

# Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the 25th day of March, 2022 are as follows:

**BY McCallum, J.:**

2021-CA-01414

WESTLAWN CEMETERIES, L.L.C. VS. THE LOUISIANA CEMETERY  
BOARD (Parish of Jefferson)

**AFFIRMED. SEE OPINION.**

**SUPREME COURT OF LOUISIANA**

**No. 2021-CA-01414**

**WESTLAWN CEMETERIES, L.L.C.**

**VS.**

**THE LOUISIANA CEMETERY BOARD**

On Appeal from the 24th Judicial District Court, Parish of Jefferson

**McCallum, J.**

The Louisiana Cemetery Board (“LCB”) challenges the district court’s judgment finding Louisiana Administrative Code 46:XIII.1503 C (hereinafter sometimes referred to as the “Rule”) to be unconstitutional. The LCB filed a direct appeal with this Court purportedly under La. Const. art. V, § 5 (D)(1), which provides this Court with appellate jurisdiction in a case in which “a law or ordinance has been declared unconstitutional.” Whether this Court has appellate jurisdiction was raised as an issue in an Answer to Appeal filed by appellees, Westlawn Cemeteries, L.L.C. (“Westlawn”) and the Trustees of the Westlawn Memorial Park Perpetual Care Trust Fund (“Trustees”).<sup>1</sup> Therefore, we address this issue first.

Our jurisprudence is clear as to the scope of this Court’s appellate jurisdiction under La. Const. art. V, § 5 (D)(1). “[R]ules and regulations promulgated by an administrative agency or department are not . . . law[s] or ordinance[s]’ under La. Const. art. V, sec. 5(D); thus, a trial court’s declaration of their unconstitutionality is not directly appealable to the Louisiana Supreme Court.” *Coastal Drilling Co. v. Dufrene*, 2015-1793, p. 3 n.2 (La. 3/15/16), 198 So. 3d 108, 112; *See also, Holthus*

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<sup>1</sup> The Trustees are Boyd L. Mothe, Boyd L. Mothe, Jr., Laurie M. Knowles, Nicole M. Lawson, Katherine M. Illg, and Boyd L. Mothe, III. The Trustees appear in this matter as intervenors. For purposes of this appeal, Westlawn and the Trustees are collectively referred to as “Westlawn.”

*v. Louisiana State Racing Comm'n*, 569 So. 2d 547, 547 (La. 1990); *Benelli v. City of New Orleans*, 474 So. 2d 1293, 1294 (La. 1985); *Vicksburg Healthcare, LLC v. State ex rel. Dep't of Health & Hosps.*, 2010-1248, p. 3 n.2 (La. App. 1 Cir. 3/25/11), 63 So. 3d 205, 206.

We recognized in *Benelli* that the appellate jurisdiction of the Court “is narrowly limited by the constitution.” This limitation is not arbitrary. It serves the purpose of restricting appeals of right to those instances where “the legislative act of a governing authority, a body which exercises the legislative functions of a political subdivision, has been declared unconstitutional.” *Id.* at p. 1294. This, we found, was consistent with the intent of the legislature as reflected in the convention debates leading to the enactment of La. Const. art. V § 5 (D). *Id.*

The provision at issue was not enacted by the Louisiana legislature; rather, it is a rule promulgated by the LCB, an administrative agency. The LCB is not a “governing body” and does not exercise “legislative functions.” Its rules and regulations, therefore, are not “laws” for which appellate jurisdiction would lie in this Court. Although the district court declared the Rule to be unconstitutional, because its judgment concerned an administrative rule, this Court does not have appellate jurisdiction. The proper forum for an appeal concerning the LCB’s rules and regulations is the court of appeal. *See* La. Const. art. V, §10 (A).

While we cannot exercise appellate jurisdiction in this case at this time, this Court has the authority to exercise supervisory jurisdiction under La. Const. art. V, § 5 (A).<sup>2</sup> As we noted in *Unwired Telecom Corp. v. Par. of Calcasieu*, 2003-0732, p. 8 (La. 1/19/05), 903 So. 2d 392, 400, “the constitutional grant of supervisory authority to this court is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court.” Thus, although we have “respect

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<sup>2</sup> Louisiana Constitution article V, § 5 (A) provides that “[t]he supreme court has general supervisory jurisdiction over all other courts.”

for the independence of other courts” and certainly want “to avoid usurping . . . appellate jurisdiction not conferred upon us by the constitution,” we have historically exercised “supervisory jurisdiction when [we] deem[ed] it necessary.” *Id.*, 2003-0732, p. 9, 903 So. 2d at 400. We have exercised supervisory jurisdiction, for example, in the interest of judicial economy (*State v. Peacock*, 461 So. 2d 1040, 1041 (La. 1984)(“since this case has already been briefed and argued in this court, judicial economy will best be served by exercising our supervisory jurisdiction”), and to avoid further delay (*Mayeux v. Charlet*, 2016-1463, p. 7 (La. 10/28/16), 203 So. 3d 1030, 1035 (“Because resolution of this issue would greatly aid the parties and the courts as well as avoid further delay[,] . . . we find it appropriate pursuant to our supervisory authority to now resolve this question of law, especially in view of the District Court declaring La. Child. Code art. 609 unconstitutional.”)).

