

STATE of NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV029308-910

)
ROY A. COOPER, III, in his)
official capacity as)
GOVERNOR OF THE STATE)
OF NORTH CAROLINA,)
Plaintiff,)
)
and)
PHILIP E. BERGER, in his official)
capacity as PRESIDENT PRO)
TEMPORE OF THE NORTH)
CAROLINA SENATE;)
TIMOTHY K MOORE, in his official)
capacity as SPEAKER OF THE)
NORTH CAROLINA HOUSE)
OF REPRESENTATIVES;)
)
and)
THE STATE OF NORTH)
CAROLINA.)
)
Defendants.)

MOTION TO INTERVENE

(N.C. Rule of Civ. Pro. 24)

COMES NOW Martin Andrew Oakes, pro se, respectfully moves to intervene as Defendant in this matter pursuant to North Carolina Rule of Civil Procedure 24(a)(2) (intervention of right) and Rule 24(b)(2) (permissive intervention). In support thereof, Movant states as follows:

1. Plaintiff filed a complaint against the Defendants objecting to SL-2023-139 which alters the construction of, and method of appointment to, the State Board of Elections.
2. Movant was appointed, (by SL-2023-148) to the State Board of Elections, and thus claims damages if Plaintiff succeeds, thus vacating Movant's appointment to the State Board of Elections, by virtue of reducing the number of seats on that board and removing appointment power from the Defendants to the Plaintiff.
3. Movant meets all the requirements for intervention of right under North Carolina Rule of Civil Procedure 23(a)(2) which states:

“Upon timely application anyone shall be permitted to intervene in an action ...when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.”
4. The motion is timely. The Complaint was filed on October 17, 2023 and no answer has yet been filed by the Legislative defendants (Berger, Moore). The Court has issued a temporary injunction, putting on hold SL-2023-139 pending a full hearing in this case, which has yet to be scheduled.
5. The movant has a direct interest in the disposition of this case, which, if found in favor of Plaintiff, would effectively remove him from the State Board of Elections.

6. Granting the motion would not unduly delay the proceedings, as Movant is ready to file within 48 hours of his motion being granted.
7. Granting the motion would not unduly delay the proceedings, as the Legislative defendants have yet to file their response.
8. Movant has created a brief which raises questions as to the constitutionality of the appointment procedure currently in place (prior to SL-2023-139), which Plaintiff seeks to continue. Movant also explains why the referendum question on the 2018 General election ballot regarding a prior configuration of the State Board of Elections and Ethics should not be considered relevant. Movant believes that no other party has addressed or will address these issues.

WHEREFOR, Movant respectfully requests the Court grant his Motion to Intervene of right pursuant to Rule 24(a)(2) of the North Carolina Rule of Civil Procedure, or in the alternative, that he be granted permissive intervention, pursuant to Rule 24(b). Movant's proposed brief is attached hereto as Exhibit 1, as per Rule 24(c).

RESPECTFULLY SUBMITTED, this the 20th day of December, 2023

/s/ MARTIN ANDREW OAKES
MARTIN ANDREW OAKES. Pro se

8057 Lucky Creek Lane
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO INTERVENE has been served on all parties through the eCourts Portal, as well as by email to and addressed as follows:

<p>WOMBLE BOND DICKINSON (US) LLP</p> <p>Matthew F. Tilley matthew.tilley@wbd-us.com Russ Ferguson russ.ferguson@wbd-us.com Sean E. Andrussier sean.andrussier@wbd-us.com Peyton M. Poston peyton.poston@wbd-us.com <i>Attorneys for Legislative Defendants</i></p>	<p>WAKE COUNTY SUPERIOR COURT</p> <p>Kellie Myers, Trial Court Administrator Kellie.Z.Myers@nccourts.org Lisa Tucker, Civil Superior Case Manager Lisa.R.Tucker@nccourts.org Aaron Davison Aaron.D.Davison@nccourts.org Byron Frazelle Samuel.B.Frazelle@nccourts.org</p>
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This the 20th day of December, 2023

/s/ MARTIN ANDREW OAKES. Pro se

EXHIBIT 1 PROPOSED ANSWER

STATE of NORTH CAROLINA
SUPERIOR COURT DIVISION
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE

