ATTACHMENT C

RESPONDENT’S ARGUMENT REGARDING THE PETITION FOR RECONSIDERATION
Attorneys for Individual Respondents
Employed by Respondent San Francisco Bay
Area Rapid Transit District

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES’ RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the matter of the Appeal Regarding the
Temporary Transit Employee Exemption of the
Public Employees’ Pension Reform Act of 2013
by

SANTA CLARA VALLEY TRANSIT
AUTHORITY,
Respondent,

and

LA KEYSHA DORSEY, JESSE GOMES,
AARON GWIN, LLOYD JACKSON II, TONI
O’CONNOR, BUDDY ROARK,
Respondents,

and

SAN FRANCISCO BAY AREA RAPID
TRANSIT DISTRICT,
Respondents,

and

State of California,
Respondents.

Agency Case No. 2018-0624

ATU RESPONDENTS’ LAKEYSHA
DORSEY, JESSE GOMES, AARON
GWIN, LLOYD JACKSON II, TONI
O’CONNOR, BUDDY ROARK
ARGUMENT IN SUPPORT OF THEIR
PETITION FOR RECONSIDERATION

Board Meeting Date: August 21, 2019
I. Introduction.

ATU Respondents LaKeysha Dorsey, Jesse Gomes, Aaron Gwin, Lloyd Jackson II, Toni O'Connor, and Buddy Roark (collectively, "ATU Respondents") submit this argument in support of their Petition for Reconsideration. The Board adopted the ALJ's Proposed Decision at its June 19, 2019 Board meeting. On July 19, Respondents requested that the Board grant a stay of execution and reconsider its decision, given that the Proposed Decision contains significant legal errors. (Gov. Code § 11521.) On July 24, 2019, CalPERS granted the request for a stay of execution. Respondents submit this argument in support of their Petition for Reconsideration.

Respondents have challenged CalPERS' application of Gov. Code § 7522.02(a)(3)(A), which exempts transit employees from PEPRA for a specified period of time (the "exemption period"). In particular, Respondents challenge CalPERS' decision to remove hundreds of transit employees hired during the exemption period from the classic benefit tier in which they had been enrolled and subject them to PEPRA, reversing the Agency's original (correct) position that PEPRA would only apply to transit employees hired after expiration of the exemption period. This unprecedented action - moving members already enrolled in one benefit tier to a lower tier - raises serious questions of statutory compliance and fiduciary duty that merit the Board's close attention.

The Proposed Decision does nothing more than repeat the points CalPERS has made in support of its action. In so doing, the Proposed Decision sweeps aside key portions of the legislative record, brushes off CalPERS' own inconsistent representations concerning the exemption for transit employees, and disregards important judicial precedent and public policy considerations. Instead, the ALJ relied on a single observation: that PBPRA's "overarching intent" was to reduce state and local pension obligations. On this basis alone the ALJ concluded that Respondents' interpretation of AB 1222 is wrong, because it is allegedly "inconsistent with the purpose of PEPRA to reduce, not expand, public pension obligations." (Proposed Decision at p. 16.)

Although the Proposed Decision departs dramatically from the prudent approach the Board has long taken to protecting the pension promises made to its members, the Board adopted the decision at its June 19, 2019 meeting. Government Code Section 11521 provides that the agency may order a reconsideration of all or part of the case on petition of any party. Because the Proposed Decision was in error, the Board should reject the Proposed Decision, and elect to hold a full hearing on this important matter. (See Gov. Code § 11517(c)(2), subd. (E).)

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1 Respondents' interpretation of the statute, which as seen below is identical with the California legislature's own 'interpretation', is by no means inconsistent with PEPRA's goal of containing future pension costs. It is undisputed that AB 1222 establishes only a temporary exemption for transit employees, subjecting all employees hired after the exemption period to PEPRA. It is, of course, that aspect of AB 1222 that achieves the goal of containing future pension costs.
II. Transit Employees Hired During the Exemption Period Are Not Subject to PEPRA.

PEPRA's transit exemption, as created by AB 1222 and extended by AB 1783, reads in relevant part:

[T]his article shall not apply to a public employee whose interests are protected under subsection (b) of Section 5333 of Title 49 of the United States Code until a federal district court rules that the United States Secretary of Labor, or his or her designee, erred in determining that the application of this article precludes certification under that section, or until January 1, 2016, whichever is sooner.

