



GEORGETOWN LAW

2015-2016 Annual Report

INSTITUTE
FOR
PUBLIC REPRESENTATION

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

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

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

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

IPR students also must consider questions of strategy, client autonomy, and professional responsibility, the need for careful preparation and planning, and how to mesh client goals with the applicable law and facts. Students have the opportunity to learn oral communication skills and to work with community groups, other public interest organizations, and expert witnesses. Students must assume responsibility for the quality of their own work and for the success of their clients' cases. Most of the work at IPR is collaborative, with the graduate fellows and faculty working with the students at each step of the case. Students learn from

observing the work of experienced attorneys who are practicing law along with them. The students, therefore, not only have the chance to perform and have their work critiqued, but also to observe and critique the performance of their supervisors.

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

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

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

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

FACULTY

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

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

served as editor-in-chief of the *Federal Communications Law Journal*. After graduating from law school, she worked at IPR as a Graduate Fellow and received her LL.M; the law firm of Fisher, Wayland, Cooper & Leader; and the Antitrust Division of the U.S. Department of Justice.

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

Laura Moy, Visiting Assisting Professor of Law, is acting director of the Communications and Technology at the clinic during spring and fall semesters in 2016. Professor Moy is returning to the clinic after having completed a teaching fellowship here from 2011–13. Prior to rejoining the clinic, Professor Moy worked as a Staff Attorney at Public Knowledge and as Senior Policy Counsel at New America's Open Technology Institute. She has written, spoken, and advocated before federal agencies and Congress on a broad range of technology policy issues, including consumer privacy, security research, device portability, copyright, and net neutrality. Professor Moy completed her JD at NYU School of Law and has an undergraduate degree from the University of Maryland. Professor Moy is also a Program Fellow at New America's Open Technology Institute.

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.

Sarah Fox received her J.D. with honors from Georgetown University Law Center, where she was a Legal Research & Writing Teaching Fellow and a member of the Barristers' Council Environmental Law appellate advocacy team. During law school, she interned for the Environment & Natural Resources Division of the U.S. Department of Justice in the Appellate and Law & Policy Sections, as well as for the Honorable Emmet G. Sullivan of the U.S. District Court for the District of Columbia and the Public Citizen Litigation Group. Following law school, she was a litigation associate in the New York offices of Jones Day and Quinn Emanuel Urquhart & Sullivan, and clerked for the Honorable Claire V. Eagan of the U.S. District Court for the Northern District of Oklahoma. A native of Kansas, Sarah received her B.A., *summa cum laude* from the University of Oklahoma.

Patrick Llewellyn received his J.D. from Harvard Law School in 2013, where he was a member of the Harvard Legal Aid Bureau and served on the General Board for the Harvard Civil Rights-Civil Liberties Law Review. At the Bureau, he worked for two years as a student attorney representing clients in government benefits hearings and low-income tenants in Boston Housing Court. He also served on the Bureau's Board of Directors as the Communications Director, helping to plan the Bureau's 100th Anniversary Celebration. After law school, he clerked for the Honorable John T. Nixon on the U.S. District Court for the Middle District of Tennessee in Nashville, TN, and for the Honorable Dorothy Wright Nelson on the

U.S. Court of Appeals for the Ninth Circuit in Pasadena, CA. Patrick received his BS from Auburn University in Biomedical Sciences.

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.

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.

Drew Simshaw earned his J.D. from the Indiana University Maurer School of Law, where he served as an Articles Editor for the Federal Communications Law Journal. Following law school, he served as postdoctoral fellow in information security law and policy and as an analyst with Indiana University's Center for Applied Cybersecurity Research and Center for Law, Ethics, and Applied Research in Health Information. He has published and presented on topics such as privacy, cybersecurity, cloud computing, emerging technology, and the public interest obligations of broadcasters. A Pacific Northwest native and proud AmeriCorps alum, he earned his B.A. from the University of Washington in Seattle.

LAW STUDENTS

FALL 2015

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Connor Cory
John Louis Davidson
Samuel Palmer Goldsmith
John Graham
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Geoffrey Leonard
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Madelaine Harrington
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IPR CIVIL RIGHTS CLINIC

I. CONSTITUTIONAL RIGHTS

A. *Mencias v. Dailey*

IPR represents Erlin Mencias in a case brought in federal court under 42 U.S.C. § 1983 against a police detective who seized Mr. Mencias's work van and tools in an effort to identify a suspect who had been a passenger in Mr. Mencias's van. The detective continued to hold the van and tools to try to coerce cooperation from Mr. Mencias for over a year after the van was searched and the items of evidentiary value removed. We argue that a seizure reasonable at its inception because based on probable cause may become unreasonable as a result of its duration or for other reasons and that the detective violated Mr. Mencias's rights under the Fourth Amendment by continuing the seizure after probable cause had dissipated. We also allege that the detective violated the Fifth Amendment's due process clause by failing to provide Mr. Mencias with information regarding the process for seeking return of his property and by telling Mr. Mencias that his van and tools could be returned only if Mr. Mencias provided information to the police as to the identity and whereabouts of the suspect.

Shortly after we filed suit, the defendant released Mr. Mencias's van and tools, but some items were missing or damaged. We are seeking compensation for the damages suffered by Mr. Mencias as a result of the unconstitutional seizure of his property. Discovery has closed in the case, and we are currently engaged in summary judgment briefing.

B. *Royer v. United States*

Randall Todd Royer is serving a ten-year sentence stemming from his conviction, pursuant to a plea agreement, for aiding and abetting the use of a firearm in relation to a conspiracy to commit a crime of violence, in violation of 18 U.S.C. § 924(c). In June 2015, the Supreme Court held, in *Johnson v. United States*, that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague. Subsequently, in *Welch v. United States*, the Supreme Court held that *Johnson* announced a new rule of constitutional law with retroactive effect on collateral review. IPR agreed to represent Mr. Royer to seek application of the rule announced in *Johnson* to his conviction under § 924(c), because § 924(c) uses language very similar to the unconstitutionally vague language of § 924(e)(2)(B)(ii).

IPR filed a motion in the U.S. Court of Appeals for the Fourth Circuit seeking an order authorizing the federal district court to entertain a successive motion for habeas relief under 28 U.S.C. § 2255. On June 3, 2016, the Fourth Circuit granted authorization, and Mr. Royer’s motion to vacate his sentence was filed in the U.S. District Court for the Eastern District of Virginia the same day. We argue that the court should vacate Mr. Royer’s conviction and sentence under 18 U.S.C. § 924(c) as having been imposed in violation of the Constitution because § 924(c)(3)(B), which defines “crime of violence” for § 924(c)(1), is unconstitutionally vague in light of the new constitutional rule announced in *Johnson* and made retroactive in *Welch*. Accordingly, we have asked the court to set aside Mr. Royer’s § 924(c) conviction and release him from prison. Briefing on the § 2255 motion is complete, and we are awaiting a ruling from the court.

C. *Delaware Riverkeeper Network v. FERC*

IPR represents the Delaware Riverkeeper Network in a due process challenge to FERC’s funding mechanism. We argue that because FERC receives much of its funding from the companies whose natural gas pipelines it regulates, FERC is biased in favor of the companies when it adjudicates pipeline applications. After we filed our complaint in federal district court, FERC and the United States and industry intervenors filed motions to dismiss. We have filed an opposition, and the motions are currently pending.

D. *Heffernan v. City of Paterson*

IPR represented the National Association of Government Employees (NAGE) as amicus in this Supreme Court case addressing whether the First Amendment’s prohibition of retaliation by the government against a public employee for engaging in constitutionally protected political activity extends to retaliation based on a factual mistake about the employee’s behavior. We argued that barring First Amendment retaliation claims where the government was mistaken about the employee’s political speech would discourage employees from engaging in protected activities and would promote inefficiency in government service. In April 2016, the Supreme Court reversed the decision below and held that public employees are protected from retaliation based on an employer’s mistaken belief that the employee had engaged in protected speech.

E. *Spokeo, Inc. v. Robins*

IPR represented fifteen information privacy law scholars as amicus in a Supreme Court case addressing whether an individual has standing to maintain an action in federal court under the Fair Credit Reporting Act (FCRA) against a search engine that gathered and disseminated information about the individual that was incorrect. We argued that the FCRA’s consumer transparency requirements and

remedial provisions represent a carefully crafted bargain that would unravel if consumers could not hold consumer reporting agencies liable for errors; FCRA violations are injuries in fact; and Congress created a remedy in FCRA that recognizes the injury worked by improper disclosure and handling of information in new technological contexts. In May 2016, the Supreme Court vacated the decision below and remanded the case for further consideration of the injury-in-fact requirement for Article III standing.

F. *Beef Products, Inc. v. American Broadcasting Companies, Inc.*

IPR agreed to represent the Consumer Federation of America (CFA) after it was subpoenaed to provide documents and third-party deposition testimony in a lawsuit arising out of an ABC News report about one of the plaintiff's products. We defended the deposition of CFA and successfully invoked associational privilege under the First Amendment to prevent disclosure of information relating to the internal, deliberative processes of the organization.

G. *Koby v. ARS National Service, Inc.*

IPR represents the National Association of Consumer Advocates (NACA) as amicus 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. We filed an amicus brief for NACA 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. The appeal was argued in January 2016. In February 2016, the Court noted that our amicus brief had drawn into question the constitutionality of 28 U.S.C. § 636(c), and certified that fact to the Attorney General. In response, the United States intervened and filed a brief. A decision is pending.

H. *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 the office requirement violates the Privileges and Immunities Clause.

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

Rather than deciding the case based on interpretations by intermediate state courts, the Second Circuit certified the state law question to the New York Court of Appeals—the state's highest court—which had not yet addressed the issue. The Court of Appeals accepted the certified question in May 2014. IPR again represented the amici in front of the Court of Appeals, arguing that the plain meaning of the New York statute was that it required attorneys to maintain a physical office in the state of New York. In March 2015, the Court of Appeals issued an Order agreeing with the amici's interpretation of the statute, and sending the case back to the Second Circuit for final disposition. Oral argument in the Second Circuit was held June 2015. In April 2016, the Second Circuit, in a 2-1 decision, reversed the district court's decision, holding that the New York law does not violate the Privileges and Immunities Clause because it was enacted not for a protectionist purpose to favor New York resident attorneys but, rather, to provide a means of resolving a service concern while allowing nonresidents to practice in the state's courts.

