2014-2015
Annual Report

INSTITUTE
FOR
PUBLIC REPRESENTATION
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IPR is a public interest law firm and clinical education program founded in 1971 by Georgetown University Law Center. IPR attorneys act as counsel for groups and individuals who are unable to obtain effective legal representation on issues of broad public importance. IPR's work currently focuses on media and technology law and policy, environmental law, and civil rights and public interest law, including employment discrimination, open government, and consumer protection. IPR students work primarily in one of the three sections of IPR, but come together weekly for clinic seminars and once a month to share their work with students in the other sections. Students, fellows, and faculty often consult and collaborate across sections.

This report summarizes IPR's projects over the last year, illustrating the impact of our work on our clients and their communities. As in past years, IPR’s work has reformed federal, state, and local regulation, established precedents of national as well as local significance, and helped give a voice to under-represented communities. One indication of IPR’s success in its client representation is how many repeat players there are – clients who come back to us for new work or recommend us to other groups needing legal representation.

The projects provide the students with valuable learning opportunities. They have the opportunity to work on unique, large scale projects raising novel legal issues and requiring extensive research and writing. The projects typically involve challenging issues and legal materials. For example, some projects require students to develop and master extensive factual records. Others require an understanding of technical issues, or complex statutes. Gathering facts and the creation and use of administrative records is an important part of the experience for many of our students.

Students are frequently required to research regulatory material and administrative law issues. Although students are usually familiar with how to find and use case law, they often have had little exposure to municipal law and regulations or to such materials as the Federal Register and the Code of Federal Regulations. Similarly, few students have used legislative or administrative history materials. With the help of IPR attorneys and the professional staff at the Law Center's library, IPR students explore the uses of these tools.

IPR students also must consider questions of strategy, client autonomy, and professional responsibility, the need for careful preparation and planning, and how to mesh client goals with the applicable law and facts. Students have the opportunity to learn oral communication skills and to work with community groups, other public interest organizations, and expert witnesses. Students must assume responsibility for the quality of their own work and for the success of their clients' cases. Most of the work at IPR is collaborative, with the graduate fellows and faculty working with the students at each step of the case. Students learn from observing the work of experienced attorneys who are practicing law along with them. The students,
therefore, not only have the chance to perform and have their work critiqued, but also to observe and critique the performance of their supervisors.

This experience has helped IPR graduates find jobs in both the private and public sector. Prospective employers value the training IPR students receive, which prepares them for almost any legal job and makes them exceptionally attractive candidates, even though they are recent graduates. IPR graduates have obtained positions in prestigious government honors program, NGO fellowships, federal and state judicial clerkships, and in firms and government agencies of all sizes. In short, the IPR “brand” is well known and respected in the legal community.

The day-to-day work on clinic cases is supplemented by weekly seminars and “rounds”. In recent terms, seminar topics have included interviewing, complaint drafting, rulemaking, litigation planning, discovery, remedies, appeals, statutory interpretation, working with the press, professional responsibility, and negotiation. Although the focus of the seminars is on public interest practice, the issues we deal with arise for most lawyers, regardless of practice area. The seminars are taught by a member of the IPR faculty, sometimes in conjunction with a graduate fellow. The format and subject matters vary. Some require students to formulate positions in small groups before meeting together with the other students, while others involve role playing or simulation. Many require that students draw on and share their experiences on their projects. The materials used in the seminars include judicial decisions, pleadings from IPR cases, law review articles, legislative materials, real and hypothetical fact patterns, and excerpts from non-legal literature.

At weekly “rounds”, students typically discuss their projects with other students in the same project area. Rounds may also be used for instruction or bringing in outside speakers. Once a month, the students give presentations on their projects within a small group of students from all three practice areas.

Students at IPR work with three faculty members and five graduate fellows. The fellows, who are selected from a national pool of several hundred applicants, are an essential part of the IPR program. They are responsible for the day-to-day supervision of the students and spend much of their time guiding students in conducting legal research, reviewing student drafts, and preparing the students for oral presentations. The fellows also work as members of IPR's legal staff and represent clients before federal and state courts and local and federal administrative bodies, when students are unavailable or unable to do this.
FACULTY

Hope M. Babcock, Co-Director and Professor of Law, directs IPR's Environmental section. She joined IPR in the fall of 1991 after being General Counsel of the National Audubon Society for five years. Professor Babcock graduated from Yale Law School in 1966. She was in private practice with LeBoeuf, Lamb, Leiby & MacRae, in their Washington, D.C. Office, and a partner at Blum & Nash, also in Washington. Before becoming Audubon's General Counsel in 1986, Professor Babcock was Deputy Counsel and Director of the Audubon Society's Public Lands and Waters Program. She served two years in the Carter Administration as a Deputy Assistant Secretary for Energy and Minerals at the Department of Interior, and on the Clinton-Gore Transition Team. In addition to her extensive litigation and government relations experience, Professor Babcock has taught environmental law at Pennsylvania, Yale, Pace, Catholic, and Antioch law schools, and has published articles on environmental and natural resources law, environmental justice, Indian sovereignty, corporate social responsibility, and federalism. She also teaches courses in environmental and natural resources law at the Law Center. She has served on the boards of several public interest environmental organizations and has been on various governmental advisory committees. Her outside interests include running, tennis, swimming, and the outdoors. She has a son, who is a Senior Attorney at the Airline Pilots Association, and three grandchildren. Professor Babcock lives with a significant other who is a semi-retired environmental policy analyst and economist and one boundlessly energetic, large rescue dog.

Angela J. Campbell, Co-Director and Professor of Law, directs the Communications and Technology Law section of IPR. This section represents non-profit organizations before the Federal Communications Commission (FCC), Federal Trade Commission (FTC) and Federal Courts to establish and enforce media policies in the public interest. Professor Campbell has taught at IPR since 1988. Along with her students and graduate fellows, she has advocated for protecting children's online privacy, diversifying media ownership, increasing access to media for persons with disabilities, and making broadcast stations more accountable to the public. She successfully argued a case in the US Court of Appeals that reversed an FCC decision that would have allowed tremendous concentration within the broadcast industry. Her recent law review articles include Pacifica Reconsidered: Implications for the Current Controversy Over Broadcast Indecency, 63 Fed. Comm. L. J. 195 (2010); The Legacy of Red Lion, 60 Admin. L. Rev. 783 (2008); and A Historical Perspective on the Public’s Right of Access to the Media, 35 Hofstra L. Rev. 1027 (2007). Professor Campbell is a frequent speaker at conferences, serves on the Steering Committee of the Food Marketing Work Group and other non-profit advisory boards, and is a Faculty Advisor to Georgetown Law’s Center on Privacy and Technology. Professor Campbell graduated from Hampshire College in 1976 and earned her JD at the UCLA School of Law in 1981, where she served as editor-in-chief of the Federal Communications Law Journal. After graduating from law school, she worked at IPR
as a Graduate Fellow and received her LL.M: the law firm of Fisher, Wayland, Cooper & Leader: and the Antitrust Division of the U.S. Department of Justice.

**Michael Kirkpatrick**, Co-Director and Visiting Professor of Law, directs IPR’s civil rights and general public interest law section. Professor Kirkpatrick joined the faculty in 2014 after a 23-year career in public interest law, most recently as an attorney with Public Citizen Litigation Group (PCLG). His practice areas at PCLG included constitutional law, civil rights, class actions, administrative law, and open government, including practice before the U.S. Supreme Court. Before joining PCLG, Professor Kirkpatrick was a senior trial attorney with the Civil Rights Division of the U.S. Department of Justice, where he litigated employment discrimination cases against state and local government employers, and defended the constitutionality of federal affirmative action programs. Earlier in his career, he was a staff attorney with the Farm Worker Division of Texas Rural Legal Aid, where he litigated employment and civil rights cases on behalf of migrant, transnational, and contingent workers. Professor Kirkpatrick is a recipient of the Peter M. Cicchino Award for Outstanding Advocacy in the Public Interest. He has served as a Wasserstein Public Interest Fellow at Harvard Law School, and as a Law and Policy Mentor for the Jack Kent Cooke Foundation. Before joining the clinic, he was an adjunct professor at Georgetown, teaching a course on ethics in public interest practice.

**Andrew Jay Schwartzman**, the Benton Senior Counselor, joined the Media Law and Policy Project in January, 2014. From 1978 through 2012, Schwartzman headed Media Access Project (MAP). MAP was a non-profit public interest telecommunications law firm which represented the public in promoting the First Amendment rights to speak and to hear. It sought to promote creation of a well informed electorate by insuring vigorous debate in a free marketplace of ideas. It was the chief legal strategist in efforts to oppose major media mergers and preserve policies promoting media diversity. MAP also led efforts to promote openness and innovation on broadband networks and to insure that broad and affordable public access is provided during the deployment of advanced telecommunications networks. Since 2003, Schwartzman has also taught at the Johns Hopkins University School of Arts and Sciences Department of Advanced Academic Programs. He was the Law and Regulation Contributor to Les Brown's Encyclopedia of Television, and is the author of the telecommunications chapter in the Encyclopedia of the Consumer Movement. Schwartzman is a graduate of the University of Pennsylvania Law School.
GRADUATE FELLOWS

Meghan Boone received her J.D., summa cum laude from the Washington College of Law at American University, where she served as the Associate Symposium Editor for the American University Law Review. During law school, she also interned with the U.S. Equal Employment Opportunity Commission and the National Women's Law Center. Prior to joining IPR, Meghan was an associate at a DC firm where she worked on Antitrust and Civil Rights class action litigation. She also clerked for the Honorable Martha C. Daughtrey on the U.S. Court of Appeals for the Sixth Circuit in Nashville, Tennessee. Meghan received her BA from Trinity College in Women, Gender and Sexuality Studies. She is barred in Florida and the District of Columbia.

Justin Gundlach received his J.D. with honors from NYU School of Law in 2010. At NYU, he participated in the environmental law clinic at the Natural Resources Defense Council and the public policy clinic at the Brennen Center for Justice. He also led conversion of NYU’s law journals to a paperless editing process and served as the NYU Environmental Law Review's online editor. After law school, he interned with the Climate Change and Energy Team at the Council on Environmental Quality and then worked as an associate at a large law firm in Washington, DC. He is barred in New York and the District of Columbia.

Daniel Lutz received his J.D. from NYU School of Law in 2012, where he served as the Senior Notes Editor on the NYU Environmental Law Journal and participated in the Global Justice Clinic. Prior to joining IPR, Daniel was a Litigation Fellow with the Animal Legal Defense Fund, litigating and performing administrative advocacy on issues ranging from captive wildlife to industrial meat production. As a law student, Daniel clerked at the Washington D.C. public interest law firm Meyer Glitzenstein & Crystal and interned with a customary land rights project on the Kenya coast. A native of Denver, Colorado, Daniel earned his undergraduate degree from Tufts University.

