Senator Grassley
Questions for the Record

Stephanie A. Finley,
Nominee, U.S. District Judge for the Western District of Louisiana

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: The amendment to Rule 26(b)(1) places a duty on all parties in a lawsuit to work together early and in a meaningful way to narrow disputes before bringing discovery issues to the court. It highlights the important role and responsibility of litigants to understand the information requested, communicate roadblocks, and set realistic priorities to satisfy the proportionality requirements which will aid in preventing undo delay and expense. The amendment emphasizes the significant role that judges play in managing and facilitating conflicts and provides guidance to assist in resolving scope of discovery issues.

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

      Response: In assessing a discovery request for non-privileged information relevant to a party's claim or defense, I would consider 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.

   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: While I believe the prior rule attempted to facilitate discovery in an equitable manner, the amendment to Rule 26(b)(1) more closely connects and defines proportionality as an integral part of resolving scope of discovery issues. In the 2015

Year-End Report on the Federal Judiciary, Chief Justice Roberts focused on having "reasonable limits on discovery through increased reliance on the common-sense concept of proportionality." Rule 26(b)(1) now requires a true assessment of proportionality as it relates to discovery, placing the responsibility on lawyers to "size and shape their discovery requests to the requisites of a case." Under the new rule, parties need not cover every factor to limit the scope of discovery, but proportionality must be addressed with specificity; gone are the old days of submitting boilerplate objections with the standard "not proportional" response. The new rule elevates the significance of the proportionality factors in shaping the scope, responses, or objections to discovery.

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 ensure that all parties understand that Rule 16(b)(2) will be followed, be actively engaged in case management, encourage the parties to meet and confer as soon as possible, and emphasize the ability to have conferences to resolve discovery issues prior to filing formal motions. Being active early will assist in reducing unnecessary cost and delay.

   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: If confirmed, my goal in any case would be to handle all matters before me as efficiently as possible. The 2015 amendments further emphasize the importance of effective case management. I will focus on actively monitoring cases, become involved when necessary, encourage counsel and parties to cooperate during discovery, explore informal discovery dispute resolution, and use technology, where appropriate, to reduce the cost of litigation when possible.

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: I would start my analysis with the presumption that the responding party ordinarily bears the costs of production to discovery requests. In determining whether to shift the costs of discovery, I would consider the specificity of the discovery requests, the likelihood of discovering critical information, the availability of such information from other sources, the purposes for which the responding party maintains the requested data, the relative benefit to the parties of obtaining the information, the total cost associated with production, the relative ability of each party to control costs and its incentive to do so, and the resources available to each 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: I would consider ordering allocation of expenses on a case by case basis to protect a party from undue burden or expense. The producing party ordinarily bears the costs of production in response to discovery requests. If the "resisting" party makes a showing that the discovery requested is irrelevant, overly broad, unduly burdensome, unreasonable or oppressive, then it would be the burden of the moving party to show that the information was relevant and necessary to proving their case.

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 believe that the amendment of Rule 26(c)(1)(B) confers a new authority or obligation. The Supreme Court in *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 358 (1978), found implicit in Rule 26 that courts may allocate discovery costs when resolving protective order issues.

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: When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved, and the information is lost as a result of a failure to preserve, Rule 37(e) focuses on whether lost information can be restored or replaced through additional discovery. A judge may utilize Rule 26(c)(1)(B) to allocate expenses which may be pertinent to solving the issues and curing any prejudice.

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

Response: The most important attribute of a judge is a commitment to fairly and impartially apply the law to the facts in the cases brought before him or her. I am deeply committed to this principle and, if confirmed, would follow it in every case.

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: A judge should be open-minded, diligent, thoughtful, even-handed, and have respect for all of the participants in the process. I believe I have always strived to treat all people whether at work, in my life or in the community as such and will continue to do so if I am confirmed.

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: If confirmed, I am fully committed to following the precedent of the Supreme Court and the Fifth Circuit, applying them faithfully and giving them full force and effect without regard to any personal opinions.

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 confirmed, in any case of first impression, I would look to the plain language of the statute, regulation, or other text at issue to determine whether its plain language could resolve the parties' dispute. If the language is clear, I would follow its plain meaning. If the language was ambiguous, I would utilize established canons of statutory construction prescribed by the Supreme Court. If these efforts did not resolve the question, I would look to guidance of analogous cases decided by the Supreme Court or the Fifth Circuit.