I. Government Worker FBI Investigation

IPR represented a federal government employee who was approached by the FBI and asked to provide information regarding her travel to foreign countries many years prior to the worker's employment with the federal government. The FBI agent insinuated in conversations with the employee that the employee's job with the federal government might be in jeopardy if the employee declined to speak with the FBI. After researching the employee's rights and responsibilities, IPR determined that the employee is under no obligation to speak to the FBI. After IPR began its representation, the FBI abandoned its efforts to interview our client.

II. DISCRIMINATION AND WORKPLACE FAIRNESS

A. *Gonzales v. Marriott Int'l, et al.*

IPR represented Mary Gonzales, a gestational surrogate who was denied lactation breaks by her employer because of her employer's belief that, as a surrogate, Ms. Gonzales was not entitled to the protections of state or federal anti-discrimination laws that protect women with pregnancy-related conditions. IPR filed a complaint on Ms. Gonzales's behalf in federal district court in California, alleging that her employer's denial of her request for lactation breaks equal to those provided to other nursing mothers violated California's Fair Employment and Housing Act and the federal Pregnancy Discrimination Act. The defendant filed a motion to dismiss Ms. Gonzales's claims. After briefing and oral argument, the district court issued a decision denying the motion to dismiss and holding that legal protections for lactating women apply regardless of surrogacy status. 142 F. Supp. 3d 961 (C.D. Cal. 2015). In early 2016, the case was resolved to the parties' mutual satisfaction.

B. *Quintana v. City of Alexandria*

IPR represents Monica Quintana in a case arising under the Family and Medical Leave Act (FMLA). Ms. Quintana was jointly employed by the City of Alexandria and Randstad, a staffing agency. Ms. Quintana informed her supervisors that she needed to miss work for a family medical emergency, and she was granted permission to go. Upon her return, her employers refused to reinstate her to her prior or an equivalent position.

In November 2015, we sued both the City and Randstad in federal district court for the Eastern District of Virginia under a joint employment theory of liability. The district court granted the City's motion to dismiss, holding that it was only a secondary employer and had not taken any action that would expose it to liability under the FMLA. In May 2016, Randstad made an Offer of Judgment under Rule 68 for \$30,000 plus attorney's fees and costs, which Ms. Quintana accepted. Final judgment was entered against Randstad and in favor of the City. We appealed to the U.S. Court of Appeals for the Fourth Circuit only as to the dismissal of the City. Briefing on the appeal has been completed—including an amicus brief filed by the National Employment Law Project on behalf of several non-profits in support of Ms. Quintana—and we expect the court of appeals to set the case for oral argument soon.

C. *Prasad v. George Washington University*

IPR represents Ricca Prasad in a federal lawsuit against George Washington University (GW), asserting claims under Title IX and common law tort and contract

theories. We allege that during her time as a student at GW, Ms. Prasad was subjected to ongoing and severe harassment from a fellow student, and GW failed to take adequate steps to address the harassment.

In June 2015, we assisted Ms. Prasad in filing a complaint under Title IX with the U.S. Department of Education Office of Civil Rights. In October 2015, we filed a lawsuit in federal district court under Title IX and five common law theories. GW moved to dismiss the common law claims, and the court stayed further proceedings pending a ruling on the motion. In June 2016, the Court ruled that Ms. Prasad's lawsuit could proceed on the Title IX claim and four of the five common law claims. The case is currently in discovery.

D. Crockett v. Hybano

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

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

The parties engaged in extensive discovery and motions practice for most of 2015. In November 2015, the parties resolved the case on mutually satisfactory terms. In January 2016, the parties stipulated to the dismissal of all claims against MTM, and Mr. Crockett moved for entry of final judgment against Hybano and Gadosolo for the amount the Court had ordered them to pay Mr. Crockett as a sanction for failure to cooperate in discovery. The Court entered judgment in March 2016, and we began collection efforts, culminating in the filing of a writ of attachment and a motion for judgment of condemnation. The court granted Mr. Crockett's motion and entered a judgment of condemnation in favor of Mr. Crockett for the amount previously ordered by the court.

E. Pineda v. Neighbors' Consejo, Inc.

Katherine Pineda worked for Neighbors' Consejo, Inc., for 19 weeks but was paid for only two weeks of work. IPR agreed to represent Ms. Pineda to recover her unpaid wages and liquidated damages. When Neighbors' Consejo refused to resolve

the matter out of court, we filed suit on Ms. Pineda's behalf in DC Superior Court against Neighbors' Consejo and three of its managing agents, asserting claims under the DC Wage Payment and Collection Law, and the DC Minimum Wage Act, and for breach of contract and promissory estoppel.

All four defendants defaulted by failing to answer the complaint, thereby waiving their opportunity to contest issues of liability. The defendants appeared in the action to preserve their ability to contest the amount of unpaid wages and damages owed to Ms. Pineda, and each defendant ultimately stipulated to the amount owed. In June 2015, the Court entered judgment against the defendants for the full amount of Ms. Pineda's unpaid wages, an additional three times that amount in statutory liquidated damages, plus attorneys' fees and costs.

IPR initiated collection efforts by recording a lien on the real property owned by Neighbors' Consejo, and IPR served post-judgment discovery to identify other assets that might be used to satisfy the judgment. In July 2015, Neighbors' Consejo filed for bankruptcy. We filed a claim in the bankruptcy proceedings on Ms. Pineda's behalf. With the approval of the Bankruptcy Court, property owned by Neighbors' Consejo was sold in March 2016, and Ms. Pineda's judgment was satisfied in full from the proceeds of the sale.

F. *Savage v. FedEx Corp.*

IPR represents Kenneth Savage on appeal to the Sixth Circuit, challenging the Western District of Tennessee's grant of summary judgment to Defendant FedEx Corp. on Mr. Savage's claims of discrimination and retaliation under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Mr. Savage was terminated from his job at FedEx approximately one month after returning from military duty in the US Navy and lodging complaints that FedEx had failed to correctly fund service members' retirement accounts. We argue that the district court failed to apply the correct standard for summary judgment when it decided disputed issues of material fact in favor of FedEx instead of leaving such issues for resolution by the jury. We filed our opening brief in June 2016, and we expect the case to be argued in the Fall of 2016.

G. *Student v. University*

IPR represents a graduate student in her claims against a public university under Title IX. During her time at the university, the student was subjected to persistent sexual harassment by other students and faculty, sexual assault by a faculty member, and retaliation for complaining of the harassment. The university also failed to provide the student with accommodations to which she was entitled as a student with a disability. In May 2016, we filed an administrative complaint with

the Department of Education Office for Civil Rights, and we are engaged in efforts to resolve the matter without litigation.

H. *Worker v. Former Employer*

IPR represented a client who was not paid on time following her discharge from employment. IPR investigated the client's claims, researched potential causes of action and administrative remedies, and calculated the amount of damages owed. Before initiating formal proceedings, IPR sent a letter to the client's former employer demanding that it pay the client liquidated damages under the DC Wage Payment Act for its delay in issuing our client her final paycheck. In October 2015, the former employer paid the amount demanded, the client was satisfied, and litigation was avoided.

III. OPEN GOVERNMENT

A. *Tushnet v. U.S. Immigration and Customs Enforcement*

IPR represents Georgetown Law Professor Rebecca Tushnet in a Freedom of Information Act (FOIA) case against U.S. Immigration and Customs Enforcement (ICE). After an ICE official was reported to have stated at a press conference that critical use of a trademark—such as the profane debasing of a mascot—constitutes trademark infringement that would allow ICE to seize the merchandise as counterfeit, Professor Tushnet sought to determine whether ICE's official policies are based on a misunderstanding of intellectual property law. When ICE refused to cooperate with Professor Tushnet's informal requests for information, IPR drafted and submitted a FOIA request on her behalf in March 2015.

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

ICE failed to provide a substantive response to Professor Tushnet's FOIA request within the required time limits. On June 12, 2015, we filed a complaint in U.S. District Court seeking an injunction ordering ICE to make the requested records available without delay. After we filed suit, ICE made five rolling productions of responsive material, and the Court entered a briefing schedule for cross-motions for summary judgment. We have filed our motion for summary judgment alleging that ICE failed to conduct an adequate search for responsive records and improperly withheld information under FOIA Exemption 7(E). The parties' cross-motions for summary judgment remain pending.

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

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

We filed suit in March 2015, seeking production of the requested records and a waiver of fees. Since we filed suit, ICE has produced some responsive records. The parties have filed cross-motions for summary judgment regarding the adequacy of ICE's search and the propriety of ICE's withholding of certain documents pursuant to several FOIA exemptions. The cross-motions remain pending.

C. Bowles v. Department of Veterans Affairs

In December 2015, IPR filed a complaint in federal district court on behalf of four veterans, alleging that the Department of Veterans Affairs (VA) had violated the Administrative Procedure Act and Privacy Act when it failed to process the plaintiffs' requests for their claims files in a timely manner. The plaintiffs sought access to these records in order to enable them to file for military disability benefits. We sought a declaration that the VA had unreasonably delayed responding to Plaintiffs' requests for access to their records and an order requiring the VA to produce the requested records. After we filed suit, the VA released the plaintiffs' claims files and moved to dismiss the case as moot. In February 2016, the parties stipulated to voluntary dismissal.

D. Public Interest Organization Claw Back Matter

IPR represented a public interest organization in resisting an attempt by a federal government agency to demand the return of records that the agency claimed had been inadvertently disclosed and which contained information that the agency claimed to be protected by the deliberative process privilege. The agency requested return of the records and a list of all disclosures the organization had made as to the information. On behalf of our client, IPR responded to the government's demand by explaining that our client has no legal obligation to return the records or refrain from using the information, and that any attempt to compel our client to produce a list of disclosures would violate our client's rights under the First Amendment. The

agency confirmed that it does not intend to initiate legal action with respect to the disclosure, and the agency has ceased its efforts to recover the records.

