Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Tiffany Cunningham
Nominee to the Court of Appeals for the Federal Circuit
June 2, 2021

1. **In your confirmation hearing, you recalled that when you clerked on the Federal Circuit, you noticed that the makeup of the court was very homogenous and that you aspired to one day serve on that court.**

   Can you discuss what it would mean to you to see the federal bench, and specifically the Federal Circuit, reflect the diversity of our country?

   Response: Enhancing the demographic and professional diversity of the Federal Circuit will further enhance the public's confidence and demonstrate to the next generation that a variety of backgrounds can be judges at that court. If I were fortunate enough to be confirmed, then I would bring both professional and demographic diversity to the bench. I have spent my almost 20-year career, litigating intellectual property cases from beginning to end, including through fact and expert discovery, trial and appeal. If confirmed, then I would look forward to mentoring the next generation of lawyers as a member of the federal bench.

2. **As you know, the Federal Circuit is unique among the 13 Circuit Courts of Appeals as it has nationwide jurisdiction over a wide range of subjects, including international trade, government contracts, and veterans benefits, as well as patents and trademarks.**

   Can you talk about your experience practicing before the Federal Circuit, and what you would look forward to if you are given the opportunity to serve on that court?

   Response: As a trial and appellate litigator, I litigate cases through their entire evolution from the trial court through appeals to the Federal Circuit. Because my career has focused primarily on patent litigation, my appellate practice has been before the Federal Circuit. I have appeared before the Federal Circuit in eight appeals, and I have achieved successful results for my clients in those appeals that resulted in a final decision by the Court. *See, e.g., Caterpillar Inc. v. Sturman Indus., Inc.*, 387 F.3d 1358 (Fed. Cir. 2004); *Fernandez Innovative Techs., LLC v. General Motors Corp.*, 325 Fed. App'x 908 (Fed. Cir. 2009); *Pieczenik v. Bayer Corp.*, 474 Fed. App'x 766 (Fed. Cir. 2012). If confirmed, I look forward to working in a collegial manner with the judges at the Court on the challenging issues that the Court addresses across the full range of the Federal Circuit's nationwide jurisdiction.

Senator Grassley, Ranking Member
Questions for the Record
Tiffany Cunningham
Nominee to be United States Circuit Judge for the United States Court of Appeals for the Federal Circuit

1. **What is your approach to statutory interpretation?**

   Response: My approach to statutory interpretation is to start with the plain language of the statute. I would also review any binding Supreme Court or other controlling precedent interpreting that statutory language. If the statutory language is clear, then I would follow the plain language of the statute. If the statutory language is ambiguous, then I would apply the other canons of statutory construction as prescribed by Supreme Court and other binding precedent.

2. **What is your approach to constitutional interpretation?**

   Response: My approach to constitutional interpretation would be to begin with review of the pertinent constitutional provision along with any binding Supreme Court and other precedent interpreting that constitutional provision. If confirmed, I would apply all binding Supreme Court and other controlling precedent interpreting that portion of the Constitution, as well as the Supreme Court's identified methods of constitutional interpretation.

3. **How would you describe your judicial philosophy?**

   Response: If confirmed, my general approach to handling cases would be to thoroughly review and analyze the briefs and record presented to me; analyze all of the applicable law, including statutory and case law precedent, and apply the law to the facts of that particular case; and just decide the issues that are squarely presented by the appeal. I would be unbiased, fair to all and not pre-judge any matters. I would not inject my personal views into the decision-making process.

4. **During your hearing you told me that you did not think district judges should rule on cases with an eye toward creating patent jurisdictions. What is the role of the Federal Circuit in ensuring that they don't do so?**

   Response: During my hearing, I testified that district court judges "need to be bound by the rule of law and just being focused on applying the law to the facts of each case without really taking into consideration regarding what sorts of cases they might want to appear before them." The Federal Circuit is tasked with only addressing the issues presented by the appeals before it through the lens of the appropriate standards of review.

If presented with venue issues, the Federal Circuit would apply all controlling precedent to the venue issues before the Court.

5. What is the role of mandamus at the Federal Circuit in ensuring that district judges or plaintiffs do not abuse venue in patent cases?

Response: A writ of mandamus is an extraordinary remedy that can only be granted if certain conditions are satisfied: "(1) the petitioner must have no other adequate means to attain the relief desired; (2) the petitioner must demonstrate a clear and indisputable right to the issuance of the writ; and (3) even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *In re HTC Corporation*, 889 F.3d 1349, 1352 (Fed. Cir. 2018) (citing *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004)) (internal quotations omitted). The Federal Circuit evaluates each case on a case-by-case basis. Depending on the specific facts of the case, the Federal Circuit has either granted or denied mandamus in patent venue cases. *See, e.g.*, *In re Google LLC*, 949 F.3d 1338, 1341-43, 1347 (Fed. Cir. 2020) (granting mandamus and directing the district court to dismiss or transfer the case as appropriate); *In re HTC Corporation*, 889 F.3d at 1352-54, 1361 (denying writ of mandamus).

