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1 not, and they are directory, not mandatory. Contrary to this Court’s February 2, 2007 ruling,
2 there is *no* 100-day statutory deadline for an agency to order the transcript of the administrative
3 hearing, much less a deadline carrying a “deemed adopted” penalty, and fundamental canons of
4 statutory construction—themselves enshrined in statute—bar this Court from inferring such an
5 unstated requirement. As a result, even if the CalPERS Board had failed to meet one of those
6 other deadlines—which is not the case—Alexander would not be entitled to a writ of mandate.

7 This Court should deny Alexander’s petition in its entirety and allow the CalPERS
8 Board to proceed with a full hearing on Alexander’s claim. Any claim, and particularly a claim
9 of that magnitude, should be decided on the merits, not on the basis of misunderstood and
10 misapplied procedural rules.

11 **FACTUAL AND PROCEDURAL BACKGROUND**

12 Alexander’s claim concerns the amount of survivor death benefits and interest owed by
13 the Legislators’ Retirement System (“LRS”), which is administered by CalPERS, to Frances
14 Alexander, the now-deceased widow of Clarence Alexander. From 1947 to 1969,
15 Mr. Alexander was employed by the State of California as the Business Manager of the State
16 Senate. In January 1969, he was elected Secretary of the Senate, and he retired in December of
17 that year. He received a monthly retirement allowance until he died in February 1998.
18 Mrs. Alexander then received a monthly survivor death benefit until she passed away in late
19 2005. Before she died, Mrs. Alexander brought an administrative claim alleging that CalPERS
20 had improperly calculated her monthly benefits; that claim is now being pursued on behalf of
21 her heirs.

22 The principal issue is the interpretation of Government Code section 9359.10, which
23 was enacted in 1966 and requires COLAs for legislative statutory officers and certain other
24 membership classifications. The statute requires that retirement allowances reflect both “cost-
25 of-living increases occurring after the retirement of the legislative statutory officer as
26 determined under Section 9360.10” and changes in the compensation “payable to the
27 incumbent of that legislative statutory office.” (Gov. Code § 9359.10.) CalPERS interprets this
28 provision in a logical fashion: the Legislature intended that the annual adjustment include any

1 incumbent salary increases plus annual COLAs prospectively. Alexander interprets this
2 provision to incorporate a *multiplier effect*: the annual adjustment would include any
3 incumbent salary increase, plus annual COLAs prospectively, *plus an additional compounded*
4 *increase* calculated by applying each COLA *since the date of retirement* to the already-
5 adjusted amount that CalPERS uses. As a result, using Alexander’s interpretation, the monthly
6 pension would far exceed either the member’s COLA-adjusted salary or the incumbent’s actual
7 salary, though the latter is also subject to an annual COLA. (See Declaration of Marguerite D.
8 Seabourn Ex. A, filed with original Opposition Brief.)

9 Alexander’s case was originally heard by an ALJ rather than CalPERS itself. An
10 evidentiary hearing was held before Administrative Law Judge Jonathan Lew on February 27-
11 28 and March 1, 2006. Judge Lew issued his Proposed Decision on May 2, 2006, and CalPERS
12 received the Proposed Decision on May 4, 2006. (Seabourn Decl. ¶ 4.) The Proposed Decision
13 would have awarded Alexander \$3,579,578 plus six percent interest, the total of which would
14 near \$8 million. (Opening Br. Ex. 2, at 40.)

