12309

No.

IN THE SUPREME COURT OF THE STATE OF MONTANA

THE STATE OF MONTANA, ex rel.
WILLIAM F. CASHMORE, M.D., and
STANLEY C. BURGER,

Relators,

vs.

FORREST H. ANDERSON, as Governor
of the State of Montana,

Respondent.

BRIEF OF INTERVENORS DAVE M. MANNING, CLYDE HAWKS, CARL M. SMITH, WALTER HOPE, JESS J. BLANKENSHIP and HERBERT J. KLINDT.

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INDEX

CONSTITUTIONAL PROVISIONS CITED

MONTANA CASES AND STATUTES CITED

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF MONTANA

THE STATE OF MONTANA, ex rel. WILLIAM F. CASHMORE, M.D., and STANLEY C. BURGER, Relators, vs. FORREST H. ANDERSON, as Governor of the State of Montana, Respondent.	No. 12309 BRIEF OF INTERVENORS

* * * * *

Intervenors Dave M. Manning, Clyde Hawks, Carl M. Smith, Walter Hope, Jess J. Blankenship and Herbert J. Klindt, pursuant to the order herein duly entered June 28, 1972, hereby submit the following brief:

Forward

The instant proceeding poses a simple question. The answer to that question may be more easily reached than all of the clamor surrounding it might indicate.

Beyond question a Constitutional Convention met and submitted a proposed Constitution to the electors "for their ratification or rejection at an election appointed by the Convention for that purpose", pursuant to Article XIX, Section 8 of the Constitution of Montana. The election was held June 6, 1972. It was held as a special election at the same time as but separate from the regular primary election.

The question posed by this lawsuit is: "Was the Constitution approved by a majority of the electors voting at the election, as required by the above Article XIX, Section 8?" If the question were to be answered in the affirmative, the new Constitution would become the organic law of Montana. It is clear that this is not

the case.

The proposal failed to obtain the restrictive majority which our Constitution requires. Therefore, it was rejected by the electors.

Argument

It is understandable that in a matter of so much notoriety as the enactment of a new Constitution, the zeal of those who espouse the cause has led them to overlook the legal principles involved. There is a veritable flood of adjudicated cases. Their distinctions are, however, about as numerous as they are, as a cursory reading of the often cited annotation at 131 A.L.R. 1383 will disclose.

There are those who will cite the Montana bond cases as authority for the proposition that the vote on June 6 was adequate. Nothing could be less accurate.

The initial bond case in Montana was Tinkel v. Griffin, (1902) 68 P. 859, 26 Mont. 426. In that case a bond election was had at the same time as a general election, just as the election relative to the Constitution was held June 6, 1972, at the same time as the regular primary election. In Tinkel the Court said:

> "It appears that the highest number of votes cast for any office voted upon at the election was 2,400, that 1,000 were cast in favor of the issuance of the bonds, and that 462 were cast against it. It thus clearly appears, counsel say, that the proposition did not receive a majority of the electors voting, within the meaning of section 5, art. 13, of the constitution. It will be observed that the requirement is that the approval must be by a majority of the electors of the county voting, not at a general election, but at an election to be provided by law. As we have seen, such an election has been provided by law to be held at any time it may be deemed necessary by the board of commissioners. It happens, also, that the manner of holding it is the same as that prescribed for general elections. Thus it may, with perfect propriety, be held at the same time at which a general election is held; but the fact that this is the case does not require a different standard

> of estimating the majority necessary from that which would govern if the election is held on a different day. The evident meaning of the constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at an election,' etc., clearly means a majority of those who vote, and not a majority of all the electors of the country, or of those who vote upon any other issue at the same or some other time."

The Court, again in Morse v. Granite County, (1911) 119 P. 286, 44 Mont. 78, cited Tinkel in concluding that a subsequent legislative enactment did not enlarge on the constitutional provision cited in Tinkel.

The Tinkel case has been often cited in other jurisdictions. It is noteworthy that those courts give to it the meaning which we ascribe to it here, namely - it stands for the proposition that the constitutional language limits the votes upon which the majority is to be based, to the votes cast (or the electors voting at) the particular election which is under consideration - not those of some other election held on the same day. A.L.R. so cites the Tinkel case in 131 A.L.R. at page 1394.

A discussion of some of the cases citing Tinkel may be informative.

