GEORGETOWN LAW

2013-2014
Annual Report

INSTITUTE
FOR
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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 2013

Civil Rights Clinic

Jacob Fields
Peter Klym
Shelby Leighton
Cain Norris
Justin Rowinsky
Garrett Thomas

Environmental Clinic

Damian Privitera
Matthew Goetz
Clara Kollm
Laura Friend
Erica Pincus
William Swanson

Media and Technology Clinic

Sean Connolly
Jacob Itzkowitz
Yena Kwon
Richard Bahrenburg
James Davy

SPRING 2014

Civil Rights Clinic

Shahzadi Ahmed
Whitney Ehlin
Gerard Fowkes
Bradley Girard
Amanda Krause
Christopher Miller

Environmental Clinic

Jamie Bowers
Lynne Dzubow
Jessica Nyman
Aislinn Shaul-Jensen
TJ Graven
Stephen Ruotsi

Media and Technology Clinic

Danielle Tepper
Lane Johnson
Heather Nodler
Matthew Dulac
Catherine Yang
Lindsey Bohl
John Tran

CIVIL RIGHTS CLINIC

I. Employment Discrimination

A. *Hairston v. Boarman*

IPR represents Kevin Hairston, an African-American who has worked for the Government Printing Office (GPO) for decades but has repeatedly been denied promotions on the basis of race. Mr. Hairston joined GPO in 1987, and, after scoring third out of 134 on GPO's Offset Press Assistant Training Program examination, he was invited to participate in GPO's Press Training Program Apprenticeship. After completing the program, Mr. Hairston became an Offset Pressperson.

In August 2006, Mr. Hairston applied for a promotion to the position of Second Offset Pressperson. GPO sent him notification that he was qualified, and internal documents obtained during the investigation reveal that the selecting and approving officials chose him for the position. Yet, without explanation, a Production Manager ordered that the selection be canceled, and the position was closed without it being offered to anyone. The position was later re-posted after management claimed that no qualified applicants had applied for the opening the first time. A white man was hired for the position. Mr. Hairston filed a complaint with the Equal Employment Office (EEO) at GPO, and he was retaliated against by his supervisors for doing so.

In September 2008, IPR filed suit on Mr. Hairston's behalf. GPO responded with a motion to dismiss, claiming that Mr. Hairston failed to exhaust his administrative remedies prior to initiating the federal lawsuit. IPR opposed this motion, and, in the fall of 2009, the district court denied the motion as to the discrimination claim and granted the motion as to the retaliation claim. In the meantime, Mr. Hairston suffered additional retaliation at GPO, and he filed additional EEO complaints after he was denied overtime and training opportunities. IPR amended his federal complaint to include the denial of training claim in the spring of 2010, and the parties engaged in discovery throughout the summer and fall of 2010.

In spring of 2011, GPO filed a motion for summary judgment, arguing that the agency had a non-discriminatory reason for canceling Mr. Hairston's promotion. IPR opposed the motion, arguing that the evidence indicates that GPO's reason was false and pretext for discrimination. The court granted summary judgment to GPO in January 2013, and IPR filed an appeal to the D.C. Circuit on Mr. Hairston's behalf. IPR successfully opposed GPO's motion for summary affirmance and merits briefing was completed in April 2014. The D.C. Circuit has scheduled oral argument on Mr. Hairston's appeal for October 2014.

B. *Eley v. Vance-Cooks*

IPR represented Melvin Eley, an African-American who had worked for the Government Printing Office (GPO) for decades but had repeatedly been denied promotions on the basis of race and retaliation. After Mr. Eley was denied a promotion in 2001, he filed an EEO complaint, and IPR represented him. GPO settled that matter favorably to Mr. Eley in 2003, but GPO continued to deny Mr. Eley promotions for which he was qualified.

Since the 2003 settlement, Mr. Eley has been denied at least four promotions, one of which was canceled without explanation. Most recently, in 2008, Mr. Eley applied for the Operations Director position, a Senior Level Service (SLS) position in the Information Technology and Systems Department. Mr. Eley was deemed qualified, but a white man was hired instead. At the time, there were no African-American men among the approximately 30 SLS positions at GPO.

IPR filed a Title VII complaint on Mr. Eley's behalf in district court in November 2009. The parties conducted discovery throughout the summer and fall of 2010. In spring 2011, GPO filed a motion for summary judgment, arguing that the agency had a non-discriminatory reason for denying Mr. Eley the promotion. IPR opposed the motion, arguing that the evidence indicated that GPO's reason was baseless and pretext for discrimination. In March 2012, the district court held a summary judgment hearing and denied summary judgment in a lengthy ruling from the bench, relying in significant part on arguments advanced in our brief. After the decision, the parties participated in mediation, and IPR obtained a favorable settlement for Mr. Eley.

C. *Smith v. Bank*

IPR represented Mary Smith (name changed), a former employee of a major national bank. Ms. Smith worked as a bank teller, and she was often assigned to work on Saturdays. While she was working at the bank, Ms. Smith converted to a religion that strictly observes the Sabbath from Friday evening through Saturday evening. In accordance with her religious practice, Ms. Smith refrains from all work on Saturdays and spends much of the day worshipping at her temple.

When the bank terminated Ms. Smith after she had worked there for nearly two years, she filed a religious discrimination complaint with the Equal Employment Opportunity Commission. EEOC issued a determination in Ms. Smith's favor, but did not prosecute her case. Ms. Smith then came to IPR, and we agreed to represent her in a federal district court proceeding. IPR filed a Title VII complaint on behalf of Ms. Smith's, alleging that the bank discriminated against her on the basis of religion and in failing to accommodate her religious observances.

Ms. Smith's complaint alleged that, after her religious conversion, she explained to her bank manager and a human resources representative that she would no longer be able to work on Saturdays. They agreed to accommodate Ms. Smith's religious practices. However, the bank manager was later replaced. Ms. Smith's complaint alleged that the new bank manager and the same human resources representative informed Ms. Smith that the bank would no longer accommodate her religious observances. Finally, Ms. Smith alleged that she was fired because she refused to work on Saturdays.

Following a period of intense discovery, the bank filed a motion for summary judgment, which IPR opposed. The court denied the bank's motion for summary judgment, holding that Ms. Smith had raised genuine issues of material fact as to both her failure to accommodate and disparate treatment claims, and the case has been resolved.

D. *Freeman v. Dal-Tile*

Represented by other counsel, Lori Freeman brought a Title VII and Section 1981 lawsuit against her former employer, Dal-Tile Corporation, alleging a hostile work environment based on race and sex, retaliation, and constructive discharge in the U.S. District Court for the Eastern District of North Carolina. Ms. Freeman later added a civil obstruction of justice claim under North Carolina state law after it emerged during discovery that Dal-Tile had destroyed potentially relevant emails.

Dal-Tile distributes granite, tile, stone, and other materials used in home remodeling. Ms. Freeman worked in the office at one of Dal-Tile's showrooms, and she frequently interacted with Timothy Koester, a sales representative for a local contracting company who did a large volume of business with Dal-Tile. Over a period of three years, Koester engaged in a broad range of sexually and racially offensive conduct during his almost daily visits to Ms. Freeman's workplace. Koester regularly made sexual comments about women—including African-American women in particular. He bragged about his sexual exploits, and he used offensive racial language. Koester targeted Ms. Freeman, the only African-American woman in the office, with several especially serious slurs and incidents of harassment. But although the branch manager witnessed Koester's behavior and Ms. Freeman complained about it, his conduct continued, Dal-Tile did nothing to stop Koester.

Ms. Freeman came to IPR after the district court granted Dal-Tile's motion for summary judgment. IPR represented Ms. Freeman on appeal to the U.S. Court of Appeals for the Fourth Circuit. The parties completed merits briefing during the fall 2013 semester, and the court heard oral argument in January 2014. In April 2014, the Fourth Circuit reversed summary judgment on Ms. Freeman's Title VII and Section 1981 hostile work environment claims (and affirmed on the remaining claims). The Fourth Circuit recognized for the first time in a published opinion that employers may be held liable for third-party harassment, applying the same test used in co-worker harassment cases. Further, the Fourth Circuit found that a jury reasonably could conclude that Koester's conduct was objectively offensive and based on race and sex, and that Dal-Tile had knowledge of the hostile work environment but failed to respond adequately.

The Fourth Circuit remanded the case to the district court and the case was resolved before trial.

II. Open Government

A. *McBurney v. Young*

IPR represented Mark McBurney, a citizen of Rhode Island, Roger Hurlbert, a citizen of California, and Bonnie Stewart, a citizen of West Virginia. Each filed requests for public records under the Virginia Freedom of Information Act (VFOIA), but each request was denied because VFOIA only grants the right to access Virginia public records to citizens of Virginia. Mr. McBurney, who had been a citizen of Virginia for 13 years, sought records from the Virginia Department of Child Support and Enforcement regarding child support for his son. Mr. Hurlbert, who runs a business that collects and provides real estate information, sought records from the Henrico County Tax Assessors Office. Ms. Stewart, a professor of journalism at West Virginia University, sought information from Virginia public universities as part of a journalism course she teaches.