6. What is your understanding of the Takings Clause?

Response: The Takings Clause of the Fifth Amendment provides that private property cannot be taken for public use without just compensation. *U.S. Const. Amend. V*; *see also, e.g., Golden v. United States*, 955 F.3d 981, 987 (Fed. Cir. 2020) (citing *Schillinger v. U.S.,* 155 U.S. 163 (1894)).

7. What do you take to be the outer limits of the Supreme Court's holding in *Kelo v. New London*?

Response: In *Kelo v. City of New London*, 545 U.S. 469, 477 (2005), the Supreme Court considered "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." The Supreme Court held that the city's economic development plan served a public purpose and satisfied the public use requirement of the Fifth Amendment. *Id.* at 484. The Supreme Court further confirmed that its decision did not prevent states from imposing additional restrictions on the exercise of the takings power. *Id.* at 489.

8. Have you ever handled a Takings claim as a lawyer?

Response: No.

9. You clerked for Judge Dyk on the Federal Circuit. What are your views on Judge Dyk's approach to Takings Clause cases?

Response: As a nominee, I do not believe that it would be appropriate for me to comment on specific approaches by any particular judge on the Federal Circuit. To the extent that a decision authored by any Federal Circuit judge constituted binding precedent in any area of law, I would be obligated to follow it. If confirmed, I would faithfully apply all controlling precedent to any cases that came before me.

10. What is your view on the role that the PTO plays in the re-review of patents?

Response: The PTO plays a significant role in the re-review of patents. For example, after the passage of the America Invents Act, parties could challenge issued U.S. patents before the PTO through inter partes review (IPR), post-grant review (PGR), or covered business method (CBM). These PTO proceedings offer a cost-effective alternative to district court litigation in order to challenge the validity of a patent while allowing for limited discovery and argument before the PTO. While the grounds for IPRs are limited to prior art patents or printed publications under 35 U.S.C. §§ 102 and 103, the grounds for PGR and CBM encompass 35 U.S.C. §§ 101, 102, 103, and 112.

11. Under the Supreme Court's First Amendment jurisprudence, can someone shout "fire" in a crowded theater?

Response: It depends on the circumstances. In *Schenck v. United States*, 249 U.S. 47, 52 (1919), the Supreme Court explained in dicta that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." The Supreme Court later clarified in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

12. Justice Scalia's opinion in *D.C. v. Heller* does allow for some regulation of firearms, such as possession of firearms by felons. Which firearm regulations has the D.C. Circuit upheld as constitutional?

Response: Since the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the D.C. Circuit has upheld a number of firearm regulations as constitutional. Specifically, the D.C. Circuit has upheld a requirement of registration of handguns and a ban on assault weapons and large-capacity magazines. *See, e.g., Heller v. District of Columbia*, 670 F.3d 1244, 1264 (D.C. Cir. 2011). The D.C. Circuit has also upheld a ban on possession of firearms for individuals convicted of common law

misdemeanors. *Schrader v. Holder*, 704 F.3d 980, 982, 991 (D.C. Cir. 2013). In *Heller v. District of Columbia*, 801 F.3d 264, 280-81 (D.C. Cir. 2015), the D.C. Circuit upheld the requirement of the registration of long guns along with the following requirements for registrants: in-person appearance, fingerprinting, photographing, reasonable fees and safety training. The Court further upheld the ban on firearm possession for individuals with a felony conviction. *Medina v. Whitaker*, 913 F.3d 152, 161 (D.C. Cir. 2019). In *United States v. Class*, 930 F.3d 460, 469-70 (D.C. Cir. 2019), the D.C. Circuit upheld as constitutional the federal statute prohibiting possession of firearms on U.S. Capitol grounds.

13. Is it proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about in a dissent?

Response: A circuit judge must follow all binding Supreme Court precedent. Nonetheless, a circuit court judge may request additional clarity regarding Supreme Court precedent in either a concurring opinion or dissent.

14. When interpreting text you find to be ambiguous, which tools would you use to resolve that ambiguity?

Response: I would begin with the language of the statute. I would also analyze the language of the statute in the context of the overall statutory structure. To interpret ambiguous text, I would review relevant Supreme Court or other controlling precedent that interprets the statute. I would also consider other tools of statutory construction as dictated by the Supreme Court or Federal Circuit precedent, as well as any persuasive authority if there is no binding authority. Lastly, I would consider the legislative history of text only as needed and to the extent the Supreme Court permits such consideration.

15. When interpreting text you find to be ambiguous, how would you handle two competing, contradictory canons of statutory interpretation?

Response: If confirmed, I would employ the approach described in response to Question No. 14 to interpret ambiguous text. To the extent that there were contradictory canons of statutory construction, I would look to controlling precedent to determine how to resolve any conflict.

