No. 1200278

IN THE SUPREME COURT OF ALABAMA

TOM FREDRICKS,

Plaintiff-Petitioner,

v.

JOHN MCMILLAN, Alabama State Treasurer; DR. KATHLEEN BAXTER, Alabama State Comptroller; and KELLY BUTLER, Alabama State Finance Director,

Defendants-Respondents.

On Appeal from the Circuit Court of Montgomery County
(CV-19-900579)

On Petition for Writ of Certiorari to the
Alabama Court of Civil Appeals
(No. 2190593)

RESPONSE BRIEF OF STATE DEFENDANTS

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May 20, 2021

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Respondents do not request oral argument and do not believe that oral argument would be helpful to the resolution of this appeal.

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STATEMENT OF THE CASE

Taxpayer Tom Fredricks ("Fredricks") brought suit in Montgomery County Circuit Court seeking declaratory and injunctive relief against State officials relating to use of fuel taxes to fund waterway projects. (C. 5). The Defendants—the State Treasurer, State Comptroller, and State Finance Director—moved for summary judgment (C. 31), and on April 14, 2020, Circuit Judge J. R. Gaines granted the Defendants' motion for summary judgment and denied Fredricks' own motion for summary judgment. (C. 365). Fredricks filed a notice of appeal to the Court of Civil Appeals on April 28, 2020. (C. 366). The appeal was initially transferred to the Alabama Supreme Court, which transferred this matter back to the Court of Civil Appeals on June 10, 2020, pursuant to ALA. CODE § 12-2-7(6). The Court of Civil Appeals affirmed the Circuit Court's judgment in favor of the Defendants. *Fredricks v. McMillan*, ___ So. 3d ___, 2020 WL 6500928 (Ala. Civ. App. Nov. 5, 2020). The Petitioner filed his petition for writ of certiorari to this Court on January 29, 2021. The petition was granted on April 22, 2021.

STATEMENT OF THE ISSUE

When Alabama was admitted into the Union in 1819, it was on the condition that "all navigable waters within the said state shall for ever remain public highways." And Section 24 of the Alabama Constitution of 1901 provides "[t]hat all navigable waters" of the State "shall remain forever public highways." In 1952, the Alabama Constitution was amended to include what is now Section 111.06 (Amendment 354). That section requires that certain funds derived from state fees, excises, and license taxes "relating to registration, operation, or use of vehicles upon the public highways" or "fuels used for propelling such vehicles" be used only for certain purposes including the "cost of construction, reconstruction, maintenance and repair of public highways." The issue presented is:

Whether the term "public highways" in Section 111.06 includes Alabama's navigable waters.

STATEMENT OF THE FACTS

Respondents State Treasurer John McMillan, State Comptroller Dr. Kathleen D. Baxter, and State Finance Director Kelly Butler (collectively, "the State") concur with Fredricks' Statement of the Facts.

STATEMENT OF THE STANDARD OF REVIEW

"'This court reviews de novo a trial court's interpretation of a statute, because only a question of law is presented.'" *Bynum v. City of Oneonta*, 175 So.3d 63, 66 (Ala. 2015) (quoting *Scott Bridge Co. v. Wright*, 883 So.2d 1221, 1223 (Ala. 2003)). Likewise, where the facts of a case are "essentially undisputed," this Court applies a de novo standard of review in determining whether the trial court misapplied the law to the undisputed facts. *Id.* (citing *Continental Nat'l Indem. Co. v. Fields*, 926 So.2d 1033, 1034-35 (Ala. 2005)).

In so reviewing, however, acts of the legislature are presumed constitutional. *State ex rel. King v. Morton*, 955 So.2d 1012, 1017 (Ala. 2006). The party attacking the statute bears the burden of overcoming the presumption of constitutionality. *Thorn v. Jefferson Cty.*, 375 So.2d 780, 787 (Ala. 1979). Furthermore:

> [I]n passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government. All these principles are embraced in the simple statement that it is the recognized duty of the court to sustain the act unless it is clear beyond reasonable doubt that it is violative of the fundamental law.

Monroe v. Harco, Inc., 762 So.2d 828, 831 (Ala. 2000) (quoting *Alabama State Fed'n of Labor v. McAdory*, 18 So.2d 810, 815 (Ala. 1944)). Thus, this Court will "afford the Legislature the highest degree of deference" and "construe its acts as constitutional if their language so permits." *Id.*

SUMMARY OF THE ARGUMENT

The Alabama Constitution permits proceeds of a gasoline tax to be used for the improvement of navigable waterways because navigable waterways are "public highways."

