Senator Chuck Grassley, Ranking Member
Questions for the Record
Jia Cobb
Nominee to be United States District Judge for the District of Columbia

1. **When Justice Elena Kagan was nominated to the Supreme Court, she explained her view that the American founders "wrote a Constitution for the ages." Justice Kagan famously went on to say: "Either way we apply what they say, what they meant to do. So in that sense, we are all originalists."**
    a. **When you consider your approach to constitutional law, would you say that there is any sense in which you are an originalist? Please explain why you are or are not.**

    Response: If confirmed as a district court judge, I will be bound to follow the interpretive approach that Supreme Court or D.C. Circuit precedent dictates. The Supreme Court has, in some cases, interpreted constitutional provisions based on the original meaning of the text at issue. *See, e.g*., *United States v. Jones*, 530 U.S. 428 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment). I would faithfully apply that precedent if confirmed. In other cases, the Supreme Court has not relied on original public meaning to interpret constitutional text. *See, e.g., Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming that the Fifth Amendment requires *Miranda* warnings prior to custodial interrogations); *Trop v. Dulles*, 356 U.S. 86 (1958) (considering "evolving standards of decency" in interpreting the Eighth Amendment). If confirmed, I will also be required to adhere to that precedent, even though the Supreme Court did not employ an originalist methodology to interpret the text or even if I disagreed with the Court's approach or decision.

    b. **If you are required to interpret constitutional text, do you consider what the text was publicly understood to mean at the time that it was written?**

    Response: Yes.

    c. **If you are required to interpret constitutional text, are you interested in briefing on what the text was publicly understood to mean at the time that it was written? And if you felt that the briefing on this constitutional history or context was too sparse, would you consider requesting supplemental briefing?**

    Response: Yes. I would also consider requesting supplemental briefing if the parties' briefing on the constitutional history or context of constitutional text, or any other issue relevant to my decision-making, was too sparse.

2. **When government actions curtail individual rights, the relevant standard of review can make a tremendous difference in the outcome of litigation. I am referring to**

standards of review such as strict scrutiny—not to standards of review such as de novo review. I would appreciate understanding your thoughts on several related questions.

a. Please explain the contours of the strict-scrutiny legal standard and when it applies, with relevant case law discussing the standard.

Response: Strict scrutiny is the highest and most rigorous standard of judicial review that courts use to determine the constitutionality of a law or policy. To withstand strict scrutiny, the law or policy at issue must be narrowly tailored to serve a compelling state interest. *See, e.g., Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). The Supreme Court has applied strict scrutiny to laws that involve suspect classifications or infringe upon certain fundamental rights. The Supreme Court has recognized "suspect classes" to include those that pertain to "immutable characteristic[s] determined solely by accident of birth," and classifications that pertain to those who are "saddled with such disabilities or subjected to a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (internal quotations and citations omitted). Classifications based upon race, alienage, national origin, and religion are suspect classes requiring strict scrutiny. *See, e.g*., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.4 (1976); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Examples of cases in which the Supreme Court has applied strict scrutiny to laws that implicate fundamental rights include content-based restrictions on speech, *see, e.g., Reed v. Town of Gilbert*, 576 U.S. 155 (2015), and laws burdening religious practice that are not neutral and of general applicability, *see, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

b. Strict scrutiny is widely viewed as favorable for individuals asserting their constitutional or civil rights, regardless of the facts—while rational basis is widely viewed as an easier standard for the government, regardless of the facts. When federal courts apply intermediate scrutiny, does the standard itself tend to favor either individuals or the government? Please explain using relevant case law.

Response: As a judicial nominee, I do not think that it would be proper for me to opine whether intermediate scrutiny review favors a particular litigant. If I am confirmed, I will be bound to apply intermediate scrutiny to those cases in which the Supreme Court or D.C Circuit has indicated that it is the appropriate standard of review—for example, in cases involving classifications based upon gender, *see e.g., Craig v. Boren*, 429 U.S. 190 (1976), or content-neutral speech regulations, *see, e.g., McCullen v. Coakley*, 573 U.S. 464 (2014).

c. Many circuit courts apply "heightened rational basis review," a phrase that draws in part from the Supreme Court's opinion in *Plyler v. Doe*, 457 U.S. 202, 238 (1982). Under this heightened review, "[r]ather than relying upon the various post-hoc rationalizations that *could* conceivably have justified the laws, the Court focused on the motivations that *actually* lay behind the laws." *Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir. 2014) (Holmes, J., concurring) (emphases in original). How would you define (1) ordinary rational-basis review and (2) heightened rational-basis review?

Response: Rational basis review requires a court to determine whether a law is rationally related to a legitimate government interest. *See, e.g., Railway Express Agency, Inc., et al. v. New York*, 336 U.S. 106 (1949); *see also F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (recognizing that "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). In *Ruggiero v. F.C.C.*, 317 F.3d 239 (2003), the D.C. Circuit, sitting *en banc*, determined that a heightened standard of rational basis review, which it defined as "occup[ying] a ground somewhere between…minimal scrutiny… and intermediate scrutiny…," was appropriate in a case involving a facial challenge to the constitutionality of the character qualification provision of the Radio Broadcasting Preservation Act of 2000.

d. Assuming that you were choosing between ordinary and heightened rational basis, how would you decide which to apply?

Response: I would apply Supreme Court and D.C. Circuit precedent to determine the applicable standard of review in a case.

3. In the context of federal case law, what is super precedent? Which cases, if any, count as super precedent?

Response: To my knowledge, neither the Supreme Court nor the D.C. Circuit has used or defined the term "super precedent." It is not a term that I have used in my practice. If confirmed, I will faithfully adhere to all Supreme Court and D.C. Circuit precedent and will not elevate some decisions over others.

4. One of the federal courts' important functions is reading statutes and regulations, determining what they mean, and determining how they apply to the facts at hand.

a. How would you determine whether statutory or regulatory text was ambiguous?