Mr. McBurney contacted IPR for assistance, knowing that IPR had previously handled a similar case, *Lee v. Minner*, against the state of Delaware, which IPR won in the U.S. Court of Appeals for the Third Circuit. Mr. Hurlbert contacted IPR soon after, and, in January 2009, IPR filed a complaint in district court in Virginia against the Virginia Attorney General, the Virginia Department of Child Support and Enforcement, and the Henrico County Tax Assessors Office on behalf of Mr. McBurney and Mr. Hurlbert. In February 2009, Professor Stewart contacted IPR regarding her own experience with the discriminatory provision of Virginia's FOIA, and the complaint was amended to add Professor Stewart's claim.

The complaint alleged that the citizens-only provision of Virginia's FOIA violates the Privileges and Immunities Clause of Article IV and the Dormant Commerce Clause of the U.S. Constitution. After a hearing, the district court granted the defendants' motion to dismiss, finding that the Attorney General, the only defendant sued by Professor Stewart, was not a proper party and that Mr. McBurney and Mr. Hurlbert lacked standing to bring their claims and opining that the plaintiffs would have lost on the merits anyway.

IPR appealed the decision to the U.S. Court of Appeals for the Fourth Circuit, and, in July 2010, after oral argument, the Fourth Circuit affirmed the district court's decision to dismiss the Attorney General and Professor Stewart; reversed the decision as to Mr. McBurney's and Mr. Hurlbert's standing; and remanded Mr. McBurney's and Mr. Hurlbert's claims to the district court. On remand, the district court found that Mr. McBurney and Mr. Hurlbert have standing to challenge VFOIA's citizens-only provision, but that the law did not violate the constitution. IPR appealed the merits decision to the Fourth Circuit. In February 2012, after oral argument, the Fourth Circuit held that the citizens-only provision did not violate the Privileges & Immunities Clause or the dormant Commerce Clause.

The U.S. Supreme Court granted IPR's petition for certiorari, which argued that the Fourth Circuit's decision conflicted with the Third Circuit's decision in *Lee v. Minner*. In conjunction with the Gupta/Beck firm as lead counsel, IPR briefed the Supreme Court appeal during the fall 2012 and spring 2013 semesters.

On April 29, 2013, the Court ruled 9-0 against IPR. In an opinion by Justice Alito, the Court held that VFOIA's citizens-only provision does not violate the Privileges and Immunities Clause because Virginia made most of the requested records available via other means and the state's refusal to provide the remaining records did not affect any constitutionally protected privilege or immunity. The Court also held that VFOIA's citizens-only provision does not violate the dormant Commerce Clause because the statute does not regulate commerce.

B. *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. More than a year and a half later, the court still has not ruled. However, 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.

C. *Southern Migrant Legal Services v. Range*

Southern Migrant Legal Services (SMLS) is a legal services organization that provides free legal services to indigent migrant agricultural workers in six southern states. To assist in its advocacy, SMLS frequently files state and federal freedom of information requests seeking documents about the employers of migrant workers. The migrant worker visa program (the H2-A program) is a heavily regulated joint federal-state 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. SMLS has requested H-2A records under the Public Records Act from the Mississippi Department of Employment Security (MDES) several times, and MDES denied each request, citing the new law.

In July 2010, IPR filed a complaint under 42 U.S.C. § 1983 in federal district court in Mississippi on behalf of SMLS. The complaint alleged that MDES's withholding of H-2A records violates federal law because a federal regulation requires states to release H-2A documents. MDES filed a motion to dismiss, arguing that SMLS lacked a right of action to challenge the Mississippi Public Records Act. IPR amended its complaint to add a preemption claim under the Supremacy Clause, and MDES filed a second motion to dismiss. IPR then filed a motion for summary judgment on the merits, arguing that the Mississippi statute making H-2A records confidential is preempted by federal law requiring the disclosure of H-2A records. Summary judgment briefing was completed in February 2011, and the court held partial hearings in July 2012 and November 2013.

In January 2014, the district issued an oral order (followed later by a written opinion) denying SMLS's motion for summary judgment and granting MDES's motion to dismiss. IPR now represents SMLS on appeal to the Fifth Circuit. Merits briefing was completed in July 2014, and oral argument is scheduled for late October 2014.

D. *Nicholls v. OPM*

Federal law prohibits men who fail to register with the Selective Service from working for the federal government unless they can show that their failure to register was not knowing and willful. The Office of Personnel Management (OPM) makes the knowing and willful determination. Based on the clinic's work in *Elgin v. U.S. Department of the Treasury*, former IPR staff attorney Leah Nicholls grew to believe that OPM often (erroneously) considers factors other than whether the failures to register were knowing and willful. Ms. Nicholls submitted multiple FOIA requests to OPM with the goal of shedding light on how the agency makes its determinations.

In April 2011, Ms. Nicholls filed a FOIA request with OPM seeking documents reflecting the numbers of men not hired or fired for their failure to register and documents related to appeals concerning the termination or failure to hire men who failed to register. Over the telephone, OPM indicated to Ms. Nicholls that it lacked documents responsive to her request, but she never received a written response.

In September 2011, IPR filed a complaint on Ms. Nicholls' behalf against OPM in federal district court, alleging that OPM never responded to her request. After failed settlement discussions, the parties filed cross-motions for summary judgment. OPM argued that it lacked responsive documents, while IPR contended that OPM had failed to conduct a sufficiently thorough search and that OPM read the request for knowing and willful appeals too narrowly.

The district court substantially agreed with IPR and granted summary judgment to Ms. Nicholls in May 2012. The court required OPM to search for responsive records and ordered OPM to produce non-exempt records related to appeals from knowing and willful determinations. After filing a motion for attorney fees and costs in May 2012, IPR reached a monetary settlement with OPM. In conformance with the court's order, OPM has produced additional responsive documents and expects to complete its production by September 2014.

In December 2011, Ms. Nicholls made an additional FOIA request to OPM seeking records concerning the agency's interpretation and implementation of the law prohibiting employment of men who failed to register with the Selective Service. By letter, OPM stated that it had located responsive records, but that the search, review, and copying costs would be more than $6,000.

On Ms. Nicholls' behalf, IPR administratively appealed the fees, arguing that the request qualified for a waiver of the search and review costs because it was made for non-commercial educational purposes. IPR also argued that Ms. Nicholls was entitled to the public interest fee waiver exempting copying costs. In April 2012, OPM's General Counsel determined that the request qualified for the educational waiver of search and review costs, reducing the costs to approximately $250, and remanded the public interest fee waiver question.

On remand, OPM has released some responsive records but withheld or redacted other records. In January 2014, IPR filed an administrative appeal challenging the agency's withholding and redactions and requesting that the agency provide a *Vaughn* index. OPM has indicated that it will issue a decision on the administrative appeal by October 2014.

III. Class Actions

A. *Hayden v. Atochem North America*

In 1992, residents of Bryan, Texas filed a class action against Atochem in federal district court in Houston, alleging that the chemical manufacturer's local pesticide plant spewed arsenic and other carcinogens, causing widespread medical problems and property damage throughout the area. The case settled favorably to the plaintiffs in 2000. Approximately $1 million remained in unclaimed settlement funds, and the district court sought proposals for distributing the remaining funds. The defendant proposed that the funds be either given back to it or given to specific local charities having nothing to do with the subject matter of the class action.

In March 2010, IPR, on behalf of class member Ralph Klier, submitted a competing proposal, arguing that the law required the court to make an additional *pro rata* distribution of funds to the most seriously injured class members. Alternatively, IPR argued that the funds should be distributed to a charitable cause with a strong nexus to the issues in the class action, such as Texas A&M's School of Rural Public Health, which researches the carcinogenic effects of pesticides on humans in Texas.

The court decided to use the funds to make *cy pres* awards to several local charities unconnected to the subject matter of the class action, such as the Children's Museum of the Brazos Valley. IPR sought a stay of the distribution, which was granted, and appealed the award to the Fifth Circuit. The Fifth Circuit heard argument in June 2011. In September 2011, the Fifth Circuit issued a decision entirely favorable to Mr. Klier and the class of seriously injured class members. *Klier v. Elf Atochem N. Am.*, 658 F.3d 468 (5th Cir. 2011). The court of appeals ruled that because the money practically could be (and, therefore, should be) distributed to the seriously injured class members themselves, a *cy pres* award was inappropriate.

On remand the district court in Houston, IPR worked with the case claims administrator to see that the remaining funds were distributed as completely and promptly as possible to the seriously injured class members. About 95% of the money designated for distribution to the class members was in fact distributed. The per-class member amounts ranged from as little as $350 to as much as $26,000.

B. *Briggs v. United States*

This nationwide class action was brought by military personnel, veterans, and their families who had held credit cards issued by a part of the U.S. military. The government had collected debts on these credit cards from the plaintiff class after the statute of limitations had expired. The parties settled in December 2009, and the government agreed to repay each class member 100% of the debt it had illegally collected.

