



GEORGETOWN LAW

2012-2013 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 first amendment and media law, environmental law and civil rights and public interest law, including employment discrimination and the rights of people with disabilities.

This report summarizes IPR's projects over the last year, illustrating the impact of our work on our clients and their communities. All of the projects also serve a clinical education function. IPR gives students and graduate fellows an opportunity to work on unique, large scale projects raising novel legal issues and requiring extensive research and writing.

These projects involve challenging issues and legal materials. For example, most of our projects require students to develop and master extensive factual records that often relate to technical issues such as interactive television or pollution control. Gathering facts and the creation and use of administrative records is an important part of the experience for many of our students.

We also frequently require students 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 in areas such as first amendment and media law or environmental law. With the help of IPR attorneys and the professional staff at the Law Center's library, IPR students explore the uses of these tools.

The 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. As in other Georgetown clinics, 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.

The day-to-day work on cases is supplemented by weekly seminars and weekly clinic meetings at which we review cases and current issues. IPR seminars are an integral part of the students' educational experience. The format and subject matter of the seminars 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. 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.

Students at IPR work with three faculty members and five graduate fellows selected from a national pool of several hundred applicants. The fellows 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 in hearings before federal and state courts and local and federal administrative bodies.

FACULTY

Angela J. Campbell, Co-Director and Professor of Law, joined IPR in February 1988, and is head of IPR's First Amendment and Media Law section. She graduated from UCLA School of Law in 1981 where she was editor-in-chief of the Federal

Communications Law Journal. She spent two years as a Graduate Fellow at IPR, where she concentrated in the communications area and argued two cases before the U.S. Court of Appeals for the D.C. Circuit. After leaving IPR, she worked as an associate at the firm of Fisher, Wayland, Cooper & Leader, and as an attorney at the Communications and Finance Section of the Antitrust Division, U.S. Department of Justice. While at the Justice Department, she was involved in enforcing the consent decree in U.S. v. AT&T, filing comments with the FCC, and investigating mergers.

Professor Campbell's work at IPR is in the areas of communications law and policy. She is particularly interested in the regulation of mass media and new technologies, such as the Internet. She has published articles on media self-regulation, advertising on the Internet, U.S. and Australian children's television regulation, telephone company claims to a first amendment right to offer video programming, and teaching advanced legal writing in law school clinics. She also teaches a seminar on comparative media law. Outside the office, she enjoys spending time with her two children.

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, and state sovereign immunity. 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 two sons, one of whom practices labor law in Washington, D.C., and three grandchildren. Professor Babcock lives with a significant other who is a semi-retired environmental policy analyst and economist, two boundlessly energetic large dogs, and an elderly cat.

Brian Wolfman, Co-Director and Visiting Professor of Law. Professor Wolfman joined the faculty in 2009 after spending nearly 20 years at the national public interest law firm Public Citizen Litigation Group, serving the last five years as the Litigation Group's Director. Before that, for five years, he conducted trial and appellate litigation as a staff lawyer at a rural poverty law program in Arkansas. Professor Wolfman has

handled a broad range of litigation, including cases involving health and safety regulation, class action governance, court access issues, federal preemption, consumer law, public benefits law, and government transparency. He has argued five cases before the Supreme Court (winning four) and dozens of other cases before federal and state appellate courts and trial courts around the country. He directed Public Citizen's Supreme Court Assistance Project, which helps "underdog" public interest clients litigate before the U.S. Supreme Court. He has testified before Congress and federal rules committees, and he is an Advisor to the American Law Institute's project on the Principles of the Law of Aggregate Litigation. Before joining the Georgetown faculty, he regularly taught a course on appellate courts at Harvard Law School and previously taught at Georgetown, Stanford, Vanderbilt, and American. At the Institute, Professor Wolfman directs the Institute's civil rights and general public interest law section.

GRADUATE FELLOWS

Thomas Gremillion received his J.D. from Harvard Law School, where he served as co-chair of the International Law Society and Articles Editor for the Harvard Environmental Law Review. Prior to joining IPR, Thomas served as an associate attorney at the Southern Environmental Law Center in Chapel Hill, NC, where he specialized in transportation and land use issues. He also clerked at the Alaska Supreme Court for Justice Dana Fabe, in Anchorage, Alaska. As a law student, Thomas interned at the Environmental Law Alliance Worldwide

(E-LAW), and at the USDOJ's Environment and Natural Resources Division Appellate Section. A native of South Carolina, Thomas graduated magna cum laude from the University of South Carolina with a B.S. in mathematics and later received his M.A. in international relations from La Universidad Andina Simón Bolívar, in Quito, Ecuador.

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

Anne King received her J.D. with high honors from the University of Chicago in 2008. In law school she participated in the Poverty and Housing Law Clinic, the Housing Initiative Clinic, and the Workshop on Foster Care. She was president of the Public Interest Law Society and a Comments Editor for the University of Chicago Law Review. After law school she clerked for the Honorable Milton I. Shadur of the Northern District of Illinois and worked at Legal Assistance Foundation of Metropolitan Chicago, the National Women's Law Center, and a small civil rights firm in DC. Anne received a BA from the University of

Chicago in comparative literature and after college she served as a Teach for America corps member in Baltimore, MD.

Aaron Mackey graduated from the University of California, Berkeley School of Law, Order of the Coif, in 2012. During his time in law school, Aaron served as a senior articles editor for the Berkeley Technology Law Journal and participated in the Samuelson Law, Technology & Public Policy Clinic. Upon graduating law school, Aaron was the Jack Nelson Freedom of Information Legal Fellow at the Reporters Committee for Freedom of the Press. Prior to attending law school, Aaron worked as a reporter at the Arizona Daily Star in Tucson, covering local government, the military and higher education. Aaron earned his bachelor's degree in journalism and English from the University of Arizona, where he served as editor in chief of the university's independent student newspaper, the Arizona Daily Wildcat. Aaron lives in Virginia with his wife Ashley and their dog, Bailey.

