

Nomination of Thomas Farr to the Eastern District of North Carolina
Questions for the Record
Submitted September 27, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. As a purely factual matter, are you aware of any evidence that, as President Trump has claimed, millions of people voted illegally in the 2016 presidential election?

I have not studied or investigated this issue and therefore cannot offer an opinion on this question.

2. Do you believe that voter fraud is widespread in the United States? If so, on what basis have you reached this conclusion?

I have not studied or investigated this issue and therefore cannot offer an opinion on this question.

3. While you were serving as lead counsel to the 1990 Helms for Senate Committee, the Justice Department filed a complaint in federal court charging the campaign with intimidating black voters in violation of the Voting Rights Act of 1965. The complaint alleged that the campaign sent over 100,000 postcards to mainly African-American voters suggesting that they were ineligible to vote and that voting could lead to criminal prosecution for voter fraud.

- a. **Did you provide any counsel, or were you consulted in any way, about the content of or the decision to send these postcards?**

No.

- b. **If so, what counsel or advice did you provide?**

- c. **What actions, if any, did you take to prevent the campaign from sending these postcards?**

I was not aware that the cards had been sent until they had been sent and the manager of the Helms Committee received a letter about the cards from the Voting Rights Section of the United States Department of Justice. The manager of the Helms Committee then called me for legal advice.

- d. **Did you have any role in the drafting or sending of the postcards? Did you participate in any meetings in which the postcards were discussed before they were sent? If so please explain your role in such meetings.**

No.

4. You defended the State of North Carolina in a suit challenging 28 state legislative districts drawn after the 2010 census. A three-judge district court panel struck down all 28 districts as unconstitutional racial gerrymanders, and the United States Supreme Court summarily affirmed.

In an opinion published on September 19, the three-judge panel called North Carolina's state-level redistricting plan "among the largest racial gerrymanders ever encountered by a federal court" that amounts to a "widespread, serious, and longstanding . . . constitutional violation."

- a. **Do you dispute the court's (and the Supreme Court's) finding that the state redistricting plan constitutes an unconstitutional racial gerrymander?**

The 2011 legislative redistricting plans were precleared by the United States Department of Justice, found to be constitutional by a three-judge State Superior Court, and found to be constitutional by the North Carolina Supreme Court on two occasions. The federal three-judge court in 2016 found the twenty-eight districts to be racial gerrymanders and their decision was affirmed by the United States Supreme Court. The decision by the Supreme Court is, of course, binding. Thus, as of the present date there can be no dispute about the legality of these districts.

- b. **These unconstitutional redistricting plans have been in place for more than four years already, and will remain in place for more than two years after the district court held that they amount to unconstitutional gerrymanders. In your view, what is the harm of leaving these redistricting plans in place for more than six years?**

For the first two elections held under these districts, there were no rulings that the districts were unconstitutional. In fact, there were state court rulings by a three-judge superior court and North Carolina Supreme Court that the districts in questions were constitutional. Moreover, it is not unusual for districting cases to take several election cycles before a final decision is reached regarding their constitutionality. For example, the NC 1992 Congressional Plan was used in elections from 1992 through 1996 even though the Supreme Court found in *Shaw II* that the 1992 version of CD 12 to be an illegal district in June of 1996. In *Shaw II*, the Court did not rule on the Constitutionality of the 1992 version of CD 1 because no plaintiff had standing to challenge that district. However, in light of the decision finding the 1992 CD 12 to be unconstitutional, there was no dispute that the 1992 version of CD 1 was also a racial gerrymander and the legislature changed both of these districts and adjoining districts for the 1998 election. Regarding the 2011 plans, the district court recently refused to order that new districts be enacted before the 2018 elections because the burdens any such remedy would impose on the voters and the election process outweighed the need to remedy the violation found in *Covington*. This is the same approach

followed by the district court following the Supreme Court's decision in *Shaw II* where illegal districts were used for three election cycles before they were replaced in 1998.