16. How do you decide when text is ambiguous?

Response: If confirmed, I would begin by reviewing the plain language of the statute with respect to the dispute in the case, to determine whether the text is ambiguous. *See, e.g.*, *Power Integrations, Inc. v. Semiconductor Components Indus., LLC*, 926 F.3d 1306, 1314 (Fed. Cir. 2019) ("In statutory construction, we begin with the language of the statute. Our first step is to determine whether the language at issue has a plain and

unambiguous meaning with regard to the particular dispute in the case.") (citations and internal quotations omitted).

17. Do you find, in general, congressional statutes or agency regulations to consist of more ambiguous text?

Response: I would address each congressional statute or agency regulation on a case-by-case basis. I do not have an opinion regarding whether statutes or regulations consist of more ambiguous text.

18. In Federalist No. 62, James Madison wrote: "It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?" Do you agree with this statement?

Response: This is an excerpt from the Federalist No. 62, entitled "The Senate." This excerpt reiterates the desire for laws to be both understandable and predictable. I agree with that statement. If confirmed, I would faithfully apply all controlling precedent to the facts of any case.

19. Do you agree with the following statements?

a. We live in a pluralistic society with people of widely diverse faith traditions. Religious freedom for all is part of our country's bedrock, from the enactment of our Constitution to the establishment of our more recent statutes that protect against religious discrimination.

Response: The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *U.S. Const. Amend. I.* The Supreme Court has reiterated that religious freedom is protected by the Free Exercise Clause. The Religious Freedom Restoration Act of 1993 further ensures that religious freedom is protected.

b. Title VII requires that employers not discriminate against applicants or employees because of their religious beliefs, observances, or practices and that employers accommodate religious beliefs, observances, and practices, absent undue hardship.

Response: Title VII prohibits employers from discriminating on the basis of race, color, religion, national origin and sex. *See* 42 U.S.C. § 2000e-2. Title VII defines

"religion" as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

c. Federal civil-rights regulators should seek to learn more about the extent to which employees request time off for prayer or Sabbath observance, seek exemption from grooming or dress codes, or seek to avoid participation in hot-button practices like abortion or LGBTQ celebration.

Response: If confirmed, my role would be to interpret the laws. I would not have a policymaking role. Accordingly, it is not appropriate for me to comment on what federal civil-rights regulators should seek to learn in fulfilling their policy roles.

d. It is important to improve religious discrimination awareness for employees and employers while encouraging meaningful dialogue between employees, employers, and the government.

Response: If confirmed, my role would be to interpret the laws. However, I am aware that employers who are subject to federal laws prohibiting various types of discrimination frequently take steps to improve awareness of those laws among their employees.

e. The federal government should prevent and remedy unlawful religious discrimination.

Response: If confirmed, my role would be to interpret the laws. I believe that the federal government is required to follow laws enacted by Congress, including laws prohibiting religious discrimination.

20. You can answer the following questions yes or no:

a. **Was *Brown v. Board of Education* correctly decided?**

Response: Consistent with the positions taken by other nominees, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided, and I will follow all binding Supreme Court precedent if confirmed. However, there are a few exceptions to this general rule and *Brown v. Board of Education*, 347 U.S. 483 (1954) is one of those exceptions. In *Brown v. Board of Education*, the Supreme Court held that the previously established doctrine of "separate but equal" is unconstitutional. I agree that this case was correctly decided.

b. **Was *Loving v. Virginia* correctly decided?**

Response: Consistent with the positions taken by other nominees, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided, and I will follow all binding Supreme Court precedent if confirmed. However, there are a few exceptions to this general rule and *Loving v.*

Virginia, 388 U.S. 1 (1967) is one of those exceptions. In *Loving v. Virginia*, the Supreme Court held that laws banning interracial marriage were unconstitutional. I agree that this case was correctly decided.

c. **Was *Griswold v. Connecticut* correctly decided?**

Response: As a nominee, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided. I will follow all binding Supreme Court precedent if confirmed.

d. **Was *Roe v. Wade* correctly decided?**

Response: As a nominee, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided. I will follow all binding Supreme Court precedent if confirmed.

e. **Was *Planned Parenthood v. Casey* correctly decided?**

Response: As a nominee, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided. I will follow all binding Supreme Court precedent if confirmed.

f. **Was *Gonzales v. Carhart* correctly decided?**

Response: As a nominee, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided. I will follow all binding Supreme Court precedent if confirmed.

g. **Was *District of Columbia v. Heller* correctly decided?**

Response: As a nominee, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided. I will follow all binding Supreme Court precedent if confirmed.

h. **Was *McDonald v. City of Chicago* correctly decided?**

Response: As a nominee, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided. I will follow all binding Supreme Court precedent if confirmed.

i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**

Response: As a nominee, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided. I will follow all binding Supreme Court precedent if confirmed.

j. **Was *Sturgeon v. Frost* correctly decided?**

Response: As a nominee, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided. I will follow all binding Supreme Court precedent if confirmed.

k. **Was *Juliana v. United States* (9th Cir.) correctly decided?**

Response: As a nominee, it is generally inappropriate for me to comment on whether any given court precedent is correctly decided. I will follow all binding and applicable precedent if confirmed.

l. **Was *Rust v. Sullivan* correctly decided?**

Response: As a nominee, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided. I will follow all binding Supreme Court precedent if confirmed.

m. **Was *TC Heartland v. Kraft Foods Group Brands LLC* correctly decided?**

Response: As a nominee, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided. I will follow all binding Supreme Court precedent if confirmed.

