

IN THE ALABAMA SUPREME COURT

TOM FREDRICKS,)	
PLAINTIFF,)	
v.)	On Petition for Writ of
)	Certiorari to the Court of
)	Civil Appeals, Case No 2190593
JOHN MCMILLAN AS STATE)	
TREASURER, DR. KATHLEEN D.)	
BAXTER AS STATE)	On Appeal from the Montgomery
COMPTROLLER and KELLY)	County Circuit Court,
BUTLER AS STATE FINANCE)	CC-19-900579
DIRECTOR)	

**PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CIVIL APPEALS**

ORAL ARGUMENT REQUESTED

/s/ William Love
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TABLE OF AUTHORITIES

Rules and Statutes

Ala. R. App. P. 39.....	2,4
Alabama Constitutional Amendment 354.....	2,3
Alabama Constitution Article 1 Section 24.....	2,3

INTRODUCTION

Petitioner Tom Fredricks respectfully requests that this Court grant a writ of certiorari to review the decision of the Alabama Court of Civil Appeals dated November 5th, 2020. This case has large ramifications for the people of Alabama, in that the Rebuild Alabama Act was passed under the contention that the roads in the state of Alabama were at an all time state of disrepair. This case and the decision made by the Court with regard to this petition will ultimately decide whether all of the money from the new gas taxes goes to the roads, highways and bridges of Alabama, or whether a substantial amount of that money will be diverted to navigable waters in the state.

PROCEEDINGS BELOW

Tom Fredricks filed suit in Montgomery Circuit court as a taxpayer litigant to enjoin the use of funds obtained through the new Alabama state gas tax from being used to fund projects regarding the Port of Mobile and other navigable waterways throughout Alabama. On cross motions for summary judgment, the Circuit Judge J.R. Gaines ruled without a written opinion in favor of the defendants, dismissing the case. Timely appeal was made to the Alabama Court of Civil Appeals, who affirmed this decision and

denied rehearing on the matter.

GROUND FOR ISSUANCE OF THE WRIT

This case has ample grounds for certiorari review under Alabama Rule of Appellate Procedure 39. The rules of appellate procedure state that cases construing a controlling provision of the Alabama state constitution are ripe for certiorari review. This case construes at minimum Amendment 354 to the Alabama Constitution, which plainly states

“no moneys derived from any fee, excises, or license taxes, levied by the state, relating to fuels used for propelling such vehicles except pump taxes, shall be expended for other than cost of administering such laws, statutory refunds and adjustments allowed therein, cost of construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights-of-way, payment of highway obligations, the cost of traffic regulation, and the expense of enforcing state traffic and motor vehicle laws.”

The appellees claim that this Amendment should be read in pari material with Section 24 of the Alabama state constitution, which states “That all navigable waters shall remain forever public highways, free to the citizens of the state and the United States, without tax, impost, or toll...” But Section 24 is part of Article 1 of the Alabama State Constitution, which is essentially the Bill of Rights for the citizens of the state of Alabama. At the very top of Article I in all caps are the words DECLARATION OF

RIGHTS. It then says “That the great, general, and essential principles of liberty and free government may be recognized and established, we declare:...” Ala. Const. art. I. This is a clear statement of purpose that visibly carries throughout all of Article I of the 1901 Constitution. Each of the 36 sections contained in Article I is instituted to build a government that may ordain liberty and secure the rights of individual citizens for the sake of free government. These rights, so declared, are not preserved so that future citizens may have an expansive definition of what a highway can be under Alabama law for the purposes of tax revenue disbursement.

The language in Section 24 is meant to be taken as a grant of access or freedom for the people, and not a definition which is to be used throughout the body of Alabama law. As Amendment 354 was passed by the people through a referendum, the language should be read in light of what voters would think when interpreting the referendum as written. The word “highway” itself means exclusively a land based road, and as the Amendment is written in a way intending to exclude other potential areas that could be funded, the construction given should be exclusionary, and not overly broad as desired by the appellees. It is essential, if there are to be referendums which determine matters of public interest, that words be given

their ordinary meaning when placed under the burden of interpretation.

In addition to meeting the statutory grounds for certiorari review on the matter of constitutional construction, the case plainly affects a class of state officers, as each defendant in this case is an officer of the state who would, in the absence of this case, follow the Rebuild Alabama Act as written, funding the projects contemplated. This is also a matter of first impression for the Court.