In the present matter, we find that the exercise of our supervisory jurisdiction serves both purposes – it avoids further delay and is in the interest of judicial economy. The latter is particularly significant under the circumstances of this case because, as will be discussed more fully herein, we find that the trial court properly found LAC 46:XIII.1503 C to be unconstitutional. As the only issue in this appeal is the constitutionality of the Rule,<sup>3</sup> no purpose would be served by remanding this case to the appellate court before review would inevitably be sought in this Court.

We do not intend our decision to exercise supervisory jurisdiction in this case to have the effect of converting an administrative rule or regulation to a “law or ordinance” for the purposes of La. Const. art. V, § 5 (D)(1). Nor do we intend our decision to set any precedent as to the future exercise of this Court’s supervisory

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<sup>3</sup> The constitutionality of LAC 46:XIII.1505 (governing the submission of annual reports) was also raised in this case; however, as discussed herein, this appeal is limited to the constitutionality of LAC 46:XIII.1503 C.

jurisdiction when an administrative rule or regulation has been declared unconstitutional.<sup>4</sup>

We now turn to the merits of this case.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Westlawn owns and operates a perpetual or endowed care cemetery located in Gretna, Louisiana. This type of cemetery is defined as “a cemetery wherein lots and other interment spaces are sold or transferred under the representation that the cemetery will receive perpetual or endowed care.” La. R.S. 8:1(34). Perpetual or endowed care cemeteries have existed since 1908, when the Louisiana legislature “enact[ed] special legislation for the perpetual upkeep of cemetery lots.” *Metairie Cemetery Ass’n v. United States*, 282 F.2d 225, 228 (5th Cir. 1960). Section 1 of Act 190 of 1908, thus provided that “[a]ny burial lot or tomb in any cemetery controlled by any company . . . incorporated for cemetery purposes may, by the owner or owners, be conveyed or willed back to and held by the company . . . in perpetual trust for the purpose of its preservation as a place of burial and shall thereafter remain forever inalienable by act of the parties.”

Cemeteries in general, and perpetual or endowed care cemeteries, in particular, are governed by Title 8 as amended and reenacted in 1974 by Act 417 of the Louisiana Legislature. In conjunction with the reenactment of Title 8, the legislature created the LCB for the purpose of “enforce[ing] and administer[ing] [its] provisions.” La. R.S. 8:66. Included in its duties is the overseeing of perpetual or endowed care cemeteries.

Before any corporation may operate as a perpetual or endowed care cemetery, it must first establish a trust fund in the amount of \$50,000.00 for that care. La. R.S. 8:454. Once a trust fund is established, “a minimum of ten percent of the gross sales

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<sup>4</sup> The exercise of our supervisory jurisdiction in this case should not be viewed as approbation of those who have prematurely presented it for our consideration.

price received for any interment space sold or transferred under the representation that such interment space shall receive perpetual or endowed care shall be deposited in the trust fund,” although the owner of the cemetery is entitled to first be reimbursed for the initial amount deposited in the trust. La. R.S. 8:454.1 C.

Use of a perpetual or endowed care trust fund is limited, as is explicitly set forth in La. R.S. 8:454.1 A, which provides as follows:

The principal of the trust fund shall remain permanently intact and only the income therefrom shall be expended. The income shall be used solely for the care of those portions of the cemetery in which interment spaces have been sold with a provision for perpetual or endowed care. 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 a provision for perpetual or endowed care and for the care of other portions of the cemetery immediately surrounding said spaces as may be necessary to preserve the beauty and dignity of the spaces sold. The fund or its income shall never be used for the development, improvement, or embellishment of unsold portions of the cemetery so as to relieve the cemetery authority<sup>5</sup> of the ordinary cost incurred in preparing such property for sale.

(Footnote added). In furtherance of this statutory provision, La. R.S. 8:454.1 B requires that a perpetual care cemetery “be maintained in a reasonable condition which shall include but not be limited to leveling of grounds where interments have been made, removal of all debris, mowing, and edging, resulting in a well-kept appearance at all times.”

All perpetual or endowed care cemeteries are required by La. R.S. 8:455 to file annual reports with the trustee no later than “ninety days after the close of the business year . . . setting forth the volume and the gross selling price of sales upon which a deposit with the trustee is required by this chapter.” No later than sixty days thereafter, the trustee must file with the LCB an annual report setting forth:

- (a) All receipts and disbursements of cash, all receipts and deliveries of other trust property during the regular

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<sup>5</sup> A “cemetery authority” is defined as “any person, firm, corporation, limited liability company, trustee, partnership, association or municipality owning, operating, controlling or managing a cemetery or holding lands within this state for interment purposes.” La. R.S. 8:1(8).

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.

La. R.S. 8:456 A(1). Perpetual or endowed care cemeteries are also required to annually file a written report with the LCB setting forth details of their operation, including the number of interment spaces sold, the amount of gross sales, the fair market value of the spaces, and the amount of deposits owed to the trust fund for the reporting period and the dates the funds were deposited with the trustee. La. R.S. 8:466. These reports are due on or before June 30 of each year. *Id.*

The LCB is required to examine the endowment care funds of each cemetery when deemed necessary but no less than once every three years, when it finds that a cemetery or trustee has failed to file the required reports, or when petitioned by no less than twenty-five interment owners who allege that the funds are not in compliance with Title 8. La. R.S. 8:461 A. If, from the reports or from other examination, the LCB finds “that there has not been collected and deposited in the endowment or perpetual care fund the minimum amounts required by this Title, the board shall require such cemetery authority to comply immediately with such requirement.” La. R.S. 8:464 A.