21. Have you had any conversations with individuals associated with the group Demand Justice, including but not limited to Brian Fallon or Chris Kang in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.

Response: No, to my knowledge, I have not spoken with individuals associated with the group Demand Justice in connection with this or any other potential judicial nomination.

22. Have you had any conversations with individuals associated with the American Constitution Society, including but not limited to Russ Feingold, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.

Response: No, to my knowledge, I have not spoken with individuals associated with the American Constitution Society in connection with this or any other potential judicial nomination.

23. Have you had any conversations with individuals associated with the Lawyers Committee for Civil and Human Rights, including but not limited to Vanita Gupta, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.

Response: No, to my knowledge, I have not spoken with individuals associated with the Leadership Conference on Civil and Human Rights in connection with this or any other potential judicial nomination.

24. You mention in your SJQ that you met with President Biden before being nominated. What was the nature of this meeting?

Response: I had a short Zoom call with President Biden on March 26. The videoconference meeting just involved President Biden getting to know more about my background.

25. Please explain with particularity the process by which you answered these questions.

Response: I reviewed and prepared answers to each question posed. As needed, I researched any issues pertinent to my responses. Additionally, attorneys from the Office of Legal Policy reviewed my questions and answers and provided me with feedback. The final answers are my own.

26. Do these answers reflect your true and personal views?

Response: Yes, I answered each question truthfully.

Nomination of Tiffany P. Cunningham to be United States Circuit Judge for the Federal Circuit Questions for the Record
Submitted June 2, 2021

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

   Response: No.

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   Response: No.

3. **Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.**

   Response: I reviewed each question and prepared answers to each question posed. As needed, I researched any issues pertinent to my responses. Additionally, I provided my answers to attorneys from the Office of Legal Policy who reviewed my questions and answers and provided me with feedback. The final answers are my own.

4. **Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.**

   Response: No. My process for preparing answers to all written questions from the Committee is explained above in response to Question No. 3.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Ms. Tiffany P. Cunningham to be United States Circuit Judge for the Federal Circuit

1. Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's philosophy from Warren, Burger, Rehnquist, or Roberts' Courts is most analogous with yours.

Response: If confirmed, my general approach to handling cases would be to thoroughly review and analyze the briefs and record presented to me; analyze all of the applicable law, including statutory and case law precedent, and apply the law to the facts of that particular case; and just decide the issues that are squarely presented by the appeal. I would be unbiased, fair to all and not pre-judge any matters. I would not inject my personal views into the decision-making process. While I cannot identify which Supreme Court Justice's philosophy is most similar to the one that I expect to employ if confirmed, above I described my general approach.

2. Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?

Response: The Constitution is an enduring document that has withstood the test of time. If confirmed, I would faithfully apply the Constitution and all controlling precedent interpreting the relevant constitutional provisions.

3. President Biden has created a commission to advise him on reforming the Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: I am aware that President Biden has created such a commission. As a nominee, it is not appropriate for me to weigh in on the size of the Supreme Court. If confirmed, I would faithfully apply all applicable Supreme Court precedent to any cases before the Federal Circuit.

4. Do you personally own any firearms? If so, please list them.

Response: No.

5. Have you ever personally owned any firearms?

Response: No.

6. Have you ever used a firearm? If so, when and under what circumstances?

Response: No.

7. Is the ability to own a firearm a personal civil right?

Response: The Supreme Court has held that the Second Amendment protects an individual's right to keep and bear arms. *See District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) ("[W]e hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home."). The Supreme Court also confirmed that the Second Amendment right to keep and bear arms is applicable to the states. *See McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 791 (2010) ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

8. Is the criminal justice system systemically racist?

Response: Throughout my career, I have focused on intellectual property litigation and have neither litigated any criminal cases nor analyzed the criminal justice system. If I were fortunate enough to be confirmed, I would resolve the specific case or controversy before the Court and not seek to resolve or analyze issues that are not squarely before the Court.

Questions for the Record for Tiffany P. Cunningham
From Senator Mazie K. Hirono

1. **As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:**

   a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

      Response: No.

   b. **Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

      Response: No.

Senator Mike Lee
Questions for the Record
Tiffany P. Cunningham, Federal Circuit

1. How would you describe your judicial philosophy?

Response: If confirmed, my general approach to handling cases would be to thoroughly review and analyze the briefs and record presented to me; analyze all of the applicable law, including statutory and case law precedent, and apply the law to the facts of that particular case; and just decide the issues that are squarely presented by the appeal. I would be unbiased, fair to all and not pre-judge any matters. I would not inject my personal views into the decision-making process.

2. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?

