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IN THE SUPREME COURT OF THE STATE OF MONTANA

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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.

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BRIEF OF ATTORNEY GENERAL

STATE
PUBLISHING CO.
HELENA, MONT.

I N D E X

AUTHORITIES

STATE PUBLISHING CO. HELENA, MONT.

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I.

STATEMENT OF THE CASE

On February 21, 1969, the Forty-Second Legislative Assembly passed Chapter 65, Laws of 1969 providing for an election in November, 1970 to determine whether a constitutional convention should be called.

On November 3, 1970, the referendum was submitted to the electors, was adopted and proclaimed to be in full force and effect.

In accordance with the referendum, the Legislative Assembly adopted chapter 1, Extraordinary Seccion, Laws of 1971 calling a convention and outlining its powers.

The convention met and prepared for submission a proposed Constitution and three alternative proposals. On March 4, 1972 the convention passed Resolution No. 11 fixing the date of a separate election for June 6, 1972, and outlining procedures for conduct of the election.

On June 6, 1972, at the separate election, the proposed constitution and three alternate provisions were sub-

mitted to the electors of the State. A majority of the electors voting at the election voted in favor of the proposed constitution.

On June 15, 1972 the board of canvassers, consisting of the Secretary of State of the State of Montana, Governor of the State of Montana, and Treasurer of the State of Montana met to canvass the votes. On June 20, 1972, the board issued its certificate showing 116,415 electors voting for the proposed constitution and 113,883 electors voting against the proposed constitution. The certificate discloses that the number of ballots issued plus the number of absentee ballots issued and returned, totaled 237,600. See Exhibit "A", Answer of Attorney General.

On June 20, 1972, respondent Forrest H. Anderson, Governor of Montana issued a proclamation proclaiming:

> "that a majority of all votes cast at said election for and against the proposed Constitution were in favor of said proposed Constitution and that, therefore, the said proposed Constitution will be in full force and effect at the time and in the manner provided in the proposed Constitution."

On June 20, 1972 relators Cashmore and Burger filed separate actions petitioning this court to assume original jurisdiction, and to declare that the proposed Constitution had not received a majority as required by Section 8, Article XIX, Constitution of Montana.

On June 20, 1972, this court ordered the actions consolidated and ordered an adversary hearing.

There is no dispute in the facts except for that arising from the phrase, "Total number of electors voting," set forth in the canvass certificate. Relators erroneously claim that this is the total number of electors actually casting ballots. Respondents have demonstrated that this figure, instead, represents the number of ballots issued

plus the absentee ballots issued and returned.

The number of ballots actually cast in the separate election is unknown, but clearly it is less than the number issued, 237,600.

II.

QUESTIONS PRESENTED

(1. Whether prior Montana decisions construing the phrase "majority of the electors voting", to mean a majority of the number of votes cast on the individual issue in question, are controlling here and should be followed by this court in this case.

(2. If not, whether the phrase "majority of electors voting" means a majority of the number of electors voting on all issues in the separate election, in which case:

A. Relators must fail, and the Constitution be held to have been adopted, since there is no evidence before the court that such a majority did not vote "for" the Constitution, and consequently nothing which validly can impeach the Governor's proclamation.

or

B. Whether a state-wide precinct by precinct recount would have to be accomplished, which conceivably could result in confirming that such majority did vote "for" the Constitution.

or

(3. Whether the phrase "majority of the electors voting", means, as many courts hold, a majority of the largest total number of electors voting

for and against any issue on the ballot, which would, again, uphold the 1972 Constitution.

(4. Whether a federal question, i.e. equal protection of the laws, is raised, should the court apply a standard different from that set forth in paragraph (1. hereinabove.

III.

ARGUMENT

A. THE 1972 CONSTITUTION WAS CLEARLY ADOPTED UNDER PRIOR DECISIONS OF THIS COURT, HOLDING THAT THE PHRASE "A MAJORITY OF THE ELECTORS VOTING AT THE ELECTION" IS DETERMINED BY COUNTING THE VOTES CAST ON THE PROPOSITION IN ISSUE.