Over the years, the LCB has adopted rules for the cemetery industry which are codified in the Louisiana Administrative Code. *See* LAC 46:XIII.101. Its authority to do so is derived from La. R.S. 8:67, which enables the LCB to “establish necessary rules and regulations for the administration and enforcement of [Title 8] and prescribe the form of statements and reports provided [by Title 8]” so long as

the “rules and regulations [do not] conflict with or [are not] contrary to any of the provisions of this title or of R.S. 49:951, et seq.”<sup>6</sup> La. R.S. 8:67.

The rule at issue in this matter, LAC 46:XIII.1503, was promulgated in 1982 and revised in 2013 to provide as follows:<sup>7</sup>

- A. The principal of the trust fund shall remain permanently intact and only the income shall be expended.
- B. The net income, after the deduction of costs associated with the operation of the trust, may be remitted to the cemetery for care and maintenance of the cemetery as provided for by title 8. A cemetery or cemetery authority may not charge the trust for administrative costs for the operation of the cemetery or trust funds.
- 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.

It is subpart C that is the focus of this appeal.

According to the allegations in this lawsuit, in January, 2019, the LCB issued a formal notice to Westlawn to appear at an informal proceeding with the LCB’s director and its attorney to discuss Westlawn’s alleged failure to comply with the Rule. The LCB maintained that the Trustees had disbursed \$392,657.30 of trust income to Westlawn more than 120 days after the close of Westlawn’s tax reporting years between 2002 and 2017 in violation of the Rule. The LCB sought the return of this sum to the principal of the Trust.

Westlawn then filed a Petition for Declaratory Judgment (“Petition”), seeking a determination that the Rule is unconstitutional because it exceeds LCB’s statutory

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<sup>6</sup> La. R.S. 49:951, *et seq.*, is the Administrative Procedure Act.

<sup>7</sup> The original version of this rule was found at LAC 46:XIII.1303 and included only the substance of current subsection C.



authority to promulgate rules and regulations, and directly conflicts with La. R.S. 8:454.1, which restricts the use of trust income to the care and maintenance of interment spaces. Westlawn also sought a declaratory judgment finding that it is not required to return the income of the trust which was used for the cemetery's maintenance and care.<sup>8</sup>

Westlawn and the LCB filed motions for (partial) summary judgment concerning the constitutionality of the Rule, with the LCB taking the position that the Rule is constitutional as a properly promulgated, valid and reasonable "implementation of statutory law" that does not exceed the LCB's delegated authority.<sup>9</sup> Before the district court considered the motions, the parties engaged in extensive litigation concerning whether the matter was required to first proceed to an administrative hearing.<sup>10</sup> When the district court ultimately considered the motions, it found that LAC 46:XIII.1503 C is not facially unconstitutional, granting LCB's motion, in part, and denying Westlawn's motion.<sup>11</sup> The district court remanded the matter to the LCB for a full administrative hearing on the merits.

Westlawn then filed a motion for new trial, arguing that the district court's ruling was contrary to the law and evidence. After a hearing, the district court agreed with Westlawn, found its prior ruling to be "clearly contrary to the law and evidence," and entered judgment declaring LAC 46:XIII.1503 C to be unconstitutional on its face. In its written reasons for judgment, the district court

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<sup>8</sup> Additionally, the Petition sought a judgment declaring that LAC 46:XIII.1505 is unconstitutional and that the LCB has complied with all of Title 8's reporting requirements.

<sup>9</sup> The LCB also filed exceptions of no cause of action, no right of action and nonjoinder of a party.

<sup>10</sup> The issue of whether review by an administrative agency is required before relief can be sought in the district court was litigated, with the last ruling of the court of appeal indicating that agency review is not a prerequisite to filing a declaratory judgment action in the district court when the allegations challenge the constitutionality of an administrative rule because an "agency is not authorized to determine the constitutionality of its own regulations." *Westlawn Cemeteries, L.L.C. v. The Louisiana Cemetery Board*, 2020-250, 2020-281, 2020-337 (La. App. 5 Cir. 1/11/21)(unpub.). Supervisory review of this decision was not sought in this Court.

<sup>11</sup> In that judgment, the district court also found LAC 46:XIII.1503 A and B to be constitutional.

noted that legislative power rests exclusively with the legislature and may not be delegated, although administrative or ministerial functions may be delegated to an agency. It then noted that an agency “has the power to ‘fill up the details’ by prescribing administrative rules and regulations,” citing *State v. Alfonso*, 99-1546 (La. 11/23/99), 753 So. 2d 156, 161. Finding that the LCB exceeded the authority granted to it by adopting a rule that “take[s] trust income from a trustee,” the district court stated:

In reality, [the Rule] does not enforce any provisions of Title 8. It merely penalizes a trustee for violating what appears to be an arbitrary time line adopted by the [LCB] for remitting trust income to the cemetery authority. Other than requiring an annual report from the cemetery authority and the trustee, Title 8 does not promulgate any deadlines for the disbursement of trust income to a cemetery authority. Again, La. R.S. § 8:465 grants the trustee the discretion to handle the permanent disposition of the funds.<sup>12</sup>

(Footnote added). From this judgment, the LCB applied to this Court, seeking a reversal of the district court’s judgment. Westlawn answered the appeal, seeking to have the Rule declared unconstitutional both facially and “as applied” because, Westlawn contends, the Rule violates substantive due process rights, is “void for vagueness under the due process clause of the Fourteenth Amendment and Article 1, § 2 of the Louisiana Constitution” and is an improper exercise of primary legislative authority. The answer to appeal further seeks a determination that subparts A and B of LAC 46:XIII.1505 are unconstitutional.