Gov. Code § 7522.02(a)(3)(A) (the "Transit Exemption"). The statute thus provides that transit employees (i.e., employees "whose interests are protected under subsection (b) of Section 5333 of Title 49 of the United States Code", the Urban Mass Transit Act) are exempt from PEPRA during a period ending, at latest, on January 1, 2016 (the exemption period).^2

The legislative record is clear that under the Transit Exemption, transit employees *hired during* the exemption period are not subject to PEPRA. The Department of Finance Enrolled Bill Report (JX 100) specifically states that the Transit Exemption "is intended to temporarily end the 13(c) dispute by exempting represented transit employees from PEPRA... if Sacramento successfully defends its ability to implement PEPRA, then PEPRA will apply to all transit employees, hired after the date of the ruling, whose collective bargaining rights are protected by 13(c)."^3 Quite simply put, transit employees hired prior to January 1, 2016 are exempt from PEPRA, while those hired on or after that date are subject to PEPRA. This reading of the statute reflects the plain intent of the Legislature to avoid any question that PEPRA might have jeopardized the federally-protected collective bargaining rights of transit workers employed in order to pave the way for California transit agencies to receive 1.6 billion dollars in federal transit funds. There is no documentary or other support in the legislative record for any contrary interpretation of the Transit Exemption.

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^2 The exemption period did, in fact, end on January 1, 2016. In the Proposed Decision, the ALJ mistakenly assumed that the exemption period ended earlier, on December 30, 2014: the district court's decision on that earlier date, however, was an interim decision remanding the matter for a more thorough consideration by the Department of Labor, and did not rule on the question of whether the DOL erred in its determination that PEPRA precluded certification. The district court did not rule on that question until August 22, 2016, well after January 1, 2016. (JX 73-74)

^3 The Proposed Decision carelessly dismisses the critical importance of the DOF report, writing that no other document in the legislative record speaks to the issue. That fact, however, only highlights the importance of the DOF report: it interprets the relevant statutory text, and no other document in the entire legislative record suggests any different interpretation.
III. CalPERS Originally Enrolled Transit Employees Hired During the Exemption Period in the Classic Benefit Tier, and Announced That Only Those Hired Subsequently Would Be Treated as “New Members” Subject to PEPRA.

After passage of AB 1222, CalPERS exempted transit employees hired during the exemption period from PEPRA, enrolling them in the classic benefit tier. Neither in its December 3, 2013 Circular (JX 47) nor anywhere else did the Agency provide notice or suggest that employees hired during the exemption period could have their enrollment in the classic tier subsequently rescinded. To the contrary, in its December 4, 2013 FAQ regarding AB 1222, the Agency stated only that should the federal district court issue a ruling adverse to the Department of Labor, “[t]ransit employees hired after the date of the court ruling will be new members as defined under G.C. section 7522.04, and will be subject to PEPRA and the reduced benefits.” (JX 91 [emphasis added].) The exact same statement was repeated in the FAQs updated on or about April 29, 2014, which remained on CalPERS’ website until at least March 26, 2015.

In reliance on these representations, which reflected the then unanimous understanding that transit employees hired during the exemption period are not subject to PEPRA, Respondents and others entered and have remained in public employment. Employees received communications from their employers, prior to their hiring date, stating that they would be placed into the 2% at 55 retirement tier; upon hiring, they were also provided with a CalPERS publication breaking down the different retirement formulas and how benefits would accrue—but the new PEPRA formula of 2% at 62 was not even mentioned. (ATU 34 at Exh. C; ATU 35.) One Respondent, David Hill, specifically asked CalPERS before taking VTA employment whether, as a gap employee, he would be exempt from PEPRA and receive classic benefits on retirement. (VTA 4.) CalPERS provided him “unequivocal assurance” he would be a PEPRA-exempt classic employee and would receive classic benefits upon retirement. (VTA 4 at ¶ 8.)

IV. CalPERS’ Sudden and Unprecedented Decision to Divest Members of Their Classic Benefits and Subject Them to PEPRA Leaves the Agency on Precarious Legal Ground.

In 2015, CalPERS suddenly and unexpectedly reversed course: its Circular dated February 25, 2015 announced for the first time that transit employees hired during the exemption period would be subject to PEPRA for all future service and taken out of the classic benefit tier in which they had been enrolled. That action, taken without review or direction from the Board, and the Proposed Decision which follows it, places CalPERS at sharp variance with other state retirement systems and leaves it on highly precarious legal footing. We outline the principal reasons for that conclusion here.

A. There is no Statutory Authority for CalPERS’ Action.

Neither CalPERS nor the ALJ have identified any law permitting ‘split’ pension benefits for service in one and the same job. Yet that is exactly what CalPERS purports to have done for transit employees, first by creating fictitious ‘permanent separations’ and ‘new member appointments’ for each such member, treating them as though they had changed jobs even though they had not, and then by abrogating to itself the authority to establish some kind of new split or ‘hybrid’ plan of pension benefits (classic benefits for the first two years and PEPRA
benefits thereafter) for these members. (JX 3, JX 95.)