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 confirmed, I would apply the law of the Supreme Court and the Fifth Circuit. I would not replace my judgment for that of a higher court.

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

   Response: The statutes enacted by Congress are presumed to be constitutional. Initially, a district court should attempt to resolve a case without addressing constitutional issues, however, if an enactment violates the Constitution or exceeds congressional authority, it should be declared unconstitutional.

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: No. Judges should apply the Constitution, the laws of the United States, and binding precedent to decide cases.

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: As a career prosecutor and JAG officer, I have demonstrated a commitment to the rule of law throughout my career. I believe that consistent application of the rule of law is necessary both to the operation of and the perception of fairness in our justice system. If confirmed, I will apply the law and precedent without regard to political ideology or other motivations.

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 have been a public servant for over 25 years and have taken great care to put aside my personal views when representing the United States. If I am confirmed, I will continue to put aside any personal views and decide matters that come before me based solely upon the application of the controlling law as applied to the facts and treat each party appearing before me with respect and fairness.

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

Response: If confirmed, I will take an active role in justly, efficiently and effectively managing my docket. I will utilize the Local Rules of the United States District Court for the Western District of Louisiana and case management systems already in place. I will also utilize scheduling conferences and close adherence to the Federal Rules of Civil and Criminal Procedure. I would establish firm and reasonable deadlines for the efficient disposition of cases, while issuing rulings promptly in an effort to promote the steady progress of cases. I will make appropriate use of Magistrate Judges and work to discern and implement other best practices for case management. I would also rely on the guidance and institutional knowledge of current judges and courthouse staff.

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: Judges do have a role in controlling the pace and conduct of litigation. I would promote a prompt and reasonable pace of litigation and use early status conferences with all counsel to identify potential issues and to discuss a proposed schedule for the case to proceed. Once a schedule is set, I would adhere to the scheduling order absent good cause to

grant an extension. I would require the highest regard to civility and professionalism by all counsel and litigants.

15. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: As a JAG, Assistant United States Attorney and as the United States Attorney, my client has been the United States. I have always seen my role as protecting the rights of the public while staying committed to protecting the rights of the defendant and ensuring justice is served, presenting evidence and argument within the confines of the Constitution, statutes, and controlling precedent. If confirmed, I will make every decision objectively, carefully considering the facts presented and applying the Constitution, statutes, and controlling precedent. As the majority of my career has been in the area of criminal law, I expect that the most difficult part of my transition would be in the area of civil law. I believe that, given my work ethic and dedication to fairness, I will be able to effectively manage this transition.

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: I believe that a judge's role is to ascertain and apply the established law in all cases. While doing so, it is my view that work should be approached with respect, fairness and civility for all parties.

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

Response: I received these questions from the Department of Justice, Office of Legal Policy on May 25, 2016. I drafted my responses and submitted them to the Office of Legal Policy, which I then finalized and approved for submission after some discussion with that office.

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

Response: Yes.

Written Questions of Senator Jeff Flake
U.S. Senate Committee on the Judiciary
Judicial Nominations
May 18, 2016

Questions for Ms. Stephanie Ann Finley

1. **What is your approach to statutory interpretation? Under what circumstances, if any, should a judge look to legislative history in construing a statute?**

   Response: If confirmed, my approach to statutory interpretation would be to look to the plain language of the statute, regulation, or other text at issue. If the language is clear that would be the end of the inquiry. If the language was ambiguous, I would look to the statute as a whole to determine if the intended meaning was clear from the larger context. I would also utilize established canons of statutory construction as set out by the Supreme Court and the Fifth Circuit. If these efforts did not resolve the question, I would look to Supreme Court and Fifth Circuit law interpreting the same or similar language in other contexts and if that guidance did not clarify the intended meaning, I would look to authority and reasoning from other courts. Where the text of a statute is ambiguous, I would, as a last resort, consider legislative history pursuant to Supreme Court and Fifth Circuit guidance.

2. **What is the proper scope of the 10th Amendment to the Constitution? In what circumstances should a judge apply it?**

   Response: The 10th Amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Supreme Court has interpreted the proper scope of the 10th Amendment in cases including *Printz v. United States,* 521 U.S. 898 (1997) and *New York v. United States,* 505 U.S. 144 (1992). If confirmed, I would faithfully follow these cases and all other binding precedent.