## DISCUSSION

The only error assigned by the LCB concerns the district court’s determination that the Rule is unconstitutional. Therefore, the sole issue before this Court is the

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<sup>12</sup> La. R.S. 8:465 A provides that “[a]ll funds held in trust for perpetual care purposes shall be administered by the trustee with such skill and care as a man of 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, considering the probable income as well as the probable safety of his capital . . . .”

constitutionality of LAC 46:XIII.1503 C. While the LCB focuses mainly on this issue, it also argues that this case should have first proceeded through the “mandatory process for the review of agency action” as provided by the Louisiana Administrative Procedure Act.<sup>13</sup>

Louisiana Supreme Court Rule VII § 4(3) requires an appellant’s brief to contain “a specification of the alleged errors complained of.” Because the issue of administrative review was not raised as an assignment of error, nor briefed, it is not properly before this Court. *See, e.g., Bonnette v. Conoco, Inc.*, 2001-2767, p. 10 (La. 1/28/03), 837 So. 2d 1219, 1227; *State v. Smith*, 418 So. 2d 515, 524 (La. 1982).

The LCB further maintains that there is “no factual record in this case,” and that “[o]nly through that mandatory process can any adjudicatory body meaningfully and properly analyze the [parties’] allegations, including any allegation of unconstitutionality.” Although we disagree with the LCB that a more detailed factual record is necessary in this case for the determination of the Rule’s constitutionality,<sup>14</sup> we do not address this issue, as it was neither included nor briefed by the LCB as an assignment of error.

### *Standard of review*

This case comes before the Court on the grant of a motion for new trial, which granted, in part, Westlawn’s Petition.<sup>15</sup> Under La. C.C.P. art. 1972 (1), when a judgment “appears clearly contrary to the law and the evidence,” a motion for new trial “shall be granted.” The applicable standard of review of a judgment granting a motion for new trial is whether the district court abused its discretion. *Pitts v.*

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<sup>13</sup> The issue of whether the parties were required to seek relief through the Administrative Procedure Act is not at issue in this case. *See* footnote 10, *supra*.

<sup>14</sup> *See, e.g., Moore v. RLCC Techs., Inc.*, 95-2621, p. 3 n.2 (La. 2/28/96), 668 So. 2d 1135, 1137 (“the sole issue before the court on this direct appeal is the constitutionality of Section 1032 on its face. Therefore, there is no factual issue before this court. . .”).

<sup>15</sup> Westlawn’s motion for new trial reiterated its contention that the Rule is facially unconstitutional, specifically limiting its argument to its contention that the Rule violates the separation of powers provision of La. Const. art. II, § 2.

*Louisiana Med. Mut. Ins. Co.*, 2016-1232, p. 10 (La. 3/15/17), 218 So. 3d 58, 66. In the instant matter, as discussed more fully below, because the district court’s finding that the Rule is constitutional “appear[ed] clearly contrary to the law,” it was required to grant Westlawn’s motion for new trial; there was no abuse of the district court’s judgment in granting this motion.

In addition to granting the new trial motion, the judgment also granted the petition for declaratory judgment, in part. The declaratory judgment action provides a method by which a court may “declare rights, status, and other legal relations whether or not further relief is or could be claimed.” La. C.C.P. art. 1871. Its purpose “is simply to establish the rights of the parties or express the opinion of the court on a question of law without ordering anything to be done.” *MAPP Const., LLC v. Amerisure Mut. Ins. Co.*, 2013-1074, p. 7 (La. App. 1 Cir. 3/24/14), 143 So. 3d 520, 528. A declaratory judgment action is an appropriate means of testing the constitutionality of a statute, an ordinance, or as here, an administrative rule. *See, e.g., Robertson v. Caddo Par., La.*, 36,540, p. 3 (La. App. 2 Cir. 12/11/02), 833 So. 2d 1139, 1141; *Liberto v. Rapides Par. Police Jury*, 95-456, p. 7 (La. App. 3 Cir. 11/2/95), 667 So. 2d 552, 556; *Vonderhaar v. Par. of St. Tammany*, 633 So. 2d 217, 225 (La. App. 1 Cir. 1993).

Like a ruling on a motion for new trial, the decision to grant or deny declaratory relief is left to the wide discretion of the district court. *See Louisiana Supreme Ct. Comm. on Bar Admissions ex rel. Webb v. Roberts*, 2000-2517, p. 3 (La. 2/21/01), 779 So. 2d 726, 728; *Succession of Robinson*, 52,718 (La. App. 2 Cir. 6/26/19), 277 So. 3d 454, 458, *writ denied*, 2019-1195 (La. 10/15/19), 280 So. 3d 613. Although this decision is subject to an abuse of discretion standard of review, the judgment itself is still reviewed under the appropriate standard of review. *Fondel v. Fondel*, 2020-221, p. 4 (La. App. 3 Cir. 3/10/21), 312 So. 3d 1180, 1183, *writ denied*, 2021-0655 (La. 9/27/21), 324 So. 3d 93; *Martin v. Martin*, 52,401, p. 6 (La.