23CV029308-910

MARTIN ANDREW OAKES, pro se)

Proposed Intervenor, as Defendant)

INTERVENOR APPLICANTS'
PROPOSED ANSWER
PURSUANT TO RULE 24(C)

v,)

ROY A. COOPER, III, in his)
official capacity as)

GOVERNOR OF THE STATE)
OF NORTH CAROLINA,)
Plaintiff,)

and)

PHILIP E. BERGER, in his official)
capacity as PRESIDENT PRO)
TEMPORE OF THE NORTH)
CAROLINA SENATE;)

TIMOTHY K MOORE, in his official)
capacity as SPEAKER OF THE)
NORTH CAROLINA HOUSE)
OF REPRESENTATIVES;)

and)

THE STATE OF NORTH)
CAROLINA.)

Defendants.)

NOW COMES potential Intervenor Martin Oakes and hereby submits this Proposed Answer pursuant to Rule 24© of the North Carolina Rules of Civic Procedure (the “Rules”), as follows:

(original complaint in **Bold**, response not bold, references *italicized*)

1. This paragraph is a legal statement to which no answer is necessary
2. This paragraph is opinion, and believes that the statement is contradicted by his answer to Plaintiff’s more detailed complaints below.
3. This paragraph is opinion, and believes that the statement is contradicted by his answer to Plaintiff’s more detailed complaints below
4. Defendant admits that the composition of the state Supreme Court has changed since it issued *Cooper v. Berger (“Cooper I”)*, 370 N.C. 392 (2018). Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of Paragraph 4
5. This paragraph is opinion, and believes that the statement is contradicted by his answer to Plaintiff’s more detailed complaints below
6. This paragraph is opinion, and believes that the statement is contradicted by his answer to Plaintiff’s more detailed complaints below.

PARTIES AND JURISDICTION

Potential Intervenor-Defendant is a resident of Lincoln County, a citizen of North Carolina, a former candidate for election and a former county commissioner.

Potential Defendant-Intervenor was appointed, (by SL-2023-148 Oct 25, 2023) to the State Board of Elections, and thus claims damages if Plaintiff

succeeds, thus vacating Defendant-Intervenor's appointment to the State Board of Elections, by virtue of reducing the number of seats on that board and removing appointment power from the Defendants to the Plaintiff.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. This paragraph is opinion to which no answer is necessary.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

FACTS

17. Many of the powers granted to the State Board of Elections under the current law are plainly executive in nature. For example, and without limitation, the State Board of Elections:.....”

What is stated by Plaintiff is technically correct, however, there are two issues with this statement. Firstly, in apparently quoting from GS163-22, Plaintiff is significantly paraphrasing the content, BUT, more importantly, Plaintiff skips over duties of the State Board that are clearly judicial in nature:

e.g. GS 163-22(c):

*(c) State Board, and shall compel observance of the requirements of the election laws by county boards of elections and other election officers. In performing these duties, the State Board shall have the right to **hear***

and act on complaints arising by petition or otherwise, on the failure or neglect of a county board of elections to comply with any part of the election laws imposing duties upon such a board...

e.g. GS 163-22(d):

*(d) The State Board of Elections shall **investigate** when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county and municipality and special district, and*

GS 163 contains significant other sections on “Hearing” (the word appears 96 times in the statute), for example

§ 163-82.18. Appeal from denial of registration

§ 163-86. Hearing on challenge

Article 11B Challenge to Candidacy

While generally hearings are held at the county level, all decisions are appealable either to the State Board or to Superior Court.

Clearly “quasi-judicial” powers are best served by a system in which a majority of the judges are **not** members of one political party, which creates the appearance, or the actuality, that decisions made are in favor of that political party, and against other political parties.

And no one disputes that the State Board of Elections is “an independent agency” (GS.163-29). How can the “**Governor’s constitutionally assigned executive branch duty of election law enforcement**” (Plaintiff’s words) be reconciled with Elections being run by an independent agency? There is also no specific wording in the Constitution which specifies that the Governor shall enforce election laws, Plaintiff stretches the words “faithfully execute the laws” to include election administration AND election judicial actions.