3. **Does current standing doctrine foster or impede the ability of litigants to obtain relief in our legal system?**

   Response: The jurisdiction of federal courts is defined and limited by Article III of the Constitution. The judicial power of federal courts is constitutionally restricted to "cases" and "controversies." §2. The standing doctrine "serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). I have no opinion as to whether current standing doctrine fosters or impedes the ability of litigants to obtain relief. If confirmed, I would ensure that all litigants, whether represented by counsel or appearing pro se, are treated fairly and that

any issues of standing are resolved consistent with the standing doctrine as established by the Supreme Court and the Fifth Circuit.

Questions for the Record
Senate Judiciary Committee
Senator Thom Tillis

Questions for Ms. Stephanie Ann Finley

1. **Some individuals have argued that the United States Constitution is a "living document," subject to different interpretations as society changes. Do you subscribe to this point of view?**

   Response: The Constitution provides a permanent framework for resolving legal matters, and it is not the role of a judge to interpret the Constitution for the purpose of addressing societal change. If confirmed, I would follow both the language of the Constitution and the precedent of the Supreme Court, as well as the Fifth Circuit.

2. **What role, if any, should societal pressure or popular opinion play in interpreting statutes or the United States Constitution?**

   Response: Societal pressure or popular opinion should not play a role in interpreting statutes or the Constitution. A judge's obligation is to be true to the rule of law when interpreting statutes and to apply binding constitutional and statutory precedent.

3. **Please define judicial activism. Is judicial activism ever appropriate?**

   Response: While different definitions of judicial activism exist, I believe it relates to jurists who seek to apply their personal views rather than deferring to the precedent of higher courts. Judicial activism is never appropriate.

4. **When, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?**

   Response: The statutes enacted by Congress are presumed to be constitutional. Initially, a district court should attempt to resolve a case without addressing constitutional issues, however, if an enactment violates the Constitution or exceeds congressional authority, it should be declared unconstitutional.

5. **What is a fundamental right? From where are these rights derived?**

   Response: Fundamental rights are those rights protected by the Due Process Clause of the Constitution. Many of these rights are derived from the Bill of Rights, but the Supreme Court has noted that rights may be deemed fundamental if they are " 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed[.]' " *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted).

6. **Do you believe the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs?**

   Response: The Supreme Court has held: "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). In addition, in its recent consideration of the Religious Freedom Restoration Act, the Supreme Court affirmed that private citizens and businesses shall not be substantially burdened in the exercise of their sincerely held religious beliefs. *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751 (2014).

7. **What level of scrutiny is constitutionally required when a statute or regulation related to firearms is challenged under the Second Amendment of the United States Constitution?**

   Response: The Supreme Court's decision in *District of Columbia v. Heller,* 554 U.S. 570 (2008), held that the level of scrutiny was higher than rational basis, but did not specify what the level of scrutiny should be, or even if it would be the same for all potential challenges to regulation under the Second Amendment.

8. **Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?**

   Response: The Supreme Court has held that states may require voters to present photo identification before casting ballots. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). If confirmed, I would apply the precedent faithfully.

9. **One challenge you will face as a federal judge is managing a demanding caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the cases on your docket? Will you give certain cases priority over others? If so, please describe the process you will use to make these decisions.**

   Response: If confirmed, I will work very hard to immediately implement case management systems and practices to manage cases efficiently and fairly. I will utilize the Local Rules of the Western District of Louisiana and the case management system already in place in the District. I would have early case management conferences, resolve discovery issues and dispositive motions timely, have mechanisms in place for the sequencing of discovery, and set time limits for all phases of cases. I would also utilize in civil cases, when appropriate, alternative dispute resolution and would delegate matters to magistrate judges as authorized and appropriate under 28 U.S.C. § 636. My goal would be to ensure that the entire docket advances efficiently. I would focus and give priority to cases requiring prompt and immediate attention, such as parties seeking injunctive and/or declaratory relief or cases with Speedy Trial Act issues.

10. **Do you believe the death penalty is constitutional? Would you have a problem imposing the death penalty?**

    Response: The Supreme Court has held that capital punishment is constitutional. *Gregg v Georgia*, 428 U.S. 153 (1976). If confirmed, I would faithfully apply settled law in this area, as in all others.