CONCLUSION

Pursuant of Alabama Rule of Appellate Procedure 39(A)(1)(A)-(C) and the Alabama state constitution, Mr. Fredricks respectfully requests that this Court grant certiorari review of the sole issue in this case, so that it may lend clarity to the interpretation of the word “highway” as used in Alabama Amendment 354.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this, the 12th day of February 2021, 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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/S/ Billy Love

EXHIBIT A

STATEMENT OF FACTS

STATEMENT OF THE FACTS

Before the Montgomery County Circuit Court, the parties stipulated to a set of facts ahead of cross motions for summary judgment.

1. Governor Kay Ivey signed into law Alabama Act No. 2019-002, the Rebuild Alabama Act (RAA).

2. The RAA enacted the first increase in the state's gas excise tax since 1992, raising gasoline and un-dyed diesel fuel prices by 10 cents per gallon by October 2021. Ala. Code. §40-17-370.

3. Each month, prior to the other disbursements provided for in the RAA, "up to \$750,000 of the tax proceeds from the additional excise tax on gasoline and up to \$230,000 of the tax proceeds from the additional excise tax on diesel fuel" is to be distributed "to the Alabama Highway Finance Corporation for the payment of the principal of and interest on bonds to be issued by it to finance improvements to the ship channel providing access to the facilities of the Alabama State Docks, to the extent necessary for such purpose," up to "one-hundred fifty million dollars (\$150,000,000) in aggregate principal amount to be used for improvement projects." This is the only allocation the RAA makes for Alabama's navigable waters.

4. The “ship channel providing access to the facilities of the Alabama State Docks,” serves as the access and interchange point for vessels and vehicles making use of the Mobile River and Mobile Bay for purposes of commerce. The Mobile River and Mobile Bay are both navigable waterways that have been used for commercial transportation of goods since prior to the State’s founding.

5. Section 24 of the Alabama Constitution states “that all navigable waters shall remain forever public highways, free to the citizens of the state and the United States, without tax, impost, or toll...” Ala. Const. art. I § 24.

6. The RAA includes the legislative finding that “a portion of the gasoline and diesel fuel sold in this state is used for marine purposes to propel vessels on coastal and inland waterways of this state.” Ala. Code. § 23-8-2.

7. Some travel does take place along Alabama waterways.

8. In 2011, the Alabama Legislature codified the finding that not less than 1.23% of the fuel excise taxes paid in the State were used for marine purposes. The legislature allocated that percentage of funding to the Marine Police, Marine Resources, and Wildlife and Freshwater Fisheries Divisions

of the Department of Conservation and Natural Resources. Ala. Code.
40-17-359(13).

9. Ala. Code § 40-17-359(13)(b)(1)'s provision for distribution of fuel excise tax revenue for marine purposes has never been challenged pursuant to Amendment 354 or any other applicable law.

EXHIBIT B

COURT OF CIVIL APPEALS DECISION

REL: November 5, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190593

Tom Fredricks

v.

John McMillan, in his capacity as State Treasurer; Dr. Kathleen Baxter, in her capacity as State Comptroller; and Kelly Butler, in his capacity as State Finance Director

**Appeal from Montgomery Circuit Court
(CV-19-900579)**

PER CURIAM.

This appeal, taken from a judgment of the Montgomery Circuit Court and transferred to this court pursuant to Ala. Code 1975, § 12-2-7(6), concerns the constitutionality of

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portions of Ala. Acts 2019 (1st Special Session), Act No. 2019-2, known as "the Rebuild Alabama Act," under which certain moneys derived from state gasoline and diesel-fuel excise taxes are to be distributed to pay the principal of and the interest on bonds issued for the financing of improvements to the Mobile Ship Channel. Because we conclude that our legislature acted within its discretion to mandate the use of those moneys to defray the "cost of construction, reconstruction, [and] maintenance and repair of public highways" within the scope of Amendment No. 93 to the Alabama Constitution of 1901 (now Art. IV, § 111.06, Ala. Const. 1901 (Off. Recomp.)), we affirm the circuit court's judgment.