Through two extensive memoranda, IPR advised class counsel on the applicable legal principles and possible appropriate charitable recipients in the event a *pro rata* redistribution of remaining funds is not feasible after an extensive search for all class members. In the memo concerning potential charitable recipients, IPR's research focused on locating reputable organizations that provide financial or debt relief assistance to veterans and their families.

After drafting the memoranda, IPR worked on maximizing the distribution to class members. The distribution process was long and productive and resulted in nearly all of the funds going to the class members themselves. After the distribution was completed, the remaining funds were distributed to a government-run charity that serves military members and their families.

C. *Hecht v. United Collection*

The federal Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from engaging in various forms of deceptive and unfair debt collection practices (such as posing as people other than debt collectors and harassing debtors with midnight phone calls). In 2010, the federal district court in New York approved a nationwide FDCPA class action settlement against a debt collector that systematically phoned alleged debtors without providing various disclosures required by the FDCPA. The settlement provided no monetary relief to the class members, small charitable contributions to charities having nothing to do with the substance of the lawsuit, and a sizeable attorney's fee for the plaintiffs' lawyers. In the meantime, Chana Hecht brought a suit regarding the same conduct in a federal district court in Connecticut. That court threw out the suit on the ground that Ms. Hecht was a member of the class that had settled in New York and that her suit was precluded by the judgment approving the earlier nationwide settlement. IPR took on the briefing and argument of the case in the Second Circuit. IPR argued that giving the New York settlement preclusive effect would violate Ms. Hecht's due process rights because she never was given notice and an opportunity to be heard in the New York case and because the plaintiffs in the New York case did not provide Ms. Hecht constitutionally adequate representation (as evidenced by the no-value settlement in the New York case). The Second Circuit agreed, ruling in August 2012 that the notice provided did not satisfy Due Process requirements, vacating the dismissal of Ms. Hecht's claim, and remanding the case to the district court.

D. *Day v. Persels & Associates LLC*

IPR filed an amicus brief in the Eleventh Circuit on behalf of the National Association of Consumer Advocates in support of absent class members who objected to a magistrate judge's approval of a no-value consumer class action settlement. We argued that the settlement's approval below was unconstitutional because it was entered by a magistrate judge, not an Article III district judge. Magistrate judges may, under 28 U.S.C. § 636(c), enter final appealable judgments *with the consent of the parties*. We argued that the use of the magistrate judge here was impermissible because the absent class members could not, and did not, consent.

In April 2013, the Eleventh Circuit heard oral argument, in which it allowed IPR to participate because our client addressed issues the parties did not raise. In September 2013, the Eleventh Circuit ruled in favor of the objectors and vacated and remanded to the district court, reasoning that the magistrate judge abused his discretion in approving the settlement. Although the majority concluded that the magistrate judge had jurisdiction despite the lack of consent from absent class members, one judge dissented, agreeing substantially with the arguments IPR advanced in its amicus brief.

E. *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 completed and oral argument is not yet scheduled.

IV. Other Matters

A. *Knight v. Thompson*

In this U.S. Supreme Court case, IPR is representing as amici the International Center for Advocates Against Discrimination and two other groups representing the interests of Sikh Americans. Earlier in this case brought under the Religious Land Use and Institutionalized Persons Act (RLIUPA), the Eleventh Circuit held that the Alabama state prison system may require inmates to cut their hair even if that violates their genuinely held religious beliefs. The inmates argued that RLUIPA demands that they be allowed to wear unshorn hair consistent with their religious beliefs because RLIUPA requires that the government use the "least restrictive means" in pursuing its legitimate interests (here, the interest in prison security). When the inmates pointed out that most state prison systems and the federal Bureau of Prisons allow religious inmates to maintain their hair unshorn—as evidence that Alabama's policy was inconsistent with the "least restrictive means" test—the Eleventh Circuit responded that what other prison systems did was "beside the point."

The prison inmates petitioned for review in the Supreme Court of the United States. IPR's amicus brief supports the inmates' petition. Through legal argument and the use of many case examples, IPR's brief shows that a wide array of religious practices, including those of mainstream religions, would be vulnerable to legislative attack unless the Eleventh Circuit's approach is rejected by the Supreme Court.

The inmates' petition remains pending before the Supreme Court.

B. *Elgin v. U.S. Department of the Treasury*

Michael Elgin, Aaron Lawson, Henry Tucker, and Christon Colby are all former valued employees of the federal government. Each was terminated solely because the Selective Service has no record that they registered. Each then sought a determination from the Office of Personnel Management (OPM) that his failure to register was not knowing and willful, a determination that would permit him to work for the federal government, but OPM denied each of their requests and their and their employers' administrative appeals.

Mr. Elgin appealed his termination to the Merit Systems Protection Board (MSPB), arguing that his termination was unconstitutional, and the MSPB dismissed his appeal for lack of jurisdiction. Mr. Elgin, joined by Mr. Lawson, Mr. Tucker, and Mr. Colby, then filed a complaint in Massachusetts federal district court, arguing that the lifetime ban on federal employment for men who fail to register is a Bill of Attainder prohibited by the Constitution and that it violates their constitutional equal protection rights because the bar on employment only applies to men. The district court held that it had jurisdiction to consider the plaintiffs' claims, but decided against them on the merits. Mr. Elgin, Mr. Lawson, Mr. Tucker, and Mr. Colby appealed, and a majority of the First Circuit panel held that it lacked jurisdiction over their constitutional claims because the Civil Service Reform Act's scheme for addressing the grievances of federal employees impliedly precludes federal district court jurisdiction over employees' constitutional claims.

In July 2011, on behalf of Mr. Elgin, Mr. Lawson, Mr. Tucker, and Mr. Colby, IPR filed a petition for certiorari in the U.S. Supreme Court. The Supreme Court granted certiorari and heard oral argument in February 2012. IPR argued that the Civil Service Reform Act did not impliedly preclude district court jurisdiction over federal employees' constitutional claims for equitable relief, and the Solicitor General contended that the Act requires that the employee bring his or her claim in the MSPB.

In June 2012, the Supreme Court held, 6-3, that the Civil Service Reform Act requires federal employees to bring their equitable constitutional claims in the MSPB, even if the MSPB cannot grant the relief sought. In step with arguments made by the Solicitor General, the Court reasoned that the Federal Circuit could decide employees' claims on appeal even if the MSPB could not. Justice Alito, joined by Justices Ginsburg and Kagan, dissented for the reasons outlined in IPR's brief.

C. *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 has not yet addressed the issue. The Court of Appeals accepted the certified question in May 2014. Merits briefing is scheduled for fall 2014, and IPR will again represent the amici in the Court of Appeals.

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

IPR is helping the parents of a child with a disability in a suit under the federal Individuals with Disabilities Education Act (IDEA) pending in the U.S. Supreme Court. IDEA seeks to ensure that children with disabilities receive a free and appropriate education (FAPE) in public schools. When parents and schools dispute whether the school district is providing a FAPE, the parties can have that dispute resolved, first, in an administrative proceeding and, after that, in the courts. Some disputes are about a student's placement: for instance, in a special-education classroom versus a "mainstream" classroom. IDEA's so-called "stay-put" provision says that while the dispute is pending, the student has the right to stay in his or her current placement. That way, the student has educational continuity during the dispute, which can sometimes be lengthy.

In this case, the Ridley School District argued to the U.S. Court of Appeals for the Third Circuit that the stay-put obligation runs only through the end of the trial-court proceedings and does not cover cases while in the courts of appeals (even though Ridley concedes that parties have a right to appeal). The Third Circuit rejected Ridley's argument. Ridley then filed a petition seeking review in the U.S. Supreme Court. IPR has drafted an opposition to Supreme Court review on behalf of the child's parents, arguing, 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.

A decision on whether the Supreme Court will review the case is expected in late September 2014.

ENVIRONMENTAL CLINIC

I. National Environmental Policy Act

A. *Public Employees for Environmental Responsibility et al v. Bromwich et al*

In late spring 2011, IPR began representing the Wampanoag Tribe of Gay Head (Aquinnah) in its opposition to the Cape Wind Energy Project, a proposed offshore wind farm to be located 3.5 miles off the coast of Massachusetts. The

Department of the Interior approved the construction and operation of the 130-turbine generator wind farm in a 25-square mile area of Nantucket Sound, known as Horseshoe Shoal, in April 2011.

The Tribe's reservation is located on the western side of Martha's Vineyard Island, and the Tribe has used Horseshoe Shoal for food, religion, and livelihood since "time immemorial." Construction of the project will irreparably disturb the seabed, which holds cultural and archaeological significance to the Tribe and was recently determined to be eligible for inclusion in the National Register of Historic Places. In addition, operation of the wind farm will disrupt the Tribe's spiritual ceremonies by obstructing the viewshed of the Eastern horizon and will interfere with the Tribe's practice of subsistence fishing in the area.