App. 2 Cir. 11/14/18), 261 So. 3d 984, 989. Thus, questions of law are reviewed *de novo*, while questions of fact are subject to a manifest-error standard of review. *Fondel*, 2020-221, p. 4, 312 So. 3d at 1183. The determination of whether a statute or, in this case, an administrative rule, is constitutional presents a question of law, which is reviewed by this Court *de novo*. See *City of New Orleans v. Clark*, 2017-1453, p. 4 (La. 9/7/18), 251 So. 3d 1047, 1051 (citing *State v. Webb*, 2013-1681, p. 4 (La. 5/7/14), 144 So.3d 971, 975); *Mid-City Auto., L.L.C. v. Dep't of Pub. Safety & Corr.*, 2018-0056, p. 10 (La. App. 1 Cir. 11/7/18), 267 So. 3d 165, 175.

### ***Constitutionality principles, generally***

“All statutory enactments are presumed constitutional.” *Carver v. Louisiana Dep't of Pub. Safety*, 2017-1340, p. 5 (La. 1/30/18), 239 So. 3d 226, 230); see also, *Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2021-00552 (La. 10/10/21), --- So. 3d ----, ----, 2021 WL 5860861 at \*6; *State v. Hatton*, 2007-2377, p. 13 (La. 7/1/08), 985 So. 2d 709, 719. This presumption is based on the premise that “legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation.” *Carver*, 2017-1340, p. 5, 239 So. 3d at 230; *Greater New Orleans Expressway Comm'n v. Olivier*, 2004-2147, p. 4 (La. 1/19/05), 892 So. 2d 570, 573 (“Because legislators owe the same duty to obey and uphold the constitution as do judges, legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation.”).

The presumption of constitutionality applies equally to ordinances. *Fransen v. City of New Orleans*, 2008-0076, p. 10 (La. 7/1/08), 988 So. 2d 225, 233; *Plaquemines Par. Civ. Serv. Comm'n v. Plaquemines Par. Council*, 2017-0449, p. 6 (La. App. 4 Cir. 2/14/18), 241 So. 3d 1040, 1045; *Harris v. Jefferson Par. President & Par. Council*, 2012-715, p. 10 (La. App. 5 Cir. 5/23/13), 119 So. 3d 603, 608. Like a statute enacted by the legislature, an ordinance “is understood to mean a legislative act of a municipality.” *Chapman v. Bordelon*, 138 So. 2d 1, 5 (La. 1962).

An administrative agency rule, on the other hand, is not one enacted by a legislative body, and this Court has yet to apply the presumption of constitutionality to an administrative agency rule, although at least one court has. *See Mid-City Auto.*, 2018-0056, p. 10, 267 So. 3d 165.

The presumption of constitutionality is significant; “[b]ecause of the presumption . . . , in determining the validity of a constitutional challenge, a Court ‘must construe a statute so as to preserve its constitutionality when it is reasonable to do so.’” *Carver*, 2017-1340, 239 So. 3d at 230; *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371, p. 22, 998 So. 2d 16, 31. Additionally, “[b]ecause statutes are presumed constitutional, the party challenging the statute bears the burden of proving its unconstitutionality.” *Fransen*, 2008-0076, p. 11, 988 So. 2d at 234; *see also, State in Int. of D.T.*, 2019-01445 (La. 4/3/20), --- So. 3d ----, ----, 2020 WL 1670730 at \*3 (internal citations omitted)(“‘Statutes are presumed to be valid, and the constitutionality of a statute should be upheld wherever possible. . . .’ When a statute is challenged as being unconstitutional on its face, . . . the moving party bears an especially heavy burden to establish that there is no other interpretation or circumstance under which the law would be constitutional.”)

Administrative agencies do not perform legislative functions and are not made up of elected officials who owe a duty to uphold the constitution. Unlike an elected legislature, an administrative agency is not presumed to have weighed principles of constitutionality in promulgating its rules and regulations. Therefore, we decline to adopt a rule that administrative rules and regulations are presumed constitutional. We do, however, find it proper to place the burden of proving unconstitutionality on the party challenging the administrative rule, as is clearly the case with statutes or ordinances. Placing the burden of proof on the party challenging a rule is consistent with other situations whereby the moving party has the burden of proof (*e.g.*, summary judgment motions and exceptions).

We now turn to the constitutional provisions applicable to the instant matter.

The powers of the state's government are divided by the Louisiana Constitution into three separate branches: legislative, executive, and judicial. La. Const. art. II, § 1. Unless "otherwise provided by [the] constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." La. Const. art. II, § 2. Thus, the Legislature, alone, has legislative power; the delegation of this power, as a general rule, is prohibited. *Krielow v. Louisiana Dep't of Agric. & Forestry*, 2013-1106, p. 5 (La. 10/15/13), 125 So. 3d 384, 388; *see also*, *State v. Miller*, 2003-0206, p. 4 (La. 10/21/03), 857 So. 2d 423, 427 ("legislative power, conferred under constitutional provisions, cannot be delegated by the Legislature either to the people or to any other body of authority.")(quoting *City of Alexandria v. Alexandria Firefighters Association*, 220 La. 754, 57 So.2d 673 (1952)).