Section 8, Article XIX, Constitution of Montana provides for a separate election where a revision to the Constitution is proposed by a convention. That section provides:

> "...unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect." Section 8, Article XIX, supra.

The issue before the court is whether the phrase quoted requires a majority of all those electors voting in the separate election, or a majority of votes cast for and against the proposed constitution.

Respondent contends that the issue is stare decisis, and relies on this court's prior decisions. We urge the court to reaffirm and apply its decision in Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859 (1902).

There, the electors of Flathead County voted on a bond issue for construction of a courthouse and jail. The question was submitted at a general election in which the highest vote cast for any office was 2,400. The bond

issue received 1,000 in favor and 462 against. Tinkel attempted to enjoin issuance of the bonds because less than a majority of those voting voted for issuance.

The court held that the bond election was a separate election and the votes cast in the general election had no bearing on the bond issue. In dictum, Mr. Justice Brantley stated that the phrase "majority of the electors thereof voting at an election" meant those actually voting on the proposition in issue.

> "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 county, or of those who vote upon any other issue, at the same or some other time." Tinkel v. Griffin, supra., p. 431. (emphasis supplied)

The philosophy of the court was explained in view of the irreconcilable differences in other jurisdictions.

> "It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence.
>
> In a recent case the court of appeals of Kentucky, having under consideration a similar constitutional provision, said: 'It is a fundamental principle in our system of government that its affairs are controlled by the consent of the governed, and, to that end, it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active, and express their opinion, who direct the affairs of the government, not those who are silent and express no opinion in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted, the same as the

> one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose.' (Montgomery County Fiscal Court v. Trimble, 47 S.W. 773, 42 L.R.A. 738.)" Tinkel v. Griffin, supra., pp. 431-432.

On close examination, it can be seen that the case stands for two propositions. First, that a separate election may be held concurrently with a general election without destroying its separate identity. Second, that in an election requiring a majority of electors voting to pass an issue, the majority is determined by counting those voting on the issue itself.

Section 5, Article XIII, supra., uses the phrase, "a majority of the electors thereof, voting". Section 8, Article XIX, supra., uses the phrase "a majority of the electors voting." The word thereof refers back to the word county. The two phrases can be read without change in the meaning as "a majority of the electors of the county voting" and "a majority of the electors of the state voting". The language of the two sections is identical. Tinkel v. Griffin, supra., cannot be distinguished from the case at bar, on the language interpreted, and its mandate is clear.

In 1911, an argument was made to the court that Tinkel v. Griffin, supra., was changed by statutory enactment. The legislature had used the phrase "a majority of the electors of the county". The argument was made that, that required a majority of all the electors.

The court concluded that Section 5, Article XIII, supra., meant a majority of those who vote on the issue because:

> "the language employed indicated that the convention had adopted the theory that the control of public affairs must be regarded as belonging to those electors who take a sufficient interest in

them to give expression to their views at the ballot box." Morse v. Granite County, et al., 44 Mont. 78, 95, 119 Pac. 286 (1911).

A weak argument, of course, can be made that the quoted portions of Tinkel v. Griffin, supra., are dicta. Even so, the case reflects the philosophy of the court and constitution that the control of public affairs belongs to those who take sufficient interest to vote on the issue. To imply the Constitution provides that a non-voter in a bond issue is deemed to yield acquiescence, but a non-voter in an election for a proposed Constitution is deemed to vote no, when the phrase under consideration is identical, is clearly wrong.

On examining cases considering what constitutes a majority, we find seven states indicate a majority is determined by the vote on the proposition in issue, and eight states indicate that the majority is determined by the total vote cast. It should be noted that most cases construe constitutional provisions similar to Section 9, Article XIX, Constitution of Montana. Several well-reasoned cases strongly support the Tinkel decision.

In State ex rel. Witt v. State Canvassing Bd. (N.M., 1968), 437 P.2d 143, the court considered special language concerning New Mexico's voting article. The applicable language of the provision read:

"...And the provisions of this section and of section one of this article shall never be amended except upon a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state, ...shall vote for such amendment."

