

SUPREME COURT
STATE OF LOUISIANA

DOCKET NO: 2021-CA-01414

WESTLAWN CEMETERIES, L.L.C.
VERSUS
THE LOUISIANA CEMETERY BOARD

CIVIL CASE

**ORIGINAL BRIEF IN OPPOSITION TO APPEAL
AND IN SUPPORT OF ANSWER TO APPEAL**

ON BEHALF OF
PLAINTIFF WESTLAWN CEMETERIES, L.L.C.,
AND INTERVENORS, AS TRUSTEES OF THE WESTLAWN
MEMORIAL PARK PERPETUAL CARE TRUST FUND

ON APPEAL FROM THE
TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA
DOCKET NUMBER 795-617
HONORABLE STEPHEN C. GREFER, PRESIDING

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STATEMENT OF THE CASE

A. Course of the Proceedings Below

This is a direct appeal from the judgment of the 24th Judicial District Court, Parish of Jefferson, the Honorable Stephen C. Grefer presiding, declaring La. Admin Code. Title 46, Pt XIII, § 1503(C) unconstitutional on its face. This original brief is submitted on behalf of plaintiff, Westlawn Cemeteries, L.L.C. (“Westlawn”) and Intervenors, Boyd L. Mothe, Boyd L. Mothe, Jr., Laurie M. Knowles, Nicole M. Lawson, Katherine M. Illg, and Boyd L. Mothe, III, in their capacities as trustees of the Westlawn Memorial Park Perpetual Care Trust Fund (“Trustees”). The judgment of the district court should be affirmed for the reasons stated below.

La. Admin. Code. Title 46, Pt XIII, §1303 provides that “[t]he validity or applicability of a rule may be determined in an action for declaratory judgment in the Twenty-Fourth Judicial District Court for the Parish of Jefferson as provided for in the applicable provisions of the Administrative Procedure Act.” On May 24, 2019, Westlawn filed this action seeking declaratory relief against the defendant, the Louisiana Cemetery Board (the “LCB” or “Board”).¹ Westlawn requested that the court issue a declaratory judgment declaring La. Admin. Code Title 46, Pt XIII, § 1503(C) and La. Admin. Code Title 46, Pt XIII, 1505 § (A) and (B) unconstitutional.²

The LCB answered the petition for declaratory judgment admitting jurisdiction and without asserting any exceptions.³ The parties conducted extensive discovery. Thereafter, the LCB moved the court for a scheduling order and agreed to decide the legal issues presented by Westlawn’s petition by cross-motions for summary judgment.⁴

On December 11, 2019, Westlawn moved for summary judgment seeking a ruling from the district court declaring L.A.C. 46:XIII.1503(C) and L.A.C. 46:XIII.1505 (A) and (B) unconstitutional.⁵ The LCB asked Westlawn to continue the hearing on its motion so it could file its own motion for summary judgment and set it on the same day. Westlawn agreed.

On January 29, 2020, the LCB filed its cross-motion for summary judgment seeking a ruling that the challenged regulations are constitutional.⁶ The LCB also unexpectedly filed

¹ R. Vol. 1, p. 10 (Petition).

² *Id.* at pp. 19-20.

³ R. Vol. 1, p. 22 (Answer, ¶ 2).

⁴ R. Vol. 1, p. 30.

⁵ R. Vol. 1, p. 34.

⁶ R. Vol. 1, pp. 129-130.

peremptory exceptions of no cause of action untimely raising failure to exhaust administrative remedies by Westlawn, an exception of no right of action, and an exception of non-joinder arguing that the Trustees are an indispensable party to this action.⁷

The parties appeared in court on February 21, 2020 for the hearing on the cross-motions for summary judgment and exceptions. During a prehearing conference in chambers it was indicated by the LCB's counsel that he was not sure if the Board would follow its staff's interpretation of the challenged regulations, and that if the Board overruled its staff it would moot the constitutional challenge before the court. After the conference, the parties agreed on the record to continue the cross-motions and exceptions and hold a limited administrative hearing before the Board limited solely to the interpretation and application of L.A.C. 46:XIII.1503(C) and L.A.C. 46:XIII.1505(A) and (B), as reflected in the judgment signed March 13, 2020.⁸ The Trustees also filed a petition for intervention in open court, without objection by the LCB, mooting the LCB's exception of non-joinder.⁹

Unfortunately, the case became unnecessarily complicated thereafter due to the actions of the LCB. It is not surprising that the LCB chooses to quickly summarize the procedural history in its brief given what the full procedural history indicates. After agreeing to conduct the limited administrative hearing, the LCB stonewalled for months and eventually refused to hold it. Instead, the LCB filed additional exceptions objecting to the Trustees' intervention after it had just strenuously argued the Trustees were indispensable parties.¹⁰ The LCB then took a writ from the March 13, 2020 judgment wherein the parties consented to holding the limited administrative hearing before the Board.¹¹

On June 18, 2020, the district court heard and denied the LCB's exception of vagueness and continued its other exceptions relating to the intervention of the Trustees.¹² The court also

⁷ R. Vol. 1, pp. 116-117 and p. 163. The LCB states that Westlawn has attempted to "leapfrog" the administrative review process. See LCB's original brief, at p. 5. Westlawn filed this action without first seeking administrative review because an administrative agency such as the LCB is without jurisdiction to decide the constitutionality of its own rules. *Louisiana Chemical Association v. Department of Environmental Quality*, 577 So.2d 230, 233 (La. App. 1 Cir. 1991). Furthermore, the failure to exhaust administrative remedies must be raised by the exception of prematurity. Therefore, any argument on exhaustion of administrative remedies was waived when the LCB answered the petition without asserting the dilatory exception of prematurity. *Buelle v. Periou*, 04-2733 (La. App. 1 Cir. 12/22/05), 927 So.2d 1126, writ denied, 06-0160 (La. 4/24/06), 926 So.2d 542.

⁸ R. Vol. 2, p. 347.

⁹ R. Vol. 2, p. 314 (Petition of Intervention).

¹⁰ R. Vol. 2, pp. 336-338.

¹¹ R. Vol. 2, p. 357.

¹² R. Vol. 2, p. 420.

ordered the LCB to conduct the limited administrative hearing.¹³ Undeterred, the LCB still refused to conduct the limited administrative hearing and took a writ from the June 18, 2020 judgment.¹⁴

On July 16, 2020, LCB issued an Order to Show Cause and Notice of Hearing to Westlawn and the Trustees to appear at a pre-hearing conference on July 31, 2020 for the purpose of setting a full-blown administrative hearing not only on the application and interpretation of the challenged regulations, but also on other claims not at issue in this litigation.¹⁵ In response, Westlawn and the Trustees filed a motion to require the LCB to proceed with the limited administrative hearing.¹⁶

On July 30, 2020, the parties appeared in court for the hearing on the motion to require the limited administrative hearing. After the court again ordered the LCB to comply with the judgment ordering the limited administrative hearing with minor changes to the scope, the LCB filed its third writ application with the Louisiana Fifth Circuit Court of Appeal.¹⁷

The above actions of the LCB had the effect of substantially delaying the resolution of this case and increasing the legal fees of Westlawn and the Trustees, which was contrary to the purpose of the compromise reached at the February 21, 2020 hearing.¹⁸ Realizing the law is not in its favor, the LCB now attempts to paint Westlawn in a bad light and claims Westlawn seeks to avoid administrative review of constitutional issues which the LCB has no authority to decide.¹⁹ The record shows that the LCB is the party that caused the “massive procedural quagmire”²⁰ it now laments in its brief by doing a total about-face after the February 21, 2020 hearing.

The three writs filed by the LCB were consolidated. On January 11, 2021, the Fifth Circuit issued its ruling holding that the district court had original jurisdiction to determine the constitutionality of facial challenges to the regulations at issue without the prerequisite of an administrative hearing before the LCB but that any as-applied challenges needed to first be presented to the Board.²¹ The Fifth Circuit remanded the case and ordered the district court to

¹³ *Id.*

¹⁴ R. Vol. 2, p. 468.

