

## ESSAY

# Classaction.gov

Amanda M. Rose†

*This Essay proposes the creation of a federally run class action website and supporting administration (collectively, Classaction.gov) that would both operate a comprehensive research database on class actions and assume many of the notice and claims-processing functions performed by class action claims administrators today. Classaction.gov would bring long-demanded transparency to class actions and, through forces of legitimization and coordination, would substantially increase the rate of consumer participation in class action settlements. It also holds the key to mitigating other problems in class action practice, such as the inefficiencies and potential abuses associated with multiforum litigation, the limited success of the Class Action Fairness Act's notice requirement in spurring effective public oversight of class actions, and the potential for abuse inherent in cy pres settlement awards.*

## INTRODUCTION

Class actions, brought on an opt-out basis under Federal Rule of Civil Procedure 23(b)(3) and state analogues, are highly controversial. Supporters emphasize that class actions can help sustain a system of free enterprise. The threat of a class action can help keep businesses honest, and when businesses fail to play by the rules the reality of a class action can result in compensation to those who have been harmed.<sup>1</sup> Relying on class action attorneys (overseen by the courts) to police business practices, supporters contend, is better than relying on ex ante regulation or large

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† Professor of Law, Vanderbilt University Law School. For helpful comments and conversations, I would like to thank Lynn Baker, Ben Berry, Brian Broughman, Elizabeth Cabraser, Brian Fitzpatrick, Todd Hilsee, Lee Kovarsky, Craig Lewis, Debbie Matties, Robert Mikos, David Siffert, Charlie Silver, Randall Thomas, Yesha Yadav, participants and panelists at the FTC's workshop on Consumers and Class Action Notices, participants at Vanderbilt Law School's 22nd Annual Law & Business Conference, and students enrolled in the University of Texas's Colloquium on Current Issues in Complex Litigation. I am grateful to Regan Vicknair for excellent research assistance.

<sup>1</sup> See, e.g., AM. ASS'N FOR JUST., FORCED ARBITRATION: HOW CORPORATIONS USE THE FINE PRINT TO BULLY AMERICANS 19–24 (2016).

government enforcement agencies vulnerable to capture and complacency.<sup>2</sup> Critics counter that relying on class action attorneys, unbound by the accountability mechanisms that apply to government enforcers, introduces its own pathologies. The incentives of class action attorneys will naturally diverge from those of class members, and court oversight and other tools to reduce these agency costs may prove ineffective. Class action attorneys may settle meritorious cases for too little, for example, selling out the class for the defendant's promise not to challenge class counsel's handsome fee award.<sup>3</sup> They may also bring nonmeritorious cases and use the threat of a costly and risky trial to extract blackmail settlements to the detriment of U.S. businesses and, ultimately, consumers.<sup>4</sup>

Who has the better argument? Nobody really knows. It is an empirical question whether class actions in general, or particular types of class actions, increase or reduce social welfare, but the data that would help to answer it are largely inaccessible to researchers. As Professors Jonah Gelbach and Deborah Hensler recently observed, “[n]otwithstanding the fierceness of the class action debate and the apparent confidence of opponents and proponents in their factual assertions, . . . we have no data that can be used to reliably determine whether class actions are good, bad, or some of each.”<sup>5</sup> In this vacuum, participants in the class action debate are left free to make arguments based on intuition and, too often, self-interest. It is no wonder the class action debate has remained polarized for decades.

The limited empirical evidence on consumer class actions that researchers have been able to study makes one thing clear: claims rates in class action settlements are very low, meaning that class actions currently do a poor job of delivering compensation to class members.<sup>6</sup> Agency costs may contribute to this if

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<sup>2</sup> See BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* 29–47, 58–73 (2019).

<sup>3</sup> See, e.g., ANDREW J. PINCUS, U.S. CHAMBER INST. FOR LEGAL REFORM, *UNSTABLE FOUNDATION: OUR BROKEN CLASS ACTION SYSTEM AND HOW TO FIX IT* 8–9 (2017).

<sup>4</sup> See *id.* at 17–19.

<sup>5</sup> Jonah B. Gelbach & Deborah R. Hensler, *What We Don't Know About Class Actions but Hope to Know Soon*, 87 *FORDHAM L. REV.* 65, 65 (2018); see also Deborah R. Hensler, *Happy 50th Anniversary Rule 23! Shouldn't We Know You Better After All This Time?*, 165 *U. PA. L. REV.* 1599, 1615 (2017) (observing that researchers “face a virtual absence of even the most basic information on how class actions operate in federal and state courts”).

<sup>6</sup> For an overview of past empirical studies on class action claims rates, see FED. TRADE COMM'N, *CONSUMERS AND CLASS ACTIONS: A RETROSPECTIVE AND ANALYSIS OF SETTLEMENT CAMPAIGNS* 9–10 (2019) [hereinafter *CONSUMERS AND CLASS ACTIONS*].

class counsel's compensation is insensitive to the number of class members who file claims. But even perfectly faithful attorneys would find it challenging to achieve substantially higher levels of claiming activity. First, identifying potential class members is often a difficult and expensive task, and the cost of the effort may reduce the pro rata amount class members making claims will receive. Under a Rawlsian veil of ignorance, class members would not prefer that every dollar that could be spent seeking out additional class members actually be spent doing so. Second, even if class members could be identified without cost, claims rates would likely remain very low. Using data subpoenaed from claims administrators, the Federal Trade Commission (FTC) recently conducted the most comprehensive study of class action settlements to date. It found that on average only 9% of the class members who were sent direct notice bothered to file claims.<sup>7</sup>

This is a troubling statistic—at least if one believes that, in addition to deterring corporate wrongdoing, class actions should strive to compensate injured class members.<sup>8</sup> To begin to understand it requires an examination of the decision-making process class members likely engage in when they receive a class action settlement notice. A rational class member would file a claim only if the expected benefits of doing so exceeded the costs. The expected benefits of filing a claim include the settlement consideration, discounted to reflect the probability of nonpayment. The costs of filing a claim include “information-processing costs”: the time and effort it will take a class member to read a notice in order to determine whether she is in fact eligible to make a claim and how to go about doing that. They also include “claims-processing

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<sup>7</sup> *Id.* at 11.

<sup>8</sup> Not all share this belief. *See, e.g.*, Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2070 (2010) (arguing that “the optimal split of small-stakes [class action] judgments is 100% for the lawyers and nothing for class members” in order to incentivize lawyers to bring all cost-justified suits in pursuit of deterrence goals); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006) (arguing that “compensation is not really an important goal in small-claims class actions” and that “[a]ll that matters” is whether class actions cause “the defendant-wrongdoer to internalize the social costs of its actions”). However, as Hensler has noted:

[T]he belief that compensation of losses large and small is an important function of class actions lives on in American discourse about class actions, in the wording of Rule 23, in district court decisions approving or rejecting proposed settlements, in appellate decisions reversing judicial approval of class action settlements, and in public debate over the failures of Rule 23(b)(3) class actions.

Hensler, *supra* note 5, at 1611 (emphasis in original) (citations omitted).

costs”: the time and effort it will take her to actually submit a claim form and assemble any required proof. “Verification costs” may also weigh in a class member’s decision. Verification costs are costs associated with the possibility that the notice may be a scam: the costs of falling victim to a scam discounted by its likelihood or, alternatively, the costs of taking steps to alleviate suspicion prior to filing a claim, whichever is less.<sup>9</sup>

Important developments in recent years have put downward pressure on information- and claims-processing costs. The Federal Judicial Center (FJC) has helped to promote best practices in the design of class action notices, for example, in an effort to make them easier for class members to read and comprehend.<sup>10</sup> And technological advances have made claiming funds vastly more convenient for class members. Thirty years ago, to file a claim a class member had to fill out a paper form, place it in the mailbox, wait for a check to arrive back in the mail, and then take that check to a bank or ATM to deposit. Today, it is often possible for a class member to submit a claim online via a case-settlement website and to receive the funds via a form of electronic transfer.<sup>11</sup> Despite these developments, claims rates remain dismally low. Why?

One possible explanation is that the settlement consideration is just so trivial in most class actions that any amount of effort required by a class member will make claiming funds irrational. But in the FTC’s recent study, half of the settlements provided median compensation of \$69 or more, and a quarter provided median compensation of \$200 or more—not trivial sums to most

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<sup>9</sup> There are also psychological costs and benefits that class members might weigh in their decisions. A class member may derive pleasure from participating in a class action settlement involving a defendant they dislike, or displeasure from participating in one against a defendant they like. Some may find participating in the judicial system emotionally rewarding; others might find it anxiety-producing.

<sup>10</sup> See *infra* Part II.A.

<sup>11</sup> See *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at \*20 (N.D. Cal. July 22, 2020) (approving a settlement notice plan that allowed class members to submit claim forms via a settlement website and receive payments via direct deposit); Robert H. Klonoff, Mark Herrmann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 742 (2008) (explaining that claims-administration websites “allow the internet user either to print or submit directly a claim form”); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 591–92 (N.D. Ill. 2011) (rejecting an objection to the submission of claims online via a settlement website); see also Jessica Erickson, *Automating Securities Class Action Settlements*, 72 VAND. L. REV. 1817, 1833 (2019) (discussing electronic deposit of funds); CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 30 (discussing the click-through rates of online settlement claim forms).

Americans.<sup>12</sup> Moreover, if low levels of redress are the driving force leading to low average claims rates, we should observe higher claims rates in cases involving higher payouts. But in the FTC's study, claims rates were virtually the same in cases paying less than \$10 as in those paying over \$200.<sup>13</sup> Class member distrust in class action notices and claims processes may explain this puzzling finding, and also may provide a compelling explanation for why claims rates are so low.

Distrust can be expected to have a significant negative impact on claims rates. If a notice and claims process is trustworthy, a rational class member will not discount the expected benefit of filing a claim to reflect the risk of nonpayment due to fraud, nor will she factor verification costs into her cost-benefit equation. When distrust is present, by contrast, she will do both; thus, the expected benefits of claiming funds will be lower and the perceived costs of claiming funds higher. As uninvited communications promising payment, class action settlement notices likely attract a high level of suspicion. The level of suspicion they attract likely increases with the promised payout, which may explain the failure of the FTC to find a strong relationship between redress level and claims rates. The level of suspicion they attract has also likely increased in recent years with the introduction of new technologies in notice and claims processes. That class members would be highly suspicious of email notices sent from unfamiliar and unofficial addresses, or of postcard notices inviting them to visit unfamiliar, unofficial websites to make a claim, seems self-evident. It is also consistent with findings in the FTC's recent study: cases using email notice and postcard notices without detachable claims forms had far lower claims rates than those using traditional long-form notices.<sup>14</sup>

This Essay predicts that unless class member distrust is reduced, claims rates in consumer class actions will remain extremely low, notwithstanding reductions in claims-processing costs made possible by technological advances. It also proposes a way to achieve such a reduction: the creation of a federally run class action website and supporting administration, referred to collectively herein as "Classaction.gov." Classaction.gov would take over several functions that today are served by for-profit class action claims administrators: it would be responsible for

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<sup>12</sup> CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 11.

<sup>13</sup> *Id.* at 32–33.

<sup>14</sup> *Id.* at 11, 28.

sending all class action notices to class members; it would create webpages for all pending class actions through which class members could, among other things, opt out and submit claims; and it would be responsible for distributing settlement payments to eligible claimants. Classaction.gov's enabling legislation would also impose an obligation on class action litigants in state and federal court to file electronic copies of court filings and orders with Classaction.gov; Classaction.gov would use these documents, as well as the distribution and opt-out data it would naturally accumulate, to create a research database that would be available to the public on the Classaction.gov website.