E. Bloche v. Department of Defense

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

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

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

The plaintiffs have also filed a motion against three other defendants: the Navy and two subunits of the Department of Defense that establish and implement military health policy. Again, the government filed an opposition and cross motion for summary judgment. The parties completed summary judgment briefing in fall 2012, and the court held a hearing on those motions in December 2012. The court permitted the government to update its explanations for withholding certain Defense subunit records, and IPR supplemented its summary judgment motion based on those updates. In the meantime, the government has begun releasing documents put in issue by IPR's summary judgment motion (particularly some documents held by the Navy). In addition, the U.S. Army has also released documents in response to an informal memorandum the plaintiffs sent to government counsel detailing concerns with the Army's insufficient explanations for

its withholdings. More than three and a half years later, the court still has not ruled on the parties' summary judgment motions.

IV. VOTING RIGHTS

A. *Wright v. Sumter County, Georgia*

IPR represents the Georgia NAACP and the Campaign Legal Center as amici before the U.S. Court of Appeals for the Eleventh Circuit in a case challenging the dilution of African-American voting strength in Sumter County, Georgia. In our brief filed in October 2015, we argue that the district court erred in applying the broad protections of Section 2 of the Voting Rights Act by taking a flawed and formalistic approach to analyzing plaintiff's statistical evidence of vote dilution, and should have allowed plaintiff's claims to proceed to trial. The appeal was argued in March 2016. The court of appeals issued an opinion July 2016, reversing the district court's grant of judgment in favor of defendants because the district court impermissibly weighed evidence and made credibility determinations at summary judgment, and remanded the case to the district court.

B. *Wittman v. Personhuballah*

IPR represented the Voting Rights Institute as amicus in this direct appeal to the Supreme Court in a case involving the standard for proving an equal protection violation based on racial gerrymandering. We filed our brief in February 2016, and the case was argued in March 2016. In May 2016, the Supreme Court dismissed the appeal without reaching the merits, holding that the appellants lacked standing.

C. *Figgs v. Quitman County, Mississippi*

IPR represented attorney Ellis Turnage against a claim by Defendant Quitman County for attorneys' fees following the voluntary dismissal of a Voting Rights Act case in which Mr. Turnage served as lead counsel for the plaintiffs. The underlying litigation was a vote dilution case, in which plaintiffs' challenged the county's drawing of its supervisor districts in such a way as to dilute the African-American vote. Following a period of discovery, and briefing on the county's motion for summary judgment, plaintiffs voluntarily dismissed their claims in January 2016. In February 2016, the county filed a motion for attorneys' fees and costs, asserting that plaintiffs were liable for attorneys' fees because their claims were frivolous, and that Mr. Turnage was liable for attorneys' fees because he had engaged in unreasonable and vexatious litigation.

The Campaign Legal Center represented the plaintiffs in opposing the fees motion, and IPR represented Mr. Turnage. In March 2016, we filed a joint

opposition. In June 2016, the Court denied the county's motion for attorneys' fees, but allowed the county's bill of costs.

IPR COMMUNICATIONS AND TECHNOLOGY CLINIC

I. ACCESSIBILITY TO TELECOMMUNICATIONS BY PERSONS WITH DISABILITIES

IPR continues to represent Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), a nonprofit organization that advocates for improved access to telecommunications, media, and information technology for Americans who are deaf and hard of hearing. In addition to representing TDI, IPR works closely with a coalition of deaf and hard of hearing consumer advocacy groups, including the National Association of the Deaf, the Hearing Loss Association of America, the Association of Late-Deafened Adults, the Deaf and Hard of Hearing Consumer Advocacy Network, Deaf Seniors of America, American Association of the DeafBlind, and the Cerebral Palsy and Deaf Organization.

A. Closed Captions on Television

IPR continues to represent TDI in efforts to ensure that all broadcast, cable, satellite, and other television programming has closed captions. Under the FCC's rules, a programmer can obtain an exemption to the closed captioning rules if it can show that captioning would be economically burdensome. The Commission invites public comment on these requests. Throughout the year, IPR students analyzed exemption petitions to see whether they met the FCC's criteria and recommended whether or not they should be denied. The students then drafted either oppositions or comments in response to each waiver request. Over the last year, IPR filed oppositions or commented on 13 waiver petitions.

Also over the last year, the FCC continued to act on waiver petitions that TDI has previously opposed or commented on. To date, of the 18 orders that have been released, the FCC has denied 11 petitions that TDI opposed, granted short waivers to 3 petitioners that TDI did not oppose, and granted waivers to 4 petitioners that TDI opposed.

B. Improving the Accessibility of User Interfaces for Closed Captioning

In November, IPR helped TDI organize and participate in meetings with FCC commissioners' staffs regarding a draft FCC order addressing the accessibility of user interfaces for closed captioning on digital apparatus and navigation devices used to view video programming. Access to user display settings—such as font, size, and color—is essential to making closed captioning available to consumers. Access to these settings is more important now than ever with the increased volume and variety of both the programming and devices available to consumers, each of which require customization based on a user's particular needs. Following the meetings, the FCC released an Order and Second Further Notice of Proposed Rulemaking that sought comment on a proposal to adopt rules requiring manufacturers and Multichannel Video Programming Distributors to ensure that user display settings are accessible.

IPR students drafted comments on behalf of TDI urging the Commission to adopt a rule that would require user display settings for closed captioning to be accessible from no lower than the first level of a menu on the full range of devices available in the marketplace. The comments, filed in February, argued that the rule would best alleviate the challenges currently faced by consumers who are forced search for settings buried in menus, and that the rule would provide equal access to video programming by removing barriers that currently prevent captions from being readable by many consumers. IPR filed reply comments on behalf of TDI in March supporting the Commission's authority to adopt the proposed rules, which remain pending.

C. Apportioning Responsibility for the Quality of Closed Captions

In January, on behalf of TDI, IPR organized and led meetings with the staffs of FCC commissioners regarding a draft order apportioning the responsibility for the quality of closed captioning among various entities. TDI was joined in the meetings by the National Association of the Deaf and the Hearing Loss Association of America. The draft order proposed to shift from a long-standing video programming distributor ("VPD")-centric responsibility model, to one that apportions the responsibility for the provision, delivery, rendering, and quality of closed captions between VPDs and video programmers.

The coalition of consumer groups expressed to the commissioners' staff members that this responsibility shift would be most effective if VPDs' remaining pass-through and customer service obligations met high standards, and if the apportionment facilitated the swift resolution of consumer complaints. The groups also urged the FCC to require video programmers to certify that they are meeting their new responsibilities, and to require that these certifications be made available on the FCC's website. Finally, the groups expressed support for the creation of a

registry of programmer contact information that would serve the public interest by putting programmers on notice of their captioning obligations, help VPDs resolve captioning complaints from their customers, and assist FCC staff in initiating swift enforcement actions in the event of violations.

On February 19, the Commission voted 4-1 in favor of the order, agreeing with and incorporating many of the positions advocated for by TDI and the consumer group coalition throughout the proceeding. The order stressed that, even after the responsibility shift, VPDs still have an important role in the distribution of captioned programming, and that they should remain fully engaged in ensuring the provision of captions. Because the order resulted in an overall lower burden on MVPDs, TDI believes that MVPDs should be diligent in fulfilling their remaining captioning obligations, and IPR will continue to help monitor the implementation and enforcement of the order.

D. Improving Accessibility by Expanding Consumers' Video Navigation Choices

In April, IPR filed comments on behalf of TDI in response to the FCC's proposal to "unlock the box" by expanding consumers' video navigation choices. Many deaf and hard of hearing consumers experience frustration with their current set-top boxes, including sometimes having to choose between keeping a box that is too old to customize caption settings, or having to pay to upgrade to a box that also includes unneeded features—effectively amounting to a surcharge for accessibility.

TDI expressed in its comments that the FCC's proposal has the potential to spur competition and innovation that would improve the accessibility of multichannel video programming for deaf and hard of hearing consumers. The filing also urged the Commission to make clear that all competitive navigation devices—whether hardware, software, or a combination of both—would be subject to the Commission's accessibility rules, and to ensure that MVPDs would be required to provide competitors with the information necessary to make any competitive devices or applications accessible. TDI filed reply comments in May. Signing on to both sets of comments were the National Association of the Deaf, Cerebral Palsy and Deaf Organization, Deaf Seniors of America, Hearing Loss Association of America, Association of Late Deafened Adults, American Association of the DeafBlind, and Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of Hearing, Gallaudet University.

In June, IPR led a coalition consisting of TDI, the National Association of the Deaf, and Hearing Loss Association of America in meetings with FCC commissioners' staffs and representatives of the FCC's Media Bureau, Consumer and Governmental Affairs Bureau, Disability Rights Office, and Office of General Counsel to discuss key issues necessary to making sure the proposed rules would

ensure that competitive navigation devices would be accessible to deaf and hard of hearing consumers. The Commission is still considering the proposed rules.

E. Transition from TTY to Real-Time Text Technology

For more than 50 years, many people who are deaf or hard of hearing have relied on teletypewriter technology (TTY) to communicate by text over phone lines. Though once considered very useful, the technology has significant limitations and its use is declining. As the nation's phone networks migrate to IP-based environments, the FCC sought comment in April on a proposal to replace TTY requirements with rules for real-time text (RTT) technology. One of RTT's advantages over TTY is that both deaf and hard of hearing users and those with whom they communicate can see what is being typed in real time, enabling more fluid, natural communication. This advantage is especially significant when communicating with 9-1-1, when every second counts.