The court determined that "three-fourths of the electors voting in the whole state..." meant voting on the proposition.

"While aware, as already noted, that the use of different words within the same provision might

lead to a conclusion that different meanings were thereby intended, we should not lose sight of the fact that to construe 'electors voting in the whole state' to in effect mean 'all electors voting at the election' as distinguished from those voting on the particular amendment would have the effect of making the 'unamendable section' even more unamendable than would otherwise be true...

It is quite evident that to hold that three-fourths of those voting at any given election is required to amend Art. VII, Sec. 1, would give effect as having cast negative votes to those voters at the election who because of negligence, lack of interest, or some other unexplained reason failed to register their votes on the particular proposition. No logical reason for counting as opposed those who do not express their preference has been suggested. Nevertheless, this is the effect of requiring a three-fourths majority of those voting at an election whether or not they voted on the particular proposition. It would have been just as reasonable only in degree than the present contention here held to be without merit." State ex rel Witt v. State Canvassing Bd., supra., p. 153.

In re Todd, infra. reversed a line of cases in existence for 50 years to adopt the rule we urge here. In doing so, the court discussed the adoption of the Indiana constitution in which both the constitution and a separate article were voted on.

The enabling act provided that poll books were to be kept, the votes counted and a canvass made, but the election was decided on the actual votes cast for the constitution and the separate article separately.

The enabling act provided:

"If it shall appear that a majority of all the votes polled at such election were given in favor of the adoption of said constitution, it shall then become the constitution of the State of Indiana." In re Todd, 208 Ind. 168, 193 N. E. 865, 869 (1926)

On page 876, the court discussed the reasons for counting only the votes cast for and against the proposition in question. Its reasons accord fully with the reasons given by this court in Tinkel v. Griffin, supra.

Tinkel is not to be distinguished on the ground that

it should be more difficult to change a constitution than to adopt a bond issue. The people of Montana have now expressed their intention to modify the constitution of 1889 three times. In 1969, the legislature by two-thirds vote enacted legislation to submit the question of a convention to the people. Chapter 65, Laws of 1969. In 1970 the people voted for having a convention. In 1972 the people voted for the adoption of the proposed Constitution.

There is no language in the proceedings of the constitutional convention indicating the desire for a more difficult voting standard for the adoption of a new constitution. The only language showing the desire to make change difficult was in reference to the vote of the legislature. Proceedings and Debates Constitutional Convention, 1889, pp. 648-655.

We do not contend that the holding in Tinkel v. Griffin, supra., is the only way the phrase in question can be interpreted. We grant that there is some conflict in the cases. We do maintain that this approach is the most reasonable and is the law.

B. EVEN IF IT IS DETERMINED THAT A "MAJORITY OF THE ELECTORS VOTING AT THE ELECTION" MEANS A MAJORITY OF ALL ELECTORS VOTING, THE EVIDENCE IS INSUFFICIENT FOR THE COURT TO DETERMINE THE RESULT ON THE FACTS PRESENTED.

The court has before it a "Certificate of Canvass" signed by the Secretary of State and witnessed by the Governor and State Treasurer. That Certificate indicates the total vote for and against the proposed constitution and the other issues voted on. The certificate also reports the "Total number of Electors Voting" as 237,600, but this figure represents the total number of ballots

issued plus the total number of absentee ballots issued and returned, Exhibit "A", Answer of Attorney General. The number of ballots issued, of course, does not represent the number of electors voting.

To arrive at the correct number of "electors voting" requires exclusion of blank, void, unintelligible and illegal ballots cast. These ballots should be excluded because under Montana law an elector has not voted until a ballot is properly marked and delivered to the ballot box.

An elector goes through three steps in casting his ballot. The first step constitutes an "offer to vote". Section 23-3018, R.C.M. 1947, provides that an elector signs his name in the precinct register. This step is to identify the elector.