5. Beginning in 2013, you represented North Carolina in a challenge to a state law, SL 2013-381, that imposed a number of voting restrictions. As the Fourth Circuit noted in that case, *North Carolina State Conference of NAACP v. McCrory*, the law required “in-person voters to show certain photo IDs, . . . which African Americans disproportionately lacked, and eliminated or reduced registration and voting access tools that African Americans disproportionately used,” such as same-day registration and early voting. You argued that the law was not “an unconstitutional burden on any voters, much less African American voters,” and that “plaintiffs’ claims of intentional or purposeful discrimination [were] baseless.” The Fourth Circuit disagreed, concluding that the voting restrictions “target African Americans with almost surgical precision” and “impose cures for problems that did not exist.” The Fourth Circuit also found that the timing of the law, which was enacted immediately after the Supreme Court’s decision in *Shelby County*, was highly relevant and went to the General Assembly’s intent: “[T]his sequence of events—the General Assembly’s eagerness to, at the historic moment of *Shelby County*’s issuance, rush through the legislative process the most restrictive voting law North Carolina has seen since the era of Jim Crow—bespeaks a certain purpose.” (831 F.3d 204, 214-216, 229)

a. How did you come to represent the State of North Carolina in this case?

Our firm was asked to represent the State of North Carolina by the North Carolina Speaker of the House and the President Pro Tem of the Senate.

b. Do you agree that the General Assembly’s “eagerness” to pass SL 2013-381 “bespeaks a certain purpose”? If not, why do you think the state legislature moved so quickly to pass this discriminatory law?

If I am confirmed to be a district court judge I will be bound by the decisions of the Fourth Circuit. As an advocate, I argued that the General Assembly did not intend to purposefully discriminate against African Americans. The laws adopted by the General Assembly and enjoined by the Fourth Circuit represent election practices followed by a majority of the states. I do not have an opinion concerning the reasons behind the legislature’s decision to combine all of these proposals in one omnibus bill or the timing of their enactment.

c. What are the policy or legal justifications for eliminating same-day voter registration and early voting?

Many states do not have same-day registration or early voting for valid reasons. Concerning same-day registration, the district court found that persons who used same-day registration fail to have their home or mailing addresses verified with boards of election at a higher rate than persons who register 25 days before an election. Many states do not have “early voting” and plaintiffs’ experts in this

case admitted that there is little evidence that early voting operates to increase turnout. In any case, North Carolina did not eliminate early voting. Under the ultimately enjoined law, North Carolina continued to have ten days of early voting and a system for early voting that included more early voting locations and hours than found in most other states. In the 2014 General Election, more voters used early voting as compared to the most analogous off year election (2010), including African American voters. That finding of fact by the district court was based upon the undisputed evidence regarding turnout and was not reversed by the Fourth Circuit.

6. At your hearing, you testified that the district court judge in this case “made a finding that none of the laws that were eventually struck down had a discriminatory impact on African Americans.” But as the Fourth Circuit noted, “[t]he district court found that not only did SL 2013-381 eliminate or restrict [those] voting mechanisms used disproportionately by African Americans,” but the law also “require[d] IDs that African Americans disproportionately lacked.” (831 F.3d at 218)

a. Can you elaborate further on your testimony?

In the 2014 general election, several of the practices ultimately enjoined by the Fourth Circuit were used. For example, the number of early voting days was reduced to ten from 17. There was no same-day registration, and there was no out-of-precinct voting. Yet, African American turnout and registration rates increased in 2014 as compared to 2010. As found by the district court, all of these practices in the 2014 election did not have a discriminatory effect on African American participation rates. That finding was not reversed by the Fourth Circuit. Regarding photo ID, the expert for the United States admitted at trial that well over 90% of registered African American voters possessed an acceptable photo ID. The district court further found that very few voters would be unable to vote because of North Carolina’s photo ID requirement combined with the reasonable impediment exception to photo ID adopted by the North Carolina General Assembly. North Carolina’s reasonable impediment provision was based upon a similar provision adopted in South Carolina’s photo ID law which was precleared by the United States District Court of the District of Columbia.

7. Is it lawful and legitimate for states to strengthen the political power of one party by enacting electoral laws that intentionally reduce the ability of African Americans and other people of color to register to vote and cast ballots?

No.

8. Please describe any representations or legal advocacy you have undertaken to protect or expand equal voting rights.

In the case of *Hendon v. N.C. State Board of Elections*, we successfully represented clients in a lawsuit challenging a North Carolina law that prohibited the counting of a

crossover vote on a ballot where a voter had also marked a straight ticket vote. At the time of this decision, North Carolina was the only state that prohibited straight ticket voters from making a crossover vote.

I was the counsel for the plaintiff-intervenors in *Shaw v. Hunt* (“*Shaw II*”), the case primarily relied upon by the plaintiffs in the recent racial redistricting cases. In *Shaw v. Reno* (“*Shaw I*”) and *Shaw II*, the Supreme Court established the cause of action for racial gerrymandering.