The term "public highways" as used in the Rebuild Alabama Act ("RAA") and two constitutional provisions can most naturally and consistently be read to include navigable waterways, and indeed, this Court has long interpreted the term "public highway" in precisely such a fashion. Fredricks' approach seeks to set up a clash among these provisions where one need not exist and ignores well-recognized principles of statutory construction. The Circuit Court properly granted summary judgment, and the Court of Civil Appeals properly affirmed. This Court should likewise find that navigable waterways are public highways within the meaning of Amendment 354 to the Alabama Constitution, permitting the allocation of certain motor fuel vehicle revenues to the Alabama State Port Authority, as provided for in the RAA.

ARGUMENT

The Circuit Court and Court of Civil Appeals each got it right: There is nothing unconstitutional about using a portion of the proceeds of a gasoline tax for improvements to navigable waterways.

The RAA provides for a gasoline tax and provides that a portion of the proceeds of the tax go to make improvements to the shipping channel in Mobile Bay. Plaintiffs argue that this use violates Amendment 354 to the Alabama Constitution because that Amendment limits the use of gasoline taxes to improvement of "public highways," and he contends that "public highways" includes only the places on land used by automobile traffic. Plaintiff's argument fails because another provision of the Alabama Constitution makes clear that navigable waterways, such as Mobile Bay, are considered to be "public highways:" "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.

There is ample other support for reading the term "public highways" to include navigable waterways, including this Court's precedents. Even before the provision quoted above was adopted in 1901,

this Court declared that navigable waterways are "public highways," relying on similar provisions in previous versions of the State Constitution. *See, e.g.*, *Bullock v. Wilson*, 2 Port. 436, 445 (Ala. 1835) (holding that all navigable streams "are recognized as common or public highways"); *Peters v. New Orleans, M. & C.R. Co.*, 56 Ala. 528, 531 (Ala. 1876) (holding that a provision of the State Constitution providing that all navigable waters shall remain forever public highways "shows an unequivocal intention to guard and preserve the navigability and usefulness of all water courses intersected by the railroad" on equal terms with bridges); *Lewis v. Coffee County*, 77 Ala. 190, 192 (Ala. 1884) (taking a broad approach to defining "navigable" waterways and holding that "'[i]f it be capable, in its natural state, of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway'") (quoting *The Montello*, 87 U.S. 430, 441-42 (1874)).

More recently, this Court has maintained that under the 1901 Constitution, Article I, Section 24 means what it says: navigable waters are "public highways." *See City of Irondale v. City of Leeds*, 122 So.3d 1244, 1248 (Ala. 2013) (holding that rivers are "navigable in fact when

they are used or are susceptible of being used, in their ordinary condition, as *highways* for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water") (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1870) (emphasis added)).

There are other examples. This Court noted that the City of Gulf Shores adopted a resolution citing both Section 24 and an Alabama Code provision to find that the city could "regulate the use of the streets of the City, including the navigable waters[,] as public highways and public thoroughfares within its jurisdiction . . . ." *Ex parte Walter*, 829 So.2d 186, 192 (Ala. 2002). This Court has also explored the definition of "highway" under a condemnation statute. After laying out several definitions of the term, this Court held that the definitions' "general idea" is "a current way of public passage," a definition that would seem to encompass navigable waterways. *Davenport v. Cash*, 74 So.2d 470, 471 (Ala. 1950); *see also Sexton v. State*, 196 So. 746, 746 (Ala. 1940) ("The term 'highway' is the generic term for all kinds of public ways . . . .") (additional quotation and citation omitted).[1]

[1] Relatedly, other courts, including the United States Supreme Court, have commonly referred to navigable waters as "highways." *See, e.g.*, *PPL Montana, LLC v. Montana*, 565 U.S. 576, 698 (2012) (holding that under

Plaintiff contends that when the public adopted the language of Amendment 354 in 1951, a wholly new definition of "public highway" was adopted. But nothing in the Amendment indicates that the State meant the same term—"public highway"—to mean completely different things in two provisions of the same Constitution.