In July, 2011, the Tribe filed a complaint in the U.S. District Court for the District of Columbia against the Department of the Interior and the Bureau of Ocean Energy, Management, and Regulation (formerly known as the Minerals Management Service), alleging that the agencies did not adequately consider the project's impacts on the Tribe, in violation of the National Environmental Policy Act and the National Historic Preservation Act. In November 2011, one IPR fellow and two IPR students travelled to Boston to give a presentation on the case to Boston University law students and to meet with Tribal representatives on Martha's Vineyard.

Following Summary Judgment briefing, the District Court for the District of Columbia ruled that the government had violated the Endangered Species Act by failing to adequately consider mitigation measures to protect migrating birds, and by failing to issue an incidental take statement for right whales in the area. The Court ruled against the Tribe, however, holding that the Bureau of Ocean Energy, Management, and Regulation fulfilled all of its procedural requirements under the National Historic Preservation Act and National Environmental Policy Act. The Tribe has decided not to appeal the decision.

II. Endangered Species Act

A. *WildEarth Guardians v. United States Department of Agriculture*

In this Ninth Circuit National Environmental Policy Act case, IPR filed an *amicus curiae* brief 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. IPR filed the brief in October 2013, in support of WildEarth Guardians. That group had challenged the Department of Agriculture's compliance with the National Environmental Policy Act (NEPA) when it reauthorized a Nevada wildlife extermination program under which federal employees trap, shoot and poison coyotes, wolves, ravens, and other animals. Rather than consider new research on predator ecology and the dangers associated with the agency's avicides, 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.

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. It also launches a frontal assault on *Goat Ranchers of Oregon v. Williams*, 379 Fed. App'x 662 (9th Cir. 2010), an unpublished Ninth Circuit opinion heavily relied on by the District Court. A ruling on the appeal is pending.

III. Highway Beautification Act

A. *Scenic America v. United States Department of Transportation*

IPR represents Scenic America, Inc. in a challenge to the Federal Highway Authority's (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 LED 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 and identified a viable litigation strategy. In November 2012, one of IPR's students gave a presentation outlining this strategy to the Scenic America Board of Directors, who voted to authorize a lawsuit. In January of 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 (APA) and the Highway Beautification Act (HBA) by issuing a rule change without notice and comment, and by adopting a rule that is inconsistent with the HBA's substantive requirements.

During Spring 2013, an IPR student interviewed Scenic America members and prepared affidavits in anticipation of the government and industry intervenor's 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, resulting from FHWA's authorization. In May of 2013, the government and industry defendants filed their motions to dismiss, which Scenic America opposed. The Court agreed with Scenic America that the group had standing to challenge FHWA's Guidance Memorandum, which was a final agency action.

During Spring 2014, IPR filed motions to supplement the administrative record submitted by FHWA, as well as summary judgment briefing on the merits. The Court upheld the motion to supplement the record, but ruled against Scenic America on summary judgment, reasoning that FHWA reasonably interpreted the term "intermittent lighting" to exclude LED digital billboard technology that cycles through thousands of advertising messages per day. In August of 2014, IPR filed a notice of appeal with the D.C. Circuit Court of Appeals.

IV. Surface Mining Control and Reclamation Act

A. *Coal Riving Mountain Watch v. United States Department of Interior*

IPR represents Coal River Mountain Watch ("Coal River"), in litigation challenging the Office of Surface Mining Reclamation and Enforcement's (OSM's) 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 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, IPR's client 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 the Surface Mining Control and Reclamation Act. 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 of the case, IPR filed suit on behalf of Coal River in the United States District Court for the District of Columbia ("DDC") and in the United States District Court for the Southern District of West Virginia ("SDWV"). IPR's 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. During Spring 2014, IPR agreed to stay its West Virginia litigation and responded to a motion to dismiss its complaint in the District of Columbia on venue grounds. A decision on that briefing is pending.

V. Land and Water Conservation Fund Act

A. *Friends of DeReef Park v. National Park Service*

IPR represents 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 (LWCFA). That law enabled the City to acquire the property for the site and to develop it as a neighborhood park, but it prohibits the conversion of the site to non-recreational use without the approval of federal officials.

Nevertheless, in 2003, the City of Charleston sold DeReef Park to private developers. Five years later, city and state officials sought federal approval of the conversion, arguing that they were contractually obligated to allow the developers to build on the park site and, therefore, the NPS had no alternative but to transfer the covenants on the park property to another park, in a different part of the city. Regulations under the LWCFA and the National Environmental Policy Act (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 the National Park Service issued its decision to approve the conversion of the park without the benefit of an environmental assessment. Five years later, private development plans for the park began to move forward, and a local resident then discovered that the park was protected.

In Fall 2013, IPR filed suit against the National Park Service and the South Carolina Department of Parks, Recreation and Tourism in the District Court for the District of South Carolina, alleging violations of the LWCFA, NEPA, and the National Historic Preservation Act. The City of Charleston intervened as a defendant in the case. An IPR student interviewed the leadership of Friends of DeReef Park and prepared a declaration in support of standing. Following a failed settlement negotiation, IPR filed its opening summary judgment brief and standing declaration. The National Park Service filed a motion for voluntary remand, conceding that the agency had not followed required procedures prior to approving the conversion. The City of Charleston has asked the court to grant remand, but leave the conversion approval in place, so that private developers can continue construction activities. IPR has opposed that request. The court's decision is pending.

VI. Clean Air Act

A. *EPA v. EME Homer City Generation, L.P.*

In September 2013, IPR filed an *amicus curiae* brief in support of EPA in a case before the Supreme Court on behalf of the American Thoracic Society, an international educational and scientific organization that works to prevent and fight respiratory disease around the world through research, education, patient care, and advocacy. The case addressed whether EPA's Cross State Air Pollution Rule ("CSAPR") was a permissible interpretation of the Clean Air Act, which requires that states prevent emissions originating within their borders from significantly contributing to downwind states' noncompliance with Clean Air Act pollution thresholds. The D.C. Circuit had vacated the Rule for exceeding EPA's statutory authority under the Clean Air Act.

IPR's brief highlights air pollution's serious public health impacts and the significant harm the D.C. Circuit's decision would cause to the public. It also addressed two of the arguments for upholding the decision, namely that air pollution is actually decreasing, and that CSAPR was not necessary to achieve compliance in downwind states. Air pollution, IPR's brief explained, continues to threaten public health, and existing regulations were not a viable means of protection.

In April 2014, the Court issued its opinion and ordered CSAPR upheld, reversing the D.C. Circuit's decision.

B. *Utility Air Regulatory Group v. EPA*

In January 2014, IPR filed another *amicus curiae* brief on behalf of the American Thoracic Society, once again in support of EPA in a case before the Supreme Court. This case considered EPA's Timing and Tailoring Rules, which provide for the regulation of greenhouse gas ("GHG") emissions from stationary sources under the Clean Air Act's Prevention of Significant Deterioration ("PSD") program. The D.C. Circuit had upheld EPA's rules after hearing various challenges to their validity under the Clean Air Act; the Supreme Court granted certiorari from that decision on a narrow question: Did EPA permissibly determine that its regulation of GHG emissions from new motor vehicles triggered permitting requirements under the CAA for stationary sources that emit GHGs?

IPR's brief focuses on the impacts of GHG emissions and global climate change on human health, highlighting the scientific community's consensus that mortality will increase due to the effects of anthropomorphic climate change, and noting that regulating GHG emissions from stationary sources would yield the co-benefit of reducing emissions of other air pollutants. IPR's brief also pointed out that adopting petitioners' proposals would curtail EPA's authority to regulate all non-criteria pollutants—not just GHGs.

In June 2014, the Court issued an opinion that charted a middle path between EPA's request that the Rules be upheld in full and challengers' argument that those Rules should be vacated. The Court's decision leaves EPA's Rules intact in terms of their effect—it is expected that they will address sources of 83% instead of 86% of the GHG emissions from facilities subject to the Clean Air Act's PSD program. However, the decision also approaches GHG emissions as a category of air pollutant distinguishable from pollutants traditionally regulated under the CAA—an approach that is sure to have implications for future rules regulating GHG emissions based on the CAA.

VII. Clean Water Act

A. *American Farm Bureau Federation v. EPA*

In May 2014, IPR filed an *amicus curiae* brief in a case before the Third Circuit on behalf of a coalition of non-profit advocacy organizations in support of EPA, which 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 that comprise 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 federal district court, arguing that it impermissibly interfered with state and local land use decisions, and thereby exceeded the authority granted to EPA by the Clean Water Act. After their challenge was rejected by the court, the Farm Bureau appealed. Twenty-one states attorneys general filed an amicus brief in support of that appeal. Their brief recapitulated the federalism arguments made by the Farm Bureau, and also asserted that EPA's oversight of nonpoint source pollution in the Chesapeake and elsewhere was unwarranted because states are competent to address it as needed.

