “family” as defined by the program, the family meets the income requirements, and the family is made up of citizens or noncitizens eligible for the program.<sup>171</sup> A public housing authority (PHA) may deny assistance to applicants for a variety of reasons, including for drug use or past criminal activity. In such a case, applicants must be given a copy of the criminal record used to disqualify them, and the PHA must give them an opportunity to dispute the accuracy and relevance of the record.<sup>172</sup> In denying assistance to an applicant, a PHA must give

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*Benefits*, DEP’T HEALTH SERVS., STATE OF WIS., <https://perma.cc/932M-GD5S> (last visited Sep. 1, 2024).

<sup>166</sup> *Housing Choice Voucher Program Section 8, Housing Choice Vouchers Fact Sheet*, U.S. DEP’T HOUS. AND URB. DEV., <https://perma.cc/238H-V5A6> (last visited Sep. 2, 2024).

<sup>167</sup> *Housing Choice Voucher (HCV) Data Dashboard*, OFF. OF HOUS. CHOICE VOUCHERS, U.S. DEP’T OF HOUS. AND URB. DEV., <https://perma.cc/34QU-W6TV> (last updated July 2024).

<sup>168</sup> *All Consumer Units: Annual Detailed Expenditure Means . . .* BUREAU LAB. STAT., CONSUMER EXPENDITURE SURVEYS, TABLE R-1 (Oct. 25, 2023) (on file with CUNY Law Review).

<sup>169</sup> Danilo Trisi, *Programs Targeted for Cuts Keep Millions From Poverty, New Census Data Show*, CTR. ON BUDGET POL’Y PRIORITIES (Sept. 10, 2019) (citing data from 2018), <https://perma.cc/MGZ3-LXT5>.

<sup>170</sup> See OFF. HOUS. CHOICE VOUCHERS, U.S. DEP’T HOUS. AND URB. DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, 64, 76, <https://perma.cc/H5VP-N5SR> (last visited Dec. 3 2023).

<sup>171</sup> 24 C.F.R. § 982.201(a).

<sup>172</sup> *Id.* at § 982.553(d)(1).

them “prompt written notice of a decision denying admission to the program (including a decision that the applicant is not eligible, or denying assistance for other reasons).”<sup>173</sup> PHAs have significant flexibility in how they implement the notice requirements of HCV.<sup>174</sup> The exact number of days an applicant has to respond is not specified in the federal regulations, but there is an adjudication process outlined: “The applicant must be given an opportunity to present written or oral objections to the PHA decision. . . . [and the] PHA must notify the applicant of the PHA final decision after the informal review, including a brief statement of the reasons for the final decision.”<sup>175</sup>

Before issuing a voucher, a PHA reaches back out to an applicant and must receive information that verifies the applicant’s eligibility within sixty days before issuance.<sup>176</sup> This means that if an applicant is notified by mail that the PHA is evaluating them for a possible voucher, they would essentially need to respond within sixty days or be denied. While this would seem to be a generous time period in which to respond, applicants often may not be reached in a timely fashion to begin this process. HCV has long been underfunded compared with the need across the country, and most PHAs have set up waitlists to which applicants must first apply.<sup>177</sup> Families often wait years to get off a waitlist, with a national average wait time of two and a half years.<sup>178</sup> As of 2021, out of the fifty largest PHAs, forty-eight had average wait times of more than one year, and some had wait times up to eight years.<sup>179</sup> Many more families never make it onto waitlists, or their local PHA does not maintain one because of the extreme scarcity of vouchers.<sup>180</sup> Applicants also face removal from waitlists in certain circumstances, including when an applicant does not reply even to a notice bearing the good news that they will be coming off the waitlist and may begin the evaluation process for a voucher. PHA may remove names of applicants “who do not respond to PHA requests for information or updates,” although if the applicant can later prove that they

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<sup>173</sup> *Id.* at § 982.201(f).

<sup>174</sup> PHAs are also required to issue a public notice, typically, at a minimum, published in a newspaper, when waitlists are reopened. This note will not examine this kind of general, non-individualized notice.

<sup>175</sup> 24 C.F.R. § 982.554.

<sup>176</sup> *Id.* at § 982.201(e).

<sup>177</sup> Sonya Acosta & Erik Gartland, *Families Wait Years for Housing Vouchers Due to Inadequate Funding*, CTR. ON BUDGET POL’Y PRIORITIES (July 22, 2021), <https://perma.cc/Q82Y-H3H3>.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

had failed to respond due to a disability, agencies are required to reinstate them.<sup>181</sup>

In California, HCV programs are administered at the county level, each of which must submit its own administrative plan—a document that every PHA administering vouchers must develop pursuant to U.S. Department of Housing and Urban Development (HUD) regulations—and adhere to it.<sup>182</sup> Among other components, the plan details the procedures the county will follow with respect to managing its HCV waitlist.

San Francisco's administrative plan for HCV notes that it sends notices to individuals on the waitlist by "U.S.P.S. or e-mail," but in practice the county requires an email address and phone number from all applicants when they apply to the waitlist.<sup>183</sup> In fact, its PHA will send notices regarding the waitlist *only* to an applicant's email address.<sup>184</sup> The agency suggests to applicants that they create an email address for this purpose if they do not already have one, or, if being assisted by a nonprofit organization, that they provide an email address of that organization so as to ensure notices are sent to a deliverable address.<sup>185</sup> However, the agency may also periodically purge and update its waitlist, which it does by sending notices by mail or email to all applicant families on the waitlist.<sup>186</sup> The plan takes a strict approach to undeliverable notices, just as HUD regulations allow (but do not require).<sup>187</sup> The county removes families from the program when notices are returned undeliverable without a forwarding address.<sup>188</sup> Even when a forwarding address is returned, the PHA resends the notice to the new address, but gives families only fifteen calendar days to respond in most circumstances.<sup>189</sup> Since the agency requires the email addresses of everyone on the waitlist, this may not be a significant disadvantage for most applicants. In these notices, the PHA can set some arbitrary other deadline (the "deadline stated on the update request form") to respond to confirm the applicant's interest in and eligibility for a

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<sup>181</sup> 24 C.F.R. § 982.204(c).

<sup>182</sup> See *Housing Choice Voucher Program Guidebook*, OFF. HOUS. CHOICE VOUCHERS, U.S. DEP'T HOUS. AND URB. DEV., <https://perma.cc/D53H-JEPC> (last visited Dec. 3 2023).

<sup>183</sup> HOUS. AUTH. CITY AND CNTY. SAN FRANCISCO, HOUSING CHOICE VOUCHER ADMINISTRATIVE PLAN 113 (May 1, 2024) (on file with CUNY Law Review); *Housing Choice Voucher - Participants*, SAN FRANCISCO HOUS. AUTH., <https://perma.cc/KEF9-8TEV> (last visited Nov. 10, 2023).

<sup>184</sup> *Housing Choice Voucher - Participants*, SAN FRANCISCO HOUS. AUTH., <https://perma.cc/2QWA-GK4U> (last visited Nov. 10, 2023).

<sup>185</sup> *Id.*

<sup>186</sup> HOUS. AUTH. CITY AND CNTY. SAN FRANCISCO, HOUSING CHOICE VOUCHER ADMINISTRATIVE PLAN 113 (May 1, 2024) (on file with CUNY Law Review).

<sup>187</sup> 24 C.F.R. § 982.204(c)(1).

<sup>188</sup> See HOUS. AUTH. CITY AND CNTY. SAN FRANCISCO, *supra* note 186.

<sup>189</sup> *Id.* at 100.

voucher.<sup>190</sup> If the applicant fails to respond, the PHA can remove the applicant without further notice.<sup>191</sup> San Francisco selects families to remove from the waitlist on an opaque point preference system prior to selecting families in order of joining the waitlist; while it is not a lottery, it is also not merely first-come, first-serve.<sup>192</sup> It is, therefore, hard for those on a waitlist to predict when exactly they must stay vigilant in checking for notices.

In a variation on San Francisco's approach, Sacramento County's PHA takes a more layered approach to notices despite requiring an email address to apply. For example, it explicitly states it sends waitlist management notices by *both* postal mail and email and provides forty-five days for applicants to respond.<sup>193</sup> By contrast, Kern County—a more rural area,<sup>194</sup> whose county seat is Bakersfield—sends notices by postal mail in some cases and notices by email in others.<sup>195</sup> It requires applications to the waitlist to be submitted with an email address and notifies applicants by email if their application is incomplete; however, applicants “shall be notified by letter or by telephone” when they are selected to come off the waitlist.<sup>196</sup> It also provides slightly less time than San Francisco for responses from applicants to contest their removal from the agency's waitlist—just ten business days.<sup>197</sup>

Similar to Kern County's approach, Mobile, Alabama, requires families to submit their application through an online portal and requires an email address.<sup>198</sup> However, the Mobile PHA only commits to sending notices of selection off the waitlist by First-Class Mail, and the consequences of an undeliverable notice are just as swift and severe as the other PHAs' approach: the applicant is removed from the waitlist.<sup>199</sup> The PHA

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 103.

<sup>193</sup> SACRAMENTO HOUS. AND REDEVELOPMENT AGENCY, HOUS. AUTH. CNTY. SACRAMENTO CAL., ADMINISTRATIVE PLAN HOUSING CHOICE VOUCHER PROGRAM 4-5 (2023) (on file with CUNY Law Review).

<sup>194</sup> Hans Johnson and Marisol Cuellar Mejia, *Rural California*, PUB. POL'Y INST. CAL., <https://www.ppic.org/publication/rural-california/> (last visited Dec. 30, 2024).

<sup>195</sup> *See Administrative Plan*, HOUS. AUTH. CNTY. KERN, SECTION 8 (CHAPTER 2) 16 (July 13, 2022) <https://perma.cc/EGC2-YV3E>.

<sup>196</sup> *Id.* at 2, 15.

<sup>197</sup> *See id.*

<sup>198</sup> MOBILE HOUS. AUTH., 2024 HOUSING CHOICE VOUCHER ADMINISTRATIVE PLAN 4-2 (May 3, 2024) (on file with CUNY Law Review); *Applicant Portal*, MOBILE HOUS. AUTH., <https://perma.cc/8VY5-KXPH> (last visited Sep. 2, 2024).

<sup>199</sup> *Id.* at 4-14.

of Montgomery, Alabama, also only commits to sending selection notices by First-Class Mail, despite having an electronic application system.<sup>200</sup>

When it comes to Mobile PHA's process for confirming the interest and eligibility of those on the waitlist, it sends notices by email and may send notices by First-Class Mail as well.<sup>201</sup> Like other agencies examined here, the Mobile and Montgomery PHAs may remove an applicant from the waitlist immediately if notices are returned undeliverable without a forwarding address.<sup>202</sup> Mobile gives applicants ten days to respond if there is a forwarding address, although Montgomery does not commit to this.<sup>203</sup> However, paradoxically, even if the agency itself made a mistake that led the notice to be undeliverable (e.g., a clerical error by staff in putting an incorrect address on an envelope), Mobile's policy is that it "may, but is not obligated, [to] reinstate the family."<sup>204</sup> Montgomery essentially has the same disclaimer.<sup>205</sup> While in many jurisdictions, lacking a permanent mailing address even for a couple of weeks may mean losing one's place in line—potentially throwing away years of waiting—one's fate on the Mobile or Montgomery waitlist can be decided by a single caseworker's misfired keystroke.

Perhaps not surprisingly given PHAs' likely different motivations at later stages of the process, both the Mobile and Montgomery PHAs specify that certain communications will be sent by email. For example, in Mobile, when the leasing process begins—after being selected—applicants should be prepared to receive emails and phone calls given the time-sensitive nature of the process.<sup>206</sup> Yet, the same is not true of notification of selection off the waitlist, for which the PHA only commits to sending notice by First-Class Mail.<sup>207</sup> In Montgomery, annual reexamination notices will be sent "and/or" by email.<sup>208</sup> This discrepancy is hard to justify

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<sup>200</sup> MONTGOMERY HOUS. AUTH., HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN 4-13 (May 1, 2020) (on file with CUNY Law Review); *HCVP*, MONTGOMERY HOUS. AUTH., <https://perma.cc/A74J-LZ6V> (last visited Nov. 10, 2023).