Aaron Mackey graduated from the University of California, Berkeley School of Law, Order of the Coif, in 2012. During his time in law school, Aaron served as a senior articles editor for the Berkeley Technology Law Journal and participated in the Samuelson Law, Technology & Public Policy Clinic. Upon graduating law school, Aaron was the Jack Nelson Freedom of Information Legal Fellow at the Reporters Committee for Freedom of the Press. Prior to attending law school, Aaron worked as a reporter at the Arizona Daily Star in Tucson, covering local government, the military and higher education. Aaron earned his bachelor's degree in journalism and English from the University of Arizona, where he served as editor in chief of the university's independent student newspaper, the Arizona Daily Wildcat. Aaron lives in Virginia with his wife Ashley and their dog, Bailey.
**Eric Null** received his J.D. from Cardozo Law School in 2012, where he was Senior Articles Editor of the Cardozo Arts & Entertainment Law Journal. He first became interested in communications, media, and intellectual property law as a second-year law student at Cardozo by working at various New York-based IP law firms and for prominent IP and telecommunications professors. Mr. Null's publications include legal articles and a book chapter on topics including the FCC’s Open Internet Order, municipal broadband, and ICANN’s new gTLD program. Mr. Null has been in Washington since graduating, and has taken various D.C.-based fellowships in the communications field, including positions at Public Knowledge and on the House of Representatives' Communications and Technology Subcommittee.

**LAW STUDENTS**

**FALL 2014**

**Civil Rights Clinic**
- Daniel Colbert
- Hannah Gordon
- Samuel Kramer
- Lindsay McAleer
- Nia Newton
- Norah Rexer

**Environmental Clinic**
- Jonathan Aronchick
- Brian Greenert
- Anita Ladher
- Sanghyun Lee
- Emily Rose
- Daniel Smith

**Media and Technology Clinic**
- Emily Behzadi
- Gregory DiBella
- Camille Fischer
- Patricia Kim
- Keir Lamont
- Daniel Syed

**SPRING 2015**

**Civil Rights Clinic**
- Noah Baron
- William Chamberlain
- John Clemons
- Matthew Ducharme
- Stacey Gray
- Jessica Westerman

**Environmental Clinic**
- Christine Hottinger
- David Kovach
- Charissa Morningstar
- Nathalie Prescott
- Rosalie Winn
- Jason Yan

**Media and Technology Clinic**
- Thomas Ball
- Christopher Dioguardi
- Caleb Gilmartin
- Jennifer Grace
- Abraham Shanedling
- Margaret Thomas
CIVIL RIGHTS CLINIC

I. Discrimination/Constitutional Rights

A. ADEX Medical Staffing, LLC v. Gu

IPR represented Wendy Gu, a nurse from China who resigned from her position with a medical staffing company and was then sued by her former employer for allegedly breaching an agreement requiring her to work 5,200 billable hours or pay a penalty and reimburse the company for certain expenses, including tuition payments. We responded to the staffing company’s complaint by raising a number of affirmative defenses, including the Thirteenth Amendment, and by bringing counterclaims for discrimination on the basis of sex, national origin, disability, and matriculation, and for violations of the DC Wage Payment Act.

The case proceeded through discovery, including multiple sets of interrogatories, requests for production of documents, requests for admissions, and third-party subpoenas for documents. IPR assisted Ms. Gu in filing administrative complaints with two different government agencies. The case was resolved on mutually satisfactory terms as IPR was preparing to file a motion for partial summary judgment seeking dismissal of the Plaintiff’s claims. IPR would have argued that Ms. Gu did not breach her employment agreement by resigning because she was an at-will employee; she did not breach an alleged tuition agreement because the statute of frauds and the parol evidence rule would render any such agreement unenforceable; and plaintiff could not maintain claims based on quantum merit and unjust enrichment because the parties had a written employment agreement that did not include a provision requiring Ms. Gu to repay tuition benefits.


IPR represents Mary Gonzales, a surrogate mother from California who was denied lactation breaks by her employer because of her employer’s belief that, as a surrogate, Ms. Gonzales is not entitled to the protections of state or federal anti-discrimination laws that protect pregnant women. IPR filed a complaint on Ms. Gonzales’ behalf in federal court in California, alleging that her employer’s denial of her request for lactation breaks commensurate with the breaks provided to other employees violated California’s Fair Employment and Housing Act and the Pregnancy Discrimination Act.

IPR is currently briefing an opposition to defendants’ motion to dismiss Ms. Gonzales’ claims. Oral argument on the motion will occur in Fall 2015.
C. Royer v. Wilson

In 2004, Randall Todd Royer was convicted, pursuant to a plea agreement, of one count of aiding and abetting the use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), and one count of aiding and abetting the carrying of an explosive during the commission of a felony, in violation of 18 U.S.C. § 844(h). The predicate crime of violence underlying Royer’s § 924(c) conviction was a violation, by others, of the Neutrality Act, 18 U.S.C. § 960. Royer was sentenced to two consecutive ten-year sentences.

In 2014, Mr. Royer filed a second pro se petition for habeas corpus relief under 28 U.S.C. § 2241, arguing that, owing to an intervening change in the law, a violation of the Neutrality Act is not a crime of violence within the meaning of § 924(c), and thus he is actually innocent of one of the charges to which he pled guilty. The district court rejected his petition in late 2014.

During the spring 2015 semester, IPR agreed to represent Mr. Royer in his appeal before the U.S. Court of Appeals for the Fourth Circuit. IPR filed a brief on Mr. Royer’s behalf arguing that because the district court at the time of his conviction had used the “most instances” approach to determine whether a violation of the Neutrality Act was a “crime of violence” for purposes of § 924(c), and that the “most instances” approach had subsequently been rejected in favor of the “categorical” approach under which a violation of the Neutrality Act is not a “crime of violence,” Mr. Royer is not guilty of violating § 924(c), and his sentence should be invalidated. Following briefing, the 4th Circuit issued a decision in June 2014, affirming the decision below.

D. Student v. University

IPR represents a female student in her claims against a local University for violating her Title IX rights and for breach of contract. During her time as a student at the University, she was subjected to ongoing and severe harassment from a fellow student. We allege that the University failed to refer the student to Title IX resources, failed to take basic remedial steps to address the harassment, failed to hold a hearing that comported with the requirements of Title IX, and failed to provide the student with the required notice of the hearing’s outcome. Further, the University led the student to believe that an agreement was in place between the University and her harasser that would afford protection to the student, even though no such agreement was in place.

IPR helped the student to file a complaint with the U.S. Department of Education Office of Civil Rights in late spring 2015, and is currently in the process of working with investigators in that office to pursue the student’s claims.
E. Government Worker FBI Investigation

IPR represents a federal government employee who was approached by the FBI and asked to provide information regarding her travel to foreign countries many years prior to the worker’s employment with the federal government. The FBI agent insinuated in conversations with the employee that the employee’s job with the federal government might be in jeopardy if the employee declined to speak with the FBI. After researching the employee’s rights and responsibilities, IPR determined that the employee was under no obligation to speak to the FBI. The FBI has made no further attempt to contact the employee since IPR began its representation.

F. Schoenefeld v. New York

A New York statute requires that non-resident members of the New York bar have an office in New York to practice law in the state. Ekaterina Schoenefeld, a member of the New York bar and a resident of New Jersey, challenged the law in district court, arguing that it discriminates in favor of state residents in violation of Article IV’s Privileges and Immunities Clause. Ms. Schoenefeld prevailed in the district court, which held that the non-resident office requirement was unconstitutional. New York appealed to the Second Circuit.

In the Second Circuit, IPR filed an amicus brief supporting Ms. Schoenefeld on behalf of twenty-two members of the New York bar who are not residents of New York and whose legal practices suffer because of the office requirement. IPR argued that the statute places significant additional burdens on out-of-state attorneys that cannot be justified by any legitimate New York interest. Because those burdens are only placed on non-residents, IPR argued that that the office requirement violates the Privileges and Immunities Clause.

In April 2014, the Second Circuit issued an opinion reasoning that resolving the constitutional issue depends on a question of state law interpretation, namely what minimum requirements are necessary to satisfy New York’s statutory mandate that non-resident attorneys maintain an in-state office. The Second Circuit noted that, under the New York intermediate state courts’ interpretations of the office requirement, the mandate appears to discriminate against non-resident attorneys, and therefore implicates the Privileges and Immunities Clause.

Rather than deciding the case based on interpretations by intermediate state courts, the Second Circuit certified the state law question to the New York Court of Appeals—the state’s highest court—which had not yet addressed the issue. The Court of Appeals accepted the certified question in May 2014. IPR again represented the amici in front of the Court of Appeals, arguing that the plain meaning of the New York statute was that it required attorneys to maintain a physical office in the state of New York. In March 2015, the Court of Appeals issued an Order agreeing with the
amici’s interpretation of the statute, and sending the case back to the Second Circuit for final disposition. Oral arguments in front of the Second Circuit occurred in June 2015, and a decision is pending.

G. Koby v. ARS National Service, Inc.

In this case, plaintiffs brought a class action alleging that collection agency ARS National Services violated the Fair Debt Collection Practices Act. A settlement between the parties was approved by a magistrate judge over the objections of absent class members. An objecting class member appealed to the Ninth Circuit, arguing that the settlement was substantively unfair and that the notice provided to the class was deficient. IPR has filed an amicus brief on behalf of the National Association of Consumer Advocates in support of the objector, arguing that the settlement’s approval below was unconstitutional because only an Article III judge, and not a magistrate judge, has the constitutional and statutory authority to enter final judgment. Briefing is complete and oral argument is not yet scheduled.

H. Hairston v. Boarman

IPR represented Kevin Hairston, an African-American who has worked for the Government Printing Office (GPO) for decades but has repeatedly been denied promotions. We brought claims for race discrimination and retaliation under Title VII of the Civil Rights Act of 1964, alleging that GPO failed to promote Mr. Hairston because of his race, and denied him training opportunities because of his race and as retaliation for complaining about GPO’s discrimination. The parties engaged in extensive discovery and motions practice. In January 2013, the district court granted GPO’s motion for summary judgment, finding that GPO had legitimate, non-discriminatory reasons for failing to promote Mr. Hairston and for excluding him from a training program.

IPR appealed the district court’s decision. IPR successfully opposed GPO’s motion for summary affirmance. Following merits briefing, the D.C. Circuit heard oral argument in October 2014, and issued a decision in December 2014, affirming the decision below.

II. Workplace Fairness

A. Mbow v. BUEI LLC d/b/a Mentora College

IPR represented Papa Mbow in a case filed in federal district court against his former employer, a for-profit English language school. We alleged that the defendant violated the Fair Labor Standards Act, and the DC Minimum Wage Revision Act, by
failing to pay Mr. Mbow overtime wages and by terminating his employment in retaliation for asserting his statutory right to overtime pay.

The case proceeded through discovery, including multiple sets of interrogatories, requests for production of documents, requests for admissions, and third-party subpoenas for documents. IPR took the depositions of two of defendant’s officers, and prevailed on a motion to compel the production of certain documents withheld under a claim of attorney-client privilege. Before discovery ended, the parties asked the Court to stay further proceedings pending mediation. The parties participated in mediation before a United States Magistrate Judge, and reached an agreement to resolve the case on mutually satisfactory terms.

