

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

INFORMAL BRIEF OF APPELLANT

Case Number: 2022-1420

Short Case Caption: Correll v. Hirshfeld

Name of Appellant: Kevin P. Correll

Instructions: Read the [Guide for Unrepresented Parties](#) before completing this form. Answer the questions as best as you can. Attach additional pages as needed to answer the questions. This form and continuation pages may not exceed 30 pages.

Attach a copy of the trial court's opinion, order, and/or judgment. You may also attach other record material as an appendix. Any attached material should be referenced in answer to the below questions. Please redact (erase, cover, or otherwise make unreadable) social security numbers or comparable private personal identifiers that appear in any attachments you submit.

1. Have you ever had another case before this court? Yes No

If yes, state the name and number of each case.

Correll v. Hirshfeld 2022-1032

2. Did the trial court incorrectly decide or fail to take into account any facts?

Yes No

If yes, what facts?

See attached Memorandum of Law supporting Appellant's PETITIONER'S EMERGENCY MOTION TO STAY OR REVERSE AGENCY ACTION SUSPENDING PETITIONER FROM THE PRACTICE OF PATENT LAW AND TRADEMARK AND OTHER NON-TRADEMARK MATTERS PENDING FINAL JUDICIAL REVIEW

3. Did the trial court apply the wrong law? Yes No

If yes, what law should be applied?

1. First Amendment - "it [is] clearly established that implicit in the right to engage in activities protected by the First Amendment is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'..." Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999)

2. The law of the D.C. Circuit -"The interpretive consensus lends further support to our conclusion that § 205 is properly understood to apply to those matters in which a federal employee's representational assistance could potentially distort the government's process for making a decision to confer a benefit, impose a sanction, or otherwise to directly effect the interests of discrete and identifiable persons or parties." (Emphasis added.) Van Ee v. Envtl Protection Agency, 202 F.3d 296 (D.C. Cir. 2000).

3. 5. U.S.C. 500 -5 U.S.C. 500 delegates practice requirements for patent matters and patent matters only to chapter 3 (sections 31–33) of title 35. The Statute of Limitations for disciplinary actions for trademark and other non-patent matters continue to be covered by 28 U.S.C. 2462. See, e.g., Sheinbein v. Dudas, 465 F.3d 493 (Fed. Cir. 2006)

See attached Memorandum of Law supporting Appellant's PETITIONER'S EMERGENCY MOTION TO STAY OR REVERSE AGENCY ACTION SUSPENDING PETITIONER FROM THE PRACTICE OF PATENT LAW AND TRADEMARK AND OTHER NON-TRADEMARK MATTERS PENDING FINAL JUDICIAL REVIEW

4. Did the trial court fail to consider important grounds for relief?

Yes No

If yes, what grounds?

On January 13, 2022, the District Court denied the [APPELLANT]'S MOTION TO REVERSE THE DIRECTOR'S ORDER FOR SUSPENSION AND/OR POSTPONE EFFECTIVE DATE OF SUSPENSION BY THE DIRECTOR PENDING FINAL JUDICIAL REVIEW. Yet, in the meantime, the present posture of the parties is the government Appellee has constrained Appellant's First Amendment rights of free speech and expressive association. Without injunctive relief pending final judicial review this is an ongoing irreparable injury suffered by the Appellant.

5. Are there other reasons why the trial court's decision was wrong?

Yes No

If yes, what reasons?

The District Court's deference to the government's argument that the Appellant was free to exercise his First Amendment rights of free speech to anyone but the federal government is the same argument rejected by this court in *In re Tam*. *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015). Further, the District Court's deference to the Appellee's mere speculative claim of potential for disruption of the workplace and appearance of impropriety is an insufficient basis by itself for a limitation of otherwise protected speech. Furthermore, the District Court's deference to an agency's First Amendment interpretation of a statute that that agency does not administer in response to an as applied constitutional challenge is well outside the deference boundaries established by *Kisor v. Wilkie*, 139 S. Ct. 2400, 204 L.Ed.2d 841 (2019)

The resulting suspension of the Appellant's license to draft and submit patent and trademark applications on behalf of others for publication by the USPTO's constitutes unconstitutional application of 203/205 which violates the Appellant's First Amendment Freedom of Speech and Expressive Association rights. "[A]ny restraint imposed in advance of a final judicial determination [in Federal Court] on the [Constitutional] merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. "*Freedman v. State of Maryland*, 380 U.S. 51, (1965).

6. What action do you want this court to take in this case?

In light of the constitutional issues presented stay agency action and restore Appellants' PAIR access pending final judicial review.

Date: 02/18/2022

Signature: /s/ Kevin P. Correll

Name: Kevin P. Correll

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KEVIN P CORRELL,)	
Petitioner,)	
v.)	
)	Civil Action No.: 1:21-cv-898 (AJT/IDD)
UNDER SECRETARY OF COMMERCE)	
OF INTELLECTUAL PROPERTY)	
("DIRECTOR"),)	
Respondent.)	
_____)	

ORDER

Petitioner Kevin P. Correll ("Petitioner") has filed two motions in which he seeks a preliminary injunction to postpone his suspension before the United States Patent and Trademark Office (USPTO): a Motion to Postpone Effective Date of Suspension By the Director Pending Final Judicial Review, [Doc. No. 2], and a Motion to Reverse the Director's Order for Suspension and/or Postpone Effective Date of Suspension By the Director Pending Final Judicial Review, [Doc. No. 9], (together the "Motions"). For the following reasons, the Motions are **DENIED**.