<sup>201</sup> MOBILE HOUS. AUTH., 2024 HOUSING CHOICE VOUCHER ADMINISTRATIVE PLAN 4-8 (May 3, 2024) (on file with CUNY Law Review).

<sup>202</sup> See *id.*; See MONTGOMERY HOUS. AUTH., HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN 4-13 (May 1, 2020) (on file with CUNY Law Review).

<sup>203</sup> MOBILE HOUS. AUTH., 2024 HOUSING CHOICE VOUCHER ADMINISTRATIVE PLAN 4-8 (May 3, 2024); See MONTGOMERY HOUS. AUTH., HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN 4-13 (May 1, 2020) (on file with CUNY Law Review).

<sup>204</sup> MOBILE HOUS. AUTH., 2024 HOUSING CHOICE VOUCHER ADMINISTRATIVE PLAN 4-9 (May 3, 2024) (on file with CUNY Law Review).

<sup>205</sup> MONTGOMERY HOUS. AUTH., HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN 4-7 (May 1, 2020) (on file with CUNY Law Review).

<sup>206</sup> MOBILE HOUS. AUTH., *supra* note 204.

<sup>207</sup> *Id.* at 4-14.

<sup>208</sup> MONTGOMERY HOUS. AUTH., HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN 11-3 (May 1, 2020) (on file with CUNY Law Review).

except by understanding that administrative plans are set by those administering them. As a result, there is little incentive for PHAs to do everything they can to contact and locate applicants on a waitlist when there are dozens—even hundreds—of others in line who may respond more quickly. In contrast, once an agency has begun the leasing process and invested time and effort in a single applicant, it is in the agency's interest to quickly and easily get in touch with them.

These discrepancies are in slight contrast to Milwaukee, Wisconsin, which, like San Francisco and Sacramento counties, has integrated email notices throughout its process. It sends notice by email or by First-Class Mail when an applicant on the waitlist has been selected for assistance.<sup>209</sup> But Milwaukee takes the typical approach of purging applicants from the waitlist when notices are sent back undeliverable and gives applicants just fifteen days to respond to notices forwarded to a new address (when they have one).<sup>210</sup> It also provides for the possibility of clerical error, and, like Mobile and Montgomery, makes no guarantees about reinstating an applicant to the waitlist even if they were removed due to an error on the part of PHA staff.<sup>211</sup> These policies are in stark contrast to the more humane approach of Sacramento, which explicitly requires the PHA to reinstate an applicant erroneously removed.<sup>212</sup>

Because housing vouchers are for the purpose of providing housing stability, draconian waitlist purging policies based on mailed notices are particularly inappropriate. While some PHAs have put their waitlist processes online and set the expectation of notice by email, there are still rules originating at the federal level that continue to allow PHAs to penalize those without a stable mailing address.<sup>213</sup> This contradiction exists with SNAP and Medicaid programs as well, but for HCV it is even more inexplicable except by noting that the incentives of program administrators and applicants are misaligned.

#### *B. Deficiencies in the Traditional Delivery of Notice*

Relying on the traditional delivery of notice by postal mail is not simply an anachronism—harkening back to a time when sending and receiving letters by mail was the most effective way of reaching people—it can also lead to catastrophic consequences for individuals because mail

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<sup>209</sup> HOUS. AUTH. CITY MILWAUKEE, HCV ADMIN. PLAN 4-19 (Oct. 12, 2022) (on file with CUNY Law Review).

<sup>210</sup> *Id.* at 4-12.

<sup>211</sup> *Id.*

<sup>212</sup> SACRAMENTO HOUS. AND REDEVELOPMENT AGENCY, HOUS. AUTH. CNTY. SACRAMENTO CAL., HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN 3-3 (2023) (on file with CUNY Law Review).

<sup>213</sup> 24 C.F.R. § 982.204(c)(1) (2024).

itself is not a reliable means to reach a transient or housing-insecure population. Issues with mail delivery are felt particularly by households who move frequently, are homeless, or otherwise unable to receive mail consistently.<sup>214</sup> Beyond states' determination that a participant is no longer eligible for benefits, administrative issues, such as missing paperwork and clerical errors leading to disenrollment, abound.<sup>215</sup> Without adequate notice, participants have no way to rectify such issues, leading to a loss of benefits.

Looking at issues with “churn” in Medicaid, SNAP, and HCV helps to illustrate how inadequate notice—and thus a lack of due process—negatively impacts the ability of millions of individuals to access safety net programs.<sup>216</sup> Churn can be described as “the degree to which individuals quickly cycle off and then back on [a] program” despite remaining eligible for it.<sup>217</sup> Keeping an individual in a program before they are kicked off is better both for the person and for the program; it is exceedingly more efficient to keep an individual in a program than it is to restart the application process, which includes having them resubmit the required documents (which may no longer be readily available), conduct an interview, and send them the information they need (or, e.g., their EBT card) to start utilizing benefits once again.<sup>218</sup> Despite this, many states continue to see unnecessary churn due to the administrative burdens of the application and renewal process, including the reliance on postal mail for notices.

Medicaid requires that participants confirm their eligibility and renew enrollment in the program at least once annually, and some beneficiaries are required to confirm their eligibility even more frequently.<sup>219</sup> As of January 2022, 42 states had implemented *ex parte* renewals—also known as administrative renewals—whereby the agency maintains a participant's enrollment so long as the agency has other data sources that can confirm the participant's ongoing eligibility, which avoids requiring the individual to respond to timely notices that may lead to termination of their benefits.<sup>220</sup> However, the share of *ex parte* renewals even in these

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<sup>214</sup> See, e.g., W. CTR. ON L. & POVERTY, RETURN TO SENDER: HOW AN UNRELIABLE MAIL SYSTEM HARMS CALIFORNIANS LIVING IN POVERTY 9-10, 17, 23 (Mar. 2023).

<sup>215</sup> Noah Weiland, *At Least 2 Million Children Have Lost Medicaid Insurance This Year*, N.Y. TIMES (Nov. 9, 2023), <https://perma.cc/3L7A-WF5A>.

<sup>216</sup> PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 151 (2019).

<sup>217</sup> *Id.*

<sup>218</sup> See GREGORY MILLS ET AL., U.S. DEP'T AGRIC., UNDERSTANDING THE RATES, CAUSES, AND COSTS OF CHURNING IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (Nov. 2014) (on file with CUNY Law Review).

<sup>219</sup> 42 C.F.R. § 435.916 (2024).

<sup>220</sup> Brooks, *supra* note 140.

states is still fairly small: As of January 2022, in thirty-three of the forty-two states conducting *ex parte* renewals, only 50% or fewer of renewals were conducted that way.<sup>221</sup> Although these streamlined renewal systems do help to reduce churn, prior to changes made during the COVID-19 pandemic about 8% of Medicaid recipients each year were kicked out of the program and then re-enrolled within one year.<sup>222</sup>

Churn can largely be attributed to individuals not receiving timely mailed notices from agencies and then not being able to send back responses before deadlines. Participants' failure to respond (such as by not submitting documentation) means that they will likely lose coverage as a result. When mail is returned undeliverable, agencies can legally terminate benefits outright.<sup>223</sup> Changes that states make to programs—often making eligibility requirements more stringent or paperwork more onerous—can further increase the administrative burden on applicants and enrollees. For example, when Arkansas implemented a work requirement for its Medicaid program in 2018, it mailed notices to participants.<sup>224</sup> As a result, more than 20,000 enrollees lost coverage—more than the number of people who lost coverage for non-compliance with the work requirement itself—because notices were undeliverable and sent back to the agency, which then set “unable to locate” as the legal basis for termination.<sup>225</sup>

As noted previously, some state Medicaid programs continue to rely on postal mail to send notices to applicants and enrollees, although some do make limited use of email, text messages, and phone calls.<sup>226</sup> But it is clear that many states could make a more concerted effort to reach enrollees when their notices are returned undeliverable: fewer than half of states report taking additional action in this situation, such as attempting to call enrollees or sending an email or text message.<sup>227</sup> However, some do take more extensive proactive steps, such as matching data with the USPS National Change of Address Database and coordinating with managed care plans and providers to get updated address information.<sup>228</sup>

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<sup>221</sup> *Id.*

<sup>222</sup> MEDICAID AND CHIP PAYMENT AND ACCESS COMM'N, AN UPDATED LOOK AT RATES OF CHURN AND CONTINUOUS COVERAGE IN MEDICAID AND CHIP 1 (Oct. 2021) (on file with CUNY Law Review).

<sup>223</sup> Suzanne Wikle et al., *States Can Reduce Medicaid's Administrative Burdens to Advance Health and Racial Equity*, CTR. ON BUDGET POL'Y PRIORITIES (July 19, 2022), <https://perma.cc/SAY7-26CC>.

<sup>224</sup> *Id.* at n.33.

<sup>225</sup> *Id.* at n.33.

<sup>226</sup> Brooks, *supra* note 140, at 17; *Medicaid is Now Texting Members*, L.A. DEP'T HEALTH (Mar. 20, 2023), <https://perma.cc/4JMW-JM6Q>.

<sup>227</sup> Brooks, *supra* note 140, at 25.

<sup>228</sup> *Id.*



Compared with Medicaid, SNAP faces even more severe issues with churn, which the U.S. Department of Agriculture (USDA) defines as when “a SNAP case exits the program and then reenters within four months or less”.<sup>229</sup> Prior to the temporary changes made during the COVID-19 pandemic to provide for continuous enrollment, states experienced anywhere from about a 17 to 28% churn rate in SNAP participation.<sup>230</sup> The vast majority of such cases happen at the time of recertification or at the time interim reports are required from participants, and occur for one month or less, which is a strong indicator that the temporary loss of enrollment is unintentional or involuntary on the part of the participant.<sup>231</sup> Some participants in one USDA-sponsored study reported not even being aware that they had lost benefits until they had attempted to purchase food, demonstrating the failure of the current system of sending notices.<sup>232</sup> The USDA study also explained the procedural issues at play:

The most frequently cited example was nonresponse to a recertification notice. Sometimes a SNAP client simply did not receive the notice because it was sent to the wrong address or the client never informed the agency of an address change. Other times, clients never responded because they were experiencing personal difficulties, they could not read the notice, they were unable to use the online resources, or they were unable to respond in person because of transportation issues.<sup>233</sup>

The study also found a high correlation between a household’s having recently moved and a failed recertification.<sup>234</sup> Put together, there is ample evidence that the failure of mailed notices to reach intended targets is driving unnecessary and severe impacts on program participants.

In response to the unfolding COVID-19 pandemic, Congress quickly put in place a number of provisions to expand and ensure continuous access to Medicaid and SNAP during the crisis. The “unwinding”<sup>235</sup> of these changes has become a unique demonstration of how due process failures—and particularly failures in adequate notice—can lead to perverse outcomes. In March 2020, Congress passed (and President Donald Trump

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<sup>229</sup> GREGORY MILLS ET AL., OFF. POL’Y SUPPORT, FOOD AND NUTRITION SERV., U.S. DEP’T AGRIC., UNDERSTANDING THE RATES, CAUSES, AND COSTS OF CHURNING IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM ix-xi (Nov. 2014)

<sup>230</sup> *Id.* at x.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at ix-xi.