Response: Assuming that there was no applicable Supreme Court or D.C. Circuit precedent construing the specific provision at issue, I would analyze the text, consider its plain meaning, and, if necessary, analyze its structure and employ traditional canons of construction to interpret it. If, after analyzing the text, I determined that the text could only be read one way, the text would not be ambiguous. On the other hand, if the text at issue could be plausibly read or understood in more than one way, I would consider the text to be ambiguous.

b. Would you apply different standards to determining whether statutory text and regulatory text were ambiguous? If so, how would the ambiguity standards differ?

Response: No.

c. When interpreting ambiguous text, what tools would you use to resolve the ambiguity?

Response: If the text's meaning remained unclear after analyzing the text and its structure, and exhausting traditional canons of construction, I would look to Supreme Court and D.C. Circuit precedent analyzing the same or similar language in other statutes or regulations. If that still did not resolve the ambiguity, I would consider persuasive authority from other jurisdictions. If controlling precedent, analysis of the text of the statute, or persuasive authority did not resolve the matter, I would consider certain legislative history, such as committee reports, as permitted by Supreme Court or D.C. Circuit precedent. For genuinely ambiguous agency regulations, I would follow the Supreme Court's precedent in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) to determine whether it would be appropriate to consider an agency's interpretation of its regulation.

d. When interpreting ambiguous text, how would you handle two competing and contradictory canons of statutory interpretation?

Response: I would closely examine the plain language of the provision at issue and the and structure of the statute before employing any traditional canons of statutory construction. In the event of a conflict, I would look to determine whether the Supreme Court or D.C. Circuit has offered any guidance on the appropriate method of construction to apply in the case.

5. Federal courts usually examine the law de novo because each court is usually obligated to correctly interpret the law to the best of its own ability. But in some cases, federal courts defer to how others interpret the law. A number of Supreme Court decisions outline this deference.

a. What is *Skidmore* deference? Please summarize the DC Circuit's *Skidmore* jurisprudence.

Response: *Skidmore* deference refers to a Supreme Court doctrine of

administrative agency deference that permits a federal court to defer to an agency's interpretation of a statute it administers, even when the agency's interpretation does carry the force of law (for example, opinion letters or enforcement guidelines). *See Christensen v. Harris County*, 529 U.S. 576 (2000). Where *Skidmore* deference is applicable, the agency's determination is not binding and is "entitled to respect only to the extent it has the power to persuade." *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944) (internal quotations and citations omitted)); *see also e.g., Indian River Cty. v. U.S. Dep't of Transp*., 945 F.3d 515, 531 (D.C. Cir. 2019) ("When an agency's interpretation of a statute has been binding on agency staff for a number of years, and it is reasonable and consistent with the statutory framework, deference to the agency's position is due under *Skidmore*."); *Orton Motor, Inc. v. U.S. Dep't of Health & Hum. Servs*., 884 F.3d 1205, 1211 (D.C. Cir. 2018) ("Ultimately, a court will uphold an agency determination under Skidmore if it is persuasive.").

b. What is *Chevron* deference? Please summarize the DC Circuit's *Chevron* jurisprudence.

Response: *Chevron* deference refers to a Supreme Court doctrine of administrate agency deference that requires a federal court to defer to an agency's reasonable interpretation of a statute that it administers. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984). It applies to agency interpretations that carry the force of law (such as a formal rule). The Supreme Court articulated a two-part test to guide courts in determining whether such deference is warranted. First, the Court determines whether the statute is ambiguous. *Id.* at 842, 843 n.9. If the statute is not ambiguous, the inquiry ends and the court "must give effect to the unambiguously expressed intent of Congress" rather than consider the agency's interpretation. *Id*. at 842–43. If Congress's intent with respect to the specific issue is not clear from the statute, the court moves to part two of the test to determine whether the agency's interpretation is based on a "permissible construction" of the statute. *Id*. at 843. If it is, the court must defer to the agency's reasonable interpretation. D.C. Circuit precedent tracks the Supreme Court's precedent. *See, e.g., Am. Hosp. Ass'n v. Azar*, 964 F.3d 1230, 1241, 1244 (D.C. Cir. 2020); *Murray Energy Corp. v. EPA*, 936 F.3d 597, 608 (D.C. Cir. 2019). Recently, the D.C. Circuit reaffirmed that in determining whether a statute is ambiguous and *Chevron* deference is warranted, "the court begins with the text, and employ[s] traditional tools of statutory construction to determine whether Congress has spoken directly to the issue." *Overdevest Nurseries, L.P. v. Walsh*, 2021 WL 2603184 at * 3 (D.C. Cir. June 25, 2021) (internal quotations and citations omitted).

c. What is *Auer* deference? Please summarize the DC Circuit's *Auer* jurisprudence.

Response: *Auer* deference refers to a Supreme Court doctrine of administrative agency deference that instructs courts to defer to an agency's reasonable interpretation of its own ambiguous regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997). In *Kisor v. Wilkie*, the Supreme Court clarified the circumstances under which *Auer* deference is warranted. 139 S. Ct. 2400 (2019). First, a court must "exhaust all the traditional tools of construction" to determine whether the regulation is "genuinely ambiguous." *Id.* At 2415. If the regulation is genuinely ambiguous, *Auer* deference is warranted only where the agency's interpretation is reasonable. *Id*. at 2415–16. The agency's interpretation must also be its authoritative and "official" position, as opposed to an "ad hoc statement not reflecting the agency's views." *Id.* at 2416. Ultimately, *Auer* deference is unwarranted where a "court concludes that an interpretation does not reflect an agency's authoritative, expertise-based, fair, or considered judgment." *Id*. at 2414 (internal quotations and citations omitted). *See also Nat'l Lifeline Ass'n v. F.C.C.*, 983 F.3d 498, 507 (D.C. Cir. 2020).

6. What is more important for a district judge: (a) reaching what he thinks is the correct conclusion or (b) reaching a conclusion that he knows will not be overturned on appeal? How would you decide whether to go with option (a) or (b)?