15 At its monthly meeting on June 21, 2006, the CalPERS Board voted to reject the
16 Proposed Decision and to decide the case itself based on the administrative record, including
17 the transcript of the evidentiary hearing. (Seabourn Decl. ¶ 5.) The Board also decided to allow
18 the parties to submit additional briefs and offer further argument at a full Board hearing.
19 Alexander CalPERS notified Alexander of the Board’s decision and that there would be a full
20 hearing before the Board. (*Id.*)

21 At the June 21, 2006 Board meeting, the Chairman of the CalPERS Board also
22 instructed CalPERS’ staff to solicit the opinion of the State Office of Legislative Counsel
23 concerning the correct construction of Government Code section 9359.10. (Seabourn Decl. ¶
24 6.) CalPERS could not directly ask the Office of Legislative Counsel for such an opinion;
25 instead, it was required to ask a member of the Legislature to request the opinion on CalPERS’
26 behalf. The CalPERS staff investigated how best to proceed, but was impeded because the
27 Legislature was out of session for a month, from July 7 to August 7, 2006. Moreover, the
28 CalPERS staff was obligated to prepare a request that posed the statutory construction issue in

1 a neutral manner that was not based on the facts of the Alexander case. This required
2 preparation of a set of illustrative hypothetical examples of the results of the different
3 interpretations, including complex actuarial computations that were included with the request.
4 These calculations were checked and rechecked by different CalPERS actuaries. This process
5 was delayed by events unrelated to any purported intent to delay proceedings or prejudice
6 Alexander. Critically, Elizabeth Yelland, the CalPERS staff counsel who had been responsible
7 for the Alexander case since its inception, left CalPERS' employ at the end of August 2006,
8 and CalPERS thus lost the considerable expertise she had developed in the complex issues. (*Id.*
9 ¶¶ 7-8.) Ultimately, CalPERS completed and approved the request for the opinion of the Office
10 of Legislative Counsel, and presented that request on October 3, 2006, to the Honorable
11 Alberto Torrico, a State Assembly Member and Chair of the Assembly's Public Employees,
12 Retirement and Social Security Committee. (Seabourn Decl. ¶ 9 & Ex. A.)

13 CalPERS, however, had no way of knowing if or when the Office of Legislative
14 Counsel would render the opinion that the CalPERS Board had requested, and it was faced
15 with a statutory deadline for agency decision making: under the Government Code, "[i]f the
16 agency...has ordered a transcript of the proceedings before the administrative law judge, the
17 agency shall issue its final decision not later than *100 days after receipt of the transcript.*"
18 (Gov. Code § 11517, subd. (c)(2)(E)(iv), emphasis added.) Because the CalPERS Board had
19 expressed its desire to decide the case after a thorough consideration that included the Office of
20 Legislative Counsel's input, CalPERS' staff temporarily held off from ordering a copy of the
21 transcript. On October 6, 2006, three days after it sent its request to Assembly Member
22 Torrico, CalPERS ordered the transcript from the Office of Administrative Hearings ("OAH").
23 (Seabourn Decl. ¶ 10 & Ex. B.) OAH was engaged in moving its offices, however, and
24 CalPERS did not receive a response to its request for several weeks. (*Id.* ¶ 11.) Eventually
25 OAH informed CalPERS that it no longer processed transcript requests and that CalPERS
26 should contact the court reporters directly. (*Id.*) CalPERS immediately did so: on November 6,
27 2006, it requested the transcripts from Peters Court Reporting. (*Id.* ¶ 11 & Ex. C.) CalPERS
28 received the transcripts on November 13, 2006, triggering the 100-day deadline. (*Id.* ¶ 11.)

1 While Alexander argues that its counsel received the transcripts in July 2006 and that
2 its counsel served errata on CalPERS’ staff counsel that month (Opening Br. at 10), Alexander
3 does not suggest that CalPERS itself actually had the transcripts before November 13, 2006, or
4 even that Alexander had offered to provide the transcripts to CalPERS. Thus, there is no basis
5 for Alexander’s assertion that CalPERS had “constructive receipt of the transcripts” as of July
6 15, 2006. (Opening Br. at 11.)