“18. The State’s 100 county boards of elections also undertake executive functions, including the primary duty of administering elections on the county level. Among other duties, county boards are authorized,,,,”

What is stated by Plaintiff is technically correct, however, there are two issues with this complaint. Firstly, in apparently quoting from GS163-33, Plaintiff is significantly paraphrasing the content, BUT, more importantly, Plaintiff skips over duties of the County Boards that are clearly judicial in nature, for example:

§ 163-82.18. Appeal from denial of registration

§ 163-86. Hearing on challenge

Article 11B Challenge to Candidacy

All of these statutes are lengthy and won’t be repeated here. But the essence is that County Boards normally are the first to hold hearings on these challenges, following rules set down by the State Board, and appeals to some of these are to the State Board.

All of this is clearly judicial in nature, not “administrative”.

“19. The North Carolina Supreme Court has held that these powers are clearly executive. Cooper I, 370 N.C. at 415. (“The Bipartisan State Board established by Session Law 2017-6...”

Denied. The opinion quoted here is of a different Session Law than the one currently in dispute. Intervenor believes that the State Board is sufficiently different as to require a new analysis, and the majority opinion in McCrory (which is used as the basis of the Cooper I opinion) which Plaintiff cites here, also states that these questions must be examined “on a case by case basis” (see 43 below). The State Board clearly performs both administrative and judicial functions.

“B. Session Law 2023-139 Deprives the Governor of Any Control of the State Board of Elections”

“20. Before it was amended by Session Law 2023-139, Section 163-19 provided that the State Board of Elections shall consist of five members, no more than three of whom may be from the same political party. Those five members were all appointed by the Governor from a total of eight nominees, with four names submitted by each state party chair of the two largest political parties in the State.”

Admitted. However, Intervenor alleges that in the law still in force, the Governor has no real ‘appointment’ power.

To paraphrase GS163-19(b):

The Governor shall reject one person from the list of four submitted by the chair of one major political party, and two from the list of four submitted by the chair of the other major political party, and he SHALL ‘appoint’ the remaining persons. The word ‘appoint’ (*Cambridge English Dictionary: APPOINT meaning: 1. to choose someone officially for a job or responsibility*) implies the ability to select, but here...

a) The Governor’s sole (minimal) ability is to reject one of the persons submitted by one party chair, and to reject two of the persons submitted by the other. The persons submitted by the party chairs may have extreme views (in any direction) but the Governor SHALL appoint those remaining after he has eliminated three of the eight.

b) Consequently, one party chair has effectively appointed the majority of the State Board, since the Governor SHALL ‘appoint’ three people from that party chair’s list.

c) Out of more than 4 million voters registered with the two major

political parties, the Governor has to “appoint” five people out of a mere eight submitted by the party chairs. Once “appointed” the Governor has no further control over the Board, he can remove a member only for cause.

d) Furthermore, neither political parties nor the chairs thereof, are mentioned in the North Carolina Constitution, and should not be granted such extraordinary powers as to effectively control the State Board of Elections. The political party chairs have NOT been elected by the people.

e) Plaintiff (nor any previous Governor since the political party chair wording was inserted into the statute) has not objected to this, but, in fact, asks that it be re-instated, as is.

This argument by Plaintiff also totally ignores the rights of the people under the 14th Amendment to the United States Constitution (equal protection under the laws). To have the state’s elections run by members of one party, to the exclusion of the other parties and of unaffiliated voters, generates at least the appearance, if not the reality, of preferential treatment of the Governor’s party’s candidates.

Session Law 2023-139 corrects this error by returning appointment power to entities (the majority AND minority leaders of the Senate and House of Representatives) which HAVE been elected by the people, and removes any constraint on who to appoint, and this includes potentially appointing unaffiliated voters.

20. Admitted.

“21. A five member State Board ensures that barring a recusal or absence, the State Board will not be deadlocked and unable to act when it needs to execute the laws.”

Technically correct, however, the implication is that a board with an even number of members will NOT be able to act.