This court has held that failure to sign the precinct registry book before casting a ballot does not affect the legality of the elector's voting, if the failure is caused by the election officials, Thompson v. Chapin, 64 Mont. 376, 209 Pac. 1060 (1922). It should be further noted that if the elector's name does not appear on the registry, he may still cast his ballot on production of a registrar's certificate indicating his entitlement to vote. Section 23-3020, R.C.M. 1947.

After identification, the elector is issued a ballot and his name is placed on the poll list. Section 23-3603, R.C.M. 1947. This list is used to determine the number of ballots issued.

The second step in the electoral process is the "preparation of the ballot". Section 23-3308, R.C.M. 1947 provides the method by which an elector prepares his ballot in a primary election. There is no requirement that the

elector mark his ballot, but even after marking the ballot, the elector has not voted.

The third step, as provided for in section 23-3308(4)(a), R.C.M. 1947, indicates that the elector is to "vote the marked ballot without leaving the polling place". Respondent maintains that the final step is completed by the depositing of a validly marked ballot in the ballot box by an election judge.

This court has confronted the issue of what constitutes the act of voting a number of times. The clearest expression is found in cases interpreting absentee voting statutes. In Goodell v. Judith Basin County, et al., 70 Mont. 222, 224 Pac. 1110 (1924), it was contended that an elector must personally appear at the polls to vote and thus an absentee ballot was invalid. The court said:

> "Under this statute (Section 703, Rev. Codes 1921) and under the authorities generally, the act of voting is not completed until the ballot is deposited in the ballot box." Goodell v. Judith Basin County, et al., supra., p. 233.

In Maddox, et al., v. Board of State Canvassers, et al., 116 Mont. 217, 149 P.2d 112 (1944), a challenge was made to the absentee voting law for servicemen which allowed ballots marked prior to the closing of the polls on election day to be received by December 31. The court said:

> "Voting is done not merely by marking the ballot but by having it delivered to the election officials and deposited in the ballot box before the closing of the polls on election day."

Further that:

> "Nothing short of this delivery of the ballot to the election officials for deposit in the ballot box constitutes casting the ballot," supra., p. 115.

It is apparent from an examination of these cases and statutes, that mere issuance of a ballot to an elector does not make that person an "elector voting at the elec-

tion."

In Sawyer Stores, Inc. v. Mitchell, et al., 103 Mont. 148, 160, 62 P.2d 342 (1936), this court said:

> "The distinction between the term "ballot" and the term "vote" must be kept clearly in mind. The former (ballot) is merely the piece of paper upon which the voter gives expression to his choice. (State v. Blaisdell, 18 N.D. 31, 119 N.W. 360; Clary v. Hurst, 104 Tex. 423, 138 S.W. 566.) A vote 'is the formal expression of a will, preference, wish or choice in regard to any measure proposed, in which the person voting has an interest in common with others, either in electing a person to fill a certain situation or office, or in passing laws, rules, regulations, etc.' (Century Dictionary)
>
> Manifestly, the purpose of submitting this proposed measure to the vote of the people is to ascertain whether or not a majority of the electors are in favor of its becoming a part of the law of this state. The purposes of the ballot are: (1) to inform the voters of the nature and purposes of the measure; and (2) to afford each elector a means of expressing his approval or disapproval thereof, that is, voting thereon." supra., p. 160.

Section 23-3606, R.C.M. 1947 the method of voting by an elector states in subsection (3):

> "If a ballot contains a Constitutional amendment, or other question to be submitted to the vote of the people, he shall mark an 'X' in the applicable square indicating his vote either for or against the amendment or question."

In determining the number of electors voting at the election, a court should exclude blank ballots, void ballots, unintelligible ballots and illegal ballots from the count.

We believe it can be fairly stated that there is a common law presumption that persons who are present but do not vote acquiesce in the final outcome of an election. We further believe that to vote, an elector must do so in accordance with the law.

In considering the electors voting, blank ballots should not be counted in determining whether the proposed

constitution received a majority.

A clear majority of jurisdictions speaking to the question of whether to consider blank ballots in determining whether a proposition has received a majority of the votes cast, exclude blank ballots. Cases are compiled in 131 A.L.R. 1382, 1386-1387.

