**Amicus Briefs**

Below are some of the amicus briefs filed by NCLC and our partners on behalf of our low-income clients. In collaboration with national, state, and local organizations and attorney advocates, NCLC provides guidance on a wide range of cases impacting low- to middle-income consumers and their families.

**Access to Justice | Civil Rights | Consumer Protection & the CFPB | Debt Collection | Housing | Predatory Lending | Regulatory Enforcement | Student Loans | TCPA**

### Access to Justice

**2019**

- **China Agritech v. American Pipe & Construction Co. v. Utah**

The Supreme Court held that “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.” The question presented in this appeal was whether the plaintiffs, whose individual claims were timely as a result of American Pipe tolling also may bring those claims in a subsequent class action on behalf of all class members who also had timely claims under the American Pipe rule. The 9th Circuit said they could. NCLC, in an amicus brief prepared by the Gupta Wessler law firm, joined AAJ in support of the plaintiff’s claim and seeking affirmation of the 9th Circuit’s ruling.

The Supreme Court ruled, however, that upon denial of class certification, a putative class member may not, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations.

- **Franks v. Google**

NCLC filed an amicus brief joined by U.S. PIRG. The issue presented was a challenge by a professional objector and industry-based class action opponent to the approval of a pure cy pres settlement distribution. The agreement negotiated between Google and the consumer class in the underlying breach of privacy case resulted in a more than reasonable damages figure. However, because of the enormous size of the class, it was economically infeasible to distribute the funds to the class members. Therefore, all of the damages were allocated to appropriate non-profit organizations. NCLC’s amicus brief focused on cy pres as a vital component for ensuring the enforceability of consumer laws and preserving their deterrent impact.

Based on a suggestion made by the Solicitor General in his submitted amicus brief, and discussed at the oral argument in the case, however, the Supreme Court ultimately decided it should not reach the merits of the appeal because there were substantial questions about whether any of the originally named plaintiffs had standing to sue in light of the standards established in Spokeo. Therefore, the Court never reached the cy pres issue but, rather, vacated the judgment of the Ninth Circuit and remanded the matter for further proceedings on the standing issue.

- **Home Depot v. Jackson**
NCLC submitted an amicus brief prepared by the Lieff Cabraser and Tousely Brain Stephens Law firms. The case raised a narrow, atypical issue: whether a third-party counter-defendant may remove a case to federal court under the Class Action Fairness Act (“CAFA”), notwithstanding that the federal court lacked subject matter jurisdiction over the original parties. The amicus brief provided the Court with representative examples of fact patterns under which a counter-defendant would attempt to remove a case under CAFA, particularly when the target of a state-court debt collection action counterclaims that the underlying debt is invalid under state law. Class action counterclaims arise in debt collection actions to dispute the merits of the debt itself. When one party avails itself of state court in an effort to collect another party’s fraudulent debt, we argued that it is not unreasonable to expect the latter to answer the charge that its debt is unlawful in that same forum. We stressed that Home Depot not only sought to change the way removal jurisdiction has worked in a radical manner, but would do so in a way that would impact the ability of consumers to raise meritorious counterclaims in an efficient and fair manner.

The Supreme Court ultimately agreed. It held that a third-party counterclaim defendant may not remove a case to federal court — even if the counterclaim against the defendant is brought as a putative class action that otherwise satisfies the requirements for federal subject matter jurisdiction under CAFA. In context, the Court stated, the term “defendant,” as used in 28 U.S.C. § 1441(a), means the defendant sued in the original complaint. The majority held that Section 1441(a) refers to the removal of a “civil action” and that the “civil action” subject to removal is the action “defined by the plaintiff’s complaint,” not a counterclaim later filed in that action. The only “defendant” entitled to remove, the Court thus concluded, is the defendant named in the original complaint. The majority also determined that construing the term “defendant” to have different meanings for purposes of Section 1441 and CAFA would render the provisions “incoherent.”