The Federal Election Commission functions just fine with three members from each political party. Similarly, the Illinois State Board of Elections functions with eight members, the New York State Board of Elections with four, the Wisconsin Elections Commission with six (not an exhaustive list).

The point behind having an equal number of members of each party, is that no party shall dominate the conduct of elections, that any decision needed shall be a compromise that both can agree on.

In any case, the Constitution (Article III, Section 5(10)), permits the General Assembly to configure any board however it wishes, as confirmed by at least one NC Supreme Court opinion (see 24 below).

22, Admitted.

23. Admitted.

24. “Under Section 163-19, as amended, the Governor has no appointment powers with respect to the State Board of Elections. Instead, all eight members are appointed by an act of the General Assembly as follows...”

The statement is correct, however, whether the General Assembly can do that is the subject of this current dispute. The NC Supreme Court has previously ruled on this issue:

(Taken from the majority opinion in Cooper vs Berger, 52PA17-2, p35)

“The General Assembly does, of course, have the authority pursuant to Article III, Section 5(10) of the North Carolina Constitution to specify the number of members of an executive branch commission. Moreover, the General Assembly clearly has the authority to establish qualifications for commission membership, to make certain persons ex officio members of the commission, and to mandate that differing policy preferences be reflected in the commission’s membership.¹³ Similarly, the General Assembly has the undoubted authority to prescribe the commission’s functions, powers and duties and to determine the substance of the laws and policies that the commission is called upon to execute. Finally, the General Assembly has the authority to provide the commission with a reasonable degree of independence from short-term political interference and to foster the making of independent, non- partisan decisions.”

25. Admitted.

26. Admitted.

27. Admitted.

28. Admitted.

29. Admitted.

30. This is an opinion of Plaintiff, and requires no answer.

31. Admitted.

32. Admitted.

33. Admitted.

34. Admitted.

“C. Session Law 2023-139 Prevents the Governor from Exercising His Constitutional Duty to Ensure that North Carolina’s Laws are Faithfully Executed. “

35. Defendant-Intervenor claims that pursuant to his response in (20) above, the Governor has virtually no control over the persons ‘appointed’ to the State Board, once appointed, especially as compared to the control by the state party chairs.

In addition, the State Board also has quasi-judicial functions, including investigating elected officials for campaign finance irregularities. If the Governor to exert control over these functions, as he seems to insist he should, we could have situations where the judicial functions of the board could be politically “weaponized”. Fortunately, this has not been the case to date, as the board has investigated a sitting Governor, several sitting Legislators, and a state party chair.

Since he doesn’t have any control now, this argument is moot.

36. Admitted.

37. Admitted.

However, Defendant-Intervenor claims that pursuant to his response in (20) above, the Governor has virtually no control over the persons ‘appointed’ to the State Board, once appointed, especially as compared to the control by the state party chairs. This issue (that the state party chairs effectively appoint the State Board of Elections) does not appear to have been raised before.

38. The first part of the paragraph, “recognizing that it could not legislatively override the judicial branch” is opinion and requires no answer. The remainder is admitted.

“39. The proposed constitutional amendment was rejected by 61.60% of North Carolina voters in the November 2018 election.”

Admitted but lacking context. While that constitutional amendment has similarities to Session Law 2023-139, it was presented to the voters in a biased and prejudicial manner contrary to law:

See *“GS 163-165.4 Standards for Official Ballots. ...*

(2) Present all candidates and questions in a fair and nondiscriminatory manner.”

While the Official Summary of Ballot Questions is not precisely an “official ballot”, it is an OFFICIAL SUMMARY, and should be held to the same standard.

The summary, mailed to ALL North Caroline voters, was headlined:

“Party Leaders in Legislature to Control Ethics and Elections Board Appointments; Eliminate Nonpartisan Representation on Board”

(see

https://www.sosnc.gov/static_forms/NC_Constitutional_Documents/2018/S133_Official_Explanation.pdf) and copied herein as Exhibit A.

There are additional pejorative comments in the text, e.g. “a tie on this

board could drastically restrict early voting opportunities.”