<sup>234</sup> *Id.*

<sup>235</sup> Centers for Medicare & Medicaid Services, *Unwinding and Returning to Regular Operations after COVID-19*, <https://perma.cc/YB8A-QNFW> (last visited Sept. 2, 2024).

signed) the *Families First Coronavirus Response Act*, which prevented states from disenrolling Medicaid participants so long as the pandemic-based Public Health Emergency (PHE) remained in place, which effectively meant participants did not have to face the annual redetermination process to continue to meet the eligibility criteria of the program.<sup>236</sup> Known as the “continuous enrollment” provision, Congress later made the provision independent of the PHE, but did set an expiration date of March 31, 2023.<sup>237</sup> This single change reduced churn and helped grow enrollment over the three-year period of the PHE by an estimated 23 million people,<sup>238</sup> accounting for nearly a quarter of all enrollees.

After the continuous enrollment provision expired, states began to reevaluate the eligibility of participants on an annual basis, as is normally required under Medicaid and SNAP. Participants in both programs have been disenrolled, many because they have been unable to renew in time, others because they are no longer eligible under the more restrictive pre-pandemic rules.<sup>239</sup> Alabama was expected to lose about 61,000 individuals from its Medicaid rolls by June 2024 due to the unwinding.<sup>240</sup> Texas had already disenrolled about 65% of its Medicaid participants, including 700,000 children by November 2023,<sup>241</sup> but even states with a more ideological embrace of the safety net have seen significant disenrollments, such as Illinois, which saw a 10% drop in participants.<sup>242</sup> Wisconsin dropped at least 400,000 participants from its Medicaid program.<sup>243</sup> California is also seeing the devastating impacts of the unwinding, with an estimated 1.8 million to 2.8 million enrollees in Medi-Cal expected to lose coverage.<sup>244</sup> Between July and September 2023 alone, more than 300,000 participants in Medi-Cal lost coverage.<sup>245</sup> Of those who have lost

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<sup>236</sup> Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178, § 6008(b)(3).

<sup>237</sup> Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 § 5131(a)(4).

<sup>238</sup> Alice Burns et al., *Medicaid Enrollment Growth: Estimates by State and Eligibility Group Show Who may be at Risk as Continuous Enrollment Ends*, KFF (Mar. 2, 2023), <https://perma.cc/7RWJ-WRP9>.

<sup>239</sup> Ruth Serven Smith & The Associated Press, *Thousands in Alabama, US Will Lose Medicaid This Year . . .* AL.COM (Mar. 19, 2023), <https://perma.cc/GYK9-KSHS>.

<sup>240</sup> *Id.*

<sup>241</sup> Noah Weiland, *At Least 2 Million Children Have Lost Medicaid Insurance This Year*, N.Y. TIMES (Nov. 10, 2023), <https://perma.cc/3L7A-WF5A>.

<sup>242</sup> *Medicaid Enrollment and Unwinding Tracker*, KFF (Nov. 8, 2023), <https://perma.cc/DW6V-6NNG>.

<sup>243</sup> Trisha Young, *Wisconsin residents endure long waits due to FoodShare and Medicaid Changes*, WIS. WATCH (Aug. 7, 2023), <https://perma.cc/6ZKQ-JLEV>.

<sup>244</sup> Soumya Karlamangla, *Millions of Californians Are Expected to Lose Medi-Cal Coverage*, N.Y. TIMES (July 17, 2023), <https://perma.cc/7MCU-DQFF>.

<sup>245</sup> Agrawal, *supra* note 146.

coverage since the end of the continuous enrollment period, about 88% did so for procedural reasons, such as not receiving a renewal notice, not sending back required information, or missing other key requirements.<sup>246</sup> All told, as of December 2023, about 8 million people across the country, including about 3 million children, had already been disenrolled from Medicaid following the expiration of the continuous enrollment period.<sup>247</sup> (This has also greatly affected SNAP enrollees. For example, Wisconsin, having added about 100,000 participants to its SNAP/FoodShare program during the pandemic, “saw a 20% increase in the use of food pantries” and “a 36% increase in the use of [free] meal sites” following the end of the “Emergency Foodshare allotment.”<sup>248</sup>) This is all happening despite the fact that Congress amended the *Families First Coronavirus Response Act* to require states to use the USPS National Change of Address Database, their own state health department’s data, or other reliable sources to ensure they have the latest contact information—including mailing address, phone number, and email address—for Medicaid enrollees who are facing redetermination, and it prohibited states from terminating benefits for a participant based on undelivered mail alone without first making a good-faith effort to locate the participant (unlike many states’ past practices).<sup>249</sup> But this requirement of states lasted only until December 31, 2023.<sup>250</sup>

Reliance on mail delivery may be most problematic in the context of affordable housing waitlists, since individuals in need of this type of public benefit, by definition, do not have stable housing. The Western Center on Law & Poverty conducted a study that illustrated common scenarios for those who have applied to voucher and other affordable housing waitlists and the inadequacy of relying on mailed notices:

Multiple advocates indicated that their clients had missed housing-related mail because they had moved or changed addresses since the time they first applied for affordable housing. One employee at a coordinated entry program reported that a significant percentage of people eligible for permanent supportive housing miss out on the opportunity because they don’t respond to mail [in a] timely [manner]. . . . [D]ue to an extreme shortage of

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<sup>246</sup> *Medi-Cal Continuous Coverage Unwinding Dashboard: August 2023*, DEP’T HEALTH CARE SERVS., <https://perma.cc/EPR2-4TJW>.

<sup>247</sup> Noah Weiland, *Biden Administration Warns 9 Governors About Medicaid Losses Among Children*, N.Y. TIMES (Dec. 18, 2023), <https://perma.cc/5856-R2DJ>; Joan Alker, *Three Million Fewer Children in the U.S. Are Covered by Medicaid*, MCCOURT SCH. PUB. POL’Y, GEORGETOWN UNIV. (Dec. 18, 2023), <https://perma.cc/SVM2-HURZ>.

<sup>248</sup> Young, *supra* note 243.

<sup>249</sup> Consolidated Appropriations Act, Pub. L. No. 117-328, 136 Stat. 5949 § 5131 (2022).

<sup>250</sup> *Id.*

affordable housing, a person may wait years to get to the top of a waiting list for affordable housing or a housing voucher. . . . [O]n average, in California, families wait for almost three years for a Housing Choice Voucher. In San Diego County, the average wait time is approximately ten years. During these long wait-times, through no fault of their own, people may no longer be able to pick up their mail at the same location they could when they first applied. Because of the limited opportunities, people are often on multiple waitlists, increasing the logistical burden of updating addresses when their circumstances change. Many programs also require that applicants periodically respond to mailed notices confirming that they want to remain on the waiting list for housing or for a voucher. Without access to mail, people may not receive notices and lose their place in line.<sup>251</sup>

This study touches on multiple reasons why mailed notices are not adequate, particularly in the affordable housing context, but some are common to other public benefits, including the threat of termination for being unresponsive to mailed notices.<sup>252</sup>

Beyond the program and population-specific reasons for why postal mail delivery is insufficient to reach applicants to and enrollees in safety net programs, state agencies continue to count on an increasingly unreliable third party, USPS, to deliver critically important information to individuals for whom the consequences can be life or death. Yet neither the agency nor the individual recipient has any control over whether that system works. USPS, once a reliable backbone of American communication and commerce, has experienced severe and debilitating financial issues over the past several decades.<sup>253</sup> Although slowdowns had been unofficially happening for some time prior, USPS announced in 2021 that it was officially going to slow First-Class mail to address its funding shortfalls, affecting up to 39% of mailed letters.<sup>254</sup> During the 2020 election, mail-in ballots arrived back to election offices weeks late, causing serious delays in vote counts in the razor-thin election that year.<sup>255</sup> Affected states ultimately sued USPS, claiming the agency's mail slowdowns and its

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<sup>251</sup> W. CTR. ON L. & POVERTY, RETURN TO SENDER: HOW AN UNRELIABLE MAIL SYSTEM HARMS CALIFORNIANS LIVING IN POVERTY 25-26 (Mar. 29, 2023) (on file with CUNY Law Review).

<sup>252</sup> *Id.* at 22-27.

<sup>253</sup> Brian Naylor, *The Postal Service Is Slowing the Mail to Save Money. Critics Say It's a Death Spiral*, NPR (Oct. 8, 2021), <https://perma.cc/XMD2-NML8>.

<sup>254</sup> *Id.*

<sup>255</sup> See, e.g., Jacob Bogage & Christopher Ingraham, *Swing-State Voters Face Major Mail Delays in Returning Ballots on Time, USPS Data Shows*, WASH. POST (Oct. 30, 2020), <https://perma.cc/9NZH-UN24>.

discontinuation of some mail sorting machines were the cause of ballots not arriving on time at election offices, and that this amounted to voter suppression.<sup>256</sup> A district court agreed and has prohibited such drastic slowdowns in the future.<sup>257</sup> However, what this will mean for the timeliness of mail delivery overall, and of public benefit notices in particular, is unclear. When there is a high-profile, national election at stake, states have great incentive to take extraordinary legal action to resolve the short-term issue of ballot delivery. States do not have a similar incentive to bring legal action when residents fail to receive public benefit notices within the brief window applicants and enrollees are given to respond.

### III. HOW POVERTY AND TECHNOLOGY HAVE CHANGED FACTS AND CIRCUMSTANCES

Notice sent by postal mail is sufficient to reach the intended target in many place-based contexts, such as property tax bills and termination of a utility service, and other scenarios where there is near certainty that a letter sent to a particular address will reach the person whose life, liberty, or property is at issue. However, there are three primary reasons mailed notice is inadequate in the context of safety net programs: low-income households tend to move more frequently than the general population, communicate more commonly in ways that are not aligned with how programs communicate, and typically have less time and cognitive bandwidth to deal with time-sensitive issues than their wealthier counterparts.

#### A. *Mobility Among Low-Income Households*

Almost by definition, households that have less money have a harder time finding an affordable place to live and their housing is less stable than those who make more money. On average, housing is the largest expense category for households.<sup>258</sup> However, around 40 million households, or about one in three, spend more than 30% of their income on housing, which is considered cost- or rent-burdened. Around 20 million households are *severely* burdened, spending more than 50% of their income on housing.<sup>259</sup>

Every year, an average of 3.6 million evictions are formally filed or threatened (where a landlord gives notice that they will formally file the

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<sup>256</sup> David Sharp & Matthew Daly, *Federal Judge Faults Postmaster General DeJoy in Mail Delays*, ASSOCIATED PRESS (Oct. 7, 2022, 5:14 PM), <https://perma.cc/4XJA-8N2H>.

<sup>257</sup> *Id.*

<sup>258</sup> BUREAU LAB. STAT., *supra* note 168.

<sup>259</sup> Peyton Whitney, *Number of Renters Burdened by Housing Costs Reached a Record High in 2021*, JOINT CTR. FOR HOUS. STUD., HARVARD UNIV. (Feb. 1, 2023), <https://perma.cc/E57A-M9AA>.

eviction in court but have yet to do so), a rate that remained consistent for about two decades prior to the COVID-19 pandemic.<sup>260</sup> However, eviction rates exploded after the pandemic, with some cities seeing rates jump by more than 50% as pandemic-era eviction protections ended.<sup>261</sup> Formal and threatened evictions are just the tip of the iceberg: many tenants vacate the unit they are living in well before their delinquency on rent or other circumstances reach the point at which they will be formally evicted or a landlord will threaten to do so.<sup>262</sup> There are also exogenous circumstances that can lead to displacement, such as a local planning authority deciding to redevelop an area, a building owner wishing to rehab her property, or a natural disaster that causes widespread destruction, all of which would require residents to vacate.

