

No. 1200278

SUPREME COURT OF ALABAMA

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TOM FREDRICKS

Appellant,

v.

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

Appellees.

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

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**BRIEF OF THE APPELLANT**

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**ORAL ARGUMENT REQUESTED**

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## **STATEMENT REGARDING ORAL ARGUMENT**

The Appellant requests oral argument in the case at bar. Oral Argument is necessary as this case presents an important question of public interest in the State of Alabama regarding the interpretation of Constitutional language as ratified by the people.

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## **STATEMENT OF THE CASE**

This case was initially filed in the Montgomery County Circuit Court by taxpayer Tom Fredricks, seeking declaratory and injunctive relief to bar the use of revenue obtained from the new gas tax towards use on projects relating to navigable waterways.

Circuit Court Judge J.R. Gaines ruled in favor of the defendants' motion for summary judgment on April 14<sup>th</sup>, 2020. (ROA 365). Notice of Appeal to this Court was filed on April 28<sup>th</sup>, 20. (ROA 366). The appeal was transferred to the Alabama Supreme Court, then deflected back to the Alabama Court of Civil Appeals by the Alabama Supreme Court pursuant to ALA. CODE § 12-2-7(6). Upon transferring the appeal, the Alabama Supreme Court ordered further proceedings to henceforth take place in the Court of Civil Appeals. On November 5<sup>th</sup>, 2020, the Court of Civil Appeals found for the Appellees, and a motion for rehearing was denied. A petition for a writ of certiorari was filed and the writ was issued on April 22<sup>nd</sup>, 2021.

## STATEMENT OF THE ISSUE

Alabama Constitutional Amendment 354 states that “no moneys derived from any fee, excises, or license taxes, levied by the state, relating to fuels used for propelling such vehicles...shall be expended for other than cost of...construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights-of-way, payment of highway obligations...and the expense of enforcing state traffic and motor vehicle laws.” The only issue at stake is whether the plain meaning of the word highway in Amendment 354 is expansive enough to include navigable waterways.

## **STATEMENT OF THE FACTS**

Before the Montgomery County Circuit Court, 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.
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 \$230,00 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

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.”
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. *Id.*

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.

## STATEMENT OF THE STANDARD OF REVIEW

This case directly addresses the interpretation of Amendment 354 of the Alabama State Constitution and the Rebuild Alabama Act. Such reviews of statutory construction are de novo. *Ex parte Liberty Nat. Life Ins. Co.*, 209 So. 3d 486, 487 (2016). Furthermore, the facts are agreed to by the parties. The proper standard of appellate review where facts are undisputed and it is a question of law is also de novo.

## SUMMARY OF THE ARGUMENT

The allocation of funds obtained through the Rebuild Alabama Act fuel tax (RAA) for use in dredging projects in the port of Mobile or other waterways is invalid and unconstitutional due to the limits imposed by Amendment 354, which 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. Ala. Const. amend. 354 (ratified 1952).

It is popularly thought that gas taxes in Alabama are imposed to fund the roads. This idea is routinely invoked whenever an increase or challenge to a gas tax is contemplated. This is logically why the Rebuild Alabama Act sought to increase the registration fee for electric vehicles to \$200, and \$100 for hybrid vehicles, as otherwise these vehicles would be pay little to no gas tax while still contributing to road wear. This is also why untaxed farm

diesel is dyed red, and why use of dyed fuel in a vehicle on the public roads is illegal. ALA.CODE § 4-17-356. The logic behind taxing roadway gas is that our roads and bridges see annual wear and damage from use, and the amount of gas purchased in the state is one of the more responsive and easily collectible ways to tax usage of the roads. Amendment 354 is the limiting provision that insures this, as it clearly limits the expenditure of funds obtained from gas taxes to the maintenance and construction of physical roads and bridges.

The single issue at stake in this case centers around the definition as used of the word *Highway* in Alabama Constitutional Amendment 354, and whether that definition is modified from its common meaning by the language in Section 24 of the Alabama Bill of Rights. The Appellees seek to frame Article I, Section 24 of the state Constitution itself as a sort of definition's page, which establishes the meaning of the word highway through all Alabama law to include all navigable waters. Section 24 states "that all navigable waters shall remain forever public highways, free to the citizens of the United States, without tax, impost or toll." This is a metaphorical grant of access to the citizens of the state, that they should be

able to move freely up and down navigable waters – not the modification of the word highway in Alabama law.

