

SUPREME COURT OF THE
STATE OF LOUISIANA

DOCKET NO: 2021-CA-01414

WESTLAWN CEMETERIES, L.L.C.

VERSUS

THE LOUISIANA CEMETERY BOARD

A CIVIL ACTION

CONSTITUTIONALITY REPLY BRIEF

ON BEHALF OF
THE LOUISIANA CEMETERY BOARD
THROUGH THE OFFICE OF THE ATTORNEY GENERAL

TWENTY-FOURTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 795-617
HONORABLE STEPHEN GREFER, PRESIDING

Respectfully submitted:

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ARGUMENT

I. Introduction

The appellees, Westlawn Cemeteries, L.L.C., and its trustees (collectively, “Westlawn”), spend nearly half of their substantive argument on matters that are not before this Court. Rather, these topics are the subject of a final judgment that Westlawn did not choose to appeal. As described in more detail below, Westlawn challenged two regulations, L.A.C. 46:XIII.1503(C) and L.A.C. 46:XIII.1505. The trial court ruled against Westlawn’s facial challenge to L.A.C. 46:XIII.1505 in March of 2021, but ruled in Westlawn’s favor on L.A.C. 46:XIII.1503(C) only on rehearing in June of 2021. The Louisiana Cemetery Board (“LCB”) appealed the June decision as to L.A.C. 46:XIII.1503(C), but Westlawn did not appeal the March decision as to L.A.C. 46:XIII.1505. Westlawn cannot now effect an appeal of that decision just by discussing it in its opposition.

For the remainder of its opposition, Westlawn makes the State’s case by repeatedly arguing *facts* in this matter despite the reality that Westlawn has spent several years assiduously avoiding having to prove its case before the fact-finding tribunal. Westlawn tries to make a factual case before this Court by referring repeatedly to testimony from *pre-litigation* depositions. In this regard, Westlawn’s arguments revolve around the *application* of the single challenged law—L.A.C. 46:XIII.1503(C)—based on specific (but un-tried) facts in this matter. Westlawn is unable to articulate a facial challenge to the law in its brief. Thus the district court erred when it decided that Westlawn’s challenge to the law was facial, and this Court should now follow its own jurisprudence and remand this matter to the LCB to develop the factual record necessary for an as-applied challenge and a substantive review of the case.

Moreover, it is clear that Westlawn simply does not like the applicable law in this matter. Thus, rather than arguing that the actual law—which has been evenly applied to all Louisiana cemeteries since the early 1980s without difficulty—is facially invalid, Westlawn points only to its own allegations and a few limited, undeveloped facts that are not in evidence in this case in an attempt to overturn a law that protects the public from unscrupulous cemetery operators. None of these tactics can be rewarded.

Nothing that Westlawn has presented constitutes a proper facial challenge to the law under review. Failing this, this Court is duty-bound to uphold the facial constitutionality of L.A.C. 46:XIII.1503(C).

II. Westlawn raises issues that are not before this Court and must be rejected.

This appeal is about one thing: the constitutionality of L.A.C. 46:XIII.1503(C). The decision that was appealed—issued by the district court on June 29, 2021 (R. 647-652)—was limited solely to the facial constitutionality of L.A.C. 46:XIII.1503(C). Westlawn’s challenge to a totally different regulation—L.A.C. 46:XIII.1505—was rejected by the district court by a judgment rendered on March 25, 2021 (R. 617-618). Westlawn chose not to appeal that judgment, and it is now considered a final judgment. Indeed, in its motion for new trial that led to this appeal, Westlawn sought the district court’s reconsideration only of its judgment regarding L.A.C. 46:XIII.1503(C) (R.621).

Although Westlawn believes that it can re-litigate the facial constitutionality of L.A.C. 46:XIII.1505 in this appeal, that supposition is incorrect. Westlawn did not challenge the district court’s ruling on L.A.C. 46:XIII.1505’s facial constitutionality in any way until its answer to this appeal filed on October 12, 2021—some 202 days after the district court’s ruling in the LCB’s favor.¹ That judgment became final on May 23, 2021—143 days before Westlawn first hinted that it disliked the ruling on L.A.C. 46:XIII.1505 in its answer before this Court. Further, if Westlawn had appealed the March 25, 2021, ruling on L.A.C. 46:XIII.1505, that appeal would properly have been before the Louisiana Court of Appeal for the Fifth Circuit.² Accordingly, all argument regarding the facial constitutionality of L.A.C. 46:XIII.1505 must be rejected both as untimely and because the trial court’s decision on that law is now final and unappealable.