2010

- **Jackson v Rent A Center, Inc.**

NCLC and Consumer Action joined in an amicus urging the Supreme Court to affirm the 9th Circuit’s decision and hold that unconscionability is a question for a court, rather than the arbitrator, to decide because judicial review of unconscionability challenges to arbitration clauses is necessary to maintain the fairness and integrity of arbitration proceedings.

**Civil Rights**

2019

- **Bostock v. Clayton County**

NCLC, with 56 other civil rights organizations, joined an amicus brief prepared by The Lawyers’ Committee for Civil Rights Under Law and The Leadership Conference on Civil and Human Rights, filed in a trio of cases before the Supreme Court. These combined cases, which the Court will consider next term, examine whether employment discrimination on the basis of sexual orientation and gender identity are covered under Title VII of the Civil Rights Act of 1964. The brief argues that outlawing job discrimination based on LGBTQ status is fully consistent with Title VII’s long history of anti-discrimination achievements, as well as the statutory text that has made those successes possible. Furthermore, if Title VII does not bar LGBTQ discrimination, that will leave many LGBTQ people of color vulnerable to workplace discrimination – an outcome contrary to Congress’ paramount goal of ensuring equal access to employment opportunities for minorities. Since there are nearly two million LGBTQ people of color in America’s workforce, they are far more likely to suffer discrimination than their white counterparts. We argue, therefore, if Title VII is not construed...
according to its plain text so that it covers LGBTQ discrimination, such discrimination would go unchecked by federal law, and biased employers would have a convenient pretext for discriminating against LGBTQ persons of color. It is thus impossible to carve out LGBTQ discrimination from Title VII’s ambit without inflicting severe harm on countless employees of color.

- **State of New York v. U.S. Department of Commerce**

NCLC joined with over 150 civil rights, grassroots, advocacy, labor, legal services groups in an amicus drafted by the Leadership Conference on Civil and Human Rights, The Leadership Conference Education Fund, Muslim Advocates, National Coalition on Black Civic Participation, National Association of Latino Elected and Appointed Officials and Wilmer Cutler Pickering Hale and Dorr LLP.

The case involved a challenge by numerous states, local governments, and non-governmental organizations to the Secretary of Commerce’s announcement to add a citizenship question to the 2020 census over the strenuous objection of the Census Bureau. The stakes are high and long-lasting as the decennial census endeavors to count every person residing in the US, regardless of citizenship status. The count is used to apportion political power at all levels of government, allocate $800 billion annually in federal funds, and affect policy and investment decisions by government and non-government entities. The addition of a citizenship question threatened to undermine the integrity of the population count by depressing the count for those who fear the government will use the information against them, in particular noncitizens and immigrant communities of color. The amicus brief challenged the defendants’ premise that the citizenship question has been a part of the modern census, as the question hasn’t been a part of the census since 1950 (before the passage of the Voting Rights Act). The amicus also argued that the plaintiffs had standing because the citizenship question would lead to an undercounting which would result in a loss of federal funding. Finally, the amicus challenged the defendants’ assertion that the citizenship question was necessary to enforce the Voting Rights Act.

The Supreme Court upheld that the Enumeration clause allows for a citizenship question to be added to the Census, but stated that the decision to add this question is a reviewable action under the Administrative Procedure Act (APA). The Supreme Court also agreed that the explanation provided by the Commerce Department for the question was insufficient. The majority wrote that under the APA, it was expected that the Commerce Department would “offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public”, but that the reason provided by the Commerce Department appeared to have been contrived and was pretextual. The Supreme Court, therefore, affirmed the District Court’s injunction prohibiting the addition of the citizenship question until the Commerce Department is able to provide a satisfactory explanation for such an action.