The Amendment provides as follows:

> No moneys derived from any fees, excises, or license taxes, levied by the state, relating to registration, operation, or use of vehicles upon the public highways except a vehicle-use tax imposed in lieu of a sales tax, and 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,

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the equal footing doctrine, a State did not hold title to riverbeds under segments of river that were non-navigable at the time of statehood, and that the proper inquiry into navigability is "whether the river 'forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other States or foreign countries in the customary modes in which such commerce is conducted by water.'" (quoting *The Montello*, 87 U.S. 430, 439 (1874)); *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404-05 (1940) (holding that the United States may regulate commerce over navigable waters "which are capable of use as interstate highways"); *Pugent Sound Power & Light Co. v. Federal Energy Regulatory Com'n*, 644 F.2d 785, 787 (9th Cir. 1981) (finding that under the Federal Power Act, a waterway is "navigable" if it is used or susceptible of being used "in its natural and ordinary condition as a highway for useful commerce.").

> 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.[2]

It therefore prohibits using gasoline excise taxes for purposes other than construction, reconstruction, maintenance and repair of "public highways" and bridges. *See One Stop, Inc. v. State Dept. of Revenue*, 814 So.2d 278, 285 (Ala. Civ. App. 2001) ("Amendment 354 provides that motor-fuel-tax revenue 'levied by the state' is to be spent for highway projects only."). The Amendment does not define the term "public highways" as either including or excluding navigable waterways, and it provides no indication, explicit or otherwise, that it intends to overturn or contradict Section 24's clear directive that navigable waters are public highways.

The operative language of Amendment 354 notably utilizes the very same term as Section 24: "public highways." The use of both words –

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[2] Amendment 354, which now appears in § 111.06 of the Constitution's recompilation, built upon Amendment 93 to the State Constitution in 1951. For purposes of this case, the two amendments are substantively identical; Amendment 354 supplanted the earlier amendment and added concluding language providing for proceeds from charges for personalized license plates or tags to be distributed as prescribed by the Legislature.

"public" and "highways" – as a phrase is important. Fredricks argues that this case turns on the definition of the word "highways" (Petitioner's Brief at 14-17), but that's not quite right. Amendment 354 first states that money derived from taxes of "use of vehicles upon the *public* highways" may be used for "construction, reconstruction, maintenance and repair of *public* highways . . .." (emphasis added). Then later the Amendment shifts to use the term "highway" instead of "public highway" ("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.") In other words, the drafters of Amendment 354 employed both the terms "public highways" and "highway," which indicates that the they deliberately chose the former phrase, with all its history, including its prior use in Section 24. For "as Justice Frankfurter colorfully put it, 'if a word'"—or phrase—"'is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (Scalia, J.) (quoting Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)).

Relatedly, the United States Supreme Court recognized in an analogous situation how two words used together can take on a new definition. In *FCC v. AT & T, Inc.*, 562 U.S. 397 (2011), the Court held that "personal privacy," within the meaning of the Freedom of Information Act, does not embrace corporations. In so holding, the Court stated that the two words together created a joint meaning beyond that of each word standing alone:

> AT & T's argument treats the term "personal privacy" as simply the sum of its two words: the privacy of a person. Under that view, the defined meaning of the noun "person," or the asserted specialized legal meaning, takes on greater significance. *But two words together may assume a more particular meaning than those words in isolation.* We understand a golden cup to be a cup made of or resembling gold. A golden boy, on the other hand, is one who is charming, lucky, and talented. A golden opportunity is one not to be missed. "Personal" in the phrase "personal privacy" conveys more than just "of a person." It suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity like, say, AT & T.

Id. at 406 (emphasis added). In the same way here, even if this Court accepts Fredricks' argument that a "highway" is limited to a surface roadway, the term "public highway" has long had a broader meaning that

the Alabama Constitution and Alabama courts recognize as including navigable waterways.[3]

Fredricks also argues that ALA. CODE § 40-17-359(b)(1) somehow favors his position. That provision finds that at least 1.23 percent of the "gasoline sold in this state . . . is used for marine purposes to propel vessels on inland and coastal waterways of this state." This legislative finding and subsequent allocation of tax proceeds actually supports the State's position that allocating revenue from fuel taxes to navigable waterways comports with Amendment 354. While this statute proportionally limited the amount of gasoline tax revenue that could be spent on waterways, the Legislature nonetheless recognized that taxes from fuels could be used for marine purposes (which makes sense: some