¹⁵ R. Vol. 2, p. 386-393.

¹⁶ R. Vol. 2, p. 373.

¹⁷ R. Vol. 2, p. 468.

¹⁸ Ironically, the LCB now also complains that the Trustees' legal fees are being paid out of the income of the Westlawn Trust “for unauthorized purposes.” See the LCB's Original Brief, at p. 3. It is customary and certainly not improper for a trustees' legal fees to be paid out of funds from the trust. In fact, the Model Trust Agreement published by the LCB states in Section 14: “Reasonable attorneys' fees, court costs, accounting fees, and similar expenses incurred by the Trustee in connection with this Trust are to be paid out of the income of the Trust.” R. Vol. 1, p. 237.

¹⁹ See *Louisiana Chemical Association*, 577 So.2d at 234. See also *Clark v. Department of Transp. & Development*, 413 So.2d 573 (La. App. 1 Cir.1982).

²⁰ See the LCB's Original Brief, at p. 4.

²¹ R. Vol. 3, pp. 513-519 (Fifth Circuit Court of Appeal Decision).

grant the parties leave to submit additional memoranda regarding the challenges to the constitutionality of the rules in question as “facial” versus “as applied” challenges and, if it found facial challenges, determine constitutionality and issue a declaratory judgment accordingly.²²

The parties filed supplemental memoranda and appeared in court for oral argument on the issue of the nature of the constitutional challenges asserted. On March 11, 2021 the district court rendered a judgment on the cross-motions for summary judgment finding Westlawn and the Trustees presented both facial and as-applied constitutional challenges and declared both regulations at issue facially constitutional, leaving for another day the “as-applied” constitutional challenges to the regulations.²³

Westlawn and the Trustees timely filed a motion for new trial limited to their facial separation of powers challenge to Section 1503(C).²⁴ On June 29, 2021, the district court granted the motion for new trial reversing, in part, its judgment denying Westlawn’s motion for summary judgment and declaring L.A.C. 46:XIII.1503(C) unconstitutional on its face as the regulation violates the separation of powers provisions of La. Const. art. II, §2.²⁵

On July 8, 2021, the LCB filed a motion for suspensive appeal taking a direct appeal to this Court from the district court’s ruling that L.A.C. 46:XIII.1503(C) is facially unconstitutional because it violates the separation of powers clause. Westlawn and the Trustees answered the appeal seeking reversal or modification of the district court’s judgment declaring Section 1505(A) and (B) facially constitutional and of the portions of the judgment denying the facial constitutional challenge to Section 1503(C) on substantive due process grounds.²⁶

B. Factual Background

Westlawn is the owner and operator of Westlawn Memorial Park, a perpetual care cemetery in Gretna, Louisiana founded in 1957. In 1957, a perpetual care trust fund was established to provide for the perpetual care of cemetery or interment spaces in Westlawn Memorial Park administered by the duly appointed trustees.²⁷ The trust is called the Westlawn Memorial Park Perpetual Care Trust Fund (the “Westlawn Trust”).

²² *Id.* at pp. 517-518.

²³ R. Vol. 3, p. 617-618.

²⁴ R. Vol. 3, p. 621.

²⁵ R. Vol. 3, p. 646.

²⁶ *See* Answer to Appeal.

²⁷ La. R.S. 8:457 provides that perpetual care cemeteries in existence before August 1, 1962 are exempt from certain requirements for the Louisiana Cemetery Act adopted in 1974 in recognition of their constitutionally protected rights.

Chapter 7 of Title 8 provides that a cemetery is initially required to fund the perpetual care trust with \$50,000.00 in cash or securities.²⁸ Thereafter, the trust is funded with a percentage of the sales price of cemetery or interment spaces designated for perpetual or endowed care.²⁹ All of the income generated by the trust is statutorily mandated to be used “solely” for the care of interment spaces and portions of the cemetery immediately surrounding the spaces.³⁰ The income generated by the Westlawn Trust is not sufficient to fund the total cost of providing perpetual care and maintenance. Westlawn funds the difference between the amount of income generated by the Westlawn Trust and the actual cost of providing for perpetual care.³¹

By Act No. 417 of 1974, the legislature amended and reenacted laws pertaining to cemeteries and created the Louisiana Cemetery Board as found in La. R.S. 8:1, *et seq.* (hereinafter, “Title 8” or the “Louisiana Cemetery Act”). La. R.S. 8:67 provides that the Board may establish necessary rules and regulations for the administration and enforcement of Title 8 and prescribe the form of statements and reports provided for therein, “but such regulations shall not be in conflict with or contrary to any provisions of Title 8 or of R.S. 49:951, *et seq.*”.

Chapter 7 of Title 8 (La. R.S. 8:450 – 467) sets forth the statutes that address the operation of a perpetual care cemetery with respect to establishing a trust, use of income generated by a trust, and annual reports of cemetery authorities and the trustees of perpetual care trusts. The entire purpose of this chapter is to cause a trust to be established to generate a stream of income over time to fund the care of the cemetery spaces sold with perpetual care and the surrounding areas.

As set forth further below, the LCB’s position is that the cemetery authority must use its tax reporting year as its reporting period on its annual reports submitted to the LCB. Chapter 7 of Title 8 provides for three reports covering an annual period and states the due date of the reports but does not mandate the beginning or ending of the 12-month reporting period to be used by the cemetery or trustee in making the reports.

La. R.S. 8:455 requires the cemetery authority to submit a report to the trustee.

455. Annual report by cemeteries

All cemeteries subject to the provisions of this chapter shall file with the trustee, as defined herein, not later than ninety days after the close of the **business year**, a

²⁸ La. 8:454(A).

²⁹ *Id.*

³⁰ La. 8:454.1(A).

³¹ R. Vol. 1, p. 68 (Affidavit of Boyd L. Mothe). There is no law that requires Westlawn to make up this deficit.

report setting forth the volume and the gross selling price of sales upon which a deposit with the trustee is required by this chapter. (Emphasis added.)

La. R.S. 8:456 requires the trustee to file an annual report with the Board.

456. Annual report by trustee; final accounting by trustee required

A. (1) Not later than sixty days after the receipt of the report required by R.S. 8:455, the trustee shall file with the board an **annual report** on a form prescribed by the board setting forth all of the following:

(a) All receipts and disbursements of cash, all receipts and deliveries of other trust property during the regular **business year** of the cemetery authority, and a detailed list of all items of trust property in the trust **at the end of each year**.

(b) A statement showing the total amount of the endowment and perpetual care trust funds invested in each of the investments authorized by law, and the amount of cash on hand not invested.

(2) The report shall be verified by the president or vice president and one other officer of the cemetery authority.

B. Within sixty days of the resignation of a trustee and transfer of the trust fund to the successor trustee, the resigning trustee shall file with the board a final accounting showing in detail all receipts and disbursements of cash and all receipts and deliveries of other trust property, and set forth a detailed list of all items of trust property in the trust from the **last reporting period** through the date of resignation and transfer of the trust fund to the successor trustee.

C. Notwithstanding any provision of law to the contrary, the annual report and final accounting shall be open for public inspection and upon request, a copy of the annual report and final accounting shall be made available. (Emphasis added.)

La. R.S. 8:466 requires the cemetery authority to file an annual report with the Board:

466. Annual report of cemetery authority; contents; fees

A. Each cemetery authority that has sold interment space subject to endowment or perpetual care, including those cemetery authorities organized before and after August 1, 1962, shall file with the board **annually**, on or before the thirtieth day of June, a written report on a form prescribed by the board setting forth all of the following:

(1) The number of contracts written in the **reporting period** for the sale of interment spaces or interment rights.

(2) The amount of gross sales or receipts from contracts of sales of all interment spaces or interment rights and the amount of any discounts.

(3) The amount of gross sales or receipts from perpetual care contracts, if any, sold separately from interment spaces or interment rights.

(4) The fair market value of interment spaces or interment rights provided without charge.

(5) The amount of deposits due the endowment or perpetual care trust fund for the **reporting period** and the dates the funds were deposited with the trustee.