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, hailing from each of the 21 states whose attorneys general filed in support of the Farm Bureau's opposition to the TMDL. Two students and a fellow contributed to the drafting of IPR's brief, which takes note of water quality degradation in several of those states owing to pollution from nonpoint sources. The brief also pointed out states' frequent inability or unwillingness to address such pollution, whether it originated within or beyond a particular state's borders. Finally, the brief argued that the Clean Water Act provided clear statutory authority for the TMDL, particularly in light of the long history of cooperation among states and EPA toward understanding and ameliorating Chesapeake Bay water quality degradation.

The Third Circuit's decision in the case is pending.

VIII. Surface Mining Reclamation and Control Act

A. *To' Nizhoni Ani et al. v. Office of Surface Mining and Reclamation Enforcement*

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 the Surface Mining Control and Reclamation Act ("SMCRA") from Office of Surface Mining Reclamation and Enforcement ("OSM"). SMCRA establishes environmental standards for strip mining and requires that permittees seek a permit renewal every five years.

In 2010, the PWCC sought to renew its permit for the fourth time. OSM renewed the permit on January 6, 2012. To' Nizhoni Ani filed an administrative appeal of the renewal on February 17, 2012. The appeal raised claims under SMCRA, the National Historic Preservation Act, the National Environmental Policy Act, and the Administrative Procedure Act. PWCC and To' Nizhoni Ani filed cross motions for summary judgment. The Administrative Law Judge issued an order denying both motions with respect to all claims and dismissing a National Environmental Policy Act claim on which no party had sought judgment.

The parties engaged in settlement negotiations from February 2013 to March 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 for a follow-up meeting with OSM. The parties executed a settlement agreement in May 2014 and IPR filed a petition to recover its costs in the case, which OSM opposed. A ruling on the costs award is pending.

IX. Food Safety Modernization Act

A. Produce Safety Rule and Preventive Controls Rule

The Food Safety Modernization Act ("FSMA") was passed in January 2011. The statute amends the Food, Drug, and Cosmetic Act by increasing the FDA's regulatory authority over food production. Specifically, FSMA directs the FDA to promulgate science-based preventive controls governing farm produce safety and off-farm packing, manufacturing, and processing. In January 2013, the U.S. Food and Drug Administration ("FDA") published draft "Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption" (the proposed produce safety rule) and "Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food" (the proposed preventive controls rule) pursuant to the Food Safety Modernization Act ("FSMA"). After publication of these rules, IPR reached out to Future Harvest—A Chesapeake Legal Alliance ("Future Harvest CASA"), a network of farmers, agricultural professionals, landowners, and consumers living and working in the Chesapeake Bay region.

In November of 2013, on behalf of Future Harvest CASA, IPR filed comments on both rules, focusing on their environmental and economic effects. In the course of drafting, IPR students collaborated with Harvard's Food Law and Policy Clinic and with the National Sustainable Agriculture Coalition, of which Future Harvest CASA is a member. In response to the comments filed, including IPR's FDA indicated that it would substantially revise its preliminary draft rules.

X. DC FOIA

A. *McMillan Park Committee v. District of Columbia*

In spring 2009, IPR began assisting the McMillan Park Committee (MPC) with its efforts to protect the historic resources and open green space of McMillan Park. The District of Columbia plans to transfer the McMillan Park historic sand filtration site to a private developer, who proposes to remove most of the historic structures and construct apartments, condominiums, and retail facilities. Many community members and groups in addition to MPC are concerned about the intensity of the proposed development, lack of usable public space, and failure to incorporate the park's unique historic resources.

In February 2009, IPR submitted District of Columbia Freedom of Information Act ("D.C. FOIA") requests on behalf of MPC to gather information about the new redevelopment proposal and its environmental and historic resource impacts. IPR also sent a letter to the mayor of D.C., urging him to conduct an environmental analysis before transferring the property to the developer. With the exception of the Deputy Mayor's Office, IPR received adequate responses to its D.C. FOIA requests. The Deputy Mayor's Office refused to disclose an indefinite number of emails between it and Vision McMillan Partners, the private developer for McMillan Park.

In March 2010, MPC filed a complaint for declaratory and injunctive relief in D.C. Superior Court. MPC then filed a Motion for Summary Judgment arguing that the District's Vaughn index was inadequate and that the District had failed to justify withholding responsive records. In March 2011, the court held that the District had failed to provide sufficient information to justify non-disclosure of the withheld records and issued an order holding in abeyance MPC's Motion for Summary Judgment pending the District's issuance of a revised Vaughn index that further describes the withheld documents and specifically addresses the ability to segregate the withheld information. The District filed a revised Vaughn Index and two new supporting affidavits in September 2011. The District also filed all the contested documents, suggesting the court might review them in camera. In August 2012, after undertaking in camera review of the documents, the court again concluded that the District's justification for withholding the documents was inadequate and ordered the District to revise its Vaughn index again. In December 2012, the District filed a revised Vaughn index, and MPC renewed its arguments in favor of summary judgment. In August of 2013, the court granted MPC's motion for summary judgment and ordered the District to release dozens of contested documents. After prevailing in the case, IPR settled with the District for recovery of over $50,000 in attorneys' fees.

During the course of this litigation, development activities at McMillan Park have continued, and community members have continued to voice opposition to Vision McMillan Partners' development plan. In March of 2013, on behalf of the McMillan Park Committee, an IPR student gave testimony before the D.C. Historic Preservation Review Board, arguing that the revised plan is inconsistent with the District's historic preservation laws. In the spring of 2013, IPR also represented the MPC in talks with DC Water to secure a commitment regarding restoration and mitigation measures associated with that agency's use of water filtration cells for emergency storm water storage.

XI. Federal Clean Water Act Compliance

A. Virginia General Permit for Construction-Related Stormwater Discharge.

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 protect the Potomac and Shenandoah watersheds focuses on maintain water quality and habitats for aquatic and other wildlife.

Pursuant to the state's authority 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 in February 2014, IPR filed suit on behalf of the Riverkeepers in the Virginia Circuit Court for the City of Richmond, challenge 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 not timely filed and served. IPR has filed responses on behalf of the Riverkeepers to contest these objections. A decision on these motions is pending.

MEDIA AND TECHNOLOGY CLINIC

I. Appeal in Support of Lower Telephone Rates for Prison Payphones

Over a decade ago, Martha Wright, a grandmother from Washington, DC, along with a group of prisoners and former prisoners, their family members, the D.C. Prisoners' Legal Services Project, Citizens United for Rehabilitation of Errants (CURE), and others (Wright Petitioners) filed a petition for rulemaking with the FCC seeking relief from excessively high rates and fees charged by companies providing Inmate Calling Services (ICS). After many years of advocacy, the FCC finally adopted interim price caps for interstate calls in 2013. The effect of this decision was to substantially reduce the cost of making an interstate phone call to or from a prison.

Several of the ICS providers and prison facilities sought review of the FCC's decision in the D.C. Circuit. The *pro bono* counsel for the Wright Petitioners was unable to handle the appeal, so IPR agreed to take it over.

A. Opposition to Stay Motions of ICS Providers

In December 2013, IPR filed a motion for the Wright Petitioners to intervene in the consolidated appeals. Shortly thereafter, IPR filed an opposition to the petitioners' emergency motion to stay the FCC order. The opposition argued that a stay would cause financial harm to individuals and families relying on ICS, who are some of the most economically disadvantaged in the nation. The opposition cited examples of families forced to cut off contact with an inmate incarcerated hundreds of miles from home because they could not afford the phone bills. The opposition also pointed out the harms to the 2.7 million children from the lack of contact with a parent who is in prison.

The stay opposition also argued that the public interest would suffer if the court stayed the FCC's order. The record showed that when families speak with an imprisoned loved one more frequently, prisoners are more likely to be successful upon reentry into the community and less likely to commit additional crimes. Reducing recidivism even by a small percentage would result in millions of dollars in savings.

The D.C. Circuit denied the stay in part, allowing the interim price caps to take effect. As a result, ICS providers generally may not charge customers more than \$0.21 per minute for prepaid/debit interstate calls or \$0.25 per minute for collect calls. However, the Court stayed parts of the FCC's order that set a much lower "safe harbor" rate for calls and required that ancillary fees be cost based.

B. Merits Brief Supporting Commission's Order

During the spring semester, a team of IPR students worked on the brief in support of the FCC's order. The students dug through thousands of comments to find overwhelming statistical and anecdotal evidence supporting the FCC's decision to lower ICS rates. In addition to conducting legal and factual research, they had to figure out what arguments to make for the clients to best support the FCC, without duplicating its arguments. They produced multiple drafts of both the Statement of the Case and the arguments.

After the petitioners filed their briefs, the Wright brief was revised to respond to their arguments. The brief contends that the FCC's action to lower the costs of interstate ICS is a lawful and reasonable response to a failed market and does not interfere with the day-to-day administration of state and local prisons facilities. It also argues that the FCC acted lawfully and appropriately in requiring that "ancillary fees" charged to customers be based on costs. Ancillary fees are paid by consumers to set up and maintain a pre-paid calling account and to add money to the account and are necessary to be able to place or receive a call. These fees can often double the cost of calling.