7 However, the timing of the proceedings required the CalPERS Board to exercise its
8 discretion under the Government Code to extend the 100-day deadline by another month.
9 Government Code section 11517, subdivision (c)(2)(E)(iv), provides, “If the agency finds that
10 a further delay is required by special circumstance, it shall issue an order delaying the decision
11 for no more than 30 days and specifying the reasons therefor.” (Gov. Code § 11517, subd.
12 (c)(2)(E)(iv).) Because of the complexity of issues, the size of the administrative record, and
13 the impending holidays, CalPERS did not have enough time to give appropriate and timely
14 notice to the parties to hold the full Board hearing at its December 20, 2006 meeting.
15 (Seabourn Decl. ¶ 12 & Ex. D.) The CalPERS Board, which consists of thirteen elected,
16 appointed, and ex officio members from across California, meets in Sacramento on Wednesday
17 of the third week of every month except January and July; it does not have a regular meeting in
18 January and instead meets off-site to consider strategic planning and direction. (*Id.* ¶¶ 2-3, 13.)
19 As a result, after CalPERS’ staff informed Alexander’s counsel of the calendaring issues, the
20 CalPERS Board set the full hearing for its February 22, 2007 meeting. (*Id.* ¶ 13.) Normally, the
21 Board would have met on Wednesday, February 21, 2007—the 100th day from CalPERS’
22 receipt of the transcript—but Monday, February 19, 2007, is a state holiday, and the Board
23 meeting was moved back one day to February 22, the 101st day. (*Id.* ¶ 14 & Ex. D.) This alone
24 constituted a “special circumstance” that required the Board to invoke its authority under the
25 Government Code.

26 Moreover, if the CalPERS Board, after the full hearing, had decided not to adopt the
27 ALJ’s Proposed Decision and instead to issue a new final decision, it would have directed the
28 CalPERS staff to draft the new decision. It would have then considered and approved the

1 decision at the following month’s meeting, which was scheduled for March 14, 2007. (*Id.* ¶ 15
2 & Ex. D.) That day would have been well within the 30-day extension allowed by subdivision
3 (c)(2)(E)(iv), and less than 130 days from CalPERS’ receipt of the transcript.

4 For these reasons, the CalPERS Board adopted a resolution at its meeting on December
5 20, 2007, in which it found “that special circumstances...prevent it from meeting the 100 day
6 period within which to issue a decision.” (Seabourn Decl. Ex. D.) Pursuant to the Government
7 Code, it therefore issued “an order delaying its decision for 30 additional days to consider and
8 issue its decision in the case.” (*Id.*)

9 With knowledge of the CalPERS Board’s pending resolution (*id.* ¶ 15), and instead of
10 waiting for the February 22, 2007 full hearing and a final decision on the nearly \$8 million
11 claim by March 14, 2007, Alexander filed the petition for writ of mandate on December 12,
12 2006. Alexander sought to have this Court declare that the ALJ’s Proposed Decision is
13 “deemed adopted” and therefore foreclose the full hearing before the CalPERS Board on
14 February 22, 2007. Alexander obtained a stay of the proceedings on February 2, 2007,
15 rendering CalPERS unable to issue a final decision within 130 days from receipt of the
16 transcript.

17 ARGUMENT

18 I. Alexander Has Failed to Establish Any Right to a Writ of Mandate.

19 Alexander’s petition is properly classified as one for a writ of mandate under Code of
20 Civil Procedure section 1085. Although Alexander has characterized it alternatively as a
21 petition for writ of mandate under section 1085 and a petition for administrative mandamus
22 under Code of Civil Procedure section 1094.5, the petition does not qualify as the latter. A writ
23 of administrative mandamus under section 1094.5 may be issued only to review a *final*
24 adjudicative decision of an administrative body. (*Board of Med. Quality Assur. v. Superior*
25 *Court* (1977) 73 Cal.App.3d 860, 862-863 [ordering dismissal of petition]; *Bollengier v.*
26 *Doctors Med. Ctr.* (1990) 222 Cal.App.3d 1115, 1123, 1125 [distinguishing administrative
27 mandamus from traditional writ of mandate].) The CalPERS Board has not yet issued its final
28 decision on the Alexander claim. Nor has the Board even addressed Alexander’s arguments

1 about whether the Proposed Decision must be deemed adopted. The Board has issued only
2 interlocutory orders rejecting the Proposed Decision, undertaking to decide the case itself, and
3 scheduling the full hearing for February 22, 2007.