I. BACKGROUND

In 2002, while working for the United States Department of the Navy as an electrical engineer, [Doc. No. 15] at 11, Petitioner started his private law firm where he received compensation for legal services related to patent, copyright, and trademark matters. Federal employees are prohibited from representing private clients before the USPTO; and while working at both jobs, Petitioner completed a survey that contained a reminder about the prohibition against federal employees representing private clients before the USPTO. *Id.* at 12. Upon receiving written notice of Petitioner's representing private clients before the USPTO, the USPTO's Office of Enrollment and Discipline (OED) launched an investigation on February 9,

2017 into Petitioner’s conduct. *Id.* at 13. The OED concluded its investigation on January 17, 2018 and filed a disciplinary action against Petitioner for violating USPTO Code and Rules as a result of his representations before the USPTO. *Id.* at 13-14. Thereafter, the chief administrative law judge (“ALJ”) of the Environmental Protection Agency heard the complaint against Petitioner and held that Petitioner had violated 37 C.F.R. §§ 10.23(a), 10.23(b)(4), 10.23(b)(5), 10.23(c)(20), 10.40(b)(2), as well as USPTO Rules §§ 11.111, 11.505, 11.804(d), and 11.116(a)(1). *Id.* at 14-15. On October 3, 2019, the ALJ issued an initial decision that the Petitioner should be suspended from practicing before the USPTO for sixty months. *Id.* at 16.

II. LEGAL PRINCIPLES

Fed. R. Civ. P. 65 authorizes a federal court to issue preliminary injunctions, which are extraordinary remedies “never awarded as of right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)). To receive a preliminary injunction, the moving party must make a clear showing that (1) the plaintiff is likely to succeed on the merits of her case; (2) the plaintiff is likely to suffer irreparable harm in the absence of injunctive relief; (3) the balance of the equities tips in her favor; and (4) an injunction serves the public interest. *Id.* at 22.

III. ANALYSIS

As an initial matter, Petitioner has failed to make the required showing that he is likely to succeed on the merits of his claim that he was wrongfully suspended from practicing before the USPTO. In that regard, an agency’s final order is upheld when “the disciplinary action was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Bender v. Dudas*, 490 F.3d 1361, 1362 (Fed. Cir. 2007); *see also Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020).

Petitioner first contends that his suspension violates his First Amendment rights. While federal employees do not give up their First Amendment rights altogether, the government may regulate the speech of federal employees without violating the First Amendment. *Pickering v. Bd. of Educ.*, 391 U.S. at 568; *see also Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

Government regulations on the speech of federal employees are evaluated under the *Pickering* balancing test. *Id.*; *see also Sanjour v. E.P.A.*, 56 F.3d 85, 90 (D.C. Cir. 1995). Along with balancing any burden on an employee's First Amendment rights, the *Pickering* balancing test also balances the government's interest in promoting efficient public services. *Id.*

Regarding an employee's interests, the balancing test turns on whether the government employee engaged in a matter of public concern. In this case, intellectual property matters are of public concern and Petitioner retained his rights to speak on those matters. Regarding the government's interest, federal employees are prohibited from receiving compensation for any representation in which the government has a direct and substantial interest. 18 U.S.C. §§ 203(a), 205(a)(2). The government has a direct and substantial interest in patent applications. *See Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579, 591 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972). Furthermore, Congress is concerned with avoiding even the appearance of impropriety because even this can erode public trust in the integrity and legitimacy of government decision-making. *See generally Macrariello v. Summer*, 973 F.2d 295, 300 (4th Cir. 1992) (holding that a government employee's speech does not have to actually disrupt efficiency—reasonable fear of an adverse effect is sufficient); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (highlighting the fact that public employees are often in trusted positions in society).

Finally, the Court has considered the extent of the impact of First Amendment rights imposed. Here, the only prohibition on Petitioner's speech was the speech Petitioner exercised

when representing private clients in front of the USPTO. Petitioner was free to speak on patent and trademark matters otherwise, including in speeches, written blogs, and even representing private clients at the local and state level.

In assessing these various interests, the Court concludes that under the *Pickering* balancing test, Petitioner's First Amendment rights were not violated because there was no significant burden on Petitioner's First Amendment rights and the government's interest involved substantially outweighs whatever burden was placed on Petitioner's First Amendment rights. For these reasons, Petitioner has not shown that he is likely to succeed on his claims that First Amendment claims.

Petitioner has also failed to show that he is likely to succeed on his statute of limitations defense. In that regard, Petitioner contends the USPTO's institution of disciplinary proceedings against him was barred by the five-year statute of limitations provided in 28 U.S.C. § 2462. [Doc. No. 10] at 28-32. Petitioner is incorrect. 35 U.S.C. § 32 provides a limitations period of either ten years after the date of misconduct or one year after the date on which the misconduct forming the basis of the proceeding is made known to the USPTO. Petitioner's disciplinary proceedings began within one year after the date upon which the misconduct was made known to the USPTO. [Doc. No. 10] at 13-14. For that reason, Petitioner fails to make a showing that he is likely to succeed on the merits of his claim.

Nor had the Petitioner made the required showing that he is likely to suffer irreparable harm in the absence of injunctive relief; the balance of the equities tips in his favor; or an injunction serves the public interest. For the reason discussed above, Petitioner will not suffer any irreparable injury as his First Amendment rights are not violated by his suspension; and the balance of the equities and public interest favor the Government given the importance of the

government interests involved, the minimal effect on Petitioner's ability to engage in protected speech and the public interest in deterring other individuals from similar conduct.

Accordingly, it is hereby

ORDERED that Petitioner Correll's Motions, [Doc. Nos. 2, 9], be, and the same hereby are, **DENIED**.

The Clerk is directed to forward a copy of this Order to Petitioner and counsel of record.