Response: I do not view these options as mutually exclusive. If confirmed as a district court judge, I would be bound by Supreme Court and D.C. Circuit precedent. This binding precedent compels the "correct conclusion." If a judge knows that a decision will not be overturned on appeal, I can only imagine it is because there is some guiding precedent that informs how a higher court would decide the matter. Following that guiding precedent (option b) is the correct conclusion (option a). I would strive to reach the "correct conclusion" by strictly applying Supreme Court and D.C. Circuit precedent.

7. In *McGowan v. Maryland*, 366 U.S. 420, 442 (1961), the Supreme Court wrote that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." Do you agree that secular actions with some religious overlap can be constitutional?

Response: I agree that the above-quoted language accurately articulates the Supreme Court's holding in *McGowan v. Maryland*. If confirmed, I would be bound by the Supreme Court's decision. I would faithfully apply this precedent without reservation.

8. Do you agree with the Supreme Court's statement in *Bostock v. Clayton County*, 590 U.S. ___ (2020), that the Free Exercise Clause lies at the heart of a pluralistic society? If so, does that mean that the Free Exercise Clause legally requires that religious

organizations and individuals should be free to act consistently with their beliefs in the public square?

Response: The free exercise of religion is a foundational and fundamental constitutional right. Supreme Court precedent and federal law protect the rights of individuals to act in accordance with their religious beliefs. If confirmed, I would faithfully apply this law and precedent without reservation.

9. **Do you agree with the Supreme Court that the principle of church autonomy goes beyond a religious organization's right to hire and fire ministers? Please describe your view on whether and/or how the Supreme Court has placed limits on church autonomy.**

Response: The Supreme Court recently considered this question in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). In *Our Lady of Guadalupe,* the Supreme Court held that the "ministerial exception" articulated in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), was not limited to members or employees of a religious institution who have formal titles and training as ministers or religious leaders. In determining that the First Amendment barred the teachers of the religious institutions from filing suit for employment discrimination and challenging their terminations, the Court affirmed that the First Amendment "protects the right of religious institutions to determine for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe*, 140 S. Ct. at 2055 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (internal quotations omitted)). If confirmed, I would faithfully apply this precedent without reservation.

10. **The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual's right to possess a firearm, regardless of the individual's participation in a "well regulated Militia." The Supreme Court later expanded on that right in *McDonald v. Chicago*, 561 U.S. 742 (2010), when it held that the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment. If you were confirmed to the DC district court and had to handle a Second Amendment challenge, what level of scrutiny would you apply?**

Response: The D.C. Circuit has adopted a two-part test for analyzing Second Amendment challenges. *See Schrader v. Holder*, 704 F.3d 980, 988 (2013). First, the Court considers whether "the activity or offender subject to the challenged regulation falls outside the Second Amendment's protections." *Id.* at 988-89. If the answer to this question is yes, the inquiry ends. If the answer is no, the Court goes on to determine "whether the provision passes muster under the appropriate level of constitutional scrutiny." *Id.* at 989. The

appropriate level of scrutiny to apply turns upon whether the law at issue "imposes substantially on the Second Amendment's core." *Wrenn v. D.C.*, 864 F.3d 650, 657 (D.C. Cir. 2017) (quoting *Heller v. D.C.* (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011) (internal quotation marks omitted)); *see also Heller II*, 670 F.3d at 1257 ("As with the First Amendment, the level of scrutiny applicable under the Second Amendment surely depends on the nature of the conduct being regulated and the degree to which the challenged law burdens that right.") (internal quotations and citations omitted). After conducting detailed analyses, the D.C. Circuit has applied intermediate scrutiny to gun registration requirements, *see, e.g., Heller II*, 670 F.3d at 1257 and as-applied challenges to statutes prohibiting gun possession by persons convicted of certain criminal offenses, *see, e.g., Schrader*, 704 F.3d 980; *Medina v. Sessions*, 279 F.Supp.3d 281, 291 (2017). On the other hand, a "total ban" on Second Amendment rights is "always invalid," and does not require a reviewing court to apply tiers of scrutiny. *Wrenn*, 864 F.3d at 665. I would follow the tests and analyses articulated in Supreme Court and D.C. Circuit precedent to determine the appropriate level of scrutiny to apply in any case.

11. After many years of relative quiet, Second Amendment jurisprudence has developed into a substantially larger body of law during the past decade. I would appreciate understanding your thoughts on several related questions.

a. According to the Supreme Court, what are the permissible limits on an individual's right to keep and bear arms?

Response: In *District of Columbia v. Heller*, the Supreme Court expressed that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *D.C. v. Heller*, 554 U.S. 570, 626-27 (2008).

b. Do the Supreme Court's precedents leave room for other constitutionally permissible limits—on an individual's right to keep and bear arms—that the Supreme Court has not already specified?

Response: Yes. In *District of Columbia v. Heller*, the Supreme Court recognized that its list (cited in response to Question No. 11a) "does not purport to be exhaustive." 554 U.S. 570, 628 n.26 (2008).

c. Is the Second Amendment individual right to "keep" arms at all different from the right to "bear" arms?

Response: In *District of Columbia v. Heller,* the Supreme Court stated: "there seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. 570, 595 (2008). I am unaware of any precedent where the Supreme Court has

differentiated between the right to "keep" arms and the right to "bear" arms. I would faithfully follow all binding Supreme Court and D.C. Circuit precedent.

12. Is the Second Amendment personal right to "keep" arms at all different from the right to "bear" arms?

Response: In *District of Columbia v. Heller,* the Supreme Court stated: "there seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. 570, 595 (2008), I am unaware of any precedent where the Supreme Court has differentiated between the right to "keep" arms and the right to "bear" arms. I would faithfully follow all binding Supreme Court and D.C. Circuit precedent.

13. When it comes to drugs, federal and local laws are not always the same. As a federal judge, would you apply the Controlled Substances Act as it is written—even if the District of Columbia's relevant drug law was more permissive than the federal law?

Response: Yes.