Response: My approach to statutory interpretation is to start with the plain language of the statute. I would also review any binding Supreme Court or other controlling precedent interpreting that statutory language. If the statutory language is clear, then I would follow the plain language of the statute. If the statutory language is ambiguous, then I would apply the other canons of statutory construction as prescribed by Supreme Court and other binding precedent.

3. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?

Response: My approach to constitutional interpretation would be to begin with review of the pertinent constitutional provision along with any binding Supreme Court and other precedent interpreting that constitutional provision. If confirmed, I would apply all binding Supreme Court and other controlling precedent interpreting that portion of the Constitution, as well as the Supreme Court's identified methods of constitutional interpretation.

4. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?

Response: I would apply the methods of constitutional interpretation employed by the Supreme Court and the Federal Circuit. Accordingly, I would review the relevant constitutional provision. In instances where the Supreme Court or the Federal Circuit has examined the original meaning of a constitutional provision, I would also employ that approach. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) ("We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.").

5. What are the constitutional requirements for standing?

Response: The Supreme Court has summarized the constitutional requirements for standing. "[O]ur cases have established that the irreducible constitutional minimum

of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations and quotations omitted).

6. Do you believe there is a difference between "prudential" jurisdiction and Article III jurisdiction in the federal courts? If so, which jurisdictional requirements are prudential, and which are mandatory?

Response: The Supreme Court and the Federal Circuit have distinguished between prudential and Article III jurisdiction. As the Federal Circuit explained, "Constitutional limitations relate to a court's jurisdictional power under Article III, which requires that the plaintiff show that he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979), and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976). Prudential limitations, by comparison, involve a court's administrative discretion to hear a case; they are those that the judiciary imposes to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *First Hartford Corp. Pension Plan & Trust v. U.S.*, 194 F.3d 1279, 1290 (Fed. Cir. 1999) (internal quotations omitted).

7. How would you define the doctrine of administrative exhaustion?

Response: The doctrine of administrative exhaustion requires a party challenging an agency decision to pursue all available agency remedies before seeking judicial review. *See, e.g.*, *Palladian Partners, Inc. v. U.S.*, 783 F.3d 1243, 1254 (Fed. Cir. 2015) ("'[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'").

8. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?

Response: Article I, section 8 of the Constitution gives Congress power to make "all Laws which shall be necessary and proper for carrying into Execution" other federal powers granted in the Constitution. This clause is also known as the "Necessary and Proper Clause." An example of an implied power is Congress' power to establish a

bank. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Congress has the implied power to incorporate a bank).

9. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?

Response: If confirmed, I would evaluate the constitutionality of such a law by using the methods previously approved by the Supreme Court or other controlling precedent. I would begin with the text of the Constitution and analyze it in conjunction with controlling precedent, including any precedent where Congress enacted a law without reference to a specific Constitutional enumerated power.

10. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?

Response: The Supreme Court has held that certain rights that are not expressly enumerated in the Constitution are protected rights. Some examples of unenumerated rights that the Supreme Court concluded were protected in the Constitution include the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy and to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to terminate a pregnancy before viability, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The aforementioned list of rights, which are based on substantive due process, is identified in *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

11. What rights are protected under substantive due process?

Response: See the response to Question No. 10.

12. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: If confirmed, my personal beliefs or views would not factor into my decision-making. The Supreme Court has distinguished between personal rights to abortion and the economic rights at issue in *Lochner v. New York*, 198 U.S. 45 (1905). Specifically, the Supreme court has afforded greater protection to personal rights, such as a right to abortion, than the economic rights at issue in *Lochner*. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) ("The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to

provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992) (applying an undue burden analysis to protect the central right recognized by *Roe v. Wade*).

13. What are the limits on Congress's power under the Commerce Clause?

Response: The Supreme Court has identified three categories that Congress may regulate under its Commerce Clause power. "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce[.]" *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (citations omitted).

14. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

Response: The Supreme Court has identified certain classifications as inherently suspect, such as race, nationality and alienage. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) ("But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.").

15. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: Checks and balances and separation of powers play key roles in our Constitution's structure. By dividing power between the legislative, executive, and judicial branches, it ensures that no one branch becomes too powerful. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) ("To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity.").

16. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: I would begin with the text of the Constitution and analyze it in conjunction with controlling precedent, including any precedent where a branch exceeds its constitutional authority. Some examples where the Supreme Court has found that a branch exceeded its authority granted under the Constitution are the cases of *United States v. Morrison*, 529 U.S. 598, 619 (2000) (holding that the

Commerce Clause did not provide Congress with authority to enact the civil remedy provision of the Violence Against Women Act), and *United States v. Lopez*, 514 U.S. 549, 551-52 (1995) (holding that Congress exceeded its power to legislate under the Commerce Clause when it passed the Gun-Free School Zones Act).

17. What role should empathy play in a judge's consideration of a case?

Response: A judge should faithfully apply the law to the facts of a case without injecting his or her personal views into consideration of the case.

18. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Both invalidating a law that is constitutional and upholding a law that is unconstitutional are undesirable.

19. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: Generally, judges should exercise judicial restraint and resolve just the case or controversy presented to him or her. Over the course of my almost 20-year patent litigation career, I have not analyzed what would account for any increase in invalidation of federal statutes. If confirmed, I would address each matter on a case-by-case basis and apply controlling precedent to the facts presented by that case.

20. How would you explain the difference between judicial review and judicial supremacy?

Response: There appears to be some debate regarding these issues. The Supreme Court has described the judiciary's role to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."). Commentators have described the difference between judicial review and judicial supremacy as follows: judicial review provides that each branch has authority to interpret the Constitution; whereas, judicial supremacy provides that the Supreme Court's interpretation of the Constitution is authoritative for the other two branches of government.

21. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: Elected officials follow both the Constitution and duly rendered judicial decisions. I also understand the difference between the role of elected officials and the independent judiciary. As a nominee, it is not appropriate for me to comment on how elected officials should balance their independent obligations to follow the Constitution and duly rendered judicial decisions.

22. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: Federalist 78 is entitled "The Judiciary Department," and reminds judges of the proper role of the judiciary. No judge can or should impose his or her will in contradiction to the Constitution or controlling law. Judges do not make the law or enforce the law, but instead handle actual cases or controversies that are before them.

23. How would you describe your approach to reading statutes—how much weight do you give to the plain meaning of the text? When we talk about the plain meaning of a statute, are we talking about the public understanding at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: When reading statutes, I begin with the plain meaning of the text. I seek to understand the public understanding at the time of enactment rather than adapting the meaning in light of social norms or linguistic conventions. My approach to reading statutes is further described in response to Question No. 2.

24. As a circuit court judge, you would be bound by both Supreme Court precedent, and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court

judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: Lower court judges, including circuit court judges, are duty bound to follow Supreme Court precedent and prior circuit court precedent that is on point for an issue regardless of whether he or she agrees with that precedent. To the extent that the precedent does not address the issue at hand, then lower court judges should explain why the precedent is distinguishable and seek to identify analogous authority that may be instructive on the issue. Judges should exercise judicial restraint to address the issues that are properly before the court.

25. Do you believe it is ever appropriate to look past jurisdictional issues if they prevent the court from correcting a serious injustice?

Response: No.

26. When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?

Response: When sentencing an individual defendant, 18 U.S.C. § 3553(a) identifies the factors that a judge shall consider. The defendant's group identity can be considered only to the extent it relates to one of the identified factors.

27. Would it ever be appropriate to sentence a defendant who belongs to a historically disadvantaged group less severely than a similarly situated defendant who belongs to a historically advantaged group to correct systemic sentencing disparities?

Response: No. 18 U.S.C. § 3553(a) identifies the factors that a judge shall consider in determining a sentence for a defendant.

28. Have you spoken with anyone affiliated with Demand Justice or the Leadership Conference on Civil Rights regarding your nomination either before or after it was announced?

Response: No, to my knowledge, I have not spoken with individuals associated with the group Demand Justice or the Leadership Conference regarding my nomination either before or after it was announced.

Questions for the Record from
Senator Thom Tillis for
Ms. Tiffany Patrice Cunningham

1. **Please describe your understanding of the workload of the Federal Circuit. If confirmed, how do you intend to manage your caseload?**

Response: As a former clerk for the Federal Circuit, I am generally familiar with the Court's workload and the types of cases that come before the Court. The Federal Circuit also reports statistics identifying the court or agency of origin for pending matters. *See, e.g.*, http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/YTD-Activity-May-2021.pdf. If I am fortunate enough to be confirmed, I would use many of the best practices that I saw during my clerkship regarding how to manage my caseload along with the case management strategies that I have developed during my almost 20-year intellectual property litigation career. Such practices include working closely and effectively with chambers staff to prepare for and resolve each matter presented. I would thoroughly analyze the parties' arguments and the accompanying record, identify the key issues to resolving each appeal along with any open questions to probe during oral argument, and seek to prepare well-reasoned and researched opinions, together with my colleagues, as efficiently as possible. As an intellectual property litigator for almost 20 years, I have seen firsthand how important it is to litigants to receive timely decisions from trial and appellate courts.

2. **The Federal Circuit jurisdiction is based upon subject matter rather than geographic location. How has your background prepared you to address the variety of issues, including appeals from administrative agencies, which you will hear?**

Response: During my clerkship at the Federal Circuit, I saw the breadth of the Federal Circuit's jurisdiction including numerous appeals from administrative agencies. I have also appeared in cases before the International Trade Commission and frequently collaborated with attorneys regarding filings before the Patent Office, such as filings in inter partes review proceedings and ex parte reexaminations, as well as their interplay with parallel litigation proceedings in district courts. If confirmed, I would bring all these experiences to the bench, along with my technical background and ability to quickly get up to speed on any new issues.

3. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

Response: Yes.