Anthony J. Trenga
United States District Judge

Alexandria, Virginia
January 13, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Kevin P. Correll,) No. 2022-1420
Petitioner -Appellant)
)
v.)
)
Under Secretary of Commerce of)
Intellectual Property (“Director”),)
Respondent - Appellee)
_____)

PETITIONER’S EMERGENCY MOTION TO STAY OR REVERSE AGENCY ACTION
SUSPENDING PETITIONER FROM THE PRACTICE OF PATENT LAW AND TRADEMARK
AND OTHER NON-TRADEMARK MATTERS PENDING FINAL JUDICIAL REVIEW

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Table of Contents

I. Statement of the Case	1
II. Statement of Consent or Opposition	2
III. Argument	2
A. Factor 1-Irreparable Injury.....	3
B. Factor (2).....	3
1. Factor (2) First Reason-First Amendment	4
2. Factor (2) Second Alternative Reason-Law of the D.C. Circuit	13
3. Factor (2) Third Alternative Reason-Appellee’s Malfeasance	14
C. Factor (3).....	21
D. Factor (4) Public Interest.....	22
IV. CONCLUSION.....	22
ADDENDUM A – RELATIONAL STATUTES ILLUSTRATION	A1

I. Statement of the Case

The USPTO Director (Respondent) filed a Complaint before an Environmental Protection Agency (EPA) Administrative Law Judge (ALJ) (“Tribunal”) on January 17, 2018, alleging that Kevin P. Correll (“Petitioner”), in violation of 18 U.S.C. 203 and/or 18 U.S.C. 205, committed attorney misconduct when he was employed as an electronics engineer employee for U.S. Navy Department when he prepared, filed, and prosecuted patent and trademark applications on behalf of third-party clients during off-duty hours as a private citizen; thus, allegedly violating obligations under the USPTO Code of Professional Responsibility and the USPTO Rules of Professional Conduct. The Tribunal’s September 27, 2018 order rejected, *inter alia*, the Petitioner’s U.S. Constitutional defenses. Following a hearing on April 16, 2019 in Providence, Rhode Island, the Tribunal issued an Initial Decision on October 3, 2019 recommending a 60-month suspension. The Appellee upheld the 60-month suspension recommendation after the Petitioner’s Appeal from the Tribunal’s Initial Decision and the Petitioner’s Request for Reconsideration denied by the Appellee July 26 2021, at which time the Appellee informed the Appellant via its stayed Final Order dated February 04, 2021 that the Appellee would inform the disciplinary enforcement agency where the Appellant is admitted to practice. The Appellant timely filed a Petition for Review in the United States District Court for the Eastern District of Virginia in accordance with 35 U.S.C. 32 for patent matters; and, in accordance with 28 U.S.C. 1402 for

trademark and other non-patent matters. The Petitioner also filed a MOTION TO POSTPONE EFFECTIVE DATE OF SUSPENSION BY THE DIRECTOR PENDING FINAL JUDICIAL REVIEW and Noticed a hearing on the motion. On January 13, 2022, without a hearing, the District Court entered an order denying the aforementioned motions. On January 25, 2022 the Petitioner filed a Notice of Appeal in the Court of Appeals for the Federal Circuit in accordance with 28 U.S.C. 1292(a)(1). The present posture of the parties is the government Respondent-Appellee has unlawfully constrained Petitioner-Appellant's First Amendment rights of free speech and expressive association. Without injunctive relief in accordance with FRAP 8 and/or 18, the action by the Appellee is an ongoing irreparable injury suffered by the Appellant.

II. Statement of Consent or Opposition

The Appellee opposes this motion.

III. Argument

There are four factors which enter into the determination of whether interim injunctive relief should be granted: (1) whether the plaintiff will suffer irreparable injury if interim relief is not granted; (2) the injury to the defendant if an injunction is issued; (3) the plaintiff's likelihood of success in the underlying dispute between the parties; and (4) the public interest. *Id.* at 750; *Jones v. Board of Governors of University of North Carolina*, 704 F.2d 713, 715 (4th Cir.1983). *Guerra v. Scruggs*,

942 F.2d 270 (4th Cir. 1991) *Med. Servs. L. L. C. v. Russo*, 140 S.Ct. 2103, 207 L.Ed.2d 566 (2020)

A. Factor 1-Irreparable Injury. The Petitioner’s “loss of First Amendment freedoms ... unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion); see *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) (“Violations of [F]irst [A]mendment rights constitute per se irreparable injury.”). *In re Murphy-Brown, LLC*, 907 F.3d 788 (4th Cir. 2018). “On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.” (5 U.S.C. 705) As the Fourth Circuit has noted, because the deprivation of valid First Amendment protections constitutes irreparable harm, “a plaintiff’s claimed irreparable harm is ‘inseparably linked’ to the likelihood of success on the merits of [his] First Amendment claim.” *Ass’n of Club Owners and Fraternal v. Musgrave*, 553 F.3d 292 (4th Cir. 2009)

B. Factor (2) The reasons herein detail the Petitioner’s likelihood of success in the present action. There are three reasons the Petitioner is likely to ultimately prevail in the present action.

1. Factor (2) First Reason-First Amendment First, the USPTO Appellee’s application of either 18 U.S.C. 203 or 205 suppresses the Appellant’s First Amendment rights of free speech and association. The USPTO Appellee argues that the USPTO’s suppression of the Appellant’s First Amendment rights of free speech and expressive association are justifiable by the USPTO’s balancing of Pickering with conflict of interest statutes; a balance that is, according to the Appellee, “easily satisfied” in favor of the USPTO. The Appellee’s “easily satisfied” is a vague, and unsubstantiated, contention that

“[t]he [USPTO’s] interest in precluding even the appearance of beneficial treatment of private interests in [USPTO]decision making well outweighs the rather modest impact on [Appellant’s] speech activity”. (Emphasis added.)

However, the Appellee’s “rather modest” Pickering analysis utterly fails the 4th Circuit’s *Ridpath* factors. Indeed, the Appellee has failed to identify any of the *Ridpath* factors supporting its *Pickering* balancing. In *Ridpath v. Board of Governors Marshall University*, the 4th Circuit listed nine non-exhaustive factors that the Supreme Court has considered significant...” See *Lawson v. Gault*, 828 F.3d 239 (4th Cir. 2016).