In July, IPR filed reply comments in the proceeding on behalf of TDI. In the comments, TDI stressed, among other things, the importance of a common implementation standard in order to achieve RTT interoperability across communication platforms, networks, and devices. It also stressed that RTT must be interoperable with telephone relay services so that users can use the same device to communicate with everyone in the community. TDI also argued for a low end-to-end latency for RTT in speech conversations, urged the FCC to make RTT a native, default-activated feature (as opposed to merely being available for download as an application), and highlighted the limitations of text-to-911 (where text is not transmitted in real time), which RTT can overcome. Finally, because many deaf and hard of hearing consumers still utilize TTY, TDI urged the FCC to require that RTT remain backward compatible with TTY technology until TTY is no longer in use. The FCC is still reviewing the proposed rules.

II. POLITICAL BROADCASTING

IPR continues to represent Campaign Legal Center (CLC), Common Cause, and the Sunlight Foundation (Sunlight) in their efforts to ensure that broadcast licensees fulfill their obligation to disclose information regarding the sponsors of political advertisements.

A. Letter to Chairman Wheeler Regarding Pending Political Broadcasting Items

In October, an IPR student helped draft a letter to FCC Chairman Tom Wheeler calling on the Commission to act on several long-pending political broadcasting items initiated by IPR on behalf of CLC, Common Cause, and

Sunlight. The letter explained that action on these items is needed in order to enforce the public file and sponsorship identification requirements of Sections 315 and 317 of the Communications Act with respect to advertisements relating to political campaigns and political matters of public importance. These requirements of these sections are crucial to protecting the right of voters to know by whom they are being persuaded.

Specifically, the letter called on the Commission to grant 11 complaints filed in May, 2014 alleging widespread violations of the Commission's online public file rule; to act on a Petition for Rulemaking filed by the Media Access Project in March, 2011 calling for amendments to the Commission's rules that would conform them to the text of Section 317 by requiring licensees to fully and fairly inform viewers and listeners about the true sponsorship of political advertisement; to grant the October 2, 2014 Application for Review of the FCC Media Bureau's dismissal of complaints filed against two broadcast licensees addressing violations of Section 317; to grant complaints against several broadcast licensees filed in October and November of 2014 addressing violations of Section 317; and to issue a Public Notice detailing the responsibilities of broadcasters in maintaining public files relating to paid political advertisements under Section 315. These matters remain pending.

B. Complaints Regarding Failures to Identify True Sponsors of Political Ads

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

Efforts to obscure the true funding of political messages have proliferated as individuals increasingly turn to political action committees with opaque or misleading names to hide their funders' true identities. As referenced in its October letter to Chairman Wheeler, IPR previously filed complaints on behalf of CLC, Common Cause, and Sunlight against several broadcast licensees in 2014 for identifying the names of super PACs, and not the individual who provided all or nearly all of the funding, as the sponsor. The FCC has not acted on an Application for Review of the dismissal of two of the complaints, and all subsequent complaints remain pending. At the same time, stations continue to air political advertisements with incorrect sponsorship identifications.

In November, IPR sent letters to 18 television stations in Missouri, Florida, Michigan, and Wisconsin that were airing ads identified on air as sponsored by

Independence USA PAC (Independence) instead of Michael Bloomberg, the sole donor of Independence. The letters presented evidence of Bloomberg's funding role and informed the stations that he should be identified the true sponsor in accordance with Section 317 and the FCC's rules. When none of the stations indicated that they would change their sponsor identification practices, IPR filed complaints against all of the 18 stations' broadcast licensees on behalf of CLC, Common Cause, and Sunlight.

The FCC's Media Bureau requested responses from the licensees. An IPR student helped draft and file a consolidated reply to the responses in February arguing that the licensees' responses further demonstrated their failure to comply with their duty to ensure that the advertisements carried contained adequate on air sponsorship disclosures, and that their non-compliance persisted even after they were provided with evidence that their on air disclosures were inadequate. These complaints remain pending before the Commission.

At the same time that IPR filed the complaints against the 18 stations, an IPR student helped draft and send letters to 103 television stations in the top 20 U.S. markets and other markets in the states where the Bloomberg ads were airing, putting those stations on notice that Bloomberg is the true sponsor of Independence USA PAC ads.

C. Supplements to Pending Complaints and Application for Review Regarding Section 317 Violations

In May, an IPR student helped draft a supplement to all complaints regarding violations of Section 317 pending before the FCC, and to the pending Application for Review of the dismissal of two complaints. The supplements highlighted two important studies that establish that television viewers are more likely to be influenced by advertisements when the sponsorship information reflects an unknown, independent group rather than an individual or group identifiable to the viewer. IPR argued on behalf of CLC, Common Cause, and Sunlight that these studies demonstrate that the violations of Section 317 at issue in the items pending before the Commission harm television viewers' ability to assess the credibility of political advertisements. As such, IPR stressed that these violations must be addressed urgently so that they do not continue to occur during present and future elections. The complaints and Application for Review remain pending.

D. Extending Online Public File Rules

In March, IPR secured a major political transparency victory for CLC, Common Cause, and Sunlight as the FCC finally implemented a requirement that all "public inspection files" be uploaded online for anyone to access. Until very recently, the FCC required stations to maintain physical "public inspection files" at

their place of business. These files include many important documents, including political files that must disclose to the public how the stations sell their advertising time for political messages, including ads by candidates themselves or outside groups. For many members of the public inspecting the physical files was difficult or even impossible. Beyond traveling to the station (which could be hundreds of miles away), visitors were often met with skeptical and difficult station employees, some of whom did not even know what the public inspection file was.

In 2012, the FCC cautiously began requiring a small portion of broadcasters to upload their public files in an FCC-hosted online database. At the time, only the top-four broadcasters (NBC, CBS, ABC, Fox) in the top 50 markets had to place their files online. In summer 2013, the FCC sought comment on how that process went. IPR filed comments on behalf of its client at the time, the Public Interest Public Airwaves Coalition, supporting the transition. Receiving very little pushback, the FCC extended the online public file requirement to all broadcasters.

In summer 2014, IPR filed a petition for rulemaking on behalf of CLC, Common Cause, and Sunlight asking the FCC to extend the online public file requirement to cable and satellite providers. This extension was important in part because political ads are increasingly shown on cable and satellite stations, yet escape public review because of the antiquated, paper-only public file rules. The FCC sought public comment in late 2014 and adopted a Notice of Proposed Rulemaking that proposed extending the online requirement to not only cable and satellite providers, but also to radio stations, in part because they too run political ads. IPR filed comments in support of the extension, including to all radio stations.

In January, the FCC adopted an order extending the online filing requirements to cable and satellite providers and radio stations. Many of the requirements went into effect when the order was published in the Federal Register on February 29, 2016. Although this represents a major victory for political transparency, IPR and its clients continue to advocate for improvement to the quality and usefulness of the data in the online public files by encouraging the FCC to adopt a standardized form, and for improving the adequacy of the content uploaded to the online public file.

III. LOW-POWER FM RADIO

In 2010, IPR client Prometheus Radio Project successfully lobbied Congress to pass the Local Community Radio Act (LCRA), which made way for hundreds of new low-power radio stations across the country. After a series of FCC rulemakings to establish licensing criteria, applications were filed in late 2013. Nearly 3,000 organizations applied for these licenses, and by the summer of 2015, the FCC had granted hundreds of construction permits for new low-power FM (LPFM) stations.

In Philadelphia, several organizations applied for an LPFM construction permit. Because only one station can transmit a signal without interference, the Commission applies a time-tested point system to resolve these “mutually exclusive” applications. As is common in densely populated communities, several applicants received the maximum point score. FCC rules and policies encourage tied applicants to “time-share” the station (i.e., divide the airtime among themselves) in order to aggregate their points and thereby break the tie. IPR clients G-town Radio, Germantown Life Enrichment Center, and Germantown United Community Development Corporation, three small, community-oriented nonprofit organizations, along with a fourth organization, the South Philadelphia Rainbow Committee, entered into such an agreement and were awarded the construction permit.

Two non-prevailing applicants petitioned the Media Bureau to deny the permit, arguing that the prevailing applicants violated FCC rules prohibiting LPFM applicants from filing separate applications with the goal of arriving at a timeshare agreement. The Media Bureau denied the petition, and a subsequent petition for reconsideration, finding that there was no such rule and that the applicants behaved in accordance with the Commission’s rules and policies. When one of the non-prevailing applicants, Nueva Esperanza, Inc. (“NEI”) applied to the full Commission for review of the Bureau’s decision, the FCC promptly and unanimously denied the application.

NEI challenged the FCC’s decision in the United States Court of Appeals for the District of Columbia Circuit, and IPR represented G-town Radio, Germantown Life Enrichment Center, and Germantown United Community Development Corporation as Intervenors supporting the FCC. An IPR student helped draft the Intervenors Brief, which was filed in June. An oral argument or decision is expected later this year.

IV. REGULATION OF PRISON PHONE RATES

In 2003, Martha Wright, a grandmother from Washington, D.C., petitioned the FCC for relief from exorbitant long-distance calling rates from correctional facilities. In prisons across the country, phone service is typically provided in each prison by a single inmate calling service provider (“ICS” provider). ICS providers thus enjoy monopoly power in the prisons where they operate. Because inmates have no choice but to use the monopoly provider in their institution, ICS providers have in the past charged extremely high rates, which are primarily borne by their families. The situation is exacerbated by the fact that the ICS companies pay kickbacks to the prisons.

In 2013, the FCC finally acted on Mrs. Wright’s petition and the pleas of tens of thousands of others who asked the FCC over the years to regulate the phone

rates charged by ICS providers. The FCC issued an order limiting the amount that ICS providers can charge. Since then, the FCC passed two more orders further expanding and clarifying its regulation of prison phone rates.

ICS providers and several states and penal authorities have sought judicial review of the FCC's decisions. They challenge the validity of the specific regulations, as well as the FCC's authority to regulate intrastate rates under any circumstances. As the FCC fights before the DC Circuit to defend its regulation of prison phone rates, IPR fights alongside the FCC on behalf of a group of inmates and their family members who have intervened in support of the FCC. In the spring, IPR opposed stay motions seeking to keep prison phone rate caps from going into effect. The Court, with one judge dissenting, granted the partial stay. IPR filed its brief supporting the FCC in the early fall. On a separate but closely related track, in August, 2016, the FCC modified its rate caps. New stay motions were filed shortly thereafter, and IPR joined co-counsel opposing them.