I was lead counsel for the plaintiffs in *Pope v. Blue*, a case challenging the 1992 North Carolina Congressional Plan as an illegal gerrymander. The *Pope v. Blue* complaint was dismissed even though the district court in *Shaw v. Hunt* found that the 1992 Congressional Plan was politically gerrymandered to protect incumbent congressmen.

I served as a member of the Wake County Board of Elections and the North Carolina State Board of Elections. In both capacities, all members of each board scrupulously attempted to enforce the law to protect the voting rights of all voters. These boards had both Republican and Democratic members. On both of these boards, all members scrupulously worked to gain consensus. We believed that it was important for the integrity of election administration to gain consensus whenever possible. It is my recollection that we achieved complete consensus on over 90% of all issues that came before these boards during my tenure.

9. Please describe the importance of the National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA) in increasing voter participation and protecting voting rights.

By passing these statutes Congress made several policy decisions regarding the obligation of states to provide registration opportunities. As a judge, I will enforce these laws based upon the statutes and binding decisions by the Supreme Court and the Fourth Circuit.

10. In a March 2012 speech to North Carolina’s Civitas Institute, you appeared to compare *NFIB v. Sebelius*, which leveled various challenges against the Affordable Care Act (ACA), to *Plessy v. Ferguson* and *Dred Scott*.

d. In what way was the challenge to the ACA similar to *Plessy v. Ferguson* and *Dred Scott*?

As a private citizen, I did not agree with the decision rendered by the Supreme Court in each of these cases.

11. In a June 2009 panel discussion, you criticized the proposed Employee Free Choice Act (EFCA), also known as “card check.” You argued that “[t]he aim of the EFCA, from employers’ point of view, is to make organizing easier, [and to] ensure that unions get a first contract and intimidate management from resisting.”

a. Why is it bad policy to make it easier for workers to form labor unions?

It is up to Congress to establish the policy related to the opportunities of employees to organize and form unions. To date, Congress has elected not to enact EFCA. If I am confirmed, I will enforce any and all laws enacted by Congress in this area based upon the terms of the statute and binding decisions by the Supreme Court and Fourth Circuit.

b. Do you oppose the ability of workers to unionize?

No.

c. Given your past opposition to the ability of workers to unionize, how can you guarantee you will treat any claims made by organized labor or by union members fairly, should those claims come before you as a district court judge?

I do not agree with the premise of this question. However, I will follow the law as established by Congress or decisions by the Supreme Court and the Fourth Circuit.

12. In 2003, you represented Pfizer in *Doyle-McTighe v. Pfizer*, a gender discrimination and hostile work environment case. In defending the company, you argued that a manager's conduct—which included condescending, sexist, and at times overtly sexual remarks—was “neither severe nor pervasive within the meaning of Title VII.”

a. At what point does an employer's misconduct relative to employees rise to the level of “severe” or “pervasive”?

The issue of when an employer's misconduct becomes sufficiently severe and pervasive is a determination based upon the facts and circumstances of each case.

13. If confirmed to the federal district court, you may at times be called upon to sign off on and enforce consent decrees entered into by the litigants. These consent decrees may relate to ending racial or gender discrimination, among other issues.

a. Do you believe that consent decrees are an important tool to ensure the robust enforcement of the law?

Yes.

14. At your hearing, Senator Coons asked you about your defense of companies against employees claiming unlawful and discriminatory employment practices, including claims of sex discrimination and hostile work environment. You previously represented a company where a supervisor allegedly told female employees that “women with children should be at home and not employed in the workplace,” and

that female employees were “stupid” and “awful.” You stated, “There are situations where somebody engages in boorish behavior, rude behavior, behavior that my mother would wash my mouth out with soap over, but they still don’t arise to actionable sexual harassment under the legal standards that apply.”

- a. **In your view, does telling female employees that “women with children should be at home and not employed in the workplace,” and that female employees are “stupid” and “awful” constitute harassment in the workplace?**

Any such conduct is completely inappropriate. Whether and when such conduct rises to a violation of federal law depends upon the facts and circumstances of each case.

- b. **You told Senator Coons that you helped a “lady friend” who had been fired from her employment based on her “gender identity.” Can you please explain more about this case and your representation?**

This matter was reported in my Senate Questionnaire. I agreed to represent a friend who was a partner in a local business who believed she was forced out because of her sexual orientation. The case was ultimately settled after I referred my friend to a local lawyer who I believe to be the very best plaintiff’s employment lawyer in North Carolina and who is also a personal friend. I consider any other information regarding this case as being protected by the attorney-client privilege.