Classaction.gov promises to legitimize class action notices and claims processes in the eyes of class members by leveraging the trust they already have in the federal government. Classaction.gov would also stand in a position to standardize the communications class members receive and to ensure that they consistently comply with best practices. The hope is that class action notices would become recognizable, official, easy-to-digest communications, and that in every case the website for submitting claims would be familiar, official, and secure. This would result in a reduction in the fraud discount rational class members apply when calculating the expected benefits of claiming settlement funds, as well as reductions in information processing and verification costs. These impacts, when coupled with the reduction in claims-processing costs that technological advances have made possible, should operate to meaningfully improve class actions claims rates.

Classaction.gov would also render class actions transparent, allowing for an evidence-based debate regarding their value in our society, and could mitigate a variety of other pernicious problems. For example, upon receipt of a new class action complaint, Classaction.gov staff could search the database for related cases and notify the respective presiding judges, thereby facilitating coordinated stays pending certification and resolution of the most appropriate suit. This would save judicial resources and would mitigate the ability of defendants to conduct much-maligned "reverse auctions."<sup>15</sup> Classaction.gov also offers a more effective way for government actors to monitor class actions than the notice provision in the Class Action Fairness Act of 2005<sup>16</sup> (CAFA).<sup>17</sup>

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<sup>15</sup> See *infra* Part III.B.

<sup>16</sup> 28 U.S.C. § 1715.

<sup>17</sup> See *infra* Part III.B.

Not only could Classaction.gov increase the claims rate among direct notice recipients, it could also be extended to make it cheaper and easier for parties to identify class members for receipt of direct notice in the first place. Imagine if individuals were encouraged to register on Classaction.gov as part of a broad and effective publicity campaign. Registrants would provide basic information about themselves as part of the registration process (e.g., name, number, email addresses, physical addresses), and Classaction.gov could then use this information to create a searchable class member database. In cases where the parties have partial identifying information about potential class members, this database could help them locate class members for receipt of direct notice. A registration feature would also provide a creative way to legitimize cy pres settlements. Registrants could be asked at the time of registration to select which nonprofits they would like unclaimed settlement monies paid to, and their expressed preferences could dictate the recipients of cy pres funds in particular cases. This would eliminate the corrupting influence introduced when the choice of cy pres recipients is left up to the judge and attorneys.<sup>18</sup>

The remainder of this Essay proceeds as follows: Part I discusses the well-recognized transparency problem with consumer class actions. Part II discusses the barriers to consumer participation in class action settlements, emphasizing the underappreciated impact of distrust on claims rates. Part III details the idea of Classaction.gov, explaining how it would work and how it could both solve the transparency problem discussed in Part I and greatly reduce the trust barrier to consumer participation in class action settlements discussed in Part II. Part III also details other important problems that Classaction.gov could mitigate and responds to potential concerns and objections. Part IV explains how extending Classaction.gov to include a registration feature would make it possible to identify a greater number of class members for receipt of direct notice and to legitimize cy pres settlements. A very brief conclusion follows.<sup>19</sup>

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<sup>18</sup> See *infra* Part IV.

<sup>19</sup> In a separate article, I explore myriad ways that Classaction.gov could support innovative techniques for reducing class action agency costs. See generally Amanda M. Rose, *Cutting Class Action Agency Costs: Lessons from the Public Company*, 54 U.C. DAVIS L. REV. 337, 401–30 (2020).

## I. THE CLASS ACTION TRANSPARENCY PROBLEM

The social value of class actions has been hotly debated for decades. Critics contend both that class action plaintiffs' attorneys bring nonmeritorious strike suits that tax the U.S. economy and that they settle meritorious cases for too little, selling out the class for excessive attorney's fees.<sup>20</sup> Defenders vigorously dispute these claims and argue that class actions serve a valuable social function: not only do they play an important compensatory role, but they also deter law breaking by supplementing often weak public enforcement efforts.<sup>21</sup> This debate has proven intractable because the empirical evidence required to substantiate or refute the core claims being asserted is either impossible or incredibly difficult to obtain.<sup>22</sup>

In order to begin to evaluate the claim that class actions serve an important deterrence function, for example, it would be important to know how many class actions are filed each year and how much defendants actually pay to resolve them. It is difficult to obtain even this basic information. There is no comprehensive database of state and federal court class action filings. A handful of websites provide lists of pending class action settlements with links to key court documents, including settlement agreements, but these lists are not comprehensive nor their links permanent. One can search Public Access to Court Electronic Records (PACER) to ferret out the number of class actions filed in federal court in a given year and to access settlement agreements and other case documents, but conducting research on PACER is difficult.<sup>23</sup> Obtaining information on state court class actions is even more so: every state has its own separate system of court records, and most do not provide online access to those records, let alone easily searchable online platforms.<sup>24</sup>

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<sup>20</sup> See PINCUS, *supra* note 3, at 8–9, 17–19.

<sup>21</sup> See AM. ASS'N FOR JUST., *supra* note 1, at 19–24.

<sup>22</sup> See Gelbach & Hensler, *supra* note 5, at 67 (“[W]e do not know a lot of things that would seem critical to know for anyone arguing anything about the performance of class actions, or how to improve that performance, much less to support rational policy reform.”).

<sup>23</sup> See Hensler, *supra* note 5, at 1618–21 (discussing the challenges associated with researching federal class actions using PACER, as well as the limited information available on the FJC's Integrated Database). *But see infra* note 33.

<sup>24</sup> See Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* 17 (RAND Inst. for Civ. Just. Working Paper No. WR-599-ICJ, 2008) (“[A]lmost all state court systems require members of the public to physically visit the courthouse to inspect the documents filed in civil cases.”). While CAFA's expansion of removal jurisdiction has diminished the

Moreover, except in cases filed in the Northern District of California, actual settlement distribution data is not generally made available to the public anywhere.<sup>25</sup> The amount of the settlement reported in the settlement agreement is meaningless in cases where unclaimed settlement monies revert to the defendant, or where the consideration takes the form of discounts on the defendant's goods or services. In such cases, the true price tag of the litigation to the defendant cannot be assessed without knowing the number of claims made or coupons redeemed.<sup>26</sup> The lack of settlement distribution data also means that we usually don't know how many class members actually ended up receiving compensation in any given case, and at what amounts, confounding efforts to assess arguments about the compensatory value of class actions. Finally, how can one begin to assess the appropriateness of class action attorney's fees when we do not even know how much class action attorneys make in fees relative to what defendants actually pay or class members actually receive? This lack of transparency stands in considerable tension with the idea that class actions serve a public function, supplementing the enforcement efforts of government officials. It also makes it difficult to convince a skeptical populace that class actions are worth preserving.

Numerous scholars have drawn attention to the class action transparency problem, and calls for reform have been made.<sup>27</sup> In

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importance of state court class actions relative to federal court class actions, it has not eliminated the state court class action. Nothing in CAFA compels a defendant to remove a state court class action to federal court, and doing so is not always in the defendant's self-interest. See *infra* note 82 and accompanying text. Moreover, corporate defendants cannot remove state court class actions brought on behalf of citizens of a single state if the defendant is either headquartered or has its principal place of business in that state, and several statutory exceptions to CAFA removal jurisdiction exist. See DAVID J. LENDER, JARED R. FRIEDMANN, JODIE BARROW & JASON B. BONK, CLASS ACTION FAIRNESS ACT OF 2005 (CAFA): OVERVIEW §§ 3–6 (2013), Westlaw.

<sup>25</sup> See Pace & Rubenstein, *supra* note 24, at 34 (reporting that “court records themselves typically do not contain distribution data and class action participants are generally unwilling to provide it to interested persons”). For more information on the recent procedural guidance for releasing settlement data adopted in the Northern District of California, see *infra* note 31 and accompanying text.

<sup>26</sup> The same is true when the settlement provides a maximum amount that the defendant will be required to pay, with the defendant's actual liability dependent upon the number of claims made. This is the functional equivalent of a settlement fund that reverts unclaimed monies to the defendant.

<sup>27</sup> See generally Gelbach & Hensler, *supra* note 5; Hensler, *supra* note 5; see also Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767, 778 (2015) (“[I]t is indefensible that commentators have been able to unearth so little data [on class action settlements] over the last thirty years.” (emphasis omitted)); NICHOLAS M. PACE, STEPHEN J. CARROLL, INGO VOGELSANG & LAURA

a 2008 RAND study, for example, Nicholas Pace and Professor William Rubenstein recommended that courts require class counsel to file actual claims distribution data at the conclusion of the case, so that it becomes part of the public record, and advocated that “a central repository for class action outcomes be developed, somewhat akin to Stanford Law School’s Securities Class Action Clearinghouse (<http://securities.stanford.edu/>).”<sup>28</sup> An earlier RAND study by Professor Hensler and coauthors made similar recommendations.<sup>29</sup> Professor Robert Klonoff and coauthors have also called for the creation of a central repository of class action filings, suggesting it be operated, on the federal side, by the FJC or a university involved in a public-private partnership and, on the state side, through the National Center for State Courts.<sup>30</sup>

Unfortunately, these calls have gone mostly unheeded. At the end of 2018, the U.S. District Court for the Northern District of California adopted procedural guidance that instructs parties to a class action settlement to file a post-distribution accounting with the court and to post it on the case’s settlement website, but no other court has yet followed suit.<sup>31</sup> A bill passed in the House

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ZAKARAS, *INSURANCE CLASS ACTIONS IN THE UNITED STATES* 117–35 (2007) (providing an overview of the challenges confronting class action research); Pace & Rubenstein, *supra* note 24, at 34 (“[I]t is very difficult, even for researchers with significant resources, to find distribution data in completed class action lawsuits.”); William B. Rubenstein, 4 *NEWBERG ON CLASS ACTIONS* § 12:17 (5th ed. 2011) (noting the paucity of reliable data regarding claims rates).

<sup>28</sup> Pace & Rubenstein, *supra* note 24, at 44.

<sup>29</sup> See DEBORAH R. HENSLER, BONNIE DOMBEY-MOORE, ELIZABETH GIDDENS, JENNIFER GROSS, ERIK MOLLER & NICHOLAS M. PACE, *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN*, EXECUTIVE SUMMARY 36–37 (1999); see also Hensler, *supra* note 5, at 1613–14 n.53 (noting efforts by Hensler and others to convince the Advisory Committee to amend Rule 23 to require disbursement-related disclosures). Hensler has also called for

a task force of researchers from academia, nonprofit organizations and government agencies to identify the data necessary to support empirical research on the operations and consequences of Rule 23, propose revisions to current administrative reports relating to class actions, review barriers to data access, and recommend solutions to these problems.

Hensler, *supra* note 5, at 1622–23.

<sup>30</sup> See Klonoff et al., *supra* note 11, at 755–57.

<sup>31</sup> See *Procedural Guidance for Class Action Settlements*, U.S. DIST. CT. N. DIST. OF CAL., <https://perma.cc/6GHS-U2QH> (last updated Dec. 5, 2018).

of Representatives in 2017 that would have imposed a similar requirement in all federal class actions died in the Senate.<sup>32</sup> No progress has yet been made on the creation of a central repository of class action filings.<sup>33</sup>

## II. WHAT EXPLAINS CLASS ACTION CLAIMS RATES?

The limited empirical evidence that does exist on class action claims rates is not encouraging. As part of its Class Action Fairness Project, the FTC recently sought to study class action claims rates and the effect of various notice methods thereon. Because there is a dearth of publicly available information on point, the FTC assembled its dataset by using its subpoena power against seven of the largest claims administrators.<sup>34</sup> Each administrator subpoenaed by the FTC was ordered to submit data on the ten largest settlements (by number of notices) it administered in each of the years 2013–2015.<sup>35</sup> Data were limited to opt-out class actions alleging consumer claims that involved a direct notice campaign to at least some class members, with a focus on federal court cases.<sup>36</sup> Although the final dataset consisted of only 149 class actions, the FTC’s study nevertheless constitutes “the most comprehensive empirical study of consumer class action settlements to date.”<sup>37</sup> The median percentage of direct notice recipients who made claims in the cases studied was 9% and the weighted mean was 4%.<sup>38</sup> The median percentage of all class

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<sup>32</sup> Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 1719 (2017). The Center for Civil Justice at NYU Law School is also working to try and convince courts to require disclosure of claims distribution data. See *Aggregate Litigation Data Project*, CTR. ON CIV. JUST. (Sept. 8, 2020), <https://perma.cc/53BH-LFDL>.

