Sen. Schmitt Questions

Question 1: The Patent Eligibility Restoration Act (PERA) would widely broaden patent eligibility. What are the protections in the patent system to prevent patent trolls—especially foreign patent trolls like those from China—from using this law to supercharge their manipulation and abuse of the U.S. patent system?

By making virtually any process "that cannot practically be performed without the use of a machine or manufacture" patent-eligible, PERA would allow a resurgence of the very types of abstract business-method patents that patent trolls have long exploited.

Foreign patent-holding entities could easily take advantage of this environment. There is no mechanism in PERA that distinguishes between domestic and foreign patent owners. Chinese or other foreign entities could acquire broad U.S. patents and use them to target American companies without contributing to domestic innovation. In practice, this would mean more lawsuits, higher compliance and settlement costs, and increased vulnerability of U.S. businesses to predatory litigation tactics.

This is even more problematic as more retailers are applying AI tools in their businesses. As I shared in my testimony, we are on the cusp of a fourth wave of abusive patent litigation – one that can be avoided if we maintain the course under Alice. This fourth wave would involve patents that apply an abstract idea using artificial intelligence. Many standard business practices can be rebranded as a supposedly-new use of AI, but as in the prior litigation waves, they would not reflect any advance in technology. Instead, they would represent attempts to profit off technology that others have invented by taking well-known practices and attaching the latest label. With the rapid adoption of AI tools by retailers and other businesses to support all aspects of their operations, this fourth wave has the potential to be the most harmful yet. And PERA would bring about this wave and give foreign patent trolls more ammunition to cause harm to American businesses.

The best protection against both domestic and foreign patent trolls is to maintain the *Alice* framework and ensure that patents are limited to genuine technological inventions, not business ideas or abstract processes.

Question 2: On balance, would PERA make it easier or harder for patent trolls to extort U.S. businesses and companies?

PERA would make it dramatically easier for patent trolls to extract settlements from U.S. businesses. The *Alice* decision reminded courts that patents on abstract ideas that do nothing to advance technology are not made patent eligible by simply tacking on generic

technology like a computer or the internet. That much-needed reminder transformed the litigation landscape: frivolous lawsuits dropped, settlement pressure declined, and legitimate innovators continued to thrive.

PERA would reverse those gains. By discarding the judicial tools that currently separate abstract ideas from true inventions, it would allow a new wave of patents on business methods, e-commerce practices, and AI applications that merely automate well-known human activities. Each of these areas presents fertile ground for troll litigation because they affect virtually every American business.

Main Street companies, including retailers, restaurants, banks, and real estate firms, would be among the hardest hit. Few have in-house counsel or the financial resources to litigate a patent case to judgment. The practical result would be a return to the pre-*Alice* era, when trolls leveraged weak patents to demand settlements from businesses that lacked the means to defend themselves.

Question 3: How would expanding patent eligibility for AI processes under PERA impact the ability of businesses to implement those technologies?

First, I am not aware of any issues for companies obtaining patents on applications of AI technology when those patents are about technological solutions to technological problems, and not merely trying to tack on the use of AI to abstract ideas. The current patent eligibility law has not had an impact on AI patenting.

PERA, however, would permit the patenting of abstract ideas that simply "apply AI" without doing more than that. As a result, it would deter, not promote, the adoption of AI technologies by American businesses. Retailers and other Main Street firms rely heavily on commercially available AI tools for inventory management, customer analytics, and operations. If PERA were enacted, these firms would face heightened legal risk each time they implement or adapt AI tools for ordinary business functions. We saw this happen with software tools before, and we would undoubtedly see it happen again.

By permitting patents on "AI-assisted" applications of common business practices, rather than on technological innovations, PERA would invite a surge of opportunistic patent claims. Businesses that use AI to forecast sales, personalize recommendations, or automate customer service could find themselves accused of infringing patents that simply repackage those basic functions in AI terminology. The threat of litigation would chill investment and slow the deployment of useful AI technologies across the economy.

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Question 4: What are examples of the types of AI innovations that are ineligible under current law but would be eligible under PERA?