4 Indeed, any challenge to the Board’s order delaying the hearing for up to 30 days, under
5 Government Code section 11517, subdivision (c)(2)(E)(iv), must be by writ of mandate. That
6 subdivision specifies that the 30-day “order shall be subject to judicial review pursuant to
7 Section 11523” of the Government Code. (Gov. Code § 11517, subd. (c)(2)(E)(iv).) Section
8 11523 provides that “[j]udicial review may be had by filing a petition for a *writ of mandate* in
9 accordance with the provisions of the Code of Civil Procedure....” (Gov. Code § 11523,
10 emphasis added.)

11 The standards for a writ of mandate are high, and Alexander has failed to meet them.
12 Under California law, for such a writ to issue, “there must be a clear case to compel the
13 performance of an act that the law specifically enjoins as a duty resulting from an office, trust,
14 or station.” (*Black v. City of Santa Monica* (1936) 13 Cal.App.2d 4, 8, quotation omitted; see
15 Code Civ. Proc. § 1085, subd. (a).) The basic requirements essential to issuance of a writ of
16 mandate include a “clear, present and usually ministerial duty upon the part of the respondent.”
17 (*Larson v. City of Redondo Beach* (1972) 27 Cal.App.3d 332, 336.) A “ministerial act”
18 enforceable by mandamus is “an act that a public officer is required to perform in a prescribed
19 manner in obedience to the mandate of legal authority and without regard to his own judgment
20 or opinion concerning the act’s propriety or impropriety, where a given state of facts exists.”
21 (*Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 934, quotation
22 omitted.) “[T]he writ will not issue to compel a discretionary act.” (*Miller v. Ostly* (1973) 34
23 Cal.App.3d 190, 195, citing *Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 326.)
24 Moreover, the writ is never granted when the right to it is “doubtful” (*Coon v. Biscailuz* (1934)
25 1 Cal.App.2d 346, 348), rather than “clear and certain” (*Dobyns v. Cheshire* (1935) 9
26 Cal.App.2d 77, 79). Finally, a writ of mandate will not issue where there is “a plain, speedy,
27 and adequate remedy, in the ordinary course of law.” (Code Civ. Proc. § 1086; see *Tevis v. City*
28 *& County of San Francisco* (1954) 43 Cal.2d 190, 198 [“It is a general rule that the

1 extraordinary remedy of mandate is not available when other remedies at law are adequate.”].)

2 As explained below, Alexander has not satisfied any of these requirements.

3 **A. CalPERS’ 100-Day Deadline Was Triggered by Its Receipt of the Transcript**
4 **of the Administrative Hearing on November 13, 2006, Subject to the**
5 **Subsequent 30-Day Order.**

6 **1. The Statutory Text Establishes Only a Deadline Running from**
7 **Receipt of the Transcript.**

8 Contrary to Alexander’s contentions, CalPERS fully complied with the timing
9 requirements of Government Code section 11517. That statute provides that if a contested case
10 is originally heard by an ALJ rather than the agency itself, the ALJ “shall prepare within 30
11 days after the case is submitted to him or her a proposed decision in a form that may be
12 adopted by the agency as the final decision in the case.” (Gov. Code § 11517, subd. (c)(1).)
13 The statute then establishes a series of 100-day deadlines for action by the agency. First, the
14 statute provides that “[w]ithin 100 days of receipt by the agency of the administrative law
15 judge’s proposed decision, the agency may act as prescribed in subparagraphs (A) to (E),
16 inclusive.” (Gov. Code § 11517, subd. (c)(2).) The statute provides a penalty *only* for failure to
17 comply with this *initial* 100-day period: “If the agency fails to act as prescribed in
18 subparagraphs (A) to (E), inclusive, within *100 days of receipt of the proposed decision*, the
19 proposed decision shall be deemed adopted by the agency.” (*Id.*, emphasis added.)