Eric Null received his J.D. from Cardozo Law School in 2012, where he was Senior Articles Editor of the Cardozo Arts & Entertainment Law Journal. He first became interested in communications, media, and intellectual property law as a second-year law student at Cardozo. His research was included in *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age* by Susan Crawford and *Infrastructure: The Social Value of Shared Resources* by Brett Frischmann. 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. During law school he worked as a summer associate at the New York City-based IP law firm Ladas & Parry and as a litigation law clerk at Sobel & Feller. He was also a Heyman-ACCA In-house Counsel intern at the fashion company Stuart Weitzman. Since graduating, he has taken various Washington D.C.-

based fellowships in the communications field, including positions at Public Knowledge and on the House of Representatives' Communications and Technology Subcommittee. He maintains a twitter account @ericnull where he reflects on technology, telecom, and IP topics.

LAW STUDENTS

FALL 2012

Civil Rights & Public Interest Law

Zach Bench
Rachel Evans
Katherine Florio
John Goza
Karin Herzfeld
Livhu Ndou

Communication & Media Law

Victoria Ajayi
Jordan Blumenthal
Amanda Burkett
Hillary Hodsdon
Jessica Lee
Jessica Wang

Environmental Law

Carolyn Cadena
Chelsea Holland
Melissa Lynch
Nicole Meyer
Bruce Strong
Natalie Veltman

SPRING 2013

Civil Rights & Public Interest Law

Jeremy Blasi
John Didday
Amanda Finlay
Sandy James
Megan Gibson
Adam Wesolowski

Communication & Media Law

Diana Cohn
Brendan Forbes
Sarah Gordon
Dashiell Milliman-Jarvis
Amber Robinson
Margarita Varona

Environmental Law

Anna Ajello
Katharine Fendler
Jordana Hausman
Gabriel Maser
Ingrid Seggerman
Katherine Wright

CIVIL RIGHTS AND PUBLIC INTEREST LAW

A. Employment Discrimination

1. *Hairston v. Boarman*

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

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

In September 2008, IPR filed suit on Mr. Hairston's behalf. GPO responded with a motion to dismiss, claiming that Mr. Hairston failed to

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

In spring of 2011, GPO filed a motion for summary judgment, arguing that the agency had a non-discriminatory reason for canceling Mr. Hairston's promotion. IPR opposed the motion, arguing that the evidence indicates that GPO's reason was false and pretext for discrimination. The court granted summary judgment to GPO in January 2013, and IPR filed an appeal to the D.C. Circuit on Mr. Hairston's behalf. GPO moved for summary affirmance of the district court's decision, which IPR opposed. Briefing on GPO's summary affirmance motion was completed in May 2013, and the parties await a decision on whether Mr. Hairston's appeal may be heard on the merits.

2. *Eley v. Vance-Cooks*

IPR represented Melvin Eley, an African-American who had worked for the Government Printing Office (GPO) for decades but had repeatedly been denied promotions on the basis of race and retaliation. After Mr. Eley was denied a promotion in 2001, he filed an

EEO complaint, and IPR represented him. GPO settled that matter favorably to Mr. Eley in 2003, but GPO continued to deny Mr. Eley promotions for which he was qualified.

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

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

3. *Batson v. BB&T*

IPR represents DuEwa Batson, a former employee of a BB&T bank

branch in Easton, Maryland. Ms. Batson worked as a bank teller, and she was often assigned to work on Saturdays. In November 2008, Ms. Batson converted to the Hebrew Israelite religion, which strictly observes the Sabbath from Friday evening through Saturday evening. In accordance with her religious practice, Ms. Batson refrains from all work on Saturdays and spends much of the day worshipping at her temple.

After her conversion, Ms. Batson explained to her bank manager and the regional human resources (HR) representative that she would no longer be able to work on Saturdays. They agreed to accommodate Ms. Batson's religious practices. However, in April 2009, the bank's manager was replaced. The new manager and the same regional HR representative informed Ms. Batson that the bank would no longer accommodate her religious observances. Ms. Batson refused to work on Saturdays, and she was fired.

Ms. Batson filed a complaint with the Equal Employment Opportunity Commission, which issued a determination in her favor, but did not prosecute her case. In June 2011, IPR filed a Title VII complaint in federal district court on Ms. Batson's behalf, alleging that the bank discriminated against her on the basis of religion and in failing to accommodate her religious observances. Following a period of intense discovery, BB&T filed a motion for summary judgment, which IPR opposed. In September 2012, the court denied BB&T's motion for summary judgment, holding that Ms. Batson had raised genuine issues of material fact as

to both her failure to accommodate and disparate treatment claims.

4. *Brooks v. MSPB*

Patricia Brooks works in the information technology department at the Merit Systems Protection Board (MSPB), a federal government agency, where she has been discriminated against because of her race (African-American) and sex (female) and retaliated against due to complaints of discrimination. Ms. Brooks was subjected to a hostile work environment consisting of, among other things, downgraded performance ratings resulting in lost bonuses, professional isolation, public harassment, ridicule, and scrutiny by her supervisors, and a false accusation of time fraud.

Represented by other counsel, Ms. Brooks filed a district court complaint alleging race and sex discrimination and retaliation. MSPB filed a motion for summary judgment, which the district court granted on the basis that a series of incidents like those Ms. Brooks experienced can never give rise to a hostile work environment claim.

IPR now represents Ms. Brooks on appeal. In September 2012, the MSPB filed a motion for summary affirmance, which IPR successfully opposed. The parties completed merits briefing on the appeal in summer 2013. IPR argued that Ms. Brooks had provided sufficient evidence for a jury to find a hostile work environment and that the district court erred in failing to consider a discrete retaliation claim. IPR now awaits oral argument and a decision.

5. *Freeman v. Dal-Tile*

Represented by other counsel, Lori Freeman brought a Title VII and Section 1981 lawsuit against her former employer, Dal-Tile Corporation, alleging a hostile work environment based on race and sex, retaliation, and constructive discharge. She later added a civil obstruction of justice claim under North Carolina state law after it emerged during discovery that Dal-Tile had destroyed potentially relevant emails. Dal-Tile filed a motion for summary judgment, which the district court granted.

IPR now represents Ms. Freeman on appeal in the U.S. Court of Appeals for the Fourth Circuit. Briefing is scheduled for the fall 2013 semester.

B. Open Government

1. *McBurney v. Young*

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

University, sought information from Virginia public universities as part of a journalism course she teaches.