While the problem of housing scarcity has been ongoing for decades, it is also one that did not exist to the same extent in the years *Goldberg* and *Mathews* were decided. New housing construction as a share of the U.S. population has been steadily decreasing.<sup>263</sup> Of the new homes that are now being constructed, units that are affordable for the lowest income levels (“entry-level homes”) have become a smaller share of the total units constructed—less than 10% in 2021 compared with about 35% in the 1970s.<sup>264</sup> The population of the United States has increased about 63% since 1970,<sup>265</sup> but the supply of entry-level homes continues to fall: An average of 150,000 units per year of new entry-level homes were on the market in the 2000s compared with 207,000 during the 1990s, and that number further decreased to an average of 55,000 units per year by the 2010s.<sup>266</sup> The United States lacks an estimated 7.3 million affordable and available rental homes for extremely low-income renters.<sup>267</sup> In other words, there are more people and not enough homes, thus, an increase in housing instability and homelessness has been an inevitable byproduct.

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<sup>260</sup> Juan Pablo Garnham et al., *New Data Release Shows That 3.6 Million Eviction Cases Were Filed in the United States in 2018*, EVICTION LAB, PRINCETON UNIV. (July 11, 2022), <https://perma.cc/3KCL-LDV4>.

<sup>261</sup> Peter Hepburn et al., *COVID-era Policies Cut Eviction Filings by More than Half*, EVICTION LAB, PRINCETON UNIV. (May 3, 2023), <https://perma.cc/Z8ZJ-S5MX>.

<sup>262</sup> Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUS. POL’Y DEBATE 461, 463 (2003).

<sup>263</sup> Jared Bernstein et al., *Alleviating Supply Constraints in the Housing Market*, COUNCIL OF ECON. ADVISORS, THE WHITE HOUSE, (Sept. 1, 2021), <https://perma.cc/VA6E-7YVB>.

<sup>264</sup> *Id.*

<sup>265</sup> U.S. CENSUS BUREAU, HISTORICAL POPULATION CHANGE DATA (1910-2020) (April 26, 2021) (on file with CUNY Law Review).

<sup>266</sup> SAM KHATER ET AL., FREDDIE MAC, HOUSING SUPPLY: A GROWING DEFICIT (May 2021) (on file with CUNY Law Review).

<sup>267</sup> *The Gap 2023: A Shortage of Affordable Homes*, ANDREW AURAND ET AL., NAT’L LOW INCOME HOUS. COAL., 1 (Mar. 16, 2023), <https://perma.cc/CQ5Y-BN5Y>.

This manifests in low-income households making frequent, involuntary moves, resulting in mailing addresses that quickly go out of date.

As a result of low supply, housing has also become increasingly expensive. In just a five-year period from 2017 to 2021, rents increased 18% on average, exceeding the rate of overall inflation.<sup>268</sup> The misalignment between rent and income is illustrated in the relative proportion of income that households spend on rent each month: from 2010 to 2020, the percentage of renter households spending 50% or more of their income on rent increased about 10%.<sup>269</sup> Homeownership has also become increasingly out of reach: The national median sale price for a single-family home increased 25% from 2019 to 2021.<sup>270</sup> At the same time, the vacancy rate for rental units fell from about 10% in 2010 to 5.6% at the end of 2021.<sup>271</sup>

Low-income households face challenges not only in affording a place to live; they also face disproportionate rates of domestic violence,<sup>272</sup> drug addiction,<sup>273</sup> and mental illness,<sup>274</sup> which can all lead to housing instability. These circumstances—eviction for not paying rent versus some other precipitating event—are not mutually exclusive. Lease violations other than nonpayment can also lead to eviction, including repeat and serious noise disturbances, property destruction, and use of a property in ways that are against the rules (e.g., running a business or having additional people living in the unit without the property owner's permission, which is more common among lower-income households where families often need to double up to avoid sleeping on the streets).<sup>275</sup>

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<sup>268</sup> Katherine Schaeffer, *Key Facts About Housing Affordability in the U.S.*, PEW RSCH. CTR. (Mar. 23, 2022), <https://perma.cc/8KZE-QLJN>.

<sup>269</sup> AM. CMTY. SURV., U.S. CENSUS BUREAU, B25070, GROSS RENT AS A PERCENTAGE OF HOUSEHOLD INCOME IN THE PAST 12 MONTHS (2010 and 2020) (on file with CUNY Law Review).

<sup>270</sup> Schaeffer, *supra* note 268.

<sup>271</sup> *Id.*

<sup>272</sup> Amy E. Bonomi et al., *Intimate Partner Violence and Neighborhood Income: A Longitudinal Analysis*, 20 VIOLENCE AGAINST WOMEN 2 (Jan. 28, 2014), <https://perma.cc/HD8C-G6F2>.

<sup>273</sup> Peter Grinspoon, *Poverty, Homelessness, and Social Stigma Make Addiction More Deadly*, HARVARD MED. SCH. (Sept. 28, 2021), <https://perma.cc/CHF9-3BMH>; Kesha Baptiste-Roberts & Mian Hossain, *Socioeconomic Disparities and Self-reported Substance Abuse-related Problems*, 10 ADDICT HEALTH 112 (Apr. 2018).

<sup>274</sup> See, e.g., Lee Knifton & Greig Inglis, *Poverty and Health: Policy, Practice and Research Implications*, 44 BJPSYCH BULL. 193 (Oct. 2020); Anna Macintyre et al., *What Has Economics Got to do with it? The Impact of Factors on Mental Health and the Case for Collective Action*, 4 PALGRAVE COMMUN. art. 10 (2018).

<sup>275</sup> Erik Gartland, *Hidden Housing Instability: 3.7 Million People Live in Doubled-Up Households*, CTR. ON BUDGET POL'Y PRIORITIES (Sept. 6, 2022), <https://perma.cc/BFQ9-5KNG>.

While certainly catastrophic to family stability and children's development,<sup>276</sup> a formal eviction proceeding ostensibly gives a household advance warning as to when it will need to move, providing members of the household time to inform public agencies and creditors—not to mention friends and family—that their old address will no longer be a valid way to reach them. In reality, however, they may not have a new address to share for weeks or months. In more dire circumstances, when members of a household need to flee their home because of a fear for their safety or the safety of others in their care, they may need to leave immediately or surreptitiously, perhaps in the middle of the night or while an abuser is out of the home. In such cases, advance notice to parties who rely on reaching household members by postal mail becomes an impossibility.

Involuntary displacement from housing affects low-income households broadly, but it does not affect communities and demographic groups evenly. There is an extensive body of research detailing the disproportionate rates of eviction and other involuntary displacement among Black, Latino/Hispanic, and women-led households—and particularly among households led by Black women.<sup>277</sup>

The cycle of eviction can also be self-reinforcing: once evicted, individuals have a harder time finding housing than they did previously because many landlords discriminate against applicants who have had a previous eviction.<sup>278</sup> Household wages also tend to decrease in at least the two years following an eviction, undoubtedly due to the challenges of keeping a job while not having a permanent place to live.<sup>279</sup> Going to a job on a regular basis becomes a major challenge when a family is couch surfing or sleeping in a car, not to mention going without the ability to shower and change into clean clothes beforehand. This inevitably leads to financial challenges and worsening credit, a major factor in the ability to obtain another lease. It is also no surprise that eviction increases mental and physical illness,<sup>280</sup> which can be attributed to the hardship of being displaced, the inevitable consequences of unstable stable shelter and

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<sup>276</sup> See, e.g., *Adverse Childhood Experiences: Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T HEALTH AND HUM. SERVS., <https://perma.cc/CFT6-K6GD>, last updated June 29, 2023).

<sup>277</sup> See, e.g., Chester Hartman & David Robinson, *Evictions: The hidden housing problem*, 14 HOUS. POL'Y DEBATE 461, 463 (2003); Matthew Desmond, *Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MACARTHUR FOUND. 1 (2014), <https://perma.cc/F84Y-UUL4>.

<sup>278</sup> Matthew Desmond, *Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MACARTHUR FOUND. 2 (2014), <https://perma.cc/F84Y-UUL4>.

<sup>279</sup> ROBERT COLLINSON ET AL., CTR. FOR ECON. STUD., U.S. CENSUS BUREAU, *EVICTION AND POVERTY IN AMERICAN CITIES* 4 (2023).

<sup>280</sup> *Id.*



being unable to consistently make meals, get adequate sleep, and engage in hygiene activities, such as bathing and brushing teeth.

This dynamic of housing instability means low-income households move more frequently than higher-income households and are more likely to face homelessness.<sup>281</sup> (Higher-income individuals can also be involuntarily displaced, but such a circumstance is unlikely to result in homelessness since they can more easily obtain new housing quickly.) Research confirms this assumption: households in poverty move about 50% more frequently than higher-income households.<sup>282</sup> Rates of eviction, homelessness, and frequent mobility are low among the entire U.S. population, but they are disproportionately high—and certainly a major crisis—for those experiencing poverty and especially for those in minority racial and ethnic demographic groups.<sup>283</sup>

Newly-arrived refugees and asylum seekers—who often find themselves homeless and living in temporary shelter upon arriving in American cities—face similar challenges with receiving mail.<sup>284</sup> Agencies send by mail court appearance notices, work permits, school enrollment information, ID cards, and other key documents that are needed both to become financially stable and to apply for other services.<sup>285</sup> While shelters and social service agencies purport to offer a place for homeless immigrants to receive such mail, the reality is these systems are informal and unreliable, with mailed notices often lost or significantly delayed.<sup>286</sup>

To partially address the issue of mail delivery for households experiencing homelessness USPS has long provided a service called “general delivery,” whereby mail is held at a post office for recipients without a permanent address.<sup>287</sup> This can be a short-term solution for those experiencing homelessness to receive mail. The service enables a person to receive mail addressed merely to their name, e.g., “John Doe, General Delivery, Seattle, Washington.” However, individual postmasters at regional USPS facilities determine the rules and restrictions on what mail they will save for people to pick up, how long they will save it, and how frequently they will do so.<sup>288</sup> Mail is generally held for no more than thirty days.

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<sup>281</sup> Robin Phinney, *Exploring Residential Mobility among Low-Income Families*, 87 SOC. SERV. REV. 780 (2013).

<sup>282</sup> Ravid K. Ihrke & Carol S. Faber, *Geographical Mobility: 2005 to 2010*, U.S. CENSUS BUREAU, 5-6 (2012).

<sup>283</sup> Phinney, *supra* note 281, at 808.

<sup>284</sup> Luis Ferré-Sadurní, *Migrants in N.Y. Shelters Face Surprising Challenge: Getting Their Mail*, N.Y. TIMES (Sep. 3, 2024), <https://perma.cc/8WUP-79XH>.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> U.S. POSTAL SERV., MAILING STANDARDS OF THE UNITED STATES POSTAL SERVICE, DOMESTIC MAIL MANUAL § 508.6.1 (2024).

<sup>288</sup> *Id.* at § 508.6.2.

Although mail may be held for longer periods if approved by the local postmaster, postmasters may limit how long they will provide this service.<sup>289</sup> General delivery may also be offered at just one retail location under the jurisdiction of the same regional postal facility, making it an inconvenient journey to pick up mail for many who might otherwise rely on this service.<sup>290</sup> While there are standards of practice in the Domestic Mail Manual issued by USPS, in reality, general delivery implementations vary widely and, therefore, so does access to the service by those without a fixed address.<sup>291</sup>

These variations and limitations were upheld as constitutional in the Ninth Circuit case *Currier v. Potter*, where three homeless men were denied a no-fee post office box<sup>292</sup> for mail delivery and were required to receive general delivery of their mail at a centralized location in Seattle—the Main Post Office—rather than at one of the other thirty-two branch offices in the greater Seattle area, particularly one closer to the homeless shelter or street-based locations where they were staying. The men sued USPS for violating *inter alia* their rights under the Fifth and Fourteenth Amendments, although on equal protection and not due process grounds.<sup>293</sup> The Court held that the rights of the men were not violated because no fundamental right was at stake, and the restrictions imposed by the USPS regulations were rational to further a legitimate public purpose.<sup>294</sup> Thus, the utility of general delivery remains quite limited for those who face housing instability. One investigation of this issue in California found that, although the state encourages counties to tell program participants lacking stable housing to consider general delivery as a fallback option, local post offices place restrictions on the service and preclude individuals from using the service indefinitely, instead limiting an individual's use of the service overall (not just the holding of an individual piece of mail) to just thirty days.<sup>295</sup>

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<sup>289</sup> *Id.* at § 508.6.4.