In Board of Education v. Woodworth, (1923, Okla.) 214 P. 1077, the issue was the success or failure of a bond election. The constitutional mandate was "three-fifths of the voters thereof, voting at an election, to be held for that purpose". There were ballots cast for an excessive levy, a question voted upon at the same time the bond issue was being voted on. After throwing out the spoiled and unvoted ballots, the Court found, as in the Tinkel case, that the excessive levy election was a separate election. The same may be said of the primary election of June 6.

In Wilson v. Wasco County, (1917, Ore.) 163 P. 317, the

Court cited the Tinkel case. The election in question was a bond election. Although authorized to be held at a general or special election, the bond issue was decided at the time of a general election. The question was whether the "majority of the voters voting at such an election" required by the constitution, would raise the need for bond votes to a majority of the votes cast for governor. The bond election was a separate election. So held the Oregon Court.

The North Dakota Court in State v. Blaisdell, (1909, N.D.) 119 N.W. 360, also cited our Tinkel case. That North Dakota case involved the vote for creation of a county. The constitutional provision was:

> "'All changes in the boundaries of organized counties, before taking effect, shall be submitted to the electors of the county or counties to be affected thereby at a general election and be adopted by a majority of all the legal votes cast in each county at such election.'"

Again, the Court held that, although the vote on the change of county boundaries is cast at a general election, it is in a strictly legal sense the holding of a "separate election". The Court called particular attention to the fact that the constitutional reference was to the "votes cast", as distinguished from our constitutional word "electors".

Through the whole strained decision in the Blaisdell case it turns on the very point we make here, that is that there were two elections held. A count of the electors voting at one election did not fix the proportion applicable to the other. Further, by the North Dakota Constitution, the measure is the "majority of the legal votes cast" - not the "majority of the electors voting" as in the Montana instance. This latter distinction is one made by the cited case of Gillespie v. Palmer, (1866) 20 Wis. 544, in

which it is pointed out that the word "votes" is not as broad as the word "voters". Thus, where the restrictive majority is from the "votes" cast, the controlling group is a part of a lesser group than when it is from a "majority of the electors voting".

We recognize that many cases have held that where, as here, there was an option to hold the election as a special one or with a general election, a majority of all the votes cast at the general or special election was needed to fulfill the constitutional requirement. (See 131 A.L.R. 1404). We believe that such holdings, although highly favorable to the result we seek, are at variance with the Tinkel case and we do not so contend.

The legislature, in fixing the ground rules for the election on the Constitution was even more restrictive than is the Montana Constitution. Section 17, Chapter 296 of the Session Laws of 1971, dealing with the subject, reads in part:

> "Section 17. (1) The revision or alteration of, or the amendments to the constitution, adopted by the convention, shall be submitted to the electors of this state for ratification or rejection, at an election appointed by the convention for that purpose, not less than two (2) months nor more than six (6) months after the adjournment of the convention.
>
> * * *
>
> "(9) If a majority of the electors voting at the special election shall vote for the proposals of the convention the governor shall by his proclamation declare the proposals to have been adopted by the people of Montana. The new constitutional provisions shall take effect as provided therein, or as provided in a schedule of transitional provisions attached thereto."

So much for the Tinkel case. It accomplished for its facts exactly what our legislature accomplished when it enacted Section 17 (9) of the Session Laws of 1971 (supra). It interpreted "majority of the electors" as the "majority of the electors voting at the special election".

We do not understand Tinkel and the bond cases to be adverse to the position we take in this matter. They are not relevant. The language in the bond cases which is urged in favor of this Constitution is, at best, dicta. If perchance, however, Tinkel is thought to be against us so that, in the light of cases herein cited, Montana would stand alone because of the Tinkel case, then we call the Court's attention to its well chosen words in State ex rel. Peery v. District Court, (1965) 400 P.2d 648, 145 Mont. 287, where, in the matter of stare decisis, the Court said:

> "Then in State ex rel. Sparling v. Hitsman, 99 Mont. 521, 44 P.2d 747, this appears:
>
> "'We realize the force and the wisdom of the rule of stare decisis. We are not unmindful of the fact that principles of law should be positively and definitely settled in order that courts, lawyers, and, above all, citizens may have some assurance that important legal principle involving their highest interest shall not be changed from day to day, with the resultant disorders that of necessity must accrue from such changes. We are mindful, however, of the fact, as stated by Mr. Justice Brandeis in a dissenting opinion in the case of DiSanto v. Comm. of Pennsylvania, 273 U.S. 34, 47 S.Ct. 267, 270, 71 L.Ed. 524, that 'in the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken.' The rule of stare decisis will not prevail where it is demonstrably made to appear that the construction placed upon the constitutional provision in the former decision is manifestly wrong.'"