20 Subparagraphs (A) through (E) lay out the options open to the agency: it may (A) adopt
21 the proposed decision, (B) mitigate the proposed penalty and adopt the rest of the proposed
22 decision, (C) make technical or other minor changes in the proposed decision and then adopt it;
23 (D) reject the proposed decision and refer the case to the same or another ALJ to take
24 additional evidence, or (E) reject the proposed decision and decide the case itself. (Gov. Code
25 § 11517, subd. (c)(2)(A)-(E).) The parties agree that the CalPERS Board chose option (E)
26 when it rejected the proposed decision on June 21, 2006. The parties also agree that the Board
27 rejected the proposed decision well within 100 days of its receiving the proposed decision on
28 May 4, 2006. The Board thus satisfied the 100-day requirement of subdivision (c)(2) and
avoided the “deemed adopted” provision.

1 Subparagraph (E) then sets out *different* 100-day time lines for decision making by the
2 agency that, by their nature, likely *cannot* run within the initial period of 100 days from receipt
3 of the proposed decision. Under that different schedule, “the agency shall issue its final
4 decision not later than 100 days after *rejection of the proposed decision*.” (Gov. Code § 11517,
5 subd. (c)(2)(E)(iv), emphasis added.) The specification of “rejection of the proposed decision,”
6 rather than “receipt...of the...proposed decision,” creates a new time line, since the rejection
7 must logically occur *after* receipt—indeed, the statute expressly allows rejection to occur up to
8 100 days after receipt.

9 The same subdivision then provides yet another 100-day deadline, which is the only
10 deadline even possibly applicable in this case: “If the agency elects to proceed under this
11 subparagraph, and has ordered a transcript of the proceedings before the administrative law
12 judge, the agency shall issue its final decision not later than *100 days after receipt of the*
13 *transcript*.” (Gov. Code § 11517, subd. (c)(2)(E)(iv), emphasis added.) While the Court ruled
14 in its February 2 order that “the transcript must be ordered ‘not later than 100 days after
15 rejection of the proposed decision,’” subdivision (c)(2)(E)(iv) states only that *receipt* of the
16 transcript *starts* the applicable 100-day timeframe; no provision within section 11517 requires
17 the transcripts be *ordered* or *received* within any given timeframe. Receipt of the transcript
18 *alone* becomes the triggering event for the applicable 100-day provision. Indeed, the two 100-
19 day periods in subdivision (c)(2)(E)(iv) are phrased identically in parallel, and there is no
20 indication that the first trumps the second; rather, one sets a default and the other sets a specific
21 deadline where, as here, the agency has ordered the transcript.

22 Basic canons of statutory construction bar the courts from adding a new deadline for
23 ordering the transcript that is not apparent on the face of the statute. “We are prohibited from
24 inserting words into a statute under the guise of statutory interpretation. Nor can we insert
25 words that would, in effect, add a provision to a statute or rewrite a statute to conform to an
26 intent not apparent in the statute's plain language.” (*In re Marriage of Dupre* (2005) 127
27 Cal.App.4th 1517, 1527.) “In construing a statute, we do not insert words into it as this would
28 ‘violate the cardinal rule that courts may not add provisions to a statute.’” (*People ex rel.*

1 *Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 768, quoting *Adoption of Kelsey S.* (1992) 1
2 Cal.4th 816, 827.) Indeed, this prohibition against adding words has itself been codified by the
3 Legislature. (Cal. Code Civ. Proc. § 1858 [“In the construction of a statute or instrument, the
4 office of the Judge is simply to ascertain and declare what is in terms or in substance contained
5 therein, not to insert what has been omitted, or to omit what has been inserted....”].) The Court
6 cannot infer a deadline for ordering the transcript, even if it believes that such a deadline would
7 be appropriate or would have been intended by the Legislature.