14. Please explain, with detail, the process by which you became a district-court nominee.

Response: On February 15, 2021, I submitted a Judicial Candidate Questionnaire to Representative Eleanor Holmes Norton's District of Columbia Federal Law Enforcement Nominating Commission. I interviewed with the Commission on March 4, 2021, and the Commission selected me as a finalist to interview with Representative Norton. Representative Norton interviewed me on March 12, 2021. Representative Norton recommended my nomination to the White House. I met with officials from the White House Counsel's Office on March 17, 2021. Since March 20, 2021, I have been in contact with officials from the Department of Justice's Office of Legal Policy. On June 15, 2021, President Biden announced his intent to nominate me and my nomination was submitted to the Senate for consideration.

15. 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 the conversations.

Response: I know Chris Kang and have talked to him. Mr. Kang previously worked on judicial nominations for the White House. I spoke to him about how the application and nomination processes work because I had no familiarity with these processes before I pursued this opportunity. I do not know Brian Fallon and have not talked to any other person who is, to my knowledge, associated with Demand Justice.

16. 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 the conversations.

Response: No.

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

Response: I reviewed the questions and drafted my answers, conducting research where necessary. I provided my draft responses to the Department of Justice's Office of Legal Policy for review and feedback. After receiving feedback from the Office of Legal Policy, I revised and finalized my responses for submission.

18. Do the answers in this document reflect your true and personal views?

Response: Yes.

Nomination of Jia M. Cobb
to be United States District Judge for the District of Columbia
Questions for the Record
Submitted July 21, 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. **Was *D.C. v. Heller*, 554 U.S. 570 (2008) rightly decided?**

   Response: As a judicial nominee, it would generally not be appropriate for me to offer my opinion on the merits of Supreme Court decisions. *District of Columbia v. Heller* is binding precedent and I would strictly apply it, without reservation, if confirmed.

4. **Is the Second Amendment right to keep and bear arms an individual right belonging to individual persons, or a collective right that only belongs to a group such as a militia?**

   Response: The Second Amendment right to keep and bear arms is an individual right. *See D.C. v. Heller*, 554 U.S. 570, 578-79 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

5. **Please describe what you believe to be the Supreme Court's holding in *Greer v. United States*, 593 U.S. _____ (2021).**

   Response: In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Supreme Court held that a felon in possession offense requires the government to prove not only that the defendant knew he possessed a firearm, but also that he knew he was a felon when he possessed it. In *Greer v. United States*, the Supreme Court held that a trial court's failure to instruct the jury (or advise a defendant during a plea colloquy) of the required *mens rea* for a felon in possession offense does not require the automatic reversal of a conviction. Instead, *Rehaif* errors raised for the first time on appeal are subject to plain error review under Federal Rule of Criminal Procedure 52(b), which permits an appellate court to review an error that "affects substantial rights." In order to establish that a

Rehaif error affected "substantial rights," the Supreme Court held that the defendant must make a sufficient showing on appeal that he would have presented evidence that he did not, in fact, know he was a felon.

6. **Please describe what you believe to be the Supreme Court's holding in *Terry v. United States*, 593 U.S. _____ (2021).**

   Response: In *Terry v. United States*, the Supreme Court held that the Fair Sentencing Act, made retroactive by the First Step Act, modified criminal penalties only for crack cocaine offenses that carried mandatory-minimum sentences. Accordingly, the defendant sentenced under 21 U.S.C. § 841(b)(1)(C) was not convicted of a covered offense under the Fair Sentencing Act and thus not eligible for a sentencing modification.

7. **Please describe what you believe to be the Supreme Court's holding in *Jones v. Mississippi*, 593 U.S. _____ (2021).**

   Response: In *Jones v. Mississippi*, the Supreme Court held that the Eighth Amendment does not require a sentencing court to find that a juvenile defendant is permanently incorrigible to impose a sentence of life without the possibility of parole, so long as the sentencing court has discretion in imposing the sentence.

8. **Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 593 U.S. _____ (2021).**

   Response: In *Tandon v. Newsom*, the Supreme Court reversed the denial of an injunction that would have prohibited California from enforcing its COVID-19 restrictions against the applicants' private, in-home religious gatherings pending appeal. In doing so, the Supreme Court made clear that government regulations are not "neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021) (emphasis in original). Further, in determining whether activities are comparable for purposes of the Free Exercise Clause, courts must consider "the risks various activities pose, not the reasons why people gather." *Id.*

9. **Please describe what you believe to be the Supreme Court's holding in *Sanchez v. Mayorkas*, 593 U.S. _____ (2021).**

   Response: In *Sanchez v. Mayorkas*, the Supreme Court held that the grant of Temporary Protected Status under 8 U.S.C. § 1254a is not an "admission" under 8 U.S.C. § 1255. Thus, an individual who entered the United States unlawfully was not eligible to become a lawful permanent resident under 8 U.S.C. § 1255, despite having been granted Temporary Protected Status.

10. What is your view of arbitration as a litigation alternative in civil cases?

Response: I have not developed an opinion regarding arbitration as an alternative to litigation in civil cases. Moreover, my personal views about the merits of arbitration, or any other matter, would have no bearing on my decision-making as a district court judge, if confirmed.

11. 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 the questions and drafted my answers, conducting research where necessary. I provided my draft responses to the Department of Justice's Office of Legal Policy for review and feedback. After receiving feedback from the Officer of Legal Policy, I revised and finalized my responses for submission.

12. 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.

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

Questions for the Record for Jia Michelle Cobb, to be United States District Judge for the District of Columbia

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. **You are currently litigating two Section 1983 suits on behalf of BLM protesters. In one of the suits, the plaintiffs allege that during the BLM protests last summer, D.C. police responded with excessive force by using pepper spray and batons. Do you believe law enforcement used excessive force when it employed pepper spray and batons against the protestors on January 6?**

   Response: Supreme Court precedent instructs how to assess excessive force claims, including the specific factors to weigh and consider. *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989). I have not investigated the circumstances of law enforcement's alleged use of force against any individual on January 6th, and thus do not have the information that would be necessary to answer this question. Further, given that there are pending cases involving the events on January 6th before the court to which I have been nominated, and it is possible that a case involving those events could come before me if I am confirmed, it would be inappropriate for me to offer any personal opinion or compare the matter to any work that I have done as an advocate. If confirmed, my prior litigation work will have no bearing on my judicial decision-making.