In Rex v. Foxcraft, 2 Burrows 1017, 97 Eng. Rep. 683 (1760), Lord Mansfield said:

> "Whenever electors are present, and do not vote at all, (as they have done here,) 'they virtually acquiesce in the election made by those who do.'"

This court stated in Tinkel v. Griffin, supra., p. 431 that:

> "It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence."

Montana's election laws are plain regarding which ballots shall not be counted. Section 23-4002, R.C.M. 1947 states:

> "A ballot or part of a ballot is void and shall not be counted if the elector's choice cannot be determined. If part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part."

In State ex rel. Wolff v. Geurkind, 111 Mont. 417, 109 P.2d 1094, 133 A.L.R. 304 (1941) four hundred electors cast ballots for a clerk of court who had died a month before the election. The electors thought by so casting their ballots, the deceased would be declared the winner, and his widow would be appointed in his stead.

This court said:

> "It is our opinion that a voter at the polls, unless he votes for some person, is not voting at all. A ballot cast, which does not express the preference of the voter for some person to fill the office is a nullity, cannot be counted and cannot be given any effect in determining the result of the election, as to that office." Supra., 109 P.2d 1099.

Further:

> "It is contended by respondents that, notwithstanding the failure of the 400 to vote for anyone, they nevertheless, in casting their ballots as they did, evidenced a purpose to defeat the relator or any other person for whom votes might be cast, and that because of the overwhelming majority of their number their expression of dissent should be recognized and given effect... True, the will of the majority, when properly expressed should govern. But experience in the early beginning of popular government in this country taught that provision was needed for the orderly expression of that will, and regulatory laws were passed for orderly assembly and to give opportunity to the citizen to express his individual will effectively. And out of this have grown our election laws; and these laws, even though in their operation at a time a result is obtained without the sanction of the majority, have been sustained by the courts. If there is opportunity for the majority a like opportunity for each individual citizen to express himself in conformity with regulations that are reasonable, the principle of majority rule is not infringed upon. And the very purpose, and the effect, of these regulatory provisions is to protect the rights of the citizen in the exercise of the elective franchise and give effect to an expression of choice as made by the majority or other controlling number." Supra., p.1100.

This court has stated that unintelligible ballots will not be counted if the elector's intent cannot be determined. Peterson v. Billings, 109 Mont. 390, 393, 96 P.2d 922 (1939).

Finally, this court has held that where a number of illegal ballots are cast, and it cannot be determined which, ballots will be stricken pro rata from the precinct count. Heyfron v. Mahoney, 9 Mont. 497, 505, 24 Pac. 93 (1890).

An Arkansas case in which the court was urged to accept the number of votes cast as shown by poll books states why that method of enumeration would not accurately reflect the number of electors voting at the election, and we urge that it is applicable here:

> "The appellant says that if the Legislature required the election judges of each precinct to return to the county commissioners, the total number of votes cast as shown by the poll books and the county commissioners then required to return the total number of votes in each county to the Secretary of State or the Speaker, together with

> the vote on the amendment, that this would give the total number of electors voting in the state, and with such returns it could be easily and accurately determined whether or not the amendment received the required majority. This method could have been adopted by the Legislature, and it looks like the natural method to adopt to comply literally with the Constitution; but even this method is only an approximation. It is common knowledge that many electors vote a blank ticket, and others vote defective tickets, and they are not counted as voting in the election, but would be counted as voting on the amendment, under this plan, as this number would increase the majority required to be reached to adopt the amendment...In a sense in all of these instances the electors participated in the election; but in a broader sense they were no more participants in the general election for state and county officers than the electors who passed by the polls without stopping to cast their ballots." St. Louis Southwestern Ry. Co. v. Kavanaugh et al. (Ark., 1906), 96 S.W. 409, 411.

Therefore, it is respectfully submitted that Relators have not demonstrated, and cannot (without a state-wide recount) demonstrate whether or not a majority of the electors voting on any or all propositions voted "for" the proposed constitution. In this state of the record, the Governor's proclamation cannot be inpeached. We submit that this consideration, as a policy matter in this and future elections, militates in favor of Tinkel.