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

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

IPR appealed the decision to the U.S. Court of Appeals for the Fourth Circuit, and, in July 2010, after oral argument, the Fourth Circuit affirmed the district court's decision to dismiss

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

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

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

2. *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 but has not yet ruled. However, the court permitted the government to update its explanations for withholding certain Defense subunit records, and IPR supplemented its summary judgment motion based on those updates. In the meantime, the government has begun releasing documents put in issue by IPR's summary judgment motion (particularly some documents held by the Navy). In addition, the U.S. Army has also released documents in response to an informal memorandum the plaintiffs sent to government counsel detailing concerns with the Army's insufficient explanations for its withholdings.

3. *Benavides v. Bureau of Prisons*

Eduardo Benavides, a federal prisoner, filed a Freedom of Information Act (FOIA) request with the Bureau of Prisons (BOP) seeking digital audio

recordings made by BOP of conversations between him and his attorney. After BOP denied his request, Mr. Benavides filed a *pro se* complaint in federal district court. BOP moved for summary judgment, claiming that the recordings are exempt from disclosure under FOIA Exemption 7(C) because they are law enforcement records and because Mr. Benavides's attorney has a personal privacy interest in the recordings. IPR agreed to represent Mr. Benavides.

In May 2010, IPR filed an opposition to BOP's motion for summary judgment and a cross-motion for summary judgment. IPR primarily argued that an attorney has no personal privacy interest in attorney-client conversations during which only the client's case was discussed. IPR also argued that the recordings were not law enforcement records. The district court held that the government had not shown the recordings were not law enforcement records and did not reach the attorney privacy issue. However, the district court declined to grant IPR's cross-motion for summary judgment and invited BOP to produce more evidence that the records constituted law enforcement records and to file a second motion for summary judgment. In June 2011, the parties completed briefing their second cross-motions for summary judgment, which involved additional declarations on both sides and new summary judgment briefs.

In two additional decisions issued in spring 2012, the court largely ruled in Mr. Benavides' favor, giving BOP the choice of either releasing the records or producing transcripts of the relevant audio recordings. BOP

ultimately released the audio recordings sought by Mr. Benavides, and the case was dismissed on its merits. IPR has moved for an award of attorney's fees, and the parties are trying to settle the fee dispute before submitting it to the court for resolution.

4. *Southern Migrant Legal Services v. Range*

Southern Migrant Legal Services (SMLS) is a legal services organization that provides free legal services to indigent migrant agricultural workers in six southern states. To assist in its advocacy, SMLS frequently files state and federal freedom of information requests seeking documents about the employers of migrant workers. The migrant worker visa program (the H2-A program) is a heavily regulated joint federal-state program.

In 2007, the Mississippi legislature amended its labor laws and classified H-2A documents as confidential, permitting the documents to be withheld under the Mississippi Public Records Act. SMLS has requested H-2A records under the Public Records Act from the Mississippi Department of Employment Security (MDES) several times, and MDES denied each request, citing the new law.

In July 2010, IPR filed a complaint in federal district court in Mississippi on behalf of SMLS. The § 1983 complaint alleged that MDES's withholding of H-2A records violates federal law because a federal regulation requires states to release H-2A documents. MDES filed a motion to dismiss, arguing that SMLS lacked a right of action to challenge the

Mississippi Public Records Act. IPR amended its complaint to add a preemption claim under the Supremacy Clause, and MDES filed a second motion to dismiss. IPR then filed a motion for summary judgment on the merits, arguing that the Mississippi statute making H-2A records confidential is preempted by federal law requiring the disclosure of H-2A records. Summary judgment briefing was completed in February 2011, and the court held a partial hearing in July 2012. The parties await decisions on all the motions.

5. *Nicholls v. OPM*

Federal law prohibits men who fail to register with the Selective Service from working for the federal government unless they can show that their failure to register was not knowing and willful. The Office of Personnel Management (OPM) makes the knowing and willful determination.

In April 2011, suspicious that OPM bases its determinations on factors other than whether the failures to register were knowing and willful, IPR staff attorney Leah Nicholls filed a FOIA request with OPM. She sought documents reflecting the numbers of men not hired or fired for their failure to register as well as documents related to appeals concerning the termination or failure to hire men who failed to register. Over the telephone, OPM indicated to Ms. Nicholls that it lacked documents responsive to her request, but she never received a written response.

In September 2011, IPR filed a complaint on Ms. Nicholls' behalf

against OPM in federal district court, alleging that OPM never responded to her request. After failed settlement discussions, the parties filed cross-motions for summary judgment. OPM argued that it lacked responsive documents. IPR contended that OPM had failed to do a sufficiently thorough search for documents reflecting the numbers of men terminated or not hired and that OPM read the request for knowing and willful appeals too narrowly.

The district court substantially agreed with IPR and granted summary judgment to Ms. Nicholls in a May 2012 order. The court required OPM to search for responsive records possessed by one of its subdivisions and ordered OPM to produce non-exempt records related to appeals from knowing and willful determinations. After filing a motion for attorney fees and costs in May 2012, IPR reached a monetary settlement with OPM.

6. *Nicholls Administrative Appeal*

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

On Ms. Nicholls' behalf, IPR administratively appealed the fees, arguing that Ms. Nicholls' request was

for non-commercial educational use and therefore qualified for a waiver of the search and review costs. Further, IPR argued that Ms. Nicholls was also entitled to the public interest fee waiver and was, therefore, exempt from having to pay the copying costs as well. In April 2012, OPM's General Counsel determined that the request qualified for the educational waiver of search and review costs, thereby reducing the costs to approximately \$250, and remanded the public interest fee waiver question. On remand, OPM has released some responsive records and IPR awaits the release of further records.

C. Class Actions

1. *Hayden v. Atochem North America*

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

In March 2010, IPR, on behalf of class member Ralph Klier, submitted a competing proposal, arguing that the law required the court to make an additional *pro rata* distribution of funds

to the most seriously injured class members. Alternatively, IPR argued that the funds should be distributed to a charitable cause with a strong nexus to the issues in the class action, such as Texas A&M's School of Rural Public Health, which researches the carcinogenic effects of pesticides on humans in Texas.