B. Crockett v. Hybano

William Crockett drove non-emergency medical transport vans from 2009 through 2012 for Gadosolo Transportation, a subcontractor of Medical Transportation Management, Inc. (MTM). During the time Mr. Crockett was employed, he was woefully underpaid for his work – averaging just over $4 per hour despite the fact that, as an employee working under a DC government contract, he was entitled to the living wage of $12.50 per hour. During the final months of his employment, Mr. Crockett was paid only sporadically, or not at all.

In Fall 2014, IPR filed a complaint in DC Superior Court against Gadosolo Transportation, MTM, and Fekadu Hybano, the owner and sole proprietor of Gadosolo Transportation, alleging violations of the Living Wage Act of 2006, the DC Minimum Wage Act, the DC Wage Payment and Collection Law, and DC Municipal Regulation Title 7, § 909.

The parties have engaged in discovery, including serving and answering multiple sets of interrogatories, requests for production of documents, and requests for admissions. IPR took the deposition of Fekadu Hybano, and has noticed a Rule 30(b)(6) deposition of MTM. IPR also filed two oppositions to motions filed by defendants to vacate default judgments that had been entered against them, and prevailed on one affirmative motion to strike defendants’ answers and for the entry of default. IPR also prevailed on a motion to compel the production of documents against two defendants and an opposition to a motion to quash a third party subpoena filed by a third defendant.

The case will continue through the discovery period into Fall 2015, after which time the parties will likely file summary judgment motions.
C. Pineda v. Neighbors’ Consejo, Inc.

Katherine Pineda worked for Neighbors’ Consejo, Inc., for 19 weeks but was paid for only two weeks of work. IPR agreed to represent Ms. Pineda to recover her unpaid wages and liquidated damages. When Neighbors Consejo refused to resolve the matter out of court, we filed suit on Ms. Pineda’s behalf in DC Superior Court against Neighbors’ Consejo and three of its managing agents, asserting claims under the DC Wage Payment and Collection Law, and the DC Minimum Wage Act, and for breach of contract and promissory estoppel.

All four defendants defaulted by failing to answer the complaint, thereby waiving their opportunity to contest issues of liability. The defendants appeared in the action to preserve their ability to contest the amount of unpaid wages and damages owed to Ms. Pineda, and each defendant ultimately stipulated to the amount of wages owed. The Court then entered judgment against the defendants for the full amount of Ms. Pineda’s unpaid wages, an additional three times that amount in statutory liquidated damages, plus attorneys’ fees and costs.

IPR has initiated collection efforts by recording the judgment in the office of the Recorder of Deeds, which establishes a lien on the real property of the defendants. IPR has also served post-judgment interrogatories and requests for production of documents to identify assets that may be available to satisfy the judgment.

D. Retail Worker v. Pop-Up Store

IPR represented a client who was not paid for all the hours he worked during a summer job in a pop-up store. IPR investigated the client’s claims, interviewed witnesses, calculated the amount of unpaid wages, and researched potential causes of action and administrative remedies. Before initiating formal proceedings, IPR sent a letter to the client’s former employer demanding that it issue the client a paycheck for the amount of his unpaid wages. The former employer complied, the client was satisfied, and litigation was avoided.

E. Jane Doe v. City and Staffing Agency

IPR has agreed to represent a client in a potential case under the Family and Medical Leave Act against the City and staffing agency that jointly employed her. Our client informed her employers that she needed to miss work to assist her husband who had suffered a stroke and was in the intensive care unit of a hospital, but her employers refused to reinstate her once she was able to return to work.
III. Open Government

A. Wolfman v. Executive Office of United States Attorney

IPR represented its former director Brian Wolfman in a Freedom of Information Act (FOIA) case seeking records from the Executive Office of United States Attorneys (EOUSA) concerning the use of motions for summary affirmance by U.S. Attorney’s Office for the District of Columbia. An original FOIA request had been filed in April 2013, and after receiving no documents, IPR filed a second request in August 2014, substituting Brian Wolfman as the requestor.

IPR filed suit in October 2014 after EOUSA failed to respond to the second request as required by FOIA. After filing suit, IPR was able to obtain the information sought, and the case was voluntarily dismissed.

B. New Orleans Workers’ Center for Racial Justice v. U.S. Immigration and Customs Enforcement

IPR is representing a community organization and eleven individuals seeking government records related to the Criminal Alien Removal Initiative (CARI). CARI is an immigration enforcement program under which U.S. Immigration and Customs Enforcement (ICE) coordinates with local police departments to plan and carry out raids in immigrant communities. The raids appear to be based on racial profiling, and they have resulted in the immediate arrest and attempted deportation of many parents, reconstruction workers, and community members. In an attempt to gather information about the program, our clients submitted a request under the Freedom of Information Act (FOIA). Despite granting our clients’ request for expedited processing, ICE failed to produce any document for over sixteen months.

We filed suit in March 2015, seeking production of the requested records and a waiver of fees. Since we filed suit, ICE has begun producing documents. Once the production is complete, we anticipate filing cross motions for summary judgment with regard to certain documents withheld under claims that they are exempt from disclosure.

C. Tushnet v. U.S. Immigration and Customs Enforcement

IPR is representing Georgetown Law Professor Rebecca Tushnet in a Freedom of Information Act (FOIA) case against U.S. Immigration and Customs Enforcement (ICE). After an ICE official stated at a press conference that critical use of a trademark—such as the profane debasing of a mascot—constitutes trademark infringement that would allow ICE to seize the merchandise as counterfeit, Professor Tushnet sought to determine whether ICE’s official policies are based on a misunderstanding of the law. When ICE refused to cooperate with Professor
Tushnet’s informal requests for information, IPR drafted and submitted a FOIA request on her behalf.

ICE responded in March 2015 by denying Professor Tushnet’s request for a public interest fee waiver. We prepared an administrative appeal of the denial of the fee waiver request. In June 2015, ICE’s Office of the Principal Legal Advisor determined that the fee waiver request should be granted.

ICE also responded to Professor Tushnet’s FOIA request by claiming that the request was overly broad, did not specifically identify the records sought, or only posed questions to the agency. ICE requested that Professor Tushnet resubmit her request with a “reasonable description” of the records sought, and stated that if Professor Tushnet did not respond within ten days, ICE would assume that Professor Tushnet was no longer interested in her FOIA request, and the case would be administratively closed. We prepared a response explaining that Professor Tushnet’s original request reasonably described the records sought and that an ICE employee familiar with the subject area should be able to locate the responsive records with a reasonable amount of effort. We also provided a detailed explanation of each part of the FOIA request.

ICE has not provided a substantive response to Professor Tushnet’s FOIA request. Therefore, on June 12, 2015, we filed a complaint in U.S. District Court seeking an injunction ordering ICE to make the requested records available without delay. ICE has not yet responded to the lawsuit.

D. Bloche v. Department of Defense

IPR represents two prominent bioethics experts, M. Gregg Bloche, M.D., a Georgetown law professor, and Jonathan Marks, a bioethics professor at Penn State, in a Freedom of Information Act (FOIA) case against various agencies of the Department of Defense and the Central Intelligence Agency. The plaintiffs seek information concerning the participation of government and civilian medical personnel in the design and implementation of torture techniques.

After filing FOIA requests with the relevant agencies in 2006 and 2007, and receiving no documents in response, IPR filed a FOIA lawsuit on behalf of the experts in November 2007. The Court ordered the government defendants to turn over relevant documents in several stages, and the releases concluded in spring 2010. The agencies are still withholding many documents, citing various FOIA exemptions.

In March 2011, the plaintiffs moved for summary judgment against a key defendant, the U.S. Air Force, arguing that the government’s exemption claims are unlawful under FOIA. Because the Air Force appears to have played a key role in developing the policies that the plaintiffs are interested in, the plaintiffs are hopeful
that this motion will serve as a bellwether for the litigation as a whole. The government filed an opposition to the motion and filed a cross motion for summary judgment. The plaintiffs filed an opposition to the government’s motion and a reply on its motion. The motion is fully briefed and awaiting a decision. In the meantime, the government has begun to release some of the Air Force documents that it previously claimed were exempt and has agreed to review informally memoranda prepared by IPR detailing legal concerns about withholdings by defendant agencies other than the Air Force.

The plaintiffs have also filed a motion against three other defendants: the Navy and two subunits of the Department of Defense that establish and implement military health policy. Again, the government filed an opposition and cross motion for summary judgment. The parties completed summary judgment briefing in fall 2012, and the court held a hearing on those motions in December 2012. The court permitted the government to update its explanations for withholding certain Defense subunit records, and IPR supplemented its summary judgment motion based on those updates. In the meantime, the government has begun releasing documents put in issue by IPR’s summary judgment motion (particularly some documents held by the Navy). In addition, the U.S. Army has also released documents in response to an informal memorandum the plaintiffs sent to government counsel detailing concerns with the Army’s insufficient explanations for its withholdings. More than two and a half years later, the court still has not ruled on the parties’ summary judgment motions.

E. Texas RioGrande Legal Aid, Inc. v. Range

IPR represented Texas RioGrande Legal Aid (TRLA), a legal services organization that represents indigent migrant agricultural workers, in seeking documents related to the H-2A guest worker program. In 2007, the Mississippi legislature amended its labor laws and classified H-2A documents as confidential, permitting the documents to be withheld under the Mississippi Public Records Act.

In July 2010, IPR sued Mississippi on behalf of TRLA. We alleged that Mississippi had violated 42 U.S.C. § 1983 by withholding H-2A records that a federal regulation requires states to release. We also brought a claim under the Supremacy Clause, alleging that the Mississippi statute making H-2A records confidential is preempted by federal law requiring the disclosure of H-2A records. The district court granted Mississippi’s motion to dismiss, and we appealed the decision to the Fifth Circuit. Merits briefing was completed in July 2014, and oral argument was held in October 2014. In November 2014, the Fifth Circuit affirmed the district court’s dismissal of our challenge to the state law, holding that the federal regulation did not create a right enforceable under § 1983 or the Supremacy Clause.
IV. Other Matters

A. Woodland v. Finance Company

Dion Woodland purchased a car and took out a subprime auto loan in Spring 2014. After losing his job, Mr. Woodland was unable to make payments on the loan, and in Summer 2014 the car was repossessed by the finance company. Following the repossession, Mr. Woodland received a letter from the finance company which stated that, even though the car had been repossessed, Mr. Woodland still owed the company a deficiency on the loan of almost $18,000.

IPR brought suit in the Circuit Court for Prince George’s County, Maryland, alleging that the Finance Company had failed to follow the procedures in Maryland’s Credit Grantor Closed End Credit Provisions regarding notice of the repossession and sale, and thus was not entitled to a deficiency. After a period of negotiation, IPR was able to settle the case on mutually satisfactory terms.