A majority of the electors voting at the special election did not vote for the new Constitution.

Article XIX, Section 8 of the Montana Constitution, in pertinant part, concerned the proposed Constitution, reads:

> "--and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect."

At the outset, we direct attention to the fact that, so far as we can determine, the time has passed when the machinery

may be set in motion for a recount under Chapter 41, Title 23, R.C.M. 47. There is not, however, an absence of evidence as to the number "of the electors voting" at the special election. The special canvassing board, consisting of the Governor, State Treasurer and Secretary of State, has certified to that fact. The certificate dated June 20, 1972, over signature of each of these officers signifies that the total number of electors voting was 237,600. (Exhibit "C" of Application for Declaratory Judgment filed by relator Cashmore). In the absence of a showing to the contrary, it will be presumed that these officers certified to the proper figure (Section 93-1301-7 (15), R.C.M. 47).

The same presumption supports the accuracy of the county canvass of votes which must be done per Chapter 40 of Title 23, R.C.M. 47 and particularly Section 23-4002 thereof.

Of interest, and bearing on the issues of this case, in part because of its view of a constitutional provision similar to our Article XIX, Section 8, is the Oklahoma case of State ex rel. Williamson v. State Election Board et al, (1943, Okla.) 135 P.2d 982. The constitutional provision, Section 1, Article 24 provided:

> "If a majority of all the electors voting at such election shall vote in favor of any amendment * * *".

The State Election Board certified as to the total number of electors voting. It also certified as to the number of votes cast for the proposed amendment and therefrom concluded that it failed. Strangely, the Attorney General in attacking the result did not suggest, nor did the Court, that the majority of electors meant anything but the majority voting at the election on all issues. He did, however, attack the results in an effort to show that the Election Board's certification as to the total votes cast was wrong. The Court said:

"When that Board has so acted, in good faith, and correctly, upon the records and county certificates before it, without fraud or mistake on the part of that Board, then there is no escape from these conclusions: (1) That the law intends a time and manner of bringing finality to the result of an election such as this; (2) That this court has no power to check the result of the election in any county or precinct and then order the State Election Board to change its certified result of such an election to a different result which we conclude it should certify; (3) That if the power so to do is to be conferred on this court or upon any state official or department of government it must be done by an enactment expressly providing therefor."

One of the obvious reasons for the diversity in the Court decisions on the question of the number of votes needed to enact a measure when a Constitution or a statute imposes a restriction - as ours does - is the variety in the constitutional language used. The courts, of course, recognize that these differences often arise by reason of the seriousness and the magnitude of the issue involved. In our own State that factor should alone be determinative of this case.

Surely, the exchange of one entire constitution for a new and different one is a vote of greatest magnitude. To the entire state it surpasses in importance amendments to the Constitution. No vote could be of greater concern. It is understandable that the framers of our Constitution should impose the greatest restriction upon the majority which should control this final election. They provided against its adoption unless "approved by a majority of the electorsvoting at the election", (Article XIX, Section 8).

It is clear that they thought more lightly of amendments. The wording in the next succeeding section of the Constitution dealing with amendments reads:

"--and at said election the said amendment or

> amendments shall be submitted to the qualified electors of the state for their approval or rejection and such as are approved by a majority of those voting thereon shall become part of the constitution." (emphasis supplied) (Montana Constitution, Article XIX, Section 9).

The provision in Section 9 is precisely the interpretation that the proponents of this new document contend for Section 8. Manifestly the framers of the Constitution in 1889 contemplated that more than one amendment might be voted on and, accordingly, provided that only those voting thereon need be counted in determining the majority. For the change of constitutions, however, they might have used the same words, they did not do so. They used words to properly restrict the majority as in their wisdom, they saw fit to do.

