Senator Grassley
Questions for the Record

Florence Yu Pan,
Nominee, U.S. District Judge for the District of Columbia

1. **As amended on December 1, 2015, Federal Rule of Civil Procedure 26(b)(1) defines the "scope of discovery" in litigation matters as "any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."***

   Chief Justice Roberts explained in his 2015 Year-End report that these amendments "make a significant change, for both lawyers and judges."

   a. **What is the effect of this amendment to Rule 26(b)(1)?**

      Response: This amendment to Federal Rule of Civil Procedure 26(b)(1) places emphasis on the concept of "proportionality" in determining the appropriate scope of discovery. Under the prior version of that subsection of the rule, the only explicit limitations on permissible discovery were based on privilege or relevance, although additional limitations could be imposed by court order. The amendment requires the parties to consider, before making a discovery request, whether the discovery request is appropriate and "proportional" within the context of the specific case. As Chief Justice Roberts stated in his 2015 Year-End Report on the Federal Judiciary, this amendment "crystallizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality." The Chief Justice also noted that the amended rule establishes, "as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case."

   b. **If confirmed, how would you assess whether a discovery request is "proportional to the needs of the case"?**

      Response: If confirmed, I would seek to apply the standard established by Rule 26(b)(1) in each case, after carefully considering the relevant criteria. I would bear in mind the purposes of the amendment, as expressed by Chief Justice Roberts in his 2015 Year-End Report on the Federal Judiciary: "[To] provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery;" and to encourage the court and the parties to make a "careful and realistic assessment of actual need."

c. How, if at all, would your assessment of whether a discovery request is "proportional to the needs of the case" differ from your view of the scope of discovery under the prior version of the rule?

Response: Although the prior version of Rule 26(b)(2)(C)(iii) did not use the term "proportional," it nevertheless enumerated very similar criteria for the court to apply in determining appropriate limits on discovery. The prior version of the rule provided: "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed . . . if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." According to the Advisory Committee Notes, "[t]he present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections."

2. The Chief Justice's 2015 Year-End report also noted reports from litigants that "[a] judge who is available for prompt resolution of pretrial disputes saves parties time and money."

As amended on December 1, 2015, Rule 16 requires a district judge to issue a scheduling order within "the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." This amendment shortened both applicable deadlines by 30 days.

a. Please explain the approach you will take to case management and the tools you will use to manage cases in a just and efficient manner if you are confirmed.

Response: If confirmed, I will strive to engage in early and effective case management. As recommended by Chief Justice Roberts in his 2015 Year-End Report on the Federal Judiciary, I would meet face-to-face with the lawyers promptly after a complaint is filed to confer about the needs of the case and to develop a case management plan. I would try to use the initial conference to simplify the issues and to eliminate any frivolous claims or defenses. I would also make myself available for additional conferences with the parties, and would require the parties to request a conference before filing a formal motion in aid of discovery.

b. Please explain and describe any effect the 2015 amendments to the Federal Rules of Civil Procedure will have on your approach to case management if confirmed.

Response: As noted by Chief Justice Roberts in his 2015 Year-End Report on the Federal Judiciary, the 2015 amendments to the Federal Rules of Civil Procedure "emphasize the crucial role of federal judges in engaging in early and effective case management." The amendments seek to enable judges to "take on a stewardship

role" in managing their cases. I would utilize the "techniques" identified by the amendments to "expedite resolution of pretrial discovery disputes, including conferences with the judge before filing formal motions in aid of discovery."

3. As you know, parties frequently propose protective orders for the approval of the district judge during the course of discovery. The 2015 amendments to the Federal Rules of Civil Procedure included a change to Rule 26(c)(1)(B) adding "allocation of expenses" to the list of items that may be included in a protective order.

a. How would you evaluate cost-allocation mechanisms included in proposed protective orders, if confirmed?

Response: The court's authority to allocate expenses associated with discovery should encourage parties to more carefully consider whether their discovery requests are truly necessary to support their cases. I would exercise this authority to curtail abusive discovery requests that drive up the costs of litigation and impose an undue burden or expense on the responding party.

b. Under what circumstances, if any, would you consider ordering allocation of expenses pursuant to Rule 26(c)(1)(B) absent suggestion of the parties?

Response: With respect to Rule 26(c)(1)(B), the Advisory Committee Notes state that the rule's recognition of the court's authority to allocate expenses "does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding." In general, absent a request by a responding party to allocate expenses differently, I would presume that the responding party is willing to bear the costs of responding.

c. Do you understand the 2015 amendment to Rule 26(c)(1)(B) to confer upon the district court a new authority or obligation to manage discovery costs through cost allocation?

Response: I do not understand the amendment to Rule 26(c)(1)(B) to confer a new authority or obligation to manage discovery costs through cost allocation. The Advisory Committee Notes state: "Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority."

d. How, if at all, do you understand the cost-allocation provisions of Rule 26(c)(1)(B) to relate to those found in Rule 37?