B. Bank of America v. Caulkett

IPR worked with Georgetown Law Professor Adam Levitin to prepare an amicus brief in support of Respondents in a case before the U.S. Supreme Court. The case addressed the issue of whether a debtor in a Chapter 7 bankruptcy proceeding may void a junior mortgage lien under § 506 of the Bankruptcy Code if the junior lien is wholly unsupported by any equity in the property. Professor Levitin’s amicus brief argued that legal and economic differences between first-lien and second-lien mortgages distinguished the case before the Court from its earlier decision in Dewsnup v. Timm, and that empirical evidence demonstrated that declining to extend the holding in Dewsnup to wholly underwater second mortgages would not disrupt the settled expectations of the mortgage market. In June 2015, the Supreme Court reversed the decision of the court below.

C. King v. Burwell

IPR’s environmental and civil rights sections collaborated to prepare an amicus brief for the American Thoracic Society (ATS) in support of Respondents in the Supreme Court case addressing whether the Affordable Care Act authorizes tax credits for health insurance purchased from federally-established exchanges. ATS argued that the statutory text must be read within the context of the structure and purpose of the Act, and the reading posited by the Petitioners would yield an absurd result because it would negatively impact the health of millions of Americans who rely for their healthcare on subsidized health coverage purchased through a federal exchange. The brief prepared by IPR used evidence related to the treatment of respiratory diseases to illustrate the causal relationship between health coverage and health outcomes, and argued that Petitioner’s reading of the statute would undermine Congress’s goal of improving health outcomes by increasing access to
affordable health insurance. In June 2015, the Supreme Court affirmed the decision of the court below.

**D. Price v. District of Columbia**

IPR represented the Council of Parent Attorneys and Advocates (COPAA) and prepared an amicus brief filed in the D.C. Circuit in a case of first impression addressing the issue of whether attorneys’ fees under the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA) must be based on prevailing market rates even if the attorney for the prevailing parties in the underlying administrative actions was appointed under the Criminal Justice Act (CJA), which caps attorneys’ fees at a below-market rate. Our brief explained that despite the IDEA’s fee-shifting provision, structural challenges often prevent poor parents from utilizing the IDEA’s private enforcement mechanism, and poor students are less likely than their wealthier counterparts to receive the appropriate special education services required by the IDEA. Our brief further explained that the Superior Court’s appointment system, by ensuring that appointed counsel will receive at least a reduced hourly rate regardless of the outcome of the litigation, puts indigent parents on equal footing with wealthier parents who can agree to pay a reduced hourly rate to special education attorneys if statutory fees are unavailable, either because the parent sacrifices statutory fees to obtain educational services for the child as part of a settlement, or fails to achieve prevailing party status. We argued that a lawyer’s agreement to represent a client at a reduced hourly rate to be paid by a third party in the event that statutory fees are unavailable does not bar the client from recovering market-rate attorneys’ fees pursuant to a fee-shifting statute, and to hold otherwise would strip indigent parents and students of an important tool for achieving the goals of the IDEA and undermine the Superior Court’s efforts to remove barriers to private enforcement of the IDEA by the poor. In June 2015, the D.C. Circuit reversed the decision of the court below and held that fees under the IDEA must be based on prevailing market rates and the CJA rate otherwise available to appointed counsel is not a proper factor in determining the hourly rate for statutory fee shifting.

**E. Ridley School District v. M.R.**

On behalf of the parents of a disabled child, IPR drafted a brief in opposition to a petition for certiorari filed in the Supreme Court by a school district seeking review of a Third Circuit decision holding that the “stay-put” provision of the Individuals with Disabilities Education Act (IDEA), which provides that a child has a right to stay in his or her current educational placement during the pendency of an IDEA case, extends through the appellate process. We argued, among other things, that the stay-put provision’s purpose of stability for children would be undermined if the provision did not cover appellate proceedings. In May 2015, the Supreme Court denied review.
I. **Children and Media**

IPR has continued to work with a variety of organizations to help create a healthy media environment for children.

**A. Request for Investigation of Google’s YouTube Kids App for Unfair and Deceptive Advertising**

In April 2015, IPR filed a request for investigation with the Federal Trade Commission (FTC) on behalf of the Center for Digital Democracy (CDD), the Campaign for a Commercial Free Childhood (CCFC), American Academy of Child and Adolescent Psychiatry, Center for Science in the Public Interest, Children Now, Consumer Federation of America, Consumer Watchdog, and Public Citizen. We asked the FTC to bring an enforcement action against Google for engaging in unfair and deceptive advertising practices in violation of Section 5 of the FTC Act in connection with the YouTube Kids app.

Google introduced the YouTube Kids app in February 2015. The app is designed for children ages 5 and under and features popular children’s programming and other “kid-friendly content.” An IPR student worked closely with CDD, CCFC, and an expert on children’s media, to analyze the content available on the app and whether Google was engaging in deceptive or unfair practices. The student then drafted the request for investigation. It set forth three different types of deceptive or unfair marketing.

- Many of the videos intermixed advertising with content such that it would be impossible for children to tell the difference. The practice is deceptive and unfair to children under Section 5 of the FTC Act. In addition, these videos would violate the Children’s Television Act of 1990 as well as regulations of the Federal Communications Commission (FCC) if they were shown on broadcast or cable television.

- Many video segments endorsing toys, candy, and other products that purported to be “user-generated,” were actually from video creators who had undisclosed relationships with advertisers. Failure to disclose such relationships violates the FTC’s guidelines concerning the use of endorsements and testimonials in advertising.

- In marketing the app to parents, Google claimed that all ads were pre-approved by YouTube’s policy team to ensure compliance with the app’s
rigorous advertising policy. In fact, much of the content on the app violated Google’s advertising policy. For example, the advertising policy states that ads for food and beverages are prohibited, but IPR found ads for Domino’s Pizza, McDonald’s, and other foods.

The filing of the request for investigation was widely covered in the press. IPR followed up with a series of meetings with our clients and the FTC Commissioners and key staff members. At these meetings, the IPR student presented our findings and answered questions. In May, based on their ongoing monitoring of YouTube Kids, CDD and CCFC found numerous videos that were not “family friendly” as Google had represented. For example, they found cartoons with explicit sexual language, jokes about pedophilia and drug use, and advertising for alcohol products. IPR helped the clients bring this additional information to the FTC. The FTC is looking into our allegations and has not yet completed its investigation.

B. Request for Investigation of Topps, Inc. for COPPA Violations

In December 2014, IPR requested the FTC investigate and bring an enforcement action against the candy company Topps for violating the Children’s Online Privacy Protection Act (COPPA). The request was filed on behalf of CDD, American Academy of Child and Adolescent Psychiatry, CCFC, The Center for Science in the Public Interest, Consumer Action, Consumer Federation of America, Consumer Watchdog, Consumers Union, The Rudd Center for Food Policy and Obesity, and the United Church of Christ Office of Communication, Inc. (UCC).

Topps is a leading candy manufacturer and makes, among other candies, the iconic lollipop Ring Pop. It operates the child-directed website Candymania to market its candies to children. In spring 2014, Topps ran a contest on Candymania called #RockThatRock. The premise of the contest was that children would take photos of themselves “rocking” with their Ring Pop and upload them to Facebook, Twitter, and Instagram with the hash tag “#RockThatRock.” The winning photos, many of which showed children younger than 13, were used in a music video with the tween band R5. Topps released the music video in June on Candymania and YouTube, where it has been viewed nearly 900,000 times. Topps also posted photos of children on its Ring Pop Facebook page.

COPPA prohibits the operators of websites directed to children from collecting, using, or disclosing children’s personal information without giving notice to parents about these practices and obtaining advance, verifiable parental consent. During and after the #RockThatRock contest, Topps collected two types of personal information from children – photographs and online contact information – by encouraging its child users to upload pictures of themselves on social media. Topps collected this personal information without giving any notice to parents or obtaining parental consent.
IPR’s request for investigation received wide coverage in the press. Nonetheless, it does not appear that the FTC has taken any action as of August 1, 2015.

C. Effort to Obtain COPPA Reports Under the Freedom of Information Act

COPPA also encourages industry self-regulation by providing for “safe harbors.” An organization seeking to operate a safe harbor program must file a proposal with the FTC that meets certain criteria. The proposal is published in the Federal Register for public comments. If the FTC approves a safe harbor, a website or online service that is a member of the safe harbor will be deemed in compliance with the COPPA rule if it complies with the safe harbor’s guidelines.

In an effort to improve this process, the FTC recently adopted IPR’s suggestion that safe harbors be required to submit annual reports. The first annual reports were due in July 2014, and six safe harbors filed reports. IPR asked the FTC to make the annual reports available so the public could assess how well private safe harbor providers were protecting children’s privacy online. After the FTC refused to disclose these documents, IPR filed a request under the Freedom of Information Act (FOIA) on CDD’s behalf.

The FTC eventually produced portions of the annual reports, but redacted key information such as the total number of members in each safe harbor program as well as how often providers disciplined their members for COPPA violations. The FTC filed a motion for summary judgement in federal district court claiming that the information withheld fell under the confidential business information exemption. IPR assisted CDD’s outside counsel in drafting a cross-motion for summary judgment. The motion argued that some of the withheld information was not exempt under FOIA and should be disclosed. In June 2015, IPR drafted the reply brief. The Court has not yet acted on this matter.

D. Comments on the FTC’s Proposed Settlement with TRUSTe

TRUSTe is one of the COPPA safe harbors, but it also operates several other privacy self-regulatory programs. In November 2014, the FTC filed a complaint alleging that TRUSTe had falsely represented that it had conducted annual reviews of the privacy practices of websites displaying the TRUSTe seal. At the same time, the FTC and TRUSTe entered into a proposed settlement providing that TRUSTe would stop making misrepresentations, pay $200,000 to the US Treasury, and report certain information to the FTC for ten years.

The FTC sought public comment on this proposed settlement. An IPR student drafted comments on the proposed settlement on behalf of CDD, American Academy of Child and Adolescent Psychiatry, CCFC, Consumer Action, Consumer Federation of America, Consumer Watchdog, and The Rudd Center for Food Policy and Obesity. The
comments expressed concern that the public had insufficient information to analyze the proposed settlement. For example, the public did not know which sites were not reviewed annually, or whether the violations occurred under TRUSTe’s COPPA safe harbor program or if they occurred under a different self-regulatory program. The comments also argued that the proposed $200,000 payment was far too low to deter future violations.

The FTC approved the settlement in March 2015. The agency sent a letter responding to our comments clarifying that most of TRUSTe’s failures to conduct annual certifications involved seal programs unrelated to COPPA.

E. Comments on Proposed Verifiable Parental Consent Mechanism

The FTC amended the COPPA rule effective July 2013, to encourage innovation in the development of techniques by which child-directed online service may provide notice and obtain parental consent, known as “verifiable parental consent mechanisms” or “VPCs.” An entity that develops a VPC may voluntarily seek FTC approval by filing its proposal with the FTC. The FTC publishes these proposals in the Federal Register for public comment.