<sup>290</sup> *Id.* at § 508.6.2.

<sup>291</sup> *Id.* at § 508.6; W. CTR. ON L. & POVERTY, RETURN TO SENDER: HOW AN UNRELIABLE MAIL SYSTEM HARMS CALIFORNIANS LIVING IN POVERTY 10 (Mar. 2023).

<sup>292</sup> *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2004). A no-fee post office box is a mailbox at a USPS retail location provided to the recipient at no cost in a USPS service area that does not provide delivery of mail to the recipient's location. Because USPS delivered to all Seattle addresses, the plaintiffs in this case were deemed ineligible for a no-fee post office box.

<sup>293</sup> *Id.* at 723.

<sup>294</sup> *Id.* at 731-32.

<sup>295</sup> W. CTR. ON L. & POVERTY, *supra* note 10.

*B. Technology Usage Among Low-Income Individuals*

The “digital divide”—whereby low-income individuals have unequal or worse access to technology than those of higher incomes—has long been observed and confirmed by numerous studies. However, it has narrowed in recent years. As of 2021, 57% of low-income adults had broadband at home, and 59% had a desktop or laptop computer.<sup>296</sup> And, although 97% of U.S. adults making over \$100,000 own a smartphone, even 76% of those making less than \$30,000 have one too. About one quarter of them exclusively rely on such a device to access the Internet.<sup>297</sup> This is nearly double the number of low-income adults who relied on their smartphone for Internet access just eight years prior.<sup>298</sup> Some demographic groups continue to report little to no Internet use, such as some segments of the elderly and disabled, but this is a dwindling population. In 2000, about 48% of all U.S. adults reported not using the Internet at all; in 2021, that figure was just 7%, and only 14% of low-income adults reported not using the Internet at all.<sup>299</sup>

The Internet has been a key tool to accessing government services and benefits for many years, and not just for those with access to computers. As far back as 2015, about 38% of low-income adults were already using their smartphone to access government services or information.<sup>300</sup> The central role that Internet access now plays in American life has never been more clear than it was in 2020, during the early days of the COVID-19 pandemic: 87% of Americans believed Internet usage to be either “essential” or “important” during the crisis.<sup>301</sup> Although many low-income households faced dire challenges throughout the pandemic, many were still able to access education and other government services as a result of being connected to the Internet in some way (although certainly not as many as higher-income peers).<sup>302</sup>

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<sup>296</sup> Emily Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), <https://perma.cc/7NAK-KAHA>.

<sup>297</sup> *Id.*

<sup>298</sup> Jessica Cruz, *Applying for Public Benefits Using a Smart Phone: Trends and Challenges*, RUTGERS N.J. STATE POL’Y LAB, <https://perma.cc/7NAK-KAHA> (last visited Nov. 12, 2023).

<sup>299</sup> Andrew Perrin & Sara Atske, *7% of Americans Don’t Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 2, 2021), <https://perma.cc/U7WP-DCHH>.

<sup>300</sup> Aaron Smith, *U.S. Smartphone Use in 2015, Chapter Two: Usage and Attitudes Toward Smartphones*, PEW RSCH. CTR. (Apr. 1, 2015), <https://perma.cc/7QXP-2YFU>.

<sup>301</sup> Emily A. Vogels et al., *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RSCH. CTR. (Apr. 30, 2020), <https://perma.cc/LPQ3-2ALR>.

<sup>302</sup> S. K., Haderlein, et. al., *Disparities in Educational Access in the Time of COVID: Evidence From a Nationally Representative Panel of American Families*, AERA OPEN 7 (Aug. 23, 2021).

Contrary to the typical narrative surrounding gaps in access to technology (and therefore access to the associated services and information), many individuals living in poverty do heavily rely upon it.<sup>303</sup> Specifically, many youth and adults experiencing homelessness use technology extensively to meet their basic needs. For example, one illustrative study of several homeless adults who had been living in shelters, transitional living programs, or on the streets in Los Angeles County reported that 94% of adults in the survey group—who were fifty-four years old on average, and 58% of whom were Black—currently or recently had a cell phone. Of those surveyed, 58% had a smartphone and 76% used text messaging.<sup>304</sup> While about a third of the survey participants reported having not used the Internet in the past three months, 85% said they used their cell phones every day and 76% had texted in the past three months.<sup>305</sup> Several other studies have found that technology can be used as a successful intervention with homeless individuals, such as to help them adhere to a medication regimen<sup>306</sup> or as a reminder of upcoming health or social service appointments.<sup>307</sup>

Technology use has also become much more prevalent in younger generations at all income levels. Among teenagers across the United States, 95% have a cell phone and 90% have a computer.<sup>308</sup> Even among teens who live in a household making less than \$30,000, 93% own a smartphone and 79% own a computer.<sup>309</sup> Black and Hispanic teens report being online “almost constantly” at rates higher than white teens, but overall 97% of teens report being online every day.<sup>310</sup> Even youth experiencing homelessness also generally use technology at high rates and are savvy at doing so,<sup>311</sup> likely due to their familiarity with the technology given its ubiquity in their lives. As these young people age into adulthood, it is likely that their technology use will continue, and the ability to reach

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<sup>303</sup> See, e.g., Harmony Rhoades et al., *No Digital Divide? Technology Use among Homeless Adults*, PUBMED CENT., NAT’L LIBR. MED. 3 (2017) (author manuscript) <https://perma.cc/A6LQ-FPRN>; Eric Rice et al., *Cell Phone Use among Homeless Youth: Potential for New Health Interventions and Research*, 88 J. URB. HEALTH 1175 (2011).

<sup>304</sup> Rhoades et al., *supra* note 303.

<sup>305</sup> *Id.*

<sup>306</sup> See generally Charon Burda et al., *Medication Adherence Among Homeless Patients: A Pilot Study of Cell Phone Effectiveness*, 24 J. AM. ACAD. NURSE PRAC. 675, (2012) (studying the usefulness of phone calls and surveys as reminders to patients to take their medication).

<sup>307</sup> See, e.g., McInnes et al., *Preliminary Needs Assessment of Mobile Technology use for Healthcare Among Homeless Veterans*, PEERJ (July 30, 2015), <https://perma.cc/GS8R-YQT7>.

<sup>308</sup> Emily A. Vogels et al., *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://perma.cc/76SF-Y49M>.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> See generally Rice et al., *supra* note 303 (studied patterns of cell phone use among homeless youth in Los Angeles).

this population through technology will only become more feasible. Indeed, 96% of young adults in general aged eighteen to twenty-nine own a smartphone, and 99% report that they use the Internet.<sup>312</sup>

Homeless youth are also already using technology to meet their basic needs and access social service information. Research strongly indicates that even when young adults experiencing homelessness do not themselves own the technology they need to access the Internet, many do so anyway through a computer lab at a drop-in center, social service agency, or public library.<sup>313</sup> Research has found that they are using the Internet to look for housing, employment, and other social services.<sup>314</sup> At least one study found homeless youth spend more than one hour online every day, with Black youth being more likely than their Hispanic and white counterparts to look for housing online.<sup>315</sup>

While older adults have rates of smartphone and Internet access lower than that of younger populations, there is still widespread adoption of technology among this cohort. Already by 2017, 73% of adults aged 65 or older and making less than \$30,000 annually owned a cell phone of some kind.<sup>316</sup> Among all adults ages sixty-five and older, 61% own a smartphone and 75% access the Internet.<sup>317</sup> Based on trends over the past several decades, the gap between the rates of technology usage between young adults and older adults is quickly narrowing,<sup>318</sup> a trend that applies to low-income individuals, as well as wealthier ones.

### C. *The Nature of Poverty With Respect to Time, Money, and Cognition*

Individuals in poverty face a range of social and economic challenges, but it is the lack of adequate time to address such challenges and to change their circumstances that is one of the biggest factors that keeps individuals in poverty.

There are many ways in which being poor leads to a lack of time. The working poor often have to travel great distances because available housing near well-paying jobs is unaffordable, so they spend hours each

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<sup>312</sup> Michelle Faverio, *Share of Those 65 and Older Who Are Tech Users Has Grown in the Past Decade*, PEW RSCH. CTR. (Jan. 13, 2022), <https://perma.cc/XYR5-ZVMD>.

<sup>313</sup> David E. Pollio et al. *Technology Use Among Emerging Adult Homeless in Two U.S. Cities*, 58 SOC. WORK 173, 174 (Apr. 2013).

<sup>314</sup> Susanna R. Curry et al. *Correlates of Homeless Youths' Stability-Seeking Behaviors Online and In Person*, 7 J. SOC'Y. FOR SOC. WORK AND RSCH. 143, 145 (2016).

<sup>315</sup> *Id.*

<sup>316</sup> See Monica Anderson & Andrew Perrin, *Tech Adoption Climbs Among Older Adults*, PEW RSCH. CTR. (May 17, 2017), <https://perma.cc/2JAL-8FS8>.

<sup>317</sup> Faverio, *supra* note 312

<sup>318</sup> *Id.*

day commuting.<sup>319</sup> When one job does not pay enough to afford the basic necessities of life—after all, the federal minimum wage is still just \$7.25 per hour, or \$15,080 working full time for fifty-two weeks annually, and twenty states have yet to set a higher minimum<sup>320</sup>—they may have to find a second job. Individuals who work second jobs tend to be low-wage workers and they tend to work multiple jobs year-round rather than just seasonally or occasionally.<sup>321</sup> Even the amount of time needed for individuals to earn a decent living has changed. In past decades, while wages were often not enough to enable economic mobility, working full-time hours even at a low wage was at least enough to make ends meet, if not enough to thrive. But since the 1970s, wages have stagnated in inflation-adjusted dollars.<sup>322</sup> From 1979 to 2022, the typical worker’s wage has increased by just 14.8%<sup>323</sup>—dramatically less than the inflation of consumer prices, which have increased about 350% in roughly the same time period.<sup>324</sup>

While some scholars have proposed quantifying the time a household has available to work as a way to measure its potential productivity and, therefore, its ability to overcome poverty,<sup>325</sup> the reality is that the time individuals need is not simply about earning an income. Low-income adults must also do the unpaid labor involved in running a household, including cooking, cleaning, doing the dishes, paying the bills, and a myriad of other tasks common to every household at most income levels. Aside from working for wages, low-income parents still have to rush to pick up their young children from school and take them to doctor’s appointments and social activities. But unlike their wealthier counterparts, they disproportionately do not share parenting with a partner,<sup>326</sup> so they have to do it all on their own or, in the best case, stitch together a patchwork community of friends and relatives who can help with providing

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<sup>319</sup> Elizabeth Roberto, *Commuting to Opportunity: The Working Poor and Commuting in the United States*, BROOKINGS INST. (Feb. 2008), <https://perma.cc/A54J-CNHE>.

<sup>320</sup> *State Minimum Wages*, NAT’L CONF. STATE LEGISLATURES, <https://perma.cc/RTF2-GWHF> (last updated October 12, 2023).

<sup>321</sup> Keith A. Bailey & James R. Spletzer, *Using Administrative Data, Census Bureau Can Now Track the Rise in Multiple Jobholders*, CENSUS BUREAU (Feb. 3, 2021), <https://perma.cc/2LRD-L7PL>.

<sup>322</sup> *The Productivity–Pay Gap*, ECON. POL’Y INST., <https://perma.cc/VJ82-TJA6> (last updated October 2022).