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

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

2. *Briggs v. United States*

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

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

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

3. *Hecht v. United Collection*

The federal Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from engaging in various forms of deceptive and unfair debt

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

4. *Day v. Persels & Associates LLC, et al.*

In this case, opponents of a consumer class action settlement have appealed to the Eleventh Circuit. IPR filed an amicus brief in support of those opponents on behalf of the National Association of Consumer Advocates

making several arguments, the most prominent of which is that the settlement's approval below was unconstitutional because it was entered by a magistrate judge, not an Article III district judge. Magistrate judges may, under 28 U.S.C. § 636(c), enter final appealable judgments *with the consent of the parties*. We maintain that the use of the magistrate judge here was impermissible because the absent class members could not, and did not, consent. In April 2013, the Eleventh Circuit heard oral argument, in which IPR participated. We now await a decision.

D. Other Matters

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

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

Mr. Elgin appealed his termination to the Merit Systems Protection Board (MSPB), arguing that his termination was unconstitutional, and the MSPB dismissed his appeal for lack of jurisdiction. Mr. Elgin, joined by Mr. Lawson, Mr. Tucker, and Mr. Colby, then filed a complaint in Massachusetts

federal district court, arguing that the lifetime ban on federal employment for men who fail to register is a Bill of Attainder prohibited by the Constitution and that it violates their constitutional equal protection rights because the bar on employment only applies to men. The district court held that it had jurisdiction to consider the plaintiffs' claims, but decided against them on the merits. Mr. Elgin, Mr. Lawson, Mr. Tucker, and Mr. Colby appealed, and a majority of the First Circuit panel held that it lacked jurisdiction over their constitutional claims because the Civil Service Reform Act's scheme for addressing the grievances of federal employees impliedly precludes federal district court jurisdiction over employees' constitutional claims.

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

In June 2012, the Supreme Court held, 6-3, that the Civil Service Reform Act requires federal employees to bring their equitable constitutional claims in the MSPB, even if the MSPB cannot grant the relief sought. In step with arguments made by the Solicitor General, the Court reasoned that the Federal Circuit could decide employees'

claims on appeal even if the MSPB could not. Justice Alito, joined by Justices Ginsburg and Kagan, dissented for the reasons outlined in IPR's brief.

2. *Schoenefeld v. New York*

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

In the Second Circuit, IPR filed an amicus brief supporting Ms. Schoenefeld on behalf of twenty-two members of the New York bar who are not residents of New York and whose legal practices suffer because of the office requirement. IPR argued that the statute places significant additional burdens on out-of-state attorneys that cannot be justified by any legitimate New York interest. Because those burdens are only placed on non-residents, IPR argued that that the office requirement violates the Privileges and Immunities Clause. Oral argument was heard in October 2012, and we await a decision from the Second Circuit.

FIRST AMENDMENT AND MEDIA LAW

A. Media and Youth

IPR has continued to work with a range of clients to protect children from inappropriate marketing and invasions of privacy.

1. Comments on Revisions to COPPA Rule

IPR played a major role in the adoption of the 1998 of the Children's Online Privacy Protection Act (COPPA). COPPA generally prohibits websites or online service providers directed at children or that have actual knowledge that a user is a child, from collecting or using a child's personal without first providing adequate notice to a parent and obtaining advance, affirmative parental consent. The Federal Trade Commission (FTC) is charged with implementing and enforcing COPPA. In summer 2010, the FTC began a rulemaking proceeding to update its rules in light of new developments in technology and marketing practices.

In September 2012, IPR filed comments in response to the FTC's request for supplemental comments on proposed revisions to the COPPA rules. IPR students drafted comments on behalf of a eighteen organizations including the Center for Digital Democracy (CDD), American Academy of Child and Adolescent Psychiatry, Campaign for a Commercial-Free Childhood, Center for Media Justice, Center for Science in the Public Interest, Consumer Action, Consumer Federation of America, Privacy Rights

Clearinghouse, Public Citizen, and the Praxis Project (collectively “Children’s Privacy Advocates”). The comments generally supported the Commission’s revised proposals. However, they opposed changing the definition of “directed to children,” because it would undercut the other beneficial proposals and lessen privacy protections for children.

Our comments had a substantial impact on the outcome of the proceeding. On December 19, 2012, the FTC issued an Order that significantly strengthened protections for children’s privacy. Most importantly, the FTC expanded the definition of personal information to include persistent identifiers, geolocation information, and photos, videos and audio files. The revised rules also make clear that behavioral advertising to children is prohibited in the absence of parental notice and consent. In addition, they clarify that websites and online services directed to children are responsible for COPPA compliance by third parties operating on their site or service, and where third parties have actual knowledge of a child, they are also responsible. The FTC Order cited the IPR comments 25 times.

Despite industry attempts to delay the effective date, the revised rules took effect July 1, 2013. IPR has been working with Center for Digital Democracy to educate parents and child advocacy organizations about the revised rules.

2. Request to Investigate Refer-a-Friend Features on Children’s Websites

In August 2012, IPR filed with the FTC five Requests for Investigation on behalf of CDD and sixteen other consumer, media, and youth advocacy organizations. We asked the FTC to investigate and bring enforcement actions against McDonald’s Corporation, which operates HappyMeal.com; General Mills, Inc., which operates ReesesPuffs.com and TrixWorld.com; Doctor’s Associates, Inc., which operates SubwayKids.com; Viacom, Inc., which operates Nick.com; and Turner Broadcasting Systems, Inc., which operates CartoonNetwork.com.

Each of these websites are directed to children and use a marketing tactic known as “refer-a-friend” to induce children to engage in viral marketing to other children. The websites invite children to submit both their own personal information as well as personal information of their friends without obtaining the express and verifiable consent of parents as required by COPPA. Even though the FTC has not taken public action on these requests, the companies named in the requests have apparently stopped using this marketing technique.

3. Requests to Investigate Mobile Apps Directed to Children

In December 2012, IPR students filed two Requests for Investigation with the FTC on behalf of the CDD. Both alleged that mobile apps directed at children were collecting personal information in violation of COPPA.

One request alleged that Mobbles, a mobile game that lets children “catch” virtual pets based on their real location, failed to comply with COPPA’s requirement to post clear and understandable notice of its privacy practices regarding children on its home page and at each area of the service that collected information from children. Mobbles also did not comply with COPPA’s requirement to obtain verifiable parental consent before collecting information such as email addresses from children.