In October 2014, AgeCheq filed its proposal for a VPC. AgeCheq sought to create a portal through which a parent could give consent for their children to use certain apps. The parent would sign up for the service by disclosing his or her name, address, date of birth, and mobile phone number. AgeCheq planned to use the phone number to send a text message with a code, which the parent would use to verify her identity. The parent would then sign an online certificate verifying ownership of the device. Thereafter, app developers could use AgeCheq’s portal to obtain parental consent.

IPR filed comments on AgeCheq’s proposal on behalf of CDD in December 2014. The comments pointed out several problems with the proposal. First, because the portal did not verify the input information against a database of correct information, children could put in any name, address, and date of birth. As long as the phone number was real (for example, it could be the child’s phone), he or she could bypass the entire system. Second, electronic signatures are not verifiable, which is why the FTC in COPPA did not allow for their use in consent mechanisms. Finally, the proposal posed a risk to parents’ privacy because their personal information would have been stored indefinitely and parents had no means to delete it. The FTC rejected AgeCheq’s proposal in a letter issued January 27, 2015. The letter cited CDD’s comments and generally agreed with CDD’s concerns.
II. Media Ownership

IPR has a long history of promoting and advocating for diversity in broadcast ownership before the FCC and in federal courts. Over the past year, IPR has continued to represent many different organizations with this common goal including Office of Communication, Inc. of the United Church of Christ (UCC), National Organization for Women Foundation (NOW), Common Cause, Benton Foundation, and Prometheus Radio Project. IPR’s work over the past year focused on two issues: (1) promoting broadcast station ownership by women and minorities, and (2) preventing broadcast stations from circumventing the FCC’s ownership limits through sharing agreements between television stations in the same community. IPR also continued its efforts to get Fox Television to comply with the FCC’s newspaper-broadcast cross-ownership rule.

Under the Telecommunications Act of 1996, the FCC must review whether or not the ownership limits continue to serve the public interest every four years. In addition, the Commission may only approve the assignment or transfer of broadcast licenses either when it is consistent with the limits, or when the applicant makes an affirmative showing that the public interest would be served by waiving the limit.

IPR represented public interest organizations that appealed the FCC decisions to relax its ownership limits in the 2002 and 2006 reviews. Both appeals were heard by the US Court of Appeals for the Third Circuit. In decisions known as Prometheus I and Prometheus II, the Third Circuit in large part agreed with IPR’s arguments, reversed parts of the FCC’s orders, and remanded them for further FCC review.

The FCC initiated the 2010 Quadrennial Review in 2009, while the appeal of the 2006 Quadrennial Review was still pending. Then in July 2011, in Prometheus II, the Third Circuit found that “[d]espite our prior remand requiring the Commission to consider the effect of its rules on minority and female ownership...the Commission has in large part punted yet again on this important issue.” The Court found that “ownership diversity is an important aspect of the overall media ownership regulatory framework” and “re-emphasize[d] that the actions required on remand should be completed within the course of the Commission’s 2010 Quadrennial Review of its media ownership rules.” The Third Circuit remanded so that the Commission could “justify or modify its approach to advancing broadcast ownership by minorities and women during its 2010 Quadrennial Review,” and the panel retained jurisdiction over the remanded issues.

In the 2010 Quadrennial Review, the FCC also sought comment on whether certain agreements between television stations in the same market, known as Joint Sales Agreements (JSAs) and Shared Services Agreements (SSAs), should count toward its ownership limits. In general, JSAs involve an agreement for one television station to sell some or all of the advertising time on one or more television station
licensed to a different entities but that serve the same area. SSAs generally involve agreements where one station operates another station licensed to a different entity in the same market. SSAs typically provide that the dominant station produces similar or identical local news programming for both stations. Stations may have both JSAs and SSAs, as well as other types of agreements, such as options to purchase.

Stations typically enter into these agreements when the ownership limits prohibit acquiring the other station outright. While stations have used these agreements to evade ownership limits for many years, IPR first became aware of them in 2009, when IPR agreed to represent the Hawai`i Media Council (MCH). MCH was concerned that a single company was planning to operate three Honolulu television stations by using SSAs.

While the FCC’s Media Bureau denied MCH’s complaint, it recognized that such agreements raised public interest concerns. For this reason, in the notice for the 2010 Quadrennial Review, the Commission asked whether it should count for purposes of the ownership limits (known as “attribution”) an ownership interest where a television station was operating another station under a sharing agreement.

A. Appeal of the FCC’s April 2014 Order

In April 2014, the FCC issued a combined Order and Further Notice of Proposed Rulemaking in the 2010 Quadrennial Review. The Order attributed JSAs, but not SSAs. As to SSAs, it only sought comment on how to define SSAs and whether to require public disclosure of SSAs.

The April 2014 order did not adopt any measures to increase station ownership by minorities and women, claiming that the FCC still lacked sufficient information to respond to the Court’s remand. Instead, the FCC sought additional comment on this and other issues. The FCC kept the 2010 Quadrennial Review proceeding open and combined it with the 2014 Quadrennial Review.

On behalf of Prometheus Radio Project, IPR filed a petition for review, or in the partial alternative a petition for writ of mandamus, of the FCC’s April 2014 decision in the Third Circuit. The petition alleged that the FCC failed to comply with the Third Circuit’s remand in the Prometheus I and Prometheus II cases, in which the Third Circuit expressly retained jurisdiction, regarding female and minority station ownership. IPR also argued that the FCC’s decision to attribute JSAs, but not even require disclosure of SSAs, was arbitrary and capricious.

The National Association of Broadcasters (NAB) and some individual broadcast companies also sought review of the same FCC decision on different grounds in the D.C. Circuit. After a lottery, the cases were consolidated in the D.C. Circuit under the name Stirk v. FCC. IPR also filed a successful motion to intervene.
on behalf of a group of public interest organizations to support the FCC on issues challenged by broadcasters, such as the attribution of JSAs.

IPR students researched the extensive record, found relevant case law, and drafted the brief filed for Prometheus in April 2015. IPR also filed a brief for the public interest Intervenors in support of the FCC in July 2015, and a reply brief on behalf of Prometheus in August 2015. Now that all of the briefs have been filed, IPR is waiting for the Court to either grant our motion to transfer the case to the Third Circuit or schedule oral argument.

B. Comments in the 2014 Quadrennial Review

At the same time IPR was initiating the appeal of the FCC’s Order of April 14, 2014, it filed comments in response to the Notice for the 2014 Quadrennial Review. The comments were filed in September 2014 on behalf of the UCC and others. The comments urged the Commission to take immediate action to require public disclosure of SSAs and to adopt a rule attributing SSAs that conferred substantial influence, thereby reducing competition and diversity, especially in local news programming.

The comments also pointed out that the Commission still had not complied with the Court’s remand order in Prometheus II. First, the Commission failed to adopt or even propose an eligible entity definition that would promote ownership by women and people of color. Second, the Commission failed to collect the data and conduct the studies that the Court told it to do in the 2010 Quadrennial Review.

UCC et al. strongly opposed the Commission’s tentative conclusion that the evidence was insufficient to show that remedying past racial (or gender) discrimination was a compelling (or substantial) interest. In reaching this “tentative conclusion,” without conducting a single new Adarand study, the Commission completely ignored the Court’s direction in Prometheus II that if “the Commission requires more and better data to complete the necessary Adarand studies, it must get the data and conduct up-to-date studies.”

Finally, UCC et al. argued that the local television, local radio, and cross-ownership rules remained necessary to promote the public interest. They strongly disagreed with the Commission’s tentative conclusion to repeal the radio cross-ownership rules. Repeal of the radio-cross ownership rules would allow large owners to increase their holdings and undermine the Commission’s goal of promoting station ownership by women and people of color. In August 2014, IPR responded to the arguments made in industry comments. A decision is not expected until June 2016 at the earliest.
C. Improving the Quality and Usability of Station Ownership Data

Although the FCC has been collecting ownership data from broadcast stations every two years starting in late 2009, the data remains incomplete, unreliable, and difficult to use. The Commission recognized these problems and issued a series of proposals to address them. But the FCC has not yet concluded any of these proceedings. In February 2015, the Commission issued its 7th Further Notice of Proposed Rulemaking, proposing that filers use their full name, address, date of birth, and only the last four digits of their social security number instead of their complete social security numbers. IPR filed comments for its ownership clients in support of this proposal and urging the FCC to adopt this rule as quickly as possible. This proceeding remains pending.

D. Challenge to License Renewal of Honolulu Television Stations

As mentioned above, IPR first became aware of sharing agreements in 2009, when it filed a complaint on behalf of the MCH, asking the FCC to prevent the agreements from taking effect because they violated FCC ownership limits and were not in the public interest. The FCC’s Media Bureau denied this complaint in November 2011. While acknowledging that IPR’s claims had merit, the Bureau stated that the only remedy was to adopt a new attribution rule, like the one proposed in the 2010 Quadrennial Review, or to challenge the licenses of the stations when they came up for renewal in 2014. IPR filed an application for review of the Media Bureau order to the full Commission in December 2011. The FCC still has not ruled on this application.

In October 2014, the Honolulu stations filed their license renewal applications, IPR drafted a petition to deny the license renewals on behalf of MCH. The petition alleged that the combination of two top-four stations and a third station that operated under sharing agreements violated the FCC’s media ownership rules and was not in the public interest. Specifically it alleged that because Raycom provided the local news programming for all three stations, and aired identical news on the two network affiliates, Honolulu residents had fewer sources of local news and many important issues were not receiving news coverage. This case remains pending at the FCC.

E. Challenges to the Renewal of Fox Television WWOR

The origins of this case date back to 2000 when Fox Broadcasting, the licensee of New York Television Station WNYW, sought to acquire another New York television station, WWOR. Because News Corp., the parent company of Fox Television, also owned the daily New York Post, acquiring WWOR would violate the FCC’s newspaper broadcast cross-ownership rule. IPR objected to the acquisition on behalf of UCC, Rainbow/PUSH Coalition, and others. However, the FCC approved the deal subject to the condition that Fox come into compliance with the cross-
ownership rule within two years. Fox was able to obtain several extensions of this waiver such that when the stations came up for renewal in 2007, Fox still held both licenses.

IPR challenged the license renewal on behalf of UCC, Rainbow/PUSH Coalition, and Free Press. That petition argued that the Commission should not renew the licensees since Fox had never met the original conditions on the transfer that it come into compliance with the cross-ownership rule within two years. Another organization, Voice for New Jersey (VNJ), also challenged the renewal of WWOR for failing to cover news and issues in northern New Jersey.

The FCC took no action on these petitions to deny until August 2014, when the Media Bureau denied both. At the same time, it granted WWOR’s license renewal along with another waiver of the cross-ownership rule that extends until 90 days after the effective date of an order in the 2014 Quadrennial Review, at which point, Fox could ask for a new waiver.

