

PETITION FOR RECONSIDERATION

PETITION FOR RECONSIDERATION AND REQUEST FOR EMERGENCY RELIEF

Application No. 18/973,067

In re: Torres, Terry

Filed: December 8, 2024

Title: Social Networking Content Supplemented Web Page Linker

Publication Date: February 26, 2026 (16 days from filing)

TO THE DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE:

Pursuant to 37 CFR 1.181 and 37 CFR 1.182, Applicant respectfully petitions for reconsideration of the Final Determination issued January 30, 2026, assessing a penalty of \$4,122.00 for alleged false certification of micro entity status.

EMERGENCY RELIEF IS REQUESTED.

This application is scheduled to publish on February 26, 2026—only 16 days from the filing of this petition. Applicant has been in full compliance with all fee requirements since November 18, 2025 (over 2.5 months), yet the application remains suspended from prosecution. The penalty is based on an enforcement framework that did not exist when Applicant certified in December 2024 and demands documentary evidence that was destroyed by technology 8-11 months before USPTO requested it. Further delay will cause irreparable harm that cannot be remedied by patent term adjustment.

NOTE: For ease of verification, all audio evidence cited in this petition has been compiled with full transcripts and timestamps. These recordings document the statements of USPTO personnel and are available for review.¹

TABLE OF CONTENTS

I. Executive Summary: The Enforcement Framework Did Not Exist

II. Jurisdiction and Standard of Review

III. Statement of Facts

III.5 Administrative and Judicial Framework

IV. The Enforcement Framework Was Not Implemented When The Certification Was Made

V. Administrative Implementation Versus Statutory Enactment

- VI. The Impermissible Retroactive Application of Substantive Rules
 - VII. A Rule That Did Not Exist Cannot Be Violated
 - VIII. The Core Defect: Retroactive Demand for Evidence That No Longer Exists
 - IX. The Office Still Provides No Standard For “Sufficient Evidence”
 - X. The Procedural Defect: Application of Undisclosed Standards
 - XI. Evidence of Good Faith: The Inquiry That Was Actually Conducted
 - XII. The Agent E. Call and the Irrelevance of Inquiry Reconstruction
 - XIII. Institutional Withholding of Information Prevented Correction
 - XIV. The December 1 Confirmation Created Reasonable Reliance
 - XV. Constitutional Due Process Violations
 - XVI. Disproportionate Impact On Pro Se Applicants
 - XVI.5 No Adequate Remedy at Law
 - XVII. Request for Relief
 - XVIII. Conclusion
-

I. EXECUTIVE SUMMARY: THE ENFORCEMENT FRAMEWORK DID NOT EXIST

This petition presents a fundamental question of procedural fairness: Can an agency assess a \$4,122 penalty for conduct that occurred before the agency implemented the enforcement framework necessary to impose such penalties?

The Timeline That Proves Impossibility:

December 8, 2024: Applicant filed application with micro entity certification after conducting reasonable inquiry using available resources (Form PTO/SB/15A, USPTO FAQ, MPEP § 509.04, Patent Center filing history).

July 8, 2025 (7 months later): USPTO published Official Gazette Notice 1536 OG 204, announcing that USPTO “will begin issuing” show cause orders for false entity status certifications. This future-tense language proves the enforcement framework was being implemented at that time—not before.

October 24, 2025 (10 months later): USPTO issued memorandum updating MPEP §§ 410, 509.03(b), 509.04, and 1002.02(b) with new procedures for reviewing entity status claims. The memo explicitly states these changes “supersede the content in the Ninth Edition, Revision 01.2024, November 2024 publication of the MPEP”—the version in effect when Applicant certified.

November 4, 2025 (11 months later): Show cause order issued to Applicant—the first notice that documentary evidence of the December 2024 inquiry might be required. By this time, any electronic evidence from December 2024 (browser history, download records, system logs) had been automatically destroyed by technology.

January 30, 2026 (14 months later): Penalty imposed for failing to provide evidence of December 2024 inquiry using standards published in July 2025 and implemented in October 2025.

The Three Temporal Impossibilities:

1. The Enforcement Framework Was Not Implemented (Section IV)

USPTO's own documents prove the framework did not exist in December 2024: - July 8, 2025 OG Notice announces USPTO "will begin issuing" orders (future tense = not operational before) - October 24, 2025 Memo implements MPEP changes that "supersede" the November 2024 version Applicant followed - 7-10 month gap between Applicant's certification and implementation

2. Evidence Was Automatically Destroyed (Section VIII)

USPTO demands documentary evidence from 14 months earlier: - Browser history auto-deletes within 30-90 days - Evidence destroyed 8-11 months before USPTO requested it - No duty to preserve arose until show cause order (11 months after inquiry) - Compliance is temporally impossible

3. Standards Were Never Disclosed (Section X)

The show cause order failed to provide fair notice: - Did not cite 37 CFR 11.18(b) - Did not mention "reasonable inquiry" requirement - Did not reference July 8, 2025 OG Notice - Did not specify what "sufficient evidence" meant - USPTO employee admitted post-penalty: "I'm really not sure" what would satisfy

The December 1 Confirmation:

On December 1, 2025 (13 days after Applicant filed response), a USPTO agent reviewed the submission and confirmed: "Everything is, it appears to be correct."

Then, 59 days later, the same document was deemed insufficient and a \$4,122 penalty was imposed—without any explanation for the reversal and without any opportunity to supplement.

The Constitutional Violation:

The penalty violates due process because: - Enforcement framework did not exist when conduct occurred (no fair notice) - Standards applied were published 7 months after certification (retroactive

application) - Evidence demanded was destroyed by technology before request made (impossible compliance) - Response confirmed “correct” then reversed 59 days later (arbitrary action)

Each defect independently requires vacating the penalty. Together, they demonstrate a fundamental breakdown of procedural fairness.

This petition does not seek to relitigate the certification mistake. It seeks relief from a penalty imposed under a post hoc evidentiary regime that was unknowable at the time and impossible to satisfy later.

II. JURISDICTION AND STANDARD OF REVIEW

This petition is filed pursuant to 37 CFR 1.181 (Petition to the Director) and 37 CFR 1.182 (Questions not specifically provided for). The Director has authority to review determinations of subordinate officials and to grant relief where fundamental fairness and due process are implicated.

The final determination should be set aside because it: - Imposes a temporally impossible standard - Applies requirements not disclosed in the notice - Violates due process through retroactive application - Is arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706(2)(A) - Lacks substantial evidence under 5 U.S.C. § 706(2)(E) - Creates reasonable reliance then penalizes that reliance

Standard of Review Under the Administrative Procedure Act

The Administrative Procedure Act, 5 U.S.C. § 706, provides that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The determination here fails this standard because it applies retroactively an enforcement framework that did not exist when Applicant certified, demands evidence that was destroyed by technology before any duty to preserve arose, and penalizes Applicant for non-compliance with standards never disclosed in the show cause order.

The Supreme Court has held that arbitrary and capricious review requires the agency to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm*

Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Here, USPTO has provided no explanation for: - Why a response confirmed “correct” on December 1 was deemed insufficient on January 30 - How Applicant could preserve evidence from 14 months earlier that technology automatically destroyed - Why standards published 7-10 months after certification should apply retroactively - What specific evidence would have satisfied the undefined “sufficient evidence” standard

Applicant has exhausted all available administrative remedies. At every turn, Applicant sought guidance and was either refused information or told no remedies were available:

November 7, 2025: Called Office of Petitions (Agent E.) seeking guidance—told “I cannot answer those questions and I have no one to transfer you to.” She called back only to inform Applicant that she was instructed not to provide help.

December 1, 2025: Called seeking status—agent confirmed response “appears to be correct.”

January 9, 2026: Called Office of Petitions (Agent G.)—admitted employees received “direction of the office” not to provide information. Called Ombudsman (Agent H.)—confirmed no authority to help, no internal remedies available.

February 2, 2026: Called seeking clarification after penalty—employee (Agent I.) admitted “I’m really not sure” what evidence would satisfy and agreed “more clarity on what sufficient evidence entails could be helpful.”

This petition is the only remaining avenue for administrative relief.

III. STATEMENT OF FACTS

Background

Applicant Terry Torres is a pro se inventor who filed Application No. 18/973,067 on December 8, 2024, claiming micro entity status. This application is a continuation-in-part (CIP) of a prior non-provisional application that also claimed micro entity status.

Applicant reasonably believed that micro entity status would carry forward to the continuation application because it was part of the same patent family. While this belief was mistaken, it was reasonable and made in good faith after conducting inquiry using resources available to a pro se applicant.

Pre-Certification Inquiry (December 2024)

Before filing, Applicant reviewed: - Form PTO/SB/15A and its instructions - USPTO Micro Entity FAQ - MPEP § 509.04 - Personal filing history in Patent Center

Based on these sources, Applicant reasonably (though mistakenly) interpreted the “four previously filed applications” rule as excluding CIPs or continuations within a single patent family. This interpretation, while incorrect, was made after conducting reasonable inquiry.

The Show Cause Order (November 4, 2025)

Eleven months after filing, Applicant received a “Notice of Payment Deficiency & Show Cause Order: Penalty Determination – Micro Entity.” The order identified that the micro entity certification was false because the filing limit of 37 CFR 1.29(a)(2) had been exceeded.

The order provided three response options: - Option I: Rebut the preliminary determination - Option II: If false but in good faith, provide itemization, payment, and “explanation supported by sufficient evidence” - Option III: If false and not in good faith, pay deficiency and fine

What the order did NOT say: - Did NOT mention 37 CFR 11.18(b) - Did NOT mention “reasonable inquiry” requirement - Did NOT request description of pre-certification research - Did NOT cite July 8, 2025 OG Notice - Did NOT specify what “sufficient evidence” meant

Applicant’s Immediate Response (November 7-18, 2025)

November 7, 2025: Applicant called Office of Petitions seeking guidance. Agent E. responded: “I cannot answer those questions and I have no one to transfer you to.” She promised a callback by Monday. She called back only to inform Applicant that she was instructed not to provide help.