The other request alleges that Nickelodeon and Playfirst falsely represented that the children’s mobile game SpongeBob Diner Dash collects personal data from users “in accordance with applicable law, such as COPPA,” when in fact the app neither provides the type of notice required by COPPA, nor makes any attempt to obtain prior, verifiable parental consent required by COPPA.

4. Requests to Investigate “Educational” Apps for Babies

On August 7, 2013, IPR filed, on behalf of its client Campaign for a Commercial Free Childhood (CCFC), requests for investigation alleging that Fisher-Price and Open Solutions were engaging in deceptive and unfair trade practices by marketing some products as “educational” for babies.

Open Solutions responded by changing its marketing to eliminate the deceptive claims, and CCFC withdrew its request with regard to Open Solutions. However, Fisher-Price is continuing to promote its mobile apps as

appropriate for babies as young as six months, claiming that its apps will improve very young children’s learning and skills. However, we could find no evidence to substantiate Fisher-Price’s claims, while studies suggest that allowing very young children to use apps may be harmful. Thus, we asked the FTC to stop these deceptive practices.

B. Accessibility to Telecommunications by Persons with Disabilities

IPR has continued to represent Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), a non-profit organization that advocates for improved access to telecommunications, media, and information technology for Americans who are deaf or hard of hearing. In addition to representing TDI, IPR worked closely with a coalition of deaf and hard of hearing consumer advocacy groups, including the National Association of the Deaf (NAD), the Hearing Loss Association of America (HLAA), the Association of Late-Deafened Adults (ALDA), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), and the Cerebral Palsy and Deaf Organization (CPADO).

1. Closed Captioning of Internet-Delivered Video and Video Device Accessibility

In October 2010, President Obama signed into law the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”), a landmark update to the Americans with Disabilities Act, the Television Decoder Circuitry Act, and the

Telecommunications Act of 1996. The CVAA requires substantially improved access for people with disabilities to advanced communications services and video programming content and devices. Among other things, the CVAA requires the FCC to implement regulations requiring closed captions for Internet Protocol (“IP”)-based video programming services and improvements to the captioning capabilities, user interfaces, and other accessibility features of video programming devices.

Following its work implementing the IP captioning portions of the CVAA from 2011-2012, IPR represented TDI during the summer of 2012 in opposing a petition for waiver from the rules by a large coalition of video programming industry members. The FCC partially denied the petition. IPR attorneys also joined representatives of TDI and other deaf and hard of hearing consumer groups to hold numerous meetings with FCC staff and industry representatives.

In fall 2012 and spring 2013, IPR students tested more than a thousand IP-delivered videos for compliance with the FCC’s rules. As a result of the testing, IPR filed a complaint against Amazon.com for non-compliance with the rules and filed two extensive reports with the FCC regarding the state of IP captioning.

2. Accessible Emergency Information and Video Description

IPR continued its work on the implementation of the CVAA by representing TDI before the FCC in a proceeding regarding the accessibility of

emergency information and audio description of video programming. IPR urged the FCC to consider the unique needs of the deafblind community, and IPR students made numerous presentations to FCC staffers.

3. Closed Captions on Television

IPR also worked to support TDI’s continuing efforts to achieve ubiquitous closed captions on broadcast, cable, satellite, and other television programming. In 2012 and 2013, IPR filed comments and oppositions regarding more than 70 new petitions for exemptions from the closed captioning rules.

4. Amicus Brief in *Greater Los Angeles Agency on Deafness v. CNN*

IPR also assisted in efforts by the deaf and hard of hearing community to attain closed captioning through the courts. In *Greater Los Angeles Agency on Deafness v. Cable News Network, Inc.*, cable network CNN filed an anti-SLAPP (Strategic Lawsuit Against Public Participation) motion against a Los Angeles deaf organization seeking to require captioning on CNN.com under California disability law, arguing that its failure to caption its videos was protected by the First Amendment. IPR filed an amicus brief with the Ninth Circuit Court of Appeals on behalf of TDI, NAD, and HLAA, arguing that closed captioning regulations were consistent with the First Amendment. The case remains pending.

5. Accessibility and Intellectual Property

Finally, IPR continued its work toward harmonizing accessibility and intellectual property policy. First, IPR filed comments before an FCC proceeding considering the problem of patent trolls suing telecommunications companies for complying with the FCC's 911 rules. TDI urged the Commission to proceed with caution to avoid collateral damage to its public safety regime, including rules designed to ensure access to emergency services for people with disabilities.

IPR also filed an amicus brief in the Second Circuit Court of Appeals on behalf of more than 15 accessibility organizations and researchers in the *Authors Guild v. Hathitrust* case, which involves efforts by university libraries to make their collections accessible to patrons with disabilities. IPR chronicled the extensive history of Congress's efforts to make copyrighted works accessible to people with disabilities, and urged the Court to conclude that the accessibility efforts of libraries constituted non-infringing fair uses.

C. Media Ownership

IPR has continued to work with its clients, which include the Office of Communication, Inc. of the United Church of Christ, Common Cause, and National Organization for Women, as well as other public interest organizations such as Free Press and the Leadership Conference and Civil and Human Rights to diversify media ownership.

1. Efforts to increase broadcast station ownership by women and minorities

Having reliable data about the race and gender of media owners is crucial to assessing the extent of such ownership and developing policies to increase opportunities for people of color and women, who had been largely excluded when the FCC awarded broadcast licenses. However, it was not until the late 1990s that, as a result of the efforts of IPR and our clients, the FCC began to collect data on the race and gender of broadcast station owners. IPR subsequently discovered, however, that the way the FCC collected data did not ensure accurate and complete data. Thus, after a rulemaking, the FCC revised its reporting requirements to require all broadcast stations to file revised ownership reports every two years starting in 2009.

In November 2012, the Media Bureau issued a report compiling ownership data from the reports filed in 2009 and 2011. The Bureau Report was issued shortly before the FCC was expected to make a decision in the 2010 Quadrennial Review to relax some of the ownership rules. IPR and its clients and allies meet with FCC Commissioners and staff to express concern that the FCC planned to relax ownership limits before considering the impact of the proposed changes on station ownership by women and people of color, as mandated by the Third Circuit Court in *Prometheus II*. The Commission responded by providing a brief amount of time in which the public could comments on the Media Bureau Report.