<sup>33</sup> However, an interdisciplinary team of Northwestern University professors was recently awarded a million-dollar National Science Foundation grant to build a searchable platform of PACER dockets. See *Interdisciplinary Team Receives NSF Grant to Build Open, Searchable Platform for Court Records*, NW. PRITZKER SCH. L. (Sept. 20, 2019), <https://perma.cc/8FM2-FSFX>. If successful, this endeavor would make research on class actions in federal court easier to conduct.

<sup>34</sup> CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 12. Claims administrators are private firms hired by counsel to assist with the design and execution of a class action notice campaign and claims-administration process. Because claims administrators handle the payment of claims to class members, they possess actual distribution data in the cases they oversee, but typically refuse to share it with researchers. See also Pace & Rubenstein, *supra* note 24, at 29–32.

<sup>35</sup> CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 12.

<sup>36</sup> *Id.* at 6 n.10, 12, 19–20.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.* at 12, 19–20.

members in these cases who made claims was likely lower, because not all class members received direct notice.<sup>39</sup> Keep in mind also that the cases the FTC studied are likely to have employed the very best practices: the FTC's study focused on the largest federal court settlements administered by seven of the top class action administrators in the nation for the years 2013–2015.<sup>40</sup> Claims rates in the broader universe of class actions settled across the country each year in state and federal court are undoubtedly lower on average.

The FTC's study should trouble those who care about class member compensation: it suggests that an overwhelming percentage of class members are having their legal rights extinguished without receiving any consideration in return.<sup>41</sup> What explains such low claims rates? The Chamber of Commerce has suggested that consumers fail to make claims because they do not feel aggrieved by defendants' behavior,<sup>42</sup> a story that is consistent with the Chamber's mantra that class actions are often meritless.<sup>43</sup> But this assumes that most individuals who receive a class action settlement notice base their decision whether to file a claim on their feelings about the merits of the case. A more plausible assumption is that they engage in a self-centered cost-benefit calculation, asking themselves whether the expected benefit to them of filing a claim outweighs the cost to them of doing so.<sup>44</sup> Understanding the benefits class members expect and the costs class members face when filing claims is therefore key to understanding why claims rates are so low and how to increase them.<sup>45</sup>

The benefit class members will receive from filing a claim will of course depend on the settlement that has been reached in a

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<sup>39</sup> Almost half of the cases in the FTC's study included a publication notice component, presumably because not all class members could be located for receipt of direct notice. The study's "calculated claims rates for cases that used publication notice likely overstate true class member responsiveness to the campaign because at least some claimants are unaccounted for in the denominator (due to receiving notice through publication rather than direct notice)." *Id.* at 24.

<sup>40</sup> CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 12, 19–20.

<sup>41</sup> The weighted average opt-out rate in the cases studied was 0.0003%. *Id.* at 22.

<sup>42</sup> See Letter from John H. Beisner, Partner, Skadden, Arps, Slate, Meagher & Flom LLP, to Off. of the Sec'y, Fed. Trade Comm'n 2 (Nov. 22, 2019).

<sup>43</sup> See PINCUS, *supra* note 3, at 17–18.

<sup>44</sup> This is not to suggest that class members act as perfectly rational actors, immune from behavioral biases. For interesting recommendations as to how notices can be crafted to correct for—or exploit—common biases, see Alex A. Parkinson, *Behavioral Class Action Law*, 65 UCLA L. REV. 1090, 1130–43 (2018).

<sup>45</sup> I ignore in the discussion that follows any psychological costs or benefits, as they will vary based on the personal attributes of specific class members. See *supra* note 9.

particular case. In some cases, the redress, or a range of the possible redress, will be stated in the notice, in others it may not be. (A third of the notices in the FTC's study did not provide any compensation estimate.)<sup>46</sup> In cases where the amount is not stated, class members will likely make an assumption based on their perception of the average amount paid in class actions involving similar allegations. Whether based on a stated figure or a guess, class members will discount the payout to reflect the probability of nonpayment. Nonpayment may result if their claim is rejected, or if the notice turns out to be a scam.

What costs do class members face when filing claims? They do not pay anything out of pocket to submit a claim, save perhaps the cost of a postage stamp. They do, however, incur a variety of other costs. These costs can be grouped into three categories. First are "information-processing costs"—the time and effort it takes a class member to read a notice and comprehend what it says. A class member must incur these costs prior to filing a claim in order to determine whether she is in fact eligible to make a claim and how to go about doing that. She may find this threshold investment too costly given the expected benefit, and simply discard the notice with the junk mail. Second are "claims-processing costs." Even when class members do read and comprehend settlement notices, the time and effort it would take to make a claim may nevertheless discourage participation in the settlement. Third are "verification costs." Class members may read and comprehend a notice but doubt its veracity. After all, class action notices are uninvited communications offering recipients money or other consideration of value, and logically invite skepticism. Before making a claim, a class member may take into account the potential costs of falling victim to a scam or, alternatively, the costs of taking steps to alleviate suspicion. These costs, alone or in combination with information- and claims-processing costs, may make claiming settlement funds irrational given the expected benefit.

As discussed below, important developments in recent years have put downward pressure on information- and claims-processing costs. These include (1) the adoption of CAFA and the promulgation of best practices in the design of class action notices and claims-administration processes, both of which make it

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<sup>46</sup> CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 32.

harder for conflicted parties to get through plans that impose unnecessary costs on class members, and (2) major technological innovations that make claiming funds more convenient for class members. The minimal impact these developments have had on claims rates, which remain dismally low, is a puzzle that this Essay seeks to solve. It posits that verification costs provide the answer. Verification costs have received far less attention from commentators than information- and claims-processing costs, but I believe they represent a major barrier to consumer participation in class actions. Perversely, the very same technological innovations that have caused claims-processing costs to decrease have likely led to an increase in verification costs. Part III offers a solution to this conundrum.

#### A. Conflicted Parties and the Development of Best Practices

It is important to recognize that the costs class members face when claiming settlement funds are subject to manipulation: notices can be drafted in ways that promote readability or in ways that detract from it; claims processes can demand more or less of class members; and notices can look more or less suspicious. This means that the incentives of the parties responsible for devising the notice and claims process matter. Unfortunately, the incentives of these parties will often be misaligned with those of class members.

If unclaimed settlement monies revert to the defendant, for example, the defendant will have a potent incentive to keep class member costs as high as possible. Even when the settlement is paid out pro rata to claiming class members, or the residual goes to charity, defendants will naturally prefer that class members discard a class notice without reading it, so as to limit reputational harm. Class counsel may not have strong incentives to push back against a defendant insisting on a settlement plan that imposes unwarranted costs on class members, provided counsel's fee is not tied to the claims rate and acquiescing is the easiest path to getting paid. And even a perfectly faithful attorney for the class may lack the bargaining power needed to effectively push back against a defendant. For-profit claims administrators cannot be counted on to check these tendencies, either: they will likely channel the incentives of the attorneys responsible for hiring them.<sup>47</sup>

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<sup>47</sup> For a discussion of these conflicting incentives by Todd Hilsee, a leading expert on class action notices, see Letter from Todd B. Hilsee, Principal, Hilsee Grp. LLC, to Advisory

That leaves the presiding judge. Some judges may take their role in reviewing proposed notice and claims-administration plans seriously; others may not. The transparency problem discussed in the last Part makes it hard to know for sure how often courts push back against the parties on these issues. What can be said is that judges have a structural incentive to acquiesce in the class action settlement context; doing so pleases both parties before the court and clears a case from the docket. At least in situations where the shortcomings of the proposed plan are not obvious, and there are no objectors inserting an element of adversariness into the process, judges probably defer more than they should.<sup>48</sup>

Fortunately, the ability of conflicted parties to unnecessarily increase class member costs so as to depress claims rates is not as easy as it once was. This is due to two developments. First, the Advisory Committee, the FJC, and consumer advocacy groups have made efforts to educate courts about best practices in notice and claims administration. Concerns about overly confusing notices led the Advisory Committee to revise Rule 23 in 2003 to make clear that notices must “clearly and concisely state in plain, easily understood language” the information required.<sup>49</sup> The FJC, for its part, has issued guidance to courts on how to design notices in a way that complies with this mandate, including offering illustrative notices.<sup>50</sup> Moreover, a broad consensus has emerged on best practices in claims processing. It is widely acknowledged, for

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Comm. on Civ. Rules of the Jud. Conf. of the U.S. & Members of the Rule 23 Subcomm. 4–7 [hereinafter Letter from Todd B. Hilsee].

<sup>48</sup> Even if judges seek out expert advice on the adequacy of a notice plan, it may be tainted. Hilsee reports that experts are reluctant to provide honest guidance to courts on notice issues because “criticisms of notice plans may lead to ‘blackballing’ by defense or plaintiff class action firms.” *Id.* at 6.

<sup>49</sup> FED. R. CIV. P. 23(e)(2)(B); see also NAT’L ASS’N CONSUMER ADVOCs., STANDARDS AND GUIDELINES FOR LITIGATING AND SETTLING CONSUMER CLASS ACTIONS Guideline 11, at 66 (3d ed. 2014) (discussing the genesis of this change).

<sup>50</sup> See generally FED. JUD. CTR., JUDGES’ CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE (2010) [hereinafter JUDGES’ CLASS ACTION NOTICE]; see also BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FED. JUD. CTR., MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 26–30 (2010). The FJC designed the illustrative notices at the request of the Subcommittee on Class Actions of the Advisory Committee on the Federal Rules of Civil Procedure. A description of the FJC’s methodology can be found on the FJC’s website, as can the notices themselves. See *Illustrative Forms of Class Action Notices: Detailed Discussion of Methodology*, FED. JUD. CTR., <https://perma.cc/9WTA-MCBZ>; *Illustrative Forms of Class Action Notices: Overview*, FED. JUD. CTR., <https://perma.cc/467U-J8N2>.

example, that a claim form should be easy to read and comprehend and should be easy to fill out, with an option to do so online via a case-settlement website; that unreasonable proof of claim should not be required; and that a claims process should be jettisoned entirely in favor of automatic payment if it is not necessary to identify class members or assess the magnitude of their damages.<sup>51</sup> That this guidance exists does not mean that it is being universally followed, of course: it is nonbinding and judges, as noted above, face their own set of conflicting incentives. (In the FTC's study, only 40% of notices used plain English payment language.)<sup>52</sup> But the guidance has likely helped some judges identify and address problematic practices and chastened some litigants and claims administrators to avoid proposing such practices to begin with.

The second notable development was the enactment of CAFA in 2005. CAFA requires each defendant in a class action to notify certain designated federal and state government actors of a proposed settlement at least ninety days prior to final approval.<sup>53</sup> This gives the designated government actors, who are presumed to have class members' best interests at heart, the opportunity to make their views on the settlement known to the court—including any perceived problems in the proposed notice and claims-administration plan. The hope is that the prospect of government intervention will deter “lawyers from crafting abusive settlements favoring themselves over consumers.”<sup>54</sup> Government actors are not obligated to respond to CAFA notices,<sup>55</sup> and courts are not obligated to defer to their views when they do,<sup>56</sup> but the notice provision may nevertheless help to temper abusive practices.

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<sup>51</sup> See, e.g., NAT'L ASS'N CONSUMER ADVOCS., *supra* note 49, at 70–72; JUDGES' CLASS ACTION NOTICE, *supra* note 50, at 6; ROTHSTEIN & WILLGING, *supra* note 50, at 30.