C. SHOULD THIS COURT DECIDE "A MAJORITY OF THE ELECTORS VOTING AT THE ELECTION", MEANS MAJORITY OF THOSE VOTING ON ALL PROPOSITIONS, THEN THE PROPOSITION RECEIVING THE LARGEST NUMBER OF VOTES SHOULD BE THE BASE ON WHICH THE MAJORITY IS DETERMINED.

In the proclamation issued by the Governor on June 20, 1972, the vote on the proposed Constitution and alternate proposals was reported as follows:

FOR the proposed Constitution:	116,415
AGAINST the proposed Constitution:	113,883
FOR a unicameral (1 house) legislature:	95,259
FOR a bicameral (2 houses) legislature:	122,425

FOR allowing the people or the legislature to authorize gambling:	139,382
AGAINST allowing the people or the legislature to authorize gambling:	88,743
FOR the death penalty:	147,023
AGAINST the death penalty:	77,733

The proposed Constitution received the largest vote totaling 230,298. The alternate proposals received the following totals: Legislative proposal - 217,684; Gambling proposal - 228,123; and Death penalty proposal - 224,756.

If this court determines that "a majority of the electors voting at the election" is based on the largest number of votes cast for any proposal, the proposed Constitution passed and the proclamation issued was correct.

We have found no case holding that "a majority of electors voting at the election" is determined by counting those persons who were issued ballots. There are no cases of which we are aware holding a count can be based on any figure arrived at without excluding improperly cast ballots. All cases seem to base a determination on the largest number of votes cast for a proposition or an office.

State ex rel. Hayman v. State Election Board, 181 Okl. 622, 75 P.2d 861 (1938), appears to say that the use of the total number of ballots issued less spoiled ballots is permissible to determine a majority, but does not decide the question. A measure was proposed and submitted at a general election. The votes on the measure were 379,405 in favor and 219,996 against. The highest vote total received was that of presidential electors of 749,740. Total ballots issued less spoiled ballots were 767,745. The State Election Board contended that by taking the number of ballots issued, minus spoiled ballots, the number of voters voting at the election would be correctly deter-

mined. While the court indicated that the method might be permissible it stated:

> "It will be noted that whether we take the ballots issued less the ballots spoiled as the method for determination of the number of 'electors voting at such election', or whether we take the highest vote cast and counted for any office or measure in the various precincts of the State, as certified by the State Election Board, the measure failed to receive votes equal to "a majority of all the electors voting at such election..." State ex rel. Hayman v. State Election Board, supra., p. 863.

Two justices dissented, giving a well reasoned discussion stating why they would have rejected using the figure arrived after taking total ballots issued less spoiled:

> "But the question remains as to how we are to determine the total number of electors voting at the election. There are three possible methods, namely: (1) the highest vote cast for any office or measure at the election held November 3, 1936; (2) the total ballots issued throughout the State, less spoiled ballots; (3) the certificate of the election officers as to the 'total number of electors voting in such elections' as required under Section 5586, O.S. 1931, 34 Okl. St. Ann. Sec. 22. The relators contend for the first, the State Election Board applied the second, and the Legislature prescribed the third."
>
> "The majority opinion criticizes the first method for the reason that it would exclude those persons who voted but who did not vote for the particular office or measure which was used as the test. I recognize this to be a legitimate criticism. However, the second method, which was used by the State Election Board, has been expressly rejected and disapproved in the cases of State ex rel. Saunders v. Clark, 59 Neb. 702, 82 N.W.8, and Hopkins v. City of Duluth et al., 81 Minn. 189, 83 N.W. 536, and it is apparent, from the evidence in this case, that it does not represent correctly the number of electors voting at the election. For illustration, it is shown that the number of ballots issued, less spoiled, for presidential electors was 762,654, while the vote actually cast and counted for presidential electors was 749,740, which demonstrates that there were 12,914 ballots for presidential electors which were issued and not spoiled, but never accounted for. These were blank ballots, mutilated ballots, or otherwise illegal ballots, which were included since they were not considered as spoiled, but which should not, by the holding of this court, have been counted in determining the total number of electors voting..." State ex rel. Hayman v. State Electoral Board, supra., p. 865 (emphasis supplied)