- c. **Putting aside the arguments that you made on behalf of any particular client, do you acknowledge, as several courts have held, that the sex discrimination prohibited by Title VII not only includes discrimination for being a particular gender, but also includes sexual harassment and discrimination for failing to conform to gender stereotypes?**

I pledge to be bound by all decisions on this issue rendered by the Supreme Court or the Fourth Circuit.

- d. **The Supreme Court’s decision in *Price Waterhouse v. Hopkins* held that treating employees differently in the workplace based on whether they conform to sexual stereotypes is a form of sex discrimination that is prohibited by Title VII of the Civil Rights Act of 1964. Do you acknowledge that this is binding precedent? Would you have any problem applying this precedent, if confirmed?**

I will follow the Supreme Court’s decision in *Price Waterhouse*.

15. Please respond with your views on the proper application of precedent by judges.

- a. **When, if ever, is it appropriate for a district court to depart from Supreme**

Court or the relevant circuit court's precedent?

It is not appropriate for a district court judge to depart from binding precedent rendered by the Supreme Court or the Fourth Circuit.

b. When, if ever, is it appropriate for a district court judge to question Supreme Court or the relevant circuit court's precedent?

I do not think it is inappropriate for a district court judge to "question" binding precedent so long as the judge follows it.

16. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A textbook on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is "super-stare decisis"? "superprecedent"?

If I become a district court judge, I will be bound by this decision.

b. Is it settled law?

If I become a district court judge, I will be bound by this decision.

17. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry.

a. Is the holding in *Obergefell* settled law?

If I become a district court judge, I will be bound by this decision.

b. On Friday, June 30, the Texas Supreme Court issued a decision in *Pidgeon v. Turner* which narrowly interpreted *Obergefell* and questioned whether states were required to treat same-sex couples equally to opposite-sex couples outside the context of marriage licenses. The Texas Supreme Court stated that "The Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons, and... it did not hold that the Texas DOMAs are unconstitutional." Is this your understanding of *Obergefell*?

I have not studied this issue. If I am confirmed to be a district court judge, I would not want to answer this question until there was an actual case or controversy before me and I had the chance to consider the facts and all applicable precedent.

18. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

I do not think it is appropriate for me to give what would amount to an advisory opinion in answering this question. Before I would answer this question, I would want to have an actual case or controversy before me and then have the opportunity to research the law and consider the facts.

b. Did *Heller* leave room for common-sense gun regulation?

I do not think it is appropriate for me to give what would amount to an advisory opinion in answering this question. Before I would answer this question, I would want to have an actual case or controversy before me and then have the opportunity to research the law and consider the facts.

c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

I have not studied this issue. If I am confirmed to be a district court judge, I will be bound by the decision in *Heller*.

19. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

If I am confirmed to be a district court judge, I will be bound to follow the decision in *Citizens United*.

b. Do individuals have a First Amendment interest in not having their

individual speech drowned out by wealthy corporations?

Every American has the right to free speech under the First Amendment. This right is subject to reasonable regulation by the Congress and binding decisions by the Supreme Court or, in my case, the Fourth Circuit. If I am confirmed I will follow this precedent.

c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

Because this issue may come before me as a judge, it would be inappropriate for me to give an advisory opinion without the benefit of an actual case or controversy and consideration of the applicable law and facts.

20. Please explain your view of the appropriate temperament of a judge. Do you believe you have the appropriate temperament to be a judge?

Judges should be kind and fair to all persons who appear before them. The district court judge for whom I clerked, Frank Bullock, and the judge I would replace, Malcolm Howard, have these qualities. They are both considered to be great judges and persons by all members of the bar. I believe that I possess the appropriate judicial temperament and will do my best to emulate these two judges if I am confirmed.

21. District court judges often say that the most difficult aspect of their job is sentencing defendants. Judges also comment that one of the most complicated legal areas are decisions involving the United States Sentencing Guidelines. How do you plan to familiarize yourself with the Guidelines, and, more importantly, how do you plan to prepare yourself to sentence criminal defendants?

My current opinion is that sentencing individuals will be the part of the job that I will find most difficult. I will study materials provided by the Judicial Center regarding the sentencing guidelines and seek assistance from other district judges, the probation office, defense counsel, and the United States Attorney.

22. What assurances or evidence can you give the Committee and future litigants who come before you that you will be fair and impartial to everyone who appears before you, if confirmed?