IPR filed comments on the Media Bureau Report in December 2012 and reply comments in January 2013. We pointed out that the percentage of stations owned by women and people of color does not even approach the corresponding percentage of national population that the percentage of broadcast stations owned by women and minorities had in many cases been falling over time. Moreover, the Report provided no analysis of how relaxing the ownership limits would affect the already low levels of ownership by minorities and women of color or even attempt to use the data to analyze the effectiveness of the FCC's existing or past policies designed to promote diverse ownership.

In February 2013, IPR filed comments on behalf of our clients recommending more improvements to the FCC's ownership data collection process. We supported the FCC's proposal to require certain holders of otherwise non-attributable interests to file ownership reports. We also supported the FCC's proposal to require all entities filing ownership reports to use an FCC Registration Number to facilitate verification and aggregation of the data. We argued that adoption of both proposals was necessary for the Commission and the public to evaluate the effectiveness of existing and/or proposed ownership policies and rules, particularly those related to minority and women. In addition, these changes were necessary steps toward the creation of a database of broadcast owners that could be searched, aggregated and cross-referenced electronically.

In the summer 2013, IPR filed comments and reply on behalf of our clients that addressed a survey commissioned by the Minority Media and Telecommunications Council. We argued that the survey did not support any relaxation of the ownership limits. Specifically, we argued that the survey was extremely limited in scope and its broad conclusions were not supported by the data.

2. Challenges to Mergers Reducing Diversity in Local News

In June 2013, the Gannett Company's announced its proposed acquisition of twenty television stations from Belo Corp. for \$2.2 billion, one of the biggest broadcast acquisitions in recent years. Before this merger can proceed, the FCC must approve the transfer of broadcast licenses. In July 2013, the IPR filed a Petition to Deny the transfer of television broadcast licenses from Belo to Gannett and two shell companies on behalf of IPR's clients, Free Press, NABET-CWA, TNG-CWA, National Hispanic Media Coalition, Common Cause, and Office of Communication, Inc., of the United Church of Christ.

The petition argued that Gannett's outright acquisition of the Belo-owned stations in Phoenix, AZ, Louisville, KY, Tucson, AZ, Portland, OR and St. Louis, MO, would violate the newspaper-broadcast cross-ownership rule and/or the local television ownership rule. As a result, Gannett and Belo have orchestrated the transaction so that Belo will transfer the licenses for these stations to a third-party shell company, either Sander Operating Company or Tucker

Operating Company, while Gannett will operate the stations through a series of agreements. referred to as joint sales agreements or shared services agreements.

We argued that if approved, the transaction would lead to job losses and a considerable reduction in the quality of journalism for millions of television homes. Moreover, these proposed arrangements are contrary to the spirit of the Commission's media ownership rules, which are intended to promote diversity, competition, and localism. Even if they do not outright violate the rules, such sharing arrangements are not in the public interest because they reduce the diversity of viewpoints and reduce competition in the provision of local news and the sale of advertising.

In August, IPR filed a joint reply to the oppositions. We showed that the applicants had failed to rebut our *prima facie* showing that the transfer of these licenses would not serve the public interest. We also disagreed with their claim that the FCC could only address sharing arrangements in a rulemaking. It is a fundamental principle of administrative law that agencies may make policy by either adjudication or rulemaking. While the Commission may ultimately decide to attribute sharing arrangements in the 2010 Quadrennial Review, that possibility does not obviate the need for the Commission to address the public interest questions raised by the sharing agreements in this transaction.

D. Enhanced Disclosure of TV Station Public Inspection Files

After many years of advocacy by IPR on behalf of the Public Interest Public Airwaves Coalition (PIPAC), the FCC finally adopted an order requiring television stations to upload the contents of their public inspection files, including their political broadcast files, to the FCC website so that the public files could be easily accessed by members of the public. The rules took effect on August 2012, before the 2012 election. The Commission initially limited the requirement of uploading the political files to major network affiliates in the top-fifty markets, so as to see how the process worked before requiring all stations to do so.

In the summer 2013, the FCC's Media Bureau issued a public notice requesting comment on how the filing went and how it might be improved. IPR drafted comments on behalf of PIPAC, the Sunlight Foundation, and the Center for Effective Government. The comments described how Sunlight Foundation and PIPAC member Free Press created the website Political Ad Sleuth to collect information from the political files in the FCC's database and to make that information more searchable. That experience demonstrated that posting political files online has accomplished many of the Commission's intended public interest goals, such as reducing the public's burden in accessing the files. Moreover, the easier availability has allowed effective reporting on electoral and political issues creating a more open political debate that better informs the public.

At the same time, the comments identified a number of problems with the FCC's process and urged the FCC to improve the online filing process before July 1, 2014. The Comments recommended that the FCC adopt data standards and require television stations to upload their political files in a machine-readable format. This approach has already been successfully employed by the Federal Election Commission to implement even more complex reporting requirements. To demonstrate how this might be accomplished, Sunlight developed a demonstration form available online at <http://assets.sunlightfoundation.com/fcc-political-form/index.html>.

Adoption of this proposal would permit political file data to be easily aggregated and analyzed. The public would benefit from being better informed about important electoral races, issues, and the political process in general. It would allow the public, as well as the Commission, to better monitor broadcast stations compliance with statutory and regulatory requirements. Broadcasters would also be less likely to inadvertently expose sensitive financial information such as bank account numbers from uploading full contracts and checks. Further, it would significantly reduce paperwork burdens for broadcast stations.

ENVIRONMENTAL

A. National Environmental Policy Act

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

In late spring 2011, IPR began representing the Wampanoag Tribe of Gay Head (Aquinnah) in its opposition to the Cape Wind Energy Project, a proposed offshore wind farm to be located 3.5 miles off the coast of Massachusetts. The Department of the Interior approved the construction and operation of the 130-turbine generator wind farm in a 25-square mile area of Nantucket Sound, known as Horseshoe Shoal, in April 2011.