Westlawn will have an opportunity to develop facts before the LCB regarding the application of to L.A.C. 46:XIII.1505 to this matter.³ Indeed, pursuant to the district court’s ruling on March 25, 2021 (R. 618), Westlawn may create a factual record before the LCB in order for any as-applied challenge to be analyzed.⁴ But Westlawn has not done that yet.

¹ Importantly, an answer on appeal is limited to the judgment appealed. Frank L. Maraist and Harry T. Lemmon, 1 LOUISIANA CIVIL LAW TREATISE, *Civil Procedure* §14.11 (West 1999) (“An answer to the appeal itself, does not bring before the appellate court all of the issues decided adversely to the answering appellee by the judgment of the trial court.”). Nothing in the June 29, 2021, judgment relates to L.A.C. 46:XIII.1505, thus rendering null any attempt to revive an untimely appeal of the March 25, 2021, judgment on the constitutionality of that law.

² La. Const. art. V, sec. 10.

³ Any as-applied challenge to the constitutionality of this law will only be properly considered by the district court. *ANR Pipeline Co. v. Louisiana Tax Commission*, 02-1479 (La. 7/2/03), 851 So.2d 1145, 1151 (only “...district court[s]...have original jurisdiction to rule on issues of constitutionality....”); *see also PBGS, L.L.C. v. Duplechain*, 2013-278 (La.App. 3 Cir. 12/18/13), 130 So.3d 45, 53 (“...an administrative agency, lacks the subject matter jurisdiction over constitutional questions.”).

⁴ *Westlawn Cemeteries, L.L.C. v. La. Cemetery Bd.*, 20-C-250, 12 (La.App. 5 Cir. 1/11/21), 2021 La.App. LEXIS 92.

Instead, Westlawn again attempts to sidestep the Administrative Procedure Act process to avoid a factual review of its actions. Westlawn now improperly argues about the constitutionality of L.A.C. 46:XIII.1505 by raising the issue in response to an appeal of a judgment on L.A.C. 46:XIII.1503. Simply, the constitutionality of L.A.C. 46:XIII.1505 is not before this Court in this appeal. For that reason alone, the 6 pages of argument in Westlawn's opposition brief on this topic must be ignored as irrelevant to the resolution of the current matter.⁵

Moreover, as this Court has held in the past, questions of constitutionality should be avoided if other methods of disposing of a matter exist. In *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, this court stated:

This Court has long adhered to the principle that it "should avoid constitutional questions whenever a case can be disposed of on non-constitutional grounds." *Sims v. Mulhearn Funeral Home, Inc.*, 07-0054 (La.5/22/07), 956 So.2d 583, 588. "This Court does not generally reach or determine constitutional issues unless, in the context of a particular case, the resolution of such issues is necessary to decide the case." *Cameron Parish School Bd. v. ACandS, Inc.*, 96-0895 (La.1/14/97), 687 So.2d 84, 87; *Ring v. State, Dept. of Transp. & Development*, 02-1367 (La.1/14/03), 835 So.2d 423, 428. Accordingly, this Court's approach in cases such as this is to determine whether the case may be disposed of on non-constitutional grounds before reaching the constitutional issue.⁶

There is no reason to deviate from this rule now.

The district court, pursuant to the Fifth Circuit's directive,⁷ has properly sent the as-applied constitutionality question of L.A.C. 46:XIII.1505 back for a full fact-finding adjudication before the LCB (R. 618). It is entirely possible that the LCB or, on appeal, the district court or Fifth Circuit, will find that the facts alleged in the LCB's original notice of this matter (R. 386-393) do not constitute violations of L.A.C. 46:XIII.1505. Such a finding by any one of these three lower tribunals would render a constitutional analysis moot. Accordingly, in an effort to avoid constitutional concerns, L.A.C. 46:XIII.1505 should be left alone for later possible as-applied analysis. Jumping the gun on a constitutional inquiry regarding L.A.C. 46:XIII.1505 is unwarranted at this time and is procedurally improper under the longstanding jurisprudence of this Court.⁸

III. Westlawn has failed to carry its burden to prove that L.A.C. 46:XIII.1503(C) is unconstitutional.

Westlawn has not raised a meaningful facial constitutionality challenge to L.A.C. 46:XIII.1503(C). Rather, the majority of Westlawn's arguments have already been addressed in the LCB's Original Brief in this matter. Accordingly, in reply, the LCB simply reasserts and incorporates

⁵ Westlawn Opposition Brief at 21-26.

⁶ *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371 (La. 7/1/08), 998 So.2d 16, 25.

⁷ *Westlawn Cemeteries, supra*, at 12.