<sup>52</sup> CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 35, 37.

<sup>53</sup> At the federal level, the attorney general of the United States must usually be notified; at the state level, the official with “primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State” must be notified or, if there is no such official, the state attorney general. 28 U.S.C. § 1715(a), (d).

<sup>54</sup> See Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971, 1973 (2008) (discussing the legislative purpose behind this provision).

<sup>55</sup> It appears that the Department of Justice has done so only six times in the past fifteen years, despite receiving hundreds of notices each year. See *infra* note 84.

<sup>56</sup> See Perry Cooper, *DOJ Opposes Another Class Deal, Another Court Ignores It*, BLOOMBERG LAW (Aug. 9, 2018), <https://perma.cc/TC4L-SYHT>.

## B. Technological Innovation

Even the most faithfully crafted notice and claims-administration plans cannot avoid imposing some level of costs on class members. The choices available to the parties who design these plans are, after all, constrained by external forces. Fortunately, these forces have shifted dramatically in recent years with technological innovation, opening up new and exciting possibilities in class action practice.

Not so very long ago, print media was the only viable option for publication notice and physical mailing of long form notices was the only viable option for direct notice. Requiring class members to mail in paper claims forms was unavoidable in cases requiring a claims process, and the only realistic way to pay claims was to send a paper check in the mail, which the class member would then have to go to the bank or an ATM to deposit. All of this has changed in recent years due to technological innovation. Today publication notice can take the form of targeted digital advertisements. Direct notice can be done via email, and when physical notice is required it can be in a short form that directs recipients to a case-settlement website with more information. Case-settlement websites can be visited to submit claims online, and class members can opt to be paid through a variety of electronic means and have the ability to deposit paper checks with a few clicks on a mobile device.

Commentators have celebrated the many benefits that can flow from the use of these new technologies in class actions:<sup>57</sup> email notice and targeted internet and social media advertising promises to increase the number of class members who receive

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<sup>57</sup> See generally Caroline Desmond, Note, *The Transformative Potential of Digital Media & Technology on Class Actions*, 23 LEWIS & CLARK L. REV. 747 (2019); Alexander W. Aiken, Comment, *Class Action Notice in the Digital Age*, 165 U. PA. L. REV. 967 (2017); Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846 (2017); Caley DeGroot, Note, *Can You Hear Me Now? The Reasonableness of Sending Notice Through Text Messages and Its Potential Impact on Impoverished Communities*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 279 (2016); Elizabeth M.C. Scheibel, Comment, *#Rule23 #ClassAction #Notice: Using Social Media, Text Messaging, and Other New Communications Technology for Class Action Notice and Returning to Rule 23(C)(2)(B)'s "Best Notice Practicable" Standard*, 42 MITCHELL HAMLINE L. REV. 1331 (2016); Jordan S. Ginsberg, Comment, *Class Action Notice: The Internet's Time Has Come*, 2003 U. CHI. LEGAL F. 739 (2003); Brian Walters, "Best Notice Practicable" in the Twenty-First Century, 2003 UCLA J.L. & TECH. 4 (2003); Klonoff et al., *supra* note 11; Jennifer Mingus, Note, *E-mail: A Constitutional (and Economical) Method of Transmitting Class Action Notice*, 47 CLEV. ST. L. REV. 87 (1999); see also Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569 (2016).

notice; email notice, online claims submission, and electronic claims payments promise to reduce the printing and postage costs that eat away at class members' recoveries; and—most importantly for our purposes—the convenience these innovations bring to the claims process should encourage more class members to participate in settlements. But settlement websites with online claims submission functionality and electronic payment options have been commonplace for some time now, and yet claims rates among direct notice recipients remain very low. What explains the failure of technology to live up to the high hopes class action commentators have had for it?

One possibility is that per-class-member recoveries are just so low that even the tiniest modicum of effort required by class members is enough to discourage participation in settlements. I do not find this explanation persuasive. Half of the settlements in the FTC's sample provided median compensation of \$69 or more, and a quarter provided median compensation of \$200 or more.<sup>58</sup> If the only cost to a class member of getting paid \$69 is the ten minutes it would take to read a notice and visit a case-settlement website to submit a claim, the class member would have to value her time at \$414 an hour or more to rationally determine it isn't worth the candle—over 14 times the average hourly wage in the United States.<sup>59</sup> Moreover, if low levels of redress are the driving force leading to low average claims rates, we should observe higher claims rates in cases involving higher payouts. But the results of the FTC's study “do not indicate a meaningful relationship between a case's level of redress and its claims rate, with the claims rate for the less-than-\$10 category only 1 percentage point lower than the more-than-\$200 category.”<sup>60</sup> This puzzling result seems to challenge the notion that class members engage in a cost-benefit calculation at all. But I submit that it is easily explained by the effect of distrust on class member decision-making. As discussed below, distrust also helps explain many other findings in the FTC's study.

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<sup>58</sup> CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 11.

<sup>59</sup> The average hourly rate for employees on private nonfarm payrolls was \$28.32 as of December 2019. See *Economic News Release*, U.S. BUREAU OF LABOR STAT., <https://perma.cc/73DB-EFT6> (last updated Jan. 10, 2020).

<sup>60</sup> CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 32.

### C. The Missing Link: Trust

Distrust will affect class member decision-making in predictable ways. If a class member distrusts a class action notice, she will discount the expected benefit of filing a claim to reflect the possibility of nonpayment due to fraud. The higher the level of distrust, the higher this discount. She will also perceive the costs of filing a claim to be higher than if trust were present. Specifically, a rational class member would add to the cost side of her cost-benefit equation an estimate of (1) the personal costs of falling victim to fraud discounted by the probability the notice is authentic or (2) the costs of verifying the authenticity of the notice, whichever is lesser.<sup>61</sup> I refer to these additional costs, whichever form they take, as verification costs. If a class member has no serious doubts about the legitimacy of a class action notice and claims process, by contrast, in deciding whether to file a claim she will not discount the value of the claim to reflect the risk of nonpayment due to fraud, nor will she weigh verification costs in her decision. Thus, the expected benefits of claiming funds will be higher and the perceived costs of claiming funds lower than if distrust were present. Trust, or lack thereof, can therefore be expected to have a very significant impact on claims rates.

Unfortunately, as uninvited communications promising payment, class action settlement notices will naturally attract suspicion, as will the claims processes they invite participation in. The level of suspicion they attract likely increases with the promised payout, which may explain the failure of the FTC to find a strong relationship between redress level and claims filing. Moreover, they likely attract suspicion even when they comply with best practices and modern technology is utilized to make claiming funds convenient for class members. Unless and until class member distrust is reduced, I expect claims rates to remain extremely low notwithstanding reductions in information- and claims-processing costs. Indeed, it seems likely that the very same technological advances that have reduced claims-processing costs, as well as printing and postage costs, have perversely led to an increase in verification costs.

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<sup>61</sup> Of course, if a class member actually did verify the authenticity of the notice, she would no longer discount the expected benefit of filing a claim to reflect the possibility of nonpayment due to fraud.

The FTC's study provides evidence consistent with this hypothesis.<sup>62</sup> For example, the cases in the study using mailed notices that included claims forms had substantially higher claims rates than cases that did not include a claim form, and thus presumably invited recipients to a case settlement website to submit a claim.<sup>63</sup> Visiting a website is arguably quicker and easier than filling out a paper form and placing it in a mailbox, so what might explain this? Distrust provides an answer. Shorter forms of notices are cheaper to produce, and thus are cheaper for fraudsters to fabricate. Moreover, the web addresses recipients are invited to visit in class action notices are unofficial and bear an unfamiliar name. Under these circumstances, class members might logically conclude that visiting the site and inputting the personal information required to submit a claim is risky. To be sure, they could take steps to alleviate their suspicions, for example by calling the court or visiting a trusted website that aggregates information on pending class actions, but incurring these verification costs may not be worthwhile.

Distrust might also help explain the failure of email notice to live up to the high expectations that commentators have had for it. Email notice has long been viewed as a low cost and potentially more effective alternative to mailed notice; commentators, in broad agreement on the desirability of email notice, have been focused on how to promote its use.<sup>64</sup> But the FTC's study suggests that it is highly ineffective, both in absolute terms and relative to mailed notice. The cases in the FTC's sample using email notice campaigns had mean and median claims rates of only 2–3%; by contrast, the median claims rate of recipients of mailed long form notices was 16% (weighted mean 10%) and the median and

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<sup>62</sup> The FTC's study does not make any causal claims. See CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 16. The statistics I discuss in the text are merely descriptive and suggestive.

<sup>63</sup> *Id.* at 28. Cases using long form notices and cases using postcard notices with a detachable claim form each had weighted mean claims rates of 10%, whereas cases using postcard notices without a claim form had a weighted mean claims rate of only 5%. *Id.* In a regression controlling for other coded notice characteristics, the FTC found that postcard notice was associated with lower claims rates relative to long-form notice, but the difference was not statistically significant. *Id.* at 40–41.

<sup>64</sup> See, e.g., Christine P. Bartholomew, *E-Notice*, 68 DUKE L.J. 217, 259–74 (2018). Advocates for email notice convinced the Advisory Committee to amend Rule 23 in 2018 to make clear that notice may be made by electronic means. See FED. R. CIV. P. 23(c)(2)(B). But see generally Letter from Todd B. Hilsee, *supra* note 47 (warning the Advisory Committee about the ineffectiveness of email notice).

weighted mean claims rate of recipients of mailed short form notices was 6–7%.<sup>65</sup> This is not surprising: we have all been trained to avoid scams by disregarding emails promising payment, especially when we do not recognize the sender’s address.<sup>66</sup> A technology has even been developed to assist us: the spam filter.

Further evidence of the trust barrier to effective email notice campaigns is found in a research survey of a volunteer internet panel conducted by the FTC. The survey sought “to evaluate whether certain email characteristics . . . influenced respondents’ comprehension, understanding, impressions, and likelihood of opening the email.”<sup>67</sup> Participants in the survey were more likely to open an email sent from a government email address, and those who said that they would not likely open an email notice often mentioned words that indicate mistrust in their narrative explanations—with “spam” the most frequently occurring word.<sup>68</sup>

The FTC’s study also suggests that verification costs will impede the effectiveness of plans that bypass a claims process and automatically distribute settlement funds—a practice commentators have long advocated should be utilized whenever possible.<sup>69</sup> Specifically, the study found that check-cashing rates for settlements that provided direct payment were only 55%, significantly lower than the check-cashing rates for settlements requiring a claims process.<sup>70</sup> Class member distrust provides an obvious explanation for this: individuals are understandably leery of an uninvited check that arrives from an unfamiliar sender, and the effort it would take to confirm the check’s legitimacy may not be worth its value.<sup>71</sup>

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<sup>65</sup> CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 25. The FTC’s regression results indicate that the difference in claims rates in cases using email notice versus long-form notice was statistically significant. *Id.* at 40–41.

<sup>66</sup> The FTC received email opening data for only a subset of the cases in its sample that used email notice and received hyperlink click-through data for only a subset of those. The weighted mean email opening rate in these cases was just 14%, and only 20% of the recipients who opened the email (4% of all email recipients) actually clicked the hyperlink to visit the case website. *Id.* at 30.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *Id.* at 53, 55, 64.

<sup>69</sup> See, e.g., ROTHSTEIN & WILLGING, *supra* note 50, at 30.

<sup>70</sup> CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 31–32.

<sup>71</sup> An earlier empirical study of claims data on fifteen consumer class action settlements similarly found that “class members do not always or even often negotiate unsolicited checks that are sent to them in the mail”; the authors suspected “that some class members were skeptical of checks they received in the mail through no effort of their own, and did not negotiate them for fear of becoming part of a scam.” Fitzpatrick & Gilbert, *supra* note 27, at 782–84.