Application of the 4th Circuit’s *Ridpath* factors to the Appellant’s First Amendment rights of free speech and expressive association clearly shows the Pickering balancing test weighing in favor of the Petitioner. The *Ridpath* factors

ask the following questions: has the Appellant: (1) impaired the maintenance of discipline by supervisors?; Answer No: (2) impaired harmony among coworkers?; Answer No: (3) damaged close personal relationships?; Answer No: (4) impeded the performance of the public employee's duties?; Answer No: interfered with the operation of the [USPTO] institution?; Answer No: (6) undermined the mission of the [USPTO] institution?; Answer No: (7) was communicating to the public or to coworkers in private?; Appellant was communicating to the Public via the USPTO's designated public forum: (8) conflicted with the responsibilities of the employee within the [USPTO] institution?; Answer No: (9); or abused the authority and public accountability that the employee's role entailed?; Answer No.

Further, it is well settled that even though [Appellant worked] for the Navy Department, [he did] not relinquished "the First Amendment rights [he] would otherwise enjoy as [a citizen] to comment on matters of public interest¹." *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968). "Where, as here, [Appellant seeks] to exercise [his] right as [a citizen] to comment on matters of public interest, and [is] not attempting simply to speak as [an employee] upon personal matters, the Government must be able to satisfy a balancing test of the type set forth in *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563,

¹ The Appellee concedes that "intellectual property questions present issues of public concern".

568, 88 S.Ct. 1731 1734, 20 L.Ed.2d 811, in order to maintain a statutory restriction on the employees' speech. See *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 564, 93 S.Ct. 2880, 2889-2890, 37 L.Ed.2d 796. However, because [USPTO's application of 203/205] constitutes a wholesale deterrent to a broad category of expression by a massive number of potential speakers, the USPTO's burden here is even greater than it was in *Pickering* and its progeny []. Specifically, the USPTO must show that the interests of both potential audiences and a vast group of present and future non-USPTO government employees in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the [USPTO], *Pickering*, 391 U.S., at 571, 88 S.Ct., at 1736." *U.S. v. Nat'l Treasury Empl. Union*, 513 U.S. 454 (1995)

The Appellee's so-called *Pickering* analysis is contrary to the long line of U.S. Supreme court cases defining the First Amendment rights of government employees. Under First Amendment strict scrutiny the Appellee's application of 18 U.S.C. 203 or 18 U.S.C. 205 to Appellant's truthful disclosure violates the Appellant's First Amendment rights of Free Speech and Expressive Association. The Appellant's truthful disclosures on matters of public concern are made for publications in the USPTO's designated public forum.

The Appellee has also failed to show any impact on the actual operation of the USPTO. Indeed, the Appellee points out that for 13 years the Appellant filed in the

USPTO's public forum expressions on matters of public concern, e.g., patent and trademark applications, to be published by the USPTO, but fails to point to even one *Ridpath* factor in those 13 years where the Appellant's exercise of his First Amendment rights impacted the actual operation of the USPTO, or that the Appellant could *potentially distort the USPTO's process*, a requirement imposed by the D.C. Court of Appeals. *Van Ee v. Env't'l Protection Agency*, 202 F.3d 296 (D.C. Cir. 2000)

Nor can the Government make any "reasonable" argument that an "appearance of beneficial treatment" attaches to the Petitioner's practice as a private citizen during off-duty hours but does not attach to other government employees, e.g., Navy, Army, Marines, Airforce patent and trademark practitioners (e.g., the Navy Department's Mr. Kasischke) who regularly represent government employees and other non-government employees before the USPTO; or, government patent and trademark practitioners representing relatives before the USPTO; or, enlisted practitioners practicing before the USPTO. In other words, the government's application of the aforementioned statutes disfavors Petitioner's expressive association and speech in the USPTO's designated public forum promoting the "Progress of Science and useful Arts"² merely because of the Petitioner's status as

² "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." *U.S. Const.* art. 1, sec. 8, cl. 8.

an off-duty Navy Department government employee. It is well settled that restrictions distinguishing among different speakers, allowing speech by some but not others is prohibited. See *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 175 L. Ed. 2d 753, 558 U.S. 310, 78 USLW 4078 (2010)

The District Court's deference to the government's argument that the Appellant was free to exercise his First Amendment rights of free speech to anyone but the federal government is the same argument rejected by this court in *In re Tam*, where the government suggested that "Mr. Tam [was] free to name his band as he wishes and use this name in commerce [just not as a registered federal trademark]" *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015). As this court pointed out "The general principle is clear: 'Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.' *Sorrell*, 131 S.Ct. at 2664." *In re Tam*, 808 F.3d 1321,1340 (Fed. Cir. 2015). Similar to federal trademark registration the USPTO is statutorily directed to "...facilitate and expedite the processing of patent applications, particularly those which can be filed, stored, processed, searched, and retrieved electronically..." 35 U.S.C. 2 (b) (2) (C) (Emphasis added). In other words,

a designated public forum for patent applications^{3,4}. There is no corresponding state or “local” level designated public forum comparable to the USPTO’s public forum. Clearly, prohibiting Petitioner’s access to the USPTO’s public forum burdens his speech and expressive associations.