## **ARGUMENT**

### **A. AMENDMENT 354 BARS FUNDING FOR WATERWAYS**

Amendment 354 is clearly designed as a limiting provision of law, and the ordinary meaning of the text compels the view that it prohibits funds from being applied to waterway improvements. One of the most essential structural canons in all of law is that words be given their ordinary meaning unless there is clear evidence to the contrary. “Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says.” *Munnerlyn v. Alabama Dept. of Corrections*, 946 So.2d 436 (Ala. 2006). This is for obvious public policy reasons, as the law functions on the principle of notice – while many legal concepts can be difficult for laymen to understand, the input and understanding of regular citizens is absolutely essential for our democracy to be able to function. Hidden landmines in the law, where words are given exotic meanings unforeseeable at the time of ratification, disenfranchise

regular citizens and cause legal chaos. Indeed, it is the job of the courts “to interpret the words consistent with their ‘ordinary meaning... at the time Congress enacted the statute.” *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (citing *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed.2d 199 (1979)). “The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute.” *IMED Corp. v. Sysytems Engineering Associates Corp*, 602 So. 2D 344 (Ala. 1992). The "plain and ordinary meaning" of statutory language may often be found in a dictionary. "What is a dictionary definition if not an assertion of that very meaning that an ordinary person would give a particular word?" *Ex Parte Christopher*, 145 So. 3D 60 (2013) citing *Carpet Installation & Supplies of Glenco v. Alfa Mut. Ins. Co.*, 628 So. 2d 560, 562 (Ala. 1993).

Amendment 354, which clearly is worded so as to limit the spending authority of our elected representatives, was approved directly by the citizens in 1952 on the basis of their understanding of the words contained within the referendum. Especially with a referendum, the common understanding of the plain language of the referendum should ideally be given the heaviest weight. “The [Alabama] Constitution is a document of

the people. Words or terms used in that document must be given their ordinary meaning common to understanding at the time of adoption by the people...” McGee v. Borom, 341 So. 2D 141 (Ala. 1976). Otherwise, the use of referendums for the purpose of lawmaking is unmoored from the preferences of the people of the state of Alabama. In light of this precedent from McGee, perhaps the issue can be restated as *“Did the people of Alabama, in ratifying Amendment 354, understand the language to include navigable waterways as being highways, eligible for funding with gasoline excise taxes?”* If the answer is no, then the Appellant is due to win this case.

**B. THE FRAMING OF AMENDMENT 354 IS A NARROW,  
EXCLUSIVE LIST**

The framing language of the amendment is that all expenditures using gas tax revenues are prohibited by the Alabama State Constitution unless the destination is listed in the amendment itself. This list is exclusive, containing only the seeds of funding for “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”. So to condense further, this means that any funding for purposes

other than highways, bridges and the maintenance or traffic enforcement directly associated with those highways and bridges, is prohibited.

Each of the items are physical constructions on land. Had the the Amendment been intended to do as the Appellees claim, it would have been of little difficulty to attach features of maritime navigation, such as locks, dams or channels. This was not done. If it had been done, or if it is done now, it will be opening the floodgates. The language adjacent to the term *highway* in Amendment 354 shows that the term is in actuality very restrictive, and not broad as the Appellees claim. Alabama has more miles of navigable waterways than any other state. To include such waterways as destinations for potential funding with gas tax revenue would be a monumental erosion of the understanding of the scope of Amendment 354's limitations.

### **C. THE HISTORY OF THE WORD HIGHWAY IS OF EARTHEN ROADS GOING BACK TO ROME**

The well established etymology of the word *highway* is derived from elevated ground, literally a dirt right of way that is higher than the surrounding area:

“The word *highway* harks back to the elevated, agger, the mound or hill of the Roman road formed by earth thrown from the side of ditches toward the center. In old England these raised, or high, ways were under the protection of the King's peace and open to public, unrestricted travel as distinguished from byways, or private roads.”

See Albert C. Rose Public Roads of the Past 8 (1953).

This obviously means that in order for a way to be high, it must be elevated. In order for it to be elevated, by definition it must be above the water. Dredging, in particular deepwater dredging, is the opposite of a *high* way. The seafloor of Mobile Bay, then, is not a *high* way. Any vessels floating above the seafloor of Mobile Bay are essentially tethered by gravity to sea-level and tidal influence. In any event, maritime infrastructure projects are disqualified from being *high* as a matter of definition.

#### **D. THE APPELLEES DEFINITION OF HIGHWAY IS A NEW CREATION**

There is no evidence that Section 24 was ever taken to expand what the word highway means in Alabama law, and there is evidence that this interpretation is totally novel and hence, was not in fact considered by the people when Amendment 354 was ratified. This brand new nature of the

Appellee's interpretation of Section 24, or the feigning of confusion over the limitations imposed by Amendment 354 is underscored by the behavior of the legislature itself. In 2011, the Alabama Legislature codified the finding that not less than 1.23% of the fuel excise taxes paid in the State was used for marine purposes. Ala. Act 2011-565, at p. 68 (§ 40(b)(1)) (codified at Ala. Code § 40-17-359(13)(b)(1)). This exact percentage was then allocated by the legislature to fund the Marine Police, Marine Resources, and Wildlife and Freshwater Fisheries Divisions of the Department of Conservation and Natural Resources.