B. The report shall be verified by the president or vice president and one other officer of the cemetery authority and shall be certified by the accountant or auditor preparing the same.

C. The cemetery authority shall pay to the board a report filing fee of not more than five dollars for each contract subject to endowment or perpetual care entered into in the **annual report period**, as specified in Subsection A of this Section. Report filing fees shall be due and payable at the time of filing the report and shall be used to cover the board's reasonable and ordinary expenses. Failure to pay report filing fees within six months after the close of the business year shall result in a late charge assessed by the board to the cemetery authority in the amount of one hundred dollars. (Emphasis added.)

It should be noted that Title 8 does not designate a particular reporting period other than annual, or require that any of the information provided in the reports be based on the cemetery authority's tax reporting year as opposed to a calendar year or any other 12 month period, which a cemetery authority deems to be its "business year."

The forms prescribed by the Board for the "Report of Trustee and Report of Cemetery Authority (Pursuant to R.S. 456 and R.S. 8:466)" provide a blank to state the reporting period that reads: "**Status of Perpetual Care Trust Fund year ending:** _____."³²

On every annual report submitted by Westlawn and the Trustees that are at issue, this blank was completed stating the annual reporting period to be the year ending "December 31."³³

The Board is statutorily mandated to "examine the reports filed with it as to their compliance with the requirements of the law."³⁴ Upon receipt, the Board stamps the reports with a "Received Date" and a "Review Date" as to when the performance of the compliance review is completed, which is certified by the signature of a member of the Examination and Inspection Committee of the Board.³⁵ The Board never raised an issue regarding the eighteen annual reports now at issue.

At all pertinent times, the Trustees have always used the calendar year as the reporting year for the Westlawn Trust.³⁶ Prior to 2000, Westlawn used a fiscal year ending March 31 as the reporting period for its annual reports. In 2000, Westlawn changed its annual reporting period to the calendar year and filed with the Board a short year report for the period April 1, 2000 to

³² R. Vol. 1, p. 73.

³³ R. Vol. 1, p. 68-69 (Affidavit of Boyd L. Mothe, ¶ 15).

³⁴ La. R.S. 8:467.

³⁵ R. Vol. 1, p. 71 and 76.

³⁶ The Westlawn Trust is required by the Internal Revenue Code to file its federal tax returns on a calendar year. *See* R. Vol. 1, p. 82 (Affidavit of Sperandeo, ¶8).

December 31, 2000.³⁷ It is undisputed that there is no statute or regulation requiring a cemetery authority to request prior approval or otherwise provide any special notice to the Board of a change in its reporting period.³⁸

Westlawn's short year report put the Board on notice over 20 years ago that Westlawn was changing its reporting period from a 12-month period ending March 31 to a 12-month period ending December 31. Thereafter, Westlawn filed all subsequent annual reports with the Board based on the calendar year, which were all received, reviewed for compliance and accepted by the Board without objection to the use of the calendar year reporting period.³⁹

Since 1987, Bobby Sperandeo, a certified public accountant since 1974, has been responsible for preparing all of the reports of Westlawn and the Trustees submitted to the Board regarding perpetual care funds. In 2018, the Board hired a new compliance investigator who performed a review of the annual reports submitted by Westlawn and the Trustees from 2002 through 2017. Following this review, the executive director of the Board issued a notice of an informal administrative proceeding to Westlawn. At the informal proceeding, the fact that Westlawn submits its annual reports based on the calendar year but files its federal income tax returns using a fiscal year end of March 31 was discussed.⁴⁰

The Board's administrative staff determined that Westlawn should have used a reporting period ending on March 31 on its annual reports for 2002-2017. The Board claimed that the reports filed with the Board by all cemeteries and trustees of perpetual care trusts are required to use the tax reporting year of the cemetery as their annual reporting period.⁴¹ The Board based this conclusion on L.A.C. 46:XIII.1505 (A) and (B).

La. Admin Code. Title 46, Pt XIII, § 1505 (A) and (B), were promulgated in October of 1982, and only provide for the due dates of reports and not a particular reporting period:

1505. Annual Reports Required

A. All perpetual or endowed care cemeteries shall submit a report to the board, on the forms prescribed by the board, within six months after the close of the cemetery authority's tax reporting year.

³⁷ R. Vol. 1, p. 68 (Affidavit of Boyd L. Mothe, ¶ 14).

³⁸ R. Vol. 1, pp. 95-96 (Deposition of Lucy McCann).

³⁹ R. Vol. 1, p. 69 (Affidavit of Boyd L. Mothe, ¶ 16).

⁴⁰ R. Vol. 1, p. 81 (Affidavit of Bobby Sperandeo, ¶ 5).

⁴¹ In the prior 31 years that Mr. Sperandeo prepared and filed the reports for Westlawn, the Board never inquired about the tax reporting year of Westlawn nor did the reports require disclosure of same.

B. All trustees of perpetual or endowed care trust funds shall submit a report to the board, on the forms prescribed by the board, within 5 months after the close of the cemetery authority's tax reporting year, or within 60 days from resignation as trustee. The assets of the trust shall be reported on a cost basis.

The Board also looked to L.A.C. 46:XIII.1503(C), the regulation at issue on the direct appeal, which regulation provides as follows:

C. All income received by the trustees of cemetery care funds, which is not remitted to the cemetery authority within 120 days after the end of the latest tax reporting year of the cemetery authority, owning or operating a cemetery for which the trust fund is maintained, shall become, for all purposes, part of and added to the corpus or principal of the trust, and may not be withdrawn or distributed.

Concluding the annual reports filed by Westlawn since the filing of its short year report did not use the correct reporting period, the Board's staff reconstructed the annual reports for 2002-2017 by changing the year-end of the reporting period from the calendar year to the March 31 year-end used by Westlawn for tax reporting purposes to identify the dates the income was distributed to Westlawn over that 15 year period and determine what distributions of income fell outside of the 120-day distribution period stated in L.A.C. 46:XIII.1503(C).⁴² The Board claimed that reconstructing the reports with the changed reporting period resulted in distributions of income made to Westlawn from 2002-2017 in the amount of \$392,657.30 to fall beyond the 120-day distribution period.⁴³

The Board then demanded by letter from its attorney that Westlawn forfeit the \$392,657.30 of income distributions received and expended over the prior eighteen years for perpetual care of cemetery spaces and that this income be returned to the Westlawn Trust and converted to trust corpus or principal and not withdrawn or distributed to Westlawn.⁴⁴

STATEMENT ON APPELLANT'S ASSIGNMENT OF ERROR

In its sole assignment of error, the LCB asserts the district court erred by ruling that L.A.C. 46:XIII.1503(C) is unconstitutional on its face and finding in its reasons for judgment that Section 1503(C) "exceeds the delegated authority from the Louisiana Legislature to the Louisiana Cemetery Board."⁴⁵ Significantly, Westlawn and the Trustees moved for and were granted a new trial on grounds that the district court erred in failing to declare Section 1503(C) unconstitutional

⁴² R. Vol. 1, pp. 99-100 (Deposition of Lucy McCann).

⁴³ R. Vol. 1, pp. 108-110 (Deposition of Joni Thompson).

⁴⁴ R. Vol. 1, p. 69 (Affidavit of Boyd L. Mothe, ¶ 18). The Board now claims that based on additional years the amount that must be returned to the principal of the trust is \$457,060.21.

⁴⁵ See the LCB's Original Brief, at p. 5. It is well-settled law that the trial court's oral or written reasons form no part of the judgment. See *Perez v. Evenstar, Inc.*, 12-1003 (La.6/22/12), 91 So.3d 288. This matter comes before the Court on review of a summary judgment and is, therefore, subject to *de novo* review.

on its face because it violates the separation of powers and is an exercise of primary legislative authority, which cannot be delegated to an administrative body, and is in conflict with other provisions of Title 8.⁴⁶ Although the LCB has not properly framed the issue, the parties agree that the analysis of whether a delegation of authority complies with the separation of power provision of the constitution requires the application of the test set forth in *Schwegmann Brothers Giant Super Markets v. McCrory*, 237 La. 768, 787–88, 112 So.2d 606 (1959).