- **Comcast v. NAAAOM**

NCLC joined 20 other national civil rights organizations in an amicus brief filed by the Lawyers Committee for Civil Rights Under Law with the United States Supreme Court. The case concerns the issue of whether a claim of race discrimination under 42 U.S.C. § 1981, a historic and critical civil rights law, falls in the absence of but-for causation. The brief seeks to detail how the application of a but-for analysis to claims brought under section 1981 could hinder access to the protections guaranteed by the statute and argues that the application of a but-for standard to establish claims of intentional race discrimination would be inconsistent with the statute’s text, history, and purpose.

2017
• **Bank of America v. City of Miami**

NCLC joined an amicus brief prepared by the Cohen Milstein law firm and also signed by the Lawyers Committee for Civil Rights, NFHA, ACLU, the Poverty & Race Research Action Council, the Leadership Conference on Civil Rights and the Impact Fund, supporting the standing of the City of Miami to assert discrimination claims against BOA and Wells Fargo under the FHA. The brief argued that standing under the FHA extends to municipalities not directly targeted by discrimination. Noting that racially discriminatory lending practices are a major cause of this country’s residential segregation, we asserted that the FHA was designed to address the systemic problems associated with such segregation and permits cities to seek redress for injuries caused by discriminatory practices.

The Supreme Court ruled that the city’s claimed injuries fall within the zone of interests that the FHA arguably protects,” and, therefore, “the city is an ‘aggrieved person’ able to bring suit under the statute.” The Court sent the case back to the 11th Circuit Court of Appeals after it “declined to decide whether the city had asserted a direct enough connection between the banks’ actions and the harm it claimed.”

### Consumer Protection & the CFPB

#### 2020

• **Seila Law v. CFPB**

NCLC’s amicus brief was joined by the Center for Consumer Law and Education Center (a joint partnership between West Virginia University College of Law and Marshall University); the UC Berkeley Center for Consumer Law & Economic Justice; The Housing Clinic of the Jerome N. Frank Legal Services Organization at Yale Law School; Consumer Action; and Professor Craig Cowie (Asst. Professor of Law and Director of the Blewett Consumer Law & Protection Program at the University of Montana Alexander Blewett III School of Law). The brief supports the 9th Circuit’s ruling that the Dodd-Frank Act provision providing that the Director of the CFPB only can be terminated by the President for-cause is constitutional. Because the CFPB has chosen to join the appellant’s challenge to its own management structure, the Supreme Court has appointed former Solicitor General Paul Clement to defend the Court of Appeals’ decision. However, since that opinion found that the for-cause termination provision was valid the Court of Appeals did not reach the issue of remedy and, therefore, Mr. Clement has not addressed that issue either. However, the appellant, the CFPB (via the current Solicitor General), and a number of their supporting amici have argued for various outcomes in the event that the provision is found to be unconstitutional, ranging from severance of the offending clause to the repeal of Dodd- Franks. NCLC’s brief, therefore, argues that if a remedy nonetheless is necessary it only should entail the severance of the current “for-cause” termination provision (which, in essence, would result in an “at-will” termination status for the Director). Such a remedy would give effect to the express language of the Dodd-Frank Act’s severability clause and comport with the traditional doctrine of severability that provides that a court should nullify no more of a statute than is necessary. We also assert that undoing Congress's sweeping restructuring of financial regulation by eliminating the CFPB instead of severing the for-cause removal provision would contravene Congress’s intent to establish a sole federal regulator charged with stabilizing the marketplace and protecting consumers.

#### 2018

• **Ohio v. American Express Co.**
NCLC joined a brief also submitted on behalf of the U.S. Public Interest Research Group Education Fund, Inc., the Center for Responsible Lending, Consumer Federation of America, Consumers Union, the National Association of Consumer Advocates, and Public Citizen. The United States and several states sued Amex, claiming that its anti-steering provisions (i.e. merchants could not offer the Amex card as a payment option unless they agreed not to steer customers towards other credit cards that provided better financial deals for the merchant) violate §1 of the Sherman Antitrust Act. The District Court agreed, finding that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders—and that Amex’s anti-steering provisions are anticompetitive because they result in higher merchant fees. The Second Circuit reversed. It determined that the credit-card market is one market, not two. The Court of Appeals concluded that Amex’s anti-steering provisions did not violate federal antitrust law. Our brief was prepared by U.S. PIRG and the firm of Cohen, Milstein, Sellers & Toll and argued that American Express’s merchant restraint suppresses price competition and thereby harm consumers. The Supreme Court affirmed the Second Circuit ruling.