8 **2. The Legislative History of the Statute Recognizes No Time**
9 **Limitation on the Agency’s Ordering of the Transcript.**

10 The legislative history cited by Alexander does not alter the clear import of the
11 statutory text. (See Opening Br. at 12-15.) There is no support in the legislative history or any
12 precedent for Alexander’s contention that the transcript provision operates only to set a
13 deadline *before*, not *after*, 100 days from rejection of the proposed decision, and that the latter
14 deadline sets some sort of absolute outside date for the final decision. (See Opening Br. at 23,
15 27.) To the contrary, the legislative history clearly illustrates that the statute has always
16 maintained separate 100-day timeframes triggered by either rejection of the proposed decision
17 or, alternatively, if the agency orders the transcript, receipt of such transcript. Moreover, as to
18 the latter option, the statute has never required an agency either to order or to receive the
19 transcript within *any* certain period of time.

20 In 1979, the Legislature first amended section 11517 to include timeframes for agency
21 action. The amendment provided, “The proposed decision shall be deemed adopted by the
22 agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless
23 within that time the agency commences proceedings to decide the case upon the record,
24 including the transcript, or the agency refers the case to the hearing officer to take additional
25 evidence.” (Act of July 2, 1979, ch. 199, § 4, 1979 Cal. Stat. 438.) The amendment further
26 provided that, “[i]n a case where the agency has ordered a transcript of the proceedings, the
27 100-day period shall begin upon delivery of the transcript. If the agency finds a further delay is
28

1 required by special circumstances, it shall issue an order delaying the decision for no more than
2 30 days....” (*Id.*)

3 When the Legislature adopted these timeframes, it understood that the transcript
4 provision left the agency considerable leeway to extend the deadline for flexibility. The Bill
5 Digest for that amendment specifically noted that the legislation “*contains a loophole* enabling
6 an agency to prolong the time for acting on a hearing officer’s proposed decision. When a
7 transcript of the hearing is ordered, the commencement of the 100-day period is *forestalled*
8 *until delivery* of the transcript.” (Opening Br. Ex. 27, at 5-6, emphases added.) The 1979
9 legislation did not require the agency to order *or* receive the transcript within a certain time
10 frame. Additionally, where the agency chose to order the transcript, the statute did not require
11 the agency to render a decision within 100 days of rejection. To the contrary, the statute left a
12 “loophole” that allowed the agency to delay ordering the transcript and thereby delay the start
13 of the 100-day timeframe that would begin upon receipt of the transcript. In fact, this
14 recognized “loophole” is not really even a loophole, and it makes good sense: because there is
15 no fixed statutory timeframe for *preparing* the transcript, there is little benefit to be had from
16 setting a fixed statutory timeframe for *ordering* it.

17 The Legislature never closed this transcript “loophole.” The next pertinent amendment,
18 passed in 1995, provided that the proposed decision was “deemed adopted” unless, within 100
19 days of delivery, the agency “notifies the parties that the proposed decision is not
20 adopted...and commences proceedings to decide the case upon the record.” (Act of Oct. 15,
21 1995, ch. 938, § 42, 1995 Cal. Stat. 87.) Again, in cases where the agency had ordered the
22 transcript, “the 100-day period shall begin upon receipt of the transcript.” (*Id.*) Again, the 1995
23 amendment did not add any timeframes for ordering or receiving the transcript.