<sup>323</sup> *Id.*

<sup>324</sup> U.S. BUREAU LAB. STAT., ECONOMIC NEWS RELEASE, CONSUMER PRICE INDEX FOR ALL URBAN CONSUMERS (CPI-U): U.S. CITY AVERAGE, BY EXPENDITURE CATEGORY (Aug. 14, 2024).

<sup>325</sup> See Clair Vickery, *The Time-Poor: A New Look at Poverty*, 12 J. HUM. RES. 27 (1977).

<sup>326</sup> *Child Well-Being in Single-Parent Families*, ANNIE E. CASEY FOUND. (June 23, 2022), <https://perma.cc/DR24-PP78>.

transportation to and from school, babysitting, and the other basic requirements of caring for children.<sup>327</sup> And just like all adults, low-income adults need to put food on the table. However, they may have to travel long distances to get to a grocery store<sup>328</sup> and they likely have to shop very carefully, maximizing their limited income or searching for the items allowed under the strict requirements of programs in which they may be enrolled, such as the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) and SNAP. Of course, if they cannot afford to go to a grocery store for the food they need, they may resort to a food pantry, where they can get free produce, nonperishable items, and other essentials. In 2022, an estimated 49 million people in the United States relied on food pantries, or about one in six people.<sup>329</sup> While this may not cost money (to individuals themselves), it does cost time, as getting to the closest food pantry, waiting in line, and then returning home—possibly in addition to going to the grocery store—can take hours each week.<sup>330</sup>

Meanwhile, getting and staying enrolled in safety net programs that help to alleviate the effects of poverty is itself time consuming. Individuals often wait many hours just to be able to apply or complete the application process to even be considered for enrollment. The experience of one elderly Wisconsin woman and her son is not atypical:

“I was on hold with people from the (FoodShare) program for one and a half hours waiting to conduct my mom’s interview,” [the son] said. “They asked me for my mom’s case number and put me on hold for another 20 minutes, and then an automated voice said something like: ‘We close at noon on Thursdays’ and ended the call.” . . . The [FoodShare call center is indeed closed at that time, which is not common knowledge for many people on these programs[.] . . . [The son] said at least three times in June he endured two hours or more of wait times to secure a FoodShare interview for his mother so she could get the assistance she needed. . . . In addition to the family’s difficulty in getting the mother interviewed, [the son] has had to send in documentation to again prove

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<sup>327</sup> Esau McCaulley, *A Hidden Currency of Incalculable Worth*, N.Y. TIMES (Aug. 11, 2023), <https://perma.cc/7RLH-PVQJ>.

<sup>328</sup> *Food Deserts in the United States*, ANNIE E. CASEY FOUND. (Feb. 13, 2021), <https://perma.cc/MLP4-EURU>; Michele Ver Ploeg, *Access to Affordable, Nutritious Food is Food is Limited in ‘Food Deserts,’* ECONOMIC RESEARCH SERVICE, U.S. DEP’T AGRIC., (Mar. 1, 2010), <https://perma.cc/V27N-T6NF>.

<sup>329</sup> *Hunger in America*, FEEDING AM., <https://perma.cc/PME9-TEXD> (last visited Dec. 7, 2023).

<sup>330</sup> Tamara Gane, *Opinion: Being Hungry in America Is Hard Work. Food Banks Need Your Help*, NPR (June 30, 2019), <https://perma.cc/73TK-H5GK>.

his mother's medical condition for both FoodShare and Medicaid.<sup>331</sup>

This experience is not only aggravating, degrading, and complex, it also costs a great deal of time that could be used for other activities, including working or caring for loved ones. Even program administrators admit the process can often be difficult and time consuming. One such administrator who ran Wisconsin's FoodShare program at the Department of Health Services for six years has said, "I'm a well-educated, smart individual, (and) that was my job, and if I had to apply for benefits, I would be challenged to do so."<sup>332</sup>

Beyond public assistance, getting an education is often seen as a way to overcome poverty in the long-term and achieve economic mobility. But enrolling in college as a low-income parent in particular poses its own challenges. About 57% of student parents are low-income, and they take about twice as long to complete college than the average student, with about a third of both single and married low-income women taking more than ten years to get a degree.<sup>333</sup> Moreover, low-income students logically need financial assistance in the form of debt to pay for tuition, fees, and books. Such debt is a larger share of household income for low-income households than it is for higher-income households,<sup>334</sup> meaning the poorest families have the hardest time paying off educational debt. This is to say nothing of the cost of education itself, which has increased significantly in recent years, far outpacing the growth of wages. Even after adjusting for inflation, in-state tuition and fees at public universities that offer bachelor's degrees have grown about 56% between 2004 and 2024.<sup>335</sup>

For all of the foregoing reasons, time is a resource that low-income individuals have in short supply. This concept has been studied by scholars and named "time poverty,"<sup>336</sup> but money poverty and time poverty are essentially one in the same. There is no poverty without being short on time. Just as individuals who have been evicted have a harder time finding

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<sup>331</sup> Young, *supra* note 243.

<sup>332</sup> Joey Prestley & Sam Watson, *Federal Food Aid in Wisconsin has Evolved, but Users Still Face Decades-old barriers*, WIS. WATCH, PBS WIS. (Aug. 8, 2022), <https://perma.cc/APE4-GQGX>.

<sup>333</sup> Katherine M. Conway et al., *Time Poverty and Parenthood: Who Has Time for College?*, 7 AERA OPEN 3 (2021).

<sup>334</sup> *A Record One-in-Five Households Now Owe Student Loan Debt*, PEW RSCH. CTR. (Sep. 26, 2012), <https://perma.cc/DW6J-35QU>.

<sup>335</sup> Emma Kerr & Sarah Wood, *A Look at 20 Years of Tuition Costs at National Universities*, U.S. NEWS & WORLD REP. (Sept. 22, 2023), <https://perma.cc/VFX9-EGLP>.

<sup>336</sup> Andrew S. Harvey & Arun K. Mukhopadhyay, *When Twenty-Four Hours Is Not Enough: Time Poverty Of Working Parents*, 82 SOC. INDICATORS RSCH. 57 (2007).



a landlord willing to rent to them, a lack of time is another self-reinforcing cycle. While those in low-wage jobs could theoretically improve their circumstances by getting a better education or applying to a higher paying job, both of these options require time low-income individuals do not have to spare.<sup>337</sup>

In addition to a lack of time being a major burden on those in poverty, relatively recent research in psychology, cognition, and stress has posited that poverty itself makes dealing with everyday tasks challenging due to the chronic stress it creates.<sup>338</sup> Without a doubt, a lack of time and social isolation are just a few consequences of financial hardship that lead to stress, which has been shown to impair working memory and cognitive flexibility, such as being able to deal with changing circumstances.<sup>339</sup>

Relatedly, researchers have also found ample evidence that a person's cognitive "bandwidth" is severely diminished under the conditions that those in poverty face every day.<sup>340</sup> The concept of bandwidth encompasses the capacity to solve problems and retain information, as well as executive control, which helps a person plan for the future, regulate behavior, and shift attention to new tasks.<sup>341</sup> A lack of bandwidth can lead to diminished decision-making and productivity. To be clear, the amount of cognitive bandwidth a person has is not a measure of innate intelligence or skill. Rather, it is a circumstantial characteristic of a person's mental state. Individuals in poverty face several issues that negatively affect bandwidth, including the distraction of having to constantly manage scarce financial resources, the health effects of a lack of adequate nutrition, and sleep deprivation.<sup>342</sup> In addition to these factors, low-income households disproportionately live in areas with more noise pollution, which has also been shown to contribute to a decline in bandwidth.<sup>343</sup> Individuals with limited bandwidth ultimately make mistakes—such as forgetting to fill out paperwork or submit documents—that those with more bandwidth are more likely to avoid. When they do make mistakes, those

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<sup>337</sup> See, e.g., Esau McCaulley, *A Hidden Currency of Incalculable Worth*, N.Y. TIMES (Aug. 11, 2023), <https://perma.cc/7RLH-PVQJ>; see also BARBARA EHRENREICH, NICKEL AND DIMED (2001).

<sup>338</sup> See Grant S. Shields et al., *The Effects of Acute Stress on Core Executive Functions: A Meta-analysis and Comparison with Cortisol*, 68 NEUROSCIENCE & BIOBEHAVIORAL REVS. 651 (2016).

<sup>339</sup> *Id.*

<sup>340</sup> Frank Schilbach et al., *The Psychological Lives of the Poor*, 106 AM. ECON. REV. 435, 435-38 (2016).

<sup>341</sup> *Id.* at 435.

<sup>342</sup> *Id.* at 437-439.

<sup>343</sup> See generally Joan A. Casey et al., *Race/Ethnicity, Socioeconomic Status, Residential Segregation, and Spatial Variation in Noise Exposure in the Contiguous United States*, 125 ENV'T HEALTH PERSP. 077-017-5 (July 25, 2017); Schilbach et al., *supra* note 340 at 438.

mistakes are often more consequential and have more lasting impacts on their lives, such as a loss in access to public benefits. Remembering to complete a task or fill out paperwork may seem trivial to most people, but the added stressors of poverty make even these basic tasks challenging.

Higher-income individuals can compensate for a lack of time with money, but that is not an option for those in poverty. As the authors of one study note, “money is a potential substitute for bandwidth. It is often possible to buy yourself the extra slack you need—hiring someone to cook and clean—or to reduce the factors which lead to lower bandwidth—purchasing a comfortable bed in a quiet neighborhood.”<sup>344</sup> This is slack that poor families just do not have.

#### IV. DUE PROCESS REQUIRES DELIVERY OF NOTICE BY MODERN TECHNOLOGY

Under the *Mathews* test, the changing nature of poverty and the modern ubiquity of technology alone do not require different or additional safeguards to satisfy due process; these considerations must be weighed against the burdens such new safeguards would put on the agencies tasked with administering them. Yet contrary to the stereotype of ossified bureaucratic agencies that mechanically administer public benefits, and doing only the bare minimum required under federal law, many states and counties already have modern technology that can be used to improve notice delivery. Moreover, many have already undertaken a range of innovations to do just that.

This Part examines agencies’ ability and willingness to employ modern technology to reach low-income individuals and then argues that this, along with the changing facts and circumstances of contemporary poverty, demands new procedural safeguards in delivering notice in order to stay compliant with the holdings of *Goldberg* and *Mathews*.

##### A. Agencies’ Adoption of Technology

While due process *requirements* in the context of public benefit programs may have remained static, the actual processes that public agencies employ have been quickly evolving in recent years. As noted previously, state and county agencies have adopted software tools that make it easier to administer their programs—and easier to deny and terminate benefits. But many agencies have also used technology to help individuals learn about and apply for programs and keep participants enrolled. Agencies have experimented with and embraced a variety of technology-driven tools—from basic text message reminders about notices and upcoming

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<sup>344</sup> Schilbach et al., *supra* note 340 at 439.

appointments to sophisticated online account systems that help applicants and participants apply and submit documentation (discussed previously).<sup>345</sup> Many agencies also send and receive emails. Technology can improve the experience for program applicants and participants and address some of the issues precipitated by the modern circumstances of poverty.

The deployment of statewide online account systems, through which individuals can apply for and manage enrollment in public benefit programs, have likely made the application and renewal process easier for many individuals. While paper forms are still available for those who prefer them, those that are able and willing to use an online system will generally find it much more efficient and dignified than having to present forms and documentation in person at a social service office. (Not to mention it is much more efficient and less error-prone for individuals to enter their own information into a database rather than having an administrator transcribe the information from filled-out paper forms.) As of 2020, all 50 states and the District of Columbia now offer online accounts through which individuals can apply for, enroll in, and renew their enrollment in Medicaid.<sup>346</sup> This modernization can largely be attributed to the Affordable Care Act, which required states to offer online application and recertification systems.<sup>347</sup> Specifically, the ACA required the Health and Human Services Secretary to develop “interoperable and secure standards and protocols that facilitate enrollment of individuals in Federal and State health and human services programs, as determined by the Secretary.”<sup>348</sup> These include “[n]otification of eligibility, recertification, and other needed communication regarding eligibility, which may include communication via email and cellular phones,” among several other forward-looking innovations to help people submit documents and streamline renewal.<sup>349</sup> These systems have made it dramatically easier for tech-savvy individuals to apply and keep their enrollment up to date. But they have not been adopted evenly across the country, having become the primary way people apply for Medicaid in only twenty-two states (although the share of people applying online may be much higher following the

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<sup>345</sup> LA DEP’T HEALTH, *supra* note 226.