In St. Louis Southwestern Ry. Co. v. Kavanaugh et al., supra., the court was asked to consider the highest vote cast for any office or measure in each county to arrive at the largest state vote. The court took the vote for Governor as the largest number cast. The court noted that in the general election of 1880, the secretary of state had addressed a circular letter to all county clerks requiring them to certify votes cast as shown by the poll books. The criticism of the Secretary of State's actions were:

> "While the Constitution requires the affirmative vote of a majority of electors voting in the general election to adopt an amendment, yet it contemplated a majority of those really participating in the 'general election for senators and representatives,' but the method pursued enabled those who voted merely on license, the amendment, or some one county or township candidate to so swell the total vote that an amendment supported by a good majority of electors voting for state officers was defeated." St. Louis Southwestern Ry. Co. v. Kavanaugh et al., supra., p. 412.

See also State v. Brantly, 112 Miss. 786, 74 So. 662, Ann. Cas. 1917E, 723 (1911) where the "number of qualified electors who deposited ballots in the ballot boxes as appeared from the list thereof made by the clerk of the election as each ballot was deposited", supra., p. 665., was rejected because:

> "...the amended returns are of no value here; for they show not the number of "qualified electors voting," but simply the number thereof who appeared at the polls and deposited ballots, legal or otherwise, in the ballot boxes, which ballots may or may not have been counted by the managers or commissioners in ascertaining the result of the election. 'Though a qualified voter succeeds in getting his name on the poll list and a ballot in the box, he is not a voter voting unless his ballot is such as is prescribed by law and conforms to the general law regulating elections' (citing cases)." State v. Brantly, supra., p. 665.

Other cases in which a majority was determined by the largest number of votes cast for a particular office or measure include: Pasadena v. Chamberlain, 192 Cal. 275,

219 P. 965 (1923) two-thirds of the largest vote for any bond issue in a special election; Town of Pine Bluffs v. State Board of Equalization, (Wyo., 1958), 333 P.2d 700, explaining State ex rel. Blair v. Brooks, 17 Wyo. 344, 99 P. 874, 22 L.R.A. (N.S.) 478 (1909); State v. Cato, 131 Miss. 719, 95 So. 691 (1923), highest number of votes cast for candidate or measure; People v. Stevenson, 281 Ill. 17, 117 N.E. 747 (1917) highest vote for legislature from each county; Rice v. Palmer, 78 Ark. 432, 96 S.W. 396 (1906) votes cast for governor.

Thus it can be seen that courts which accept the meaning of majority as one more than fifty per cent of the total votes cast in the election, uniformily use the proposition receiving the largest number of votes as the base. In the case at bar the proposition receiving the largest number of votes as the base was the proposed constitution, and we therefore submit that it was validly adopted as proclaimed by the Governor.

D. ADOPTION OF THE RULE PROPOSED BY RELATORS COULD DENY EQUAL PROTECTION OF THE LAW UNDER THE UNITED STATES CONSTITUTION TO THE MAJORITY VOTING "FOR" THE 1972 CONSTITUTION.

Relators argue that even though a majority of those voting for or against the Constitution, favored it, the document should nonetheless be stricken down. The fundamental precept of our society is majority rule, and a serious question--a federal question--is presented where those of the majority are denied equal protection of the law under the United States Constitution. This issue is now raised at the first opportunity to do so in this case.

The rule relators contend for has the result of giving a non-vote the effect of a "no" vote. This dilutes

the weight of each of the 116,415 "for" votes and converts a "majority" to an insufficiency. Termed negatively, a single "no" vote is given more weight and effect than a "for" vote.