LAW AND ARGUMENT ON APPELLANT’S ASSIGNMENT OF ERROR

A. Facial Constitutional Challenge.

In a facial constitutional challenge, a plaintiff is claiming that a statute is unconstitutional at all times and under all circumstances. *Sabri v. United States*, 541 U.S. 600, 609 (2004). It is axiomatic that the Constitution is the supreme law of this state to which all legislative instruments must yield. *Iberville Par. Sch. Bd. v. La. State Bd. of Elementary and Secondary Educ.*, 2017-0257, p. 8 (La. 3/13/18), 248 So. 3d 299, 306. Although the party challenging a statute generally has the burden of proving unconstitutionality, when a legislative instrument conflicts with a constitutional provision the legislative instrument must fall. *See Caddo–Shreveport Sales and Use Tax Com’n v. Office of Motor Vehicles Through Dept. of Public Safety and Corrections of the State*, 97-2233, p. 6 (La. 4/14/98), 710 So. 2d 776, 780. Logically, the same standards apply when addressing whether an administrative regulation conflicts with the Constitution. *Comeaux v La. Tax Comm’n*, 20-1037 (La. 5/20/21), 320 So.3d 1083, 1096.

B. Section 1503(C) Violates the Separation of Powers Provisions of the Constitution.

“A constitution defines and limits the powers of the government it creates. It therefore follows, as a natural and also a logical result, that the governmental exercise of any power not authorized by the constitution is an assumed power, and therefore illegal.”

- Thomas Paine

1) Primary Legislative Authority is Not Delegable.

The state constitution divides governmental power among separate legislative, executive, and judicial branches and provides that no one branch shall exercise powers belonging to the others. *Hoag v. State*, 04-0857, p. 4 (La. 12/1/04), 889 So.2d 1019, 1022 (citing La. Const., art.

⁴⁶ The district court’s Written Reasons for Judgment dated June 29, 2021 also states, in pertinent part, that “[m]overs argue that the Board’s adoption of regulation 1503(C) is an exercise of primary legislative authority which cannot be constitutionally delegated to an executive branch entity.” R. Vol. 3, pp. 647-648.

II, §§ 1 and 2). “Legislative power rests exclusively in the legislature.” *State v. Alfonso*, 99-1546, (11/23/99), 753 So.2d 156, 160 (La. 1999).

The Louisiana Constitution unequivocally mandates the separation of power among the three branches of state government and has traditionally distinguished in delegation cases between delegation of legislative authority, which necessarily violates the separation of powers, and delegation of ministerial and administrative authority, which does not. *State v. All Pro Paint & Body Shop, Inc.*, 93-1316 pp. 6-7 (La. 7/5/94), 639 So.2d 707, 711.

Schwegmann Bros., *supra*, first set forth the analysis to be applied in determining what powers may constitutionally be delegated to an administrative agency, and whether the legislature properly delegated authority to an administrative agency. In the LCB’s brief it concludes that *Schwegmann* only asks two questions to resolve the constitutionality of a statute.⁴⁷ Since 1959, the Louisiana Supreme Court reviewed, refined and applied the holding of *Schwegmann* to establish a three-prong test for determining, on a case by case basis, whether a statute unconstitutionally delegates legislative authority, as opposed to administrative or ministerial authority, to an administrative agency. *See Alfonso*, 753 So.2d at 161.

Under the three-prong *Schwegmann* test, a delegation of authority to an administrative agency is constitutionally valid only if the enabling statute (1) contains a clear expression of legislative policy; (2) prescribes sufficient standards to guide the agency in the execution of that policy; and (3) is accompanied by adequate procedural safeguards to protect against abuse of discretion by the agency. *Id.*⁴⁸

a) Section 1503(C) Fails the Schwegmann Test

1) Clear Expression of Legislative Policy

Here, the enabling statute, La. R.S. 8:67, utterly fails to satisfy the *Schwegmann* test. It simply states:

The board may establish necessary rules and regulations for the administration and enforcement of this title and prescribe the form of statements and reports provided for herein, **but such rules and regulations shall not be in conflict with or contrary to any provisions of this title or of R.S. 49:951, et seq.** (Emphasis added).

⁴⁷ See the LCB’s Original Brief, at p. 7.

⁴⁸ Application of the *Schwegmann* three-prong test ensures the elected members of the legislature retain all legislative power by insisting that they, and not their delegates in the executive branch, make the difficult policy choices for which they are accountable to the public through the democratic process. *All Pro Paint*, 639 So.2d at 712.

La. R.S. 8.67 makes no policy statement regarding trust income, but does establish a policy *limiting* the authority of the Board. The only clear expression of legislative policy regarding trust income is found in La. R.S. 8:454.1:

“It is the intent of this Section that the income of said fund shall be used solely for the care of interment spaces sold with the provision for perpetual and endowed care . . .”

The above quoted provisions are a clear expression of a legislative policy that the income is not to be converted to principal under any circumstances and is to be used solely for care of the cemetery. Section 1503(C) is in direct conflict with the expressed legislative policy of Title 8 because it prevents income from being used “solely” for the care and maintenance of the cemetery as is required by La. R.S. 8:454.1 by converting the trust income to principal if the income is not distributed to the cemetery authority within 120 days of the cemetery’s tax reporting year.

Importantly, there is no corresponding provision in Title 8 and Title 8 provides no time limit by which the trustee of a perpetual care trust is required to distribute income to the cemetery. Indeed, La. R.S. 8:465 provides in pertinent part: “All funds held in trust for perpetual care purposes shall be administered by the trustee with such skill and care a man or ordinary prudence, discretion, and intelligence would exercise in the management of his own affairs, not in regard to speculation but in regard to the permanent disposition of his funds...” As the district court found, the legislature “clearly entrusted the *permanent* management of trust funds to the trustee of a perpetual care trust.”⁴⁹

Title 8 strictly mandates that “the income of said fund shall be used solely for the care of interment spaces sold with a provision for perpetual or endowed care and for the care of other portions of the cemetery immediately surrounding said spaces.” *See* La. R.S. 8:454.1. It is left to the discretion of the trustee to administer the trust and determine, as a fiduciary, when the income should be distributed to the cemetery to be used for care and maintenance.

2) Legislatively Prescribed Standards to Guide the Agency in Execution of the Expressed Policy.

There are no standards set forth by the legislature providing guidance to the Louisiana Cemetery Board in executing a policy calling for the conversion of income to principal.⁵⁰

⁴⁹ R. Vol. 3, pp. 651-652 (Emphasis in original).

⁵⁰ La. R.S. 8:451.1 states: The principal of the trust fund shall remain permanently intact and only the income therefrom shall be expended.

3) Legislatively Stated Procedural Safeguards to Protect Against Abuse of Discretion by the Agency.

La. R.S. 8:67 states, in pertinent part, that any rules and regulations adopted by the Louisiana Cemetery Board “shall not be in conflict with or contrary to any provision of this title.” This is the only provision of Title 8 with respect to 1503(C) which is a legislatively adopted safeguard to guide the agency and protect against abuse of discretion by the agency. The agency has no authority to adopt a regulation which is in direct conflict with legislative pronouncements. Any regulation which diverts the trust income from use “solely for the care of internment spaces sold with the provision for perpetual and endowed care” violates this clear legislative policy and is unconstitutional on its face.

Even applying the two-part test applied by the Board, Section 1503(C) fails the test of constitutionality. The Board states that the first question is “does the regulation ‘determine what the law shall be?’”⁵¹ Nowhere in the statute is there any policy or provision of delegation of authority to require the income generated by the perpetual care trust to be distributed to a cemetery authority within any particular period of time much less provide that any income not distributed within any particular time shall be converted to principal. The Board legislated this “law” and did so by the “exercise of primary and independent discretion,” which is the second question of the test of constitutionality posed by the Board.⁵²

The LCB’s argument with respect to the *Schwegmann* test is conclusory and lacking any real analysis. In defense of its adoption of the 120-day rule, the LCB points to statutes from Missouri and Arkansas and argues that these states also regulate perpetual care trusts in the same way as Section 1503(C) by providing for conversion of undistributed income to the principal of the trust.⁵³ It is apparently lost on the LCB that it is citing *statutes* from other states and not regulations promulgated by an administrative agency, which does not raise a separation of powers concern as the statutes are a legislative act. If the Louisiana legislature passed a law providing for conversion of income to principal of perpetual care trusts when income is not distributed to the cemetery authority within 120 days of its tax reporting year, the separation of powers issue would

⁵¹ See the LCB’s Original Brief at p. 7.