Distrust will also likely stymie use of electronic payment options, as class members will predictably be hesitant to provide the account data necessary to elect electronic payment. It can also be expected to limit the effectiveness of publication notice campaigns that utilize digital advertising. Marketing research shows that click-through rates on banner advertisements are incredibly low.<sup>72</sup> Concerns about security are frequently cited as one of the primary reasons why.<sup>73</sup> Those concerns will predictably run high for advertisements promising money to class members, as well.

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Recognizing the role that distrust plays in consumer class actions is an important first step on a path toward reducing it and, ultimately, increasing claims rates. The next Part offers a proposal that promises to increase consumer trust in class action notices and claims processes. The proposal would also minimize the ability of conflicted parties to manipulate the notice and claims process to increase unnecessarily the costs class members face, as well as produce other significant benefits—including solving the transparency problem discussed in Part I.

### III. FIXING THE TRUST AND TRANSPARENCY PROBLEMS: CLASSACTION.GOV

Imagine if all class action notices and claims forms shared a standardized format, utilized best practices in terms of content, and instantly and effectively communicated their authenticity to recipients. This would eliminate the fraud discount that rational class members would otherwise apply when calculating the expected benefit of filing a claim. It would also reduce information-processing costs because it would be easier for recipients to comprehend what the communication is trying to convey, and it would eliminate verification costs. These impacts, when coupled with the reduction in claims-processing costs that the internet and electronic methods of payment have made possible, should operate to meaningfully improve class actions claims rates. I propose in this Part a viable way to get there from here. My proposal has

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<sup>72</sup> See Desmond, *supra* note 57, at 755 (“The average rate at which people actually click on a banner in the United States is 0.09 percent.”).

<sup>73</sup> See, e.g., Michael Brenner, *Banner Ads Have 99 Problems and a Click Ain’t One*, MKTG. INSIDER GRP. (May 21, 2018), <https://perma.cc/B2UX-MAF8> (reporting that “54% of internet users have never clicked a banner ad because they don’t trust them”).

the additional benefit of minimizing the ability of conflicted parties to place their interests above class members, eliminating the transparency problem discussed in Part I, and mitigating several other pernicious problems with class actions.

In overview, I propose the creation of a class action website and supporting administration—Classaction.gov—run by the federal government, perhaps by a new “Office of Class Actions” within the FTC or Department of Justice, or by a new agency within the judicial branch akin to the FJC. A widespread publicity campaign would attend the launch of Classaction.gov, educating the public about its existence and purposes. The Classaction.gov website would contain a home page with basic, easy-to-understand information about class actions and class member rights. It would also provide a portal to an easily searchable online database that would contain all class action filings in state and federal court, as well as notice and claims distribution data. Classaction.gov would also serve several functions that today are served by for-profit claims administrators: it would house webpages for all pending class actions through which class members could, among other things, opt out and submit claims; it would be responsible for sending all class action notices to class members; and it would be responsible for distributing settlement payments to eligible claimants. Below I discuss each of these functions in greater depth, outline the major advantages of the proposal, and respond to concerns.

#### A. Description of Basic Functions

The basic functions I envision for Classaction.gov can be grouped under three headings: (1) research database and case website functions; (2) notice-related functions; and (3) opt-out and claims-related functions. I discuss each below. In Part IV, I discuss a possible extension: using registration on Classaction.gov to generate a database that could be used to locate class members in particular cases.<sup>74</sup>

##### 1. Research database and case website functions.

I propose that a federal law be enacted requiring litigants in class actions to electronically file searchable, digital copies of filings and orders in their cases with Classaction.gov. Classaction.gov staff

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<sup>74</sup> In a separate article I explore how Classaction.gov could be further built upon to help reduce class action agency costs. *See* Rose, *supra* note 19, at 401–30.

would create a case webpage upon receipt of each new putative class action complaint. The case webpage would be on the Classaction.gov website and would bear an official address in an identifiable format (e.g., <https://classaction.gov/Rose-v-Microsoft>). Classaction.gov staff would create the webpage by populating standardized fields with basic information about the case, and would post future case filings to the webpage. Upon receipt of a new class action complaint, Classaction.gov staff would also search its system to determine whether any related putative or certified class actions were pending in other jurisdictions; if so, they would link the respective case webpages and inform the presiding judges.<sup>75</sup> When and if a class action were certified, the case webpage would be updated to provide additional information as well as to include portals through which class members could opt out and, as discussed in more detail below, file claims in the event of settlement.

Classaction.gov staff would also use the filings and orders it received to create a research database that would be made publicly available on the website. The design details of this database should be developed in consultation with data and computer scientists and empirical civil justice researchers (of which there are many, at the FJC and in the academy<sup>76</sup>), but the basic idea is easy to grasp. Classaction.gov would stand in a position to consistently code various case and pleading characteristics and to feed filings it receives into a comprehensive database with a user-friendly interface. Any interested party could utilize the database to conduct research, and could also sign up to receive email alerts whenever filings coded with certain characteristics were added to the database (e.g., orders granting class certification in employment discrimination cases pending in Ohio) or to follow events in specified cases of interest (e.g., motions filed in *Rose v. Microsoft*).

## 2. Notice-related functions.

The notice-related functions I envision for Classaction.gov are important, but limited. Devising an effective notice campaign is a very case-specific endeavor, and it is not a task that I recommend Classaction.gov staff fully assume. Identifying and locating

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<sup>75</sup> If related class actions were consolidated, Classaction.gov staff would create a new consolidated case webpage, which would contain links to archived versions of the preconsolidated case webpages.

<sup>76</sup> See Hensler, *supra* note 5, at 1602–03 nn.15–18 (identifying some of the leading empirical researchers on class actions); see also *Interdisciplinary Team Receives NSF Grant*, *supra* note 33.

class members in particular is a burden that should remain in the hands of the litigants, subject to court oversight (although, as will be discussed in Part IV, *Classaction.gov* could build out a database to assist with this). I do propose, however, that *Classaction.gov* be responsible for standardizing the content of class action notices and that it be responsible for delivering those notices to class members.

I propose that *Classaction.gov*, with input from the FJC, National Center for State Courts, and other interested parties, devise standard forms of notice to be consistently used across cases. All such notices would refer class members to the case's official webpage on the *Classaction.gov* website, inviting them to visit the site for more information, to opt out, or, if applicable, to submit a claim for settlement funds. The standard forms would have fields that the parties, with court approval, would be responsible for populating with case-specific information; with this done, the form would be forwarded to *Classaction.gov*. *Classaction.gov* staff would screen the proposed language for compliance with best practices. If problems were identified, the staff would return the form with suggested revisions to the presiding judge for approval or further comment.

Once finalized, *Classaction.gov* staff would cause direct notices to be sent to the list of recipients provided by the parties in the manner approved by the court. If email notice were called for, the email would be sent from an identifiable and trustworthy @*classaction.gov* email address, and all physical notices would be official, recognizable federal communications. *Classaction.gov* could—like private claims administrators do today—track return-to-sender mail and email opening data and resend notices according to instructions devised by the parties and approved by the court.

### 3. Opt out and claims-related functions.

As already alluded to, class members wishing to opt out would do so by using a portal on the case website; opt-out data would be compiled by *Classaction.gov* and provided to the parties and the court. More importantly, class members wishing to make a claim to settlement funds would also do so via a portal on the case webpage. The claim page class members would interface with to submit a claim would be standardized in appearance across cases. As with the standard notices, there would be fields

on the claim page that would be populated with case-specific information that the parties, with court approval, would provide (e.g., a description of the settlement consideration, a description of the required proof of claim, and any special options for receiving payment above standard options that would be available in every case by default). Classaction.gov staff would screen the proposed language for compliance with best practices, and if problems were identified, suggest revisions to the presiding judge for approval or further comment.

The claim portal on the Classaction.gov case webpage would accept submissions and track claims, but Classaction.gov staff would not be responsible for determining the validity of the claims submitted. That labor-intensive responsibility would remain with the parties. Once the claims period ended and the parties reviewed the submitted claims and determined a final list of eligible claimants, Classaction.gov would be responsible for distributing the settlement consideration. In the event of a monetary settlement, the defendant would escrow the money with the federal government, and Classaction.gov would then pay claims from the escrow account in the manner elected by the recipients (e.g., direct deposit, PayPal, or federally issued paper check). Coupon settlements could be delivered via email from a @classaction.gov email address.

## B. Advantages

The database that Classaction.gov would create and maintain would solve the class action transparency problem discussed in Part I. This database would provide scholars with a treasure trove of nuanced data that could be easily accessed and manipulated to conduct sophisticated research on class actions, enriching and elevating the public policy debate that surrounds them. Not only would the Classaction.gov database make it immensely easier to exploit data in class action filings and orders than it is today using PACER and disparate state court data sources, the database would also include data that today is simply inaccessible to researchers. For example, the database would include actual distribution data for every settled class action—data that is not currently publicly available anywhere outside of the Northern District of California. Classaction.gov would naturally accumulate this data due to the claims-processing functions it would assume. Classaction.gov would also naturally accumulate comprehensive opt-out and notice-related data. The notice-related data, when

combined with the distribution data, would permit for ongoing research on the effectiveness of various notice methods. Indeed, Classaction.gov's centralized role in notice provision could be exploited to conduct the type of randomized, controlled testing, such as A/B testing, that the FTC's study suggests to help determine the most effective notice practices.<sup>77</sup> Thus, the best practices that Classaction.gov would be responsible for implementing could evolve and improve over time based on proven effectiveness.

Of critical importance, Classaction.gov would also legitimize class action communications, reducing the trust barrier discussed in Part II.C—a barrier that I believe has precluded meaningful improvement in claims rates despite tremendous reductions in claims-processing costs made possible by technological advances. Classaction.gov would achieve this by leveraging the trust that citizens have in the federal government to foster confidence in class action notices and claims processes. To be sure, citizens' trust in the federal government is variable and incomplete, but it is safe to assume that it is, on average, far greater than the level of trust citizens have in the strange class action communications they sporadically receive today. It is reasonable to expect that many individuals who would throw away a piece of mail or delete an email from a strange sender would open mail or an email from a recognizable government sender, and that many individuals who would not visit a strange and unofficial website to submit a claim would visit a website run by the federal government to do so. Moreover, it is reasonable to expect that many individuals who would not be comfortable inputting the account data needed to elect electronic payment on an unofficial website would feel comfortable doing so on a website run by the federal government. It is also reasonable to expect that class members would be more willing to deposit an official check issued by the federal government than a strange check from an unfamiliar sender.

Classaction.gov would also help reduce information processing costs, putting additional upward pressure on claims rates. This is because it would stand in a position to impose standardization and ensure that best practices in formatting and language choice were consistently followed. Judges should welcome this coordinating role that Classaction.gov would play; it allows them to borrow the expertise of Classaction.gov staff rather than expending the effort to acquire such expertise themselves. Faithful class

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<sup>77</sup> See CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 79.

attorneys should also welcome it, as it would reduce the ability of defendants to insist on notice and claims-processing plans that impose unnecessary costs on class members as a bargaining chip in settlement negotiations. The benefits that would flow from the standardization achieved would increase over time, as individuals would become familiar with the consistent format of class action communications and thus would find them easier and easier to comprehend. This comprehension could be jump-started by an effective publicity campaign at the launch of Classaction.gov that would both educate Americans about the existence and role of Classaction.gov as well as introduce them to the type of communications they might receive as class members. Such a campaign would further bolster trust.