There is no statutory authority supporting these "hybrid appointments" and hybrid plan of benefits. Government Code Section 7522.04 and Title 2 of the California Code of Regulations, Section 579, set forth the *only* circumstances in which an employee may acquire benefits under two different retirement benefit formulas. Section 7522.04 provides that members who have previously accrued pre-PEPRA retirement benefits and then change employers after a break in service of greater than six months may be considered "new members" and retire with formulas under both pre-PEPRA and PEPRA formulas. *(See, e.g., 7522.04(f)(3).)* Section 579.4 of the regulations defines a "break in service" as a *permanent separation from employment.* Similarly, Government Code Section 7522.04(f)(2) provides that members who were not subject to reciprocity under Section 7522.02(c) may also be subject to a PEPRA retirement formula after having accrued pre-PEPRA benefits. Section 579.3 of the regulations addresses exclusively reciprocity.

At hearing, the Agency conceded that it has *never* previously done what it did here: move employees into "new member appointments" and a lower retirement tier even though they had not incurred a break in service or changed employers. (TRI 138:25-139:8.) Indeed, Agency staff acknowledged that CalPERS did not rely on any statutory provision, regulation, or other document when it devised its plan to treat exempt employees as having new member appointments in order to move them to a different retirement tier. *(TRI 172:5-11.)* Nor did CalPERS support its action with rulemaking: no regulations were promulgated and no guidance was given from the Board with respect to the implementation of AB 1222. *(TRI 148:12-21.)* CalPERS did not seek clarifying legislation, nor even seek to amend its contract with the agencies with respect to how transit employees hired during the exemption period would be treated under PEL. *(ATU 3 at 000028-32.)* In short, CalPERS' action had no basis in law and was *ultra vires.*

B. *If Allowed to Stand, CalPERS' Decision Would Be Actionable as a Breach of Its Fiduciary Obligation to Provide Accurate and Complete Information to Members of the Retirement System.*

CalPERS (and the Proposed Decision) contends that the FAQs posted on its website from December 2013 through March 2015 -- which as noted above unequivocally stated that transit employees *hired after* the exemption period would be new members subject to PEPRA -- were not intended to be complete as they contained a disclaimer that the Agency's interpretation was "preliminary." But it is not plausible to suppose that CalPERS intended to tell only 'half the story' in the FAQs posted on its website for over a year by deliberately omitting the impact on and prospects for transit workers hired during the exemption period. If *that* is what CalPERS intended, then it violated its fiduciary duty to provide complete and accurate information to its members, regardless of whether the interpretation was a "preliminary" one. At hearing, the Agency testified that it "had all the legislative information that [it] needed with regard to what the transit employee exemption was" as of December 4, 2013. *(See Tr. at 157:18-158:5; 169:13-171:5.*) There are, therefore, just two possibilities: either CalPERS truthfully and accurately reported its interpretation of the Transit Exemption in the materials posted on its website for over a year, or it misrepresented its views to members of the Retirement System and contracting...
agencies, thereby breaching its core fiduciary duty to provide accurate and complete information about the benefit programs it administers. Respondents can only conclude that the materials posted on the Agency's website for over a year reflected what was then its complete and well-considered interpretation of the Transit Exemption.

C. CalPERS' Action Conflicts with the Agency's Own Policies on Vested Benefit Rights.

CalPERS' original, and correct, interpretation of the effect of the Transit Exemption, as communicated to all members and contracting agencies, was in line with the agency's longstanding policy on vested benefit rights. CalPERS' 2011 publication, *Vested Rights of CalPERS Members: Protecting the Pension Promises Made to Public Employees*, clashes with the action it took in this case. The publication thoroughly explores the California Contract Clause as applied to public employees' retirement benefit rights, and proclaims that "Promised benefits may be increased during employment, but not decreased, absent the employees' consent. [...] The courts have established that this rule prevents not only a reduction in the benefits that have already been earned, but also a reduction in the benefits that a member is eligible to earn during future service." (ATU 22, p. 8, emphasis in original). The publication emphasizes that vested rights can only be modified in a way disadvantageous to a member if the member receives a comparable new benefit and that even "amending the California Constitution would not open the way to lawfully impairing vested pension rights." (Id. at p. 10-11.)