⁵² *Id.*

⁵³ See the LCB’s Original Brief at p. 14.

not be before the Court. The LCB's argument only further demonstrates that it is improperly exercising primary legislative authority.

Moreover, the LCB argues that the Missouri statute provides for conversion of income to principal if the income is not distributed to the cemetery within 60 days of the trust fund year.⁵⁴ The Missouri statute provides in part that, "[t]he income from the endowed care trust fund **may** be distributed to the cemetery operator at least annually **on a date designated by the cemetery operator**, but no later than sixty days following the end of the trust fund year."⁵⁵ Thus, distribution of income is not even mandated under Missouri law the way that the LCB has attempted to mandate distributions to the cemetery in Section 1503(C) by a certain date when such a mandate is not provided for in Title 8.

With respect to the Arkansas statute that is also cited by the LCB, the statute does not provide for conversion of income to principal. In fact, the statute allows the trustee to withdraw the income from the trust on behalf of the cemetery at least one time per year for permitted uses. This statute offers no justification for the LCB's attempt to legislate by regulation.⁵⁶

The ultimate effect of applying the 120-day rule set forth in Section 1503(C) is a direct conflict with the clear intent of La. R.S. 8:454.1(A), which states that the income "shall be used solely for the care of interment spaces" and does not provide for the conversion of income to principal under any circumstances. By converting the income to principal the converted income is not available to "be used solely for the care of interment spaces" amounting to a total violation of the clear expression of legislative intent.

b) Section 1503(C) forfeiture provision violates the separation of powers.

Only the legislature has the authority to prescribe forfeitures, fines and penalties. The penalty for violation of Chapter 7 of Title 8 is fines or imprisonment for not more than six months, or both. *See* La. R.S. 8:460. Violations are penal in nature and interpretation of the law requires strict construction in favor of the alleged violator and all doubt must be resolved against imposition of penalty. *Claiborne Sales v. Collector of Revenue*, 233 La. 1061, 99 So.2d 345 (La. 1957); *AAA*

⁵⁴ *Id.*

⁵⁵ V.A.M.S. 214.330.2(8) (Emphasis added).

⁵⁶ The Arkansas statute cited by the LCB also permits the cemetery to withdraw funds from the principal. A.C.A. § 20-17-1013(a)(5)(g)(1).

Safety, Inc. v. Dept. of Public Safety and Corrections, 13–2171 (La. App. 1 Cir. 7/11/14), 146 So.3d 709; *La. Bd. Of Ethics v. Holden*, 12-1127 (La. App. 1 Cir. 6/25/13), 121 So.3d 113,118.

Forfeiture penalties are not a penalty imposed by Title 8.⁵⁷ The application of 1503(C) providing for conversion of income not distributed within 120 days of the cemetery’s tax reporting year to the principal of the trust amounts to a forfeiture of the cemetery’s right or privilege to use the income generated by the perpetual care trust for providing perpetual care. Title 8 does not provide, under any circumstances, for the loss of the right or privilege to the use of income to provide perpetual care nor does it delegate any authority to the LCB to call for such forfeiture. Moreover, the legislature has prescribed the penalties applicable to a cemetery authority that violates rules and regulations concerning cemetery care funds. La. R.S. 8:460 provides:

Whoever violates any of the provisions of this chapter, shall upon conviction, be fined not more than \$1,000.00 or imprisoned for not more than six months, or both.

This Court has made clear that the adoption of fines, penalties and forfeitures are a primary legislative function that cannot be delegated to an administrative agency. *Alfonso*, 754 So.2d at 160. The decision to mandate the forfeiture provision enunciated in 1503(C) is an exercise of legislative authority and a violation of the separation of powers clause.

In *Mid-City Automotive, LLC v. Dept. of Pub. Safety and Corrections*, 218-056 (La. App. 1 Cir. 11/7/18), 267 So.3d 165, the First Circuit Court of Appeals, applying the *Schwegmann* test, struck down, as a facially unconstitutional exercise of legislative authority by an administrative body, the power to impose fines where the statutes provide no guidance or limits. The court stated: “(t)his unfettered discretion makes the exercise of a delegated authority by the Office of State Police legislative rather than administrative in nature.” *Id.* at 178.

Here, the application of 1503(C) amounts to a forfeiture of Westlawn’s right or privilege to use the income generated by the Westlawn Trust for providing perpetual care. Title 8 does not provide for the loss of the right or privilege to the use of income to provide perpetual care nor does it delegate any authority to the LCB to call for such forfeiture. The LCB does not have the power to require the conversion of income to principal or to require a cemetery to return to the principal

⁵⁷ Forfeiture includes the “loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.” *Forfeiture*, Black’s Law Dictionary (11th ed. 2019).

of the trust income already distributed and spent on the maintenance of the cemetery when such is not provided for in Title 8.

c) The LCB's understanding of perpetual care trusts is deeply flawed.

The LCB's brief demonstrates a fundamental misunderstanding of perpetual care trusts. The LCB argues that the Trustees are not the owners of the funds held in the Westlawn Trust and that Westlawn has no constitutionally protected right to receive the income from the Westlawn Trust. Without any support, the LCB asserts that cemetery trust funds "are not subject to the provisions of the Louisiana Trust Code."⁵⁸ Contrary to the LCB's assertions, the Louisiana Trust Code governs all trusts including cemetery or perpetual care trust funds.⁵⁹

The Louisiana Trust Code defines a trust as "the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another." See La. R.S. 9:1731. Under Louisiana law, title to the trust property vests in the trustee alone, and a beneficiary has no title to or ownership interest in trust property..." See *Bridges v. Autozone Properties, Inc.*, 04-0814 (La.3/24/05), 900 So.2d 784, 796-97.

In an attempt to circumvent its violation of the constitution, the LCB argues that a regulation requiring Westlawn to return \$457,060.21 of income distributed to it by the Trustees and expended on the care of the perpetual care cemetery to the principal of the trust does not amount to a penalty or forfeiture because "Westlawn has no constitutionally protected rights" to the income of the Westlawn Trust.⁶⁰ Under Title 8 it is clear that the cemetery authority is the only party with the right to receive the income distributed from the trust for the purposes of providing perpetual care to the cemetery.

The LCB next argues that the income generated by the Westlawn Trust is the property of the consumers as if Westlawn has no right to use the income to maintain the cemetery.⁶¹ After the establishment of a trust, a minimum of 10% of the gross sales price received by the cemetery from an interment space sold or transferred is to be deposited as principal into the trust fund. Notably,

⁵⁸ See the LCB's Original Brief, at pp. 8-9. The LCB cites only to a secondary source for the proposition that Louisiana is not alone in exempting cemetery trust funds from the provisions of the state's trust code. However, nothing in this source addresses Louisiana law or suggests that the Louisiana Trust Code does not govern cemetery trust funds.

⁵⁹ La. Act. 2010 No. 390 § 2 declares "The provisions of the Act shall apply to all Trusts, whether created before or after the effective date of the Act." See also, La. R.S. 9:2252.

⁶⁰ See the LCB's Original Brief, at pp. 2-3.

⁶¹ See the LCB's Original Brief, at p. 14.

the consumer does not pay an additional 10% into the trust fund. The cemetery deposits a percentage of “the gross sales price received for any interment space sold.”⁶²

A review of the statutes in Title 8 and the Louisiana Trust Code clearly establishes that the property of a perpetual care trust is the property of the trustees to administer for the benefit of persons who purchased cemetery property when the cemetery operator has agreed to provide perpetual care and to disburse the income generated by the principal to the cemetery authority to pay for the maintenance of the perpetual care cemetery.