Further, the D.C. Court of Appeals stated that “Van Ee has raised a serious question about the constitutionality of applying § 205 to his proposed communications [to the EPA].” In that case an off duty engineer for the EPA was charged with violating § 205 when he made statements on behalf of others to the EPA. *Van Ee v. Env’tl Protection Agency*, 202 F.3d 296 (D.C. Cir. 2000). It follows that if *Van ee*’s communications to the EPA raises a serious constitutional threshold, then that constitutional threshold is far, far, exceeded by the government applying 18 U.S.C. 205 or 203 to prohibit the Petitioner’s patent and trademark communications to the public via the USPTO’s public forum, an agency

³ "...the role of the specification is to teach, both what the invention is (written description) and how to make and use it (enablement)." *University of Rochester v. G.D. Searle & Co., Inc.*, 358 F.3d 916 (Fed. Cir. 2004)

⁴ Like technical journals, for example, [patent applications] show the state of technology, set forth what others have already achieved, and provide technical information that others can avoid repeating. THOMAS T. GORDON & ARTHUR S. COOKFAIR, PATENT FUNDAMENTALS FOR SCIENTISTS & ENGINEERS 51 (2d ed. 2000).

constitutionally ⁵ and statutorily commanded to publicly broadcast those communications via its designated public forum.

The Government also misses the point that "it [is] clearly established that implicit in the right to engage in activities protected by the First Amendment is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'..." *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999)

The Government has also failed to prove by clear and convincing evidence required by 37 CFR 11.49 that the Petitioner's speech was not protected by the First Amendment. Contrary to U.S. Supreme Court rulings, the USPTO Director shifted the burden of proving that Petitioner's speech is unprotected from the government to the Petitioner and then dismissed the Petitioner's First Amendment defenses citing lack of "clear and convincing" evidence required by 37 CFR 11.49.⁶ (*See Final Order*) However, "[it] is well established that [t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it. [] This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material

⁵ "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." *U.S. Const.* art. 1, sec. 8, cl. 8.

⁶ See n.24.

degree. *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993)(internal quotation marks omitted)

Even if the Petitioner had the burden of proving Petitioner’s speech and expressive association is protected by the First Amendment, in *Persaud v. Director, USPTO*, Civil Action No. 1:16-cv-495 (doc. #6, pg. 16-17) the Appellee affirmed “[Appellant] only needs to show by clear and convincing evidence that a *reasonable trier of fact could* find in his favor” (Emphasis in original.)⁷ The Government’s inconsistent definition of “clear and convincing” and subsequent off-hand dismissal of Petitioner’ First Amendment defenses is clearly arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The District Court order, again deferring to the Appellee’s speculative claim of adverse public perception and denying the Petitioner’s motions, cited *Macrariello v. Summer*, 973 F.2d 295, 300 (4th Cir. 1992). The District Court held that “...a government employee’s speech does not have to actually disrupt efficiency—reasonable fear of an adverse effect is sufficient...”. (Emphasis added.) *See Id.* That case, however, dealt with speech by police officers within a police department, clearly not analogous to the facts of the present case. Furthermore, even if it were relevant, *Macrariello* qualified “adverse effect” with must be “reasonably” apprehended. The government has not made any showing that the Appellant’s

⁷ *cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,248 (1986).

speech as a private citizen in the government's public forum is, or could be, disruptive to the government's process, or that an "adverse effect" could be reasonably apprehended by Appellant's exercise of his rights to engage in activities protected by the First Amendment. The mere *speculative claim* of potential for disruption of the workplace is an insufficient basis by itself for a limitation of otherwise protected speech. "The Government's underlying concern is that federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities. This interest is undeniably powerful, but the Government cites no evidence of misconduct []." *U.S. v. Nat'l Treasury Empl. Union*, 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). Moreover, the U.S. Government is a vast organization with multitudinous departments, bureaus, and independent agencies, with nearly 3 million federal employees. The Appellant, formerly one of those 3 million federal employees, was an electronic engineer employed by Naval Undersea Warfare Center, a laboratory within Naval Sea Systems Command, within the Navy Department, within the Department of Defense. The Appellant was organizationally so far removed from the U.S. Patent & Trademark Office (USPTO), an agency within the Department of Commerce, there can be no "reasonable" assertion of an appearance of impropriety warranting suppression of the Petitioner's freedom of speech. Indeed, the government concedes that the Petitioner worked "at an entirely different government agency" and that that no action by the Appellee could impact the Petitioner's work

environment. (See OED Director's Motion for Summary Judgement) Conversely, no action by the Petitioner could impact the Respondent's (USPTO) work environment or distort the USPTO process.

2. Factor (2) Second Alternative Reason-Law of the D.C. Circuit The second alternative reason that the Appellant is likely to succeed in the present action is that the Tribunal, the Chief EPA ALJ, sitting in the geographic area of the D.C. Circuit was obligated to follow the Law of the D.C. Circuit developed in *Van Ee v. Env'tl Protection Agency*, 202 F.3d 296 (D.C. Cir. 2000). In *Van ee*, the D.C. Appellate Court's inductive generalization held that "The interpretive consensus lends further support to *our conclusion* that § 205 is *properly understood* to apply to those matters in which a federal employee's representational assistance could *potentially distort the government's process* for making a decision to confer a benefit, impose a sanction, or otherwise to directly effect the interests of discrete and identifiable persons or parties." (Emphasis added.) *Van Ee v. Env'tl Protection Agency*, 202 F.3d 296 (D.C. Cir. 2000).⁸ Here, the Appellee has failed to prove, or even assert, that the Appellant could distort the USPTO process. As noted earlier, the Appellee concedes that the Appellant worked "at an entirely different government agency" and that that no action by the Appellee could impact the

⁸ Arguably the Law of the D.C. Circuit is at least applicable to those violations alleged by the Respondent prior to the America Invents Act changing the court of review from the D.C. Court to the Eastern District of Va.

Appellant's work environment. (See OED Director's Motion for Summary Judgment) Conversely, no action by the Appellant could impact the Appellee's (USPTO) work environment.