There is a well-recognized exception to this principle. "[T]he legislative branch has the authority to delegate to administrative boards and agencies of the State the power to ascertain and determine the facts upon which the laws are to be applied and enforced." *Krielow*, 2013-1106, p. 5, 125 So. 3d at 388. That is, as the district court in this case noted, the legislature "may confer upon administrative officers in the executive branch the power to 'fill up the details' by prescribing administrative rules and regulations." *Alfonso*, 99-1546, p. 7, 753 So. 2d at 161. Accordingly, "administrative and ministerial functions may, by statute, be delegated to an agency in the executive branch." *Id.*, 99-1546 p. 6, 753 So.2d at 160. These principles recognize that the "delegation of certain administrative functions is necessary because of the vast amount of governmental functions that are vested in the legislative branch, which cannot possibly enact and re-enact detailed laws to cover every situation during rapidly changing times." *Krielow*, 2013-1106, pp. 5-6, 125 So. 3d at 388-89 (quoting *Alfonso*, 99-1546, p. 6, 753 So. 2d at 160).

Importantly, however, “[a]n agency exercising delegated authority is not free to pursue any and all ends, but can assert authority only over those ends which are connected with the task delegated by the legislative body. The open-ended discretion to choose ends is the essence of legislative power, and it is this power that the legislature possesses and agencies lack.” *Alfonso*, 99-1546, p. 9, 753 So. 2d at 162. (Citation omitted). The rules and regulations promulgated by an agency thus, may not exceed the authority delegated to it by the legislature. *In re Tillman*, 2015-1114, p. 15 (La. 3/15/16), 187 So. 3d 445, 455. “So long as [a] regulation or action of the official or board authorized by statute does not in effect determine what the law shall be, or involve the exercise of primary and independent discretion, but only determines within prescribed limits some fact upon which the law by its own terms operates, such regulation is administrative and not legislative in its nature.” *Tillman*, 2015-1114, p. 15, 187 So. 3d at 455 (quoting *Schwegmann Brothers Giant Super Markets v. McCrory*, 112 So.2d 606, 613 (1959)).<sup>16</sup>

To establish that a statute, or as here, an administrative rule, is facially unconstitutional,<sup>17</sup> the party challenging it “must establish that no set of circumstances exists under which [it] would be valid, that is, that the law is unconstitutional in all its applications.” *LaPointe v. Vermilion Par. Sch. Bd.*, 2015-

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<sup>16</sup> The oft-cited *Schwegmann* case established a three-prong test to determine whether a delegation of authority to an administrative agency is constitutionally valid. In this case, the delegation of authority to the LCB is found in La. R.S. 8:67, which, as noted, provides the LCB with authority to establish rules and regulations. It is not the constitutionality of this delegation of authority that is at issue in this case, but whether the Rule is constitutional. See *Comeaux v. Louisiana Tax Comm’n*, 2020-01037, p. 15 n.18 (La. 5/20/21), 320 So. 3d 1083, 1093 (“The district court erroneously addressed whether the enabling statutes pursuant to which the Commission promulgated Section 3103(Z), . . . are constitutional delegations of authority under *Schwegmann* . . . Neither the Assessor’s original petition for declaratory judgment nor the Assessor and LAA’s motion for partial summary judgment challenged the constitutionality of the Legislature’s delegation of authority to the Commission. Instead, the relevant question presented is whether the Commission exceeded the authority delegated to it or unconstitutionally infringed on the powers of the Assessor.”).

<sup>17</sup> As we noted in *Comeaux*, “[w]hen a legislative instrument conflicts with a constitutional provision, the legislative instrument must fall. . . . Logically, we apply the same standards when addressing whether an administrative regulation conflicts with the Constitution.” *Id.*, 2020-01037, p. 19, 320 So. 3d at 1096.



0432, p. 10 (La. 6/30/15), 173 So. 3d 1152, 1159-60. “In determining whether a law is facially invalid, the court ‘must be careful not to go beyond the statute’s facial requirements and speculate about hypothetical or imaginary cases.’” *Id.* (Citation omitted).

***Constitutionality of the Rule (LAC 46:XIII.1503 C)***

As noted, the Rule was promulgated by the LCB under the authority provided to it by La. R.S. 8:67 to establish “necessary rules and regulations” for it to administer and enforce Title 8. Subpart A of the Rule reiterates the legislature’s intent set forth in La. R.S. 8:454.1 A that “[t]he principal of the trust fund shall remain permanently intact and only the income shall be expended.” The Rule, in subpart B, allows net income to be remitted to a cemetery for its care and maintenance after costs have been deducted. Subpart C, the focus of this appeal, requires all income not remitted to a cemetery authority within 120 days after the end of its tax reporting year to be added to and become a permanent part of the corpus or principal of the trust. Consistent with Subpart A of the Rule and La. R.S. 8:454.1 A, Subpart C further provides that this income, once added to the principal, “may not be withdrawn or distributed.”

It is the LCB’s position, generally, that the Rule is a “constitutional and valid promulgation pursuant to a legislative grant of authority,” because under *Schwegmann*, it neither determines what the law shall be nor involves the exercise of primary or independent discretion. To the contrary, the LCB maintains, the Rule “merely determines facts upon which the detailed provisions of La. R.S. 8:454.1 C operates.” That is, because La. R.S. 8:454.1 C requires a minimum of ten percent of gross sales of perpetual interment spaces to be deposited in the trust, the Rule merely determines facts upon which this statute operates. Thus, the LCB argues the Rule is administrative rather than legislative in nature and simply “sets forth the mechanism

by which the relevant statutes are effectuated,” consistent with the statutory authority granted to it.