V. CHILDREN AND MEDIA

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

A. Requests for Investigation of Google's YouTube Kids App for Unfair and Deceptive Advertising

Following on a request for investigation we filed with the FTC in April 2015, in November 2015, IPR again asked the FTC to bring an enforcement action against Google for engaging in unfair and deceptive advertising practices in violation of Section 5 of the FTC Act in connection with operation of its YouTube Kids app.

The original request for investigation was filed on behalf of the Center for Digital Democracy (CDD), the Campaign for a Commercial Free Childhood (CCFC), American Academy of Child and Adolescent Psychiatry, Center for Science in the Public Interest, Children Now, Consumer Federation of America, Consumer Watchdog, and Public Citizen, and alleged that Google violated Section 5 through YouTube Kids because 1) videos available on the app intermixed advertising with content in a way that would be impossible for children to understand, 2) videos available on the app violated the FTC's guidelines concerning endorsements in advertising by containing undisclosed paid product endorsements, and 3) videos available on the app violated Google's own advertising policy.

In the November 2015 supplement, IPR acted on behalf of CDD and CCFC to provide additional information regarding the children's media marketplace that illustrates the urgent need for the FTC to take action to stop deceptive and unfair marketing practices taking place on YouTube Kids. The supplement also noted that

although Google had made some changes to the YouTube Kids app since April, none of the changes altered children’s advocates’ prior conclusions contained in the April request for investigation.

As of the release of this annual report, unfair and deceptive marketing practices continue on YouTube Kids, and to our knowledge the FTC still has not taken action to stop these practices.

B. Requests for Investigation of Food and Beverage Companies for Violating Their Own Pledges Not to Advertise Certain Products to Children

Also in November 2015, IPR submitted a request for investigation with the FTC on behalf of CDD and CCFC asserting that several food and beverage companies are violate their own consumer-facing pledges regarding children’s advertising by posting advertisements on YouTube Kids.

The Consumer Food and Beverage Advertising Initiative (“CFBAI”) was created in 2006 by the food and beverage industry to “shift the mix of advertising primarily directed to children . . . to encourage healthier dietary choices and healthy lifestyles.” CFBAI participants develop a “pledge” that incorporates CFBAI’s Core Principles and must “agree to CFBAI oversight and monitoring of their pledges and to be held accountable for failure to comply with their pledges.” The Core Principles include a requirement that advertising primarily directed to children under age 12 meet specific nutrition criteria designed to ensure that the most harmful junk foods are not advertised directly to children. Many prominent food and beverage companies participate in CFBAI, including McDonald’s, Burger King, Coca-Cola, PepsiCo, Mars, Nestlé, Kellogg, General Mills, and Post Foods.

Despite the existence of CFBAI, IPR students discovered that a large number of unhealthful junk food products that do not meet CFBAI nutrition criteria are marketed directly to children via commercials and product promotional videos made available on the YouTube Kids app. In total, IPR research uncovered approximately 600 videos that depicted foods or beverages that do not meet the CFBAI nutrition criteria.

Because Section 5 of the FTC Act prohibits unfair and deceptive trade practices, and because CFBAI participants have publicly pledged not to advertise unhealthful food products directly to children, IPR has alleged that CFBAI participants advertising junk food on YouTube Kids are engaging in unfair and deceptive practices in violation of Section 5. The request for investigation we filed in November 2015 documented a number of offending videos discovered on YouTube Kids and asked the FTC to bring enforcement actions against CFBAI members found to be in violation of their pledge.

As of the release of this report, the FTC still has not taken action to stop these practices.

VI. MEDIA OWNERSHIP

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

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

IPR has been representing civil rights and other public interest groups in litigation over the FCC's decisions on broadcast ownership continuously since 2003, having obtained three decisions from the U.S. Court of Appeals for the Third Circuit reversing the FCC. In decisions known as *Prometheus I* and *Prometheus II*, and *Prometheus III*, the Third Circuit in large part agreed with IPR's arguments, reversed parts of the FCC's orders, and remanded them for [further FCC review](#).

In response to the first of the remands in 2004, the FCC issued a decision in 2008 designed to constitute its mandated 2006 Quadrennial Review. While review of that decision was still pending, the FCC initiated the mandated 2010 Quadrennial Review. Then, in July 2011, in *Prometheus II*, the Third Circuit found that “[d]espite our prior remand requiring the Commission to consider the effect of its rules on minority and female ownership...the Commission has in large part punted yet again on this important issue.” The Court found that “ownership diversity is an important aspect of the overall media ownership regulatory framework” and “re-emphasize[d] that the actions required on remand should be completed *within the course of the Commission's 2010 Quadrennial Review* of its media ownership rules.” The Third Circuit remanded so that the Commission could “justify or modify its approach to advancing broadcast ownership by minorities and

women during its 2010 Quadrennial Review,” and the panel retained jurisdiction over the remanded issues.

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

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

While the FCC’s Media Bureau denied MCH’s complaint, it recognized that such agreements raised public interest concerns. For this reason, in the notice for the 2010 Quadrennial Review, the Commission asked whether it should count for purposes of the ownership limits (known as “attribution”) an ownership interest where a television station was operating another station under a sharing agreement. In its August, 2016 ownership decision, the FCC largely agreed with the position IPR advanced, but its action will not have a retroactive effect as to MCH’s complaint.

A. Appeal of the FCC’s April 2014 Order

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

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

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

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

IPR students researched the extensive record, found relevant case law, and drafted the brief filed for Prometheus in April 2015. IPR also filed a brief for the public interest intervenors in support of the FCC in July 2015, and a reply brief on behalf of Prometheus in August 2015.

During the fall of 2015, IPR students assisted in preparation for oral argument scheduled for early December. Just before argument, the D.C. Circuit finally granted our motion to transfer the case to the Third Circuit. Oral argument in that court was scheduled for April 2016, and Professor Angela Campbell worked with students who participated in a moot court to prepare for arguments. The students studied the oral argument process and went to Philadelphia to attend Professor Campbell's argument.

In May 2016, the Court ruled in favor of IPR on the minority and female ownership issue, directing the Commission to take prompt action to make a determination on a critical definitional issue. It denied IPR's effort to have SSAs (discussed above) treated as ownership interests. The Court largely rejected broadcasters' challenge to the FCC's decision to keep other ownership rules in place, accepting arguments IPR advanced on behalf of intervenors IPR represented supporting that part of the FCC's decision. The FCC responded to the remand in August, 2106, and the fourth round of appeals over the FCC's failure to address low rates of ownership by women and people of color will proceed in the fall of 2016 and into 2017.

VII. PRIVACY OF INTERNET CUSTOMERS

In 2015, as part of its Open Internet Order promulgating rules designed to protect net neutrality, the FCC reclassified broadband as a telecommunications service under Title II of the Communications Act. Title II authorizes and directs the

FCC to regulate service providers in a number of consumer protection areas, one of which is privacy.

Under the privacy provisions of Title II, the FCC is required to protect private information about telecommunications—including broadband—customers, including information about their use of the service. In the broadband context, information about customers' use of the service might include, for example, information about what sites they visit and apps they use, and when, how often, and how much.

In keeping with its statutory obligation to protect the privacy of information that broadband customers necessarily share with their providers, the FCC released a Notice of Proposed Rulemaking in March 2016 proposing a comprehensive and strong set of rules that would broadly empower broadband customers to control how their broadband providers are allowed to use their information.

IPR began representing New America's Open Technology Institute (OTI) in support of strong privacy protections for broadband customers in early 2016. In response to the Notice of Proposed Rulemaking, IPR worked with OTI to draft and file comments and reply comments largely supporting the FCC's strong proposal, and also represented OTI in in-person meetings with policymakers to discuss the proposal. Professor Laura Moy also spoke at several events regarding the proceeding.

VIII. ACCESS TO PHONE AND INTERNET FOR LOW-INCOME CONSUMERS

IPR and its students have worked with the Benton Foundation to file comments supporting the FCC's proposal to reform and expand its Lifeline program for low-income consumers. In the spring of 2016, the Commission followed IPR's position in revising the Lifeline subsidy so that it can now be used for obtaining broadband as well as voice service. In addition to its filings on behalf of the Benton Foundation, IPR has been providing general advice to a broad coalition of civil rights and consumer groups on FCC and appellate procedural issues relating to the implementation of the new rules.

IX. MUNICIPAL BROADBAND NETWORKS

In the fall of 2015, IPR filed two different amicus curiae briefs in the U.S. Court of Appeals for the Sixth Circuit supporting an FCC decision preempting state laws that prohibited municipalities from building and providing publicly-owned broadband service. One brief was for Massachusetts Senator Edward Markey and the second on behalf of a coalition of public interest groups seeking to promote broadband deployment. Unfortunately, in the summer of 2016, the Court reversed the FCC's decision.

IPR ENVIRONMENTAL CLINIC

I. NATIONAL ENVIRONMENTAL POLICY ACT

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

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

The environmental petitioners in the Cove Point case made two strategic decisions early on: first, that someone should argue to the court that FERC had impermissibly ignored the fracking and infrastructure development in the Marcellus Shale that would surely follow from licensure and construction of an export terminal on the Chesapeake Bay; and second, that those arguments would best appear in an amicus brief. IPR answered the call and filed an amicus brief in November 2015 on behalf of a coalition of regional environmental advocates, including several Waterkeeper organizations. The amicus brief carried out the mission of highlighting the connection between the Cove Point terminal and fracking in the Marcellus Shale, and of detailing for the court the very real environmental impacts of that activity for members of the *amici* and their communities throughout the mid-Atlantic. The D.C. Circuit heard oral argument in the case on April 19, 2016; unfortunately, in July 2016, the Court issued an opinion denying the environmental petitioners’ petition for review on all grounds.