CalPERS (and the Proposed Decision) argues that the Transit Exemption and CalPERS' FAQs did not create a vested right. But this misses the mark: Respondents do not argue that either of these created a vested right, but rather that CalPERS acted arbitrarily and against its own published policies in its decision to reverse course on how it interpreted the Transit Exemption. For as CalPERS acknowledges in its 2011 publication and many other places, it is acceptance and retention of employment that typically creates a vested right to pension benefits, and here CalPERS acted with reckless disregard for the fact that transit employees hired during the exemption period had accepted or remained in employment on the basis of the promise made to them that they would be enrolled in the classic benefit tier. Neither CalPERS nor the ALJ have explained how the Agency's treatment of transit workers hired during the exemption period can be squared with its longstanding policy on vested benefit rights.

D. CalPERS' Action Ignores the Long Line of Judicial Authority Holding That Pension Statutes Must Be Interpreted Liberally in Favor of Applicants.

In the Proposed Decision, the ALJ asserted that the language of the Transit Exemption is ambiguous with respect to the "intent regarding the pension benefits to be afforded the transit employees after the transit employee exemption ended." (Proposed Decision at p. 13.) As already noted (but brushed aside by the ALJ), any such ambiguity is decisively resolved by the legislative record, as CalPERS itself implicitly acknowledged in the FAQs posted on its website from December 2013 through March 2015. Moreover, well-settled California Supreme Court and other judicial authority provides that any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, consistent with the statute at issue. (*Ventura County Sheriffs' Assoc. v. Bd. of Retirement* (1997) 16 Cal.4th 483, 490; *see also*, e.g., *Cavitt v. City of Los Angeles* (1967) 251 Cal. App. 2d 623 (pension statutes "are to be liberally
interpreted in favor of the applicant," and pension benefits are valuable property rights which may not be taken away by a strained construction of applicable statutory language.) The ALJ casually disregards this longstanding and binding precedent.

E. CalPERS' Is the Only Retirement Agency That Has Misinterpreted the Transit Exemption.

CalPERS stands alone in its strained interpretation of the Transit Exemption. James Donich, General Counsel for the Orange County Transportation Authority ("OCTA"), notes, for example, that the Orange County Employees Retirement System has interpreted the transit exemption as the Respondents do in this case have: that PEPRA will not apply to employees hired during the exemption period. (VTA 3 at ¶¶ 1, 6.) Mr. Hunt testified and provided similar documentary evidence showing the CalPERS' interpretation is at odds with several other transit agencies and their employees' pension plans, which honor the rights of transit employees hired during the exemption period to accrue classic benefits while applying PEPRA to those hired after expiration of the exemption period (January 1, 2016). (E.g., Sacramento Regional Transit District (ATU 36, p. 2), Golden Gate Transit District (ATU 37), Santa Clara Valley Transit Authority (ATU 38), Orange County Transportation Authority (VTA 3, Donich Decl.), the Alameda Contra-Costa Transit District (JX 94), and Monterey-Salinas Transit District (JX 93).)

V. Conclusion

For the reasons enumerated here, CalPERS' treatment of transit employees hired during the exemption period cannot stand. The Board's decision to adopt the Proposed Decision supporting the Agency's action should be reconsidered, and the Proposed Decision should not be adopted. Given the unprecedented nature of the Agency's action and the importance of the issues involved in this matter, Respondents request that the Board hold a full hearing in this case. (See Gov. Code § 11517(c)(2), subd. (E.).)
Board Meeting Date: June 19, 2019
PROOF OF SERVICE

I am a citizen of the United States and am employed in Alameda County. I am over the age of eighteen (18) years and not a party to the above-captioned action. My business address is Leonard Carder, LLP, 1330 Broadway, Suite 1450, Oakland, California 94612. On August 6, 2019, I served the following document(s):

- ATU RESPONDENTS LAKEYSHA DORSEY, JESSE GOMES, AARON GWIN, LLOYD JACKSON II, TONI O'CONNOR, AND BUDDY ROARK'S ARGUMENT IN SUPPORT OF THEIR PETITION FOR RECONSIDERATION

On August 06, 2019, service was effectuated by forwarding the above-noted document(s) in the following manner:

- [X] By Email (in lieu of hand delivery), to the recipients at the address as noted in the attached service list.
- [X] By U.S. Mail, by placing the document(s) listed above in a sealed envelope, addressed as noted in the attached service list, with postage fully prepaid and placing it for collection and mailing following the ordinary business practices of LEONARD CARDER LLP.
- [X] By Facsimile to the number(s) as noted in the attached service list, by placing it for facsimile transmittal following the ordinary business practices of LEONARD CARDER LLP.

I declare under penalty of perjury, under the law of the State of California, that the foregoing is true and correct.

Executed on Tuesday, August 06, 2019, at Oakland, California.

Ariel M. Lopez
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