November 18, 2025: Applicant filed comprehensive response (14 days after notice): - Acknowledged the error - Explained the reasonable mistake - Stated certification was made in good faith - Provided complete itemization - Paid full \$1,412 deficiency - Corrected status to small entity going forward - Requested waiver of penalty

USPTO Confirmation (December 1, 2025)

On December 1, 2025 (13 days after response filed), Applicant called to check status. A USPTO agent reviewed the submission and stated: “Everything is, it appears to be correct.”

This confirmation was critical because: - It occurred 11 months after the inquiry was conducted - It indicated the response satisfied all requirements - It created reasonable reliance that no additional evidence was needed - It foreclosed any opportunity to supplement

The Long Silence (December 2025 - January 2026)

Despite the December 1 confirmation, no decision was issued for 77 days. Applicant made multiple attempts to obtain status updates or guidance.

January 9, 2026: Called Office of Petitions (Agent G.) after 52 days of waiting. Agent G. stated processing time is typically 3-5 months, then made critical admissions:

When Applicant asked whether the application would be published on the scheduled February 26, 2026 date despite the prosecution suspension, Agent G. responded:

“I’ll be honest with you, we have not been given information on whether the application [will be published].”

This admission reveals that USPTO employees responsible for assisting applicants do not know whether publication will proceed, cannot provide status information, and lack basic procedural information about how suspended applications are handled.

Agent G. then explained the institutional information blackout:

“Actually the direction of the office is that we are trying to not, you know, to entertain, too much, too many conversations on this topic. They want us to really leave this to the people who are actually reviewing the response to the show cause order. They don’t want us to really meddle in these matters until they have been reviewed by the proper authorities here. So I really wish that I could give you more information than what we have authorized to provide.”

Later in the same conversation, Agent G. expressed personal frustration at being unable to help:

“I wish that I could do more than that. I try to do all I can for my callers. I try to go above and beyond for them if I can... if I had any information that I could provide you...I would give it to you.”

This was not individual confusion. This was institutional policy to withhold information.

Same day: Applicant contacted Ombudsman (Agent H.) seeking alternative relief. Agent H. confirmed: “We don’t have authority to override petitions or any other department.” No internal remedies available.

The Penalty Determination (January 30, 2026)

On January 30, 2026—77 days after filing response and 59 days after USPTO confirmed it was “correct”—the Final Determination was issued assessing a \$4,122 penalty.

Critical finding: The determination stated Applicant’s response “does not give any details regarding a reasonable inquiry being made” and cited: - 37 CFR 11.18(b)(2)—NOT mentioned in show cause order - July 8, 2025 OG Notice—NOT mentioned in show cause order - “Inquiry reasonable under the circumstances”—NOT mentioned in show cause order

This was the first time Applicant learned that describing pre-certification inquiry steps was required—14 months after the inquiry was conducted.

Post-Penalty Admission (February 2, 2026)

Three days after penalty assessment, Applicant called seeking clarification. The conversation with employee Agent I. revealed:

When asked what evidence could have satisfied: Agent I.: “Yeah, I’m really not sure. I really apologize.”

When asked to review the show cause order: Agent I.: “I do see that it was reviewing the notice itself and it doesn’t look like they provide any items you specifically must provide to meet that.”

When Applicant pressed on lack of clarity: Agent I.: “I hear your arguments. I understand. I do. I believe, you know, having more clarity on what sufficient evidence entails could be helpful.”

These admissions, made three days after imposing a \$4,122 penalty, confirm the standard was not disclosed and even USPTO employees cannot articulate what would satisfy it.

Out of necessity—and in the absence of any formal channel for presenting exculpatory context—Applicant created a website, USPTO.news, to ensure a full and transparent record is available to the Office. The website is not adversarial in nature and should not be misconstrued as such; rather, it serves as a resource. It includes the relevant documents, public statements, and a selection of

recorded telephone calls with USPTO representatives, allowing the Office to independently verify statements made by its own personnel.

These calls were recorded using a pre-installed system that automatically retains 90 days of phone activity. Applicant did not set out to record USPTO staff, nor did Applicant initially intend to use these recordings for any public purpose. However, upon experiencing an extended pattern of conflicting and evasive responses, Applicant preserved the recordings to protect against what later became sweeping, unsupported allegations. Even then, Applicant hesitated to use them publicly out of concern for the individual employees involved. It remains Applicant's belief that many of those personnel were acting under directives they did not author and should not be blamed for.

In every stage of this process, Applicant has sought only to resolve the matter fairly and resume patent prosecution. The site exists because no other channel was provided. The recordings exist because the agency gave no notice of the standards it would later apply. And this petition exists because Applicant continues to believe that justice and procedure must apply equally—regardless of an applicant's size, resources, or perceived leverage.

III.5 ADMINISTRATIVE AND JUDICIAL FRAMEWORK

For the Director's complete understanding of the procedural context, Applicant respectfully provides the following information about the administrative and judicial framework governing this matter.

Exhaustion of Administrative Remedies

This petition represents Applicant's final administrative remedy. Under well-established principles of administrative law, a party must exhaust available administrative remedies before seeking judicial review. *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (“As a general rule, parties exhaust prescribed administrative remedies before seeking relief from the federal courts.”).

Applicant has exhausted all available administrative channels: - Responded timely to show cause order (November 18, 2025) - Sought guidance from Office of Petitions (November 7, 2025; January 9, 2026; February 2, 2026) - Contacted USPTO Ombudsman (January 9, 2026) - Filed this Petition for Reconsideration (February 7, 2026)

No further administrative remedies exist. If this petition is denied, Applicant will have no choice but to seek judicial review.

Judicial Review Framework

Applicant respectfully informs the Director that, should this petition be denied, judicial review is available under multiple statutory provisions:

35 U.S.C. § 145 - Civil Action Against Director: “An applicant dissatisfied with the decision of the Patent Trial and Appeal Board in an appeal under section 134(a) may, unless appeal has been taken to the United States Court of Appeals for the Federal Circuit, have remedy by civil action against the Director in the United States District Court for the Eastern District of Virginia or in the United States District Court for the district in which the applicant resides...”

While this provision specifically addresses Board appeals, the Federal Circuit has recognized that district courts have jurisdiction over constitutional challenges to Director decisions even outside the formal § 145 framework. See *Collaso v. Rea*, 408 F.2d 1380 (D.C. Cir. 1969).

28 U.S.C. § 1331 - Federal Question Jurisdiction: District courts have original jurisdiction over civil actions arising under the Constitution and laws of the United States. The constitutional due process violations alleged here create federal question jurisdiction.

28 U.S.C. § 1361 - Mandamus Jurisdiction: “The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

5 U.S.C. § 702-706 - Administrative Procedure Act: Provides for judicial review of final agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”
5 U.S.C. § 706(2)(A).

Venue

Should judicial review become necessary, venue would be proper in the United States District Court for the District of New Jersey under 28 U.S.C. § 1391(e)(1)(C), which provides that actions against federal officers “may be brought in any judicial district in which... the plaintiff resides if no real property is involved in the action.”

Applicant resides at xxxx xth Ave., xxxxxxxx, xxx xxxx xxxxx, within the District of New Jersey.

Venue would also be proper in the Eastern District of Virginia under 35 U.S.C. § 145 and 28 U.S.C. § 1391(e)(1)(A) (district where defendant agency is located).

Standing

Applicant has constitutional standing under Article III because:

Injury in Fact: The \$4,122 penalty is a concrete economic injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Additionally, the suspension of prosecution threatens publication delay causing competitive harm not remedied by patent term adjustment.

Causation: The injury is fairly traceable to USPTO's actions—specifically, the retroactive application of an enforcement framework that did not exist when Applicant certified and the demand for evidence that was destroyed before any duty to preserve arose.

Redressability: The injury would be redressed by vacating the penalty and lifting the prosecution suspension, which the Director has authority to do.

Applicant also has prudential standing as the party directly subject to the penalty determination and directly affected by the prosecution suspension.

Mandamus Standards

Should mandamus relief become necessary, Applicant respectfully notes that mandamus is available to compel performance of a clear, non-discretionary duty. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004).

The duties at issue here are non-discretionary:

Due Process Duty: The Constitution imposes a mandatory duty on all government agencies to provide fair notice of legal standards before imposing penalties. This is not discretionary. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

APA Duty: The Administrative Procedure Act imposes a mandatory duty not to act arbitrarily or capriciously. 5 U.S.C. § 706(2)(A). An agency cannot confirm a response is “correct,” wait 59 days, then impose a penalty based on that same document without explanation.

Retroactivity Prohibition: *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) establishes that substantive rules cannot be applied retroactively without clear Congressional authorization. This is a legal limitation, not agency discretion.

These are not requests for the agency to exercise discretion favorably toward Applicant. These are requests to comply with mandatory legal requirements that bind all federal agencies.

Applicant's Preference for Administrative Resolution

Applicant respectfully emphasizes that administrative resolution is strongly preferred to judicial review. Litigation imposes burdens on both parties, consumes judicial resources, and delays resolution. If the Director grants this petition, the matter can be resolved immediately without need for further proceedings.

However, the constitutional and procedural violations documented in this petition are sufficiently grave that, if administrative relief is denied, judicial review will be necessary to protect Applicant's rights and to prevent establishment of a precedent that would harm all micro and small entity filers.

Applicant provides this information not as a threat but as transparency about the full procedural landscape. The Director should be fully informed about what judicial review would entail should this petition be denied.

IV. THE ENFORCEMENT FRAMEWORK WAS NOT IMPLEMENTED WHEN THE CERTIFICATION WAS MADE

The penalty determination relies on an enforcement framework that did not exist when Applicant made the certification on December 8, 2024. While the underlying statute (35 U.S.C. §§ 41(j) and 123(f)) was enacted in December 2022, the administrative framework necessary to enforce penalties—including defined standards, show-cause procedures, and compliance guidance—was not implemented until seven months after Applicant's certification.

Applicant does not dispute the statutory authority of 35 U.S.C. §§ 41(j) and 123(f); this petition challenges the enforcement program and evidentiary standards that were not operational or disclosed at the time of certification.