4. What is judicial activism? Do you consider judicial activism appropriate?

Response: Judicial activism may involve injecting one's personal views into judicial decision-making, which is not appropriate. Regardless of one's personal views, a judge needs to faithfully apply the law to the facts of each case.

5. Do you believe impartiality is an aspiration or an expectation for a judge?

Response: Impartiality is an expectation, duty, and requirement for judges. *See, e.g.*, Code of Conduct for United States Judges, Canon 3.

6. Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?

Response: No. A judge is not in a policymaking role and should not second-guess policy decisions. Instead, a judge should focus on faithfully applying the law to the facts of each case before him or her.

7. Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?

Response: Yes, it may result in an undesirable outcome. If confirmed, I would address each matter on a case-by-case basis and apply controlling precedent to the facts presented by that case, regardless of my personal views.

8. Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?

Response: No.

9. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: Patent eligibility jurisprudence remains one of the hottest and most debated topics in patent law, seven years after the Supreme Court's decision in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014) and nine years after its decision in *Mayo Collaborative Servs. v. Prometheus Labs. Inc.*, 566 U.S. 66 (2012). In my experience pre-*Mayo/Alice*, motions were less frequently filed seeking to invalidate patent claims under 35 U.S.C. § 101. Post-*Mayo*/*Alice*, there was a significant uptick in the number and the success of section 101 motions to invalidate patent claims, including motions to dismiss and motions for summary judgment. According to a LegalMetric Nationwide Report, the

overall win rate on section 101 motions was 50.6% between June 2014 and June 2020. I am aware that the Supreme Court is considering a petition for certiorari after the Federal Circuit denied a petition for rehearing en banc in another section 101 case. *See American Axle & Manufacturing Inc. v. Neapco Holdings LLC*, 966 F.3d 1347 (Fed. Cir. 2020) (denying petition for rehearing en banc). While I understand the concerns that you have raised, as a nominee, it is generally inappropriate for me to comment on whether any given Supreme Court precedent is correctly decided. If confirmed, I would faithfully apply all controlling Supreme Court precedent to the facts of any case, and I would also strive for clarity in the opinions that I authored to best serve future litigants.

10. Do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: The Supreme Court has set forth a two-step framework to determine whether a patent will survive a section 101 challenge. "In *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. ——, 132 S. Ct. 1289, 182 L.Ed.2d 321 (2012), we set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts. First, we determine whether the claims at issue are directed to one of those patent-ineligible concepts. If so, we then ask, '[w]hat else is there in the claims before us?' To answer that question, we consider the elements of each claim both individually and 'as an ordered combination' to determine whether the additional elements 'transform the nature of the claim' into a patent-eligible application. We have described step two of this analysis as a search for an 'inventive concept' —i.e., an element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.'" *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 217-18 (2014) (internal citations omitted). *See also Mayo Collaborative Servs. v. Prometheus Labs. Inc.*, 566 U.S. 66, 92 (2012) ("[W]e conclude that the patent claims at issue here effectively claim the underlying laws of nature themselves. The claims are consequently invalid.").

If confirmed and presented with a case raising a section 101 challenge, I would apply the two-step framework in conjunction with all other on point Supreme Court or Federal Circuit precedent, including the progeny of *Alice*. All parties either defending or asserting a section 101 challenge appreciate clarity and consistency with respect to determining whether the claims at issue will be deemed patent ineligible. If confirmed, I would apply all controlling Supreme Court precedent, including any additional Supreme Court precedent further clarifying section 101 jurisprudence.

11. Over the past year or two, stakeholders have increasingly been expressing concerns about litigation in the Western District of Texas. Most of these concerns appear to be driven by the explosive growth of litigation in a single division – the Waco Division – of WD Tex. The Waco Division had only one patent case in 2016, and

again had only one in 2017, but last year there were almost 800 patent cases filed in Waco. The result is that around 20% of the patent cases filed in the U.S. are assigned to a single district court judge. Do you see that kind of concentration of patent litigation as a problem? And, if so, what – if anything – should be done about it?

Response: During my hearing, I testified that district court judges "need to be bound by the rule of law and just being focused on applying the law to the facts of each case without really taking into consideration regarding what sorts of cases they might want to appear before them." The Supreme Court and the Federal Circuit have also considered the requirements under the patent venue statute. *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1521 (2017) ("As applied to domestic corporations, 'reside[nce]' in § 1400(b) refers only to the State of incorporation."); *In re Cray*, 871 F.3d 1355, 1360 (Fed. Cir. 2017) ("[O]ur analysis of the case law and statute reveal three general requirements relevant to the inquiry: (1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant. If any statutory requirement is not satisfied, venue is improper under § 1400(b)."). I recognize that Congress may also weigh the policy considerations associated with the distribution of patent cases in courts across the United States. Litigants continue to use motions to transfer or motions to dismiss for improper venue as tools to move cases between venues. Recently, the Federal Circuit has also considered the extraordinary remedy of petitions for writ of mandamus relating to patent venue. Depending on the specific facts of the case, the Federal Circuit has either granted or denied mandamus in patent venue cases. *See, e.g., In re Google LLC*, 949 F.3d 1338, 1341-43, 1347 (Fed. Cir. 2020) (granting petition for mandamus and directing the district court to dismiss or transfer the case as appropriate); *In re HTC Corporation*, 889 F.3d 1349, 1352-54, 1361 (Fed. Cir. 2018) (denying petition for writ of mandamus).