The text was approved by Attorney General Josh Stein and Secretary of State Elaine Marshall, both Democrats, at a meeting of the NC Constitutional Amendments Publication Commission on September 6, 2018. Republican Paul Coble refused to attend the meeting,

The text submitted also failed to note that its defeat would reset the State Board to the current structure of a majority effectively appointed by a state party chair.

Most voters would prefer a non-partisan conduct of elections.

Due to the biased presentation of the proposed amendment to the voters, no conclusion about the result of the vote should be considered valid in this case.

40. Opinion, to which no answer is required
41. Opinion, to which no answer is required
42. Opinion, to which no answer is required
43. Misleading and lacking in context. Plaintiff strives to take a case (McCrorry) which revolved around three very different agencies, (the Oil and Gas Commission, the Mining Commission, and the Coal Ash Management Commission.), none of which is an “independent” board like the Board of Elections. And none of these have significant judicial roles. The majority opinion in that case contains the words, “..based upon a case by case analysis of the extent..” Those words can actually be found in Plaintiff’s paragraph 44! Clearly the opinion quoted says that EACH situation has be to be analyzed by itself, and not applied as a general rule.

44. Misleading. Session Law 2023-139 only marginally impacts the Governor's current ability to 'appoint', etc.. In this case, as outlined in Defendant-Intervenor's response to 20 above, **prior to** Session Law 2023-129 the Governor's "appointment" powers are miniscule (the members of the State Board are actually persons selected by the party chairs), his 'removal' powers are slight (for cause only), and his supervisory powers are zero – the independent State Board runs things.
45. Misleading and lacking in context. Same response as 43 above.
46. Misleading again. In the case of a vacancy, prior to Session Law 2023-139, the Governor SHALL appoint one of the three persons nominated by the appropriate state party chair. Again, the Governor currently has little choice.
47. Misleading again, to use the three commissions at issue in McCrory. The "independent" agency that runs our elections must be free from political influence, especially since it exercises judicial powers which can affect an elected official, and in the past has done, even with a sitting Governor, long-term legislators and a party chair.
48. Misleading again, to use the three commissions at issue in McCrory. The "independent" agency that runs our elections must be free from political influence, especially since it exercises judicial powers which can affect an elected official. (deliberately repeated, since the issue is the same)
49. Prior to Session Law 2023-139, the Governor really didn't have the ability to "appoint" the majority of the State Board compared to the party chair's over-riding selection of persons.

50. Having the Governor in charge of litigation involving the State Board has led to the infamous Collusive Settlement {20CVS8881), in which the Democratic Plaintiffs and the State Board's Democratic majority agreed to weaken election laws regarding absentee ballots. The "consent" agreement, negotiated among parties, all Democrats, specifically enjoined enforcement of a number of election laws. The Attorney-General (a Democrat) represented the State Board. This entire case is a prima facie example of the Governor NOT "taking care that the laws shall be faithfully executed". Thus it is essential that the State Board, on occasion, be able to hire independent counsel.

51. Plaintiff is repetitive, again quoting (cherry-picking, actually) McCrory, a case which is not similar, as noted in 43 above.

52. Plaintiff is repetitive, again quoting (cherry-picking, actually) McCrory, a case which is not similar, as noted in 43 above.

53. Plaintiff summarizes his prior complaints. Prior to Session Law 2023-139, the state party chairs select the majority and minority members of the State Board, the Governor merely can reject one person out of the four presented by one party chair, and two from the four presented by the other. Party chairs not elected officials, nor are they constitutionally recognized officials. If Session Law 2023-139 had said, instead, that "the Governor shall appoint those members presented by the General Assembly", he could maintain the fig leaf that he "appointed" them, but, in reality, has the same freedom in the 'appointments' as with the party chairs.

All of Plaintiff's subsequent claims are similarly based on the faulty claim that the Governor "appoints" them.

54. The State Board is an independent agency, and should not be controlled by any political party, and the execution of election laws, especially those which involve judicial matters, should be left to the independent agency. Session Law 2023-139 removes appointment power of the State Board from the party chairs, and gives it to the General Assembly, both majority AND minority leaders, to create an equally split board which will be required to reach consensus, generally via compromise among the members.