IPR students drafted two applications for review of the Bureau’s decision by the full Commission. The one on behalf of UCC, Rainbow/PUSH, and Free Press argued that the Media Bureau violated Commission precedent by granting a waiver contingent on the outcome of the 2014 Quadrennial Review. The other application for review filed on behalf of VNJ, sought reversal of the Bureau’s finding that WWOR had provided sufficient coverage of New Jersey. Unless corrected, VNJ argued that the precedential effect of this Bureau order would make it next to impossible for citizens to challenge a license renewal. The Commission has not yet acted on either application for review.

In the meantime, WWOR filed a new license renewal application. During the spring semester, IPR drafted petitions to deny renewal for UCC and Rainbow/PUSH. The petition urged the Commission to resolve several important legal and factual questions raised in the applications for review before it acted on the license renewals. In addition, it argued that changed circumstances, including News Corp.’s acquisition of the Wall Street Journal, required that the Commission reassess whether a waiver was justified.

III. Accessibility to Telecommunications by Persons with Disabilities

IPR continues to represent Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), a nonprofit organization that advocates for improved access to telecommunications, media, and information technology, for Americans who are deaf or hard-of-hearing. In addition to representing TDI, IPR works closely with a coalition of deaf and hard of hearing consumer advocacy groups, including the National Association of the Deaf, the Hearing Loss Association of America, the
A. Closed Captions on Television

IPR has continued to represent TDI in efforts to ensure that all broadcast, cable, satellite, and other television programming has closed captions. Under the Commission’s rules, a programmer can obtain an exemption to the closed captioning rules if it can show that captioning would be economically burdensome. The Commission invites public comment on these requests. IPR students analyzed many exemption petitions to see if they met the FCC’s criteria and recommended whether or not they should be opposed. The students then drafted oppositions or comments on each waiver request. Over the last year, IPR filed oppositions or commented on 35 waiver petitions.

Also over the last year, the FCC began acting on the waiver petitions that TDI had previously challenged. In the 15 orders that have been released so far, the FCC has denied 10 petitions that TDI opposed, granted 2-year waivers to two petitioners that TDI did not oppose, and granted waivers to three petitioners that TDI opposed. In addition, the Commission summarily dismissed dozens of pending captioning petitions that TDI opposed because they had failed to provide the required information.

B. Captioning New Forms of Video Programming

In spring 2015, IPR filed comments on behalf of TDI in an FCC rulemaking proceeding. The FCC had proposed to allow certain providers of online video programming to be treated as Multi-Channel Video Programming Distributors, or MVPDs, under the Communications Act. Currently, only cable operators and direct satellite broadcasters are considered MVPDs. If adopted, the proposed rule would provide certain benefits to online program providers, while at the same time, impose certain obligations on them. One obligation would be to provide closed captioning.

TDI’s comments focused on ensuring that video programming remains accessible to people who are deaf or hard-of-hearing. Specifically, they argued the Communications Act requires that both existing and new MVPDs provide closed captions on all English and Spanish language programming unless it falls under one of the exceptions. The comments also urged the Commission to include within its interpretation of MVPDs entities that provide on-demand programming. Extending the MVPD definition to on-demand services in this way would ensure that the broadest number of video programming distributors would be covered by the Commission’s video captioning rules. The Commission is expected to make a decision in late 2015.
IV. Political Broadcasting

In 2012, after more than a decade of advocacy on behalf of the Campaign Legal Center, Common Cause, Sunlight Foundation, and others, the FCC finally required television stations to make their records of sales of time for political broadcasting available to the public online. IPR students analyzed these online political files and determined that many stations were not in compliance with the Commission’s sponsorship identification and disclosure requirements.

A. Complaints Regarding Failures to Identify the True Sponsors of Political Ads

Section 317 of the Communications Act and FCC rules require that broadcast stations identify on-air the sponsor any political programming, i.e., programming (usually an advertisement) that supports or opposes a candidate for public office or advocates concerning an issue of national importance. The purpose of requiring disclosures is to ensure that members of the public know by whom they are being persuaded. The station must fully and fairly disclose the identity of the person who has paid for the advertisement and must exercise due diligence to obtain the information that is needed to make the announcement.

Efforts to obscure the true funding of political messages have proliferated recently as individuals increasingly have turned to political action committees with opaque or misleading names to hide their funders’ true identities. In July 2014, IPR filed complaints at the FCC on behalf of Campaign Legal Center, Common Cause, and the Sunlight Foundation. These stations aired issue ads identifying a Super PAC as the sponsor, even though the Super PAC received virtually all its funding from a single individual. The complaints argued that the individual funder, rather than the name of the Super PAC, was the true sponsor of these ads and should have been disclosed on-air.

In September 2014, the Media Bureau dismissed the complaints, and IPR asked the Commission to reverse the Bureau’s decision. The Bureau asserted that the parties could not file a complaint before they furnished the stations with evidence calling into question the true identity of the sponsor, IPR responded that that the Bureau relied on an old case that did not reflect the current law. The Bureau also claimed that the complaints raised “sensitive First Amendment interests.” IPR responded that, to the extent there were any First Amendment interests involved in this case, it was the First Amendment interest of the public to know the source of the advertisements.

In addition, IPR sent letters informing the stations of the true identity of the sponsors of certain political ads. When the stations did not respond, IPR filed
complaints against WJLA (for a second time) and WLS in November 2014. The application for review and the new complaints remain pending.

B. Petition to Expand Online Public File to Cable and Satellite

In July 2014, IPR filed a petition for rulemaking seeking to extend the online public file requirement to cable and satellite providers. At that time, cable and satellite providers were only required to maintain public inspection files in paper form. The FCC sought comment on IPR’s petition in August 2014. In the fall, IPR students drafted comments in support of the petition. After reviewing the comments, the FCC began a rulemaking proceeding seeking comments on a proposed rule to require that cable and satellite providers as well as radio stations be required to place their public inspection files online.

Some small radio station owners filed comments asking to be exempt from online filing. IPR responded that if there were to be any exceptions, they should be based on political ad revenue rather than the number of employees at a station. IPR also took this opportunity to argue again that the FCC should impose a standardized format for the online political file so it could achieve its original goal of creating a database that is searchable and capable of aggregation. The FCC has not yet acted on the notice of proposed rulemaking.

V. Low – Power FM Radio

For several years, IPR has represented Prometheus Radio Project, a nonprofit organization committed to developing and supporting community based radio. Prometheus successfully lobbied Congress to pass the Local Community Radio Act (“LCRA”) in 2010. This law made it possible for hundreds of new low-power radio stations across the country. The Commission then began a series of rulemakings to establish licensing criteria. Applications were filed in late 2013. Nearly 3,000 organizations applied for these licenses. By the summer of 2015, the FCC had granted hundreds of construction permits for new LPFM stations.

In prior semesters, IPR students worked with Prometheus Radio Project to help approximately sixty community organizations apply for LPFM licenses. As the applications worked their way through the FCC’s process, applicants in Philadelphia and Florida sought IPR’s assistance to respond to oppositions or to negotiate settlements. Ultimately, the Commission granted both applicants permission to construct the stations.
VI. Ensuring Consumers Can Unlock Their Cellphones and Tablets

Over the past year, IPR represented Consumers Union in a rulemaking before the Copyright Office. Under the Digital Millennium Copyright Act (DMCA), it is illegal to bypass digital locks on software and electronic devices that would allow parties to access copyrighted material. Many phones are sold with digital locks that tether the device to a particular wireless network despite the fact that most modern phones can operate on any of the major wireless carriers.

Every three years, the Copyright Office conducts a proceeding to exempt certain activities from liability under the DMCA. IPR previously represented Consumers Union in the 2012 proceeding in an effort to legalize the unlocking of cellphones and tablets.

Subsequently, the Copyright Office granted only a very narrow exception. That decision sparked a public outcry that ultimately led to the President signing the Unlocking Consumer Choice and Wireless Choice Act in fall 2014. The Act repealed the narrow exemption granted by the Copyright Office and instructed the agency to consider expanding any future unlocking exemption to tablets.

In fall 2014, IPR filed an initial proposal to exempt cellphones and tablets from the DMCA. This proposal would allow consumers to use their devices on any wireless network they wanted. The proposal argued that an exemption was needed because the DMCA artificially inflated cellphone prices and stifled innovation in the markets for wireless networks and devices. In spring 2015, an IPR student drafted comments supporting the proposed exemption. IPR fellow Aaron Mackey testified in support of the exemption at a hearing held by the Copyright Office in May 2015. The agency is expected to rule on this proposal in fall 2015.

ENVIRONMENTAL SECTION

I. National Environmental Policy Act

A. WildEarth Guardians v. United States Department of Agriculture (9th Cir.)

In this Ninth Circuit National Environmental Policy Act (“NEPA”) case, IPR filed an amicus curiae brief in October 2013 on behalf of a group of environmental law professors, urging the Ninth Circuit to reverse a District Court ruling that would shut the courthouse doors to environmental activists. The amicus brief supported WildEarth Guardians in the group’s challenge to the U.S. Department of Agriculture’s reauthorization of a Nevada wildlife extermination program. Rather
than consider new research on predator ecology and the dangers associated with the agency’s extermination activities, federal officials had sought to justify the status quo by referencing an environmental analysis last updated in 1997.

The district court for the District of Nevada dismissed the lawsuit on standing grounds. WildEarth Guardians had submitted affidavits from its members who enjoy viewing the species targeted by the extermination program. However, according to the court, because Nevada state wildlife officials had pledged to take over the extermination program if the federal agency discontinued it, the court could not offer any relief that would redress the plaintiff’s injuries.

For the Ninth Circuit appeal, IPR’s amicus brief emphasizes the special nature of procedural injuries, particularly those arising under NEPA. It argues that the lower court’s rule ignores the information disclosure purpose of NEPA, and invites courts to engage in unhelpful speculation. The parties submitted oral arguments in March 2015, and in August 2015, the Ninth Circuit reversed the district court, finding that WildEarth Guardians did have standing.

B. EarthReports, Inc. et al. v. FERC (D.C. Cir.)

The fracking boom in the U.S. has meant, among other things, the construction of new pipelines and other natural gas infrastructure for the purpose of transporting gas from fracked wells to consumers. The Natural Gas Act makes the Federal Energy Regulatory Commission (“FERC”) responsible for licensing the construction of natural gas pipelines, compressor stations, and import/export terminals, including the Cove Point liquefied natural gas (“LNG”) export terminal currently under construction on the Chesapeake Bay. FERC must comply with NEPA before issuing a license for construction and operation of new natural gas infrastructure. In the case of the Cove Point terminal, FERC issued an environmental assessment (“EA”) that ignores impacts arising from the fracking in the Marcellus Shale that will feed—and be spurred by—Cove Point’s operation. Numerous commenters asked FERC to reconsider its decision on the grounds that its EA was deficient; when FERC denied that request, several of those commenters brought suit in the D.C. Circuit Court of Appeals.