Classaction.gov could mitigate other problems with class action practice, as well. For example, by linking related putative class actions at the time of filing and notifying the respective presiding judges, Classaction.gov staff could facilitate voluntary coordinated stays pending certification and resolution of the most appropriate suit.<sup>78</sup> This would save judicial resources while mitigating the ability of defendants to conduct a reverse auction.<sup>79</sup> In a reverse auction, “a defendant in search of a class settlement identifies plaintiffs’ lawyers willing to join in seeking judicial approval for a deal such that the defendant may purchase the preclusion of class members’ claims on the cheap.”<sup>80</sup> As Professors Samuel Issacharoff and Richard Nagareda have explained, “this form of collusion holds for the defendant the tantalizing promise of turning competition for litigation control within the plaintiffs’

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<sup>78</sup> Multiforum merger litigation has been a hot topic in recent years, with several commentators arguing that coordinated stays are an attractive solution to the problems it presents. See, e.g., Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1129–35 (2013); Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1803–05 (2012); see also Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 524–28 (2000) (advocating for the creation of a single registry of class actions to be maintained by the U.S. Judicial Panel on Multidistrict Litigation to help courts and parties identify duplicative class actions filed in different jurisdictions). But see Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 517–20, 526–38 (discussing the shortcomings of voluntary coordinated stays and favoring a statutory solution).

<sup>79</sup> Professor John Coffee was the first to use this term in the class action settlement context. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370–73 (1995).

<sup>80</sup> Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1667 (2008).

bar against the interests of class members themselves.”<sup>81</sup> If the choice of forum for certification and settlement were taken out of defendants’ hands, it would eliminate the potential for this sort of abuse.<sup>82</sup> Classaction.gov could help to discourage reverse auctions even if coordinated stays were not issued. It would allow competing class counsel to easily learn of an inadequate settlement proposed in a parallel case, for example, giving them an opportunity to object. And the notification requirement would ensure that judges presented with a proposed class action settlement were always aware of any related litigation in other forums, and thus of the reverse auction risk, even if no objections were lodged.

Classaction.gov would also facilitate better oversight of class actions by government actors, nonprofits and other interested parties. CAFA’s notice provision alerts only designated federal and state authorities to a proposed class action settlement, and gives these authorities a ninety-day window to provide input.<sup>83</sup> The notified authorities may be uninterested in doing so due to competing priorities and resource constraints, or they may find themselves unable to act within the ninety-day window—it can take time for the notice to make its way through the organization into the hands of the right government attorney, and the attorney may have no prior knowledge of the case, finding it difficult to form an opinion in the allotted time frame.<sup>84</sup> Classaction.gov

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<sup>81</sup> *Id.*

<sup>82</sup> Class counsel can try to prevent a reverse auction by requesting consolidation of overlapping class actions pending in federal court for pretrial proceedings from the Judicial Panel on Multidistrict Litigation, 28 U.S.C. § 1407, but this will not prevent a defendant from seeking to settle the claims on the cheap in state court. *See* Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 292 (2014) (explaining that CAFA did not eliminate the potential for reverse auctions because it does not require plaintiffs to file nationwide class actions in federal court or defendants to remove them to federal court).

<sup>83</sup> 28 U.S.C. § 1715(d).

<sup>84</sup> In February 2018, the outgoing associate attorney general stated in a speech that the “DOJ receives over 700 CAFA notices every year, but has only participated in two cases, and those were more than a decade ago.” Rachel L. Brand, Assoc. Att’y Gen., Remarks to the Washington, D.C. Lawyers Chapter of the Federalist Society (Feb. 15, 2018). She explained that delays in processing the notices were to blame:

It was an almost comical story of government bureaucracy. Mail to the Attorney General undergoes what the mailroom calls “strict scrutiny.” This means a CAFA notice goes through multiple mail rooms, each in a different government building and each requiring weeks of processing and sorting. They’re scanned by X-ray machines, which makes any CDs in the package unreadable. And that’s just the mailroom process. On average, it would take 70 days from receipt until a lawyer reviewed the notice. Often, they weren’t reviewed by a lawyer until after the fairness hearing or even after the settlement had been finalized.

would allow a larger group of interested parties—including additional government actors, nonprofit consumer advocacy organizations, academics, and others—to conveniently receive email alerts about cases of interest, both at the settlement stage and at earlier junctures in the case. These alerts could be set for particular cases, or for particular categories of cases (e.g., antitrust class actions filed in Illinois). Alerted parties would be well situated to express their views on a proposed settlement to the court in a timely manner, and would also stand in a position to potentially weigh in at the motion to dismiss, summary judgment, or class certification stages. This is important because if a government actor has concerns about a case’s underlying merit, those concerns should be raised at an earlier stage of the proceedings, not through an attack on the settlement—which, if successful, will only impose additional costs on the defendant.<sup>85</sup> Classaction.gov case webpages might even be equipped with an online portal through which interested parties could easily submit views to the court.

### C. Questions and Concerns

A standard set of questions can be expected any time a proposal for the creation of a new government bureaucracy is advanced. Why not leave it to the market? What is it going to cost? Where will the funding come from? In this Section, I address these and other important concerns raised by my proposal.

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*Id.* At the time of the speech, the DOJ had “begun to fix that process,” *id.*, and has since filed statements of interest in four consumer class actions. See generally Statement of Interest of the United States, *Cannon v. Ashburn Corp.*, No. CV 16-1452 (D.N.J. Apr. 16, 2018), 2018 WL 1406882; Off. of Pub. Affs., *Department of Justice Files Amicus Brief Opposing Unfair Class Action “Coupon” Settlement*, DEP’T OF JUST. (Feb. 4, 2019), <https://perma.cc/356C-VWEN>; Off. of Pub. Affs., *Department of Justice Opposes Unfair Attorney Fee Arrangement in Class Action Settlement Involving Dial Soap*, DEP’T OF JUST. (May 10, 2019), <https://perma.cc/SHG6-U7VM>; Off. of Pub. Affs., *Proposed Class Action Settlement Involving Lenny & Larry’s Cookies Amended to Give Consumers More Value*, DEP’T OF JUST. (Apr. 16, 2019), <https://perma.cc/V9VJ-CKJJ>.

<sup>85</sup> Other commentators have pointed out that government notice would be more effective if given earlier in class action litigation. See Sharkey, *supra* note 54, at 1993–94 (observing that “as an information-providing mechanism, [the] effectiveness [of CAFA’s notice provision] certainly would be enhanced if it provided for notification before certification.” (emphasis omitted)); Letter from Timothy J. Muris, Chairman, FTC, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice and Proc. of the Jud. Conf. of the U.S. 6 (Feb. 15, 2002) (recommending that Rule 23 be revised to require class action litigants to notify “the relevant government agency . . . early in the process, preferably no later than the time class certification and appointment of class counsel are being considered”).

1. Why not leave it to the market?

I am not cavalier when it comes to suggesting an expanded role for the government. But I believe government—and, in particular, the federal government—stands in the best position to solve the problems identified in this Essay. Private actors have little economic incentive to seek innovative ways to bring transparency to class actions or to increase class action claims rates. Consumers will not pay for a solution, given collective action and free-rider problems, and the compromised interests of class action attorneys, corporate defendants, and the claims administrators they hire have already been discussed.

Recently, class action aggregator websites, driven by advertising revenue, have emerged. These websites publicize information on pending class action settlements and offer links to settlement websites where claims may be submitted. Some of these websites are trustworthy, and thus offer a way for class members to check the authenticity of settlement notices. But they are very different from what this Essay envisions *Classaction.gov* to be. Their list of pending class actions is not comprehensive, so class members could visit the site, not see their case, and falsely assume that the notice they received is inauthentic. Moreover, most recipients of class action notices will not be aware of the existence of these websites, whereas under my proposal every class action notice sent would specifically direct the recipient to *Classaction.gov*, and the general populace would be familiar with *Classaction.gov* due to the publicity surrounding its launch. Even class members that are aware of trustworthy class action aggregator websites may find visiting them to verify the authenticity of a class action notice to be too much of a burden given the expected benefit. Under my proposal, by contrast, the notices themselves would be official, familiar, and trustworthy communications, encouraging recipients to directly visit the case webpage on *Classaction.gov* without incurring any verification costs along the way. These websites also differ from my vision of *Classaction.gov* because they provide no functional research database, instead providing transitory links to settlement websites that expire when the settlement period ends. Finally, these websites can encourage the

submission of false claims. Common sense dictates that individuals will be less likely to submit false claims via a website that belongs to the federal government.<sup>86</sup>

Beyond incentive problems, no private or state actor has the ability to accomplish what the federal government could accomplish through Classaction.gov. Only the federal government has the authority to standardize class action notices, claims forms, and case webpage design across the nation. And only the federal government has the authority to require that all class action case webpages be housed on a single website, and to mandate that litigants use those webpages for opt outs and claims submissions and processing. Standardization and centralization are key to achieving the reductions in information and verification costs that will, in turn, lead to higher levels of claiming activity. The federal government is also unique in its ability to create a comprehensive research database. It alone can compel litigants in both state and federal court to contribute court filings to the database. Moreover, no private actor could force courts to require publication of actual claims distribution data, whereas Classaction.gov would naturally accumulate this information in real time given its contemplated claims-settlement functions.

Although a government monopolist would be taking over some of the services that for-profit claims administrators provide today, efficiency losses are not inevitable. Given the conflicting incentives of the parties responsible for hiring claims administrators, it is not clear that administrators' profit motive always works to the benefit of class members.<sup>87</sup> Moreover, the tasks that Classaction.gov would take over are fairly straightforward and ministerial in nature. It should not be difficult for faithful government agents to find cost-effective ways to perform them. Indeed, consolidating these functions in Classaction.gov may produce economies of scale. The trust fostered by Classaction.gov would also render technological innovations like email notice and electronic claims processing and payment more effective—encouraging

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<sup>86</sup> Classaction.gov could also use the comprehensive claims filing data it would accumulate to red-flag individuals or IP addresses submitting claims in a suspicious number of cases, and bring to bear the cybersecurity expertise of the federal government to ferret out and prevent fraudulent “bot” filings. See Alison Frankel, *The Class Action Bots Are Coming! (Actually, They're Already Here.)*, REUTERS (Jan. 18, 2018), <https://perma.cc/2YE5-QCEG> (noting that a leading “class action notice expert . . . is worried that [private] claims administrators, who are facing competitive pressure, don't have the resources to keep up with the bots”).

<sup>87</sup> See Letter from Todd B. Hilsee, *supra* note 47, at 4–6.

greater reliance on those techniques and thus reducing postage and printing costs.

It is also the case that the parties who would be hurt should Classaction.gov become a bottleneck in the resolution of class actions are powerful interest groups—large corporations and the plaintiffs’ class action bar. These parties can use their political clout to address any concerns that arise. The enabling legislation could even anticipate concerns by including strict deadlines for how rapidly Classaction.gov staff would be required to perform particular tasks.<sup>88</sup>

A final observation is in order. If, as is widely believed, class actions serve a supplemental law enforcement role, creating a government infrastructure to support and monitor that endeavor is wholly appropriate. Most other countries do not allow private attorneys to represent strangers on an opt-out basis at all,<sup>89</sup> and the representative litigation that is permitted abroad is typically subject to a more intrusive level of government regulation than U.S. class actions would be if Classaction.gov became a reality.<sup>90</sup>

## 2. What is it going to cost and who is going to pay for it?

In every settled class action, money must be spent delivering notices, building case-settlement websites, and distributing settlement funds. Classaction.gov would replace profit-driven claims administrators in providing these services. As discussed above, I believe Classaction.gov could provide these services as efficiently, and perhaps even more efficiently, than claims administrators. But other aspects of Classaction.gov would introduce new costs:

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<sup>88</sup> For example, it could impose deadlines by which Classaction.gov staff would be required to return comments on proposed notice and claims page language, send approved notices to class members after receipt of delivery instructions from the parties, and distribute settlement funds after receiving a list of eligible claimants.