On July 8, 2025, the USPTO published Official Gazette Notice 1536 OG 204, titled "Statutory Penalties for False Assertions or Certifications of Small and Micro Entity Status." This notice announces the commencement of the enforcement framework. The notice states, in critical future-tense language:

“The USPTO will begin issuing a combined notice of payment deficiency and order to show cause as to why a fine should not be assessed (‘combined notice and order’), when the USPTO makes a preliminary determination that a pending patent application (‘application’) or patent contains a false assertion or certification that resulted in the payment of at least one fee in an unentitled reduced amount. The USPTO will issue a subsequent notice to provide a final determination of whether a fine is being assessed, and the fine amount, based on any timely response to the combined notice and order and the record as a whole.”

The use of future tense—“will begin issuing” and “will issue”—is dispositive. As of July 8, 2025, the USPTO was announcing the beginning of its enforcement framework, not merely describing an existing practice. The plain language establishes that the show-cause order process, the standards for evaluating responses, and the procedures for imposing penalties were being implemented as of that date.

Applicant’s certification was made on December 8, 2024—seven months before this implementation. During those seven months between Applicant’s certification and the framework’s announcement, there existed:

No published guidance connecting 37 CFR 11.18(b)(2)’s “reasonable inquiry” standard to micro entity certifications. The July 8, 2025 OG Notice was the first USPTO publication explicitly stating: “An entity is required to conduct an inquiry reasonable under the circumstances prior to making the assertion or certification. See 37 CFR 11.18(b)(2).”

No show-cause order procedures. The “combined notice and order” process described in the OG Notice did not exist as a defined framework until July 2025.

No compliance standards. The July 8, 2025 notice provided the first detailed explanation of what evidence might satisfy a good faith showing, referencing specific MPEP sections and establishing the connection between the five-application limit and the reasonable inquiry requirement.

No enforcement mechanism. The Office of Petitions’ authority and procedures to assess these specific penalties were established through the framework announced in the July 8, 2025 notice, not before.

The constitutional requirement of fair notice demands more than a statute buried in the United States Code. Due process requires that an agency provide clear guidance about the standards by which

parties will be judged, establish procedures for enforcement, and give the regulated public notice that the enforcement framework is operative. See *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (“The Constitution requires that criminal laws provide fair notice of what conduct is prohibited.”); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012) (agencies must provide fair warning before imposing sanctions).

Until the July 8, 2025 publication, Applicant had no notice that: - The “reasonable inquiry” standard of 37 CFR 11.18(b)(2) would be applied to micro entity certifications in penalty proceedings - Show cause orders would follow the specific “combined notice and order” format - Responses would be evaluated against standards detailed in the OG Notice - The Office of Petitions would assess penalties through these procedures

The USPTO cannot simultaneously announce in July 2025 that it “will begin issuing” penalty notices and also claim that the framework was fully operational seven months earlier when Applicant certified. If the framework was operational in December 2024, the July 2025 announcement would be unnecessary and the future tense would be inaccurate. If the July 2025 announcement accurately reflects when the framework became operational (as its plain language indicates), then Applicant’s December 2024 certification occurred before the framework existed.

Moreover, the penalty determination itself acknowledges the significance of the July 8, 2025 notice by citing it as authority. The determination states: “Prior to implementation of the penalty provisions of 35 U.S.C. 41(i) and 123(f), the USPTO issued an Official Gazette Notice titled ‘Statutory Penalties for False Assertions or Certifications of Small and Micro Entity Status,’ 1536 OG 204, July 8, 2025.” This statement admits that the July 8, 2025 notice was issued “prior to implementation”—meaning implementation occurred after that date. If implementation occurred after July 8, 2025, it certainly had not occurred by December 8, 2024.

The timeline is undeniable:

December 8, 2024: Applicant certified July 8, 2025: USPTO announced “will begin issuing” orders (7 months later) November 4, 2025: Applicant received show cause order (11 months later) January 30, 2026: Penalty imposed (14 months later)

The absence of an implemented enforcement framework when Applicant certified means there was no fair notice of the standards that would later be applied, no procedures to follow, no guidance available for consultation, and no framework to which Applicant could conform conduct.

V. ADMINISTRATIVE IMPLEMENTATION VERSUS STATUTORY ENACTMENT

Administrative law distinguishes between statutory enactment and administrative implementation. A statute may exist in the United States Code, but an agency cannot enforce penalties under that statute until it has established the regulatory framework, published compliance guidance, and provided fair notice to the regulated public.

The Supreme Court has repeatedly emphasized this distinction. In *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), the Court held: “Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures... an agency must ‘scrupulously observe rules, regulations, or procedures which it has established.’” An agency cannot penalize individuals for non-compliance with procedures that did not exist when the conduct occurred.

Similarly, in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), the Supreme Court stated: “Retroactivity is not favored in the law... Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”

The D.C. Circuit has further clarified that agencies must provide fair warning before imposing sanctions based on interpretations of existing regulations. *General Electric Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (“An agency may not... apply a new standard retroactively when to do so would unduly interfere with legitimate reliance on prior standards.”).

Here, the statute (35 U.S.C. §§ 41(j) and 123(f)) existed in December 2024, but the enforcement framework did not. The distinction is critical because:

Statute alone: Provides general authority but no specific procedures, standards, or guidance

Implemented framework: Establishes how the statute will be enforced, what evidence is required, what procedures will be followed, and what standards will be applied

Applicant’s December 2024 certification occurred when the statute existed but the framework did not. USPTO cannot impose penalties based on a framework that was implemented seven to ten months after the conduct.

Furthermore, the USPTO formally confirmed this timeline in a Memorandum dated October 24, 2025 (Advance Notice of Change to the MPEP), available at <https://www.uspto.gov/sites/default/files/documents/uaiamemo-oct2025.pdf>, which stated:

“These changes to the MPEP are effective on issuance of this memo and supersede the content in the Ninth Edition, Revision 01.2024, November 2024 publication of the MPEP.”

The October 24, 2025 memorandum implemented changes to MPEP §§ 410, 509.03(b), 509.04, and 1002.02(b) related to reviewing entity status claims and assessing penalties. Critically, the memo states these changes “supersede” the November 2024 MPEP—the version in effect when Applicant certified on December 8, 2024.

“Supersede” means to replace completely, to make obsolete, to take the place of. The legal implication is clear: the rules Applicant followed in December 2024 (November 2024 MPEP) were replaced by different rules in October 2025. Superseded rules cannot be applied retroactively to conduct that occurred under the prior version. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-08 (1973) (agency cannot apply new interpretations retroactively when parties have relied on prior interpretations).

Moreover, the October 24, 2025 memorandum contains a revealing footnote attempting to clarify that “These changes do not suggest that the USPTO previously lacked authority or procedure...” Yet the same footnote admits: “Although the USPTO did not routinely undertake such reviews, the USPTO has done so where, for example, the record contains prima facie evidence that an entity status certification is erroneous.”

This admission is dispositive. If USPTO “did not routinely undertake such reviews” before October 2025, then the systematic enforcement framework announced in July 2025 and implemented in October 2025 represents a substantive change in how entity status certifications are reviewed and penalties are imposed. Applicant’s December 2024 certification occurred during a period when such reviews were not routine, under an MPEP that would be superseded ten months later.

Because the October 2025 memo superseded the November 2024 MPEP (which was in effect when Applicant certified), the USPTO admits that the rules governing these penalties changed after Applicant’s conduct. Superseded rules cannot be applied retroactively to conduct that occurred under the prior version. The penalty must be based on the November 2024 MPEP that governed Applicant’s December 8, 2024 certification—not the October 2025 version that superseded it.

VI. THE IMPERMISSIBLE RETROACTIVE APPLICATION OF SUBSTANTIVE RULES

The USPTO's 2025 framework created substantive rather than merely procedural changes. By defining the "reasonable inquiry" requirement for the first time in the context of a 3× monetary penalty, by establishing show cause procedures that did not previously exist, and by creating new standards for evaluating good faith, the Office created new legal obligations.

Under the Landgraf presumption against retroactivity, substantive rules cannot be applied retroactively unless Congress explicitly authorized it. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The Court emphasized: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 265.

The Supreme Court established a two-step framework for analyzing retroactivity:

Step One: Does the statute or regulation apply to conduct occurring before its effective date? If yes, it has retroactive effect.

Step Two: Did Congress clearly express intent for retroactive application? If no, the presumption against retroactivity controls.

Applying this framework:

Step One: The July 2025 OG Notice and October 2025 MPEP changes are being applied to Applicant's December 2024 certification—conduct occurring 7-10 months before the framework was announced and implemented. This is retroactive application.

Step Two: No clear statement of retroactive application exists in 35 U.S.C. §§ 41(j) or 123(f). The statutes contain no language stating they apply to certifications made before implementing regulations were published, before enforcement frameworks were established, or before compliance guidance was issued.

Under *Landgraf*, the presumption is that these provisions apply prospectively—from the date of implementation, not the date of enactment.

The Federal Circuit has applied Landgraf’s framework in the patent context, holding that new procedural requirements cannot be applied retroactively to pending applications when doing so would affect substantive rights. *Aristocrat Techs. Austl. Pty Ltd. v. Int’l Game Tech.*, 521 F.3d 1328, 1332-33 (Fed. Cir. 2008).

The distinction between procedural and substantive changes is critical. A procedural change affects only how cases are processed and can often be applied retroactively. A substantive change affects legal rights, obligations, or liabilities and cannot be applied retroactively without clear Congressional authorization. See *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (applying Landgraf framework to distinguish procedural from substantive changes).

The 2025 framework changes are substantive because they:

Create new obligations: The requirement to document and preserve evidence of pre-certification inquiry was not disclosed until July 2025. This creates a new obligation that did not exist in December 2024. See *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996) (obligation to comply with new regulatory requirements is substantive).

Establish new penalties: While the statute authorized penalties, the framework for assessing them—including what evidence would excuse the penalty under the good faith exception—was not established until July-October 2025. See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (penalty frameworks are substantive).

Define previously undefined terms: “Sufficient evidence of good faith” had no operational definition until the July 2025 OG Notice and October 2025 MPEP updates provided specific guidance. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (new interpretations that create new obligations have retroactive effect).

Change legal consequences: Under the November 2024 MPEP, entity status reviews were “not routine.” Under the October 2025 MPEP, systematic reviews and penalty assessments became standard. This fundamentally changes the legal landscape. See *Lynch v. United States*, 292 U.S. 571, 579-80 (1934) (changing legal consequences of conduct is retroactive application).