This result, we have argued, is contrary to the fundamental rule of our 1889 Constitution as interpreted by Tinkel. Such result also encroaches on areas protected by the United States Constitution. The Fourteenth Amendment extends equal protection of the laws to the citizens of the states. The rule applies to state elections. Equal protection requires one vote for one man and is not satisfied where this requirement is not met. Reynolds v. Sims, 1964, 377 U.S. 533, 84 S.Ct. 1362; Ely v. Klahr, 1971, 403 U.S. 108, 91 S.Ct. 1803; Avery v. Midland County, 1968, 390 U.S. 474; Kirkpatrick v. Preisler, 1969, 394 U.S. 526; Wells v. Rockefeller, 1969, 394 U.S. 542.

We respectfully submit therefore that the fundamental fairness of majority rule as stated in Tinkel, is also required by the United States Constitution. Surely the framers of our present constitution did not intend to adopt a standard questionably deficient when put to the equal protection test.

IV.

CONCLUSION

The court would seem to be faced with three definitions possibly applicable to the questioned phrase. First, that interpretation applied in Tinkel. Second, the view of many courts which adopt a majority of the largest number of electors voting on any individual issue. Either of these results would uphold the constitution.

The third possibility would require a majority of all electors voting on any issue. This alternative would give

no clear answer, and, is fraught with problems here. The total number of individual electors who voted on any proposition is unknown. A recount would be required. Questions of equal protection are raised. And there is a violation of the basic principle of majority rule. These problems would require time and expense to solve, and even then could have the same result--that of upholding the 1972 Constitution.

In the face of these problems, the logic of the Tinkel court is unassailable and shines as a beacon of truth begging to be heeded.

For all the foregoing reasons it is respectfully submitted that the Court should uphold the proclamation of Governor Anderson and decree that the 1972 Constitution was approved by the people of Montana at the election held June 6, 1972.

Respectfully submitted,

ROBERT L. WOODAHL
Attorney General of the State of Montana

By: _____
CHARLES C. LOVELL
Chief Counsel
Office of Attorney General
P. O. Box 1645
Great Falls, Montana 59403

WILLIAM N. JENSEN
Assistant Attorney General
State Capitol Building
Helena, Montana 59601

CERTIFICATE OF SERVICE

I hereby certify that I served the attached Brief of Attorney General and Answer to Intervenors' Complaint upon counsel of record by mailing a true copy of each this date in an envelope with postage prepaid addressed to:

Joseph P. Monaghan
2218 Elm Street
Butte, Montana 59701

Hibbs, Sweeney, Colberg & Koessler
P. O. Box 1321
Billings, Montana 59101

Douglas Y. Freeman
Courthouse
Hardin, Montana 59034

Marshall G. Candee
P. O. Box 617
Libby, Montana 59923

A. W. Scribner
Power Block Building
Helena, Montana 59601

Gerald J. Neely
2822 First Avenue North
Billings, Montana 59101

Jerome T. Loendorf
Professional Building
Helena, Montana 59601

C. W. Leaphart, Jr.
Montana Club Building
Helena, Montana 59601

Diana S. Dowling
519 North Rodney
Helena, Montana 59601

D. Patrick McKittrick
1713 Tenth Avenue South
Great Falls, Montana 59401

Lawrence Eck
310 North Higgins
Missoula, Montana 59801

Franklin S. Longan
Securities Building
Billings, Montana 59101

John Layne III
1301 University Avenue
Helena, Montana 59601

Clayton R. Herron
P. O. Box 783
Helena, Montana 59601

Donald C. Robinson
Silver Bow Block
Butte, Montana 59701

William F. Meisburger
Courthouse
Forsyth, Montana 59327

Robert L. Kelleher
2108 Grand Avenue
Billings, Montana 59103

Calvin A. Calton
P. O. Box 1178
Billings, Montana 59101

Forrest H. Anderson
Governor of the State of Montana
Helena, Montana 59601

Keller, Reynolds and Drake
South Annex, Power Block
Helena, Montana 59601

Morrow, Nash & Sedivy
208 East Main Street
Bozeman, Montana 59715

DATED this 13th day of July, 1972.

ROBERT L. WOODAHL
Attorney General

CHARLES C. LOVELL
Chief Counsel

WILLIAM N. JENSEN
Assistant Attorney General

By: William N. Jensen