⁸ *M.J. Farms, supra*, at 25.

by reference everything in that brief. The few new issues do not articulate a facial challenge to L.A.C. 46:XIII.1503(C).

A. A legitimate, rational, and reasonable governmental interest cannot be extracted from post-hoc staff personnel thoughts.

Westlawn focuses its facial challenge to L.A.C. 46:XIII.1503(C) on a legal theory that such a law cannot possibly support a legitimate, rational, or reasonable governmental purpose. But Westlawn does not actually correctly apply this legal theory to the challenged law.

As set forth in the LCB’s Original Brief, the purpose of L.A.C. 46:XIII.1503(C) is evident from an *in pari materia* reading of La. R.S. 8:451, *et seq.*, as well as a litany of legal and industry commentary. The nature of perpetual care trust funds is to maximize the amount of income available for long-term cemetery maintenance.⁹ The challenged regulation accomplishes this goal by continuously growing the principle of the Westlawn Perpetual Care Trust Fund when income is not timely used by the cemetery for authorized purposes. Westlawn cites to no authority to controvert this reasonable, rational, and legitimate public purpose.

Instead, in support of its claim that L.A.C. 46:XIII.1503(C) is not legitimate, rational, or reasonable, Westlawn simply selects a few quotes from pre-trial depositions of LCB staff as to their speculations regarding the basis of the law. This testimony is not in evidence and these staff have never been qualified as experts to give such opinions. By Westlawn’s own admission, these staff had no involvement in the promulgation of L.A.C. 46:XIII.1503(C). Whether the current LCB staff (or even the past staff) can speculate about the purpose behind any regulation when asked to do so in a deposition is dispositive of nothing at all.¹⁰ Courts have consistently ruled that such *post-hoc* justifications, intentions, or musings are irrelevant when a Court is considering a law’s validity.¹¹

Westlawn hopes that this Court will be taken-in by irrelevant personal assessments and speculations of regulatory history by current government employees—musings that are not even in

⁹ LCB’s Original Brief at 8-10 and the sources cited therein.

¹⁰ *See e.g., Red Stick Studio Development, L.L.C. v. State*, 2010-0193 (La. 1/19/11), 56 So.3d 181, 189 (“How Red Stick, State employees, or even an individual legislator interpreted Section 3(C) is irrelevant. The only relevant issue is the intent of the entire legislature in enacting Act 456.”).

¹¹ *E.g., East Baton Rouge Parish School Board v. Foster*, 2002–2799 (La. 6/6/03), 851 So.2d 985, 999 (observing “...that the post-enactment statements of legislators on legislative intent have generally been excluded as having ‘limited value to an understanding of the clear meaning and legal effect of a statute’ and that “...the understanding of one member, or even a few members, of the legislature is not determinative of legislative intent.”).

evidence. This argument in support of the extreme remedy of unconstitutionality is not appropriate and should not be countenanced by this Court.

B. Substantive due process infringements require a right—something that Westlawn has not identified.

The crucial missing component to Westlawn's challenge of L.A.C. 46:XIII.1503(C) is a right on which the regulation infringes. Though Westlawn spends considerable time alleging that L.A.C. 46:XIII.1503(C) represents an unconstitutional violation of substantive due process, it is unable to identify what right has been infringed. Based upon Westlawn's assertions below,¹² the LCB presumes that Westlawn is still laboring under the incorrect understanding that cemeteries own the perpetual care trust funds associated with their burial grounds. But these funds are held in trust for the perpetual maintenance of the cemetery, to benefit the people buried there and their families as well as the general public; the funds are not the cemetery's property.¹³ Without any infringement on a right of its own, Westlawn's claims that L.A.C. 46:XIII.1503(C) violates its due process falls flat. There is no basis for this challenge other than that Westlawn dislikes the challenged law. Dislike is not a valid basis to strike down a law.

C. None of the mandates of L.A.C. 46:XIII.1503(C) will cause Westlawn (or anyone) to forfeit anything.

Westlawn belabors another mistaken belief: that the challenged laws cause forfeitures of some of Westlawn's substantive rights.¹⁴ While these allegations appear to be directed at L.A.C. 46:XIII.1505, the LCB addresses this issue in order to ensure clarity for the analysis of L.A.C. 46:XIII.1503(C).

As it relates to L.A.C. 46:XIII.1503(C), Westlawn cannot actually identify any impinged substantive rights because there are no relevant rights to be forfeited. The challenged law simply regulates funds that are not owned by Westlawn or any other similarly situated cemetery. Because these are trust funds paid by *the public* and held for explicit *public-protection* purposes, limitations on the use of such funds cannot be said to be a forfeiture of any right held by Westlawn.