It is noteworthy, too, that the framers of the Constitution had before them the Enabling Act adopted February 22, 1889, (25 Stat. 676). In Section 5 of that Act, dealing with the adoption of the Sioux Falls Constitution, the words, less restrictive than those we have under consideration were:

> "--and if a majority of all votes cast on this question shall be for * * *"

The wording selected by the Constitutional Convention of 1889 in this regard cannot be said to have been chosen on the spur of the moment and by accident. It was a part of the Constitution proposed in 1884. The delegates had five years time within which to reconsider it, if they had seen fit to do so.

It cannot be argued that the wording of Section 8 was chosen by accident. To give meaning to that Section as contradistinguished from Section 9 it must be interpreted as we contend - there is no other way.

The cases covering the situation now before this Court are so numerous that we shall not attempt to cite all of them nor

to distinguish one from the other, except in a general way. Suffice it to say, although we can find cases, a part of whose language may argue against our position, we find not a single case seemingly against us, that cannot be distinguished.

Perhaps the strongest case against us is the New Mexico case of State v. State Canvassing Board, (1968, N.M.) 437 P.2d 143. A reading of that case indicates the horrible status into which the State of New Mexico had fallen and, in a sense, forgives the Court for its efforts at judicial legislation. Even that New Mexico Court might have found, as did this Court in the Tinkel case (supra), that the election for the constitutional amendment was a separate election. That, in a sense, is just what the New Mexico Court did. It was working with and considering amendments - not the adoption of a new constitution. It was working with a situation where three-fourths, not just a majority, was needed to enact the measure, and it was working with an otherwise insoluable problem on which the people of New Mexico had spoken ten successive times. To those extents, even the New Mexico case is distinguishable.

So far as meeting the factual and legal situation squarely is concerned, we have found no case more applicable to the present situation than the 1960 case of Stoliker v. Waite, (Mich.) 101 N.W.2d 299. The issue was the call of a constitutional convention.

The Constitution there had language requiring a vote of the "majority of electors voting at such election" as distinguished from the constitutional language applicable to adopting amendments, that was, "a majority of the electors voting thereon". The Michigan case is a "Black Horse" case with our situation now.

Justice Smith, speaking for the Court, in Michigan, among other things said:

"In short, we are now asked to hold that the people did not clearly understand what they were thus doing. * * * We are to hold that when they required to pass a constitutional amendment a majority of the votes cast thereon, and when they required to call a constitutional convention a majority of the votes cast at such election, they were actually prescribing no difference between the two votes but were in fact merely calling for the same vote on each. All of this we decline to do. The understanding of the people is not so meager. * * * From the language used it is clear that they meant to distinguish between the votes required for a simple amendment and those required to call a constitutional convention and our holding is that they did so distinguish. (emphasis supplied)

"We have thus relied upon the contemporaneous understanding of the people. Their understanding is as relevant today as it was a half-century ago and it has direct applicability to the situation before us. When the people went to the polls in 1958 to vote upon the question of a constitutional convention, they went with the contemporaneous understanding that a failure to vote upon the constitutional question would have the practical effect of a vote in the negative thereon.

* * *

"Many conceive the constitutional requirement hereinabove discussed to be an impediment to the economic and social well being of this State. We are urged, as though we were a constitutional convention faced with a choice of alternatives, to choose that one the more beneficial to our people. All of this misconceives the problem presented to this Court. We are not a constitutional convention. We have before us for consideration a Constitution already adopted, the words of which are clear and clearly stated. We have no choice of alternatives presented to us. The people themselves made the choice, now urged upon us, back in 1908. The argument that their choice is, a half-century later, shown to have been unduly restrictive of constitutional change does not constitute this Court into a constitutional convention, empowered somehow at this date, to make a wiser choice."

Arguendo--: The electors in the State of Montana went to the polls June 6, 1972, with the contemporaneous understanding identical with that of the Michigan voters indicated by Justice Smith. If they had read the Constitution, they could have no other understanding. To bolster that understanding, Community Services Programs of the Higher Education Act of 1965, (a

Federally funded program), together with a group of Montana citizens, financed and caused a supplement to be included with many leading Montana newspapers before the election. (See Affidavit of R. W. Harris herein on file). That supplement was over the endorsement of at least four of the elected delegates to the Constitutional Convention. They are Mrs. Thomas Payne (Katie Payne), Mr. Fred Martin (Fred M. Martin), Margaret S. Warden and Dr. Richard B. Roeder (Richard B. Roeder), all as appears from the supplement itself.