Debt Collection

2020

- **Rotkiske v. Klemm**

The key question presented in this case is whether the discovery rule applies to toll the Fair Debt Collection Act’s (“FDCPA”) one-year statute of limitations. NCLC filed its own amicus brief in which we argued that debt collection, which affects millions of Americans each year, often is accompanied by deceptive or unfair practices, particularly by the third-party debt collectors that are subject to the FDCPA. We contended that the FDCPA was intended to curb such abuse, but that such a purpose would be impaired if consumers were not given a fair opportunity to pursue violations that go undetected when they occur. Therefore, we supported the proposition that the one-year statute of limitations should not be construed as an absolute bar to claims that are brought beyond a year from the date of the violation.

In an 8-1 opinion authored by Justice Thomas, the Supreme Court ruled that, absent the application of an equitable doctrine, the statute of limitations in the FDCPA begins to run on the date on which the alleged violation occurs, not the date on which the violation is discovered. The Court recognized, however, the existence of a fraud-based discovery rule, although it found that Rotkiske failed to properly make that fraud argument on appeal (contrary to the dissent filed by Justice Ginsberg). We are disappointed that the discovery rule clearly will not apply in FDCPA cases as we argued, but we were pleased that the Court did not change any of its jurisprudence regarding the availability of equitable tolling of the applicable statute of limitations under appropriate circumstances.

2019

- **Obduskey v. McCarthy & Holthus, LLP**

NCLC submitted an amicus brief in support of the consumer’s argument that non-judicial foreclosures are covered under the FDCPA, clarifying that mortgages are debts, the law firm in question was a debt collector, and the letter in question was in connection with the collection of a debt. The brief also analyzed the mechanics of Colorado foreclosure law and discussed the policy reasons for applying the FDCPA to non-judicial foreclosure.

The Supreme Court, however, affirmed the lower court ruling and held that a business engaged in no more than non-judicial foreclosure proceedings is not a “debt collector” under the FDCPA, except
for the limited purpose of enforcing security interests.

2017

- **Henson v. Santander**

NCLC joined with NACA, Tzedek DC, The Legal Aid Society of the District of Columbia, and Civil Justice in an amicus brief to address the question whether a company that regularly attempts to collect debts it purchased after the debts had fallen into default is a “debt collector” subject to the Fair Debt Collection Practices Act. Our amicus builds upon one that we filed in the 4th Circuit, which was authored by Dick Rubin and Joanne Faulkner. Dan Edelman is the lead author of this version of the brief. This amicus brief argues that the ruling below, holding that a bad-debt purchaser is not subject to the FDCPA because the debt buyer is not seeking to collect “for another” (1) runs afoul of the principles of statutory construction; (2) is inconsistent with congressional intent and legislative history of the FDCPA; (3) is contrary to decades of guidance and enforcement actions by the federal agency responsible for enforcing the FDCPA; and (4) would exempt the entire debt buying industry and grant debt buyers a significant competitive advantage over other debt collectors whose collection efforts must comply with the FDCPA, which would elevate form over substance and weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation.

The Supreme Court decided, however, that Santander was not a debt collector under the FDCPA’s second definition of debt collector. The narrow opinion held that a debt buyer is not subject to the FDCPA as an entity regularly collecting debts “owed or due another,” leaving intact the alternative approach of showing that a debt buyer qualifies as a debt collector under the FDCPA because the “principal purpose” of its business is the collection of debts.