<sup>89</sup> See, e.g., Yu-Hsin Lin, *Modeling Securities Class Actions Outside the United States: The Role of Nonprofits in the Case of Taiwan*, 4 N.Y.U. J.L. & BUS. 143, 156 (2007) (observing that opt-out class actions are “uniquely American”).

<sup>90</sup> For example, many countries limit standing to government-approved entities. See Manning Gilbert Warren III, *The U.S. Securities Fraud Class Action: An Unlikely Export to the European Union*, 37 BROOK. J. INT’L L. 1075, 1089 (2012) (“The collective redress schemes adopted by various EU member states generally provide standing only to governmental authorities, consumer associations, and other specified organizations.” (citations omitted)); see also Ching-Ping Shao, *Representative Litigations in Corporate and Securities Laws by Government-Sanctioned Nonprofit Organizations: Lessons from Taiwan*, 15 ASIAN-PAC. L. & POL’Y J. 58, 62–74 (2013) (discussing the Taiwanese model of representative securities litigation by government-sanctioned nonprofit organizations).

Classaction.gov would have to be included by litigants as a recipient of electronic service of process for class action filings; the Classaction.gov website and database would need to be designed; the standardized notice and claims forms would need to be developed; a publicity campaign would have to be run; sufficient personnel would have to be hired to maintain the database and website and to perform the screening functions envisioned; and measures would have to be taken to ensure the security of any sensitive personal information class members might be asked to provide when claiming funds through case webpages.<sup>91</sup>

These costs would not be trivial, and I do not attempt here to quantify them or weigh them precisely against the substantial benefits that Classaction.gov promises to produce. The goal of this Essay is more modest: to start a conversation regarding the potential wisdom of investing in a government infrastructure to both bring transparency to, and help improve consumer participation in, class action litigation. My intuition, however, is that the benefits Classaction.gov would produce would far outweigh its costs, at least if smartly designed. As for who would pay, an obvious funding source exists: class actions. The cost of providing notice and processing claims could be passed on directly to the litigants, just as it is today. These costs would vary depending on case-specific postage and printing costs. The funds needed to create and support the database and general operations of Classaction.gov could be raised through a modest tax on class action settlement values.

### 3. If you build it, will they come?

Even if Classaction.gov succeeds in significantly reducing the information and verification costs that deter claims filing today, in every case some class members will still view the game as not worth the candle. Others might continue to be deterred from filing claims by cybersecurity risks that not even the most reputable websites can completely guard against. Therefore, no one should expect that if Classaction.gov becomes reality, 100% of direct notice recipients will start filing claims. But if Classaction.gov is well designed and well publicized, I believe that it will meaningfully increase claims rates for the reasons discussed in Part III.B.

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<sup>91</sup> For an introduction to the federal government's obligations to safeguard personally identifiable information, see Off. of Privacy & Open Gov't, *Privacy Program*, DEPT OF COM., <https://perma.cc/ZW7B-JHKH> (last updated Oct. 8, 2019).

While nothing quite like Classaction.gov has been launched before, examples of successful citizen-facing federal websites offer some foundation for my optimism that individuals will utilize Classaction.gov. DoNotCall.gov, for example, is the federal website run by the FTC on which individuals can register their phone numbers for the National Do Not Call Registry. As of the end of the 2019 fiscal year, the registry had 239.5 million numbers actively registered.<sup>92</sup> StudentAid.gov is the federal website run by the Department of Education on which students can submit their Free Applications for Federal Student Aid (FAFSA). It processed 18 million FASFA's last year.<sup>93</sup> Nearly 90% of taxpayers e-filed their tax returns through IRS.gov in 2019,<sup>94</sup> and over 15 million people used Healthcare.gov to shop for health insurance between November 1 and December 21, 2019.<sup>95</sup>

#### 4. Is Classaction.gov constitutional?

Because my proposal would involve a federal agency in the administration of class actions filed in state court, it raises constitutional questions. The envisioned requirement that state court litigants transmit copies of court filings and orders to Classaction.gov would easily withstand constitutional challenge; indeed, even if the onus were placed directly on state court clerks to transmit these documents, it would not offend the Constitution. Federal courts have repeatedly dismissed challenges to federal information requirements imposed on state governments based on federalism grounds.<sup>96</sup> The requirements that class action litigants in

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<sup>92</sup> *FTC Releases FY 2019 National Do Not Call Registry Data Book*, FED. TRADE COMM'N (Oct. 17, 2019), <https://perma.cc/P47U-F2SC>.

<sup>93</sup> FED. STUDENT AID, ANNUAL REPORT FY 2019, at 6 (2019).

<sup>94</sup> *See Filing Season Statistics for Week Ending October 18, 2019*, INTERNAL REVENUE SERV., <https://perma.cc/SVR4-LW3H> (last updated Oct. 25, 2019).

<sup>95</sup> *2020 Federal Health Insurance Exchange Enrollment Period Final Weekly Enrollment Snapshot*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Jan. 8, 2020), <https://perma.cc/S65D-T6ZG>.

<sup>96</sup> *See* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 134–44 (2012) (providing a detailed overview of the case law and concluding that “no federal court has yet ruled that information-reporting requirements imposed by Congress, executive agencies, or grand juries violate constitutional federalism doctrines in general or the anti-commandeering rule in particular”); *see also* Printz v. United States, 521 U.S. 898, 918 (1997) (holding that federal statutes “which require only the provision of information to the Federal Government, do not involve . . . the forced participation of the States’ executive in the actual administration of a federal program”); *Freilich v. Upper Chesapeake Health*, 313 F.3d 205, 214 (4th Cir. 2002) (“[M]ore is required than the expenditure of time and effort on the part of state officials in order to offend the Tenth Amendment.”).

state court use federally approved forms of notice—and utilize Classaction.gov for case webpages, notice delivery, and claims processing—present closer constitutional questions. The federal government may not constitutionally “compel the States to enact or administer a federal regulatory program.”<sup>97</sup> It can, however, “hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes.”<sup>98</sup> This includes conditioning states’ continued receipt of federal funds on their compliance with a federal policy, so long as the condition is not “so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>99</sup> Consistent with these constitutional principles, Congress could condition federal funds that benefit state judiciaries on states’ compliance with Classaction.gov mandates.<sup>100</sup> Because such funds would represent only a small fraction of any state’s total budget, the condition would represent the type of “relatively mild encouragement” that the Constitution permits.<sup>101</sup> It should not take much to convince states to accept Classaction.gov, given that it will help in their administration of justice without imposing significant burdens. Class action notices sent by Classaction.gov and case webpages should, however, very clearly indicate in what court the case is pending and under what sovereign’s law the underlying legal claims have been brought, so that lines of political accountability remain clear.

##### 5. Is Classaction.gov politically viable?

This is by far the hardest question to answer. There are powerful forces who benefit from the status quo and who will see

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<sup>97</sup> *New York v. United States*, 505 U.S. 144, 188 (1992).

<sup>98</sup> *Id.*

<sup>99</sup> *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)); see also Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1914 (1995) (observing that “with *Dole*, the Court offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states”).

<sup>100</sup> State courts receive conditional federal grants to support numerous programs and activities today. See, e.g., Edward Byrne Memorial Justice Assistance Grant (JAG) Program, BUREAU OF JUST. ASSISTANCE, <https://perma.cc/G99U-QAH4> (providing an overview of a conditional federal grant for criminal alien law enforcement in state and local jurisdictions); *Court Improvement Program*, CHILD WELFARE INFO. GATEWAY, <https://perma.cc/68JM-9BEJ> (describing a federal grant to the highest courts in each state for foster care improvement); *State Support*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, <https://perma.cc/UNP8-K9WK> (describing a conditional federal grant program to state and local governments to address juvenile crime).

<sup>101</sup> See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (quoting *Dole*, 483 U.S. at 211).

much to dislike in my proposal. Corporations benefit from the reverse auctions that Classaction.gov would help prevent. They also have no interest in making it easier for customers to find out about litigation against them. Class action attorneys might similarly fear the transparency that Classaction.gov promises: the research it would allow could expose weaknesses in the system that might lead to broader reforms detrimental to their self-interest.<sup>102</sup> Moreover, if it is true that corporate defendants and class action attorneys enter mutually beneficial settlements that shortchange the class, neither will be interested in facilitating better oversight of settlements by government actors and nonprofits. Obviously, claims administrators will be opposed as well, given that my proposal eliminates a segment of their business. Up against these concentrated interest groups stand dispersed consumers, the most obvious beneficiaries of my proposal. Getting Congress to act under the circumstances will be a challenge. But if faithful class action attorneys, the FTC, courts, and consumer advocacy organizations lend their voices to the call, I like to think that Classaction.gov stands a fighting chance.

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This Part has explained how Classaction.gov could help increase claims rates among class members who receive notice. What about the class members who don't? The next Part explains how introducing a registration feature to Classaction.gov would make it possible to provide notice to a greater number of class members than is possible today, as well as produce additional benefits—such as legitimizing cy pres settlements.

#### IV. EXTENSIONS

No matter how well designed, a class action notice won't help get compensation into the hands of class members if notice isn't received. Unfortunately, many class members never receive direct notice in class actions today. Data limitations and cost concerns are part of the explanation why. When classes consist of purchasers of small consumer products, for example, defendants

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<sup>102</sup> Alternatively, the increased legitimacy Classaction.gov might bestow on class actions could prove useful to class action attorneys in their fight against forced arbitration. The existence of a federal government agency dedicated to class action litigation would itself lend an air of legitimacy to class actions; such legitimacy could be fostered further through educational material posted on the Classaction.gov homepage regarding the role that class actions can play in deterring corporate wrongdoing.

may lack records to identify all members, or defendants' records may contain incorrect or incomplete information on purchasers. For example, the defendant may have a purchaser's phone number or name and place of purchase but lack any corresponding email or physical address. Sometimes defendants or third parties may have data that could be compiled to locate purchasers, but compiling it might be so expensive that it makes more sense to provide publication notice and hope for the best. Recall that amounts spent searching for class members may reduce the amount available to satisfy class member claims,<sup>103</sup> so class members considering the question under a Rawlsian veil of ignorance would not prefer that every dollar that could be spent locating class members actually be spent doing so.

Incentive problems are also likely part of the explanation. As discussed in Part II, class action defendants will prefer an ineffective notice campaign even when they are not entitled to the settlement reversion, so as to limit reputational damage. They can therefore be expected to exaggerate the difficulties they face identifying and locating class members. Class counsel may be insufficiently motivated to push back if attorney's fees are insensitive to the number of class members who make claims, or may lack the bargaining power to do so. Claims administrators will be inclined to do what the attorneys and defendant want. Judges, for their part, are poorly positioned to determine whether the parties are making a good faith effort to locate class members and have structural incentives not to rock the settlement boat.

In addition to performing the beneficial functions described in the last Part, *Classaction.gov* could also be used to help increase the number of class members who are identified and located for receipt of direct notice. Imagine if individuals were encouraged to register on *Classaction.gov* as part of a broad and effective publicity campaign. Registration could be touted as a way to increase one's odds of being identified as a class member and hence getting compensation, or it could be made a precondition to participating in class action recoveries.<sup>104</sup> Registrants

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<sup>103</sup> This is obvious when the settlement agreement requires that notice costs be paid from the settlement fund, but even when the defendant agrees to directly pay notice costs, class members will bear the incidence of those costs if the defendant adjusts by reducing the amount it is willing to pay in settlement.

<sup>104</sup> The latter approach would require, essentially, that individuals opt in to the system of class action litigation via *Classaction.gov* registration. Individual class actions would remain opt out for registrants, but nonregistrants would not be bound by a class

would provide basic information about themselves as part of the registration process. For example, registrants would be required to submit their name, current email addresses, primary addresses, and phone numbers; they might further be encouraged to provide past addresses and numbers with associated estimated dates of use. If class action defendants have any identifying information about potential class members, it is usually one of these bits of information. Linking the bits of information that a defendant has about a potential class member with a current way of communicating with that person can be very difficult, however. Classaction.gov could help mitigate this problem by using registrant data to create a searchable database of potential class members. The incomplete data points that a defendant possesses about potential class members could be used to search this imagined database for matching registrants.