Applying the constitutional avoidance doctrine, a reviewing court is likely to find the EPA tribunal failed to follow the law of the D.C. Circuit or that the law of the D.C. Circuit is instructive, e.g., there must be a finding that the Appellant could *potentially distort the government's process*. As pointed out above, the Appellee has not found, nor can the Appellee find, that the Appellant, acting as a private citizen during off duty hours while employed by the Navy Department, could potentially distort the USPTO's process. Indeed, it follows that if mere status as a government employee could distort the USPTO's process then all patents secured by government patent practitioners, e.g., Navy patent practitioners, were fraudulently obtained.

If a lower court ruling declines to follow the Law of the D.C. Circuit and is subsequently upheld by an appellate court then there will be a split in the Federal Circuits, appealable to the U.S. Supreme Court. The U.S. Supreme Court has indicated that the conflict-of-interest laws, similar to the ones at issue here, implicate serious constitutional concerns. See, for example, *McDonnell v. United States*, 136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016).

3. Factor (2) Third Alternative Reason-Appellee's Malfeasance The third alternative reason that the Appellant is likely to succeed in the present action is due

to the Appellee's malfeasance with respect to the law and its own regulations. Here, the Appellee failed to follow 5 U.S.C. 706 (c), 28 U.S.C. 2462, Federal Circuit law, and U.S. Supreme Court law with regard to the differing statute of limitations for trademark matters and patent matters.

As a threshold matter, the Agency Practice Act exempted patent practice requirements before the Patent Office as provided by 5 U.S.C 500. Specifically, 5 U.S.C 500 states that "...*with respect to patent matters* that continue to be covered by chapter 3 (sections 31–33) of title 35." Trademark matters continue to be covered by 5 U.S.C. 500(d)(2).

Further, as the Supreme Court elaborated at length in *Kisor* "...the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, *even after a court has resorted to all the standard tools of interpretation.*" *Kisor v. Wilkie*, 139 S. Ct. 2400, 204 L.Ed.2d 841 (2019) (Emphasis added.) Here, it is clear on its face that 5 U.S.C. 500 delegates practice requirements for *patent matters and patent matters only* to chapter 3 (sections 31–33) of title 35. The distinction between patent matters covered by 35 U.S.C. 32 and trademark and non-patent matters covered by the APA, specifically 5 U.S.C. 500(d)(2), has been clearly, and **authoritatively**, articulated by the USPTO:

"The USPTO Director has authority under 35 U.S.C. 32 to suspend or exclude practitioners registered to practice before the Office in *patent matters*. See also 5 U.S.C. 500(e). The USPTO Director also has authority to suspend or

exclude practitioners who practice before the Office in *trademark* and other nonpatent matters. See 5 U.S.C. 500(d)(2)...” 68 Fed. Reg. 69454 (December 12, 2003) (Emphasis added).

Thus, the District Court’s deference to the Respondent’s now interpreting chapter 3 (sections 31–33) of title 35 to include trademark matters is an impermissible ad hoc enlargement of 5 U.S.C. 500 by the court. “...a court should decline to defer to a merely "convenient litigating position" or "post hoc rationalizatio[n] advanced" to "defend past agency action against attack." *Christopher* , 567 U.S. at 155, 132 S.Ct. 2156 (quoting *Bowen v. Georgetown Univ. Hospital* , 488 U.S. 204, 213, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) and *Auer* , 519 U.S. at 462, 117 S.Ct. 905). *Kisor v. Wilkie*, 139 S. Ct. 2400, 204 L.Ed.2d 841 (2019)

Further, it is a well settled cannon of statutory interpretation that when Congress amends a specific section of a statute it intends the rest of the statute to be undisturbed and that it means what it says. Here, 5 U.S.C. 500 was amended in 1999 to change the *name* of the “Patent Office” to the “Patent and Trademark Office”. That Congress chose not to amend the phrase “*with respect to patent matters*” at that time to include trademark matters clearly signals Congressional intent that Chapter 3 of 35 U.S.C. only pertains to patent matters.

Thus, the 35 U.S.C. 32 time limits for prosecuting a disciplinary action apply only to patent matters and not trademark or other non-patent matters. The Statute of Limitations for disciplinary actions for trademark and other non-patent

matters continue to be covered by **28 U.S.C. 2462**. See, e.g., *Sheinbein v. Dudas*, 465 F.3d 493 (Fed. Cir. 2006) It is worth noting that the **ALJ identified 28 U.S.C. 2462 as *being relevant*** in these proceedings. See *Order on [Petitioner's] Motion to Dismiss*. For clarity, the Petitioner includes a graphical depiction of the above statutory relationships in Addendum A. It is also worth noting here that 35 U.S.C. 2(b)(2) does not authorize the USPTO to issue substantive rules such as 37 CFR 11. 34 (d) *Time for filing a complaint* when it effects a change in existing law which affects individual rights.⁹ Thus, with respect to trademark matters and other non-patent matters the USPTO Director does not have statutory authority to unilaterally supplant the 28 U.S.C. 2462 five-year jurisdictional statute of limitations applicable to trademark matters with discipline rule 37 CFR 11. 34 (d) statute of limitations, which essentially mirrors 35 U.S.C 32.

Yet, the January 17, 2018 complaint filed by the OED Director, on behalf of the Respondent-Appellee, included the Petitioner's allegedly improper trademark representations spanning ten years before the complaint filing date. ("The five-year clock in the jurisdictional statute of limitations §2462 begins to

⁹ "We have also previously held that 35 U.S.C. § 2(b)(2) does not authorize the Patent Office to issue "substantive" rules. See *Merck & Co. v. Kessler*, 80 F.3d 1543, 1549-50 (Fed.Cir.1996). "A rule is `substantive' when it `effects a change in existing law or policy' which `affect[s] individual rights and obligations.'" *Animal Legal Def. Fund*, 932 F.2d at 927 (quoting *Cubanski v. Heckler*, 781 F.2d 1421, 1426 (9th Cir.1986), vacated as moot sub nom., *Bowen v. Kizer*, 485 U.S. 386, 108 S.Ct. 1200, 99 L.Ed.2d 402 (1988))." *Cooper Technologies Co. v. Dudas*, 536 F.3d 1330 (Fed. Cir. 2008)

tick when the [claim first accrued], not when it is discovered." *Gabelli v. Sec. & Exch. Comm'n*, 133 S. Ct. 1216 (2013).) Thus, the complaint included alleged trademark and other non-patent matter claims statutorily barred by §2462's five-year limitation, thus rendering the entire complaint jurisdictionally defective.