2016

- **Midland Funding v. Johnson**

NCLC joined Public Citizen, the Legal Aid Society of DC and NACA in an amicus brief prepared by Public Citizen in support of the respondent. The case presents two questions: (1) whether filing a proof of claim on a knowingly time-barred debt violates the FDCPA, and (2) whether any such claim under the FDCPA is impliedly repealed by the Bankruptcy Code. The Public Citizen amicus brief argues: (1) The Court should affirm that a knowing attempt to collect time-barred debt violates the FDCPA, and (2) The least sophisticated consumer standard for assessing whether collection conduct is deceptive or misleading under 15 U.S.C. 1692e should be applied to proof of claims in bankruptcy, not what a competent attorney or trustee would believe as argued by Midland Funding.

- **Sheriff v. Gillie**

NCLC coordinated efforts in this FDCPA case to file an amicus brief prepared by Dick Rubin and Deepak Gupta that also was joined by Public Good and NACA. The issues presented are (1) Whether special counsel – lawyers appointed by the Attorney General to undertake his duty to collect debts owed to the state – are state “officers” within the meaning of 15 U.S.C. § 1692a(6)(C); and (2) whether it is materially misleading under 15 U.S.C. § 1692e for special counsel to use Attorney General letterhead to convey that they are collecting debts owed to the State on behalf of the Attorney General.

Our amicus focuses on the second issue, including rebutting Petitioner’s argument that the Supreme Court should reject the least sophisticated consumer standard and instead adopt an “average
consumer” standard.

2013

• Marx v. General Revenue Corp

The court held that when a debt collector wins a Fair Debt Collection Act case brought by a consumer that the consumer may be made responsible for the debt collector’s court costs, amounting to $5443, in this case. Previously most courts had held that the debt collector could only recover its costs if it established that the consumer brought the suit in bad faith and for the purpose of harassment. The debt collector must establish that to obtain the payment of its attorney fees by the consumer.

2010

• Jerman v. Carlisle

Debt collectors’ legal mistake in the language of a Fair Debt Collection Practices Act notice did not amount to a bona fide error defense letting the debt collector off the hook.

• United Student Aid Funds, Inc. v. Espinosa

Argued that the Fair Debt Collection Practices Act’s bona fide error defense was not intended by Congress to apply to mistakes of law by debt collectors. Since the bankruptcy court’s error in confirming a Ch. 13 plan discharging a portion of the student loan debt without first finding undue hardship in an adversary proceeding was not jurisdictional, the judgment was not void. Because student loan creditor received actual notice of the filing, due process was met. The bankruptcy court’s legal error in confirming the debtor’s plan absent a finding of undue hardship in an adversary proceeding did not render its judgment void. Bankruptcy courts presented with a plan proposing the discharge of student loan debt without a determination of undue hardship in an adversary proceeding should not confirm such a plan, even if the creditor fails to object or to appear at the proceeding at all.

Housing

2015

• Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.

NCLC filed an amicus brief with our colleagues at the ACLU in an appeal in the United States Supreme Court in which the disparate impact cause of action under the Fair Housing Act is being challenged. The brief is substantially similar to the amicus we filed in the Mt. Holly case prior to that appeal being settled before a decision was handed down. It is one of approximately a dozen amicus briefs being coordinated by a coalition of civil rights organizations, including NCLC, to be filed in support of the appellee. The unique contribution of our amicus brief is that it focuses on disparate impact as a vital tool for remedying the discriminatory lending practices that fueled the subprime lending bubble and contributed to the current foreclosure crisis. The brief also argues that disparate impact analysis is a crucial tool for stopping housing discrimination against domestic and sexual violence victims. The Supreme Court subsequently upheld the decision of the 5th Circuit Court of Appeals and ruled that disparate-impact claims are cognizable under the Fair Housing Act.
Jesinoski v. Countrywide Home Loans, Inc