B. *Audubon Soc’y of Portland et al. v. U.S. Army Corps of Eng’rs* (D. Or.)

In spring 2015, the U.S. Army Corps of Engineers (“Corps”) approved a plan to shoot thousands of double-crested cormorants, for the stated purpose of protecting endangered juvenile salmon in the Columbia River. The plan appeared to have grown out of Endangered Species Act mitigation measures—called Reasonable and Prudent Alternatives (“RPAs”)—that the Corps and the National Marine Fisheries Service (“NMFS”) developed to avoid altering Columbia hydroelectric dam operations. Several wildlife protection groups brought suit on various grounds, contending, *inter alia*, that the agency did not have the authority to kill the birds, and had failed to consider alternatives that could protect the salmon—such as alter the operations of the Columbia River dams. Representing Animal Legal Defense Fund (“ALDF”), IPR prepared declarations in support of ALDF’s members’ standing to challenge the Corps’ plan, as well as declarations alleging the irreparable harm ALDF members would suffer should bird killing occur.

On May 8, 2015, the U.S. District Court for the District of Oregon heard oral argument on the wildlife organizations’ motion for preliminary injunction. At the hearing, the District of Oregon court denied the motion, allowing the Corps to begin killing cormorants in the Columbia River. The colony began to show signs of collapse in early 2016—around 40 percent of the birds in the colony abandoned their nests. On May 4, 2016, in a related case, the court determined that the Corps and NMFS violated the Endangered Species Act and NEPA by issuing inadequate RPAs for the Columbia River hydroelectric system. In this case, the court asked the parties to brief the validity of the cormorant killing plan, in light of the related May 2016 decision. Briefing has completed and a court decision is imminent.

C. *Friends of DeReef Park v. Nat’l Park Serv. et al.* (D.S.C.)

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

In 2003, the City of Charleston sold DeReef Park to private developers. Five years later, city and state officials sought federal approval of the park's conversion of the DeReef Park covenants to another park, in a different part of the city. Regulations under the LWCF and NEPA require federal officials to conduct an environmental assessment under NEPA and ensure that city and state officials have provided for public notice and participation prior to approving a park's conversion. Neither city nor state officials, however, notified residents that DeReef Park was protected under federal law, and NPS never performed an environmental assessment. In 2012, private development plans for the park began to move forward.

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

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

The NPS remand is ongoing. NPS completed part of its remand in July 2016, but has not placed covenants on a replacement park. Until the City, State, and NPS identify, acquire, and place covenants on a replacement park, the remand process will not be fully complete.

D. Diller Island

In 2000, USACE issued a permit to the Hudson River Park Trust (HRPT) under § 10 of the Rivers and Harbors Act and § 404 of the Clean Water Act for various construction projects related to public park development extending into the Hudson River in Manhattan. The permit covered a project area spanning approximately five miles, from Battery Park to West 59th Street. Under the terms of this permit, as features of the park (e.g. piers) are funded and designed, the applicant must request authorization from USACE to construct the individual

features within the project area. In 2015, HRPT requested authorization under the existing permit for the construction of a replacement pier for Pier 54. This proposed replacement pier, known as “Diller Island,” will be a 2.7 acre “floating” park featuring walking paths, gardens, and a 700-seat amphitheater. Most of the construction for the new pier will take place outside of the existing footprint of Pier 54, and will require adding approximately 550 new pilings, which will be driven into the Hudson River to support its weight.

IPR was asked to evaluate whether NEPA requires USACE to complete environmental analyses before approving the project under the existing permit, as well as whether the project could be approved under the Clean Water Act, which requires a permit. IPR produced an opinion letter regarding the possible forms that approval could take, and recommending legal strategies.

In May 2016, several online news sources reported that the U.S. Army Corps of Engineers gave approval to HRPT to proceed with construction under the Trust’s existing permit. According to these news articles, construction was scheduled for summer 2016. A state court lawsuit filed by the City Club of New York has delayed that construction, however. That lawsuit was dismissed by a trial court judge in April 2016, but the City Club appealed, and in June 2016 the appeals court granted a temporary injunction against construction pending appeal. In September 2016, the appeals court upheld the lower court’s decision, and lifted the injunction. IPR intends to stay abreast of any changes to the project.

II. CLEAN WATER ACT

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

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

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

In July 2015, the Third Circuit issued a unanimous decision to uphold the TMDL. The Farm Bureau petitioned for certiorari to the Supreme Court in November 2015. The Supreme Court denied the cert. petition in February 2016.

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

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

Pursuant to the authority delegated to Virginia under the Clean Water Act, Virginia's State Water Control Board ("SWCB") reissues a "general permit" every five years for various designated polluting activities, such as construction. To operate—and pollute—legally, a person or entity whose activities qualify under a general permit must register with Virginia's Department of Environmental Quality ("DEQ") and agree to abide by the conditions specified in the general permit. Starting in 2013, the SWCB held hearings and invited public comments on a proposed reissuance of Virginia's Construction General Permit. In November 2013, on behalf of the Potomac and Shenandoah Riverkeepers, IPR filed comments with the SWCB to suggest changes to the proposed Construction General Permit. In particular, the comments encouraged the SWCB to revise the permit to provide for greater public notice regarding construction plans and greater public access to site owners' plans for mitigating pollution from those sites.

The SWCB did not take up the suggested changes in the final version of the Permit, and in February 2014, IPR filed suit on behalf of the Riverkeepers in the Virginia Circuit Court for the City of Richmond. The suit challenges the Permit for violating public participation and other requirements of the federal Clean Water Act. DEQ, represented by Virginia's Attorney General, responded by filing

procedural objections, which alleged that the suit was neither filed nor served timely. IPR contested these objections, and presented its arguments at a hearing in November 2014. In August 2015, the Riverkeepers prevailed when the Court denied the State's motion to dismiss. IPR expects to brief the merits of its petition for appeal in Fall 2016.

C. *Kelble et al. v. Comm. of Va.* (Richmond Circuit Ct., Va.) (sludge application permit)

In May 2015, the Potomac and Shenandoah Riverkeepers requested IPR's assistance in taking over another case against the Virginia State Water Control Board that had been pending in the Virginia Circuit Court for the City of Richmond since September 2013. The complaint in this case challenges the State's sewage sludge permitting system. Until 2007, the Virginia Department of Health ("VDH") regulated the application, storage, and temporary staging of sewage sludge in Virginia. In 2007, these regulations were transferred from VDH to the Board, and on February 28, 2011, the Board proposed amendments to the regulations. The Board voted to adopt the proposed Sludge Regulations, and the final Sludge Regulations were signed into law on June 12, 2013. During the amendment process, Riverkeepers submitted comments expressing concerns about permitting application of sludge on karst, a rock formation through which pollutants can discharge directly into surface and ground water, and about modifications to Nutrient Management Plan (NMP) requirements that eliminated an environmentally-protective agronomic rate limit on application.

The State failed to address these concerns in the final version of the Regulations, and the Riverkeepers filed suit against the state in the Virginia Circuit Court for the City of Richmond on September 25, 2013. The State challenged the Riverkeepers' petition on procedural grounds, but the Court denied those challenges and found in favor of the Riverkeepers on April 4, 2014.

After IPR became involved in the case in the summer of 2015, it worked with the Attorney General's office to finalize the record that would form the basis of its petition for appeal. IPR filed an initial brief in support of its petition for appeal on May 27, 2016. Briefing was completed on July 29, 2016, and oral argument was held on September 16, 2016. The court has not yet issued a decision.

III. CLEAN AIR ACT

A. *State of West Virginia, et al. v. EPA, et al.* (D.C. Circuit)

In 2007, the Supreme Court held in *Massachusetts v. EPA* that carbon emissions are "air pollutants" within the meaning of the Clean Air Act (CAA), and that EPA must regulate carbon emissions if it finds that those emissions endanger

public health and public welfare. In 2009, EPA made a finding that carbon emissions contribute to climate change and endanger public health and public welfare, putting it under an obligation to regulate carbon emissions because they harm human health. On October 23, 2015, EPA partially fulfilled this obligation by publishing in the Federal Registrar its Clean Power Plan (CPP). The CPP will reduce carbon emission levels from existing power plants thirty-two percent below 2005 levels by 2030. The Plan will do this by improving heat rate at affected coal-fired power plants and replacing fossil fuel-fired generation with lower-emitting natural gas power plants and renewable energy.

Immediately upon publication of the CPP, a number of states and members of the utility industry filed suit in the D.C. Circuit challenging the lawfulness of the Plan. These and other suits were consolidated into a single case: *State of West Virginia, et al. v. EPA, et al.* As part of this lawsuit, Petitioners raise a number of claims against EPA, including, for example, that language in the Clean Air Act Amendments of 1990 prohibits EPA from regulating carbon emissions from power plants under § 111(d)—the section governing development of emissions standards from existing sources—because power plants are already regulated under § 112 as sources of hazardous air pollutants, as well as alleged procedural improprieties in the way the rule was promulgated. The Supreme Court has stayed EPA’s enforcement of the CPP pending this appeal.

IPR was approached by the American Thoracic Society (ATS), a New York-based education and scientific organization that works to prevent and fight respiratory disease, to present to the Court the dangers of climate change for public health. In furtherance of that goal, IPR wrote a brief on behalf of ATS and a coalition of other medical and public health organizations that outlined the public health impacts of climate change and the ways in which the CPP furthers the public health goals of the Clean Air Act.

Oral argument was held September 27, 2016. A decision is expected in early 2017.

B. *Murray Energy, et al. v. EPA, et al.* (D.C. Circuit)

On October 26, 2015, the United States Environmental Protection Agency (EPA) finalized the rule “National Ambient Air Quality Standards for Ozone” as part of EPA’s ongoing obligation under the Clean Air Act to periodically review and update the National Ambient Air Quality Standards (NAAQS) for harmful criteria pollutants. Under sections 108 and 109 of the Act, EPA is required to establish, review, and revise, as appropriate, NAAQS for each of six harmful criteria air pollutants—including ground-level ozone. EPA revised the level of the primary ozone standard from 75 ppb to 70 ppb.