To the electors, the supplement conveyed precisely the interpretation of this Michigan Court. It said:

> "There is also a special consideration peculiar to the Montana situation. Article XIX, Section 8 of the 1889 Constitution requires that any item the convention submits to the people can be adopted only by a majority of the electors voting at the election. We know that as they go down the ballot voters fail to vote in increasing numbers on each subsequent item. Consequently, the likelihood of a proposition failing for the lack of a majority of those voting in the election increases with the addition of each item on the ballot." (emphasis supplied)

The supplement closed with paragraphs containing the following words, directed to the voter:

> "If the proposed Constitution fails, your vote on the other measures--the make-up of the legislature, gambling, and the death penalty--will not count because they automatically fail if the proposed Constitution is rejected. Second, your vote on these three questions will not count unless each is decided by a majority of those voting in the election. If you fail to vote on any item, you will aid in its defeat." (emphasis supplied)

The ballot on which all electors at the special election voted contained an admonition to the voter outlined in black for emphasis. It read:

> "THE PROPOSED CONSTITUTION WILL INCLUDE A BI-CAMERAL (2 HOUSES) LEGISLATURE UNLESS A MAJORITY OF THOSE VOTING IN THIS ELECTION VOTE FOR A UNI-CAMERAL (1 HOUSE) LEGISLATURE IN ISSUE 2."

That admonition can only be interpreted to mean - "each issue which is presently on the ballot can be enacted only if it receives the affirmative vote of a majority of those voting in the election".

These were the bases on which the people cast their ballots June 6, 1972. Their response was the defeat of the proposed Constitution.

Interesting are some of the decisions - of ours and sister States:

Wyoming is cited as being a state whose Court imposes a most rigid limitation on the majority which may enact an issue with which the constitutional limitation is concerned. The first case of consequence was State ex rel. Blair v. Brooks, (1909, Wyo.) 99 P. 874. In that case, involving the amendment to the Constitution, the controlling clause required "a majority of the electors". The Court determined that an elector is one who is qualified and who, with that qualification, votes at the election in question (not necessarily on the involved proposition). The Court said:

> "The language is broader in meaning than a mere majority of the electors who actually vote upon the proposition. Neither residence of the elector nor failure to vote can militate against this proposition. The word 'elector' is generic. It includes, not only those who vote, but those who are qualified, yet fail to exercise the right of franchise. To hold otherwise would, in effect, give to the word 'electors' a narrower and more restricted meaning than that given to it in the Constitution.
>
> "* * * There were more than half of the electors voting at the November, 1908, election who failed to indicate their desires or wishes upon the adoption of the proposed amendment. It was the expression of the elector's wish upon the question which the law called for--a positive expression in a particular manner--and not the absence of such

> expression which was authorized to be recorded. To ratify is to affirm, and the Constitution requires in order to ratify that there be an affirmative expression of a majority of the electors to whom the question is submitted, the withholding of which is not sufficient. The proposed amendment was submitted to the electors of the state, and it required a majority of those electors to ratify it. As it appears that the number of electors who voted at the election and in favor of ratification of the amendment were less than a majority of the electors who voted at the election, it follows that the amendment was not ratified. The demurrer should be sustained."

That case has been affirmed many times by the Wyoming Court, the last of which was in 1970, State ex rel. White v. Hathaway, (Wyo.) 478 P.2d 56.

Strangely, Blair v. Brooks cited the Idaho case of Green v. State Board of Canvassers, (1896, Ida.) 47 P. 259, with the comment that Wyoming would not follow the Idaho Court. One might opine that the ruling of the Idaho Court would be adverse to the position of the relator in the case at bar.

Not so, the Idaho case concerned an amendment to its Constitution. The effective constitutional provision was Article 20, Section 1.

> "--and if a majority of the electors shall ratify the same, such amendment * * * shall become a part of this constitution." (emphasis supplied)

The Court held that this language meant a majority of the electors voting on the proposition. However, the case is precisely in point for us now. The Idaho Court called attention to a following, differently worded Section (Section 3) of the same Article of its Constitution dealing with the calling of a Constitutional Convention which provides, much as does the Montana provision under consideration, "if a majority of all the electors voting at said election shall have voted for a Convention"--

The Court contrasted the two Sections and said:

"--So is also section 3 of article 20, which provides that when it shall be deemed necessary to call a convention to revise or amend the constitution, which shall be called if a majority of all the electors voting at said election shall have voted for a convention, etc. The language of these sections is clear and unmistakable. It needs no construction, and it is only necessary to count the ballots cast at any such election and those voting for the proposition, to ascertain if a majority of all those voting at said election were in favor of the proposition."