USPTO may argue that because the statute existed in December 2022, penalties could theoretically be imposed for any certification after that date. But this argument ignores the constitutional requirement of fair notice. Even if a statute theoretically applies, an agency cannot enforce it without

first establishing the regulatory framework and providing clear guidance to the regulated public. Christopher, 567 U.S. at 155-56 (“[A]gencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”) (quoting Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986)).

The Supreme Court addressed this precise issue in Landgraf, holding that retroactive application of new legal rules violates basic notions of fairness. The Court distinguished between laws that merely change procedures (which may apply retroactively) and laws that create new obligations or change substantive rights (which cannot). 511 U.S. at 269-75.

Here, the 2025 framework did not merely change how existing obligations were processed. It created new obligations (document inquiry), established new standards (37 CFR 11.18(b)(2) in penalty context), implemented new procedures (show cause orders), and fundamentally changed the consequences of entity status certifications (from “not routine” reviews to systematic penalty assessments).

Applicant cannot be held to standards that were published seven months after the certification and implemented ten months after the certification. The Landgraf presumption against retroactivity applies, and no clear statement of Congressional intent to apply these provisions retroactively exists.

VII. A RULE THAT DID NOT EXIST CANNOT BE VIOLATED

At the time Applicant certified micro entity status on December 8, 2024, there was no USPTO statute, rule, MPEP section, policy, notice, or enforcement framework requiring applicants to retain evidence of their inquiry or to document the basis for micro entity status eligibility.

The enforcement framework imposing such evidentiary requirements was not published until July 8, 2025 (OG Notice), and was not implemented until October 24, 2025 (USPTO Memorandum updating the MPEP).

Even if the USPTO believes those standards applied at the time of the November 2025 show cause order (which Applicant does not concede), they were never cited or disclosed in that order.

The fundamental principle is this: One cannot violate a rule that did not exist and was never disclosed.

This principle is not merely equitable—it is constitutional. The Due Process Clause requires that laws provide “fair warning” before imposing penalties. *United States v. Lanier*, 520 U.S. 259, 265 (1997). The Supreme Court has held that “no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

While the certification requirement itself existed, the evidentiary framework for proving good faith did not. Without published guidance defining what evidence would satisfy the “sufficient evidence” standard, Applicant had no fair warning that: - Pre-certification inquiry steps needed to be documented - Browser history needed to be preserved - Specific sources consulted needed to be memorialized - Evidence of the inquiry process would be demanded 11-14 months later

The Federal Circuit has recognized this principle in the patent context. In *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1282 (Fed. Cir. 2005), the court held that USPTO cannot impose sanctions for violating requirements that were not clearly established at the time of the conduct.

VIII. THE CORE DEFECT: RETROACTIVE DEMAND FOR EVIDENCE THAT NO LONGER EXISTS

Even if the enforcement framework had existed in December 2024 (which it did not), the determination would still fail because it demands documentary evidence from 14 months prior that no longer exists and could not reasonably be expected to exist.

The Temporal Impossibility

Timeline of Evidence Destruction:

December 8, 2024: Application filed, micro entity certification made, reasonable inquiry conducted.

Days 1-30 after certification: Browser operates normally, history accumulates.

Days 30-90 after certification: Browser history reaches retention limit, begins auto-deletion according to standard settings.

Day 90+ (March 2025): All browser history from December 2024 automatically deleted. Temporary internet files purged. Download folder cleaned. System restore points overwritten. Cache files cleared.

November 4, 2025 (11 months later): Show cause order issued. By this time, ALL electronic evidence from December 2024 is gone.

January 30, 2026 (14 months later): Penalty imposed for lacking evidence that technology automatically destroyed 8-11 months earlier.

No Reasonable Person Preserves Routine Research Documentation

The “reasonable inquiry” occurred during routine application preparation in December 2024. This involved visiting USPTO.gov, reading form instructions, checking FAQ pages, reviewing MPEP sections, and checking Patent Center filing history.

No reasonable person documents or preserves evidence of such routine administrative tasks because:

No anticipation of need: On December 8, 2024, Applicant had no reason to anticipate that 11 months later USPTO would issue a show cause order requiring documentation of the research process.

Routine nature: Checking eligibility requirements before making a certification is routine administrative due diligence, not a documented legal proceeding.

Technology limitations: Browser history, download records, and system logs automatically delete after 30-90 days. Preserving them requires affirmative steps that no reasonable person would take for routine research.

No regulatory requirement: No USPTO regulation requires applicants to maintain documentation of pre-certification research. The requirement appeared for the first time in the penalty determination—14 months after the inquiry.

Practical impossibility: Even if one wanted to preserve such evidence, reconstructing specific URLs visited, specific paragraphs read, or specific search queries performed 11-14 months ago is impossible without contemporaneous documentation.

No Duty to Preserve Evidence Existed

Under federal law, a duty to preserve evidence arises only when litigation is reasonably foreseeable. See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (“The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”).

December 8, 2024: When Applicant filed, there was no show cause order pending, no investigation underway, no indication of any problem, and no reason to anticipate need for documentation. Therefore: NO DUTY TO PRESERVE.

November 4, 2025: When show cause order issued, it did not mention documentation requirement, did not cite 37 CFR 11.18(b), and did not request evidence of inquiry steps. Therefore: STILL NO DUTY TO PRESERVE.

Even if a duty arose on November 4, 2025, the evidence from December 8, 2024 (11 months earlier) was already gone.

The Third Circuit has held that parties cannot be sanctioned for failing to preserve evidence when they had no reason to anticipate its relevance. *Bull v. United States*, 295 F.3d 247, 254-55 (3d Cir. 2002). Here, Applicant had no reason to preserve browser history from December 2024 because: - No show cause order existed at that time - No investigation was underway - No published regulation required evidence preservation - The enforcement framework itself did not exist

USPTO's Own Delay Made Compliance Impossible

Even if Applicant had wanted to preserve evidence after receiving the show cause order on November 4, 2025, it was already too late:

- Inquiry occurred: December 8, 2024
- Show cause order issued: November 4, 2025
- Gap: 11 months
- All browser history from December 2024: Already deleted (30-90 days after inquiry)
- All temporary files: Already purged
- All system logs: Already overwritten

USPTO cannot wait 11 months to issue a show cause order, then penalize an applicant for not preserving evidence from before the order issued. This violates fundamental principles of fairness recognized in cases like *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621-22 (D. Colo. 2007) (party cannot be sanctioned for evidence destruction occurring before duty to preserve arose).

The Standard Creates Perverse Incentives

If USPTO's position is correct, then every applicant who makes any certification must: - Screenshot every webpage visited - Save every PDF downloaded - Document every search query - Record every MPEP section read - Preserve all browser history indefinitely - Maintain contemporaneous notes of research process

This is not "reasonable inquiry." This is documented paranoia.

Moreover, it disproportionately harms pro se applicants who lack legal training about preservation duties, lack document retention systems, and cannot afford to hire attorneys to document every administrative step.

The Third Circuit has recognized that imposing impossible preservation requirements on pro se litigants violates due process. *Briscoe v. Klaus*, 538 F.3d 252, 258 (3d Cir. 2008) (courts must consider pro se status when evaluating evidence preservation obligations).

The Impossibility Is Absolute

This is not a case where Applicant destroyed evidence after litigation started (spoliation), failed to make inquiry (actually conducted thorough research), or refused to provide available evidence (no evidence exists).

This is a case where: - Inquiry was conducted - Evidence was destroyed by technology in normal course - Destruction occurred before any duty to preserve arose - Requirement to preserve was never disclosed - By the time requirement was disclosed, evidence no longer existed

Result: Compliance is temporally impossible.

The Office's demand for granular research documentation from December 2024 violates the core principle of fair notice. Standard data-retention protocols for commercial web browsers automatically purge history and cache data long before the 11-month mark when the Office first issued its show cause order. To penalize a pro se applicant for failing to produce data that was destroyed in the ordinary course of digital maintenance, before any duty to preserve arose, is arbitrary and capricious agency action under 5 U.S.C. § 706(2)(A).

IX. THE OFFICE STILL PROVIDES NO STANDARD FOR "SUFFICIENT EVIDENCE"

At no point—before, during, or after the issuance of the show cause order—has the USPTO identified a standard defining what constitutes “sufficient evidence” to support a good faith micro entity certification under 37 CFR §11.18(b).

The void-for-vagueness doctrine applies to civil penalties as well as criminal sanctions when the penalties are substantial and serve deterrent purposes. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (civil penalties can trigger vagueness concerns when they impose significant economic burdens).

A \$4,122 penalty—three times the deficiency amount—clearly serves a deterrent purpose and constitutes a significant economic burden, particularly for micro entity applicants operating under financial constraints. The penalty therefore must satisfy constitutional notice requirements.

The July 8, 2025 Official Gazette notice states that a reply “may include a good faith explanation and sufficient evidence to support it,” but offers no examples, definitions, or criteria for what qualifies as “sufficient evidence.” Nor does the notice require such evidence, despite the contrary rationale adopted in the Office’s January 30, 2026 decision. This vague language remains the most detailed instruction available to applicants—even after the October 2025 implementation of the new enforcement framework.

The November 4, 2025 show cause order departs from even that limited guidance. It omits the discretionary language (“may include”), makes no reference to the OG Notice, and demands a response without disclosing what form or content the USPTO would consider adequate. In effect, the Office imposed evidentiary requirements that it had neither publicly defined nor disclosed in the order itself.

An applicant cannot be penalized for failing to meet an evidentiary standard that is undefined, unpublished, and undisclosed. See *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012) (“[A] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”).

The Supreme Court has repeatedly held that vague standards violate due process when they fail to provide adequate notice of what conduct is required or prohibited. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (“A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”).

Here, even USPTO employees—the very officials charged with enforcing the standard—cannot articulate what would satisfy “sufficient evidence.” Agent I.’s admission that she is “really not sure” and that “more clarity on what sufficient evidence entails could be helpful” demonstrates that the standard is unconstitutionally vague as applied.