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

In July, 2011, the Tribe filed a complaint in the U.S. District Court for the District of Columbia against the Department of the Interior and the Bureau of Ocean Energy, Management, and Regulation (formerly known as the Minerals Management Service), alleging that the agencies did not adequately consider the project's impacts on the Tribe, in violation of the National

Environmental Policy Act and the National Historic Preservation Act. The Tribe's case was consolidated with a similar action filed in the same court last June by several citizen groups.

During the 2011-2012 academic year, IPR researched the Tribe's claims and reviewed the government's extensive administrative record. In November 2011, one IPR fellow and two IPR students travelled to Boston to give a presentation on the case to Boston University law students and to meet with Tribal representatives on Martha's Vineyard. In the Fall 2012, IPR submitted the Tribe's Motion for Summary Judgment briefing, and a decision on the case is pending.

B. Endangered Species Act

1. *Natural Resources Defense Council v. Salazar*

In this Ninth Circuit Endangered Species Act case, IPR file an amicus brief on behalf of a group of natural resource law professors in support of rehearing en banc. The Ninth Circuit held last year that the plaintiffs, a coalition of environmental groups, did not have standing to challenge the Bureau of Reclamation's renewal of a series of water contracts for users of the Delta-Mendota Canal, part of California's Central Valley Project, which transfers water from the Sacramento River to the San Joaquin Valley. The Ninth Circuit also held that the Bureau of Reclamation lacked discretion in renewing a series of settlement contracts for Central Valley Project water use and, therefore, that

the agency had no obligation, under the Endangered Species Act, to consult with the Fish and Wildlife Service regarding potential impacts of contract renewal on endangered delta smelt.

IPR's brief focused on the dangerous implications of these holdings for the future of water law in the nation's arid regions particularly in light of climate change. The Ninth Circuit granted the petition and will hear argument en banc in the fall.

C. Highway Beautification Act

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

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

IPR reassessed its earlier legal analysis and determined a viable litigation strategy. In November 2012, one of IPR's students gave a presentation outlining this strategy to the Scenic America Board of Directors, who voted to authorize a lawsuit. In

January of 2013, Scenic America filed a complaint in the U.S. District Court for the District of Columbia against FHWA and the U.S. Department of Transportation.

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

During Spring 2013, IPR interviewed Scenic America members and prepared affidavits in anticipation of the government and industry intervenor's motion to dismiss on standing grounds. Scenic America members described injuries including the aesthetic impacts of a digital billboard in close proximity to the home, reduced highway safety, and the drain on Scenic America's resources resulting from FHWA's authorization. In May of 2013, the government and industry defendants filed their motions to dismiss, which Scenic America opposed. The court's decision is currently pending.

D. Clean Air and Clean Water Advocacy

1. Ten Mile Creek

Located just outside of Clarksburg, Maryland, along the I-270 corridor, Ten Mile Creek is one of the healthiest waterways in the Chesapeake Watershed. Plans to develop the farmland and forests surrounding the Creek, however, threaten to impede its ability to serve as a habitat for wildlife like trout and salamanders and as a drinking water source. In particular, a proposal to build a regional mall in the headwaters of the Creek led Audubon Naturalist Society (ANS) to approach IPR for advice on legal tools to help preserve the Ten Mile Creek watershed.

IPR researched how local ordinances, Maryland state land use law, and federal laws, including the Clean Water Act and Safe Drinking Water Act, could protect the Ten Mile Creek watershed. IPR students attended planning department meetings and visited the site of the Creek, and in December 2012, submitted an Opinion Letter documenting its research and discussing ANS' potential litigation options. In the meantime, ANS successfully campaigned to amend the Clarksburg Master Plan to better protect Ten Mile Creek.

2. Frederick County Incinerator

In December 2012, the Maryland Department of the Environment (MDE) issued tentative determinations approving air, water, and refuse

disposal permits for the Frederick/Carroll County Renewable Waste-to-Energy facility, a municipal waste combustor. The project's proponents propose to locate the incinerator in an industrial park about 4.5 miles from downtown Frederick, Maryland. The facility would burn 1,500 tons of household waste, tires and sewage sludge per day, more than double the amount of waste generated by Frederick and Carroll County residents. Operating at its designed peak capacity, the facility would generate around 45 MW of electricity, but its impacts on the surrounding air and water would approximate that of a coal-fired electric generating plant.

On behalf of Community Research, Inc., and in coordination with the Sierra Club, Potomac Riverkeeper, the Environmental Integrity Project, and other local activists, IPR submitted comments to MDE on the proposed air and refuse disposal permits for the incinerator in May of 2013. IPR's comments note various discrepancies in the emissions projections for the incinerator, and the need for more information regarding issues such as ash disposal, greenhouse gas mitigation, and compliance with the Clean Air Act's new source non-attainment review provisions. MDE's response to comments on the proposed permits and tentative determinations is pending.

E. Advocacy in the District of Columbia

1. McMillan Park

In spring 2009, IPR began assisting the McMillan Park Committee (MPC) with its efforts to protect the historic resources and open green space of McMillan Park. The District of Columbia owns the McMillan Park sand filtration site, comprised of 26 acres of open space fenced off from public use and unique brick tower-like structures built in 1906 for the purpose of water filtration. The District plans to transfer the property to a private developer who proposes to remove most of the historic structures and construct apartments, condominiums, and retail facilities, leaving approximately 3–4 acres of contiguous open space for public use. Many community members and groups in addition to MPC were concerned about the intensity of the proposed development, lack of usable public space, and failure to protect more of the unique historic resources in McMillan Park.

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

McMillan Partners, the private developer for McMillan Park.

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

During the course of this litigation, development activities at McMillan Park have continued. In March 2012, developer Vision McMillan Partners released revised plans for the

site, which call for preservation of more of the existing structures and more open space than the original plans, but still would destroy most of the historic structures on the site. Community members continue to voice opposition to the plan, and in March of 2013, on behalf of the McMillan Park Committee, an IPR student gave testimony before the D.C. Historic Preservation Review Board, arguing that the revised plan is inconsistent with the District's historic preservation laws. In the spring of 2013, IPR also represented the MPC in talks with DC Water to secure a commitment regarding restoration and mitigation measures associated with that agency's use of water filtration cells for emergency stormwater storage.