In support of its position in this case, the LCB maintains that the Rule was promulgated to protect perpetual trust income. The Rule’s 120-day deadline, it argues, “is strictly for the remittance of the income to the cemetery by the trustee.” That income “never belong[ed] to the cemetery operator” but is held in trust “for the benefit of the consumers who paid into the trust.” Any amounts not remitted, the LCB maintains, “are not lost” but are “used to enhance the trust,” and, thus, the Rule serves the purpose of protecting trust income and “maximizing the long-term viability of perpetual care trusts.” That is, the larger the trust, the more income it generates for the maintenance of a cemetery. Furthermore, the LCB submits, the Rule assists the trustees “by ensuring that the trustee can invest unused income rather than letting it languish and it helps the trustee fulfill the duties of protecting, maximizing, and accounting for the trust funds.”

The LCB takes the further position that, inasmuch as the income must to be used to maintain a cemetery in a reasonable condition, and the legislature provided a non-limited list of ways by which this is to be accomplished,<sup>18</sup> the Rule’s requirement that income be distributed for that purpose “within a set timeframe is reasonable . . . as it accomplishes the legislative goal of regular maintenance.”

We agree with the LCB that the legislature made clear that the interest from a perpetual care trust fund must be used for the care and maintenance of a perpetual care cemetery; the principal is to remain intact. We disagree with the LCB, however, that the Rule merely determines facts upon which the provisions of La. R.S. 8:454.1 are to operate. We further disagree with the LCB that the Rule does not involve the exercise of primary or independent discretion and is administrative in nature.

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<sup>18</sup> See La. R.S. 8:454.1 B.

In enacting Title 8 and, more particularly, those statutes concerning perpetual care cemeteries and trust funds, the legislature provided certain terms and conditions, including the requirement that certain amounts from sales be deposited in trust funds, that cemetery authorities and trustees comply with various reporting requirements, and that the LCB periodically examine the trust funds. The statute addresses the “use” of trust fund income only to require that it be solely for the care and maintenance of interment spaces. There are no other provisions relating to the use of trust fund income.

In promulgating the Rule, however, the LCB created a restriction as to how trust fund income is to be “used.” Rather than allotting certain income (that income not timely remitted by a trustee) to a cemetery’s care and maintenance, the Rule requires that it become part of the principal of the trust. As such, it does not serve to advance the express mandate of La. R.S. 8:454.1 A that trust fund income be used for a cemetery’s care and maintenance. Nor does it implement any existing law, “fill up details,” or determine “some fact upon which the law by its own terms operates.” Instead, it sets forth an altogether new requirement for trust fund income not contemplated by La. R.S. 8:454.1 and “determine[s] what the law shall be.” *See Tillman*, 2015-1114, p. 15, 187 So. 3d at 455. Accordingly, it cannot be viewed as merely administrative in nature.

To the contrary, the LCB clearly acted in a legislative capacity and exercised “primary and independent discretion” in violation of the separation of powers doctrine when it promulgated the Rule. *See Alphonso*, 99-1546, p. 11, 753 So. 3d at 163 (where administrative agency “improperly exceeded its statutory authority” in promulgating an administrative regulation, “[t]he . . . regulation is . . . unconstitutional.”). There is no indication that the legislature intended to provide

the LCB with authority to allow trust fund income to be used for purposes other than cemetery care and maintenance, *e.g.*, conversion of income into principal.<sup>19</sup>

Our finding that the Rule’s promulgation impermissibly exceeded the authority granted to the LCB by the legislature is consistent with other decisions of this Court. In *Arrant v. Wayne Acree PLS, Inc.*, 2015-0905 (La. 1/27/16), 187 So. 3d 417, 423, for example, this Court considered whether an administrative rule shortening the prescriptive period for appealing the denial of a request for medical treatment by a medical director of the Office of Workers’ Compensation in a workers’ compensation matter exceeded the authority granted by the legislature. The lower courts found that the director acted within his authority in promulgating the rule, holding that a disputed claim for compensation was prescribed.

In reversing the lower court decisions, this Court reiterated the principle that “the Legislature, after fixing a primary standard, may confer upon administrative officers in the executive branch the power to ‘fill up the details’ by prescribing administrative rules and regulations.” *Id.*, 2015-0905, p. 7, 187 So. 3d at 421. Although the director of the Office of Workers’ Compensation had been given “broad general authority to promulgate rules and regulations concerning the medical treatment schedule,” the legislature had already established prescriptive periods for claims for medical benefits. Thus, the director, in promulgating the rule, exceeded the authority delegated by the legislature. The Court stated:

Because all of the director’s power comes from the enabling statute and no statute explicitly or implicitly delegates to the director the power to alter the prescriptive period plainly provided in La.Rev.Stat. 23:1209(C) for “[a]ll claims for medical benefits payable pursuant to R.S. 23:1203,” the 15–day [shortened] period set out in Title 40, Part I, Chapter 27, Section 2715(B)(3)(f) of the Louisiana Administrative Code cannot provide a legitimate basis for sustaining an exception of prescription under the facts of this case.

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<sup>19</sup> The LCB cites examples of other states which have similar provisions for perpetual trust funds; however, as Westlawn notes, those provisions are statutes, enacted by legislative bodies and, thus, raise no separation of powers issues.

*Id.*, 2015-0905, p. 8, 187 So. 3d at 423.