2. **Please describe the legal distinction between a protest and a riot?**

   Response: Congress has defined a riot as a "public disturbance" that involves either (1) "an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual" or (2) "a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual." 18 U.S.C. § 2102(a). The First Amendment protects "the right of the people peaceably to assemble," U.S. Const. amend. I, however, the Supreme Court has recognized that "where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

3. **Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.**

   Response: The Constitution requires that the President "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Supreme Court's decision in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), provides guidance concerning how to evaluate the appropriate scope of executive power.

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

Response: I do not use any labels to characterize my judicial philosophy. For me, my "judicial philosophy" is the method and manner in which I would approach judicial decision-making if I am fortunate enough to be confirmed. I believe that a judge must thoroughly study the facts and arguments presented by the parties to fully engage with litigants and render informed decisions. A judge must be neutral and impartial, as well as provide parties a full opportunity to be heard on matters related to their cases. I also believe that a judge must put aside all personal beliefs and base her decisions solely on what the law demands, including the text of any relevant constitutional or statutory provisions and applicable precedent. Further, I believe that a judge must treat all parties with respect and expeditiously rule on matters that come before the court. I have not studied the individual philosophies of Supreme Court Justices and would have a very different function if I am confirmed as a district court judge, and therefore cannot compare the approach that I would take to the philosophy of any Supreme Court Justice.

5. **Does the Constitution's meaning evolve and adapt to new circumstances even if the document is not formally amended? If so, when?**

Response: The Constitution is an enduring document. If confirmed, I would follow Supreme Court and D.C. Circuit precedent concerning the meaning of the Constitution in applying its provisions.

6. **Please briefly describe the interpretative method known as originalism.**

Response: While others may have a different view, I understand "originalism" to refer to the belief that constitutional text should solely be interpreted consistent with the way the text would have been understood at the time that it was adopted.

7. **Please briefly describe the interpretive method often referred to as living constitutionalism.**

Response: While others may have a different view, I understand "living constitutionalism" to refer to the belief that the meaning of the Constitution can change over time in accordance with changing circumstances.

8. **If you were to be presented with a constitutional issue of first impression—that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?**

Response: While it is possible that, if confirmed, I will encounter factual scenarios that another court has never confronted, I struggle to imagine a circumstance in which there would not be any precedent—not even analogous precedent—to guide my decision-making. If confirmed, I would be bound by Supreme Court and D.C. Circuit precedent,

including the methods those courts have used to interpret specific constitutional provisions. The Supreme Court has, in some cases, interpreted constitutional provisions based on the original public meaning of the text at issue, *see, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012); *District of Columbia v. Heller*, 554 U.S. 570 (2008), but not all, *see, e.g., Dickerson v. United States*, 530 U.S. 428 (2000); *Trop v. Dulles*, 356 U.S. 86 (1958). If I ever confronted the rare circumstance in which there were truly no guiding or analogous precedent, I would consider the original public meaning of the text, as well as any other arguments the parties made about the interpretation of the Constitution in the case.

9. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: In *District of Columbia v. Heller*, the Supreme Court recognized that "the public understanding of a legal text in the period after its enactment or ratification….is a critical tool of constitutional interpretation." 554 U.S. 570, 605 (2008).

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

Response: Yes.

11. **Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?**

Response: Yes.

12. **Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?**

Response: The executive branch is responsible for making political appointments and is required to follow the Constitution. If confirmed and called to rule upon the constitutionality of an executive appointment, I would follow Supreme Court and D.C. Circuit precedent.

Questions for the Record for Jia Michelle Cobb
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
Jia Cobb, D.D.C.

1. How would you describe your judicial philosophy?

Response: I do not use any labels to describe my judicial philosophy. For me, my "judicial philosophy" is the method and manner in which I would approach judicial decision-making if I am fortunate enough to be confirmed. I believe that a judge must thoroughly study the facts and arguments presented by the parties to fully engage with litigants and render informed decisions. A judge must be neutral and impartial, as well as provide parties a full opportunity to be heard on matters related to their cases. I also believe that a judge must put aside all personal beliefs and base her decisions solely on what the law demands, including the text of any relevant constitutional or statutory provisions and applicable precedent. Further, I believe that a judge must treat all parties with respect and expeditiously rule on matters that come before the court.

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

Response: I would first determine whether the Supreme Court or D.C. Circuit previously interpreted the specific statutory provision at issue, because I would be bound to follow that precedent. If there was no controlling precedent construing the provision at issue, I would look at the text of the statute. If the statute did not specifically define the terms at issue, I would consider the plain meaning of the terms in the statutory text. If the statute was ambiguous on its face, I would look to other methods of statutory construction to interpret the text. If the meaning of the statute remained unclear after exhausting all available canons of statutory construction, I would consider persuasive authority analyzing similar language in other statutes or precedent from other jurisdictions. In the rare circumstance in which controlling precedent, analysis of the text of the statute, or other persuasive authority did not resolve the matter, I would consider certain legislative history, if appropriate, such as committee reports.

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

Response: I would interpret the constitutional provision in accordance with how the Supreme Court or D.C. Circuit interpreted the provision at issue. I believe that it would be rare to confront a true constitutional issue of first impression as a district court judge, but if I encountered that rare circumstance, I would consider the text of the provision and the meaning of the terms at issue, as well as the method of interpretation that the Supreme Court or D.C. Circuit has used in the most analogous circumstance.

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

Response: The text and original meaning of a constitutional provision play an important role in interpreting the Constitution. The Supreme Court has, in some cases, interpreted constitutional provisions based on the original meaning of the text at issue, *see, e.g*., *United States v. Jones*, 565 U.S. 400 (2012); *District of Columbia v. Heller*, 554 U.S. 570 (2008), but not all, *see, e.g., Dickerson v. United States*, 530 U.S. 428 (2000); *Trop v. Dulles*, 356 U.S. 86 (1958). If I am confirmed, I will be bound to follow all Supreme Court and D.C. Circuit precedent concerning the appropriate method of constitutional interpretation in any case.