EPA's standard was challenged by industry petitioners claiming that the standard was too low, as well as by environmental petitioners claiming that the standard was insufficiently protective of the environment and human health. IPR was asked to write an *amicus* brief on behalf of American Thoracic Society and the American Lung Association (together, the "public health *amici*") in support of the environmental petitioners. The public health *amici* wanted to bring to the attention of the D.C. Circuit the significant human health impacts of a deficient primary ozone standard. Both ATS and ALA have urged EPA to select an ozone standard of 60 ppb several times over the last five years. During the most recent ozone review, EPA initially considered a level of 60 ppb, and the Clean Air Scientific Advisory Committee has suggested a range from 60 ppb to 70 ppb five separate times in the past decade. EPA, however, ultimately selected the highest level within that range—70 ppb.

The brief focused on the science linking ozone pollution to a number of adverse health effects, and argued that a standard of 60 ppb should have been selected to adequately protect human health. The second part focused on a specific example of why the selected "form," one of the ways in which ozone levels are calculated, was deficient: the agency's new standards allow air quality regulators to ignore the significant health impacts from wintertime ozone events, such as winter ozone formations documented in the upper Green River basin area in Wyoming. These events are known to cause ozone spikes up to 140 ppb. Finally, the third section of the brief discussed EPA's overreliance on chamber studies and underutilization of population-based, multicity, epidemiological studies.

Briefing was completed in September 2016. Oral argument has not yet been scheduled.

IV. SURFACE MINING CONTROL AND RECLAMATION ACT

A. *Coal River Mountain Watch v. U.S. Department of Interior* (D.D.C.)

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

In 2012, Coal River contacted West Virginia officials to ask them to terminate a Marfork Coal Company's surface mining permit because the company had failed to initiate permitted activities within three years of its permit issuance. West Virginia officials instead granted the Company a "retroactive extension" of its permit. Coal River filed a petition challenging the extension with OSM's Charleston field office. The field office ruled that West Virginia had violated SMCRA. However, West Virginia appealed the field office decision, and OSM's national headquarters overturned it, reasoning that "shall" means "may" in certain contexts.

In fall 2013, IPR filed suit on behalf of Coal River in both the United States District Court for the District of Columbia and the United States District Court for the Southern District of West Virginia. The twin complaints alleged that OSM's approval of the West Virginia permit extension policy was arbitrary and capricious, and that the approval unlawfully bypassed notice and comment rulemaking procedures. In December 2014, IPR amended its District of Columbia complaint to include allegations that OSM has similarly extended a coal mining permit in Alaska. OSM then moved to dismiss the District of Columbia complaint and transfer venue to West Virginia. After briefing and oral argument—including argument by an IPR fellow—Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia denied OSM's motion to dismiss in November 2015. IPR subsequently filed a motion for summary judgment on behalf of Coal River in March 2016. The parties have completed briefing and are now awaiting either oral argument or a decision on the merits from Judge Jackson.

B. *Castle Mountain Coal. et al. v. U.S. Dep't of Interior* (D. Ak.)

Representing Coal River Mountain Watch, IPR submitted an amicus brief in the U.S. District Court for the District of Alaska in a lawsuit challenging OSM's determination that an expired surface mining permit in Alaska remained valid until a regulatory body affirmatively terminated the permit. The lawsuit, filed by Trustees for Alaska and Earthjustice on behalf of a coalition of environmental organizations and tribal communities, tracks a similar theory to the case in which IPR is representing Coal River as a principal party—*Coal River Mountain Watch v. U.S. Department of Interior* (D.D.C.). In the Alaska case, the plaintiffs have challenged OSM's decision declaring that the Usibelli Mine Company has a valid surface coal mining permit. Usibelli received its permit in 1991, did not ask for an extension before its permit terminated in 1996, and did not commence operations until 2010. The environmental and tribal plaintiffs have alleged that Usibelli's surface mining permit terminated and was no longer valid.

In September 2015, IPR filed a motion seeking permission to submit an amicus brief on behalf of Coal River, in support of the plaintiffs' motion for summary judgment. Over the objections of the defendants—including the U.S. Department of the Interior, State of Alaska, and Usibelli Mining Company—the

district court allowed IPR to file the amicus brief. The brief presents the current problems arising from surface mining operations in Alaska and across the United States, the problems that Congress intended to fix when it enacted SMCRA, and the importance of the statutory provision at issue in the lawsuit.

The Alaska federal district court held oral argument on January 29, 2016. On July 7, 2016, the district court issued an opinion finding unlawful OSM's decision that the Usibelli permit remained valid. The court agreed with the plaintiffs' theory—SMCRA unambiguously means that a permit "shall terminate" if a permittee has not commenced operations within three years of receiving the permit, and has not received a valid extension. Because Usibelli did not begin operations within three years of permit issuance and did not seek an extension, OSM's determination that the permit remained valid was not in accordance with law.

V. ANIMAL WELFARE ACT

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

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

The roadside zoo at issue is Cricket Hollow Zoo in northern Iowa, which exhibits exotic animals and farm animals. Even though USDA has found Cricket Hollow Zoo to be in violation of the AWA every time that the agency inspected the zoo, and even though exhibitors must "demonstrate compliance" with the AWA in order to receive a license, USDA has renewed the zoo's annual license to exhibit animals each year. ALDF has challenged USDA's 2014 and 2015 approvals of the zoo's license, as well as USDA's pattern and practice of renewing the zoo's license, in the U.S. District Court for the District of Columbia.

In fall 2014, USDA moved to dismiss ALDF's complaint. In response, IPR contended that USDA needed to prepare a full administrative record at the same time it moved to dismiss the complaint; USDA disagreed. After extensive briefing in early 2015, the district court decided that the agency must prepare an administrative record, but that the record could be less extensive than what ALDF had requested. The parties then briefed USDA's motion to dismiss, and on March 14, 2016, Judge Colleen Kollar-Kotelly granted USDA's motion to dismiss. Judge Kollar-Kotelly held that the Animal Welfare Act was silent on the question of license renewals, and deferred to the USDA's approach of renewing licenses without confirming a facility's compliance with the AWA.

In April 2016, IPR filed an appeal of the district court decision to the D.C. Circuit, on behalf of ALDF and the two individual plaintiffs. The appeal is pending.

B. Animal Legal Def. Fund v. U.S. Dep't of Agric. (D.D.C.)

While IPR's lawsuit against USDA for rubber-stamping the Cricket Hollow Zoo's license renewal applications was pending in district court, the agency brought an administrative enforcement action against Cricket Hollow Zoo. ALDF possesses information that it believes will assist the USDA in its administrative enforcement proceeding, and is concerned that, without ALDF's involvement, the administrative proceeding will be a charade that will merely lead to a slap on the Cricket Hollow Zoo owners' wrists. Thus, on behalf of ALDF, IPR filed a motion to intervene in the administrative proceeding.

The administrative proceeding is currently before a USDA administrative law judge ("ALJ"). Representing ALDF, IPR moved to intervene in October 2015. The Animal and Plant Health Inspection Service ("APHIS"), the branch of the USDA that brought the enforcement proceeding against the Zoo, opposed ALDF's intervention motion. In late December 2015, the ALJ denied ALDF's motion. On behalf of ALDF, IPR administratively appealed the ALJ's decision to the USDA appellate body, called the Judicial Officer. In a short, summary decision, the Judicial Officer denied ALDF's appeal.

On May 13, 2016, IPR filed a complaint in the U.S. District Court for the District of Columbia, challenging the USDA Judicial Officer's decision rejecting ALDF's motion to intervene. The complaint alleges that the USDA violated the Administrative Procedure Act by creating a "flat ban" against ALDF's third party participation—even though ALDF has a significant interest in protecting the animals at Cricket Hollow Zoo, and even though ALDF has information that would assist the decision-maker in the USDA administrative proceeding. The lawsuit is pending before Judge Christopher Cooper.

VI. FEDERAL ADVISORY COMMITTEE ACT

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

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

relevance of the Tobacco Control Act and Federal Advisory Committee Act to the ethical criteria for TPSAC membership.

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

The D.C. Circuit heard oral argument in October 2015, and reversed the district court in a January 2016 opinion. The D.C. Circuit held that the tobacco companies’ alleged injuries were “too remote,” “uncertain,” or, “to put the same thing another way, insufficiently imminent.” Therefore, the tobacco companies’ claims should have been dismissed because the companies did not have standing to bring suit. Because the court held that the tobacco companies did not have standing, it did not reach the arguments presented in IPR’s amicus brief.

B. The Cornucopia Inst. v. U.S. Dep’t of Agric. (W.D. Wisc.)

The Cornucopia Institute (“Cornucopia”) is a public interest organization headquartered in Cornucopia, Wisconsin that represents certified organic farmers and organic farming organizations. Cornucopia’s mission is to defend the integrity of organic food standards and educate both consumers and farmers about organic agriculture issues. Cornucopia is concerned that the U.S. Department of Agriculture (“USDA”) has taken a series of actions that undermine the integrity and independence of the National Organic Standards Board (“NOSB”). The NOSB is a fifteen person, independent advisory committee authorized by the Organic Food Production Act (“OFPA”) that advises the USDA on organic food issues. In particular, the NOSB provides advice to the USDA about the National List. The National List is a list of allowed synthetic chemicals and prohibited natural substances in food certified as organic. Cornucopia is concerned that USDA has recently taken a number of actions that undermine organic standards, in particular by appointing representatives of the “big ag” industry to spots on the NOSB reserved for organic farmers.

In April 2016, IPR filed a complaint on behalf of Cornucopia and two of its individual members in the Western District of Wisconsin, alleging that USDA’s actions violate the OFPA as well as the Federal Advisory Committee Act (“FACA”). Specifically, USDA violated the OFPA by failing to appoint owners or operators of organic farming operations to spots specifically reserved to them by law. Moreover, USDA’s appointment of such unlawful members violates FACA because those appointments amount to a failure to preserve the membership and viewpoint

balance required by law. Finally, USDA engaged in a series of conduct with regard to the NOSB that constitutes undue influence in violation of FACA.