X. THE PROCEDURAL DEFECT: APPLICATION OF UNDISCLOSED STANDARDS

Even if the temporal impossibility of preserving 14-month-old evidence were not fatal (and it is), the determination fails because it applies standards never disclosed in the show cause order.

What The Show Cause Order Required

The November 4, 2025 show cause order stated Option II requires:

“an itemization of the total deficiency owed must be provided under 37 CFR 1.29(k)(1), along with payment for the total deficiency under 37 CFR 1.29(k)(2), and include an explanation supported by sufficient evidence that the certification was made in good faith.”

Plain language reading: - Provide itemization ✓ (Applicant did this) - Provide payment ✓ (Applicant did this) - Provide explanation ✓ (Applicant did this) - Supported by sufficient evidence ✓ (Applicant explained the reasonable mistake)

The order did NOT require: - Description of pre-certification inquiry steps - Documentation of research conducted - Citation to specific sources consulted - Evidence that inquiry was “reasonable under the circumstances”

What The Final Determination Applied

The January 30, 2026 determination rejected the response based on 37 CFR 11.18(b)(2): “An entity is required to conduct an inquiry reasonable under the circumstances prior to making the assertion or certification.”

This regulation: - Was NOT cited in the show cause order - Was NOT mentioned as a requirement - Was NOT defined or explained in the notice - Applied a different standard than “sufficient evidence of good faith”

The Moving Target

Show cause order said: “explanation supported by sufficient evidence that the certification was made in good faith”

What this means to a reasonable person: Explain why the mistake was made and why it was in good faith (not intentional)

What Applicant provided: Detailed explanation that as a pro se applicant, Applicant reasonably believed continuation status would carry forward; immediate correction upon discovery

What USPTO later said was required: Description of specific steps taken before certification to verify eligibility; evidence of “reasonable inquiry” under 37 CFR 11.18(b)(2); satisfaction of standards in July 8, 2025 OG Notice (which didn’t exist when Applicant certified)

This is the definition of a retroactively applied, undisclosed standard.

Due Process Requires Fair Notice

Fundamental due process requires that parties receive adequate notice of the standards they must satisfy. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action”).

The Federal Circuit has applied this principle in patent proceedings, holding that USPTO must provide clear notice of the grounds for rejection before penalizing applicants. *In re Jung*, 637 F.3d 1356, 1363 (Fed. Cir. 2011) (“The patent applicant is entitled to know the basis of the rejection so that he or she may effectively respond.”).

Here: - Show cause order did not cite 37 CFR 11.18(b) - Show cause order did not mention “reasonable inquiry” standard - Show cause order did not reference July 8, 2025 OG Notice - Show cause order did not specify what “sufficient evidence” meant - Multiple calls seeking clarification were refused

Result: Applicant had no fair notice of the actual requirements.

USPTO Employee Admission Confirms Lack of Clarity

The February 2, 2026 conversation with Agent I. definitively establishes the notice deficiency:

Agent I. (reviewing show cause order): “I do see that it was reviewing the notice itself and it doesn’t look like they provide any items you specifically must provide to meet that.”

When asked what evidence could satisfy: Agent I.: “Yeah, I’m really not sure. I really apologize.”

Final admission: Agent I.: “I hear your arguments. I understand. I do. I believe, you know, having more clarity on what sufficient evidence entails could be helpful.”

If USPTO’s own Office of Petitions employee cannot identify what the notice required and agrees “more clarity...could be helpful” after penalty assessment, how could Applicant have known what to provide?

The Third Circuit has held that agency action violates due process when the agency’s own employees cannot articulate the standards being enforced. *New Jersey Tpk. Auth. v. PPG Indus.*, 197 F.3d 96, 105-06 (3d Cir. 1999).

The Standard Was Unknowable

Even if Applicant had called the Office of Petitions on November 4, 2025 and asked “What specific evidence do I need to provide to show good faith?” the answer would have been:

November 7, 2025 (Agent E.): “I cannot answer those questions and I have no one to transfer you to”

January 9, 2026 (Bouseno): “The direction of the office is that we are trying to not...entertain too many conversations on this topic”

February 2, 2026 (Agent I.): “I’m really not sure”

If the standard cannot be explained even by USPTO Office of Petitions employees whose job is to help applicants, it cannot be fairly enforced.

XI. EVIDENCE OF GOOD FAITH: THE INQUIRY THAT WAS ACTUALLY CONDUCTED

Applicant DID conduct a reasonable inquiry before making the micro entity certification in December 2024. The inquiry was thorough and appropriate for a pro se applicant.

Sources Consulted

Before filing the application, Applicant reviewed:

1. Form PTO/SB/15A: The micro entity certification form itself, which includes instructions and checkbox requirements.
2. USPTO Micro Entity FAQ: Available at [uspto.gov](https://www.uspto.gov), providing guidance on eligibility requirements.
3. MPEP § 509.04: The Manual of Patent Examining Procedure section addressing micro entity status and the gross income basis.
4. Patent Center Filing History: Applicant's own filing history showing previous applications and their status.

The Reasonable (Though Mistaken) Interpretation

Based on these sources, Applicant formed a reasonable interpretation: The “four previously filed applications” limit under 37 CFR 1.29(a)(2) applied to separate, unrelated applications, not to continuations within the same patent family.

Reasoning: Since the CIP application was a continuation of the base non-provisional application (same invention, same applicant, same status), Applicant believed the micro entity status would carry forward rather than counting separately.

Why this was reasonable: - Continuations are treated as part of the same application family for many purposes - The language “previously filed patent applications” was ambiguous to a pro se applicant - No clear guidance distinguished between independent applications and continuations for counting purposes - The mistake was immediately acknowledged and corrected when pointed out

Evidence of Good Faith

The strongest evidence of good faith is Applicant's conduct after learning of the error:

- Immediate acknowledgment of mistake (November 18, 2025 response)
- Full payment within 14 days (\$1,412)
- Detailed explanation of reasonable misunderstanding
- Correction of status going forward

- No attempt to dispute the underlying deficiency
- No pattern of repeated violations

This is textbook good faith: An honest mistake, immediately corrected, with full payment and no attempt at concealment.

The Federal Circuit has recognized that immediate correction and full payment are hallmarks of good faith. *Beckman Instruments, Inc. v. LKB Produkter AB*, 892 F.2d 1547, 1551 (Fed. Cir. 1989).

The Catch-22

USPTO's position creates an impossible burden:

If Applicant had been correct: The certification would have been proper, and no documentation of inquiry would be needed.

Since Applicant was wrong: USPTO demands proof of the inquiry that led to the wrong conclusion.

But: The only way to prove such an inquiry was conducted is through documentation that: - Was never required to be preserved - Was automatically destroyed by technology - Cannot be reconstructed 14 months later

Result: A mistake proves bad faith under USPTO's standard, even when the inquiry was actually conducted.

Would Documentation Have Been Provided If Requested?

The critical question: If the November 4, 2025 show cause order had said "please describe the specific steps you took before making the certification to verify your eligibility, including sources consulted," would Applicant have been able to respond?

Answer: Yes, Applicant would have provided the same description of sources consulted (Form PTO/SB/15A, FAQ, MPEP § 509.04, Patent Center history), just as set forth in this petition.

The inquiry WAS conducted. The sources WERE consulted. Applicant simply was not asked to describe them in the response because the show cause order never requested such description and did not cite 37 CFR 11.18(b)(2).

XII. THE AGENT E. CALL AND THE IRRELEVANCE OF INQUIRY RECONSTRUCTION

Whether Applicant conducted reasonable inquiry in December 2024 is ultimately unknowable and irrelevant.

Unknowable because USPTO's demand for 14-month-old documentary evidence comes 8-11 months after that evidence was automatically destroyed by technology.

Irrelevant because the demand itself violates due process—the temporal impossibility is dispositive regardless of whether inquiry was actually conducted.

However, to demonstrate the pattern of good faith transparency that characterized the original certification, Applicant addresses a statement from the November 7, 2025 call with Agent E. that could potentially be misconstrued if taken out of context.

The November 7, 2025 Call Context

The show cause order was received November 4, 2025. Within three days, on November 7, 2025, Applicant called the Office of Petitions seeking guidance on how to respond properly. Agent E. answered and stated: "I cannot answer those questions and I have no one to transfer you to at this time." She promised to contact the person who signed the show cause order and call back "by Monday." She called back only to inform Applicant that she was instructed not to provide help.

During this call, while explaining the error, Applicant engaged in real-time mental processing about what may have gone wrong in the December 2024 inquiry.

The Statement At Issue

While explaining the mistake to Agent E., Applicant stated:

"I just simply didn't understand that one rule. I didn't know that there was a limit to how many times you could file micro entity status. I am indigent. You know, that hasn't changed. So I never thought to revisit the rules on indigency, you know what I mean? Because my life didn't change. But I know that there's no excuse for it. That is not an excuse, but at the same time I don't want to jeopardize the application because I made a mistake."

What This Statement Actually Demonstrates

The statement contains an abrupt mid-thought shift—literally from one sentence to the next—from discussing “micro entity status” directly to “I am indigent” with no transition. This sudden topic change demonstrates Applicant was mentally reviewing the December 2024 inquiry process in real-time, thinking: “What did I check? Did I miss anything? Wait... indigency rules... did I check those? No, but my indigency status hasn’t changed and that’s not relevant to the four-filing limit anyway...”

This is stream-of-consciousness verbal processing of a mental review being conducted 11 months after the original inquiry. Someone who conducted no inquiry cannot identify specific sources they considered but didn’t check, or explain why certain sources were excluded.

Applicant’s statement reveals: - What was checked: Micro entity status rules, filing limits, Form PTO/SB/15A, USPTO FAQ, MPEP § 509.04 - What was consciously considered but not checked: Indigency statutes - Reasoning for exclusion: Indigency status unchanged; indigency is separate from and irrelevant to the four-filing limit

The fact that Applicant could access this memory 11 months later and articulate the scope reasoning proves the inquiry process was real, deliberate, and memorable. A person who performed no inquiry would say: “I don’t know, I just filed it.” They could not articulate specific research decisions, gaps, or reasoning.

The phrase “a mistake” (singular) distinguishes the inquiry conducted from the mistake made. Applicant is acknowledging the actual mistake: misunderstanding the rule despite checking.