I promise the Committee that I will do my very best to be fair and impartial and make all decisions based upon the facts of each case and the applicable law.

23. Please describe with particularity the process by which you answered these questions.

The answers to these questions are my own. In making this answer, I have considered the advice given to me by attorneys in the Office of Legal Policy of the United States Department of Justice.

Senator Dick Durbin
Written Questions for Allison Eid, Thomas Farr and William Ray
September 27, 2017

For questions with subparts, please answer each subpart separately.

Questions for Thomas Farr

1. In 2016, North Carolina enacted H.B. 2, the Public Facilities Privacy and Security Act. In addition to the law's reprehensible discrimination toward the transgender community in North Carolina, the law had sweeping consequences for employment discrimination cases in the state. The law eliminated the ability of workers who faced discrimination on the basis of race, religion, color, national origin, age, sex, or disability to bring an employment discrimination lawsuit in state court.

a. You expressed support for this change. Specifically, you were quoted in a news report as stating, "I think it's better policy for the state." Do you stand by your comments?

As a private citizen, I did not think that any party is served by duplicative federal and state remedies. Before H.B. 2 was repealed, North Carolina's wrongful discharge claim was a common law cause of action that duplicated the remedies provided to employees by federal law but did not provide employees with the ability to recover attorneys' fees as are generally available under most federal employment discrimination statutes.

As a private citizen, I also believed that employment disputes should be resolved as promptly as possible because they often turn on the testimony of witnesses whose memories can fade over time and who may no longer be working for the same employer when a case is in discovery and goes to trial. Congress recognized the need for prompt resolution of employment disputes by adopting a 180-day statute of limitations for the filing of charges with the EEOC. At the time of my statement, employees in North Carolina could file claims for wrongful discharge within three years with no charge-filing requirement. I did not believe any party is served by waiting three years to resolve an employment dispute.

Since the time of my statement, the General Assembly has reinstated the claim for wrongful discharge. Should I be confirmed, if there are cases where plaintiffs have brought wrongful discharge claims that are within the supplemental jurisdiction of a federal court, I will follow state law as determined by North Carolina's appellate courts with respect to these claims.

b. Why do you think employees who were discriminated against based on the color of their skin, their gender, or their creed should not be able to pursue a discrimination lawsuit in state court?

I have never made the statement upon which this question is premised. If the state provides for such a claim, plaintiffs should be able to pursue it. Employees who are discriminated against in North Carolina have always had, and currently have, the option of filing a claim based upon any federal employment discrimination statute in state court.

c. Shortly after the law was passed, the legislature actually reversed course on this issue and restored North Carolinians' right to file employment discrimination lawsuits in state court. Did you disagree with this decision?

The decision by the North Carolina General Assembly to reinstate wrongful discharge claims is a policy decision of the legislature that must be respected by federal judges. I will enforce any such claim as a federal district court judge in cases where these claims are within the supplemental jurisdiction of the court.

2. In 1990, you worked as a lawyer for Senator Jesse Helms' reelection campaign. In a letter submitted to the Committee, the Congressional Black Caucus wrote about a disturbing incident that occurred while you served in this role. The letter noted that "[t]he campaign had engaged in a despicable scheme to discourage voter turnout, sending postcards to more than 100,000 North Carolinians, mostly African-Americans, warning that they might be ineligible to vote and that they might be arrested for voter fraud if they came to the polls."

In 1992, the Justice Department filed a civil complaint in relation to this scheme, which alleged that the scheme had violated the Voting Rights Act. In reports about the incident, you were described as "a participant in meetings about the mailing." It was also noted that you were "involved in earlier 'ballot security' efforts."

a. When did you become aware of this scheme?

During Senator Helms' 1990 re-election campaign, I did not work on the campaign on a daily basis and only provided legal advice when I was called by the campaign to do so. I became aware of the card mailing effort only after the cards were mailed and the Helms Committee was contacted by the Voting Rights Section of the United States Department of Justice the week before the General Election.

b. Did you ever raise objections to this scheme?

After I was contacted, I was asked to review the card after it had already been mailed. I was appalled to read the incorrect language printed on the card and to then discover it had been sent to African Americans. I then learned that the Helms Committee intended to use any returned cards to challenge voters on election day. After I became aware of this effort, the Helms Committee followed my advice to cancel any and all election day activities related to the use of these cards to challenge voters. Based upon my instructions, returned cards were not used to challenge voters.