Under current law, patents that merely apply AI or other computational tools to routine tasks (such as adjusting prices, displaying recommendations, or generating marketing materials) are ineligible because they claim abstract business concepts, not technological inventions. Courts have repeatedly invalidated such patents when they lack a specific improvement in the functioning of a computer or AI system.

Under PERA, those same patents would likely become eligible. Any process that "cannot practically be performed without a machine" would qualify, regardless of whether the invention improves that underlying technology. That could include:

- AI-driven methods of predicting consumer behavior or credit risk;
- Algorithms that tailor online content or advertisements;
- Automated scheduling, routing, or pricing tools for businesses; or
- Systems that use AI to "analyze" customer preferences and display results.

These are precisely the kinds of claims that have been rejected under *Alice* because they seek to monopolize basic commercial activities. Making them patent-eligible again would create broad legal exposure for every company that employs AI in its operations, including retailers, banks, logistics providers, and software developers.

Question 5: Why should Congress—or why should Congress not—expand eligibility to such AI innovations?

Congress should not expand patent eligibility to these types of AI-related business methods. Doing so would not encourage meaningful innovation; it would merely enable the privatization of fundamental tools and ideas that countless businesses depend upon. The patent system is designed to reward genuine technological advances, not the repackaging of ordinary commercial activity with new terminology.

If Congress were to extend eligibility in this way, it would recreate the very conditions that led to widespread abuse before *Alice*: patents on abstract concepts like "using AI to recommend a product" or "applying a model to forecast sales." Those patents do not teach any new technology, yet they can be used to sue or threaten any company that uses AI in a similar way.

Retailers and other Main Street businesses would be especially vulnerable because AI has become integral to modern commerce. Expanding eligibility would transform a tool of innovation into a source of legal risk and higher costs, ultimately raising prices for consumers and diverting resources from productive investment. The better approach is to preserve the balance struck by the courts: protect true technological breakthroughs, while excluding abstract business concepts that exploit technology without advancing it.

Sen. Tillis Questions

Question 1: Is there a continuing need for Congress to step in with patent eligibility legislation? Please explain.

With respect to patent eligibility for abstract ideas, there is not a continuing need for Congress to intervene with new patent eligibility legislation. The Supreme Court's decision in *Alice v. CLS Bank* and subsequent guidance from the Federal Circuit have already restored a workable and predictable framework for determining patent eligibility for abstract ideas. Despite anecdotal reports from some judges to the contrary, the empirical evidence shows that both the U.S. Patent and Trademark Office (USPTO) and the courts have adapted effectively. The USPTO's own "Adjusting to Alice" study demonstrated that examiner rejections under Section 101 became less frequent and more predictable after *Alice*. Likewise, academic studies confirm that Section 101 determinations are now among the most consistent areas of patent law.

Rather than uncertainty, the current system provides businesses and innovators alike with a clear understanding of what can and cannot be patented. The problems that existed before *Alice*—the issuance and assertion of vague, abstract patents on basic business practices—were far more disruptive and costly to the economy. The Patent Eligibility Restoration Act (PERA) would dismantle that stability, introducing years of fresh uncertainty as courts and agencies work to interpret an entirely new statutory framework.

Question 2: Despite how broken the current situation is regarding patent eligibility, is it in the interest of some parties to maintain the broken status quo? Why is this?

Respectfully, with respect to abstract ideas, I would not characterize the current system as "broken." The patent eligibility framework established by the Supreme Court in *Alice v. CLS Bank* has proven to be both functional and effective in practice. It corrected a period in which abstract, non-technological patents were routinely granted and exploited against legitimate businesses. Since *Alice*, the courts and the U.S. Patent and Trademark Office have developed clear, workable guidance that distinguishes genuine technological inventions from attempts to monopolize ideas or business practices.

It is true that some federal judges have described the *Alice* framework as unpredictable or difficult to apply, and those concerns deserve acknowledgment. However, we should place greater weight on empirical evidence than on anecdotal frustration. The USPTO's "Adjusting to Alice" study found that examiner rejections under Section 101 became both less frequent and more predictable after the decision. Independent academic analyses have reached similar conclusions, showing that Section 101 outcomes are at least as consistent—and often more so—than in other areas of patent law. The data demonstrate that the system functions with increasing clarity over time as courts refine the doctrine.