2. *Anacostia Watershed Society & Anacostia Riverkeeper v. Washington Gas Light Co.*

IPR represented the Anacostia Watershed Society (AWS) and the Anacostia Riverkeeper (ARK) in their efforts to secure remediation of a legacy toxic site in the Anacostia watershed. Both AWS and ARK are nonprofit organizations committed to restoring the health of the Anacostia River and its watershed.

For nearly a century, Washington Gas operated a gas manufacturing plant located near the Anacostia River at the southeast corner of M and 12th Streets in Southeast Washington, DC. Originally, marshes, wetlands, and mudflats existed between the plant and the river. By 1919, the seawall along the river was complete and the naturally occurring estuarine features

had been filled in behind the seawall, creating the site's current topography. In addition to the dredged material from the Anacostia River, Washington Gas placed fill material that contained coal tar mixed with solid wastes from the gas manufacturing plant in the wetlands on site. As a result, the soil and groundwater on an 18.8-acre site were contaminated with coal tar and other gas manufacturing waste constituents that contain toxic carcinogens. The bottom of the Anacostia River adjacent to the contaminated land is also contaminated. Fish in the Anacostia generally have a high cancer rate attributable to high concentrations of polynuclear aromatic hydrocarbons (PAHs), among other carcinogens. PAHs are found in the soil on the site and a PAH hot spot exists in the river adjacent to the site.

Under a 1999 record of decision, most of the contaminated land has been remediated. But approximately 4.5 acres of land, most of which was formerly managed by the National Park Service, remains unremediated, as does the affected nearshore areas of the Anacostia River. In 2008, the District of Columbia acquired ownership of the unremediated land. Currently, the unremediated land hosts multiple uses, including unrestricted public access to the seawall, from which people can fish and launch non-motorized boats. A 2006 record of decision addressing the unremediated land concluded that the soil poses an unacceptable health risk for juveniles recreating on the site and for utility, construction, and landscape workers working on the site.

Despite the documented risks, local and federal agency efforts to reach an agreement with Washington Gas to

implement remedial actions for the remaining land and the Anacostia River stalled, in part because of complications arising from the transfer of land from federal to local control. AWS and ARK sought IPR's help to jumpstart the process. In mid-December 2010, IPR sent a ninety-day notice of intent to sue letter to Washington Gas and the District of Columbia under the Resource Conservation and Recovery Act's (RCRA) imminent and substantial endangerment citizen suit provision.

In August 2011, AWS and ARK brought suit against the Washington Gas Light Company in Federal District Court for the District of Columbia, alleging violations of RCRA and seeking an injunction requiring Washington Gas to clean up the site. Washington Gas filed a motion to dismiss arguing that because of ongoing federal and local efforts to begin the cleanup process, the court lacked jurisdiction to hear the case.

In December 2011, the District of Columbia, the federal government, and Washington Gas finally reached an agreement. The two governments filed a complaint against Washington Gas under the Comprehensive Environmental Response Compensation and Liability Act and immediately lodged a consent decree, laying out a plan for cleanup and providing sixty days for public comment. IPR assisted AWS and ARK in drafting comments addressing both the consent decree's technical aspects and its provision for future public participation. After submitting those comments, AWS and ARK moved to intervene in the consent decree proceedings.

In August 2012, the governmental parties completed review of the public comments, issued a revised consent decree, and motioned the court to enter the decree. On behalf of AWS and ARK, IPR negotiated an agreement with the parties. AWS and ARK agreed to withdraw their motion to intervene, and the governmental parties agreed to provide status reports on cleanup progress and hold periodic public meetings. The court entered the consent decree and dismissed AWS and ARK's RCRA suit.

3. Kenilworth Park Landfill Site Remediation

The Kenilworth Park Landfill site is one of many contaminated sites along the Anacostia River. From 1942 until 1968, the District of Columbia (District) operated a landfill on the northern portion of the Kenilworth site. By the 1970s, the landfill had ceased operations, and the site was covered with soil, revegetated, and reclaimed for recreational purposes, with District authorities building a recreation center and playing fields on the site. However, in 1998, NPS began conducting environmental investigations at the site to determine what risks the former landfill contamination may pose to human health or the environment. In 2012, NPS published a Feasibility Study Report (FS) to identify and evaluate potential remedial alternatives to address contamination at the Site, and in February of 2013, NPS issued a proposed action plan to clean up the site.

On behalf of the Anacostia Riverkeeper, IPR submitted comments

on the NPS Plan, criticizing it for failing to consider a broader range of remediation alternatives, and questioning whether the agency had collected sufficient data to support its selection of the preferred alternative. NPS has not yet issued a Record of Decision for the cleanup plan.

F. Federal Administrative Law

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

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

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

In 2010, the PWCC sought to renew its permit for the fourth time. OSM renewed the permit on January 6, 2012. To' Nizhoni Ani filed an administrative appeal of the renewal on February 17, 2012. The appeal raised claims under SMCRA, the National

Historic Preservation Act, the National Environmental Policy Act, and the Administrative Procedure Act.

PWCC and To' Nizhoni Ani filed cross motions for summary judgment. PWCC sought summary dismissal of five claims, each involving SMCRA. To' Nizhoni Ani sought summary judgment on four claims, two related to SMCRA, and two related to the preservation of cultural resources.

The Administrative Law Judge issued an order denying both motions with respect to all claims and dismissing a National Environmental Policy Act claim on which that no party had sought judgment.

In September 2012, an IPR staff attorney and student traveled to Denver to review the Kayenta Mine permit file at OSM's headquarters and to Black Mesa to meet with the client groups.

Since February 2013, the parties have been engaged in settlement negotiations. An IPR staff attorney traveled to Phoenix for mediation with all of the parties. And in April, an IPR staff attorney and student traveled to Denver for a follow-up meeting with OSM. Negotiations are ongoing.

G. Food Safety

1. Food Safety Modernization Act

The Food Safety Modernization Act (FSMA) was passed in January 2011. The statute amends the Food, Drug, and Cosmetic Act by increasing

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

On behalf of Future Harvest CASA, IPR drafted comments on both rules, focusing on their environmental and economic effects. In the course of drafting, IPR collaborated with Harvard's Food Law and Policy Clinic and with the National Sustainable Agriculture Coalition, of which Future Harvest CASA is a member. The comments are currently due September 16, 2013, but the FDA has indicated that it may postpone the due date.