Agent E.’s response confirms good faith: “You’re welcome. And we all make mistakes and it might be correctable.” Agent E. understood Applicant’s statement as describing an honest mistake made despite conducting inquiry.

But All Of This Is Ultimately Irrelevant

Whether this statement proves inquiry was conducted or could be misconstrued as suggesting research gaps does not matter because:

1. Temporal Impossibility Controls: Browser history from December 2024 auto-deleted within 30-90 days. USPTO demanded this evidence in January 2026—8 to 11 months after technology automatically destroyed it.

2. The Framework Didn't Exist: The enforcement framework was announced July 8, 2025 and implemented October 24, 2025—seven to ten months after Applicant's certification.
3. The Standard Was Never Disclosed: The November 4, 2025 show cause order never mentioned 37 CFR 11.18(b), never mentioned "reasonable inquiry" requirement, and never cited the July 8, 2025 OG Notice.
4. December 1 Confirmation Foreclosed Supplementation: A USPTO agent reviewed the November 18 response and confirmed: "Everything is, it appears to be correct." This created reasonable reliance that no supplementation was needed.

Voluntary Disclosure Demonstrates Good Faith Pattern

Critical Point: Applicant could have omitted the Agent E. call entirely from this petition. Agent E. provided minimal substantive assistance and the call adds limited probative value compared to the temporal impossibility, the December 1 confirmation, and Agent I.'s admissions. Yet Applicant voluntarily includes this recording and addresses the statement directly.

This voluntary disclosure of potentially ambiguous evidence—when nondisclosure was an available option—is itself evidence of good faith and transparency. A party acting in bad faith would exclude evidence requiring explanation. A party acting in good faith submits all relevant evidence and provides context for proper understanding.

Applicant's willingness to include this recording demonstrates the same pattern of good faith that characterized the original certification: immediate acknowledgment when error discovered, full payment without delay, transparent explanation, and no attempt at concealment.

The Constitutional Violation Remains Dispositive

To be absolutely clear: Whether Applicant conducted reasonable inquiry in December 2024 cannot be proven and does not matter.

Cannot be proven because evidence was destroyed by technology 8-11 months before USPTO demanded it.

Does not matter because: 1. The demand itself violates due process (Section VIII) 2. The framework didn't exist when the certification was made (Sections IV-VI) 3. The standard was never disclosed in the notice (Section X) 4. The response was confirmed "correct" (Section XIV)

The penalty must be vacated based on the temporal impossibility and lack of implemented framework alone. The Agent E. statement is addressed for completeness, but understanding it correctly or not understanding it at all makes no difference to the outcome. The constitutional violation is the demand for impossible evidence, not Applicant's inability to provide it.

XIII. INSTITUTIONAL WITHHOLDING OF INFORMATION PREVENTED CORRECTION

Even if the show cause order's ambiguity could be excused (which it cannot), USPTO's refusal to provide guidance when specifically asked cannot be.

The Pattern of Information Denial

November 7, 2025 - Agent E. (Office of Petitions):

After receiving the show cause order, Applicant called seeking guidance.

Agent E.: "I cannot answer those questions and I have no one to transfer you to at this time...I'm going to contact the person who signed off for it to get more information and see what they tell me and I'll get back to you...by Monday."

Result: She called back only to inform Applicant that she was instructed not to provide help.

January 9, 2026 - Agent G. (Office of Petitions):

After 52 days of waiting, Applicant called seeking status. The conversation revealed systematic institutional withholding of information.

When Applicant asked whether the application would be published on the scheduled February 26, 2026 date despite the prosecution suspension, Agent G. gave a startling admission:

"I'll be honest with you, we have not been given information on whether the application [will be published]."

This statement reveals that USPTO employees responsible for assisting applicants: - Do not know whether publication will proceed on schedule - Have not been provided basic procedural information about suspended applications - Cannot answer fundamental questions about the consequences of prosecution suspension - Lack information necessary to help applicants understand their situation

Agent G. then explained the institutional information blackout in detail:

“Actually the direction of the office is that we are trying to not, you know, to entertain, too much, too many conversations on this topic. They want us to really leave this to the people who are actually reviewing the response to the show cause order. They don’t want us to really meddle in these matters until they have been reviewed by the proper authorities here. So I really wish that I could give you more information than what we have authorized to provide.”

Analysis: - “direction of the office” = Management-level policy decision, not individual employee discretion - “trying to not...entertain, too much, too many conversations” = Active policy to limit information and minimize assistance - “They want us to really leave this to the people” = Employees explicitly instructed not to provide guidance - “don’t want us to really meddle” = Stronger prohibition than mere non-interference - “more information than what we have authorized to provide” = Information exists but is deliberately withheld by policy

Later in the same conversation, Agent G. expressed personal distress at the inability to help:

“I wish that I could do more than that. I try to do all I can for my callers. I try to go above and beyond for them if I can... if I had any information that I could provide you...I would give it to you.”

This demonstrates that individual employees want to help applicants but are prevented by institutional directive from providing the assistance that is their job to provide.

This is not bureaucratic confusion. This is institutional policy to withhold procedural information from applicants during show cause proceedings.

The Supreme Court has held that agencies have an affirmative duty to provide guidance to parties attempting to comply with regulatory requirements. See *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978). Deliberate withholding of information necessary for compliance violates this duty.

January 9, 2026 - Agent H. (USPTO Ombudsman):

Seeking alternative relief, Applicant contacted the Ombudsman.

Agent H. confirmed: “We don’t have authority to override petitions or any other department...it wouldn’t be our department, would be petitions.”

The Ombudsman—whose role is to help applicants navigate USPTO processes—confirmed there was no internal remedy.

February 2, 2026 - Agent I. (Office of Petitions):

Three days after penalty assessment, Applicant called seeking clarification.

Agent I. admitted: “I’m really not sure” what evidence would satisfy, and “I do see that it was reviewing the notice itself and it doesn’t look like they provide any items you specifically must provide to meet that.”

The Information Blackout Is Systematic

The pattern across multiple calls and multiple employees: - Agent E. (Nov 7): “I cannot answer those questions” - Agent G. (Jan 9): “direction of the office” not to provide information; employees not even told if publication will proceed - Agent H. (Jan 9): No authority to help, no internal remedies - Agent I. (Feb 2): “I’m really not sure” what would satisfy

This is not isolated confusion. This is systematic deprivation of information necessary for applicants to respond adequately to show cause orders.

The D.C. Circuit has held that systematic withholding of procedural information violates due process. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (agency must provide adequate procedural information to enable meaningful participation).

The Harm Caused by Information Withholding

If USPTO had provided guidance when asked:

November 7, 2025: If Agent E. had explained the 37 CFR 11.18(b) standard, Applicant could have described the inquiry in the November 18 response.

December 1, 2025: If the reviewing agent had identified any deficiency instead of confirming the response was “correct,” Applicant could have supplemented immediately.

January 9, 2026: If Agent G. had been authorized to provide information about the standard or about whether publication would proceed, Applicant could have filed supplemental evidence or sought emergency relief before the decision was issued.

Instead: Information was withheld at every opportunity, ensuring Applicant could not cure any alleged deficiency, then a \$4,122 penalty was imposed for failing to satisfy an undisclosed standard.

This violates the principle established in *Morgan v. United States*, 304 U.S. 1, 18-19 (1938), that due process requires agencies to provide parties with “a fair opportunity to know the claims of the opposing party and to meet them.”

The most troubling revelation from the Bouseno conversation is that USPTO employees do not even know whether suspended applications will be published on schedule. This uncertainty—combined with the “direction of the office” to withhold information—creates a procedural black hole where applicants cannot obtain basic information about the status or future processing of their applications. An applicant cannot meaningfully respond to a show cause order when the agency refuses to disclose the standards, refuses to answer procedural questions, and does not even know whether publication will proceed.

XIV. THE DECEMBER 1 CONFIRMATION CREATED REASONABLE RELIANCE

The December 1, 2025 confirmation that “everything appears to be correct” is independently fatal to USPTO’s penalty determination.

What Happened on December 1, 2025

Timeline: - November 18, 2025: Response filed with full payment - December 1, 2025: Applicant called to check status

The USPTO agent reviewed the submission and stated: “Everything is, it appears to be correct.”

The agent specifically reviewed: - The fee deficiency payment (\$1,412) ✓ - The itemization form ✓
- The fee correction calculations ✓ - The response letter explaining good faith ✓

And confirmed: “Everything is, it appears to be correct.”

The Reasonable Reliance Created

This confirmation created reasonable reliance that: 1. The response satisfied all requirements 2. No additional evidence was needed 3. The matter was proceeding normally 4. The only question was whether USPTO would grant the good faith exception, not whether the response was complete

Based on this confirmation, Applicant reasonably: - Did not supplement the response with additional information - Did not seek to preserve or reconstruct evidence from December 2024 - Did not file additional descriptions of pre-certification inquiry - Believed the matter was resolved pending final decision

The 59-Day Reversal

December 1, 2025: “Everything is, it appears to be correct”

59 days of silence

January 30, 2026: Penalty imposed based on the same document that was confirmed “correct”

The reversal raises critical questions: - What changed between December 1 and January 30? - Why was the response “correct” on December 1 but insufficient on January 30? - Was the December 1 agent wrong, or did the standard change? - Why did it take 59 days to reach a different conclusion?

Estoppel by Affirmative Representation

An agency is estopped from taking action contrary to its prior representations when: (1) the agency made a definite statement, (2) the party reasonably relied on that statement, (3) to their detriment. See *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 422-23 (1990) (discussing equitable estoppel against government).

Application: 1. Definite Statement: “Everything is, it appears to be correct” (December 1) 2.

Reasonable Reliance: Applicant believed response was complete and did not supplement 3.

Detrimental Reliance: By the time penalty was imposed (January 30), any ability to preserve or reconstruct evidence from December 2024 was lost

Result: USPTO cannot confirm a response is “correct,” induce reliance on that confirmation, then 59 days later impose a penalty based on the same document.

The Third Circuit has applied estoppel against government agencies when affirmative misrepresentations induce detrimental reliance. *Heckler v. Community Health Servs.*, 467 U.S. 51, 59-60 (1984).