Further, "...the Federal courts have determined that when a court lacks jurisdiction over the subject matter [], any judgment rendered is void; a legal nullity. *Jordon v. Gilligan*, 500 F.2d 701, 704 (6th Cir. 1974), cert. denied 421 U.S. 991 (1975); *Hicklin v. Edwards*, 226 F.2d 410, 413 (8th Cir. 1955). *Jordon v. Gilligan*, supra at 704, noted that a judgment entered without jurisdiction is void and "is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside." "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety. See 16 Moore § 106.66[1], pp. 106-88 to 106-89." *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 546 U.S. 500, 163 L.Ed.2d 1097 (2006)

Stemming from the jurisdictionally defective complaint the ALJ violated 37 CFR 11.50(a) and 5 U.S.C. 556(d) when the ALJ did not exclude, but considered and ruled upon statutorily barred trademark matter misconduct evidence. (*See Initial Order*) Thus, the Petitioner's Due Process rights were violated: (1) when the OED filed a jurisdictionally defective complaint; and, (2) the ALJ not excluding, and considering and ruling upon statutorily barred trademark matter misconduct. By law,

any judgement stemming from a jurisdictionally defective complaint must be dismissed.¹⁰ Further, the Complaint filed by the USPTO OED Director includes 14 years of alleged patent matter misconduct from June 2003 to October 2017, exceeding the 10 year statute of limitations in 35 U.S.C. 32. The OED Director “amended” the Complaint via the OED Director’s brief in Opposition to Petitioner’s Motion to Dismiss; and, the ALJ accepted the OED Director’s brief as amending the Complaint. (See *OED Director’s Opposition to Petitioner’s Motion to Dismiss* and *ALJ’s Order on Petitioner’s Motion to Dismiss*) However, it is axiomatic that a Complaint may not be amended by briefs in opposition to a motion to dismiss.¹¹

¹⁰ “...the Federal courts have determined that when a court [or lower tribunal] lacks jurisdiction over the subject matter [], any judgment rendered is void; a legal nullity. *Jordon v. Gilligan*, 500 F.2d 701, 704 (6th Cir. 1974), cert. denied 421 U.S. 991 (1975); *Hicklin v. Edwards*, 226 F.2d 410, 413 (8th Cir. 1955). *Jordon v. Gilligan*, supra at 704, noted that a judgment entered without jurisdiction is void and “is a legal nullity and a court [or lower tribunal] considering a motion to vacate has no discretion in determining whether it should be set aside.” “[W]hen a federal court [or lower tribunal] concludes that it lacks subject-matter jurisdiction, the court [or lower tribunal] *must dismiss the complaint in its entirety*. See 16 Moore § 106.66[1], pp. 106-88 to 106-89.” *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 546 U.S. 500, 163 L.Ed.2d 1097 (2006)

¹¹ “And it “is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.” *Coleman v. Pension Benefit Guar. Corp.*, 94 F. Supp. 2d 18, 24 n.8 (D.D.C. 2000) (quoting *Morgan Distrib. Co., Inc., v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989)). To hold otherwise would mean that a party could unilaterally amend a complaint at will. See *Unidynamic*

Stemming from the jurisdictionally defective complaint the Administrative Law Judge (ALJ) violated 37 CFR 11.50(a) and 5 U.S.C. 556(d) when the ALJ did not exclude, but considered and ruled upon statutorily barred patent matter misconduct. (*See Initial Order*) The Petitioner's Due Process rights were violated: when the OED filed a jurisdictionally defective complaint; and when the ALJ not excluding, and considering and ruling upon statutorily barred patent matter misconduct. (See Complaint and Initial Order) By law, any judgement stemming from a jurisdictionally defective complaint must be dismissed¹².

A reviewing court adhering to the constitutional avoidance doctrine or wanting to avoid a circuit split between the reviewing court circuit and the D.C. Court of appeals is likely to find that the Respondent's findings, and conclusions based upon a jurisdictionally defective complaint were (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or (2) contrary to constitutional right, power, or privilege; or (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (4) without observance of procedure required by law. A finding of any of these factors compels the reviewing court to set aside agency action, findings, and conclusions.

Corp., 868 F.2d at 995.”*Statewide Bonding, Inc. v. U.S. Dep't of Homeland Sec.* (D.C. Cir. 2020)

¹² *See n6.*

C. Factor (3). An injury to the Appellee is non-existent. The Appellee states the “primary purposes for the discipline of practitioners who violate their professional obligations is to deter other individuals from acting similarly.” First, the Appellee has the burden of proof that the Petitioner’s speech is not protected by the First Amendment and/or that the Law of the D.C. Circuit is not applicable, in order to ascertain if the Petitioner has violated any professional obligations.

The Appellee fails to provide proof that its actions suppressing the Petitioner’s First Amendment rights would survive strict scrutiny, or for that matter, intermediate scrutiny. Under strict scrutiny, the [Appellee] bears the burden of proving that the statute's restriction on speech, as applied by the Appellee (1) advances a compelling [Appellee] interest and (2) is narrowly tailored to serve that interest. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665-66, 191 L. Ed. 2d 570 (2015).¹³ (Footnotes omitted.) “Determining that a restriction on speech is subject to strict scrutiny is nearly always a death knell for the restriction: “it is the rare case in which . . . a law survives strict scrutiny.” *Burson v. Freeman*, 504 U.S. 191, 211, 112 S. Ct. 1846 1857, 119 L. Ed. 2d 5 (1992).