NCLC and amici opposed the respondents’ argument that TILA rescission must be exercised by filing a lawsuit. Rescission gives homeowners the right to cancel a loan transaction for three days after a loan closing. Consumers can exercise this right simply by giving notice to the creditor. The plain language of the statute unmistakably supports this position. Additionally, administrative interpretations from the Federal Reserve Board and judicial interpretations from the federal courts of appeal support rescission through notice. The Truth in Lending Act gives a homeowner the right to rescind a mortgage loan (other than a purchase-money mortgage) for up to three years if the lender failed to make certain key disclosures about the loan. Some courts had held that the homeowner had to file suit in court within this three year period. The Supreme Court issued a unanimous decision, agreeing with our amicus brief that the only thing the homeowner has to do within the three-year period is notify the creditor that he or she is exercising the right to rescind. The Supreme Court also made another very helpful comment, stating that the consumer could return the net amount owing on the loan after rather than before rescinding. The right to rescind under the Truth in Lending Act has been one of the most important tools to fight predatory mortgage lending. This decision will make a difference for many homeowners.

2013

Mount Holly v. Mount Holly Citizens in Action

NCLC wrote the amicus brief with the ACLU and were joined on the brief by the National Coalition Against Domestic Violence; NCRC; the National Center on Homelessness and Poverty; the National Housing Law Project; Public Citizen and the National Women’s Law Center. The Mt. Holly case concerns the application of the Fair Housing Act disparate impact discrimination cause of action in a municipal zoning challenge by elderly African Americans and Hispanic Americans whose affordable residences were consider “blighted” by their town and threatened with demolition to build unaffordable housing. The case was settled by the parties and dismissed.

2012

First American v. Edwards

NCLC joined AARP, Center For Responsible Lending, and the National Consumers League in a amicus brief prepared primarily by Public Citizen, Inc., arguing that permitting Real Estate Settlement Procedures Act plaintiffs to seek statutory damages without proving their monetary loss does not undermine the values of the constitutional requirement of “standing” – that a plaintiff has a real stake in the suit.

The Court dismissed its decision to grant certiorari in Edwards v. First American. Corp. as improvidently granted. In Edwards the Ninth Circuit held that a homebuyer had standing to assert a violation of RESPA’s ban on referral fees and kickbacks against a title insurer even though the homebuyer did not allege that she was overcharged as a result of the illegal conduct. The court based its decision on the text of RESPA and legislative history showing that Congress was concerned about more than just the cost of settlement services. Kickbacks could affect a service provider’s impartiality and willingness to give professional advice. In doing so the Ninth Circuit followed similar decisions from the Third and Sixth Circuits. No circuit courts have required economic injury to establish standing under this section of RESPA.

Magner v. Gallaher
NCLC joined an amicus brief prepared by the Lawyers’ Committee for Civil Rights Under Law with other national civil rights organizations arguing that the Fair Housing Act properly is interpreted to authorize disparate impact claims and that the Eighth Circuit applied the correct burden-shifting approach to litigating disparate impact claims consistent with current practices and HUD’s proposed regulation. NCLC also consulted with the ACLU (which cites NCLC’s Credit Discrimination manual and references NCLC’s sub-prime mortgage discrimination disparate impact cases brought under the Fair Housing Act) and the Department of Justice with regard to the preparation of the amicus briefs they separately prepared.

The Fair Housing Act makes it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer … or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(a).

Plaintiffs are owners of rental properties who argue that Petitioners, municipal officials, violated the Fair Housing Act by “aggressively” enforcing the City of Saint Paul’s housing code. According to Respondents, because a disproportionate number of renters are African-American, and Respondents rent to many African-Americans, requiring them to meet the housing code will increase their costs and decrease the number of units they make available to rent to African-American tenants. The district court granted summary judgment for the City, and the Eighth Circuit reversed holding that the lessors should be allowed to proceed to trial because they presented sufficient evidence of a “disparate impact” on African-Americans.

The Supreme Court granted cert on the following critical questions presented:

1. Are disparate impact claims cognizable under the Fair Housing Act?
2. If such claims are cognizable, should they be analyzed under the burden-shifting approach, under the balancing test, under a hybrid approach, or by some other test?