- c. **Do you agree that a scheme to systematically disenfranchise minority voters should be investigated by the Department of Justice as a possible violation of the Voting Rights Act?**

Yes. But I would never plan or participate in any scheme to mail African American voters cards of this nature and I did not play any role in the planning or execution of this card mailing.

- d. **The oath of office for an attorney in North Carolina includes these words: “I... do swear that I will truly and honestly demean myself in the practice of an Attorney, according to the best of my knowledge and ability, so help me God.” Do you think that an attorney’s participation in a systematic scheme to lie to and disenfranchise voters demonstrates the type of true and honest behavior required by this oath?**

No.

3. **President Trump has claimed—without any evidence—that three to five million people voted unlawfully in the 2016 election. Do you think that President Trump is correct in his assertions of widespread illegal voting in American elections, or do you agree with the overwhelming evidence that says otherwise?**

I have not investigated this issue and have no basis to offer an opinion.

4. In 2013, a divided Supreme Court voted 5-4 in *Shelby County v. Holder* to gut the Voting Rights Act. The Court struck down a provision of the Act that required certain jurisdictions—including a number of counties in North Carolina—to “preclear” any changes to their voting laws with the Department of Justice. After the decision, the North Carolina legislature moved quickly to enact a massive voter suppression bill, which included a strict photo ID requirement, early voting cutbacks, and the elimination of same-day registration, out-of-precinct voting, and preregistration for teenagers who turn 18 before an election.

Last year, a three-judge federal appeals court struck down the law. The court found that the legislature had “target[ed] African Americans with almost surgical precision” and “enacted... the law with discriminatory intent.”

You represented North Carolina in litigation over this law—even after a newly elected governor and attorney general declined to defend it. In a cert petition to the Supreme Court—which was denied—you argued that “the notion that these election laws are reminiscent of ‘the era of Jim Crow’ is ludicrous.” However, the appeals court opinion noted that “[b]efore enacting [the] law, the legislature requested data on the use, by race, of a number of voting practices.” It went on to note that “[u]pon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.” Writing a

law to target and restrict the voting practices of African Americans sounds pretty reminiscent of the Jim Crow era to me.

Why did you decide to continue the litigation in this case after the governor and attorney general declined to defend it?

We never represented the Governor in this litigation. From the beginning of this case and for several years, and before Attorney General Stein took office, Attorney General Cooper agreed that our firm was co-counsel with the Attorney General for the State of North Carolina and all other defendants besides the Governor. All of the many pleadings filed in this case with the district court, the Supreme Court in 2014, and the Fourth Circuit show Attorney General Cooper or his office signing pleadings listing our firm as co-counsel for North Carolina.

The new Attorney General, elected in 2016, former State Senator Josh Stein, voted against this legislation as a State Senator. After Mr. Stein became Attorney General, he decided to file papers with the Supreme Court representing that our firm did not represent the State or other defendants other than the Governor. This position by Attorney General Stein was contrary to the position taken by Attorney General Cooper for three years. There remains today an unresolved question under North Carolina law regarding the position taken by Attorney General Stein before the Supreme Court.

5. You represented North Carolina's Republican-led legislature in recent redistricting litigation before the Supreme Court. Earlier this year, the Court struck down the redistricting plan for two North Carolina congressional districts because "racial considerations predominated" in their design. This unconstitutional racial gerrymander would have diminished the power of African-American voters in other districts. Your work in these election cases led the Congressional Black Caucus (CBC) to state in their letter opposing your nomination that you have "carved out a position for [your]self as the preeminent attorney for North Carolina Republicans seeking to curtail the voting rights of people of color."

Have you served as an attorney for North Carolina Republicans seeking to curtail the voting rights of people of color?

No. As an advocate, I vehemently disagreed with the argument that the General Assembly sought to curtail the voting rights of people of color or any other voter.

**Nomination of Thomas Farr to the
United States District Court for the
Eastern District of North Carolina
Questions for the Record
Submitted September 27, 2017**

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”
 - a. Do you agree with Justice Roberts’s metaphor? Why or why not?

In general I agree with Chief Justice Roberts, However in some instances, such as cases involving indigent criminal defendants, a district court judge should consider asking questions to law enforcement witnesses to ensure that the jury has evidence needed to render a fair decision.

- b. What role, if any, should the practical consequences of a particular ruling play in a judge’s rendering of a decision?

Decisions should be based upon the law and the facts. I do not see why a judge could not consider practical issues so long as any such consideration is not inconsistent with the law.