This determination by the legislature was absolutely necessary, under the 2011 understanding of Alabama law, so that the marine police could receive funding from that 1.23% of gas tax revenue. This is an obvious tell that nobody considered Section 24 to create a broad definition for Alabama highways until sometime after 2011. Again, the Appellee's interpretation of the language in Section 24 of the Alabama Constitution is totally new. It would require near impossible foresight, along with a legal education fit for high-placed clerkship for any citizen evaluating Amendment 354 to have anticipated the argument the Appellees make.

## **II. SECTION 24 SPEAKS SOLELY OF A RIGHT TO ACCESS**

In order to assist their interpretation, the Appellees attempt to enlist Section 24 of the Alabama State Constitution to aid them. They suggest that Section 24 creates a new definition for the word highway, or at the very least some uncertainty about the matter. If the safe harbor of uncertainty is reached, they suggest they are then owed some amount legislative deference to cover the expenditures from a Constitutional angle.

Perhaps the best way to get at this is to simply read Article I from the very beginning and give context to the determining language. The Alabama Constitution adopted in 1901 is the longest and most amended operable constitution in the world. To reach Section 24 however, it is a mere 1,345 words into a Constitution encompassing over a thousand pages. All of Article I is, then, of primary importance to the drafters of the 1901 Constitution. Typically when a legislature or lawmaking body intends to define a term, they include a definitions section where several terms are defined one after another, for the purpose of clarity. This is done because the whole purpose of a definitions section is to add clarity, not detract from it. Otherwise, words can be ripped from context. Article I does not fit that purpose, it has a higher role.

Article I tells us exactly what Section 24 is intended to be. 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 then 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. The Appellee’s preferred interpretation of Section 24 does not secure a right or liberty to the people.

One can check the veracity of this by asking what Section 24 accomplishes if it is not definitionally asserting that waterways are to be treated as highways; if the traditional reading of Section 24 grants what was taken to be a traditional common right of passage or access of the people to use navigable waterways as corridors of transport, this would comport with securing a private right or liberty. Freedom of movement is an ancient,

essential concept of our American system. This, and only this, is the purpose of Section 24.

The Constitution of the state of Alabama should be read so that it may harmonize with itself, logically and structurally. "A constitutional provision, as far as possible, should be construed as a whole and in the light of (the) entire instrument and to harmonize with other provisions, *(so) that every expression in such a solemn pronouncement of the people is given the important meaning that was intended in such context and such part thereof.*" *Hornsby v. Sessions*, 703 So. 2d 932, 939 (Ala. 1997) (quoting *State Docks Comm'n v. State ex rel. Cummings*, 150 So. 345, 346 (1933)(emphasis added)). That is precisely what the Appellant's reading of Section 24 does, by harmonizing Article I and its "DECLARATION OF RIGHTS" heading with the purpose of assuring that citizens will be able to freely move on Alabama's waterways without toll unless authorized by statute. In this limited, freedom procuring role Section 24 is a sturdy, workmanlike addition to our state Declaration of Rights that codifies what might have been already understood about our commonlaw rights as citizens. It does nothing more.

It would also be wrong in this context to apply deference to the legislature's findings in the Rebuild Alabama Act. In this matter, what is actually being interpreted is not strictly speaking, the Rebuild Alabama Act at all, but the Alabama State Constitution. Of course, the Alabama legislature can attach conclusory findings to whatever bills they pass, and the excellent lawyers for the state can point to these as examples and try to attach weight to them. Ultimately, however, the Court must determine in its role who to give deference to, the understanding of the people who ratified the Constitution, or the Alabama Legislature. In the context of this dispute, it would be more appropriate for the Court to once again side with the people and recognize that the plain and common meaning of the word highway excludes, for the purposes of Alabama law, navigable waterways from being treated as highways for this purpose.

## CONCLUSION

As a matter of interpretation, there is no way to reasonably conclude that Section 24 from the Alabama Constitution of 1901 establishes a special definition for the term *highway* that is to be observed throughout Alabama law. Instead, it is nothing more than a straightforward guarantee of a right of access to navigable waterways, a matter of primary importance to the

drafters of the Constitution. If this is true, then each instance of deference as asked for by the defendants would be improper, and the standard common definition of the word *highway* as being a word exclusively denoting a land based road would compel the conclusion that funding the port of Mobile or other projects relating to Alabama waterways would be forbidden by Amendment 354 to the Alabama Constitution. For these reasons, the Court should hold that the dispersal of the funds in question for improvements to waterways is unconstitutional and grant the injunctions requested.

/S/ Billy Love

Attorney For Appellant

## **Certificate of Compliance**

This brief filed on May 14<sup>th</sup>, 2021 complies with all the requirements listed within rule 32(B)2 of the Alabama rules of appellate procedure. Namely, it is in Century Schoolbook 14 font and it is 3,804 words, excluding exhibits.

/s/ William Love

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## **Certificate of Service**

I hereby certify that on this, the 14<sup>th</sup> day of May, 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