On March 5, 2019, Alabama Governor Kay Ivey issued a proclamation, in accordance with Article V, § 122, of the Alabama Constitution of 1901, summoning the Alabama Legislature into an extraordinary session beginning on March 6, 2019, to consider particularly designated subjects deemed by the governor to be "necessary ... for the safety and economic prosperity of the people of Alabama." The subjects included in the governor's proclamation encompassed, in pertinent part, legislation "to levy an additional excise tax

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on gasoline and diesel fuel"; "to provide for the distribution of th[o]se additional revenue streams for the sole purpose of improving and maintaining the transportation infrastructure of the state, its counties and municipalities, and the Alabama State Port Authority"; "to provide the Alabama Highway Finance Corporation with authority to borrow money and issue bonds for the purpose of improving the Alabama State Docks and the Mobile Bay ship channel"; and "to provide the State Treasurer authority to pay the principal and interest of bonds issued by the [Alabama Highway Finance Corporation] out of the revenues appropriated and pledged for such purpose."

During the ensuing extraordinary session, the Alabama Legislature passed two pertinent bills that became law on March 12, 2019. House Bill 3, enacted as Ala. Acts 2019 (1st Special Session), Act No. 2019-3, provided in § 1(a)(1) that the Alabama Highway Finance Corporation ("AHFC") would have the power "[t]o borrow money and issue its bonds in evidence thereof ... for the purpose of financing the widening and deepening of the Mobile Ship Channel" and related improvements; the Mobile Ship Channel was defined in § 1(d) of Act No. 2019-3 as "the existing ship channel having its

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northern terminus seven thousand (7,000) feet north of the mouth of the Mobile harbor, and its southern terminus approximately 6 nautical miles south of Fort Morgan, comprising approximately 31 nautical miles in length." House Bill 2, enacted as Act No. 2019-2 (i.e., the Rebuild Alabama Act), imposed (in § 6) an additional excise tax on "each net gallon of gasoline and diesel fuel" to be implemented in four phases: (a) six cents per gallon after August 31, 2019; (b) an additional two cents per gallon on October 1, 2020; (c) an additional two cents per gallon on October 1, 2021; and (d) "[b]eginning October 1, 2023, and on July 1 of every other year thereafter," a periodic increase or decrease of one cent per gallon dependent upon future changes in "the yearly average of the National Highway Construction Cost Index ... issued by the U.S. Federal Highway Administration" compared to the average for the period ending in December 2020. Under § 7(b) of the Rebuild Alabama Act, which has since been codified as Ala. Code 1975, § 40-17-371(b), "up to \$750,000 of the tax proceeds from the additional excise tax on gasoline and up to \$230,000 of the tax proceeds from the additional excise tax on diesel fuel" received each month is to be

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distributed to the AHFC "for the payment of the principal of and interest on bonds to be issued by it to finance improvements to the ship channel providing access to the facilities of the Alabama State Docks, to the extent necessary for such purpose."

The legislature further expressly stated as findings in the Rebuild Alabama Act that, "consistent with the constitutional mandate that navigable waterways are public highways, ... a portion of the gasoline and diesel fuel sold in this state is used for marine purposes to propel vessels on coastal and inland waterways of this state" and that "it is the policy of this state to use a portion of the funds derived from the additional excise tax levied by this act on each net gallon of gasoline and diesel fuel for the programs and activities of the Alabama State Port Authority." Act No. 2019-2, §§ 2(a) & 2(b). The "constitutional mandate" referred to by our legislature is currently set forth in Act I, § 24, of the Alabama Constitution of 1901: "That all navigable waters shall remain forever public highways, free to the citizens of the state and the United States, without tax, impost, or toll." That mandate, which has appeared in each of

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Alabama's state constitutions since Reconstruction,¹ is in strict accord with a Congressional mandate dating back to March 3, 1803, to the effect that "all navigable rivers within the territory of the United States, south of the state of Tennessee, shall be deemed to be and remain public highways," 2 Stat. ch. 27, § 17, at p. 235, and also appears in the subsequent act of Congress, enacted on March 2, 1819, permitting Alabama to become a state (3 Stat. ch. 47, § 6, p. 492).

In 1952, the people of Alabama ratified Amendment No. 93 to the Alabama Constitution of 1901 ("Amendment No. 93").² In pertinent part, Amendment No. 93 earmarked moneys derived from state fees, excises, and license taxes "relating to registration, operation, or use of vehicles upon the public highways" or to "fuels used for propelling such vehicles" to particular specified uses. The uses permitted by Amendment

¹See Ala. Const. 1868, Art. I, § 26; Ala. Const. 1875, Art. I, § 25.

²Amendment No. 354, adopted in 1975, did not alter the pertinent language of Amendment No. 93 as originally ratified; the 1975 amendment instead added other provisions concerning personalized special motor-vehicle license plates. See generally Ala. Const. 1901, Art. IV, § 111.06.