<sup>346</sup> Tricia Brooks et al., *Medicaid and CHIP Eligibility, Enrollment, and Cost Sharing Policies as of January 2020*, KFF 33 (Mar. 2020) <https://perma.cc/AQ5Q-8E6L>.

<sup>347</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 129 (codified in scattered sections of 42 U.S.C.).

<sup>348</sup> 42 U.S.C. § 300jj-51(a).

<sup>349</sup> *Id.* at § 300jj-51(b)(6); *See also* DEP’T OF HEALTH HUMAN SERV. OFFICE OF CONSUMER INFORMATION AND INSURANCE OVERSIGHT, GUIDANCE FOR EXCHANGE AND MEDICAID INFORMATION TECHNOLOGY (IT) SYSTEMS (Version 1.0) (Nov. 3, 2010) (on file with CUNY Law Review).

COVID-19 pandemic, given how much of American life shifted online during that time).<sup>350</sup> As of 2020, paper or in-person applications were still the primary way individuals applied for Medicaid in some states.<sup>351</sup> As noted previously, forty-one states already allow individuals to opt into electronic notices for Medicaid.<sup>352</sup> The online systems of most states, including those in California and Wisconsin, also enable individuals to apply to non-Medicaid programs,<sup>353</sup> such as SNAP. Under Medicaid rules, those who opt into electronic notices via email must continue to receive notices by that modality.<sup>354</sup>

As discussed previously, many PHAs administer waitlists with an online system. HUD issues guidance that “encourages PHAs to use multiple application acceptance methods in order to comply with their affirmative marketing and fair housing obligations” including “[a]ccepting applications online.”<sup>355</sup> The Department also encourages PHAs to “have applicants obtain applications and return the completed forms via mail, email, online (e.g. the PHA’s website), or fax. These methods reduce barriers for applicants who have difficulty traveling to the PHA office because of a disability, work, or family care responsibilities, or because the family lives in another neighborhood within the PHA’s market area, or is living out-of-state and interested in relocating to the PHA’s area.”<sup>356</sup> The guidance further notes this can be “[i]nstead or in addition to allowing applicants to apply in person,” which appears to mean that PHAs could potentially refuse to take applications in person.<sup>357</sup> Although this raises equity concerns for those who feel more comfortable doing things offline, it also indicates that PHA offices are presumed by HUD to already use modern tools, like email, in communicating with applicants.

In addition to the deployment of online application systems with electronic notice opt-ins, agencies have in recent years utilized a range of other technologies to better reach individuals to inform them of programs they may be eligible for, help them apply, and send notifications. Given the near-universal ownership of cell phones among the target demographic, one tool that has been shown to be particularly effective at

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<sup>350</sup> Brooks et al., *supra* note 346.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 17.

<sup>354</sup> 42 C.F.R. § 435.918.

<sup>355</sup> U.S. DEP’T HOUS. AND URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK: WAITING LIST AND TENANT SELECTION 12-13 (2023) (on file with CUNY Law Review).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

reaching low-income individuals is sending SMS text message notifications.<sup>358</sup> In one pilot program run by nonprofit Benefits Data Trust and the New York City Department of Social Services, the agency sent text message “nudges” to SNAP participants to remind them about their annual recertification process.<sup>359</sup> The agency reports that the pilot program helped thousands of individuals successfully recertify after losing SNAP, and at one-third the normal cost of helping individuals re-apply.<sup>360</sup> Another program, run by nonprofit Code for America on behalf of the State of Louisiana, sends text message reminders and guidance to enrollees in, and individuals potentially eligible for, many of the state’s public benefit programs, including Medicaid, SNAP, Temporary Assistance for Needy Families (TANF), and WIC.<sup>361</sup> The program takes a layered approach, coupling text messages with mailed notices,<sup>362</sup> and has been able to significantly increase SNAP and Medicaid renewal rates.<sup>363</sup> In yet another example, the policy research nonprofit Center on Budget and Policy Priorities and Benefits Data Trust jointly worked with the states of Colorado, Massachusetts, Montana, and Virginia to conduct pilots that tested a series of text messages to improve WIC enrollment. The pilots saw promising results in increasing enrollment and also demonstrated that it is a low-cost and low-maintenance system for agencies to administer.<sup>364</sup>

To be sure, technology can also pose a threat to adequate notice in the public benefits context. For example, individuals in Colorado were automatically denied benefits by a software system, yet were not given information as to the reason, making it difficult to contest the decision.<sup>365</sup> In other instances, benefits for individuals in California and Texas were erroneously terminated from programs by a computer system without advanced notice.<sup>366</sup> How computer algorithms work may not be fully understood by the agencies who utilize them and, just like all humans, computer

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<sup>358</sup> See Vogels et al., *supra* note 308; see also Kimberly A. Tyler & Rachel M. Schmitz, *Using Cell Phones for Data Collection: Benefits, Outcomes, and Intervention Possibilities with Homeless Youth*, 76 CHILD. AND YOUTH SERVS. REV. 59 (2017).

<sup>359</sup> Katie Sullivan, et.al, *Using Text Message Outreach to Reduce SNAP Churn*, BEECK CTR. FOR SOC. IMPACT + INNOVATION, GEORGETOWN UNIV. 10 (Oct. 2021), <https://perma.cc/NN4C-9HMN>.

<sup>360</sup> *Id.*

<sup>361</sup> LA DEP’T HEALTH, *supra* note 226.

<sup>362</sup> *Id.*

<sup>363</sup> CODE FOR AM., LA’MESSAGE PILOT: TEXT REMINDERS IN LOUISIANA (Dec. 2019) (on file with CUNY Law Review).

<sup>364</sup> See Jess Maneely & Zoë Nueberger, *Targeted Text Message Outreach Can Increase WIC Enrollment, Pilots Show*, CTR. ON BUDGET POL’Y PRIORITIES & BENEFITS DATA TR. (June 10, 2021), <https://perma.cc/PM66-6N6K>.

<sup>365</sup> Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1276 (2008).

<sup>366</sup> *Id.*

programmers can and do introduce bugs that make incorrect determinations about individuals. However, while these examples point to significant deficiencies in the way some agencies have implemented specific technologies, they do not indicate problems with technology adoption writ large, particularly in light of widespread agency adoption of email—and, in some cases, even text messages—to reach applicants and participants.<sup>367</sup>

The technology required to send notices by email and text messages is also inexpensive, particularly compared with other forms of reaching households. As of September 2024, a first-class stamp was \$0.73, which is in addition to the cost of paper and printing.<sup>368</sup> By contrast, email is essentially free (now that basic email systems are already standard office technology in government agencies across the country) and text messages can be sent for less than one cent per message.<sup>369</sup> While there are upfront and ongoing maintenance costs to setting up an automated or even manual text messaging system, those costs pale in comparison to the cost of churn. One study by the Food and Nutrition Service found that “the certification costs associated with churn are approximately \$80 for each instance of churn that requires a full reapplication. This amount varies widely among States, from less than \$30 to more than \$130. . . . The added annual certification costs associated with churn range from \$0.1 million in Idaho to \$6.0 million in Illinois, equaling an estimated 1 to 4% of total certification costs in the States studied. . . . [And t]he annual amount of SNAP benefits forgone by cases that churn ranges from \$2.2 million in Idaho to \$108.2 million in Florida.”<sup>370</sup>

#### *B. Due Process Requires Notice by Reasonably Available Technology*

Since *Goldberg* was decided in 1970, much has changed about poverty, including an increase in involuntary mobility among low-income households, the adoption of modern technology, and a decrease in time available to meet basic needs. Yet the baseline procedural safeguards in public benefit program administration that are in place today are nearly

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<sup>367</sup> *But see id.* at 1248-49 (explaining computer decision making that sends mass notices straddles the line between decisions requiring individualized notice and none: “The archetypal *Londoner/Bi-Metallic* distinction has long animated the separate, yet parallel, procedural regimes that govern individual adjudications and rulemaking. Today’s automated systems, however, resist this traditional classification. Now, computers both render decisions about important individual rights and engage in rulemaking.”).

<sup>368</sup> U.S. POSTAL SERV. NOTICE 123 (July 14, 2024), <https://perma.cc/UGL5-H239>.

<sup>369</sup> *SMS Pricing*, TWILIO, <https://perma.cc/TB25-K6EJ> (last visited Dec. 28, 2023).

<sup>370</sup> GREGORY MILLS ET AL., OFF. OF POL’Y SUPPORT, FOOD AND NUTRITION SERV., U.S. DEP’T AGRIC., UNDERSTANDING THE RATES, CAUSES, AND COSTS OF CHURNING IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM xii (Nov. 2014).

identical to those that were in place fifty years ago, despite the fact that this constitutional requirement “is not a technical conception . . . unrelated to time, place and circumstances.”<sup>371</sup> Even as early as 1884, the Supreme Court explained that to consider what constitutes due process unchangeable “would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.”<sup>372</sup> The facts and circumstances on the ground have changed, and, since “due process is flexible and calls for such procedural protections as the particular situation demands,”<sup>373</sup> due process requirements in the administration of public benefits must change with them.<sup>374</sup>

Moreover, the willing adoption of technology by public agencies has fundamentally changed the calculus when applying the *Mathews* test to whether agencies must be constitutionally required to go above and beyond their current practices. In reapplying the test’s three factors—first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation and the probable value of different procedural safeguards; and third, the government’s interest, including any additional fiscal and administrative burdens the different safeguards would entail—to today’s facts and circumstances, it is clear that notices sent by postal mail alone are constitutionally inadequate.<sup>375</sup> Thus, courts that are asked to revisit this issue should require the government to adopt more stringent communications modalities that are more “reasonably calculated to reach”<sup>376</sup> the intended recipient, and could consider adopting a *reasonably available technology* standard for notice in the context of public benefits.

First, the private interest involved when it comes to receiving public benefits remains high for low-income individuals. In this context, receiving or not receiving cash or in-kind resources, such as food-purchasing assistance, health insurance, and housing vouchers, can be the difference between surviving and not. It is not an exaggeration to say that even a temporary loss in benefits or lack of housing can lead to hunger, homelessness, and illness, all of which can and do lead to long-term health, social, and economic consequences for all individuals, and especially

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<sup>371</sup> *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1972).

<sup>372</sup> *Hurtado v. California*, 110 U.S. 516, 529 (1884) (noting that to declare due process unchangeable “would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally.”).

<sup>373</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

<sup>374</sup> *Id.*; see also *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

<sup>375</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>376</sup> *Mullane*, 339 U.S. at 318.

children.<sup>377</sup> Receiving adequate and timely notice from welfare agencies is the lynchpin of the benefits application and retention process; missing notices has devastating consequences. As discussed previously, notices that are sent to an old address and returned to an agency without a forwarding address are grounds for immediate termination of either the application process or even benefits already being delivered.<sup>378</sup> When individuals fail to respond to notices in a timely fashion—fewer than two weeks in some cases—or neglect to submit all required documentation, their benefits can be terminated or denied before they even start. While the private interest in receiving cash welfare benefits in 1969 (at the time *Goldberg* was argued) was certainly high, the interest the benefit creates is even greater today: the minimum wage has not kept pace with inflation, salaries overall have remained stagnant, and the cost of health care<sup>379</sup> and housing costs have skyrocketed. Thus, in many ways, cash and in-kind resources that beneficiaries receive through public benefit programs are even more valuable today than they were fifty years ago, and the private interest is therefore even greater.