II. Political Broadcasting

Broadcast stations have long been required to publicly disclose the sponsors of political advertisements as well as other information about candidate and issue advertising. That information was kept at the station's main studio, and members of the public generally had to visit the station in person to view this information. That changed as a result of the advocacy of IPR and its client, the Public Interest Public Airwaves Coalition (PIPAC). In 2012, the Commission started requiring television stations to put their public inspection files in an online database hosted by the FCC. These files may be viewed at https://stations.fcc.gov/.

A station's public inspection file contains, among other things, applications, ownership reports, children's programming, issue-responsive programming, and a "political file," containing records concerning political broadcasting. Section 315 of the Communications Act, as amended by the 2002 Bipartisan Campaign Reform Act, requires that broadcast stations maintain records regarding any request to purchase broadcast time that "communicates a message relating to any political matter of national importance." These records must identify the issue, candidate, and election referred to by the ad and the sponsor of the ad. The licensee must also disclose the purchaser's chief executive officers or members of the executive committee or of the board of directors.

After the Supreme Court struck down limits on campaign expenditures in *Citizens United* and in *McCutcheon v. Federal Election Commission*, the amount of money being spent on candidate and issue advertising on television has increased dramatically. Yet, the public retains the right to know about the organizations and individuals seeking to influence their vote through these ads. Thus, it is more important than ever for the public and journalists to have easy access to television stations' political files.

In summer 2013, IPR filed comments on behalf of PIPAC, the Sunlight Foundation, and the Center for Effective Government, detailing the public benefits from online disclosure, which at that time applied only to the major network affiliates in the fifty largest markets. The comments urged the FCC to proceed with plans to require all television stations to upload their political files starting in July 2014, which it did. The comments also recommended that the FCC adopt data standards and require television stations to upload their political files in a machine-readable format to make the data easier to analyze and more useful to the public. The Commission has not yet acted on this proposal.

A. Complaints filed against eleven television stations for failing to make required disclosures

In May 2014, IPR filed complaints at the FCC on behalf of the Campaign Legal Center and the Sunlight Foundation against eleven television stations. The complaints were drafted by IPR students who also reviewed many stations' online political files. The complaints indicated of widespread noncompliance with the disclosure requirements without regard to the political leanings of the sponsor, the geographic location, or the station's network affiliation. For example, many stations failed to identify the candidate to which the ad referred; the issue of national importance to which the ad referred; and/or the chief executive officer or board of directors of the sponsor. In some cases, stations simply uploaded blank disclosure forms. In others, stations filled in some, but not all, of the required information. The FCC acted quickly. Not only did FCC Chairman Tom Wheeler release a statement in support of our complaints, but within a month of filing, the FCC forwarded the complaints to the stations involved for their response, and IPR filed replies to their responses.

B. Complaints against television stations that failed to properly identify sponsors of political ads

In July 2014, IPR filed complaints at the FCC against two television stations on behalf of Campaign Legal Center, Common Cause, and the Sunlight Foundation. These stations had aired issue ads without disclosing the true identity of the sponsor as required by Section 317 of the Communications Act.

One of the stations, WJLA, in Washington, D.C., ran ads purchased by the NextGen Climate Action Committee (NextGen). NextGen was founded, and at the time solely funded, by Tom Steyer, a former hedge-fund manager worth billions. The complaint alleged that Steyer, and not NextGen, was the true sponsor of the ad, and therefore the station should have disclosed Tom Steyer's name at the end of the ad rather than the name of the committee. It also alleged that WJLA clearly failed to exercise "reasonable diligence" to ascertain the true sponsor as required by the Communications Act.

The other complaint was against Portland, OR television station KGW. KGW ran ads purchased by the American Principles Fund (APF). At the time, APF was funded almost exclusively by Sean Fieler, a hedge-fund manager. The complaint alleged that Fieler was the true sponsor of the ads, and therefore the station should have disclosed Sean Fieler's name at the end of the ad rather than "American Principles Fund." It also alleged that the station did not exercise "reasonable diligence" to ascertain basic funding information for the group.

C. Petition for Rulemaking to extend online public file requirements to cable and satellite

Because spending by political candidates, Super PACs and "dark money" groups is not limited to broadcast television stations, IPR filed a Petition for Rulemaking on behalf of Campaign Legal Center, Sunlight Foundation and Common Cause in July 2014. The petition asked the FCC to require that cable and satellite operators, which currently make their public files (including political files) available at certain physical locations, to upload them into the online database currently used only for broadcast television stations. Putting the files online would make it easier for the public to access the information. Because political campaigns and outside groups have substantially increased spending for advertisements on cable and satellite channels, the public needs online access to obtain comprehensive data on political ad spending. The FCC, again acting very quickly, put the petition out for public comment in August 2014.

III. Media Ownership

The FCC's regulation of broadcast station ownership continues to be a major focus of IPR's advocacy on behalf of the Office of Communication, Inc. of the United Church of Christ, National Organization for Women Foundation, Common Cause, Prometheus Radio Project and other organizations. The FCC rules are intended to promote diversity of viewpoints, diversity of ownership, competition, and the provision of local news and other local programming by limiting the number of television and radio stations that may be commonly owned within a market, as well as common ownership of newspapers and broadcast stations.

Under the Telecommunications Act of 1996, the FCC must review whether 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 where it is consistent with the limits, or the applicants make an affirmative showing that the public interest would be served by waiving the limit.

IPR's clients successfully challenged previous decisions by the FCC in its 2002 and 2006 reviews to relax its ownership limits. Both appeals were heard by the US Court of Appeals for the Third Circuit. In both decisions, which are known as *Prometheus I* and *Prometheus II*, the Court in large part agreed with IPR's arguments, reversed parts of the FCC's orders, and remanded for further FCC review. While the appeal of the 2006 Quadrennial Review was still pending, the FCC began its 2010 Quadrennial Review.

IPR filed multiple comments and made numerous *ex parte* presentations in the 2010 Quadrennial Review. Most recently, IPR's advocacy efforts focused on two objectives. First, we urged the FCC to take action to stop television stations from evading local ownership limits by entering into "shared services agreements" (SSAs). The local television rule prohibits common control of two or more television stations in all but the largest markets as well as common control of two top-four ranked television stations (usually the CBS, NBC, ABC and Fox affiliates). An SSA may allow one station to provide all local news for another television station, to sell advertising on that station, and to control most of its operations. IPR's clients sought to require the disclosure of all such sharing agreements. In addition, they wanted the FCC to amend its "attribution rules," which identify the types of ownership interests that are counted for purposes of the ownership limits, to attribute ownership where an SSA gave a station substantial influence over another station in the same market.

Second, IPR's clients wanted to make sure that the FCC complied with the Court's order in *Prometheus II* that the FCC take certain steps to promote broadcast station ownership by women and people of color. Our many filings showed wide disparities in station ownership by women and people of color as compared to white men. The comments also suggested research and other concrete steps that the Commission could take to advance the goal of increasing ownership diversity.

In April 2014, the FCC issued a combination Order and Further Notice of Proposed Rulemaking in the 2010 Quadrennial Review (2014 Quadrennial Review). In the Order, the FCC amended its "attribution rules," which identify the types of ownership interests that are counted for purposes of the ownership limits, to include Joint Sales Agreements (JSAs). JSAs are agreements in which a station sells advertising time on another station in the same market. JSAs are similar to SSAs in that they both confer substantial control to another in-market station owner and may be used to evade violations of the media ownership limits.

In the Further Notice, the FCC combined the ongoing 2010 Quadrennial Review with the new 2014 Quadrennial Review. The Further Notice sought comment on whether to retain or amend its ownership limits, how to respond to the *Prometheus II* remand regarding racial and gender diversity in station ownership, and whether to require that stations disclose SSAs.

A. Petitions regarding the FCC's Action and Inaction in the 2010 Quadrennial Review

IPR filed a petition for review of the 2014 Quadrennial Review on behalf of Prometheus Radio Project, *et al.* in the Third Circuit. The petition asserted that the FCC failed to satisfy the Third Circuit's remand instructions in *Prometheus II*. Specifically, it alleged that the FCC failed to collect and analyze the data and conduct studies necessary to promote station ownership by women and people of color. Further, the petition alleged that the FCC acted arbitrarily in attributing one type of sharing agreement between broadcast television stations (JSAs) while not requiring that a different type of sharing agreement raising similar concerns (SSAs) even be disclosed.

Three other petitions for review were filed in the DC Circuit by industry parties. The National Association of Broadcasters (NAB) challenged the FCC's failure to relax or repeal any rules, while two others challenged the decision to attribute JSAs. Because petitions of the same order were filed in different courts, initial jurisdiction was determined by lottery. After the DC Circuit was selected, Prometheus *et al.* filed a motion to transfer the case to the Third Circuit, which had retained jurisdiction over the remanded portions of *Prometheus II*.