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: Please see my response to Question No. 2.

a. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: It is my understanding that "plain meaning" refers to the term's ordinary meaning at the time of its enactment.

6. What are the constitutional requirements for standing?

Response: The Supreme Court articulated the minimum constitutional requirements for Article III standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Those requirements are: (1) that the plaintiff has suffered an injury in fact that is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical"; (2) that there is a causal connection between the alleged injury and the defendant's actions, and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal quotations and citations omitted). The Supreme Court recently reaffirmed these requirements in *California, et al. v. Texas, et al.* 141 S. Ct. 2104 (2021).

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court recognized that Congress has powers beyond those expressly enumerated in the Constitution by virtue of the Necessary and Proper Clause. *McCulloch* recognized Congress's power to establish a national bank as an example of Congress's implied powers under the Constitution.

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

Response: I would apply Supreme Court and D.C. Circuit precedent to evaluate the constitutionality of the law. For example, I would look to *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) to evaluate whether Congress had the authority to enact the law in question under the Commerce Clause.

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

Response: The Supreme Court has held that the due process clauses of the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted). In *Washington v. Glucksberg*, the Court collected cases recognizing substantive due process rights, including: the right 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 use of 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 abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Id*. at 720; *see also Saenz v. Roe*, 526 U.S. 489 (1999) (recognizing a right to travel); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing a right of same-sex couples to marry). The Supreme Court has also "assumed, and strongly suggested" that there is a "right to refuse unwanted lifesaving medical treatment." *Glucksberg*, 521 U.S. at 720.

10. What rights are protected under substantive due process?

Response: Please see my response to Question No. 9.

11. 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: My response to Question No. 9 is not based upon my personal beliefs, but my understanding of the Supreme Court's precedent. The Supreme Court has held that the due process clauses protect the unenumerated rights identified in response to

Question No. 9 because they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation and citations omitted). The Supreme Court has not afforded the same protection to economic rights that were initially recognized in *Lochner v. New York*. *See, e.g., West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937); *Williamson v. Lee Optical of Okla. Inc*., 348 U.S. 483 (1955). If confirmed, I will faithfully apply all Supreme Court precedent, regardless of any opinion I may have about the merits of the Court's decisions.

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

Response: Congress may regulate the use of the channels of interstate commerce, the instrumentalities of interstate commerce, and activity that substantially affects interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

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

Response: The Supreme Court has recognized "suspect classes" to include those that pertain to "immutable characteristic[s] determined solely by accident of birth," and classifications that pertain to those who are "saddled with such disabilities or subjected to a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (internal quotations and citations omitted). Classifications based upon race, alienage, national origin, and religion are suspect classes requiring strict scrutiny. *See, e.g*., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.4 (1976); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: The separation of powers and system of checks and balances in our Constitution are foundational. Congress is charged with making the law. Courts interpret the laws when there are cases or controversies concerning the application of the law in a case. The executive branch enforces the law. The Framers developed these separate branches of government to decentralize power and to ensure that each branch of government could operate as a check on the power of the others.

15. 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 look to the text of the Constitution and applicable Supreme Court and D.C. Circuit precedent on the proper scope of executive or congressional power. I would follow that precedent in resolving the controversy before me. For example,

cases like *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); or *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) could be instructive depending on the issue.

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

Response: None.

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

Response: Both outcomes are equally undesirable.

18. 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: I have not studied this issue and have not developed an opinion regarding any changes in the Supreme Court's exercise of its power to invalidate federal statutes.

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

Response: I understand judicial review to refer to the power of the judicial branch to assess the legality of actions taken by the legislative or executive branch. I understand judicial supremacy to refer to the view that Supreme Court is the final interpreter of the meaning of the Constitution.

20. 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 have an independent obligation to uphold the Constitution and are also required to adhere to duly rendered judicial decisions. As a judicial nominee, I do not believe it would be appropriate for me to offer an opinion as to

how elected officials can best balance their constitutional obligations and responsibilities in the event an official perceives some conflict.

21. 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: It is essential that judges remain cognizant of their limited authority. Federal judges are not elected officials. They do not share the legislature's power to make the law or the executive's power to enforce the law. A court's role is limited to interpreting what the law is, and only in cases involving actual controversies that are brought before it.

22. As a district 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: If I am confirmed as a district court judge, it will not be within my purview to question the constitutional underpinnings of a case or limit its applicability below what Supreme Court or D.C. Circuit precedent requires. If I am confirmed, I will be bound to fully and faithfully apply binding precedent to the cases before me regardless whether I agree with it.

23. 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: The sentencing statute, 18 U.S.C. § 1335(a), identifies the factors that a court is directed to consider in sentencing.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: I am not familiar with any statement from the Biden Administration defining equity. I do not have a personal definition of equity, but understand it to refer to the quality of being fair and impartial.

25. Is there a difference between "equity" and "equality?" If so, what is it?

Response: I do not have personal definitions of "equity" and "equality" and would defer to their dictionary definitions. I understand that there is a current debate concerning the meaning of "equity" and "equality" with some holding the view that equality is focused on ensuring that individuals are provided the same resources and opportunities, while equity concerns ensuring equality in outcomes.

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?

Response: In interpreting the 14th Amendment, I would look to the text of the constitutional provision and Supreme Court and D.C. Circuit precedent concerning the scope of its protections.

27. How do you define "systemic racism?"

Response: I understand systemic racism to refer to discrimination or causal racial disparities that are the result of policies, patterns, or practices, as opposed to discrete instances of discrimination by individual actors.

28. How do you define "critical race theory?"

Response: I do not have a personal definition of critical race theory but understand it to refer to a field of legal scholarship that studies the intersection between race and United States law. I am not familiar with its specific tenets.