Response: The cost-allocation provisions of Rule 26(c)(1)(B) and the provision for payment of expenses in Rule 37(a)(5) both encourage parties to engage in reasonable discovery practices, by placing the costs associated with unreasonable or abusive

discovery practices on the proponent of such practices. Under Rule 37(a)(5), the court can order the non-prevailing party in litigation over a motion to compel to pay the prevailing party's reasonable expenses in litigating the motion.

4. What is the most important attribute of a judge, and do you possess it?

Response: A judge must have the intellectual capacity and the personal commitment to make fair and appropriate rulings in every case, by faithfully applying the governing law to the facts that are before the court. I believe that I have demonstrated that I possess these attributes while serving as an Associate Judge of the Superior Court of the District of Columbia for the past seven years.

5. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: I agree with Canon 3(A)(3) of the Code of Conduct for United States Judges, which states: "A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." I believe that the attributes of patience and courtesy are particularly important. I try to meet this standard every day, both on and off the bench.

6. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: I am committed to following the precedents of higher courts and giving them full force and effect, even if I personally disagree with such precedents. I am mindful of the appropriate role of a District Court judge, and would take great care to conscientiously apply governing case law.

7. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: If there were no controlling precedent that was dispositive on an issue with which I was presented, I would look first to the text or plain language of the law that I was asked to interpret. I would also look to principles of statutory construction, and to precedents in analogous cases. In all cases, including cases of first impression, I would find a firm basis for my ruling in the statutory text or in relevant case law.

8. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: If I believed that the Supreme Court or the Court of Appeals had seriously erred in rendering a decision, I would nevertheless apply that decision. I would be bound by controlling authority, even if I did not agree with that authority.

9. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: Where Congress has exceeded its enumerated powers under the Constitution in enacting a statute, or where a statute is in conflict with the Constitution, it is appropriate for a federal court to declare the statute unconstitutional. A federal court should avoid deciding such a constitutional issue unless it is necessary to resolve the case before the court, and a court should not make such a judgment unless it is well supported by precedent.

10. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.

Response: In interpreting the Constitution, judges should look to the text of the Constitution, and to the precedents of the Supreme Court and the relevant court of appeals. These are all domestic sources of law.

11. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Response: I am committed to grounding my decisions and rulings in precedent and in the text of the law. I believe that I have done so as an Associate Judge of the Superior Court of the District of Columbia for the past seven years.

12. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: I am committed to being fair and impartial in every case, and will decide every case by applying the governing law to the facts that are before me. I believe that I have demonstrated these qualities as an Associate Judge of the Superior Court of the District of Columbia for the past seven years.

13. If confirmed, how do you intend to manage your caseload?

Response: If confirmed, I will follow the recommendations regarding case management provided by Chief Justice Roberts in his 2015 Report on the Federal Judiciary. The report notes that "[j]udges must be willing to take on a stewardship role, managing their cases

from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation." It further states that "judges who are knowledgeable, actively engaged, and accessible early in the [litigation] process are far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing." In addition, I would certify matters to magistrate judges, where appropriate.

14. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes, I believe that judges should play an active role in controlling the pace and conduct of litigation. If confirmed, I will promptly schedule an initial conference in every case to confer with the parties about the needs of the case and to develop a case management plan. I will try to use the initial conference to simplify the issues and to set a reasonable schedule for the litigation of the case. I would also make myself available for additional conferences with the parties, as needed. Furthermore, I would employ Rule 16 of the Federal Rules of Civil Procedure to manage the cases before me.

15. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.

Response: In deciding cases and writing opinions, I start by carefully reviewing the pleadings filed by the parties and all of the authorities that they cite. In analyzing the legal issues, I always look to the text of any statute or rule that I am being asked to interpret, and to any governing case law from the District of Columbia Court of Appeals and the Supreme Court. If there is no binding case law directly on point, I look to principles of statutory construction, to legal precedents from other jurisdictions, or to precedents interpreting analogous statutes. If I am not familiar with the area of law in question, I sometimes consult treatises and hornbooks to gain a better understanding of the broader context of the law.

16. President Obama said that deciding the "truly difficult" cases requires applying "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy . . . the critical ingredient is supplied by what is in the judge's heart." Do you agree with this statement?

Response: In deciding any case, a judge should faithfully apply the governing law to the facts. I do not believe that a judge's personal opinions, values, or background should determine the court's ruling.

17. Please describe with particularity the process by which these questions were answered.

Response: I received these questions for the record on July 20, 2016. I familiarized myself with the issues of civil procedure raised in the questions. I then drafted my responses, and submitted them to the Office of Legal Policy at the United States Department of Justice on July 29, 2016.

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

Response: Yes.