B. Intervention in NAB's Appeal of a Public Notice regarding SSAs

In March 2014, shortly before the FCC issued the Quadrennial Review, the FCC's Media Bureau, which is charged with reviewing proposed license transfers to determine whether they are in the public interest, issued a Public Notice to provide guidance concerning its processing of applications involving SSAs and contingent or financial interests. The NAB sought review of this action in the D.C. Circuit. The FCC filed a motion to dismiss the petition on the grounds that the Media Bureau's public notice was not a final agency action. IPR filed a motion on behalf of Prometheus *et al.* supporting the motion to dismiss, and requesting that if the case is not dismissed that it be consolidated with the other petitions for review of the 2010/2014 Notice/Order because it presented legal and factual issues in common.

C. Challenges to Mergers involving SSAs to Circumvent Ownership Limits

2013 was a blockbuster year at the FCC for media mergers. IPR represented organizations challenging license transfers or assignments that involved SSAs designed to get around ownership limits.

1. Gannett-Belo

As described in last year's annual report, IPR filed a petition to deny in June 2013 opposing Gannett Company's proposed acquisition of twenty television stations from Belo Corp. for $2.2 billion. The petition, which was filed on behalf of Communications Workers of America (both NABET and the Newspaper Guild), National Hispanic Media Coalition, Common Cause, Office of Communication, Inc. and Free Press, argued that the acquisition was not in the public interest because Gannett was proposing to use SSAs to circumvent the FCC media ownership limits.

In December, after Gannett agreed to sell one of the stations pursuant to a consent decree with the Department of Justice, the FCC's Media Bureau denied IPR's petition and approved the license transfers. In January 2014, IPR filed an application for review asking the full Commission to reverse the Media Bureau decision for three reasons. First, the approval of the assignments involving sharing arrangements to evade the newspaper-broadcast-ownership rule presented a novel question of law, fact, and policy that should be decided by the full Commission. Second, the Bureau's decision was incorrect because the assignment of licenses was contrary to the Communications Act, which permits assignments only where they serve the public interest. Finally, failure to reverse this decision and the previously unreviewed Bureau precedents on which it relied would result the increased use of such sharing agreements to further evade the FCC's media ownership rules.

2. Tribune-Local TV transaction

In January 2014, IPR also filed an application for review of the Media Bureau's approval of Tribune Co.'s acquisition of nineteen television stations licensed to Local TV. Because outright acquisition of some of the Local TV stations would have violated the Commission's cross-ownership limits, Tribune entered into various SSAs with a "sidecar "company Dreamcatcher. The application for review, which was filed on behalf of Free Press, made arguments similar to those made in application for review of the Gannett-Belo transaction.

3. Transfer of KFVE

In February 2014, IPR filed a petition to deny the transfer of television station KFVE, Honolulu, on behalf of the Media Council Hawai`i (MCH). As described in prior annual reports, IPR has represented MCH since 2009 in an effort to diversity ownership and local news coverage in Honolulu. Specifically, Media Council Hawai`i (MCH) challenged a transaction through which Raycom, one of the largest broadcasting companies in the US, acquired direct control over two major network affiliates in Honolulu (KHNL and KGMB), as well as indirect control over KFVE, through the use of various sharing arrangements. While the Media Bureau agreed that the original 2009 transaction was inconsistent with the local television ownership rules, it nonetheless declined to take action because it had no transfer application before it. MCH filed an application for review of the Bureau's decision in December 2011, which remains pending.

In November 2013, an application was filed with the FCC seeking approval of the transfer of KFVE to American Spirit Media, LLC. Raycom, which had initially obtained an option to purchase KFVE in 2009 when it entered into the SSA, had transferred the option to American Spirit. American Spirit exercised the option, but needed FCC approval for the transfer to proceed.

An IPR student drafted a petition for MCH arguing that approval of the transfer would not serve the public interest because it would undermine the purpose of the local television station ownership limit and allow Raycom to continue to air virtually identical news programs on three Honolulu stations. The petition included a side-by-side comparison of news programming on the three stations over two days, which showed that the local news programs on KFVE were almost identical to those on the two Raycom-owned stations. The petition also argued that American Spirit appeared to have no independent existence apart from holding licenses on behalf of Raycom, since all six of its stations were operated by Raycom. Finally, it urged that the full Commission, rather than the Media Bureau, should review this application because it concerned issues and facts almost identical to those present in MCH's pending application for review.

IV. Children's Online Privacy

The Children's Online Privacy Protection Act of 1998 (COPPA) generally requires website operators and online service providers that target children under 13, or know a particular user is under 13, to provide notice to parents and obtain verifiable parental consent (VPC) before collecting, using, or disclosing personal information about children. The Federal Trade Commission (FTC) is charged with implementing and enforcing COPPA. Over the last few years, the FTC sought comments on updating the COPPA through its own "COPPA Rule." IPR filed comments on behalf of the Center for Digital Democracy (CDD) and a broad coalition of children's and privacy advocacy organizations. The FTC significantly revised the rule and made many changes in response to IPR's comments.

The revised COPPA Rule took effect in July 2013. Over the past year, IPR students worked with CDD on projects to ensure the revised rule is properly interpreted and enforced.

A. Requests for the FTC to investigate potential COPPA Rule violations

In the fall semester, IPR students reviewed children's websites and mobile apps to assess compliance with the revised COPPA Rule. Based on this analysis, they drafted two requests for investigation. The students presented their findings to the FTC staff and filed the requests for investigation in December 2013.

1. Marvelkids.com

Marvelkids.com is a website owned by Disney that features Marvel comic heroes games, video and activities for children. IPR found that the Marvelkids.com's privacy policy had not been updated to comply with the revised COPPA Rule. The privacy policy described a number of practices prohibited under the revised COPPA rule. For example, it stated that Marvelkids.com collected personal information from visitors to the site (including IP addresses and the pages visited before and after visiting Marvelkids.com), used this information to tailor communications to the visitor, and disclosed information to third party ad companies and ad serving companies. Under the revised COPPA rule, none of these activities are permitted without giving direct notice to parents and obtaining prior verifiable consent. Yet Marvel made no attempt to provide direct notice or to obtain consent.

The request for investigation was widely covered in the press. Marvelkids.com quickly changed its privacy policy to the overall Disney privacy policy. In the spring semester, an IPR student analyzed the Disney privacy policy and found that it too was not fully compliant with the COPPA Rule. Thus, in February 2014, IPR filed a letter advising the FTC of those findings.

2. Hello Kitty Carnival

Hello Kitty Carnival is a mobile app developed by Sanrio, a large Japanese firm that also markets a wide variety of products based on the popular children's character Hello Kitty. The request for investigation alleged that Sanrio and third-party advertising companies were collecting three types of personal information from children via the Hello Kitty Carnival app–identifiers that are unique to the mobile device, information regarding the mobile device's physical location, and photographs containing images of children. Sanrio did not provide COPPA-compliant notice or gain verifiable parental consent before collecting this information. Sanrio's privacy policy was not clearly and understandably written and it contained confusing and contradictory material.

B. Comments on proposed COPPA safe harbor programs

COPPA includes a provision enabling companies to join an approved safe harbor program. A member of a safe harbor that abides by the safe harbor's guidelines is deemed to be in compliance with COPPA. To become an approved safe harbor, an organization must to apply to the FTC and meet certain criteria. Applications for "safe harbor" status are published in the Federal Register to allow public comment on whether they meet criteria set forth in the COPPA Rule. IPR worked with CDD to comment on two such requests.

1. iKeepSafe

CDD opposed iKeepSafe's safe harbor application because the company in charge of enforcement did not seem to have sufficient staff to effectively enforce the iKeepSafe rules. CDD also objected that iKeepSafe's guidelines used permissive language when the COPPA Rule required mandatory language and thus, did not provide as much protection for children as the COPPA Rule. The FTC recently approved iKeepSafe contingent on the company changing some of the permissive language to mandatory language, as requested by CDD.

2. kidSAFE+

CDD opposed the kidSAFE+ safe harbor application on a variety of grounds. In particular, it objected to kidSAFE's plan to use a logo for its COPPA safe harbor seal, "kidSAFE+," that looked very similar to its "kidSAFE" seal, which denotes that the online service complies with certain safety criteria, because it would likely be confusing to parents. The comments also objected that the kidSafe+ guidelines did not provide protection that was equal or greater to the protections in the COPPA Rule and that the application failed to provide (or redacted) information necessary to determine whether the safe harbor program met the relevant criteria

C. Comments on proposed verifiable parental consent mechanisms

The COPPA Rule prohibits websites and apps from collecting, disclosing, and using personal information from children without first obtaining verifiable parental consent (VPC). To obtain consent, companies can use "verifiable parental consent mechanisms." Companies offering VPC mechanisms may apply for FTC approval. IPR worked with CDD on comments opposing two such applications.

