

No. 1200278

SUPREME COURT OF ALABAMA

TOM FREDRICKS

Appellant,

v.

JOHN MCMILLAN AS STATE TREASURER,
DR. KATHLEEN D. BAXTER AS STATE
COMPTROLLER and KELLY BUTLER AS
STATE FINANCE DIRECTOR

Respondents.

Appeal from the Circuit Court of
Montgomery County, Alabama; 03-CV-2019-900579.00

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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SUMMARY OF THE ARGUMENT

The word *highway* as used by the respondents is not of a certain physical place but rather an area that can be traversed. As used in Section 24 of the Constitution of 1901, there is no tangible, specific area of territory contemplated by the word *highway*, but rather, it refers only to the ability of freely moving from point A to point B. Because of the lack of a specific, tangible place or territory, the word *highway* as found and used in each of the cases cited by the respondent is a poor fit for a reading in conjunction with Amendment 354, which is expressly trying to limit what gas tax revenue can be applied to by tying it to specific and tangible items. If the Court adopts the respondent's reading of the word *highway*, then Amendment 354 is neutered, and the funding of all sorts of projects tied only to the unspecified public areas where things can freely move will be unleashed. All of this is in direct contravention of what the people who ratified the amendment took the amendment to mean. Their understanding of Amendment 354 as barring the use of gas tax revenue on anything that is not a land based road should be recognized and upheld.

ARGUMENT

Each use of the word *highway* as cited by the respondent is in a case concerning navigability and free access, and not funding. The right of citizens to travel along navigable waterways in Alabama is overwhelmingly established by the brief of the respondent, but the application of the word *highway* or even *public highway* in the manner sought by the respondents is left with stunningly little support.

The word *highway* is sometimes used to denote a route or path that can be freely taken. This phenomena is not limited to navigable waterways at all, but any free area over which the people of the state can move something, anything, from point A to point B. *Highway* is even sometimes used in a metaphorical sense, such as using the term information *superhighway* to refer to the internet. See generally Brandon Moseley, *Ivey signs rural broadband initiative into law*, (May 31, 2019) alreporter.com/2019/05/31/ivey-signs-rural-broadband-initiative-into-law/.

In *United States v. Causby*, 328 U.S. 256 (1946), the Supreme Court held that the *ad coelum* doctrine had a limited place in the modern world, and that “The air is a public highway, as Congress has declared.” If that is so, then there is plainly no limiting component left in Amendment 354, it is

absolutely and totally toothless. If one imports the definition of the word *highway* from *Causby*, then even the airspace above Alabama is eligible for funding from state gas tax revenue. Meanwhile, the code of Alabama is peppered with the word highway, some examples referring to the right of access, but a substantial amount referring to public roads. If highway as used in Section 24 is exported for use in other statutes, it may cause havoc. For instance, ALA. CODE § 32-5A-60 bars the depositing of cans or bottles along highways. If highways and navigable rivers are interchangeable terms, this would likely make jug fishing a misdemeanor. This absurd result shows that interpreting Section 24 broadly could cause havoc, unless it is recognized that for the purposes of Section 24 and Amendment 354, the words used can have different meanings.

THE UNDERSTANDING OF AMENDMENT 1 IN 1952

The respondent's use of the word *highway* is directly repugnant to the contemporaneous understanding of the language of Amendment 354 at the time of its drafting and passage. The pertinent language at issue was first passed into law as Amendment 93 in 1952, when it appeared on the ballot as Amendment 1. Amendment 1 saw some public discussion of whether there was a need for a constitutional provision to restrict the diversion of funds

obtained from gas tax revenue. Political ads from the time “GUARANTEE that all your state gasoline taxes and auto-tag fees will be used for ROADS – and for ROADS alone!” THE HSV. TIMES, Nov. 2, 1952, at pg 10. An article in *The Huntsville Times* detailing the four amendments from 1952 notes that Amendment 1 is “better known as the Road Protection Amendment.” The Four Amendments, HSV. TIMES, Nov. 2, 1952. The same article also notes that “unless state road tax funds are used only for road purposes, as Amendment 1 provides, it will be almost impossible to get a real, long-range improvement program started on our major state and federal highways.” Another advertisement running that week states that Amendment 1 “Will guarantee that all state gasoline tax money and auto tag money will be USED EXCLUSIVELY FOR ROADS” HSV. TIMES, Nov 3rd 1952, at pg 7.

It seems the problem, prior to 1952, was that the road fund was continually raided, and the roads in the early 50s were, like today, a subject of frustration for the average Alabama driver. Like the word *highway* or the word *bridge*, the word *road* could, without offending the boundaries of English grammar, be used metaphorically to apply to ways or routes through air, water or land. But by far it’s most common, concrete usage, is that of a physical path evincing use and the improvements which make use

practicable. The people of Alabama created in 1952 a hard earmark in favor of rehabilitating and expanding the highways in the state, funded by gasoline taxes. Had they intended to pass a broader amendment that reserved funding for the purposes of intrastate transportation, including ports, airports, flyways, or rivers, it would have been very easy to draft. Simply put, they could have included those words in the amendment.

It is the established precedent of the Supreme Court of Alabama to give effect to the will of the people in Constitutional referendums. The intent of the people who drafted and who voted for Amendment 354 is absolutely clear. There has been no serious attempt by the respondent to state otherwise, the people saw Amendment 354 as being a road protection amendment that would create a legislature-proof constitutional earmark in favor of hard road construction. While the English language is sometimes malleable, constitutional amendments are not. The clear intent of the drafters of Amendment 354 was to limit the ways gasoline tax money could be used. If it is true that the people of the state understood Amendment 354 to only speak of overland roads, if they indeed thought that the Amendment was “the road protection amendment”, then the Court should hold that their understanding is that which is law.

“The Constitution is a document of the people. Words or terms used in that document must be given their ordinary meaning common to the understanding at the time of its adoption by the people. *Wright v. United States*, 302 U.S. 583, 58 S. Ct. 395, 82 L. Ed. 439 (1938). In construing a constitutional provision, the courts have no right to broaden the meaning of words used and, likewise, have no right to restrict the meaning of those words. We are, therefore, not at liberty to disregard or restrict the plain meaning of the provisions of the Constitution. *McGee v. Borom*, 341 So. 2D 141 (1976).

CONCLUSION

The respondents seek to create a legal fiction, based on an impermissibly broad and untethered reading of Section 24, so as to completely contradict the meaning of Alabama Amendment 354. This legal fiction is entirely novel, born out of necessity because of budget constraints and the need to match federal dollars, and not a ground up reading of the Alabama Constitution of 1901. Earnest Alabamians from 1952 would not be

happy if they could see the gymnastics at play here. It is up to this honorable Court to give effect to their will by overruling the Court of Appeals and ruling in favor of the Appellant.

/S/ Billy Love

Attorney For Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief filed on June 4th^h, 2021 complies with all the requirements listed within rule 28(j)(1) of the Alabama rules of appellate procedure. Namely, it is in Century Schoolbook 14 point font and it is 1,310 words from the Summary of the Argument to the end of the Conclusion

/s/ William Love

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 4th day of June, I caused a true and correct copy of the foregoing to be filed via ACIS and U.S. Mail and served via email of U.S. mail, first-class postage prepaid, addressed to the following:

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