Predatory Lending

2010

- **Midwest Title Loans v. Mills**

NCLC joined AARP, Consumer Federation Of America, Indiana Legal Services, Inc., And The Sargent Shriver National Center On Poverty Law in an amicus brief primarily prepared by Public Citizen and the Center For Responsible Lending in support of the Indiana Attorney General’s certiorari petition to the U.S. Supreme Court. Indiana, which regulates auto-title lending, sought to apply its law to title loans made by Illinois lenders to Indiana residents when the loans were advertised in Indiana and the lenders registered liens in Indiana and repossessed cars in Indiana— but the loan contracts themselves were signed over the border in Illinois. A lender brought a commerce clause challenge and was successful arguing that the Indiana law unlawfully interfered with interstate commerce: “The contract was, in short, made and executed in Illinois, and that is enough to show that the territorial-application provision violates the commerce clause.”

Cert denied leaving intact the 7th Circuit decision that the Indiana law regulating car loans between Indiana consumers and Illinois car dealers unlawfully interfered with interstate commerce.

Regulatory Enforcement

2020
• **Liu v. SEC**

NCLC joined an amicus brief with Better Markets and CRL. The issue presented in Liu is whether the SEC has the ability to order disgorgement as a remedy in its cases under the explicit equitable authority granted by its enabling statute. The certified the question whether, and to what extent, the SEC may seek “disgorgement” in the first instance through its power to award “equitable relief” under 15 U. S. C. §78u(d)(5), a power that historically excludes punitive sanctions. The appellant’s argument, rejected by both the District Court and the 9th Circuit Court of Appeals, is that disgorgement is an unauthorized penalty rather than an equitable remedy. Our amicus brief supports the position that disgorgement is, in fact, an equitable remedy which falls well within the broad express powers granted to the agency by Congress. But it goes further in arguing that a contrary ruling would call into question similar remedies available to other agencies through virtually identical grants of equitable authority and jeopardize their enforcement efforts by eliminating critical options for effective relief. Without raising the issue directly in the amicus brief, we primarily are concerned that a bad opinion affecting our ability to exercise private rights of action under the ECOA, FHA and ERISA, among other consumer protection statutes, where NCLC often relies upon disgorgement as a viable remedy and a necessary component for successfully certifying a class. The Supreme Court held that a disgorgement award that does not exceed a wrongdoer’s net profits and is awarded for victims is equitable relief permissible under §78u(d)(5).

2012

• **National Meat Ass’n v. Harris**

NCLC joined in an amicus brief with Public Citizen, Center for Responsible Lending, AARP, Public Health Law Center and Consumer Federation of America in a case about whether the Federal Meat Inspection Act expressly nullifies or preempts a particular California law. The amicus brief argues there is a presumption against federal laws preempting state laws. Although the main brief did not challenge the presumption, the Chamber of Commerce’s amicus brief did challenge it. The Supreme Court held that the California statute directly conflicted with the federal statute and was preempted without having to address the presumption against preemption.

**Student Loans**

2020

• **New York Legal Assistance Group v. Devos and U.S. Department of Education**

Based on our extensive experience advocating for debt relief on behalf of low-income students harmed by abusive schools and consulting with legal aid attorneys across the country who represent student borrowers, amicus writes to explain how the Department of Education’s 2019 Rules arbitrarily and capriciously ignored congressional intent and its own prior justification for heightened student protections. Further, it ignored the experience of the students Congress intended the Higher Education Act to help. Legal aid organizations told the Department about the ways in which schools deceive borrowers and the struggles borrowers face in getting relief. Instead of reducing burdens for borrowers and increasing school oversight, the 2019 Rules not only rescind virtually all of the student protections added by the 2016 Rules, they also give predatory schools a free pass to lie and cheat students, while saddling them with debt they will never be able to repay.
TCPA