1. AssertID

AssertID proposed a verification system that used Facebook to verify that the person granting permission was in fact the child's parent. CDD commented that this untested system could be gamed easily with fake Facebook accounts. Further, this mechanism required parents and children to disclose substantial amounts of information about themselves to AssertID. Citing CDD's comments, the FTC rejected this application.

2. Imperium

Imperium proposed a knowledge-based authentication system (KBA). KBA, which is used by some financial institutions, verifies identity by asking a few "out-of-wallet" questions about things likely to be known only by that individual. CDD commented that the proposal was insufficient in that it did not describe how its methods would be effective at verifying parental consent. Moreover, Imperium had not shown that a KBA system would work in the VPC context where the goal is to ensure the responding person is the child's *parent* rather than to verify identify.

D. Freedom of Information Act requests

On behalf of CDD, IPR has filed two requests under the Freedom of Information Act (FOIA) to obtain information concerning children's privacy. Under the revised COPPA Rule, safe harbor programs must file an annual report with the FTC starting in July 2014, detailing the number of complaints filed against member companies and the type of enforcement the safe harbor used to fix the problems. The FOIA request seeks to have those reports made public.

Another FOIA request seeks documents from the National Institute of Standards and Technology (NIST), which recently granted $1.6 million to Privacy Vaults Online, Inc. (PRIVO) and Verizon for the creation of a VPC mechanism. The FOIA request seeks to obtain PRIVO's grant application and other related information about the request from PRIVO.

V. Low-Power FM Radio

IPR represents Prometheus Radio Project, a nonprofit organization committed to developing and supporting community based radio in communities across the United States. Prometheus was the leading force behind the drafting and passage of the Local Community Radio Act (LCRA) in 2010, which opened up the airwaves for hundreds of new low-power radio stations across the country. In the wake of the LCRA's passage, the Commission began a series of rulemakings that culminated in the creation of a low-power FM (LPFM) application window in late 2013. LPFM stations have a limited broadcast radius of only a few miles, meaning that they are highly local service that is designed to serve communities. In the fall 2013 application window, nearly 3,000 organizations applied for radio licenses to broadcast in their communities.

A. Advising LPFM Applicants

During the fall semester, IPR students helped nearly 60 applicants apply for low-power FM stations. The applicants included community justice organizations, social/health programs, and Native American tribes. The students reviewed each organization's application to ensure it met the Commission's minimum requirements and that the applicant had maximized its chances of obtaining a radio license. After the application window closed, the Commission awarded licenses to about a dozen applicants that faced no competitor. These stations are expected to be on the air before the end of 2014 or in early 2015.

B. Creating a Guide for Organizations that Applied for LPFM Licenses

Other applicants advised by IPR applied for frequencies where they faced competition from other applicants, a situation that the Commission refers to as mutually exclusive (MX) applications. The Commission developed a point system for choosing among MX applications. However, because many groups were expected to claim the maximum number of points, the Commission also allowed applicants with the most points to team up with one or more other applicants in an effort to win the channel. This process, known as voluntary timesharing, allows applicants to aggregate their points and the group with the most points gets the license.

In spring 2014, an IPR student wrote a comprehensive guide for LPFM applicants working with Prometheus to explain the Commission's selection process and provide practical advice. The guide included a detailed breakdown of all the various scenarios applicants could encounter after learning that they were in an MX group. The guide discussed how applicants might negotiate with other groups to create universal or voluntary settlements. It also provided practical tips on the type of information that had to be included in settlement agreements, including a template for the agreements and an example of a hypothetical agreement between two applicants. Prometheus distributed the guide to the LPFM applicants it supported.

C. Supporting the LPFM Service in Commission Pleadings

Full-power FM radio owners have long fought the establishment of the LPFM service due to concerns about the interference they might cause to full-power FM stations. Despite a Congressional study demonstrating that the concerns of full-power stations were unfounded, full-power FMs continue to try to limit the ability of LPFM stations to get on the air. IPR has represented Prometheus in various efforts to defend the LPFM service in the face of challenges by full-powered stations.

1. LPFM Applicant Process Theatre Inc.

In spring 2014, IPR filed an *amicus curiae* statement in support of Process Theatre, Inc., an LPFM applicant in the Sacramento, California market. AMFM Texas Licenses, LLC, which owns a full-power station in Sacramento, filed a petition to deny Process Theatre's LPFM application, arguing that the LPFM applicant had not used an accurate engineering model to show there would not be interference. In particular, AMFM argued that because its engineering study — which used a different method than the one required by the LPFM rules — predicted interference, the application should be dismissed. IPR responded that because Process Theatre used a process approved by the Commission to demonstrate a lack of interference, AMFM's arguments should be rejected. The statement also argued that allowing a full-power station's engineering study to trump an LPFM applicant's interference study put LPFM applicants at a distinct disadvantage.

2. LPFM Applicants in the LA Market

In summer 2014, IPR filed an opposition on behalf of Prometheus to a clarification of the LPFM rules sought by KYLA, a full-power FM station in Los Angeles. The rules allow an LPFM applicant to show that no interference will occur to adjacent channels by showing that its proposed transmitter is located consistent with certain minimum distance requirements. LPFM applicants had to conduct engineering studies showing a lack of interference with such channels. The opposition argued that requiring LPFM applicants to conduct additional engineering studies would be cost prohibitive for most applicants, since they are usually small, community-based nonprofit organizations. Further, requiring such studies after the fact could jeopardize hundreds of LPFM applicants that did not conduct the studies requested by KYLA because they were not required to do so by the FCC's rules.

VI. Accessibility to Telecommunications by Persons with Disabilities

IPR has continued 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 worked closely with a coalition of deaf and hard of hearing consumer advocacy groups, including the National Association of the Deaf (NAD), the Hearing Loss Association of America (HLAA), the Association of Late-Deafened Adults (ALDA), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), and the Cerebral Palsy and Deaf Organization (CPADO).

A. Closed Captions on Television

IPR has worked to ensure that all broadcast, cable, satellite, and other television programming is accessible by means of closed captions as required by the Communications Act and the Commission's captioning rules. Under the Commission's rules, programmers are required to caption their content unless one of the handful of exemptions in the rules applies. In particular, a programmer can petition for an exemption from closed captioning if it can show that captioning would be economically burdensome. In spring 2014, an IPR student analyzed exemption petitions and drafted comments opposing thirteen, primarily on the ground that the petitioner failed to make a sufficient showing. In August 2014, the Consumer and Governmental Affairs Bureau acted on two pending petitions, denying one that TDI had opposed and granting another that TDI did not oppose. The Bureau also summarily dismissed dozens of pending captioning petitions that TDI had previously opposed on the grounds that the petitioners failed to provide the information required for a waiver.

Two petitioners whose applications were dismissed as incomplete sought Commission review of the Bureau's action. Both applications involved requests to exempt religious services recorded for broadcast from closed captioning and raised the same legal arguments. IPR drafted and filed oppositions on behalf of TDI and the other organizations.

B. Improving Commission Processes for Handling Captioning Petitions

In fall 2013, Tom Wheeler was confirmed as the new FCC Chairman. One of his first actions was to seek public comment on how the Commission could improve its procedures to be more responsive to the public. IPR had long been frustrated by the delays and difficulties caused by the Commission's requirement that petitions for exemption from closed captioning as well as comments on those petitions be filed in paper at the FCC's headquarters. Most other FCC proceedings allow electronic filing. IPR drafted comments for TDI and the other consumer groups asking that parties seeking or opposing closed-captioning waivers be able to file electronically. In spring 2014, the FCC adopted an order to allow electronic filing. The comments also asked the Commission to process dozens of pending closed-captioning waiver requests. Subsequently, the FCC summarily dismissed dozens of pending waiver petitions that failed to provide sufficient information.

C. Closed Captioning Controls and User Interfaces

IPR worked with TDI, NAD, and other deaf and hard of hearing consumer advocacy groups to draft comments filed with the FCC related to implementation of the Twenty-First Century Communications and Video Accessibility Act (CVAA). The comments sought to make closed-captioning controls and other accessibility features on televisions, set-top boxes, and other devices more accessible and easy to use. IPR drafted a section of the comments demonstrating that the Commission had ample legal authority under the CVAA to require that accessibility features be readily available on all devices.

VII. Supporting Robust Network Neutrality

IPR drafted comments for the Benton Foundation filed in the FCC's network neutrality proceeding in April 2014. The comments argued that preserving an open Internet was a vital policy goal because vulnerable populations such as seniors and persons with disabilities rely on an open internet to access services designed to help them. They further argued that the proposal to impose network neutrality rules that allowed for "commercial reasonable" practices would be insufficient to protect a vibrant open Internet. Benton was concerned that such case-by-case enforcement would create uncertainty for Internet users, startups, and other companies. Instead, the comments urged the FCC to reclassify the transmission portion of the Internet under Title II of the Communications Act, which would allow the FCC to impose non-discrimination requirements on data transmission, while leaving the content layer of the Internet largely unregulated.