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No. 93 include the "cost of administering such laws, statutory refunds and adjustments allowed therein, cost of construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights-of-way, payment of highway obligations, the cost of traffic regulation, and the expense of enforcing state traffic and motor vehicle laws" (emphasis added).

On April 3, 2019, less than one month after the Rebuild Alabama Act went into effect, taxpayer Tom Fredricks initiated a civil action in the Montgomery Circuit Court seeking, in pertinent part, a judgment declaring that the term "public highways" in Amendment No. 93 refers only to land-based public highways and an injunction preventing moneys derived from the Rebuild Alabama Act from being applied "to the port of Mobile or any other project bearing principal relation to Alabama waterways." Named as defendants in the action were State Treasurer John McMillan, State Comptroller Dr. Kathleen Baxter, and State Finance Director Kelly Butler. The defendants answered the complaint and denied that Fredricks was entitled to the relief sought. The parties thereafter expressly stipulated that the Rebuild Alabama Act "provides

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for an additional tax on gasoline and diesel fuel" and that "Mobile Bay and the ship channel providing access to the Alabama State Docks, referred to in Section 7(b) of the [Rebuild Alabama Act], are navigable waters."

In October 2019, the defendants filed a motion for a summary judgment in their favor on all claims asserted by Fredricks, arguing that the pertinent language of Amendment No. 93, a portion of the Alabama Constitution of 1901, should be construed in pari materia with § 24, another portion of the same constitution, and in a manner consistent with the validity of the Rebuild Alabama Act. Fredricks filed a cross-motion for a summary judgment in his favor in November 2019, advocating for adoption of the "standard common definition of the word highway as being a word exclusively denoting a land based way." The circuit court, after a hearing, denied Fredricks's summary-judgment motion and instead entered a summary judgment in favor of the defendants. Fredricks timely appealed from that judgment, and that appeal, as we have stated, was transferred to this court pursuant to Ala. Code 1975, § 12-2-7(6), a statute that authorizes our supreme court

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to transfer certain civil cases within that court's appellate jurisdiction to this court.³

A summary judgment, such as that entered by the circuit court in this case, "is appropriate upon a showing that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law." Carpenter v. Davis, 688 So. 2d 256, 258 (Ala. 1997) (citing Rule 56, Ala. R. Civ. P.). As was true in Carpenter, "[t]he facts in this case are undisputed," and we will thus "review the [circuit] court's application of the law to those facts to determine whether the [defendants] were entitled to a judgment as a matter of law." Id.

In his brief, Fredricks aptly observes that "[t]he only issue at stake is what does the word 'highway' or 'public

³Subsection a. of § 12-2-7(6) excludes from the class of transferrable appeals those civil cases that our supreme court determines "present[] a substantial question of federal or state constitutional law." Pursuant to Ala. Code 1975, § 12-3-16, this court is bound by decisions of our supreme court, and we may infer that that court has determined that no substantial question of state constitutional law is present in this case. Cf. Young v. Ledford, 37 So. 3d 832, 832 n.1 (Ala. Civ. App. 2009) (similarly inferring determination that transferred appeal did not involve resolution of "'novel legal question'" having "'significant statewide impact,'" which, under § 12-2-7(6)b., would have precluded that transfer).

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highway' in [Amendment No. 93] refer to," and he asks whether the "plain meaning" of either of those terms correctly encompasses Alabama's navigable waterways. Fredricks then cites as authoritative a portion of a 1953 treatise tracing the etymology of the English word "highway" as having descended from the concept of Roman roads that were formed by throwing dirt from side ditches into a raised central location and observing that such raised roads were under royal protection and open to public travel as compared to "byways," which were private (1 Albert C. Rose, Public Roads of the Past, p. 8 (1953)),⁴ and proceeds therefrom to the position that "[t]he seafloor of Mobile Bay ... is not a high way." The defendants, for their part, assert that the term "highway" is commonly interpreted as a generic reference to all kinds of public ways (citing, among other cases, Sexton v. State, 239 Ala. 662, 663, 196 So. 746, 746 (1940)), yet thereafter, in their zeal to uphold the summary judgment under review, rely heavily upon the placement of the word "public" before "highway" and depart from Sexton's clear expression that the

⁴The pertinent portion of the treatise appears in the record on appeal.

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term "public highway" is "'tautological ..., since all highways are necessarily public.'" Id. (quoting State ex rel. McMaster v. District Ct. for Broadwater Cnty., 80 Mont. 228, 231, 260 P. 134, 135 (1927)).