The LCB also argues that “the consumers are the sole beneficiaries” of the trust.⁶³ La. R.S. 9:1725(2) states that “Income beneficiary” means a beneficiary to whom the income is payable. The only entity entitled to receive the income under the terms of Title 8 is the cemetery authority. Under the Louisiana Trust Code, Westlawn is the income beneficiary of the Westlawn Trust. Moreover, the Model Trust Agreement published by the Board provides that: “**All income of the Trust Fund shall be paid to the Settlor monthly or at intervals as the Trustee and Settlor shall from time to time deem appropriate.**”⁶⁴ The “Settlor” is the cemetery authority.

Notably, the Model Trust Agreement contains no provision ordering the disbursement of the income within 120 days of the end of the cemetery’s tax year or providing for the conversion of the income of the trust to principal. In fact, it specifically leaves the timing of distributions of income to the discretion of the trustee and the cemetery, further undermining the LCB’s position that the 120-day distribution rule is necessary to provide for regular maintenance of the cemetery.⁶⁵

C. Section 1503(C) Exceeds the Scope of Title 8

A regulation can also be struck down as unconstitutional if it exceeds the scope of the statute under which it was promulgated, as evidenced by a construction that is contrary to the statute’s purpose. *See Alfonso*, 753 So.2d at 160. In *Traigle v. PPG Industries, Inc.*, 332 So.2d 777, 782 (La.1976), this Court explained that “an administrative construction cannot have weight where it is contrary to or inconsistent with the statute.”

As set forth above, the enabling statute (La. R.S. 8:67) provides:

The board may establish necessary rules and regulations for the administration and enforcement of this title and prescribe the form of statements and reports provided for herein, **but such rules and regulations**

⁶² See La. R.S. 8:454.1(C).

⁶³ See the LCB’s Original Brief, at p. 14.

⁶⁴ R. Vol. 1, p. 236. (Emphasis added).

⁶⁵ *Id.*

shall not be in conflict with or contrary to any provisions of this title or of R.S. 49:951, *et seq.* (Emphasis added).

The legislative policy regarding trust income is found in La. R.S. 8:454.1:

“It is the intent of this Section that the income of said fund shall be used solely for the care of internment spaces sold with the provision for perpetual and endowed care . . .”

The question is whether Section 1503(C) furthers or frustrates the purpose of La. R.S. 8:454.1 by providing for conversion of income to principal if it is not distributed to the cemetery within 120 days of its tax reporting year. The district court correctly ruled that Section 1503(C) is facially unconstitutional because it violates separation of powers and is in conflict with the provisions of Title 8. The above statutes are the provisions in Title 8 that Section 1503(C) conflicts with as is clear from a plain reading of the statutes and regulation. There is nothing in Title 8 that states that the income for any one year is only to be used for maintenance in that particular year. The statutory mandate and stated policy is that the income is to be used solely for care and maintenance of the cemetery. There is no statutorily established policy setting a period of time within which it must be used. Thus, Section 1503(C) is facially unconstitutional because it exceeds the scope of the statute and is contrary to the statute’s purpose.

ASSIGNMENTS OF ERROR ON ANSWER TO APPEAL

In their answer to this direct appeal, Westlawn and the Trustees explained that this Court’s prior interpretation of La. Const. art. V., § 5(D) has consistently held that it does not have exclusive appellate jurisdiction over a direct appeal involving a district court’s ruling that a regulation is unconstitutional.⁶⁶ However, Westlawn and the Trustees respectfully requested that the Court exercise its general supervisory jurisdiction to convert the instant appeal to an application for supervisory writs and affirm the judgment of the district court declaring Section 1503(C) unconstitutional on its face. *See Holthus v. Louisiana State Racing Comm’n*, 569 So.2d 547 (La.1990); *citing Benelli v. City of New Orleans*, 474 So.2d 1293, 1294 (La.1985).⁶⁷

In the event that the Court exercises appellate jurisdiction over this matter, Westlawn and the Trustees assign as error on their answer to the appeal, the following:

⁶⁶ See Answer to Appeal.

⁶⁷ The affirmation of the district court’s judgment will moot major issues in this case and bring this matter to a speedy conclusion, thus serving the purpose of judicial economy. *See Commercial Nat’l Bank in Shreveport v. Scott*, 398 So.2d 1127 (La.1981), note 2.

Assignment of Error No. 1

The district court erred by not declaring La. Admin. Code. Title 46, Pt. XIII, § 1503(C) facially unconstitutional for violating substantive due process rights.

Assignment of Error No. 2

The district court erred by not declaring La. Admin. Code 46:XIII.1505 (A) and (B) facially unconstitutional for being void for vagueness, violating substantive due process rights, and violating the separation of powers clause of the Constitution.

LAW AND ARGUMENT ON ANSWER TO APPEAL

A. Section 1503(C) Violates Substantive Due Process.

A regulation violates substantive due process when it does not bear a real and rational relationship to an appropriate governmental objective. *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934); *Louisiana State Bd. of Optom. Exam. v. Pearle Optical*, 248 La. 1062, 184 So.2d 10 (1966); *City of Lafayette v. Justus*, 245 La. 867, 161 So.2d 747 (1964). Stated another way, a violation of substantive due process requires arbitrary and capricious conduct by the governing authority. *Standard Materials, Inc. v. City of Slidell*, 96-0684 (La. App. 1 Cir.9/23/97), 700 So.2d 975, 986.

The question presented for substantive due process analysis regarding the Section 1503(C) 120-day distribution rule is:

What is the governmental interest being advanced by La. Admin. Code. Title 46, Pt XIII, § 1503(C) converting income to principal if not distributed within 120 days of the close of the cemetery's tax reporting year and is there a rational relationship between the regulation and a legitimate state interest?

The absence of a logical connection between the regulation and the legitimate state interest results in the regulation being a violation of the due process clause and is thus invalid.

With respect to the 120-day rule found in Section 1503(C), Lucy McCann, the Executive Director of the Board since 1996, testified that she was not the director at the time of adoption and she does not know the reason or purpose for the 120-day rule or why it was adopted. Joni Thompson, the Board Compliance Investigator who cited Westlawn in 2018 for not properly reporting since 2000, testified that she does not know the purpose served by the 120 day rule in the regulation.

Title 8 recognizes it takes decades for a cemetery to build a perpetual care fund that will sustain and pay for the care and maintenance of cemetery spaces sold with perpetual care. In the early years it will not be sufficient and in some years there may be a surplus and then in other years unexpected costs may arise such as the need to replace a roof on a mausoleum building due to a fortuitous event such as a hurricane. There is nothing in Title 8 that states that the income for any one year is to only be used for maintenance in that particular year. The time of the distribution is left to the discretion of the trustee who is in the best position to determine when a distribution should be made applying the standard set forth in La. R.S. 8:465.

Joni Thompson, Compliance Investigator for the Board, testified that:

Q. Now, if it costs \$100,000 to maintain a cemetery in 2017 and the trustee distributes \$200,000 to the cemetery is that a problem? Is that a violation of law as far as you are concerned?

A. If the income is used for maintenance of the cemetery, no.

Q. So it doesn't have to be used in the same year?

A. Not that I am aware of.⁶⁸

It is respectfully submitted that Section 1503(C) does not advance any legitimate governmental interest. The stated governmental interest and intent set forth in Chapter 7 of Title 8 is to use all the income "solely" for the purposes of care and maintenance of the perpetual care cemetery. Section 1503(C) has no logical or rational connection to that purpose. To the contrary, by converting income to principal it results in the income not being available for use for the legislatively stated purpose. This is clearly an arbitrary and capricious regulation that violates the substantive due process clause of the state and federal constitutions.

The LCB's substantive due process argument is illogical and contrary to the purpose of the statute. In particular, the LCB asserts that "a regulation requiring distribution of income to cover maintenance within a set timeframe is reasonable inasmuch as it accomplishes the legislative goal of regular maintenance."⁶⁹ But requiring that the trust income be distributed is not the same as requiring that the income be spent by the cemetery on maintenance within a certain period of time. Indeed, the compliance officer of the Board testified that the cemetery authority is not required to spend or use the money in the same year it is received.⁷⁰

⁶⁸ R. Vol. 1, pp. 112-113 (Deposition of Joni Thompson).