The environmental petitioners in the Cove Point case made two strategic decisions early on: first, that someone should argue to the court that FERC had impermissibly ignored the fracking and infrastructure development in the Marcellus Shale that would surely follow from licensure and construction of an export terminal on the Chesapeake Bay; and second, that those arguments would best appear in an amicus brief. IPR answered the call and now represents a group of regional environmental advocates, including several Waterkeeper organizations. That coalition will file an amicus brief in August 2015.
C. Audubon Soc'y of Portland et al. v. U.S. Army Corps of Eng'rs (D. Or.)

In spring 2015, the U.S. Army Corps of Engineers approved a plan to shoot thousands of double-crested cormorants, for the stated purpose of protecting endangered juvenile salmon in the Columbia River. Several wildlife protection groups brought suit on various grounds, contending, inter alia, that the agency did not have the authority to kill the birds, and had failed to consider alternatives that could protect the salmon—such as alter the operations of Columbia River dams. Representing the plaintiff Animal Legal Defense Fund (“ALDF”), IPR prepared declarations in support of ALDF’s members’ standing to challenge the Corps’ plan, as well as declarations alleging the irreparable harm ALDF members would suffer should bird killing occur.

On May 8, 2015, the U.S. District Court for the District of Oregon heard oral argument on the wildlife organizations’ motion for preliminary injunction. At the hearing, the court denied the motion, allowing the Corps to commence killing cormorants in the Columbia River. The case is ongoing, and the parties will file summary judgment briefing in late fall 2015.

II. Clean Water Act

A. Am. Farm Bureau Fed’n v. EPA (3d Cir.)

In May 2014, on behalf of a coalition of non-profit environmental organizations, IPR filed an amicus curiae brief supporting EPA in this Third Circuit case. The agency had issued a regulation limiting the total maximum daily load (“TMDL”) of several pollutants found to be damaging to the Chesapeake Bay. Those pollutants flow chiefly from nonpoint sources, such as agricultural fields and construction sites. EPA had formulated the TMDL in collaboration with the District of Columbia and the six states in the Chesapeake watershed—Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia. The American Farm Bureau Federation, the National Association of Home Builders, and others challenged the TMDL in the Middle District of Pennsylvania, arguing the TMDL impermissibly interfered with state and local land use decisions, and so exceeded the authority granted to EPA by the Clean Water Act. After the challenge was rejected by the district court, the Farm Bureau appealed.

The coalition represented by IPR included the National Parks Conservation Association, the Alliance for the Great Lakes, the Environmental Law and Policy Center and over 20 waterkeepers and other water quality advocacy organizations. Two students and a fellow drafted the amicus brief, which took note of water quality degradation owing to pollution from nonpoint sources. The brief also pointed out states’ frequent inability or unwillingness to address such nonpoint source pollution,
whether it originated within or beyond a particular state’s borders. Finally, the brief argued the Clean Water Act provides clear statutory authority for the TMDL, in light of the long history of cooperation among states and EPA toward understanding and ameliorating Chesapeake Bay water quality degradation.

In July 2015, the Third Circuit issued its unanimous decision to uphold the TMDL. The Farm Bureau is expected to seek certiorari to the Supreme Court.

**B. Kelble et al. v. Comm. of Va. (Richmond Circuit Ct., Va.) (construction general permit)**

IPR began its representation of the Potomac and Shenandoah Riverkeepers in September 2013, when the Riverkeepers sought IPR’s help with their effort to persuade Virginia to revise its requirements for developers responsible for pollution flowing from construction sites. The Riverkeepers work to prevent the degradation of water quality and habitats for aquatic and other wildlife in the Potomac and Shenandoah watersheds.

Pursuant to the authority delegated to Virginia under the Clean Water Act, Virginia’s State Water Control Board (“SWCB”) reissues a “general permit” every five years for various designated polluting activities, such as construction. To operate—and pollute—legally, a person or entity whose activities qualify under a general permit must register with Virginia’s Department of Environmental Quality (“DEQ”) and agree to abide by the conditions specified in the general permit. Starting in 2013, the SWCB held hearings and invited public comments on a proposed reissuance of Virginia’s Construction General Permit.

In November 2013, on behalf of the Potomac and Shenandoah Riverkeepers, IPR filed comments with the SWCB to suggest changes to the proposed Construction General Permit. In particular, the comments encouraged the SWCB to revise the permit to provide for greater public notice regarding construction plans and greater public access to site owners’ plans for mitigating pollution from those sites.

The SWCB did not take up the suggested changes in the final version of the Permit, and in February 2014, IPR filed suit on behalf of the Riverkeepers in the Virginia Circuit Court for the City of Richmond. The suit challenges the Permit for violating public participation and other requirements of the federal Clean Water Act. DEQ, represented by Virginia’s Attorney General, responded by filing procedural objections, which allege that the suit was neither filed nor served timely. IPR has filed responses on behalf of the Riverkeepers contesting these objections, and presented its arguments at a hearing in November 2014. A decision on the Attorney General’s motions is still pending.
III.  Endangered Species Act

A.  People for the Ethical Treatment of Property Owners v. Fish & Wildlife Serv. (10th Cir.)

In April 2015, IPR filed an amicus brief on behalf of forty-two Environmental Law Professors in the case People for Ethical Treatment of Property Owners [“PETPO”] v. U.S. Fish and Wildlife Service, supporting the federal government’s Constitutional authority to protect the Utah prairie dog under the Endangered Species Act (“ESA”). The case is currently on appeal in the 10th Circuit. It concerns PETPO’s challenge to a rule that prescribed when and where individuals can “take” the Utah prairie dog, which is listed as a threatened species under the ESA. Bringing suit in the District of Utah, PETPO successfully argued that because the Utah prairie dog resides only in Utah and has no commercial value, the United States has no authority under the U.S. Constitution to regulate its take. This is not the first time that a group has challenged the ESA on constitutional grounds, but the District of Utah was the first court to find the challenge meritorious.

IPR’s brief contended that the Commerce Clause does indeed provide Congress with the authority to legislate to protect intrastate species like the Utah prairie dog. The ESA protects such species by regulating economic activities that substantially affect interstate commerce, which United States v. Lopez established as a valid use of Commerce Clause authority. In addition, IPR’s brief drew from both the majority opinion and Justice Scalia’s concurrence in Gonzales v. Raich to argue that the Commerce Clause, read in conjunction with the Necessary and Proper clause, gives Congress the authority to protect intrastate species. Nearly 70 percent of all species listed under the ESA reside in only one state; if Congress cannot protect these species the ESA’s scheme would crumble.

Oral argument in the case is not yet scheduled, and the Tenth Circuit’s decision is pending.

IV.  Surface Mining Control and Reclamation Act


IPR represents Coal River Mountain Watch (“Coal River”), in litigation challenging the Office of Surface Mining Reclamation and Enforcement’s (“OSM”) approval of a West Virginia policy that unlawfully extends permits for several hundred proposed coal mining operations beyond their termination date. The Surface Mining Control and Reclamation Act (“SMCRA”) states that a permit “shall terminate,” if a permittee does not begin mining operations within three years of a permit’s issuance. In West Virginia, however, state regulatory officials have enacted a policy that requires the state to give a mine owner notification before its permit
expires and allows the state to grant extensions for mining permits after the three-year expiration date.

In 2012, Coal River contacted West Virginia officials to ask them to terminate Marfork Coal Company’s Eagle No. 2 mining permit because the company had failed to initiate permitted activities within three years of its permit issuance. West Virginia officials instead granted the Company a “retroactive extension” of its permit. Coal River filed a petition challenging the extension with OSM’s Charleston field office. The field office ruled that West Virginia had violated SMCRA. However, West Virginia appealed the field office decision, and OSM’s national headquarters overturned it, reasoning that “shall” means “may” in certain contexts.

In fall 2013, after IPR students developed alternative jurisdictional theories, IPR filed suit on behalf of Coal River in the United States District Court for the District of Columbia and in the United States District Court for the Southern District of West Virginia. The twin complaints allege that OSM’s approval of the West Virginia permit extension policy was arbitrary and capricious, and that the approval unlawfully bypassed notice and comment rulemaking procedures.

In December 2014, the District of Columbia court allowed IPR to amend its complaint to include allegations that OSM has similarly extended a coal mining permit in Alaska. IPR has agreed to stay its West Virginia litigation while the parties litigate a motion to dismiss the District of Columbia complaint and transfer venue to West Virginia. A decision on that issue is pending.

B. To’ Nizhoni Ani et al. v. Office of Surface Mining & Reclamation Enforcement (administrative appeal before Interior’s Office of Hearings and Appeals)

IPR represents a coalition of non-profit organizations in an administrative appeal of a coal mine permit renewal. The coalition includes To’ Nizhoni Ani, Diné Citizens Against Ruining Our Environment, Black Mesa Water Coalition, Sierra Club, and the Center for Biological Diversity (collectively, “To’ Nizhoni Ani”).

The Peabody Western Coal Company (“PWCC”) has been mining at the Kayenta mine, on Black Mesa in northeastern Arizona, since the 1960s. In 1990, the company received a life-of-mine permit under SMCRA from OSM. SMCRA establishes environmental standards for strip mining and requires that permittees seek a permit renewal every five years.

In 2010, PWCC sought again to renew its permit. OSM authorized renewal in January 2012. To’ Nizhoni Ani filed an administrative appeal of the renewal in February 2012. The appeal raised claims under SMCRA, the National Historic Preservation Act, NEPA, and the Administrative Procedure Act.
The parties engaged in settlement negotiations in 2013 and 2014. An IPR staff attorney traveled to Phoenix in March 2013 for mediation with all of the parties, and an IPR staff attorney and student traveled to Denver in April 2013 for a follow-up meeting with OSM. The parties executed a settlement agreement in May 2014 that compelled OSM, inter alia, to revise its hydrologic impact analysis, and IPR filed a petition to recover its costs in the case, which OSM opposed. In October 2014, after finding that the settlement had indeed pushed OSM to take several of the steps sought in the plaintiff’s complaint, the Administrative Law Judge granted in full IPR’s request for costs.

V. Land and Water Conservation Fund Act

A. Friends of DeReef Park v. National Park Service et al. (D.S.C.)

IPR represents community group Friends of DeReef Park in an action challenging the conversion of a neighborhood park, created with federal funding, into a site for a luxury residential development. DeReef Park is located in Charleston, South Carolina. In 1980, state and municipal authorities agreed to maintain the site in perpetuity for recreational purposes, in exchange for federal funding under the Land and Water Conservation Fund Act (“LWCF”). That law enabled the City to acquire the property for the site and to develop it as a neighborhood park, but it prohibits conversion of the site to non-recreational use without the approval of federal officials.

In 2003, the City of Charleston sold DeReef Park to private developers. Five years later, city and state officials sought federal approval of the park’s conversion, arguing that NPS had no alternative but to transfer the DeReef Park covenants to another park, in a different part of the city. Regulations under the LWCF and NEPA require federal officials to conduct an environmental assessment and ensure that city and state officials have provided for public notice and participation prior to approving a park’s conversion. Neither city nor state officials, however, notified residents that DeReef Park was protected under federal law, and NPS never performed an environmental assessment. In 2012, private development plans for the park began to move forward.