Regardless of what the terms "highway" and "public highway" might mean in other contexts, the clear intent of the drafters of the Alabama Constitution of 1901 was to place Alabama navigable waters in the category of "public highways" that Alabama's citizenry is free to traverse, even if the underlying root term "highway" may properly trace its roots to the road-building practices of Roman Britannia. Similarly, the drafters of Amendment No. 93, some 50 years later, acted in recognition of the existing definition of "public highways" and included no provisions to exclude navigable waterways from that definition. "Each section of the Constitution must necessarily be considered in pari materia with all other sections." Jefferson Cnty. v. Braswell, 407 So. 2d 115, 119 (Ala. 1981) (emphasis added).

Our interpretation of the term "public highways" to include navigable waterways, in accordance with § 24 of the Alabama Constitution of 1901, is by no means a novel or a

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strained one. The former Alabama Court of Appeals confronted a similar question in Pappenburg v. State, 10 Ala. App. 224, 65 So. 418 (1914), in which a defendant was convicted of having violated a statute that proscribed "conveying or transporting over or along a public street or highway prohibited liquors[] for another" because he had transported the liquors over the Tennessee River, a navigable waterway. 10 Ala. App. at 226, 65 So. at 419. The Court of Appeals opined that "the word 'highway' is a generic name used to denote 'every thoroughfare which is used by the public, whether it be a carriageway, a horseway, a footway, or a navigable river,'" id. (quoting 3 James Kent, Commentaries on American Law, p. 548 (11th ed. 1867)), and cited both § 24 of the Alabama Constitution of 1901 and the 1819 act of Congress as support for the proposition that "the generic term 'highways' as including navigable streams has been the declared law of this state" and as "the correct general construction or definition to be given to the term in this state in both criminal and civil cases." 10 Ala. App. at 227-28, 65 So. at 419. The Court of Appeals upheld the defendant's conviction, holding that the statutory term

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"highway" was to be interpreted as having been used in its "generally recognized meaning" so as to include "a navigable river" such as the Tennessee River. 10 Ala. App. at 230, 65 So. at 420. See also Walter v. City of Gulf Shores, 829 So. 2d 181, 185 (Ala. Crim. App. 2001) (holding that municipality could regulate business activity in navigable waters within its police jurisdiction because "the navigable waters within the police jurisdiction ... are a public highway, not private property"), aff'd, 829 So. 2d 186 (Ala. 2002).

The general principle applies that courts of this state seek to sustain, rather than strike down, enactments, such as the Rebuild Alabama Act, of our legislature, which acts as a coordinate department of Alabama's government. See Ex parte Boyd, 796 So. 2d 1092, 1094 (Ala. 2001). As we have stated, Amendment No. 93 allows the expenditure of gasoline and diesel-fuel excise taxes levied by the State to defray the cost of "construction," "reconstruction," "maintenance" and "repair" of "public highways" -- a term that has a generally accepted meaning, as Pappenburg makes clear, that includes any thoroughfare used by the public, whether on land or on water. The Rebuild Alabama Act allocates certain excise-tax moneys to

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defray financial obligations incurred by the AHFC to finance improvements to the Mobile Ship Channel, a body of water that was stipulated by the parties as navigable. We thus conclude that the allocation in the Rebuild Alabama Act of excise-tax moneys collected by the State to offset monetary obligations incurred by AHFC, an instrumentality of the State, in order to reconstruct, maintain, or repair the Mobile Ship Channel is a constitutional exercise of the legislature's power under Amendment No. 93, and we affirm the summary judgment in favor of the defendants.

AFFIRMED.

Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur.

Edwards, J., concurs in the result, without writing.

EXHIBIT C

DENIAL OF APPLICATION FOR REHEARING

The Court of Civil Appeals



REBECCA C. OATES
CLERK

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MEG WILLIAMS FIEDLER
ASSISTANT CLERK

January 15, 2021

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Tom Fredricks v. John McMillan, in his capacity as State Treasurer; Dr. Kathleen Baxter, in her capacity as State Comptroller; and Kelly Butler, in his capacity as State Finance Director (Appeal from Montgomery Circuit Court: CV-19-900579)

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:

Application for Rehearing Overruled. No opinion written on rehearing.

Thompson, P.J., and Moore, Donaldson, Edwards, and Hanson, JJ., concur.

Rebecca C. Oates

Rebecca C. Oates
Clerk, Court of Civil Appeals