29. Do you distinguish "critical race theory" from "systemic racism," and if so, how?

Response: Please see my responses to Questions Nos. 27 and 28.

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
July 21, 2021

For all nominees:

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

For all judicial nominees:

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

   Response: I do not use any labels to describe my judicial philosophy. For me, my "judicial philosophy" is the method and manner in which I would approach judicial decision-making if I am fortunate enough to be confirmed. I believe that a judge must thoroughly study the facts and arguments presented by the parties to fully engage with litigants and render informed decisions. A judge must be neutral and impartial, as well as provide parties a full opportunity to be heard on matters related to their cases. I also believe that a judge must put aside all personal beliefs and base her decisions solely on what the law demands, including the text of any relevant constitutional or statutory provisions and applicable precedent. Further, I believe that a judge must treat all parties with respect and expeditiously rule on matters that come before the court.

2. **Would you describe yourself as an originalist?**

   Response: Please see my response to Question No. 1.

3. **Would you describe yourself as a textualist?**

   Response: Please see my response to Question No. 1.

4. **Do you believe the Constitution is a "living" document? Why or why not?**

   Response: I do not use the term "living" to describe the Constitution. That term has several definitions and is fraught for many. Instead, I agree with judges and judicial nominees who have described the Constitution as an enduring document. Part of the genius of the Constitution is that its mandates and principles can be applied to new circumstances.

5. **Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.**

   Response: My deep admiration for many Supreme Court justices does not flow from their jurisprudence or how they may have voted in any case. Rather, I admire Supreme Court justices for their intellectual rigor, fidelity to the law, and service to our democracy. I am particularly grateful for trailblazers like Thurgood Marshall and Sandra Day O'Connor, who reached the height of the legal profession with many odds stacked against them. As the first African American and first woman on the Court respectively, they served an important role modeling function that was motivating for me as I pursued a career in the law.

6. **Was Marbury v. Madison correctly decided?**
7. **Was Lochner v. New York correctly decided?**
8. **Was Brown v. Board of Education correctly decided?**
9. **Was Bolling v. Sharpe correctly decided?**
10. **Was Cooper v. Aaron correctly decided?**
11. **Was Mapp v. Ohio correctly decided?**
12. **Was Gideon v. Wainwright correctly decided?**
13. **Was Griswold v. Connecticut correctly decided?**
14. **Was South Carolina v. Katzenbach correctly decided?**
15. **Was Miranda v. Arizona correctly decided?**
16. **Was Katzenbach v. Morgan correctly decided?**
17. **Was Loving v. Virginia correctly decided?**
18. **Was Katz v. United States correctly decided?**
19. **Was Roe v. Wade correctly decided?**
20. **Was Romer v. Evans correctly decided?**
21. **Was United States v. Virginia correctly decided?**
22. **Was Bush v. Gore correctly decided?**
23. **Was District of Columbia v. Heller correctly decided?**
24. **Was Crawford v. Marion County Election Bord correctly decided?**
25. **Was Boumediene v. Bush correctly decided?**
26. **Was Citizens United v. Federal Election Commission correctly decided?**
27. **Was Shelby County v. Holder correctly decided?**
28. **Was United States v. Windsor correctly decided?**
29. **Was Obergefell v. Hodges correctly decided?**

Responses to Questions 6-29: For those cases listed above that remain binding precedent, I would be obligated to follow them, if confirmed, regardless whether I agree with them. I can fulfill that obligation without reservation, and my personal opinions about the Supreme Court's rulings will play no role in my decision-making. Prior judicial nominees have made exceptions to the general rule against nominees commenting on the merits of Supreme Court decisions to acknowledge that *Marbury v. Madison, Brown v. Board of Education* (including *Bolling v. Sharpe*), *Loving v. Virginia*, and *Gideon v. Wainwright* were correctly decided, and I agree.

30. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?

Response: An appellate court, sitting *en banc*, can overturn its precedent in certain circumstances. Federal Rule of Appellate Procedure 35 governs *en banc* determination and provides that an *en banc* hearing should be ordered only when "necessary to secure and maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." Of course, if I am confirmed as a district court judge, I would have no occasion to consider whether D.C. Circuit precedent should be revisited. I would be bound to defer to the D.C. Circuit's determination whether it is appropriate to reaffirm or overturn precedent.

31. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?

Response: Please see my response to Question No. 30.

32. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: No. A defendant's race should not be a factor in the court's sentencing decisions.

<u>For Ms. Jia Cobb:</u>

1. Why did you choose to work for the Public Defender Service for the District of Columbia?

Response: I went to law school to pursue a career in public service. At law school, I had two professors who started their careers at the Public Defender Service for the District of Columbia (PDS) and spoke highly of their experience. I spent part of my 2L summer at PDS and participated in a trial advocacy course during my 3L year that PDS attorneys largely taught. Based on these experiences, I decided that PDS was a great place to begin my career in public service. I welcomed the opportunity to work with individual clients

and to ensure that all my clients received the protections that our Constitution affords them, regardless of their financial circumstances. Additionally, PDS is known for its substantial trial training and supervision. In addition to the important work that I could do for clients—which was my priority—I also learned how to effectively prepare and conduct a trial from talented trial lawyers.

2. **Were you ever concerned that your work for the Public Defender Service for the District of Columbia would result in more violent criminals—including gun criminals and sex criminals—being put back on the streets?**

   Response: No.

Questions from Senator Thom Tillis
for Jia Michelle Cobb
Nominee to be United States District Judge for the District of Columbia

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

   Response: Yes.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: Judicial activism may have different definitions to different people. I define a judicial activist as a judge who does not set aside her personal views about the outcome of a case and who does not feel constrained by the requirements of the law in making judicial decisions—neither of which are appropriate.

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

   Response: Impartiality is an absolute expectation for a judge.

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

   Response: No.

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

   Response: If I am confirmed as a district court judge, I would be required to apply federal statutes and applicable precedent regardless whether I agree with them. I would also be required to respect and uphold lawful determinations of a jury, regardless whether I would have made a different decision as the finder of fact. The only desirable outcome in any case is one that comports with the law. A judge who faithfully and strictly applies the law will likely have to render decisions that conflict with her personal beliefs, but she must do so regardless of the result.