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[3] In this regard, even assuming that the definition of "highway" under ALA. CODE § 40-17-322(27) applies to this issue involving a separate article, the definition of "highway" under § 40-17-322(27) does not preclude reading the term "public highway" to encompass navigable waterways. Likewise, Amendment 354 uses both the terms "vehicle" and "motor vehicle." "Motor vehicle" as used in Amendment 354 seems to refer to cars, trucks, and other land-based modes of transportation, as the term is used when discussing vanity license plates. Thus, the drafters of the Amendment presumably intended a broader meaning when it restricted the use of sales from taxes upon fuels for "vehicles," as opposed to "motor vehicles." *Cf.* ALA. CODE § 32-1-1.1 (setting forth definitions in the Motor Vehicles and Traffic title and defining "motor vehicle" and "vehicle" differently).

boats are powered by gasoline, taxes are paid when such gasoline is purchased, and there is nothing surprising or untoward about the use of a gasoline tax to improve navigable waterways). Thus, the RAA's use of gas tax revenue for waterways is not a recent innovation. Indeed, the Legislature has similarly found in another act that navigable waters are to be treated on similar terms as roadways. *See* ALA. CODE § 33-7-1 ("All navigable waters in this state are public thoroughfares.").

Fredricks does not dispute that the Port of Mobile is navigable or that it provides common passage. Nor could he. *See Bean Dredging, L.L.C. v. Alabama Dept. of Revenue*, 855 So.2d 513, 519 (Ala. 2003) ("Waterways are navigable when they are used or susceptible of being used as highways for commerce, over which trade and travel may be conducted . . . . Neither party contends that Mobile Bay and the Mobile River are not navigable waterways and thus not highways for commerce."). Instead, Fredricks argues that the term "public highways" under Amendment 354 must mean something different than it does under Section 24, even though Amendment 354 does not state this. He bases this in part on what is "popularly thought" about how gas taxes in Alabama are to be used, and on the "common meaning" of "highway."

(Petitioner's Brief at 13-17). In so doing, Fredricks advocates for an interpretation that pits Section 24 of the Alabama Constitution against Amendment 354. Fredricks' position is polar opposite from this Court's consistent requirement for interpreting a constitutional provision. "'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 (Ala. 1933) (alterations in original)). The Court has made it clear that "'[e]ach section of the Constitution must necessarily be considered *in pari materia* with all other sections.'" *Town of Gurley v. M & N Materials, Inc.*, 143 So.3d 1, 46 (Ala. 2012) (Parker, J., concurring specially) (quoting *Jefferson Cty. v. Braswell*, 407 So.2d 115, 119 (Ala. 1981) (alteration in original)). Thus, this Court should construe Amendment 354 in harmony with Section 24, if possible.

Such an interpretation is not only possible, it is entirely logical. Section 24 recognizes that navigable waters are "public highways," just

as Alabama courts have since the 1800s.[4] Amendment 354 does not contradict Section 24, as the amendment sets forth no alternate definition of "public highways." Nothing in the text of Amendment 354 indicates that the drafters meant to preclude the meaning of the term "public highways" that appears in Section 24, and Fredricks' speculation about what is "popularly thought" about Amendment 354 or what the "common meaning" of highway is does not change this fact. The drafters of the RAA specifically found as follows: "That *consistent with the constitutional mandate that navigable waterways are public highways*, the Legislature hereby finds as a fact 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(a) (emphasis added). There is thus no reason why this Court should read into the Alabama Constitution a contradiction that does not appear within the plain language of the document. The RAA can and should be read in a way that complies with both constitutional provisions.

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[4] Fredricks' argument that Section 24 fails to include a header entitled "definitions" does not change the fact that the Section 24 clearly indicates that not only are navigable waters "public highways," but that they "shall forever remain" so.

CONCLUSION

The Court of Civil Appeals correctly held that navigable waterways are public highways, that the gasoline tax may properly be used to improve navigable waterways, and that the Circuit Court's judgment was correct:

> 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 waterways 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).

Fredricks, ___ So. 3d at ___, 2020 WL 6500928 at *3.

This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limitation set forth in Alabama Rule of Appellate Procedure 28(j)(1). According to the word-count function of Microsoft Word, the brief contains 3,875 words from the Statement of the Case through the Conclusion. I further certify that the brief complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The brief was prepared using Century Schoolbook 14-point font. *See* Ala. R. App. P. 32(d).

s/ James W. Davis
James W. Davis

CERTIFICATE OF SERVICE

I certify that on May 20, 2021 I electronically filed the foregoing document with the Clerk of the Court using the ACIS system, which will send a copy to all counsel of record. In addition, as required by Alabama Rule of Appellate Procedure 31(b), I caused an original and nine copies of this document to be filed with the Clerk of the Court on this day, and I caused to be sent by U.S. Mail one copy of this document to counsel for the Petitioner at the following address:

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