2020

• **Barr v. American Association of Political Consultants**

The National Consumer Law Center, the Consumer Federation of America, and Verizon filed a joint amicus brief in a case in which a group of robocallers is challenging the constitutionality of an exemption provision of the Telephone Consumer Protection Act (TCPA). The amicus brief does not support either party in the appeal. Nor does it take any position on the validity of the specific TCPA exemption at issue in the case. Rather the amici argue that the TCPA plays an integral role in protecting the country’s communications customers as well as the communications system from being deluged by automated, unsolicited calls to mobile phones. The purpose of the statute represents a compelling interest sufficient to justify any narrow restrictions on speech inherent in protecting consumers and the communications network from such calls. Therefore, minimal exceptions to the TCPA’s general protections should not in any way justify a ruling from the Court that would undermine Congress’ ability to adopt the TCPA’s general prohibition on non-consented-to calls to cellular phones.

2011

• **Mims v. Arrow Financial Services, LLC**

NCLC and the National Association of Consumer Advocates (NACA) urged the Supreme Court to review a lower court decision denying a consumer the right to file their federal Telephone Consumer Protection Act (TCPA) claim in a federal court by finding that Congress limited TCPA claims to state courts. On June 27, 2011, the United States Supreme Court granted the petition for review. Oral argument for petitioners is scheduled for November 28, 2011.

• **AT&T Mobility L.L.C. v. Concepcion**

NCLC joined a dozen other advocacy organizations in a brief by the Legal Aid Society of the District of Columbia and NACA arguing that the Federal Arbitration Act does not prevent state contract law from invalidating as unconscionable a contract providing that a consumer entering into the contract has waived her right to a class action against the phone company.

The Supreme Court on April 27, in a highly anticipated decision in Concepcion sharply limited consumer class actions. The court ruled that the Federal Arbitration Act (FAA) preempts the “Discover Bank” rule, finding unconscionable a contractual clause banning class relief. The Court limited FAA language that an arbitration agreement can be struck down “upon such grounds as exist at law or in equity for the revocation of any contract.” The Discover Bank rule prohibited bans on class-wide relief found in consumer adhesion contracts where damages are small and where the party with superior bargaining power deliberately cheats large numbers of consumers out of individually small sums of money. Since this rule applies to bans on class relief both in court and arbitration, it is grounds for “the revocation of any contract.” The majority still struck it down as inconsistent with the FAA. The majority found that it was fundamental to arbitration that it be streamlined and expeditious. The Discover Bank rule, by forcing class arbitration on an unwilling party, negates the FAA requirement that arbitration agreements be enforceable as written. Class arbitration is inconsistent with FAA arbitration because it greatly increases the risks to defendants, requires arbitrators to make class certification judgments, and is slower, more costly and more likely to generate procedural issues.
NCLC joined in an amicus brief with the Consumers Union of the United States, Inc. and Center for Constitutional Rights. Although the case primarily concerns issues of employer wage discrimination against female employees, its implications for other class actions is enormous. The brief argues that Wal-Mart Stores, Inc. (“Wal-Mart”) was mistaken that a defendant has the right to individual hearings to determine the monetary relief owed by its discriminatory policies. This position would gut the class-action mechanism along with its intended efficiencies. Wal-Mart disregards widely approved techniques used to calculate monetary relief in class suits generally, and in employment-discrimination class actions specifically. Second, the employees’ experts on discrimination satisfied the requirements for expert testimony.

The Supreme Court found (9 to 0) that classes certified under Fed. R. Civ.P. 23(b)(2) cannot include claims for individualized monetary relief—in this case, backpay—at least where the monetary relief is not incidental to injunctive or declaratory relief. Instead, the class should proceed under Rule 23(b)(3) that contains additional requirements. The case’s other ruling (5-4 with the usual five conservative justices in the majority) found insufficient commonality where the class alleged that thousands of Wal-Mart managers pursuant to a corporate culture had each discriminated against 1.5 million female employees. While the decision contains broad and troubling language about commonality, the unusually ambitious nature of the claims should limit the holding’s applicability regarding many consumer class actions.