Second, both the risk of “erroneous deprivation” and the “probable value” of instituting different procedural safeguards have increased over the past several decades. Because low-income families struggle to find affordable housing, the working poor often cannot afford basic needs even when they are working a job (or multiple jobs) full time.<sup>380</sup> Low-wage jobs simply pay too little to make ends meet, and being able to make more money for the same number of hours worked often requires obtaining a higher education credential which is increasingly out of reach because of the dollar cost, time cost, or both.<sup>381</sup> Low-income individuals are stretched thin as a result of having to use their precious time in ways that enable their survival. Empirical studies have shown that this leads to diminished cognitive capacity—as a byproduct of situational stressors—to fully process information and respond effectively.<sup>382</sup> This means that it is more challenging for low-income individuals to navigate complex workflows, including applying for and staying enrolled in benefits and, therefore,

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<sup>377</sup> *Adverse Childhood Experiences: Risk and Protective Factors*, Ctrs. For Disease Control and Prevention, U.S. DEP’T OF HEALTH & HUM. SERVS. <https://perma.cc/L2KW-W7L3> (last updated May 16, 2024).

<sup>378</sup> See, e.g., 42 C.F.R. § 431.213(d).

<sup>379</sup> See Shameek Rakshit et al., *How Does Medical Inflation Compare to Inflation in the Rest of the Economy?*, PETERSON-KFF HEALTH SYS. TRACKER <https://perma.cc/36N2-B9C8> (last updated Aug. 2, 2024).

<sup>380</sup> *The Problem*, NAT’L LOW INCOME HOUS. COAL., <https://perma.cc/NJ26-J9VA> (last visited Sept. 25, 2024).

<sup>381</sup> ECON. POL’Y INST., *supra* note 322.

<sup>382</sup> Schilbach et al., *supra* note 340.



more challenging to contest erroneous adverse decisions by agencies, which involves asking for a fair hearing and engaging meaningfully in that process. Notices have been mailed to individuals through the postal service for decades, but the changing nature of poverty (as discussed previously) means that it is more likely that mailed notices will fail to reach their intended recipient today than in the 1970s. Thus, the risk of erroneous deprivation of welfare benefits has increased substantially.

The probable value of additional or substitute safeguards is also substantially higher for individuals today than it was decades ago. Whereas email did not exist decades ago, it is now a ubiquitous means of communication, free for anyone to use. There are dozens of free email providers, including popular ones such as Google's Gmail or Yahoo! Mail, all of which can be used on computers at public libraries, nonprofits, and some social service agencies. Moreover, a large proportion of low-income households have computers and Internet access at home.<sup>383</sup> The vast majority also have mobile devices, such as smartphones, which can be used to send and receive email for free either through a cellular phone plan or by using a public Wi-Fi hotspot.<sup>384</sup> Text messaging, too, has become ubiquitous, with a large majority of low-income individuals overall owning cell phones, and with near-universal ownership and use among younger individuals.<sup>385</sup> It is this context that makes electronic notice so valuable: applicants and participants in public benefits are not only likely to receive notices when agencies send them via email and text message, they may also *prefer* to receive notices this way. While reliable data about the number of individuals who have opted into electronic notices in public benefits nationwide is not readily available, the general trend toward adopting email and cell phones—and overall decline in the volume of First-Class Mail being sent<sup>386</sup>—is undeniable. Thus, additional safeguards, such as agencies layering benefit notices sent by mail with email and text message counterparts, would provide a substantial benefit to individuals. These should not be substitutes for mailed notices since many individuals—although a decreasing share—undoubtedly still prefer paper notices and perhaps would be more likely to see information that way. Indeed, there is ample evidence that multiple ways of getting in touch with people are more likely to prompt them to take action rather than relying on just one

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<sup>383</sup> Vogels, *supra* note 296.

<sup>384</sup> *See id.*

<sup>385</sup> *Id.*; see generally Aaron Smith, *Chapter 2: Usage and Attitude Toward Smartphones*, PEW RSCH. CTR. (April 1, 2015), <https://perma.cc/BR23-XBM8> (article provides percentages of demographically-categorized smartphone users engaging in certain behaviors).

<sup>386</sup> U.S. POST. SERV., *DELIVERING FOR AMERICA: OUR VISION AND TEN-YEAR PLAN TO ACHIEVE FINANCIAL SUSTAINABILITY AND SERVICE EXCELLENCE* 9 (Mar. 23, 2021) (as of FY2020, “First-Class Mail volume . . . has declined by 45 percent since FY2007”).

mode.<sup>387</sup> However, it is clear that providing additional notices through electronic means would provide value to many people applying to and enrolled in programs.

Third, and finally, adding safeguards to the process by requiring layered, electronic notices not only does *not* threaten the government's interest at stake, but it can also *reduce* the government's fiscal and administrative burdens. Agencies across the country have shown that, when it comes to adding technology-based safeguards, "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"<sup>388</sup> have become trivial. Every state has an online system to apply for Medicaid, and every state except Idaho and Wyoming have online systems to apply for SNAP.<sup>389</sup> Such systems already send out information via email to applicants, so the underlying technology infrastructure already exists for that purpose. (And very likely the public agencies that run SNAP in the two remaining states without online systems for SNAP applications can send out individualized emails at no additional cost to the agencies, since each state tells applicants they can submit an electronic copy of the paper application via email.)<sup>390</sup> Moreover, many of these same online systems give individuals the ability to opt in to receive notices electronically, so a built-in capability already exists in many cases and simply needs to be turned on by default. Collecting an email address is already happening on traditional paper application forms, even in states without online applications.<sup>391</sup> Agencies would also potentially need to update computer systems to send notices by default to all individuals, and workflows could be updated such that individual case workers would simply send emails at the same time that notices are sent by mail. In sum, it would be little additional burden on public agencies to send email notices to all applicants and enrollees, even to those who apply offline or through another means, such as by mailing or faxing in an application.

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<sup>387</sup> Laura Ruiz et al., USING REMINDERS TO EXPEDITE CLAIM FORM SUBMISSION AMONG INJURED WORKERS 13-19 (UBC-DIBS, Working Paper CBI-04, 2022), <https://perma.cc/7YWZ-YYTM>.

<sup>388</sup> *Mathews*, 424 U.S. at 335.

<sup>389</sup> Brooks, *supra* note 346; *SNAP Online: A Review of State Government SNAP Websites*, CTR. ON BUDGET POL'Y PRIORITIES (Nov. 7, 2022) <https://perma.cc/49PM-5253>; *SNAP: How to Apply and Frequently Used Forms*, WYOMING DEP'T FAM. SERVS. <https://perma.cc/9EVW-JZEV> (last visited Sep. 2, 2024); *Apply for SNAP*, IDAHO DEP'T HEALTH & WELFARE, <https://perma.cc/5RFD-CECU> (last visited Sep. 2, 2024).

<sup>390</sup> *SNAP: How to Apply and Frequently Used Forms*, WYOMING DEP'T FAM. SERVS. <https://perma.cc/9EVW-JZEV> (last visited Sep. 2, 2024); *Apply for SNAP*, IDAHO DEP'T HEALTH & WELFARE, <https://perma.cc/5RFD-CECU> (last visited Sep. 2, 2024).

<sup>391</sup> *Application for Assistance*, WYOMING DEP'T FAM. SERVS., <https://perma.cc/9EVW-JZEV> (last visited Sep. 2, 2024); *Application for Assistance*, IDAHO DEP'T HEALTH & WELFARE, <https://perma.cc/5RFD-CECU> (last visited Sep. 2, 2024).

Depending on the agency, sending text messages to all individuals would be slightly more burdensome than email, although agencies around the country have already shown that this is feasible and a relatively low-cost investment. Requiring electronic notices would reduce churn, saving precious time and money by avoiding the need to re-enroll eligible individuals whose benefits were terminated due only to a failure to respond to notices (saving anywhere from hundreds of thousands to millions of dollars, depending on the state, as discussed previously). There may be short-term additional administrative burdens to set up or change workflows or software systems, but in the long run, the administrative work would be reduced.

However, the *Mathews* test does not require agencies to add safeguards just because they can. Certainly, there are a variety of additional, innovative notice-related safeguards with which agencies might experiment to increase enrollment and retention. Innovations might include simply extending the time people have to respond to notices, having a case worker visit a participant's home in person, or requiring the use of the USPS National Change of Address Database before mailing notices.<sup>392</sup> But while each of these steps would increase the likelihood of someone receiving adequate notice, they pose significant administrative and fiscal burdens on agencies, and would not necessarily address the underlying problem.

By contrast, sending electronic notices by email and text message is responsive to the exact ways in which facts and circumstances have changed, and cures the inadequacy of mailed notices: they are no longer reasonably calculated to reach the intended recipient. Sending them electronically generally resolves this deficiency for all the foregoing reasons, and it does so without adversely affecting the government interest. Courts have readily prescribed cures for due process failures when the costs to the government are minimal.<sup>393</sup> They could do so now with mailed notice requirements. Even when there is *some* additional cost in having to update procedures, such an additional burden is "not overriding in the welfare context."<sup>394</sup> Thus, where an agency can cure the issue with little cost, courts are likely to find it must do so.

Still, even if courts were to broadly accept electronic notices as being a required procedural safeguard, what format such a notice would need to take could still be highly variable and debatable. Courts could consider adopting an additional test for evaluating whether the mode of sending a

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<sup>392</sup> See W. CTR. ON L. & POVERTY, *supra* note 10.

<sup>393</sup> See, e.g., *Blick v. Palmer*, 102 F.3d 1472, 1476-78 (8th Cir. 1997) ("The state can accommodate the plaintiffs with little cost, in either finances or time.").

<sup>394</sup> *Goldberg*, 397 U.S. at 266.

notice is adequate: it could look to whether the agency has adopted *reasonably available technology* in sending the notice to individuals. This would be consistent with the requirement in *Mullane* that the “means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”<sup>395</sup> An agency need not employ exhaustive means to reach participants, and certainly no court would impose that requirement on agencies where a statute does not. It would also certainly not require procedures that are likely to add a significant additional burden on an agency’s finances, such as requiring the adoption of certain tools or complex software upgrades that may be out of reach for agencies without appropriated funding. However, using technology already readily available to an agency to reach participants could offer a new baseline standard by which to judge whether procedures are reasonably calculated to reach the intended recipient. Relying on mailed notices alone is certainly calculated to reach the intended recipient, but it is not reasonably so. By contrast, requiring the adoption of available technology that is already feasible and customary would comply with the test in *Mullane*, whereby the procedures used to provide notice should be “not substantially less likely to bring home notice than other of the feasible and customary substitutes.”<sup>396</sup> For an agency to be reasonable in its calculation, it should be required to go further than a process that has for many years proven to be inadequate.

#### CONCLUSION

The government in the context of public benefits administration has a responsibility to send notices, using means by which the intended recipient is likely to see it. Given the inadequacy of sending notices by mail, agencies are not meeting their due process obligations when they only send notice via this traditional method despite the availability of a means more likely to reach the intended target. Agencies have demonstrated that they can resolve this issue by sending notices by email and text message along with mailed notices. Such layered notices would be more likely to be seen by recipients, and declining to implement them in the contemporary context is constitutionally inadequate. Where sending notices by means already available to agencies is very likely to cure the inadequacy, and those means are cost-effective and do not unduly burden the agencies, agencies ought to be required to employ them. The personal interest at stake for low-income individuals is nothing short of survival.

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<sup>395</sup> *Mullane*, 339 U.S. at 315 (1950).

<sup>396</sup> *Id.*