AFFIRMATIVE DEFENSE

1. Plaintiff claims that Session Law 2023-139 deprives him of any control over the State Board of Elections. Intervenor-Defendant claims that currently Plaintiff has so little control as to be meaningless, that the state party chairs exercise effective control, despite having no constitutional nor legislative standing. Session Law 2023-139 removes the party chairs from their unconstitutional role.
2. Plaintiff claims that previous rulings confer the right to have the State Board of Elections follow his policy views and priorities. Intervenor-Defendant claims that elections do NOT have 'policies' but the State Board is required to follow election laws. In any case, Plaintiff has no such effective right now, as the State Board follows the 'policy views' of the majority state party chair, who selected the majority members.
3. Prior Supreme Court rulings have acknowledged the right of the general Assembly to configure boards and commissions in any way they choose, as noted in 24 above.
4. Plaintiff's claims that the voters have previously defeated a constitutional amendment identical to Session Law 2203-139 is not valid because the law is not the same as the ballot question, but, more importantly, was presented to the voters in the Official Summary in a biased manner.

PRAYER FOR RELIEF

To the extent that Plaintiff's Prayer for Relief requires a response, Intervenor-Defendant denies any such claims or facts or allegations and ask that the Court deny any request for injunctive relief and declare that these North Carolina laws in question are constitutional, valid and enforceable

For all of the above reasons, Defendant-Intervenor requests that Plaintiff's complaint be dismissed with prejudice.

RESPECTFULLY SUBMITTED,

this the 20th day of December, 2023

MARTIN ANDREW OAKES, pro se

Defendant-Intervenor
8057 Lucky Creek Lane
Denver, NC 28037
704-277-3226
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EXHIBIT A

Official Explanation
(Session Law 2018-133)
Question as it will appear on the ballot:

For Against
Constitutional amendment to
establish an eight-member
Bipartisan Board of Ethics
and Elections Enforcement in
the Constitution to administer
ethics and elections law.

Party Leaders in Legislature to Control Ethics and Elections Board Appointments; Eliminate Nonpartisan Representation on Board

Today, North Carolina has a 9-member Bipartisan Board of Ethics and Elections to administer ethics and elections law. The Governor appoints 8 of 9 members of this board from nominees provided by the 2 largest political parties. The Governor appoints the 9th member, who is not a member of a political party, from nominations provided by the other 8 members.

The Legislature passed a law in 2017 establishing an 8-member board to administer elections, ethics, and lobbying laws. The North Carolina Supreme Court struck that law down as unconstitutional because it took executive authority from the Governor. The 2017 law also lacked representation of unaffiliated voters.

This proposed amendment would overturn that Supreme Court decision. It would reduce the current board from 9 members to 8 by removing the only member who represents unaffiliated voters.

If the amendment passes, majority and minority political party leaders in the Legislature would nominate the potential members of the board. There is an argument that nominated members could include members of the Legislature itself. The Governor then would have to choose the 8 members from the finalists the legislative leaders selected. This process would likely create a board of 4 Democrats and 4 Republicans. If the amendment passes, there would be no 9th nonpartisan member.

Removing the 9th board member may result in a 4-4 partisan deadlock vote. Under current law, a tie on this board could drastically restrict early voting opportunities.

The board's responsibilities would include enforcing ethics and elections laws, which includes lobbying, campaign finance, and early voting, among other things. So, the board would oversee the legislative leaders and the Governor who picked them.

If this Amendment passes, it would be only the 2nd board authorized in our constitution. The other is the State Board of Education.

This is just a short summary of the amendment. To see the actual amendment before voting on it, go to: <https://tinyurl.com/ncsos133>.

Adopted September 6, 2018, by the NC Constitutional Amendments Publication Commission.

Elaine F. Marshall, Secretary of State, Commission Chair
Josh Stein, Attorney General, Member
Paul Y. Coble, Legislative Services Officer, Member

CERTIFICATE OF SERVICE

I hereby certify that the foregoing INTERVENOR’S ANSWER has been served on all parties through the eCourts Portal, as well as by email to and addressed as follows:

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This the 20th day of December, 2023

/s/ MARTIN ANDREW OAKES. Pro se