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

   Response: No.

7. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

   Response: The Supreme Court has held that the Second Amendment confers, "an individual right to keep and bear arms." *D.C. v. Heller*, 554 U.S. 570, 595 (2008); *see*

also McDonald v. City of Chicago, 561 U.S. 742 (2010) (holding that the right of an individual to keep and bear arms under the Second Amendment is enforceable against the states). If confirmed, I would follow this precedent without reservation.

8. **How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?**

   Response: I would review Supreme Court and D.C. Circuit cases and apply the applicable precedent to the matters before me. Supreme Court and D.C. Circuit precedent provide instruction for analyzing Second Amendment challenges. *See, e.g., D.C. v. Heller*, 554 U.S. 570 (2008); *Wrenn v. D.C.*, 864 F.3d 650 (D.C. Cir. 2017); *Schrader v. Holder*, 704 F.3d 980 (2013); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011). The Supreme Court is also considering a case concerning whether New York's denial of applications for concealed-carry licenses violates the Second Amendment, which may be instructive on the issue once it is decided. *See New York State Rifle & Pistol Ass'n, Inc., et al. v. Bruen*, *et al.*, No. 20-843.

   The Supreme Court has also considered the permissibility of certain COVID-19 restrictions that impact constitutional rights, which I would consider in evaluating any similar challenges. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

9. **What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?**

   Response: There is ample Supreme Court and D.C. Circuit precedent on qualified immunity, and I would analyze and apply this precedent in resolving qualified immunity cases, if confirmed. Supreme Court precedent makes clear that officers are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was clearly established at the time." *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018).

10. **Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?**

    Response: As a judicial nominee, I do not think it would be proper for me to offer my opinion on Supreme Court precedent. I believe that legislative bodies are best suited to answer questions regarding the scope of qualified immunity and to make changes if they deem appropriate.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: Please see my response to Question No. 10.

12. 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: As a judicial nominee, I do not generally think it would be proper for me to offer my opinion on, or criticize, Supreme Court precedent. In any event, I have not developed an opinion on the matter because I have not litigated patent eligibility cases in my civil practice. I would look to precedent setting forth standards for patent eligibility, for example, *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014) and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), to apply to any patent eligibility matters before me, if confirmed.

13. How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.

a. *ABC Pharmaceutical Company* develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?

Response: I agree with other judicial nominees who have declined to analyze specific factual hypotheticals, as doing so may suggest how candidates would decide matters that could come before them, if confirmed. If a matter like the hypothetical posed in Question No. 13a came before me, if confirmed, I would look to precedent, such as *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); and any other precedent that could potentially be instructive, to apply to the facts of the case before me.

b. *FinServCo* develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?

Response: I agree with other judicial nominees who have declined to analyze specific factual hypotheticals, as doing so may suggest how candidates would decide matters that come before them, if confirmed. If a matter like the hypothetical posed in Question No. 13b came before me, if confirmed, I would look to precedent, such as *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010); and any other precedent that could potentially be instructive, to apply to the facts of the case before me.

c. *HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

Response: I agree with other judicial nominees who have declined to analyze specific factual hypotheticals, as doing so may suggest how candidates would decide matters that come before them, if confirmed. If a matter like the hypothetical posed in Question No. 13c came before me, if confirmed, I would look to precedent, such as *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); and any other precedent that could potentially be instructive, to apply to the facts of the case before me.

d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla*'s billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

Response: I agree with other judicial nominees who have declined to analyze specific factual hypotheticals, as doing so may suggest how candidates would decide matters that come before them, if confirmed. If a matter like the hypothetical posed in Question No. 13d came before me, if confirmed, I would look to precedent, such as *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010); *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007), and any other precedent that could potentially be instructive, to apply to the facts of the case before me.

e. *Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a

naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?

Response: I agree with other judicial nominees who have declined to analyze specific factual hypotheticals, as doing so may suggest how candidates would decide matters that come before them, if confirmed. If a matter like the hypothetical posed in Question No. 13e came before me, if confirmed, I would look to precedent, such as *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); and any other precedent that could potentially be instructive, to apply to the facts of the case before me.

f. A business methods company, *FinancialServices Troll,* specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?

Response: I agree with other judicial nominees who have declined to analyze specific factual hypotheticals, as doing so may suggest how candidates would decide matters that come before them, if confirmed. If a matter like the hypothetical posed in Question No. 13f came before me, if confirmed, I would look to precedent, such as *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010); and any other precedent that could potentially be instructive, to apply to the facts of the case before me.

g. *BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

Response: I agree with other judicial nominees who have declined to analyze specific factual hypotheticals, as doing so may suggest how candidates would decide matters that come before them, if confirmed. If a matter like the hypothetical posed

in Question No. 13g came before me, if confirmed, I would look to precedent, such as *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007); and any other precedent that could potentially be instructive to apply to the facts of the case before me.

h. Assuming *BioTechCo's* diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?

Response: As a judicial nominee, I do not believe it would be proper to opine regarding any provisions that should exist in law.

i. *Hantson Pharmaceuticals* develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?

Response: I agree with other judicial nominees who have declined to analyze specific factual hypotheticals, as doing so may suggest how candidates would decide matters that come before them, if confirmed. If a matter like the hypothetical posed in Question No. 13i came before me, if confirmed, I would look to precedent, such as *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); and any other precedent that could potentially be instructive to apply to the facts of the case before me.

j. *Stoll Laboratories* discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?

Response: I agree with other judicial nominees who have declined to analyze specific factual hypotheticals, as doing so may suggest how candidates would decide matters that come before them, if confirmed. If a matter like the hypothetical posed in Question No. 13j came before me, if confirmed, I would look to precedent, such as *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); and any other precedent that could potentially be instructive to apply to the facts of the case before me.

14. Based on the previous hypotheticals, 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: Please see my response to Question No. 12.