Those who describe the system as "broken" often do so because *Alice* made it harder to profit from low-quality patents. Patent assertion entities that built a business model around vague claims to common commercial practices—such as using online shopping carts or displaying store maps—saw their leverage disappear once courts could invalidate those patents early in litigation. These entities, along with some who license or invest in such patents, have a financial incentive to restore the ambiguity that previously enabled abuse.

In short, what some call a "broken" system is in fact a more balanced one. It protects inventors who create genuine technological advances while preventing those who would use the patent system as a tool for rent-seeking. Maintaining that balance is essential for innovation, competition, and the economic health of Main Street businesses.

Question 3: The technologies that the U.S. most needs to develop to compete with China's growth, including advanced computing, AI, and biotechnology, are often those that fall outside current patent eligibility standards. How will PERA help the U.S. maintain global leadership in these competitive sectors? What does a failure to enact such legislation mean to our global competitiveness in general?

I am not aware of there being issues obtaining patents in advanced computing or AI technology. PERA is not needed to support the United States' continued leadership in those areas. To the contrary, it would make American industry less competitive by flooding the marketplace with low-quality patents that stifle innovation rather than promote it. The United States' global leadership in fields such as AI, software, and e-commerce has

flourished under the *Alice* framework, not in spite of it. Investment in these sectors has grown dramatically since *Alice*, showing that clear limits on abstract patents encourage rather than deter innovation. A new research paper just published that affirms this fact as well. *See* Helmers, Christian and Love, Brian J., Patent Protection and Software Firm Financing (October 13, 2025), available at https://ssrn.com/abstract=5600070.

PERA would replace those clear limits with vague, untested statutory language. By permitting patents on business methods and abstract ideas dressed up in technical language, it would expose thousands of productive American businesses, especially those on Main Street, to new waves of litigation. The resulting costs, uncertainty, and risk aversion would slow the adoption of emerging technologies and shift resources away from research, product development, and consumer benefit.

True technological advances are already patentable today. What PERA would enable are patents on generic "applications" of computing or AI technologies to familiar tasks. Far from fostering innovation, that would recreate the very barriers that the U.S. system overcame through *Alice*.

Question 4: PERA 2025 has several changes this year compared to PERA from the prior Congress. Do you believe that these were good changes to the bill? Why or why not?

The changes made in the 2025 version of PERA do not resolve its core problems. While the drafters have clarified certain definitions, the bill still overturns more than a century of case law distinguishing patentable technological inventions from unpatentable abstract ideas. It retains language that would make any process that is "substantially economic, financial, business, social, cultural, or artistic" patent-eligible so long as it "cannot practically be performed without the use of a machine or manufacture." As our counsel, former Acting USPTO Director Joseph Matal, has explained, that standard would cover virtually every modern business activity, since nearly all rely on a computer, communication device, or even pen and paper.

Additionally, PERA continues to bar courts from considering whether a patent's elements are "known, conventional, or routine." That prohibition would make it impossible to identify whether a claim represents a genuine technological advance or simply applies an old idea using conventional tools. This is not a minor drafting flaw—it strikes at the heart of what distinguishes innovation from abstraction.

Supporters of PERA often argue that Section 101 should be confined to a threshold question of subject-matter eligibility, leaving questions of novelty, non-obviousness, and definiteness to be addressed only under Sections 102, 103, and 112, respectively. In theory that sounds tidy, but in practice those provisions failed to prevent the torrent of vague, non-

technological business-method patents that overwhelmed the system before *Alice*. Examiners already applied Sections 102 and 103 to assess novelty and obviousness, yet thousands of patents claiming routine commercial practices ("ordering with one click," "displaying a menu," "sending a confirmation email") were granted and enforced. To assume that these same provisions would now magically begin doing work they could not do before is wishful thinking. Only the eligibility doctrine under Section 101, as refined by *Alice*, has proven capable of filtering out these abstract claims at the outset.

In sum, while the text of PERA has evolved, the bill's fundamental effect remains the same: to invite a resurgence of business-method patents, increase litigation, and raise costs for Main Street businesses and consumers without promoting genuine innovation.