12. The fact that around 20% of the patent cases in the U.S. are assigned to just one of the more than 600 district court judges raises concerns about the level of forum shopping that seems to occur in patent litigation. Do you see "judge shopping" and "forum shopping" as a problem in patent litigation? If so, what is required to address this?

Response: Over the course of my career, I have represented both plaintiffs and defendants. In many of the cases where I have represented defendants, those cases have been filed in the most popular jurisdictions for patent litigation. The Federal Circuit has previously described Congress' goal for the predecessor to the patent venue statute. *See, e.g.*, *In re Cray*, 871 F.3d 1355, 1361 (Fed. Cir. 2017) ("'Congress adopted the predecessor to § 1400(b) as a special venue statute in patent infringement actions to eliminate the 'abuses engendered' by previous venue provisions allowing such suits to be brought in any district in which the defendant could be served.' *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262, 81 S. Ct. 557, 5 L.Ed.2d 546 (1961)"). See also response to Question No. 11.

13. It's no secret that I've been a strong supporter of the policies that former PTO Director Iancu put in place, especially with respect to the operation of the Patent Trial and Appeal Board or "PTAB." But some stakeholders seem to have raised potentially legitimate concerns about how some of these policies are being applied in practice. One example of this involves the application of the *Fintiv* test in the context of so-called discretionary denials. Under *Fintiv,* the PTAB applies a multi-factor test to determine whether to exercise its discretion to refuse to review a challenged patent. The factor that often seems to be given the most weight in applying this test is factor two, which considers the proximity of the court's trial date to the projected statutory deadline for the PTAB's final written decision. The logic of this factor is simple: If the PTAB isn't going to render a decision until after the district court has already ruled on the validity of the same patent, then the PTAB's decision may essentially be rendered moot, so it may not make sense for the PTAB to move ahead with its review. I wholeheartedly agree *with that principle.*

But, the complaint that I've heard repeatedly from stakeholders is that the scheduled trial date for the district court case is often changed to a later date after the PTAB has issued its decision refusing to move ahead with review. As a result, the PTAB is frequently denying review based on a trial date that later turns out not to be accurate. Now, I support the goal of minimizing the burdens of parallel proceedings, but I find it troubling that the PTAB relies so heavily on a piece of information that is known to be inaccurate in most cases. Can you share your views on this as a litigator and how would you address this issue if you are confirmed to the Federal Circuit?

Response: Thank you for raising this important issue. Over the course of my career, many of my trials have been rescheduled from the initial trial date set by the court. As you noted, the PTAB has provided for a six-factor test regarding discretionary denial of inter partes review petitions, based on a parallel proceeding. *See, e.g., Apple Inc. v. Fintiv, Inc.*, No. IPR2020-00019, 2020 WL 2126495, at *2 (PTAB Mar. 20, 2020) ("As with other non-dispositive factors considered for institution under 35 U.S.C. § 314(a), an early trial date should be weighed as part of a 'balanced assessment of all relevant circumstances of the case, including the merits.' Indeed, the Board's cases addressing earlier trial dates as a basis for denial under *NHK* have sought to balance considerations such as system efficiency, fairness, and patent quality. When the patent owner raises an argument for discretionary denial under *NHK* due to an earlier trial date, the Board's decisions have balanced the following factors: 1. whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted; 2. proximity of the court's trial date to the Board's projected statutory deadline for a final written decision; 3. investment in the parallel proceeding by the court and the parties; 4. overlap between issues raised in the petition and in the parallel proceeding; 5. whether the petitioner and the defendant in the parallel proceeding are the same party; and 6. other circumstances that impact the Board's exercise of discretion, including the merits.") (citations omitted); *see also, e.g.*, *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2141 (2016) ("Our

interpretation of the 'No Appeal' provision here has the same effect. Congress has told the *Patent Office* to determine whether inter partes review should proceed, and it has made the agency's decision 'final' and 'nonappealable.' § 314(d). Our conclusion that courts may not revisit this initial determination gives effect to this statutory command."); *Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1382-83 (Fed. Cir. 2021) ("Mylan lacks a clear and indisputable right to review of the Patent Office's determination to apply the *Fintiv* factors or the Patent Office's choice to apply them in this case through adjudication rather than notice-and-comment rulemaking. Given the limits on our reviewability, Mylan's *ultra vires* argument cannot be a basis for granting the petition for mandamus."). While I understand the concerns that you have raised, as a nominee, it is generally inappropriate for me to comment on whether any given precedent is correctly decided. If confirmed, I would faithfully apply all controlling precedent to the facts of any case before me.