IPR filed an amended complaint in September 2016, and USDA's response to that amended complaint is due October 19, 2016.

VII. FEDERAL POWER ACT

A. *Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n* (U.S.)

Economist Charles J. Cicchetti sought IPR's help with drafting and filing an amicus brief in the Supreme Court to explain why the Federal Energy Regulatory Commission ("FERC") had been correct when, in Order No. 745, it instructed wholesale electricity market administrators to sometimes compensate "demand response"—a product of consumers curtailing their use of electricity—at the same price as electricity.

Sometimes, paying a few people not to consume electricity is cheaper than supplying electricity to everyone who wants it. The classic example of such times is a very hot summer day, when large majorities of residents in a city turn on their air conditioning. This economic principle is referred to as "demand response," shorthand or demand for electricity that responds to incentives or changes in price. In the early 2000s, wholesale electricity market administrators began experimenting with demand response to enable wholesale markets to supply electricity more reliably and at lower prices. As required by the Federal Power Act, which charges FERC with maintaining "just and reasonable rates" in wholesale electricity markets, FERC had approved these diverse uses of demand response as they evolved in the early and mid-2000s. In 2010, FERC proposed a unified approach, which would compensate demand response at the same rate as electricity. FERC was, in industry jargon, proposing to make wholesale markets pay the same for a "negawatt" of demand response as for a megawatt of electricity. FERC revised its proposal more than once in response to comments, eventually issuing Order No. 745. The Order tells wholesale market administrators to pay the same for a megawatt and a negawatt, if the negawatt can be "dispatched" just like electricity and if dispatching it would yield a "net benefit" to wholesale market buyers. At times when dispatching a mix of negawatts and megawatts would cause any buyer to pay more than the cost of solely megawatts, the Order instructed market administrators not to compensate the negawatt provider.

Electricity generators and others challenged the Order in the D.C. Circuit, raising arguments about FERC's jurisdiction and about its prescribed level of compensation. A divided panel struck the Order down on both grounds. First, the court said that FERC, by ordering payments that eventually made their way to curtailing retail electricity consumers, had overstepped its jurisdiction and meddled

with retail markets (the regulatory province of states). Second, the court said FERC's Order would result in "overcompensation" for demand response. Judge Edwards, in dissent, articulated thorough and sharp criticisms of the majority view on both points. Echoing many of the dissent's points, FERC and others sought certiorari on the jurisdictional question. The Supreme Court granted cert. not only on that question, but also on the question of whether FERC had been arbitrary and capricious in ordering wholesale market administrators to compensate some demand response at the same price as electricity.

The brief IPR that drafted with Dr. Cicchetti, filed July 2015, focused on FERC's approach to compensating negawatts. It argued that FERC got the economics right after considering and responding to diverse concerns raised in response to its initial proposal. At oral argument, Justice Breyer gave mention to the amicus brief, calling it "the best brief to read" on the test that FERC designed to determine when demand response would yield a "net benefit." On January 25, 2016, the Court reversed the D.C. Circuit and upheld FERC's demand response rule.

VIII. WILD AND SCENIC RIVERS ACT

A. *Murr v. Wisconsin* (U.S.)

In June 2016, IPR filed an amicus brief in the U.S. Supreme Court on behalf of former Vice President Walter Mondale, the St. Croix River Association, and American Rivers, in a federal takings case. The amicus brief supports the State of Wisconsin and St. Croix County, which are defending their regulations that limit property development along the banks of the federally designated St. Croix River. The state and county regulations were created in accordance with the designation of the Lower St. Croix River as a Wild and Scenic River, under the federal Wild and Scenic Rivers Act.

The petitioners in *Murr* are challenging a zoning ordinance that limits their ability to develop and/or sell a parcel of riverfront land on the St. Croix River. They argue that the regulation—which merges their two substandard adjoining parcels into one parcel—restricts their use of the land to the point that it is a regulatory taking. The legal question at issue in the case is what constitutes the "parcel as a whole," or, in other words, what is the denominator for determining the property's diminution of value.

IPR's amicus brief does not delve into the legal question, and instead seeks to provide a persuasive factual context for the state and county governments' takings defense. The landowner petitioners have attempted to create a narrative in which the petitioners are the "victims" of federal government overreach. The amicus brief aims to counter the petitioners' narrative, by highlighting the attributes of the St. Croix River to make the court sympathetic to the river's federal, state, and local

legal protections. IPR included three photographs of the St. Croix River and its environmental amenities within the brief. IPR's amicus brief, written on behalf of longstanding advocates for the Wild and Scenic Rivers generally and the St. Croix River in particular, is the only amicus brief addressing the river itself.

The petitioners filed their reply brief in late July 2016. Oral argument has not yet been scheduled.

IX. ENDANGERED SPECIES ACT

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

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

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

Oral argument in the case took place September 28, 2015, and the Tenth Circuit's decision on the appeal is imminent.

X. WILD AND FREE-ROAMING HORSES AND BURROS ACT

A. *Am. Wild Horse Pres. Campaign v. Jewell* (10th Cir.)

On November 27, 2015, IPR filed an amicus brief on behalf of four natural resources and administrative law professors, in support of wild horse advocates appealing a U.S. District Court for the District of Wyoming decision to the Tenth Circuit. The brief supports the advocates' challenge to the Bureau of Land Management's ("BLM") removal of over 1,200 wild horses on federally protected lands.

When removing wild horses from public and private land, BLM must comply with the procedures in the Wild Free-Roaming Horses and Burros Act ("WHA"). In 2014, a private cattle-grazing association requested that BLM remove wild horses on both public and private property in areas of Wyoming open space called the "Checkerboard." In responding to that request, BLM decided to remove wild horses from both public and private lands pursuant only to "private land" removal procedures (required by Section 4 of the WHA), circumventing "public land" procedures (required by Section 3 of the WHA).

IPR's law professors' amicus brief argues that under the plain language of the WHA, Congress unambiguously directed BLM to follow Section 3's rigorous procedures before removing wild horses on "public lands." Therefore, the agency's 2014 decision to remove wild horses on the Checkerboard under Section 4—the "private land" removal process—alone, violates numerous principles of statutory interpretation. Alternatively, because the agency presented its novel interpretation that Section 4 authorizes wild horse removal on public lands in just one sentence of its 2014 "Decision Record," without giving opportunity for notice-and-comment on its new reading, BLM's position does not deserve deference from the courts under the *Chevron* doctrine.

On October 14, 2016, the Tenth Circuit issued a short opinion reversing the district court's decision and finding that BLM's actions violated both the WHA and the Federal Land Policy and Management Act, promising a more fulsome explanation in a forthcoming opinion.

XI. HIGHWAY BEAUTIFICATION ACT

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

IPR represents Scenic America in a challenge to the Federal Highway Authority ("FHWA") authorization of digital billboards along federally regulated highways. In 2008, IPR submitted a petition for rulemaking on Scenic America's behalf, asking the federal agency to declare a moratorium on construction of digital billboards, which are bright light-emitting diode displays with advertisements that

change approximately every six seconds. FHWA declined to impose a moratorium, and in fall 2012, Scenic America asked IPR to explore other legal options.

IPR reassessed its earlier legal analysis. In January 2013, Scenic America filed a complaint in the U.S. District Court for the District of Columbia against FHWA and the U.S. Department of Transportation.

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

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

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

In both fall 2014 and spring 2015, IPR filed briefs in the D.C. Circuit in support of Scenic America's appeal. Four nonprofit groups—American Planning Association, Garden Club of America, Sierra Club, and the International Dark-Sky Association—submitted a joint amicus brief in support of Scenic America. The government and industry defendants filed oppositions. An IPR fellow argued Scenic America's appeal before the D.C. Circuit on September 25, 2015. On September 6, 2016, the D.C. Circuit issued an opinion affirming the decision of the lower court.

XII. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, AND EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT

A. *Waterkeeper Alliance v. EPA* (D.C. Cir.)

On December 11, 2015, IPR filed an amicus brief on behalf of two medical organizations—the American Thoracic Society and the American Lung Association—in support of environmental advocates, who have challenged an EPA rulemaking exempting large factory farms from reporting emissions of hazardous air pollutants.

In 2008, EPA promulgated a final rule exempting large factory farms, called concentrated animal feeding operations (“CAFOs”), from having to report releases of hazardous substances into the air from animal waste. Two federal laws would otherwise mandate reporting: the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and Emergency Planning and Community Right-to-Know Act (“EPCRA”). Under EPA’s 2008 rule, the agency justified its industry carve-out by claiming that “based on its experience,” it “cannot foresee a situation where the agency would initiate a response action” based on emissions reporting. Environmental groups, represented by Earthjustice, challenged the EPA exemption rule in the D.C. Circuit in 2009. The incoming Obama administration responded by claiming that it was reconsidering the rule, and asked the appellate court to remand the rule to the EPA, but to also leave the rule in place. In April 2015, after six years of no hint that EPA was planning to revise the exemption rule, the environmental groups returned to court and asked the D.C. Circuit to withdraw its remand to EPA and consider the merits of their challenge to the rule. The D.C. Circuit agreed to consider the challenge.

Earthjustice filed the environmental groups’ opening brief in early December 2015, arguing that the EPA rule is unlawful agency action constituting a carve-out for CAFOs. They argued that the exemption violates the plain terms of CERCLA and EPCRA, which apply to all industries that release hazardous substances into the ambient environment. IPR filed the medical organizations’ amicus brief on December 11. The brief explains the negative impacts of ammonia and hydrogen sulfide gas emissions from CAFOs, and describes how the reporting exemption denies doctors and other health professionals access to the information needed to prevent, diagnose, and treat lung disease and other air pollution impacts.

Industry associations from the meat production industry intervened in the environmentalists’ challenge to the 2008 rule. The parties completed briefing on the challenge in March 2016. The D.C. Circuit’s decision on the challenge is pending.