⁶⁹ See the LCB's Original Brief, at p. 12.

⁷⁰ R. Vol. 1, pp. 112-113 (Deposition of Joni Thompson).

There is also no merit to the LCB's argument that trust income must be distributed to the cemetery within 120 days from the cemetery's tax reporting year so it is not "languishing."⁷¹ The LCB apparently believes that the income generated by the trust is not invested by the trustees pending distribution to a cemetery authority and therefore it is "languishing" and thus must be delivered to the cemetery authority where it can "languish" in the cemetery's bank account. Even brokerage accounts hold income generated by investments in a money market account pending distribution. There is nothing in the record to suggest trust income is languishing when it is in the hands of the trustee awaiting distribution to the cemetery.

The LCB's proffered justification for the 120-day rule is a pretext because, applying its logic, the Board apparently believes it is acceptable for the distribution of income to be made to the cemetery authority when it is not immediately needed to pay for maintenance and to thus "languish" in the accounts of the cemetery authority rather than being in the hands of a trustee earning interest to be used for maintenance when the need arises. The application of Section 1503(C) does not advance the proffered governmental interests to have the income made available for maintenance in a timely manner. Section 1503(C) is a violation of substantive due process.

B. Section 1505 (A) and (B) is Void for Vagueness

The void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

A regulation is void for vagueness under the due process clause of the Fourteenth Amendment and Article I, §2 of the Louisiana Constitution of 1974 unless it provides fair warning of prohibited conduct and explicit standards for enforcement. *Lionhart v. Foster*, 100 F.Supp.2d 383, 388-89 (E.D. La. 1999). "Vague laws violate the principle that the law gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Id.* at 389 (citing *Grayned*, 408 U.S. at 108, 92 S.Ct. at 2298-99). The purpose of the void-for-vagueness doctrine is to eliminate arbitrary and discriminatory enforcement of laws. *See Kramer v. Price*, 712 F.2d 174, 176 (5th Cir. 1983) (quoting *Kolender v. Lawson*, 461 U.S.

⁷¹ See the LCB's Original Brief, at p. 16.

352, 361, 103 S.Ct. 1855, 1858-59, 75 L.Ed.2d 903 (1983)). As the United States Supreme Court stated in *Grayned*, “if arbitrary and discriminatory enforcement is to be prevented,” the law must provide “explicit standards” for those who enforce it. 408 U.S. at 108, 92 S.Ct. at 2299.

In *Connick v Lucky Pierre’s*, 331So.2d.431, 433 (La. 1976), this Court articulated the constitutional standard as follows:

Thus any statute which either forbids or requires the doing of an act and which, therefore, acts as a guide to future conduct, is deemed to be void for vagueness if ‘men of common intelligence must necessarily guess at its meaning and differ as to its application . . . [citations omitted]

1) Title 8 Sets Forth Only an Annual Reporting Period.

The full text of the statutes found in Title 8 regarding the annual reports filed by the cemetery and trustees is set forth in the Factual Background section above. In summary, Title 8 provides for three annual reports:

(i) La. R.S. 8:455 calls for the cemetery authority to submit a report to the trustee of its perpetual endowment care trust not later than 90 days after the close of the “business year.”

(ii) La. R.S. 8:456 requires the trustee to file an annual report no later than 60 days after receipt of the cemetery authorities report required by La. R.S. 8:455.

(iii) La. R.S. 8:466 requires the cemetery authority to file its annual report with the Board on or before June 30th of each year.

None of the above statutes designates or mandates a particular reporting period for the annual report other than annual. The statutes do not require any information provided in the report based on the cemetery authority’s fiscal year or tax-reporting year as opposed to a calendar year or any other 12-month period that may be selected as a business year by the cemetery authority.

L.A.C. 46:XIII.1505 is entitled “Annual Report Required.” Section A requires that the annual report of the cemetery is to be filed within six months after the close of the cemetery authority’s tax reporting year. Section B calls for the trustee to submit a report to the Board within five months after the close of the cemetery authority’s tax reporting year or within sixty days from the resignation as trustee.

A review of the statutes and the regulations clearly show that none of them mandate that the report that is submitted must use a particular reporting term that is the tax reporting year, the fiscal year, or any other fixed term period. As the record reflects, Westlawn filed a report for the period of April 1, 2000 through December 31, 2000 and the following year filed a report for the year ending December 31, 2001. The Board is statutorily bound to review all reports it receives

for compliance. See La. R.S. 8:467. Westlawn and the Westlawn Trust used the calendar year as their reporting period since 2000 without any objection from the Board.

Lucy McCann, the Executive Director of the Board, testified that the cemetery is free to choose the tax year that it wishes to use and there is nothing that prevents the cemetery from changing its year end for tax purposes during its operation.⁷² The approval of the Board is not required nor is any formal notification to the Board.⁷³ A review of the reports indicate that there is no place to identify on the report the tax-reporting year of the cemetery authority.⁷⁴

2) Void for Vagueness under the Due Process Clause.

The Board claims that Title 8 and/or the regulations cited herein requires cemeteries and trustees of perpetual care funds to file annual reports using only the cemetery's tax reporting year as the twelve month reporting period. Therefore, this court must examine the provisions and terms Section 1505 (A) and (B) to determine whether they give persons of ordinary intelligence fair notice of what conduct is prohibited or required or whether they are so unclear or indefinite that the regulation is void for vagueness.

The consequence to Westlawn for not using its tax reporting year as its reporting period is forfeiture of \$457,060.21 distributed to it by the Trustees and used to maintain the cemetery since 2002. "The fourteenth amendment of the United States Constitution, as well as Article I, Section 2 of the Louisiana Constitution of 1974, command that words and phrases used in statutes not be so vague and indefinite that any 'penalty' prescribed for their violation constitutes the taking of liberty or property without due process of law. *Wright v. Georgia*, 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963); *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed.2d 888 (1939); *State v. Lindsey*, 310 So.2d 89 (La.1975); *City of Shreveport v. Brewer*, 225 La. 93, 72 So.2d 308 (1954)."

There is no reading of Title 8 or the regulations which in any way states that the annual reports must report on the same 12-month period as the tax reporting year of the cemetery authority. Title 8 only states when reports are to be filed.

Boyd L. Mothe has served as President, Chairman of the Board, and Manager of Westlawn for over 32 years, and Bobby Sperandeo, who has been a certified public accountant for 45 years

⁷² R. Vol. 1, pp. 68-69 (Deposition of Lucy McCann).

⁷³ *Id.*

⁷⁴ R. Vol. 1, pp. 71-77.

and has prepared the annual reports of the Westlawn Trust for 32 years, have both attested that they have never interpreted or otherwise understood Title 8 or the regulations to require a cemetery or the trustees of a perpetual care trust fund to use only the cemetery's tax reporting year as the annual reporting period for the reports filed with the Board.⁷⁵

The regulation is void for vagueness under the due process clause unless it provides fair warning of prohibited conduct and explicit standards for enforcement. Vague laws and regulations violate the principal that the law must give a person of ordinary intelligence a reasonable opportunity to know what is required so that he may act accordingly. *See Connick*, 331 So.2d at 433. As the attestations of Mr. Sperandeo and Mr. Mothe show, these gentlemen are at least of average intelligence and have been involved with perpetual care cemeteries and cemetery trust funds for a combined 64 years, and neither of them have understood the laws and regulations as requiring the use of the tax reporting year as the reporting period for the cemetery or the perpetual care trust.

In the event that this Court should find that the statutes and the regulations actually contain a mandated 12-month reporting period, it is respectfully submitted that the provisions of Section 1505(A) and (B) are void for vagueness. In the alternative, Westlawn and the Trustees request that this Court enter a declaratory judgment declaring the provisions of Section 1505(A) and (B) void for vagueness with respect to the interpretation that they mandate the use of the tax reporting year of the cemetery as the reporting period for cemeteries and perpetual care trust reports called for in Chapter 7 of Title 8 as the statute only calls for a report to be submitted on an annual basis.