The Supreme Court of Utah in a decision dealing with an amendment to the Constitution of that State, placed the same emphasis on the use of the word "thereon" in Section 9, and its absence from Section 8 as we do here. Complaint was made that a majority of all the electors voting at the general election had not voted for the proposed amendment. In Lee v. State, (1962, Utah) 367 P.2d 861, the Court said:

"As to the first ground, suffice it to say that Section 1 of Article XXIII clearly provides that if a majority of the electors voting thereon, that is, on the proposed amendments, favor them, they shall become a part of our Constitution. It does not say that there must be approval by a majority of the electors casting votes in the general election to enable passage of a constitutional amendment submitted by a joint resolution of the Legislature."

In the A.L.R. annotation, supra (131 A.L.R. 1382, 1418), reference is made to a situation "where two or more questions (are) submitted together". The case of City of Sacramento v. Goddard, (1926, Cal.) 252 P. 329 is cited for the view that where twelve propositions were submitted at a special election, each proposition was deemed carried if it received the required two-thirds of the votes cast for that proposition. The City Charter provided:

"If two-thirds of the electors so voting at such election shall vote in favor..." (emphasis supplied)

The California Court concluded that the words "so voting" referred to the vote made on each proposition standing alone. The Court, however, confirmed our view of language very like the Montana

Statute when it said:

> "The Legislature, however, by a subsequent enactment (Stats. 1901, p.27), authorized the submission of more than one proposition or purpose at the same election, but provided that it shall 'require the votes of two-thirds of all the voters voting at such special election to authorize the issuance of the bonds.' It is conceded here that, if the sufficiency of the vote on the filtration bond issue is to be determined in accordance with the provisions of the statute, proposition No. 4 did not carry."

The California case of People ex rel. Smith v. City of Woodlake, (1940, Cal.) 106 P.2d 71, purports to summarize many California cases. Among other things, that Court said:

> "'The provision of the constitution in regard to elections like that under consideration has been quoted, and it will be observed that the words used are, 'whenever a majority of the electors voting at a general election shall so determine.' These words clearly do not indicate that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required.'" * * *
>
> "'This language plainly implies, we think, that a majority of all the electors voting at the election is necessary to carry the proposition to reorganize.'"
>
> * * *
>
> "In Howland v. Board of Supervisors, supra, relied upon by respondent, two separate and distinct elections were held, one a general election and one for the purpose of submitting a proposition to incur a bonded indebtedness. It was held that since the two elections were separate and distinct the number of votes cast in one did not affect those cast in the other."

Clearly, California agrees both with Tinkel and with our view of the present situation.

In Indiana, the Supreme Court dealing with amendments to the Constitution had language similar to our Section 8, "if a majority of said electors ratify the same". In Re Denny, (1901) Ind. 59 N.E. 359, 51 L.R.A. 722, took the strictest of views and held that the amendment must be approved by a majority measured by the vote for governor (the) candidate receiving the highest

number of votes at that election.

Conclusion

With almost complete uniformity the adjudicated cases agree that a "majority of the electors voting in the election" means just what the quoted phrase says. We do not presume upon this Court by citing cases on statutory or constitutional interpretation which can be more explicit.

Inasmuch as a majority, that is, one or more votes more than half of the total number of votes cast in the election were not cast for the proposed Constitution, the measure failed. By the ballot on which the electors voted, they were specifically advised that such would be the case. Any comment in the Tinkel case or otherwise made by this Court which may seem to be at variance with the above conclusion is, at best, obiter dictum.

These intervenors urge upon this Court that an order be made declaring that in the election held June 6, 1972, the proposed Constitution failed of passage and that any proclamation purported to have heretofore been made to the contrary is a nullity.

Respectfully submitted this 12th day of July, 1972.

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By

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Intervenors Dave M. Manning, Clyde Hawks, Carl M. Smith, Walter Hope, Jess J. Blankenship and Herbert J. Klindt upon counsel of record by mailing a true copy thereof this date in an envelope with postage prepaid addressed to:

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