Further, the Appellee fails to explain how the Appellee would be harmed if a preliminary injunction is granted pending final judicial review. Particularly given that since the Petitioner’s induced early retirement from government service in

¹³ *Gresham v. Rutledge* (E.D. Ark., 2016)

September of 2018 the Appellee has not objected to the Petitioner's patent and trademark practice before the USPTO, nor has the Appellee pointed to any "harm" suffered by the Appellee because of the Petitioner's practice.

D. Factor (4) Public Interest It is in the public's interest to uphold the Constitution and maintain the status quo and allow access to qualified patent and trademark practitioners pending final judicial review. The Appellee fails to articulate the harm to the public if a preliminary injunction is granted.

IV. CONCLUSION

In sum, a long line of Supreme Court cases has demonstrated the requirement that "the Government bears the burden of identifying a substantial interest and justifying the challenged restriction." *Greater New Orleans Broadcasting Ass 'n, Inc. v. United States*, 527 U.S. 173,183 (1999) (emphasis added). *Thompson v. Western States Medical Center*, 535 U.S. 357, 367-377 (2002).

“[T]he First Amendment recognizes, and protects against, even de minimis harms. See *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 805 (7th Cir. 2016) (rejecting an argument of "de minimis" First Amendment harm and approving an award of nominal damages); *Lippoldt v. Cole*, 468 F.3d 1204, 1221 (10th Cir. 2006) (similar); *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1261 (11th Cir. 2006) (similar); *Risdal v. Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000) (similar); cf. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (same). No more is needed to violate the Constitution. “*Knights First Amendment Inst. At Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D. N.Y., 2018)

Suspension of the Appellant's license to draft and submit patent and trademark applications on behalf of others for publication in the USPTO's public forum constitutes unconstitutional application of 203/205 which violates the Appellant's First Amendment Freedom of Speech and Expressive Association rights. "[A]ny restraint imposed in advance of a final judicial determination [in Federal Court] on the [Constitutional] merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. "*Freedman v. State of Maryland*, 380 U.S. 51, (1965).

"For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. [] In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 78 S.Ct. 1163 1171, 2 L.Ed.2d 1488, we said, 'In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.' Later, in *Bates v. Little Rock*, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480, we said, '(w)here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Most recently, in *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297, 81 S.Ct. 1333 1336, 6 L.Ed.2d 301, we reaffirmed this principle: '* * * regulatory measures * * * no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.'" *National Association for Advancement of Colored People v. Button*, 371 U.S. 415 (1963).

In sum, a long line of Supreme Court cases has demonstrated the requirement that "the Government bears the burden of identifying a substantial interest and

justifying the challenged restriction." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173,183 (1999) (emphasis added). *Thompson v. Western States Medical Center*, 535 U.S. 357, 367-377 (2002).

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For the foregoing reasons, this Court should grant the Petitioner’s EMERGENCY MOTION TO STAY OR REVERSE AGENCY ACTION pending final judicial review.

DATE: February 18, 2022

Respectfully Submitted,

/s/ Kevin P. Correll

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ADDENDUM A – RELATIONAL STATUTES ILLUSTRATION

ADDENDUM A – RELATIONAL STATUTES ILLUSTRATION

PUBLIC LAW 106-113—NOV. 29, 1999
 “(2) Section 500(e) of title 5, United States Code, is amended by striking “Patent Office” and inserting “United States Patent and Trademark Office””

“It has long been established that the title of an Act [or name change] “cannot enlarge or confer powers.” United States v. Oregon & California R. Co., 164 U.S. 526 (1896); Cornell v. Coyne, 192 U.S. 418 (1904). See United States v. Fisher, 2 Cranch 358, 386, 2 L.Ed. 304 (1805); Yazoo & Mississippi Valley R. Co. v. Thomas, 132 U.S. 174 (1889). “ Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S.1 (Emphasis added.)

5 U.S.C. 500
 (d) This section does not—
 ...
 (2) authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency;
 (e) Subsections (b)–(d) of this section do not apply to practice before the United States Patent and Trademark Office with **respect to patent matters** that continue to be covered by chapter 3 (**sections 31–33**) of title 35.

PUBLIC LAW 93-596 JAN 2, 1975
 “To amend the Trademark Act of 1946 and title 35 of the United States Code to **change the name** of the Patent Office to the “Patent and Trademark Office”.”

Patent Matters

“... “absent provision[s] cannot be supplied by the courts.” ... To do so “ is not a construction of a statute, but, in effect, an enlargement of it by the court. ’...” Rotkiske v. Klemm, 140 S. Ct. 355 (2019).

Trademark, Non-patent Matters
 five-year statute of limitations pursuant to 28 U.S.C. 2462. See, e.g., *Sheinbein v. Dudas*, 465 F.3d 493 (Fed. Cir. 2006)

35 U.S.C. 32
 “A **proceeding under this section** shall be commenced not later than the earlier of either the date that is 10 years after the date on which the misconduct forming the basis for the proceeding occurred, or 1 year after the date on which the misconduct forming the basis for the proceeding is made known to an officer or employee of the Office as prescribed in the regulations established under section 2(b)(2)(D).”

35 U.S.C. 2
 (b) Specific Powers.—The Office—
 (2) may establish regulations, **not inconsistent with law**, which—
 (D) may govern the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office, and may require them, before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office;

37 C.F.R. 11.34(d)
 (d) Time for filing a complaint. A complaint shall be filed within one year after the date on which the OED Director receives a grievance forming the basis of the complaint. No complaint shall be filed more than ten years after the date on which the misconduct forming the basis for the proceeding occurred.

Violates 5 U.S.C. 706(c) (“in excess of statutory jurisdiction”) when applied to trademarks and other non-patent matters.