As I envision it, the presiding judge would approve a search plan submitted by the parties, but neither the court nor the parties would have access to the class member database. Instead, Classaction.gov staff would execute the search and share only the results (stripped of any sensitive personal data). This might be an iterative process. An initial search might result in an unacceptably high number of duplicate matches—imagine searching the database using generic names like “John Smith” with no associated data, like a phone number, address, or state of purchase. In such a case, the court might order the parties to compile additional data points, at least on the subset of class members that produced multiple database matches, and then to rerun the search. If that is not possible or is too expensive, direct notice could be sent to all registrants identified in the search results, but additional proof of claim might be required for those who turn up as one of multiple matches.

Classaction.gov could also help identify registrants for receipt of direct notice even when the defendant has no data at all about them. In *Class Action Notice in the Digital Age*, Alexander Aiken explained how class actions might exploit “lookalike” advertising techniques to locate unknown class members for receipt of direct notice in cases where the parties have identifying information on at least some class members.<sup>105</sup> Lookalike advertising is offered by media companies with large databases of registered

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action settlement and thus would remain free to bring individual (but not class) claims against a settling defendant.

<sup>105</sup> Aiken, *supra* note 57, at 1003–07.

users, like Facebook.<sup>106</sup> The advertising client provides the company with identifying information about a seed group (e.g., a list of customer email addresses), and the company finds those in the seed group who hold accounts with it. The company then runs a proprietary machine-learning algorithm to decide who of its users look like the client's seed group, based on what it knows about the client's seed group members, and then targets the lookalikes.<sup>107</sup> The company does not actually provide the client with identifying information about the lookalikes, nor does it send direct messages to the lookalikes on the client's behalf;<sup>108</sup> doing so without a look-alike's prior consent would likely violate privacy policies and terms of use. Aiken suggests that claims administrators could create their own databases of consumer data and develop their own algorithms so that they could run this sort of search in house and then use the information they have on lookalikes to send them direct notice.<sup>109</sup>

Aiken's idea is intriguing, but impractical. Only a handful of media companies in the world have databases of users large enough for lookalike searches to work well;<sup>110</sup> it would be prohibitively expensive for claims administrators to try to amass the data and develop the algorithms they would need to rival the capabilities of these companies. Classaction.gov offers a more feasible way to get direct notice into the hands of lookalikes. Imagine if Classaction.gov registrants could choose to give Classaction.gov permission to seek identifying information about them from media companies like Facebook and Google for the limited purpose of determining if they might be a member in a class action. A media company could then use data the parties have on known class members to identify lookalikes in the standard way, but instead of just targeting advertisements about the case at the list of lookalikes, the company could compare that list to a list of consenting registrants and return to Classaction.gov a list of any matches. These registrants could then be sent direct notice, which they are more likely to respond to than an advertisement. Direct notice could also be sent to consenting registrants even if the defendant

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<sup>106</sup> See, e.g., *Lookalike Audiences*, FACEBOOK BUS., <https://perma.cc/D2MQ-9CAL>.

<sup>107</sup> See Jeff Rajeck, *Lookalike Audiences: The Next Big Thing in Marketing?*, ECONCULTANCY (Sept. 26, 2014), <https://perma.cc/6ABE-VDMX>.

<sup>108</sup> See *id.*

<sup>109</sup> Aiken, *supra* note 57, at 1002–03.

<sup>110</sup> See Desmond, *supra* note 57, at 762.

lacks the partial class member information needed to run a look-alike search; for example, a media company like Google could identify consenting registrants it knows to have visited websites that the parties have identified as likely trafficked by class members, and Classaction.gov could then send these individuals direct notice. Like registrants who come up as one of multiple matches, registrants who are identified in this manner might be asked to provide additional proof of claim.<sup>111</sup>

Not only would the class member database make it easier and cheaper to locate class members, it would also make it easier and cheaper to communicate with them. This is because Classaction.gov would have an email address for every registrant, making it possible to use email notice and thus avoid the printing and postage costs associated with physical notice. Unlike the email addresses customers sometimes provide at the point of purchase of a consumer good, the email addresses registrants would provide to Classaction.gov would be of high quality. And unlike the email notices sent today, email notices sent by Classaction.gov to registrants would be recognized, trusted communications and thus would be more likely to be read and to elicit a response.<sup>112</sup>

Registrants on Classaction.gov could also be invited to provide account information at the time of registration for any future deposit of settlement funds. This would facilitate automatic electronic distributions in cases where a claims process is unnecessary, saving printing and postage costs.<sup>113</sup> It would also help ensure that money actually gets into the pockets of class members, where it belongs—recall that the check cashing rate in the FTC’s study was only 55% in cases involving automatic distributions of paper checks.<sup>114</sup>

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<sup>111</sup> My intention is to highlight how Classaction.gov could facilitate the use of these techniques to effect direct notice rather than publication notice, not to endorse their effectiveness or desirability—topics well outside the scope of this Essay.

<sup>112</sup> To be sure, even government emails can be spoofed. The publicity campaign surrounding the launch of Classaction.gov should educate the populace that no legitimate email from Classaction.gov would ever invite a recipient to click on a hyperlink or to take any action other than to visit the case webpage housed on the official Classaction.gov website by typing or pasting the address into their browser.

<sup>113</sup> For a discussion of how technology could be utilized to facilitate automatic distribution in the specific context of securities class actions, see Erickson, *supra* note 11, at 1839–42.

<sup>114</sup> See CONSUMERS AND CLASS ACTIONS, *supra* note 6, at 31–32.

A Classaction.gov registration feature could also serve to mitigate concerns about the use of cy pres settlements.<sup>115</sup> Cy pres settlements come in two forms: sometimes an entire class action settlement is paid out to charity on the rationale that per-class-member recoveries are too small to justify administering payment (“unfettered cy pres”); other times, charities are designated to receive any settlement funds that remain unclaimed at the conclusion of the claims period (“residual cy pres”).<sup>116</sup> Cy pres settlements are controversial because they redirect money that rightfully belongs to class members to charities chosen not by class members, but by some combination of the defendant, the attorneys, and the judge. This has many implications, not least of which is the potential for conflicts of interest.<sup>117</sup> In a proposed settlement, the parties might suggest as a cy pres recipient a charity that the judge is fond of, for example, in order to increase the likelihood the judge will approve the settlement without

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<sup>115</sup> See, e.g., Abraham B. Dyk, *A Better Way to Cy Pres: A Proposal to Reform Class Action Cy Pres Distribution*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 635, 640, 649–53 (2018) (providing an overview of courts' and commentators' “growing criticism of cy pres” settlements).

<sup>116</sup> See Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 114–17 (2014) (providing a brief history of cy pres doctrine and the development of residual cy pres in the class action context). In 2013, Chief Justice John Roberts called attention to “fundamental concerns surrounding the use of [cy pres] remedies” and indicated that in a future case the Supreme Court “may need to clarify the limits on the use of such remedies.” *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari). The Supreme Court granted certiorari in a different case to address whether unfettered cy pres settlements are “fair, reasonable, and adequate” within the meaning of Rule 23(e)(2) in 2018, but ended up remanding the case for a standing determination. *Frank v. Gaos*, 139 S. Ct. 1041, 1043, 1046 (2019) (per curiam). In a dissenting opinion, Justice Clarence Thomas indicated that he would have overturned the settlement as unfair because the class members received “no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims.” *Id.* at 1048 (Thomas, J., dissenting). The Court may get another chance to address cy pres settlements soon. See Alison Frankel, *State AGs, Class Action Watchdog Protest Cy Pres-Only Settlement in Google Street View Case*, REUTERS (Jan. 22, 2020), <https://perma.cc/H7R8-YYMS>.

<sup>117</sup> For an elaboration of these conflicts, see Wasserman, *supra* note 116, at 120–34. For a critique of cy pres settlements on constitutional grounds, see Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 641–48, 650–51 (2010). For the Chamber of Commerce's take on cy pres settlements, see generally JOHN H. BEISNER, JESSICA DAVIDSON MILLER & JORDAN M. SCHWARTZ, U.S. CHAMBER INST. FOR LEGAL REFORM, *CY PRES: A NOT SO CHARITABLE CONTRIBUTION TO CLASS ACTION PRACTICE* (2010). For arguments in defense of cy pres awards by the American Association of Justice, an interest group aligned with the class action plaintiffs' bar, see Brief of Amicus Curiae American Association for Justice in Support of Respondents at 6–22, *Frank v. Gaos*, 139 S. Ct. 1041 (2019) (No. 17-961). See also Christine P. Bartholomew, *Saving Charitable Settlements*, 83 FORDHAM L. REV. 3241, 3257–76 (2015).

closely scrutinizing it for its fairness to class members. Or if a charity that class counsel is fond of stands to receive cy pres funds, she might not push as hard as she otherwise would to increase the claims rate, or might even agree to an unfettered cy pres settlement despite the feasibility of a claims process.

Classaction.gov could dampen the controversy over cy pres settlements in two ways. First, by making it easier to identify class members, increasing the claims rate, and reducing the costs of notice and claims administration, Classaction.gov promises to reduce the number of cases that arguably warrant unfettered cy pres settlements as well as the amount of unclaimed settlement monies available to be paid out in residual cy pres settlements. Second, in either type of cy pres settlement, courts could direct funds in accordance with the preferences of Classaction.gov registrants. Imagine if registrants on Classaction.gov were invited to select from a list of nonprofits as part of the registration process.<sup>118</sup> Their choices could then be looked to in order to determine which organizations should receive cy pres funds. This would eliminate the conflicts of interest that arise when the defendant, attorneys, or judge get to pick the recipients. In cases involving a direct notice campaign, for example, courts could allocate cy pres funds in accordance with the preferences of registrants who were direct notice recipients but did not make claims.<sup>119</sup> In cases lacking a direct notice campaign but including a claims process, residual cy pres funds could be directed to charities selected by registrants receiving settlement funds, on the rationale that their preferences are the best proxy for the preferences of nonparticipating class members. In cases involving only publication notice and an unfettered cy pres distribution, recipients could be based on the preferences of some subset of Classaction.gov registrants who share common features with the unidentified class members.

While adding a registration feature to Classaction.gov would make it easier and cheaper to find, communicate with, and distribute funds to class members, and would offer a way to legitimize cy pres settlements, it would also introduce new costs. For example, the class member database would have to be built out,

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<sup>118</sup> Nonprofit organizations that applied and satisfied objective, content-neutral criteria would be entitled to be included on the list.

<sup>119</sup> Multiple charities could receive funds in proportion to their popularity amongst the registrants, or, if that would be unruly given the number, the top vote-getters could split the funds in proportion to their popularity.

maintained, and publicized, and the security of registrants' personal data would have to be safeguarded. I believe these costs would be justified if a sufficient number of people were to register on the site, such that the benefits imagined above would in fact materialize. Convincing individuals to register on Classaction.gov may prove harder than convincing them to visit the Classaction.gov website to make a claim on a case webpage. Convincing them to store account data on the website may be harder still. A well-designed, well-funded publicity campaign is therefore an essential component of this proposal. This campaign would have to, *inter alia*, explain to people why registration is in their self-interest and alleviate the security and privacy concerns they may have.

#### CONCLUSION

Class actions raise important public policy questions. The dearth of publicly accessible information about them is unacceptable. The low level of consumer participation in class action settlements is similarly unacceptable, at least if one views class member compensation as a goal of class action litigation. Big problems like these warrant bold solutions. This Essay has introduced an idea—the creation of a class action website and supporting administration run by the federal government—that would address both of these problems, and which promises to improve class action practice in many other important ways.