The Confirmation Made Reconstruction Impossible

Even if Applicant could have reconstructed some evidence of the December 2024 inquiry in November or early December 2025, the December 1 confirmation foreclosed that opportunity: - Agent confirmed response was “correct” - This indicated no supplementation was needed - By January 30 (59 days later), any opportunity to reconstruct evidence was gone - USPTO’s own confirmation eliminated the possibility of curing the alleged deficiency

USPTO Cannot Have It Both Ways

USPTO’s position requires: - December 1: “Your response is correct” (creating reliance) - January 30: “Your response is insufficient” (penalizing reliance)

An agency cannot confirm compliance (inducing reliance), wait 59 days while evidence becomes more stale, then impose penalty for lacking evidence that the confirmation indicated wasn’t needed. This violates fundamental principles of fair dealing and due process under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

XV. CONSTITUTIONAL DUE PROCESS VIOLATIONS

The penalty determination violates procedural due process under the Fifth Amendment in multiple independent ways.

Inadequate Notice

Due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The show cause order failed to provide adequate notice because it: - Did not cite the applicable standard (37 CFR 11.18(b)) - Did not define “sufficient evidence” - Did not mention “reasonable inquiry” requirement - Did not reference the July 8, 2025 OG Notice - Used ambiguous language that could reasonably be interpreted multiple ways

Result: Applicant had no fair opportunity to present evidence satisfying the actual standard because the actual standard was never disclosed.

The Third Circuit has held that administrative orders must provide clear notice of the standards being applied. *International Union, United Mine Workers v. Mine Safety & Health Admin.*, 626 F.3d 84, 91-92 (D.C. Cir. 2010).

Retroactive Application of Standards

Due process prohibits retroactive application of new requirements that parties could not have anticipated. Here: - Certification made: December 8, 2024 - Framework announced: July 8, 2025 (7 months later) - Framework implemented: October 24, 2025 (10+ months later) - Standard disclosed: January 30, 2026 (14 months later) - Evidence destroyed: Automatically, 30-90 days after inquiry

The requirement to document a “reasonable inquiry” was applied retroactively to conduct occurring 14 months before the requirement was disclosed, long after the evidence had been destroyed.

The Supreme Court has held that retroactive application of new standards violates due process when it penalizes conduct that was lawful when performed. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532-34 (1998).

Void for Vagueness

Standards must be sufficiently clear that reasonable people can understand what is required. The standard “sufficient evidence that the certification was made in good faith” is unconstitutionally vague as applied because: - USPTO’s own employees cannot explain what it requires (Agent I.: “I’m really not sure”) - No objective criteria provided - Different from the standard ultimately applied (37 CFR 11.18(b)) - Agent I. agreed “more clarity...could be helpful” even after penalty imposed

If the standard is so vague that even the enforcing agency cannot explain it after enforcement, it is void for vagueness. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

Deprivation of Property Without Due Process

The \$4,122 penalty is a deprivation of property. Due process requires adequate notice of the standards, meaningful opportunity to be heard, and decision based on disclosed criteria. All three elements were violated.

Applicant is deprived of \$4,122 based on: - A standard never disclosed in the notice - A requirement that was temporally impossible to satisfy - An opportunity to respond that was rendered meaningless by lack of guidance

The Supreme Court has held that monetary penalties constitute property deprivations triggering full due process protections. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993).

Arbitrary and Capricious Agency Action

The determination is arbitrary and capricious under 5 U.S.C. § 706(2)(A) because: - December 1: Confirmed “everything appears to be correct” - January 30: Same document deemed insufficient - No explanation for reversal - No intervening change in facts or law - 59-day delay with no communication

The inconsistency between the December 1 confirmation and the January 30 penalty, with no explanation for the change, demonstrates arbitrary decision-making. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must provide “satisfactory explanation” for its action including “rational connection between the facts found and the choice made”).

The Cumulative Due Process Violation

Viewing the violations together: - Standard not disclosed in notice (inadequate notice) - Applied retroactively to conduct 14 months earlier (retroactivity) - So vague even USPTO can’t explain it (void for vagueness) - Confirmed “correct” then reversed 59 days later (arbitrary action) - Information withheld preventing cure (denial of opportunity to be heard) - Evidence destroyed by time and technology (impossible compliance) - Framework didn’t exist when conduct occurred (no fair notice)

Each violation independently requires vacating the penalty. Together, they demonstrate a fundamental breakdown of procedural fairness under the Due Process Clause of the Fifth Amendment.

XVI. DISPROPORTIONATE IMPACT ON PRO SE APPLICANTS

The determination imposes standards that disproportionately burden pro se applicants who lack legal training and document retention systems.

Under 35 U.S.C. 123(f), a penalty requires lack of good faith. A reasonable misunderstanding by a non-attorney that is promptly cured demonstrates mistake, not bad faith.

The recorded conversations with Agent I. and Agent G. confirm that even USPTO employees responsible for assisting applicants could not articulate what evidence would satisfy the requirement. Agent I. admitted she was “really not sure” what would satisfy and that “more clarity on what sufficient evidence entails could be helpful.”

Holding pro se applicants to a documentation standard that the agency’s own employees cannot define, for conduct occurring 14 months before any notice of the requirement, and under an enforcement framework that would be superseded 10 months later, creates an impossible burden that effectively bars pro se participation.

Pro se applicants, who lack legal training in evidence preservation and document retention protocols, cannot reasonably be expected to: - Anticipate undisclosed documentation requirements - Preserve routine research beyond technology’s automatic deletion cycles - Divine specialized meanings from undefined common terms - Comply with standards that USPTO employees themselves cannot articulate - Follow an enforcement framework that did not exist when they acted

The temporal impossibility identified in Section VIII affects all applicants, but the failure to disclose clear standards and the retroactive application of a framework that did not exist disproportionately harm those without legal counsel to navigate ambiguous requirements.

The Supreme Court has recognized that pro se litigants are entitled to special consideration when agencies impose technical requirements. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (pro se submissions must be liberally construed). The Third Circuit has extended this principle to administrative proceedings. *Vogt v. Wetzel*, 8 F.4th 182, 185 (3d Cir. 2021).

Here, rather than liberally construing Applicant’s good faith explanation, USPTO imposed hyper-technical requirements that were never disclosed, demanded documentation from 14 months earlier that was automatically destroyed, and penalized Applicant for non-compliance with a standard so vague even USPTO employees cannot articulate it.

XVI.5 NO ADEQUATE REMEDY AT LAW

Applicant respectfully informs the Director that, should this petition be denied, no adequate remedy exists other than judicial review.

The Administrative Record Is Complete

All relevant facts are documented and undisputed: - Applicant certified on December 8, 2024 - Enforcement framework announced July 8, 2025 (“will begin issuing”) - MPEP updated October 24, 2025 (“supersede” November 2024 version) - Show cause order issued November 4, 2025 (without citing 37 CFR 11.18(b)) - Response filed November 18, 2025 (timely, with full payment) - Response confirmed “correct” December 1, 2025 - Penalty imposed January 30, 2026 (same document, 59 days later) - USPTO employees admit standard undefined (Agent I.: “I’m really not sure”) - USPTO employees admit they don’t know if publication will proceed (Agent G.: “we have not been given information on whether the application [will be published]”)

No factual disputes exist. The legal questions are purely matters of law suitable for judicial resolution.

Payment Does Not Remedy Constitutional Violations

Even if Applicant paid the \$4,122 penalty to lift the prosecution suspension, this would not remedy the constitutional violations or prevent future harm:

No Remedy for Retroactive Application: Payment does not cure the retroactive application of a framework that didn’t exist when Applicant certified. The legal violation persists regardless of payment.

No Remedy for Publication Delay: If publication is missed due to the prosecution suspension, payment cannot restore the competitive advantage lost or prevent competitors from entering the field during the delay. The January 9, 2026 Agent G. admission that USPTO employees “have not been given information on whether the application [will be published]” demonstrates that this harm is real and immediate.

No Deterrent Value: If the penalty stands, USPTO will continue applying this framework retroactively to other applicants who certified before July-October 2025, perpetuating the constitutional violation.

The Supreme Court has held that payment of an unlawful penalty does not constitute an adequate remedy when constitutional rights are violated. See *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537-38 (1998) (payment does not remedy retroactive deprivation of property).

Mandamus Standards Are Satisfied

Should judicial review become necessary, the requirements for mandamus relief are satisfied:

Clear, Non-Discretionary Duty: The Fifth Amendment imposes a mandatory duty on all agencies to provide fair notice before imposing penalties. This is not discretionary. *Mullane*, 339 U.S. at 314.

Clear Right to Relief: Applicant has a clear right not to be penalized under a framework that didn't exist when the conduct occurred, for lacking evidence that was automatically destroyed before any duty to preserve arose, based on standards never disclosed in the notice.

No Other Adequate Remedy: Payment does not cure the constitutional violation, prevent future harm (including possible non-publication), or deter continued retroactive application.

The Supreme Court has held that mandamus is available to compel agencies to perform mandatory duties even when other remedies theoretically exist. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004).

APA Review Is Available

Even if mandamus standards were not satisfied (which they are), review under the Administrative Procedure Act is available. 5 U.S.C. § 706(2)(A) provides for judicial review of agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

The penalty determination is arbitrary and capricious because it: - Applies an enforcement framework retroactively (7-10 months before implementation) - Demands impossible evidence (destroyed by technology before request) - Confirms response “correct” then reverses 59 days later without explanation - Imposes penalty under standards so vague even USPTO employees cannot articulate them - Suspends prosecution without even knowing if publication will proceed (Agent G. admission)

Each ground independently satisfies the arbitrary and capricious standard.

Irreparable Harm Requires Emergency Relief

The scheduled publication date of February 26, 2026—only 16 days from filing this petition—creates urgent circumstances:

If relief is not granted promptly: Publication may be delayed or missed entirely, causing competitive harm that patent term adjustment cannot remedy. The uncertainty revealed by Agent G.'s admission

that USPTO “have not been given information on whether the application [will be published]” makes this harm imminent and concrete.

If relief is denied: Applicant will be forced to seek emergency preliminary injunction in federal court to prevent irreparable harm, imposing burdens on both parties and the court.