In fall 2013, IPR filed suit against the National Park Service (“NPS”) and the South Carolina Department of Parks, Recreation and Tourism in the District Court for the District of South Carolina, alleging violations of the LWCF, NEPA, and the National Historic Preservation Act. The City of Charleston intervened as a defendant in the case. After IPR moved for summary judgment in spring 2014, NPS sought a voluntary remand, conceding that it had not followed required procedures prior to approving the conversion. NPS explained that during remand it intended to satisfy
LWCF requirements by either restoring the covenants at DeReef Park or transferring them to an adequate and nearby replacement park.

While the motion for voluntary remand was pending, the private developer (“GMS”) moved to intervene. GMS also opposed the voluntary remand motion. The South Carolina federal court allowed GMS into the litigation, but granted NPS’s motion for voluntary remand. Having become a party to the lawsuit, GMS then filed counterclaims against IPR’s client, Friends of DeReef Park. After six months of intense motions practice and two appearances by an IPR fellow in South Carolina District Court, the court rejected all of GMS’s counterclaims.

The NPS remand is ongoing. NPS intends to finish its remand by end of August 2015.

VI. Highway Beautification Act

A. Scenic Am., Inc. v. Foxx et al. (D.C. Cir.)

IPR represents Scenic America in a challenge to the Federal Highway Authority (“FHWA”)’s authorization of digital billboards along federally regulated highways. In 2008, IPR submitted a petition for rulemaking on Scenic America’s behalf, asking the federal agency to declare a moratorium on construction of digital billboards, which are bright light-emitting diode displays with advertisements that change approximately every six seconds. FHWA declined to impose a moratorium, and in fall 2012, Scenic America asked IPR to explore other legal options.

IPR reassessed its earlier legal analysis. In November 2012, IPR presented a new strategy to Scenic America’s Board of Directors, who voted to authorize a lawsuit. In January 2013, Scenic America filed a complaint in the U.S. District Court for the District of Columbia against FHWA and the U.S. Department of Transportation.

Scenic America’s suit challenges the validity of a guidance memo issued by FHWA in September 2007, which directs agency personnel not to apply certain regulations—those prohibiting signs with “flashing,” “moving,” or “intermittent” lights—to digital billboards. The practical effect of the guidance memo was to eliminate federal oversight of the placement of digital billboards near federally funded highways. Scenic America’s complaint alleges that FHWA violated the Administrative Procedure Act and the Highway Beautification Act by issuing a rule change without notice and comment, and by adopting a rule that is inconsistent with the Highway Beautification Act’s substantive requirements.

In spring 2013, IPR interviewed Scenic America members and prepared affidavits in anticipation of the government and industry defendants’ motion to
dismiss on standing grounds. Scenic America members described injuries, including the aesthetic impacts of a digital billboard in close proximity to the home, reduced highway safety, and the drain on Scenic America’s resources. In May 2013, the government and industry defendants filed their motions to dismiss. The district court agreed with Scenic America that the group had standing to challenge FHWA’s Guidance Memorandum, which was a final agency action.

In spring 2014 IPR filed a summary judgment motion. The district court ruled against Scenic America, reasoning that FHWA had reasonably interpreted the term “intermittent lighting” to exclude digital billboard technology that cycles through thousands of lighted advertising messages per day. In August 2014, IPR appealed the decision to the D.C. Circuit Court of Appeals.

In both fall 2014 and spring 2015, IPR filed briefs in the D.C. Circuit in support of Scenic America’s appeal. Four nonprofit groups—American Planning Association, Garden Club of America, Sierra Club, and the International Dark-Sky Association—submitted a joint amicus brief in support of Scenic America. The government and industry defendants filed oppositions.

The D.C. Circuit scheduled oral argument on the case for September 25, 2015.

VII. Animal Welfare Act

A. Animal Legal Def. Fund v. Vilsack (D.D.C.)

IPR represents the Animal Legal Defense Fund (“ALDF”) in a challenge to the U.S. Department of Agriculture’s (“USDA”) implementation of the Animal Welfare Act (“AWA”). In particular, ALDF has challenged USDA’s rubber-stamping renewals of a roadside zoo’s AWA license.

The roadside zoo at issue is Cricket Hollow Zoo, which exhibits exotic animals as well as farm animals in northern Iowa. Even though USDA has found Cricket Hollow Zoo to be in violation of the AWA every time the agency inspects the zoo, and even though exhibitors must “demonstrate compliance” with the AWA in order to receive a license, USDA renews the zoo’s annual license to exhibit animals every year. ALDF has challenged USDA’s approval of the zoo’s 2014 license, as well as USDA’s pattern and practice of renewing the zoo’s license, in the U.S. District Court for the District of Columbia.

In fall 2014, USDA moved to dismiss ALDF’s complaint. In response, IPR contended that USDA needed to prepare a full administrative record at the same time it moved to dismiss the complaint; USDA disagreed. After extensive briefing in early
2015, the district court decided that the agency must prepare an administrative record, but that the record could be less extensive than what ALDF had requested.

Briefing on USDA’s motion to dismiss ALDF’s complaint will occur in July and August 2015.

VIII. Organic Food Production Act

A. Organic Labeling (opinion letter)

In 2014-2015, an organic food advocacy organization asked IPR to identify legal avenues for challenging recent actions taken by the U.S. Department of Agriculture with regard to the Organic Food Production Act. Over the past few years, USDA’s actions have diluted the regulatory strength of the Organic Food Production Act’s organic food labeling program. IPR wrote an opinion letter discussing the administrative advocacy and litigation options available for tightening organic labeling standards.

IX. Federal Advisory Committee Act

A. Lorillard, Inc. v. U.S. Food & Drug Admin. (D.C. Cir.)

The American Thoracic Society (“ATS”) asked IPR to draft an amicus brief on its behalf in support of the Food and Drug Administration (“FDA”)’s appeal of Lorillard, Inc. v. FDA, 56 F. Supp. 3d 37 (D.D.C. 2014) to the D.C. Circuit. In Lorillard, the United States District Court for the District of Columbia ordered FDA to remove three members from its Tobacco Products Scientific Advisory Committee (“TPSAC”) and prohibited FDA from relying on TPSAC’s report on the effects of menthol cigarettes. The court grounded its decision in the ethics law governing the conduct of federal employees, 18 U.S.C. § 208, notwithstanding the more specific relevance of the Tobacco Control Act and Federal Advisory Committee Act to the ethical criteria for TPSAC membership.

ATS joined Tobacco Free Kids (“TFK”), a nonprofit organization long engaged in advocacy to rein in access to tobacco products, in developing arguments for a joint amicus brief. TFK’s portion of the brief focused on statutory interpretation; ATS’s portion focused on the FDA’s approach to potential conflicts with TPSAC members, and also on implications of the decision for scientific advisory committees more generally.
The D.C. Circuit has yet to schedule oral argument in the case and its decision is pending.

X. Affordable Care Act


ATS sought IPR’s help in drafting an amicus brief on behalf of its members for submission to the Supreme Court in the latest case dealing with the Affordable Care Act. That case considered the IRS’s interpretation of a clause in the Act; specifically, the Court was asked to decide whether customers who buy individual coverage through a federal health care exchange should have the same access to subsidies as customers buying coverage through a state-run exchange.

IPR’s environmental and civil rights sections collaborated to develop practical and legal arguments. The resulting brief explained some of the serious financial and health implications of the case for patients suffering from respiratory conditions. It also argued that the text and context of the Act’s language do not allow for an interpretation other than the one adopted by the IRS.

The Court ruled in June 2015 that the IRS had interpreted the language correctly, though the Court expressly did not defer to the IRS’s reasoning. Rather, the Court arrived at its conclusion based on its own analysis of the Act. The vote in the case was 6-3: the Chief Justice wrote for the majority and Justice Scalia wrote the dissent.

XI. Federal Power Act

A. Federal Energy Regulatory Commission v. Electric Power Supply Association (Supreme Court)

Economist Charles J. Cicchetti sought IPR’s help with drafting and filing an amicus brief in the Supreme Court to explain why the Federal Energy Regulatory Commission (“FERC”) had been correct when, in Order No. 745, it instructed wholesale electricity market administrators to sometimes compensate “demand response”—a product of consumers curtailing their use of electricity—at the same price as electricity. A brief explanation helps to understand how demand response, FERC’s Order, and the Supreme Court’s decision to take the case all fit together.

Sometimes, paying a few people not to consume electricity is cheaper than supplying electricity to everyone who wants it – the classic example of such times is a very hot summer day, when whole cities turn on the air conditioning. This premise
has been widely understood and less widely implemented since the late 1970s. It is often referred to as “demand response,” shorthand for demand for electricity that responds to incentives or changes in price. Starting in the early 2000s, wholesale electricity market administrators experimented with using demand response to enable wholesale markets to supply electricity more reliably and at lower prices. As required by the Federal Power Act, which charges FERC with maintaining “just and reasonable rates” in wholesale electricity markets, FERC had approved these diverse uses of demand response as they evolved in the early and mid-2000s. In 2010, FERC proposed a unified approach, which – controversially – would compensate demand response at the same rate as electricity. To use industry jargon, FERC was proposing to make wholesale markets pay the same for a “negawatt” of demand response as for a megawatt of electricity. FERC revised its proposal more than once in response to comments and eventually issued Order No. 745, which instructs wholesale market administrators to pay the same for a megawatt and a negawatt, if the negawatt could be “dispatched” just like electricity and if dispatching it would yield a net benefit to wholesale market buyers. At times when dispatching a mix of negawatts and megawatts would cause any buyer to pay more than she would have for just megawatts, the Order said not to compensate the negawatt provider at all.

  
  Electricity generators and others challenged the Order in the D.C. Circuit, raising arguments about FERC’s jurisdiction and about its prescribed level of compensation. A divided panel struck the Order down on both grounds. First, the court said that FERC, by ordering payments that eventually made their way to curtailing retail electricity consumers, had overstepped its jurisdiction and meddled with retail markets (the regulatory province of states). Second, the court said FERC’s Order would result in “overcompensation” for demand response. Judge Edwards, in dissent, articulated thorough and sharp criticisms of the majority view on both points. Echoing many of the points in Judge Edwards’ dissent, FERC and others sought certiorari on the jurisdictional question. To the surprise of nearly everyone watching, the Supreme Court granted cert not only on that question, but also on the question of whether FERC had been arbitrary and capricious in ordering wholesale market administrators to compensate some demand response at the same price as electricity.

  The brief IPR drafted with Dr. Cicchetti ignores the jurisdictional question and focuses completely on FERC’s approach to compensating negawatts. It argues that FERC got the economics right after considering and responding to diverse concerns raised in response to its initial proposal. The brief was filed in July 2015.

  The Court will hear oral argument in September and should issue a decision by the end of the year.