We reached the same conclusion in *Alfonso*. At issue was an administrative rule adopted by the Wildlife and Fisheries Commission which made criminal the failure of fishermen to report the number of mullet caught during the mullet fishing season. The Commission adopted the rule pursuant to the authority delegated to it by the legislature to “‘adopt rules to regulate the taking of mullet,’ expressly stating that such regulations ‘shall provide for zones, permits, fees, and other provisions necessary to implement this Section.’” *Alfonso*, 99-1546, p. 9, 753 So. 2d at 162. The Court noted that the legislature had already “‘imposed a comprehensive statutory reporting requirement” that included the requirement that commercial fishermen file a monthly report indicating the quantity of each kind of fish sold. *Id.*, 99-1546, p. 5, 753 So. 2d at 160. Thus, because the legislature only authorized the Commission to develop rules concerning the taking of mullet, and not the reporting of mullet, the rule unconstitutionally exceeded the authority granted to the Commission.

Similarly, in the instant matter, while the LCB had general authority to promulgate rules and regulations to administer and enforce Title 8, the legislature had already restricted the use of income from perpetual trust funds to cemetery care and maintenance. The LCB’s authority did not include the power to alter the use of that income for any other purpose, including its conversion into principal. Accordingly, the LCB, in promulgating the Rule, exceeded the authority granted to it by the legislature.

We further find that the Rule clearly conflicts with the legislative intent for perpetual care trust funds in two ways. First, the Rule essentially grants the trustees of perpetual care trust funds the power of determining what happens to trust fund income. Title 8 does not delineate when income is to be disbursed to a cemetery authority or set forth any specific requirements about its disbursement. Subpart B

of the Rule, however, states that the “net income, after deduction of costs associated with the operation of the trust, *may* be remitted to the cemetery for care and maintenance of the cemetery.” (Emphasis added). The use of the term “may” indicates that the trustees have discretion as to when (and whether) to remit income to a cemetery authority.<sup>20</sup> If, for whatever reason, the trustees receive but do not timely remit the trust income to a cemetery authority, under the Rule, the income becomes part of the trust’s principal, where it cannot thereafter be withdrawn or distributed. This allows the trustees to hold onto income until there is no option but to put the income into the principal of the trust, a result inconsistent with the scheme set forth by the legislature for perpetual care trusts.

Second, the Rule’s requirement that the income become, “for all purposes,” “part of and added to the corpus or principal of the trust” if not timely remitted, necessarily amounts to the “use” of income – the conversion of the income into principal – for purposes other than the care of a cemetery. Although the LCB may establish rules to administer or enforce Title 8, there is nothing in Title 8 which authorizes the LCB to require income to be converted into principal. To the contrary, because there is only one legislative mandate for the use of trust fund income, the Rule violates La. R.S. 8:454.1 A. Moreover, Title 8 contains no provisions as to when a cemetery authority must use income and the Rule’s requirement that it be converted into principal if not remitted within the 120-day period impermissibly sets forth a time limitation for the use of that income.

After our *de novo* review of the record, we find that the district court correctly found LAC 46:XIII.1503 C to be unconstitutional on its face. Because of this finding, we need not address Westlawn’s contention that LAC 46:XIII.1503 C is also “unconstitutional as-applied.” *See LaPointe*, 2015-0432, p. 10, 173 So. 3d at

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<sup>20</sup> “Words and phrases must be read with their context and construed according to the common and approved usage of the language.” La. R.S.1:3. “The word ‘shall’ is mandatory and the word ‘may’ is permissive.” *Id.*

1159 (“A facial constitutional challenge seeks more drastic relief than an as-applied challenge. . . .”). Nor do we address Westlawn’s answer to appeal, raising the constitutionality of LAC 46:XIII.1505 A and B. Although in its first judgment, the district court found the these rules to be constitutional as well, when Westlawn filed its motion for new trial, it expressly limited the scope of its motion to the constitutionality of LAC 46:XIII.1503 C.<sup>21</sup> Likewise, the district court’s June 29, 2021 judgment on the motion for new trial makes no mention of LAC 46:XIII.1505 A and B. Accordingly, because there was no appeal of the finding in the first judgment that LAC 46:XIII.1505 is constitutional, and it was not raised in the motion for new trial, the issue is not properly before this Court. *See, e.g., Wilson v. Compass Dockside, Inc.*, 93-1860 (La. App. 4 Cir. 3/15/94) 635 So. 2d 1171, 1176(“the granting of a motion for new trial sets aside and vacates the original judgment *on the issue on which a new trial has been granted*. . . .Thus, when the trial court has granted a motion for new trial, the appellate court is prohibited from reviewing the case to determine whether the original judgment was correct. . . . [T]he only judgment this court is allowed to review is the second judgment, issued after the granting of the motion for new trial, which is in fact the judgment that we reviewed in this case.”)(citations omitted, emphasis added).

### **DECREE**

For the foregoing reasons, we find that, in promulgating LAC 46:XIII.1503 C, the LCB exceeded the authority granted to it to establish rules and regulations to administer Title 8. The judgment of the district court declaring it to be unconstitutional on its face is therefore affirmed.

### **AFFIRMED**

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<sup>21</sup> The Motion for New Trial seeks “to set aside the portion of the Judgment . . . with respect to the facial separation of powers challenge to [the Rule] as clearly contrary to the law and evidence.” The supporting memorandum, too, states that “this Motion for New Trial . . . is limited to the [Rule] violation of the separation of powers provision of La. Const. Art. II, § 2. . . .”