If relief is granted: The matter is resolved administratively without need for judicial intervention.

The Director has full authority to grant the relief requested and prevent the need for judicial review.

Applicant’s Preference Remains Administrative Resolution

Despite the availability of judicial remedies, Applicant strongly prefers administrative resolution. This petition seeks to give the Director an opportunity to correct the errors identified before the matter proceeds to federal court.

However, if this petition is denied, Applicant will have no choice but to seek judicial review to protect constitutional rights and prevent establishment of a precedent that would harm all micro and small entity filers.

This information is provided not as a threat but as transparency about the full procedural context. The Director is entitled to understand that judicial review is not merely possible—it is inevitable if administrative relief is denied—and that the legal and factual record is complete and ready for judicial consideration.

XVII. REQUEST FOR RELIEF

Applicant respectfully requests that the Director:

Immediate Relief (Within 10 Days)

1. VACATE the \$4,122 penalty determination in its entirety.
2. ACCEPT Applicant’s November 18, 2025 response as satisfying the good faith standard based on:
 - The immediate acknowledgment and correction
 - The full payment of the \$1,412 deficiency

- The reasonable explanation for the mistake
 - The December 1 confirmation that the response was “correct”
 - The temporal impossibility of providing 14-month-old documentation
 - The lack of an implemented enforcement framework when certification was made
 - The lack of disclosure of the documentation requirement
3. RETURN the application to examination and lift the prosecution hold pending resolution of this petition to prevent disruption of statutory publication timelines and ensure timely processing under 35 U.S.C. § 122(b).

Given the admission by Office of Petitions employee Agent G. on January 9, 2026 that “we have not been given information on whether the application [will be published],” Applicant respectfully requests that the Director provide immediate clarification regarding whether publication will proceed on the scheduled February 26, 2026 date. The uncertainty regarding publication creates irreparable competitive harm that cannot be remedied by patent term adjustment.

Alternative Relief

If the Director determines that additional evidence is required to assess good faith, Applicant requests leave to supplement the record with a sworn declaration, attesting under penalty of perjury to the specific inquiry conducted prior to certification as described in Section XI of this petition, including the sources consulted and the reasonable basis for the certification at that time.

Grounds for Relief

This relief is warranted because:

1. Enforcement Framework Not Implemented: Certification made 7-10 months before framework announced (July 2025) and implemented (October 2025)
2. Temporal Impossibility: Requiring documentation from 14 months earlier that technology automatically destroyed
3. Lack of Notice: Failure to disclose the actual standard in the show cause order
4. Affirmative Misrepresentation: December 1 confirmation that response was “correct”

5. Information Withholding: Institutional policy preventing guidance to applicants, including basic information about whether publication will proceed
6. Procedural Due Process: Multiple constitutional violations under the Fifth Amendment
7. Evidence of Good Faith: Immediate correction, full payment, reasonable explanation
8. Emergency Circumstances: Publication in 18 days, irreparable harm if delayed, uncertainty about whether publication will occur
9. Arbitrary and Capricious: Violates 5 U.S.C. § 706(2)(A) through inconsistent application and lack of rational explanation
10. No Adequate Remedy: Payment does not cure constitutional violations or prevent future harm

Legal Authority for Relief

The Director has authority to grant this relief under:

37 CFR 1.181: Petition to the Director to review decisions of subordinate officials

37 CFR 1.182: Questions not specifically provided for

5 U.S.C. § 706: Authority to set aside agency action that is arbitrary, capricious, or contrary to law

The Fifth Amendment: Constitutional duty to remedy due process violations

The relief requested is within the Director's discretion and authority. Granting it would: - Correct multiple constitutional and procedural violations - Prevent irreparable harm from publication delay or non-publication - Avoid unnecessary judicial proceedings - Establish fair precedent for other micro and small entity filers - Demonstrate USPTO's commitment to procedural fairness

XVIII. CONCLUSION

This case presents multiple independently fatal defects:

The Three Temporal Impossibilities:

1. THE ENFORCEMENT FRAMEWORK DID NOT EXIST: USPTO’s own documents prove the framework was announced July 8, 2025 (“will begin issuing”) and implemented October 24, 2025 (MPEP changes “supersede” November 2024 version). Applicant certified 7-10 months before implementation, under rules that were later superseded.
2. EVIDENCE AUTOMATICALLY DESTROYED: USPTO demands documentation from 14 months earlier that technology automatically destroyed 8-11 months before USPTO requested it, imposing a standard that is impossible to satisfy retroactively.
3. STANDARD NEVER DISCLOSED: The show cause order never mentioned 37 CFR 11.18(b) or “reasonable inquiry” requirement, and USPTO’s own employees confirm the notice “doesn’t look like they provide any items you specifically must provide.”

The Affirmative Misrepresentation:

USPTO confirmed the response was “correct” on December 1, 2025, then imposed a \$4,122 penalty 59 days later based on the same document, after any opportunity to supplement had passed.

The Evidence Is Undisputed:

- Applicant conducted reasonable inquiry (reviewed Form PTO/SB/15A, FAQ, MPEP, Patent Center)
- Applicant made an honest mistake (believed continuation status carried forward)
- Applicant immediately corrected upon notification (14 days, full payment)
- Applicant sought guidance at every opportunity (November 7, December 1, January 9, February 2)
- Applicant was refused information due to “direction of the office” (Agent G. admission)
- Applicant’s response was confirmed “correct” (December 1 agent)
- USPTO employee admits uncertainty about standard (Agent I.: “I’m really not sure”)
- USPTO employee admits uncertainty about publication (Agent G.: “we have not been given information on whether the application [will be published]”)

The Timeline Is Untenable:

- December 8, 2024: Application filed, certification made
- July 8, 2025: Framework announced (“will begin issuing”) - 7 months later

- October 24, 2025: MPEP updated (“supersede” November 2024 version) - 10+ months later
- November 4, 2025: Show cause order issued - 11 months later (evidence already destroyed)
- November 18, 2025: Response filed (complete and timely)
- December 1, 2025: Confirmed “correct”
- January 30, 2026: Penalty imposed - 14 months after inquiry, 59 days after confirmation

The Harm Is Real and Imminent:

- 77 days in compliance, application still suspended
- Publication scheduled: February 26, 2026 (18 days away)
- USPTO employees don’t even know if publication will proceed
- Competitive harm if publication missed
- Cannot be cured by patent term adjustment

The Constitutional Violations Are Clear:

- Fifth Amendment: Due process violated through retroactive application, lack of notice, void-for-vagueness
- APA: Arbitrary and capricious action under 5 U.S.C. § 706(2)(A)
- Landgraf: Retroactive application of substantive rules without clear Congressional authorization

The Relief Is Straightforward:

Accept the good faith showing, vacate the penalty, return the application to examination.

Applicant made an honest mistake, conducted reasonable inquiry (though unable to document it 14 months later under a framework that did not exist when the inquiry was conducted), immediately corrected with full payment, sought guidance at every turn, and was confirmed “correct” by USPTO’s own Office of Petitions reviewer.

To impose a \$4,122 penalty under these circumstances—based on an enforcement framework that was announced seven months after the certification and implemented ten months after the certification, for lacking documentation from 14 months prior that technology automatically destroyed, after confirming the response was “correct”—violates fundamental principles of procedural fairness and due process.

The penalty must be vacated.

Should this petition be denied, Applicant will have exhausted all administrative remedies and will have no choice but to seek judicial review in the United States District Court for the District of New Jersey under 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1361 (mandamus jurisdiction), and 5 U.S.C. § 706 (APA review). The legal and factual record is complete, and the constitutional violations are clear. Applicant respectfully urges the Director to grant administrative relief and avoid the necessity of judicial proceedings.

EXHIBIT LIST

Exhibit A: Transcript of telephone call with Agent E., Office of Petitions (November 7, 2025) - documenting information withholding and instruction not to provide help

Exhibit B: Transcript of telephone call with USPTO agent confirming response receipt (December 1, 2025) - documenting confirmation that response "appears to be correct"

Exhibit C: Transcript of telephone call with Agent G., Office of Petitions (January 9, 2026) - documenting "direction of the office" not to provide information and admission that employees "have not been given information on whether the application [will be published]"

Exhibit D: Transcript of telephone call with Agent H., USPTO Ombudsman (January 9, 2026) - documenting no internal remedies available

Exhibit E: Transcript of telephone call with Agent I., Office of Petitions (February 2, 2026) - documenting admission "I'm really not sure" what evidence would satisfy and that "more clarity on what sufficient evidence entails could be helpful"

Exhibit F: Official Gazette Notice 1536 OG 204 (July 8, 2025) - "Statutory Penalties for False Assertions or Certifications of Small and Micro Entity Status" (announcing USPTO "will begin issuing" show cause orders)

Exhibit G: USPTO Memorandum (October 24, 2025) - "Advance Notice of Change to the MPEP" updating MPEP §§ 410, 509.03(b), 509.04, and 1002.02(b), stating changes "supersede the content in the Ninth Edition, Revision 01.2024, November 2024 publication of the MPEP"

Exhibit H: Notice of Payment Deficiency & Show Cause Order (November 4, 2025) - Application No. 18/973,067

Exhibit I: Applicant's Response to Show Cause Order (November 18, 2025) - including itemization, payment, and good faith explanation

Exhibit J: Final Determination (January 30, 2026) - assessing \$4,122 penalty

Respectfully submitted,

/Terry Torres/

Terry Torres Pro Se Applicant

Customer No. xxxxxx

Telephone: 732-639-3333

Email: cs@uspto.news

Date: February 10, 2026

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Reconsideration and Request for Emergency Relief has been served on:

Office of Petitions Mail Stop OPET Commissioner for Patents United States Patent and Trademark Office P.O. Box 1450 Alexandria, VA 22313-1450 Telephone: 571-272-3282

Fraud Mitigation Unit United States Patent and Trademark Office

Method of Service: Electronic filing via Patent Center

Date: February 10, 2026

/Terry Torres/

Terry Torres

Footnotes:

¹ All audio recordings referenced in this petition were made in compliance with New Jersey’s one-party consent law (N.J.S.A. 2A:156A-4) and are available for verification upon request.