C. Section 1505 (A) and (B) Violates Substantive Due Process

The question presented for substantive due process analysis regarding the reporting period that the LCB argues is found in Section 1505 is:

Assuming that Title 8 or the regulations require the annual reports call for in Chapter 7 of Title 8 to use only the cemetery's tax reporting year as the annual reporting period, what is the governmental interest being advanced by such a rule and is there a rational relationship between the rule and a legitimate state interest?

As attested to by Bobby Sperandeo, the choice of the 12-month period used for reporting purposes under Title 8 has no effect on the amount of income that is earned or distributed to the cemetery for use in providing care and maintenance for cemetery spaces sold with the provision

⁷⁵ R. Vol. 1, p. 69 (Affidavit of Boyd L. Mothe, ¶ 20) and R. Vol. 1, p. 82 (Affidavit of Sperandeo, ¶ 11).

of perpetual care.⁷⁶ Lucy McCann, Executive Director of the Board, testified that she does not know the reason or purpose being advanced by requiring a cemetery to file its report on an annual basis based on its tax year.⁷⁷ She further testified that beneficiaries are not damaged in any way by the cemetery filing its reports on an annual basis other than its tax reporting year.⁷⁸

The Board has no justification for a regulation requiring a fixed 12-month reporting year. Further, there is no logical connection between such a requirement (if such requirement exists) and any legitimate government interest, meaning that Section 1505(A) and (B) is arbitrary, capricious, and violates substantive due process rights requiring Westlawn to forfeit \$457,060.21 of income distributed to it by the trustees.

Westlawn and the Trustees respectfully request that the Court issue a declaratory judgment declaring any interpretation of Section 1505(A) and (B) as mandating a particular reporting year or requiring a cemetery authority or the trustee of a perpetual care trust to use the tax reporting year of the cemetery for the twelve month annual reporting period for reports provided in Chapter 7 of Title 8 violates substantive due process rights and, thus, is unconstitutional.

D. Section 1505 (A) and (B) Violates the Separation of Powers.

Westlawn and the Trustees incorporate the law applicable to a constitutional challenge based on separation of powers set forth above on pages 10-13 of this brief.

The Board does not have constitutionally delegated authority to mandate the tax reporting year of the cemetery as the reporting year for reports under Chapter 7 of Title 8. The only place “tax reporting year” appears is in Section 1505 of the regulations and then only to state when the reports are due. It cannot be disputed that the provisions of Chapter 7 of Title 8 does not provide a fixed reporting period other than that the reports be filed on an annual or a 12-month basis.

Title 8 provides that the annual report of the trustee called for in La. R.S. 8:456 is due within 60 days after the trustee receives the report of the cemetery authority called for in La. R.S. 8:455. The cemetery authority is required to deliver this report only to the trustee and then within 90 days after the close of its “business year.” (La. R.S. 8:455 and 456). Section 1505(B) requires the trustee to submit its annual report to the Board within five months after the close of the cemetery authority’s tax reporting year.

⁷⁶ R. Vol. 1, p. 82 (Affidavit of Sperandeo, ¶ 12).

⁷⁷ R. Vol. 1, p. 97 (ll. 14-18).

⁷⁸ R. Vol. 1, p. 97-98.

Upon the trustees' receipt of the cemeteries report, La. R.S. 8:456 triggers a 60 day period within which the trustees must file its annual report. If the cemetery has a March 31 tax reporting year end and chooses to deliver the report to the trustee on December 31st of the previous year, La. R.S. 8:456 mandates that the trustee deliver its report to the Board by the end of February. However, applying the time period set forth in Section 1505(A), the trustee would have until August to file the annual report.

Section 1505(A) requires the cemetery authority to file its report due under 8:466 within six months after the close of the cemetery authority's tax reporting year. However, La. R.S. 8:466 states that the cemetery's report under 8:466 is due "on or before the thirtieth day of June." This presents a clear conflict between 1505(A) and La. R.S. 8:466. For example, if the tax reporting year of the cemetery is March 31, then under La. R.S. 8:466 it must file its report on June 30th. However, under the time period set forth in Section 1505(A), the cemetery authority would have until the end of September to file its 8:466 annual report.

What the above demonstrates is that the Board in adopting its regulations totally ignored the time periods mandated by Title 8 for the report due dates. The authority to set the report due dates has not been delegated by the legislature to the Board and neither has the authority to fix the reporting period. The delegation statute found at La. R.S. 8:67 specifically limits the authority of the Board to adopt regulations by requiring such regulations to be "necessary" and not in conflict with or contrary to Title 8. Action taken by an administrative board, in order to be valid, must fall within the legislative grant of authority. An exercise by the Board of power belonging only to the legislative branch is a violation of the separation of powers provision of the constitution.

Assuming this Court finds that La. R.S. 8:67 delegates the power to the Board to set a fixed reporting period, such authority has not been properly delegated. Applying the three-pronged test enunciated by the Louisiana Supreme Court in *Schwegmann, supra*, a statute unconstitutionally delegates legislative authority unless it contains a clear expression of legislative policy, prescribes sufficient standards to guide the agency in the execution of that policy, and is accompanied by adequate procedural safeguards to protect against abusive discretion by the agency.

The only clear expression of legislative policy in Chapter 7 of Title 8 is that the income generated by the trust fund is to be used solely for the care of interment spaces or with provisions for perpetual or endowed care. Any regulation which diverts the income from such use to provide

perpetual care violates the legislative policy to be enforced. There is no legislative policy expressed in the legislation that in any way addresses the legislature's intent to require the annual report of the trustees or the reports of the cemeteries to report on the same 12 months as the tax reporting year of the cemetery.

The enabling legislation fails to provide adequate procedural safeguards to prevent unlimited, unreasonable, or arbitrary action of the Board. *Mid-City Automotive, supra*. When delegated authority is unfettered, its exercise becomes legislative, not administrative in nature and contravenes the mandates of Article II, Section 2 of the Louisiana Constitution. Assuming the Court finds that La. R.S. 8:76 delegates the authority to the Board to fix the reporting period of cemeteries and trustees of perpetual care trusts, such delegation fails to satisfy the *Schwegmann* test and is thus in violation of the constitutional requirement of the separation of powers.

CONCLUSION AND PRAYER FOR RELIEF

The Louisiana Cemetery Board adopted a regulation that places an arbitrary 120-day deadline on distributions from trustees of perpetual care trusts to cemeteries and penalizes cemeteries by permanently converting all income not distributed to them within by that arbitrary deadline to the principal of the trust. The LCB now demands that Westlawn forfeit over \$450,000 of income distributed to it over the course of almost two decades and used for the care and maintenance of the cemetery when such a forfeiture or penalty is not provided by statute and not within the authority that can constitutionally be delegated to the Board.

The LCB's adoption of Section 1503(C) is a clear exercise of primary legislative authority by an administrative body and is in direct conflict with the stated intent and purpose of the statute. The district court correctly concluded that Section 1503(C) is unconstitutional on its face as it violates the separation of powers clause on the constitution. The district court's judgment partially granting summary judgment in favor of Westlawn and the Trustees and declaring Section 1503(C) unconstitutional on its face should be affirmed.

In the event this Honorable Court exercises its appellate jurisdiction over this matter and finds Section 1503(C) does not violate separation of powers, it should reverse or modify the district court's judgment and declare Section 1503(C) facially unconstitutional because the regulation violates substantive due process rights as it bears no rational relationship to a legitimate government interest.

Finally, the Court should also reverse or modify the district court's judgment declaring Section 1505 (A) and (B) facially constitutional and declare those parts of the regulation facially unconstitutional because they are void for vagueness, violate substantive due process, and violate the separation of powers clause of the state and federal constitutions.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Original Brief has been forwarded to counsel of record for all parties via facsimile, electronic mail, and/or by depositing same in the U.S. mail, postage prepaid and properly addressed, on this 2nd day of December, 2021.



RYAN C. HIGGINS