The operation of cemeteries is, at its core, a long-term money-losing venture. Over time, grave spaces are sold and the available merchantable land diminishes. With the diminishment of this land, so too diminishes the cemetery's income. In order to provide some amount of protection for the sacred

¹² See also Westlawn Opposition at 16.

¹³ LCB's Original Brief at 8-10 and the sources cited therein.

¹⁴ See Westlawn Opposition at 14-16. In fairness, the district court also seemed to confuse the requirements under L.A.C. 46:XIII.1503(C) with forfeitures. This is incorrect.

spaces of the dead, Louisiana’s Legislature, along with lawmakers in virtually every United States jurisdiction,¹⁵ mandate a percentage of the amount charged for grave spaces sold with a guarantee of perpetual care so that those funds could be held in trust for future maintenance as the income of the cemetery decreases.¹⁶ No perpetual care trust fund was ever intended to fully cover the costs of maintaining a cemetery in pristine condition; that is an overhead cost of operating a cemetery. The trust funds are merely a guard against complete insolvency for maintenance purposes. They will attach to any entity, public or private, that owns and operates the cemetery land, and were never envisioned to be the property of the cemetery operator.

Because of this, restrictions placed on the disbursement of perpetual care trust funds or designed to grow the principle are aimed at protecting the public, and cannot reasonably be said to represent a forfeiture by any party that does not own them in the first place. In other words, Westlawn cannot forfeit funds that it never owned. Westlawn does not own the trust funds at issue in this case. Westlawn’s forfeiture arguments are irrelevant diversions from the constitutional substance of this appeal and should be rejected.

D. Louisiana’s Trust Code is irrelevant to this Court’s analysis.

Westlawn’s final erroneous belief is that the Louisiana Trust Code governs this matter. As set forth in prior filings, the Trust Code is Louisiana’s general law regarding trusts. The Louisiana Legislature deviated from the Trust Code as it relates to cemetery matters when it enacted Chapters 7 and 8 of Title 8. This deviation created more specific laws regarding cemetery trusts than the more general laws found in the Trust Code. Black letter law counsels that specific statutes on a topic govern when specific laws are pitted against general laws.¹⁷ In this matter, the cemetery-specific provisions of Title 8, Chapter 7 (perpetual care trusts) control to the exclusion of the more general trust laws contained in the Louisiana Trust Code. For this reason, Westlawn’s reliance on the Trust Code bears no weight on this Court’s analysis of L.A.C. 46:XIII.1503(C)’s constitutionality.

¹⁵ *E.g.*, V.T.C.A., Health & Safety Code § 712.001, *et seq.* (Texas); Miss. Code Ann. § 41-43-31, *et seq.* (Mississippi); Ala.Code 1975 § 27-17A-40, *et seq.* (Alabama); A.C.A. § 20-17-904 (Arkansas).

¹⁶ La. R.S. 8:451, *et seq.*

¹⁷ *Catahoula Parish School Bd. v. Louisiana Machinery Rentals, LLC*, 2012-2504 (La. 10/15/13), 124 So.3d 1065, 1079 (“This court has repeatedly found that, as a general rule of statutory interpretation, a specific statute controls over a broader, more general statute. *Burge v. State*, 10-2229 (La. 2/11/11), 54 So.3d 1110, 1113.”).

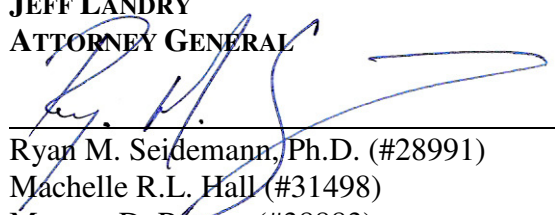
CONCLUSION AND RELIEF REQUESTED

Considering the foregoing, the State respectfully requests that this Court overturn the erroneous ruling below by finding that L.A.C. 46:XIII.1503(C) is constitutional on its face.

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VERIFICATION OF SERVICE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned notary public, personally appeared

RYAN M. SEIDEMANN

who, after being duly sworn, did state that he is an attorney for the Defendant/Appellant, the Louisiana Cemetery Board, that the allegations of the Constitutionality Reply Brief are true to the best of his knowledge, information, and belief, and that a copy of the brief was served upon the following via U.S. Mail, properly addressed, this 10th day of December, 2021.

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SWORN AND SUBSCRIBED before me, Notary Public, on this 10th day of December, 2021.



Morgan D. Rogers

Notary Public

La. Bar No. 38883

My commission ends at death.