- c. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a judge to make a subjective determination?

In ruling on a Rule 56 motion, a judge can only consider undisputed material facts as a basis for his decision. Absent a specific example, I do not see why this would require a subjective decision by the district court judge.

2. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”

- a. What role, if any, should empathy play in a judge’s decision-making process?

I cannot cite any and all circumstances where empathy might play a legitimate role but I believe that it is an appropriate consideration when considering requests for accommodations from lawyers and in criminal sentencing.

- b. What role, if any, should a judge’s personal life experiences play in his or her decision-making process?

I hope that my personal experiences as a lawyer and father will help me empathize with attorneys who appear before me and whose personal and family responsibilities must be balanced with their professional obligations.

- c. Do you believe you can empathize with “a young teenage mom,” or understand what it is like to be “poor or African-American or gay or disabled or old”? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

There has been tragedy in my family life and in instances involving young men who I coached when they were boys playing soccer. I hope that these personal experiences will help me empathize with all parties and persons who would appear before me if I am confirmed.

3. As the attorney defending the North Carolina legislature against a challenge to its voter ID law, you argued that the law did not place “an unconstitutional burden on any voters, much less African American voters.” The Fourth Circuit disagreed with you, however, and the Supreme Court denied certiorari in the case.
 - a. Do you still believe that the voter ID law was not intended to disenfranchise African Americans?

As an advocate, I believed that the North Carolina General Assembly did not intend to disenfranchise African American voters. The actual findings of fact made by the district court, which were not reversed by the Fourth Circuit, show that African American turnout and registration increased in elections when the enjoined practices were enforced. The district court judge found that there was no discriminatory intent. The Fourth Circuit disagreed. As a district court judge I am obligated to follow the decision by the Fourth Circuit and pledge that I will do so.

- b. Do you believe voter ID laws are ever used as a tool to disenfranchise people of color?

I would have to consider the specific facts and circumstances to offer any opinion on this question. If a photo ID law was adopted to intentionally disenfranchise persons because of their color then it should be enjoined.

- c. As a federal judge, would you protect the voting rights of all Americans, regardless of race?

I promise that I will enforce election laws without regard to race based upon statutes enacted by Congress and decisions by the Supreme Court or the Fourth Circuit.

4. You have repeatedly defended companies against employees claiming unlawful and discriminatory employment practices, including claims of sex discrimination and hostile work environment. For instance, you defended a company in a case in which a supervisor

allegedly told female employees that “women with children should be at home and not employed in the workplace,” and that female employees were “stupid, retarded, and awful.”

- a. Putting aside the arguments you made on behalf of any particular client, do you acknowledge, as several courts have held, that the sex discrimination prohibited by Title VII not only includes discrimination for being a particular gender, but also includes sexual harassment and discrimination for failing to conform to gender stereotypes? What precedential value would the holding from these courts have in your decision-making?

I pledge that I will follow any precedent by the United States Supreme Court or the Fourth Circuit on these issues and all other issues.

- b. In *Price Waterhouse v. Hopkins*, the Supreme Court held that treating employees differently in the workplace based on whether they conform to sexual stereotypes is a form of sex discrimination that is prohibited by Title VII of the Civil Rights Act of 1964. Do you recognize this as binding precedent with respect to the protections against sex discrimination provided by Title VII? Do you believe that there are certain stereotypes about how men and women are supposed to act that are beyond what was meant by the Supreme Court in *Price Waterhouse*? For example, the stereotype that men are supposed to date women and not men? What basis would there be for treating this stereotype different than other stereotypes about how men and women are supposed to act?

My personal opinions should not form the basis of any decisions I might make as a district court judge. I pledge that I will follow precedent established by the Supreme Court and the Fourth Circuit.

- c. In *City of Los Angeles v. Manhart*, the Supreme Court stated that the “simple test” for sex discrimination is whether there has been “treatment of a person in a manner which, but for that person’s sex, would be different.” Are you familiar with this decision, and do you recognize it as precedent that is binding on lower courts?

If confirmed as a district court judge I would be obligated to follow this decision.

5. Recently, you publicly supported a provision of North Carolina’s anti-LGBT HB2 law that curtails the legal rights of workers who believe they were fired due to racial, gender, or other types of discrimination, stating, “I think it’s better policy for the state.”
 - a. What criteria do you apply when assessing if a law represents sound public policy? What role do you believe a judge’s policy preferences should play in their determination of legal issues?

The “policy preferences” of a district court judge should not play a role in any judicial decision made by a judge.

- b. Why do you believe that the HB2 law as a whole is “better policy for the state”?

I did not make a public statement regarding the entire HB2 law. My comments related to a portion of that law that repealed a state claim for wrongful discharge. My opinion as a private citizen was that all persons and parties are best served by the elimination of state remedies that duplicate federal remedies. For example, when Congress enacted Title VII, it adopted a 180-day statute of limitations for employees to file charges with the EEOC. Congress did so in part because employment disputes depend upon the memories of persons involved which can fade over time. Congress also believed that expeditious resolution of employment disputes furthered important public interest. Under North Carolina's state claim for wrongful discharge, employees could wait for three years to file a lawsuit. Since the time of my statement, the North Carolina legislature has reinstated wrongful discharge claims. As a district court judge, I will not hesitate to enforce this claim when the district court has supplemental jurisdiction to consider it.

- c. Do you believe that, after *Obergefell v. Hodges* and *Pavan v. Smith*, states have the right to deny married same-sex couples certain benefits or protections offered to married different-sex couples based on the state's view of what makes for "good policy"?

I am obligated to follow those decisions. If I am confirmed to be a district court judge, I would not want to answer this question until there was an actual case or controversy before me and I had the chance to consider the facts and all applicable precedent.

6. In your confirmation hearing, you said with respect to jury trials: "Trials are good for the lawyers and typically not for anybody else."
- a. What did you mean by that? Do you still believe that jury trials are not "good for anybody else"?

My intention in making this statement relates to my own experience defending companies in employment cases. In almost every instance, my experience as an advocate has been that it is in the company's interest to seriously consider settlement to avoid the expense of litigation and the risk of an adverse jury decision. But the right of a jury trial is protected by the Constitution and it is up to litigants and not a judge to decide when to settle a case versus taking a case to a jury.

- b. How would that belief influence your actions and decisions as a federal judge?

Please see my answer to question 6a.

- c. The framers believed the right to a civil jury trial was important, and for this reason they included the Seventh Amendment in the Bill of Rights. Do you believe the Seventh Amendment is obsolete?

Absolutely not. Please see my answer to question 6a.

7. In a March 2012 speech discussing *NFIB v. Sebelius*, you cautioned about the dangers of losing the conservatives' "5-4 majority" on the Supreme Court. You said that the four liberal justices "will almost always find a way to uphold social legislation passed by a Democrat-controlled Congress and supported by a Democrat President." In that same speech, you lauded the conservative judges for their deference to Congress.
- a. How do you square those two positions?

As a private citizen, I agreed with the position of the dissenters in *NFIB*. As a district court judge I am bound to follow decisions by the United States Supreme Court, regardless of the composition of the majority.

- b. When do you believe it is appropriate for judges to defer to Congress? When is it appropriate for judges to overturn legislation?

In general, district court judges should defer to the policy choices made by Congress. In any case, they are bound by the decisions of the Supreme Court and their circuit court. In any other respect, the answer to this question would depend on the facts of the case in question.

8. In the same March 2012 speech, you seemed to compare *NFIB v. Sebelius* to *Plessy v. Ferguson* and *Dred Scott*, saying, "You've heard about cases like *Plessy vs. Ferguson*—horrible decision by the Supreme Court in 1890, or whatever the date is, affirming the concept of 'separate but equal'; and the *Dred Scott* case in which the Supreme Court upheld the Fugitive Slave Law . . . and I think the courageous decision in *Brown v. Board of Education* to overturn *Plessy vs. Ferguson* and overrule. This [*NFIB v. Sebelius*] is the type of case that we've got right here in front of us. This is one of the most ridiculous cases in the history of our country."
- a. What did you mean by that?

As a private citizen, I agreed with the dissenters in *NFIB v. Sebelius*. As a district court judge, I am bound by that decision.

- b. What other cases would you compare to *Plessy* and *Dred Scott*? Would you compare those cases to *Roe*? *Obergefell*? *Lawrence*?

It is not up to a district court judge to "reverse" decisions by the Supreme Court or for a district court judge to decline to follow any decision by the Supreme Court.

- c. Given your previous criticisms of the Supreme Court decisions related to the Affordable Care Act, how can the American people be confident that you will uphold that precedent?

The ABA has investigated me on two decisions and both times has given me a unanimous well-qualified rating. I would not have received this rating if there were any questions about my integrity or ability to follow the law as

interpreted by the Supreme Court or the Fourth Circuit.