24 In both the 1979 and 1995 versions of section 11517, the subsequent “100 day period
25 for agencies to devise their own decisions after rejecting an administrative law judge’s
26 decision” was not as clear in the statute as it was in practice. (Senate Committee on
27 Governmental Organization, Staff Analysis of A.B. 1692 (“Staff Analysis”) (July 13, 1999),
28 Opening Br. Ex. 19, at 1.) Accordingly, in 1999, the Legislature repealed that language and

1 adopted the current version of section 11517. (Act of Sept. 7, 1999, ch. 339, §§ 1-2, 1999 Cal.
2 Stat. 95.) The legislative history indicates that the amendment was not intended to change the
3 law, but rather solely to clarify “that an agency must accept or reject an administrative law
4 judge’s proposed decision within 100 days of receiving the decision. . . [I]f a decision is
5 rejected, the agency has *another* 100 days from the date of rejection *or the date it receives the*
6 *transcript of the proceedings* to issue its own final decision.” (Staff Analysis, Opening Br. Ex.
7 19, at 1, emphases added.)

8 Alexander argues that the 1999 amendment, which became effective the following year,
9 closed the transcript “loophole” by adding a new substantive requirement that agencies render
10 a final decision within 100 days of rejection *regardless* of whether the agency orders a
11 transcript. (Opening Br. at 18-19.) However, the legislative history of the amendment, authored
12 by its sponsor, indicates that the amendment was intended to make “no substantive changes to
13 existing law.” (Fair Political Practices Commission, Enrolled Bill Report on A.B. 1692,
14 Opening Br. Ex. 17, at 1.) Indeed, the bill’s sponsor expressly intended that the clarifying
15 amendment would “*preserve* the intended timing requirements underlying the statute *as*
16 *currently written* and express those requirements in language which is more readily
17 understandable.” (Staff Analysis, Opening Br. Ex. 19, at 2, emphases added.) As the bill
18 analysis for A.B. 1692 made clear, rejection of the proposed decision and receipt of the
19 transcript have always functioned as *alternative* trigger points for *subsequent* 100-day periods.
20 A.B. 1692 was intended simply to make the existing deadlines more clear, not to eliminate the
21 alternate 100-day deadline triggered by receipt of the transcript. Again, the “loophole” left in
22 1979 has never been closed (Opening Br. at 33); instead, it is currently reflected in subdivision
23 2(E)(iv), which still imposes no timeframe for ordering or receiving the transcript. By citing
24 the “100 days from the date of rejection” language while omitting the “or the date it receives
25 the transcript of the proceedings,” Alexander simply ignores the continuing existence of the
26 alternative 100-day period that defeats its argument.

1 **3. The “Deemed Adopted” Penalty Applies Only to a Failure to Take**
2 **Action Within 100 Days After Receipt of the Proposed Decision.**

3 In any event, the “deemed adopted” penalty applies only if the agency fails to act
4 within 100 days of *receipt* of the proposed decision. As the 1999 legislation makes clear, if the
5 agency elects option (E)—that is, it rejects the proposed decision and proceeds to decide the
6 case itself—it can only in the rarest of situations complete that process within 100 days of
7 *receipt* of the proposed decision. (Gov. Code § 11517, subd. (c)(2).) That explains the
8 precision of subparagraph (E): “Reject the proposed decision, and decide the case upon the
9 record, including the transcript, or upon an agreed statement of the parties, with or without
10 taking additional evidence.” (Gov. Code § 11517, subd. (c)(2)(E).) The Legislature included a
11 comma after “[r]eject the proposed decision,” separating that phrase from “and decide the case
12 upon the record.” The agency must act on the proposed decision within 100 days from receipt,
13 and satisfies that requirement by rejecting it. Once rejected, the agency has a *second* 100-day
14 period in which to render a final decision. Subparagraph (E) is unique among the five
15 subparagraphs because it provides a different schedule not constrained by the initial 100-day
16 requirement, and reflects the fact that the Board is undertaking a far more extensive
17 reconsideration of the case than is entailed under subparagraphs (A) through (D). As a logical
18 matter, the “deemed adopted” penalty applicable to actions that must occur during the first
19 100-day period cannot apply to actions that can take place in a subsequent 100-day period.
20 This is true even under Alexander’s flawed argument that the statute requires an agency to
21 order the transcript either before or at the time of rejecting the proposed decision, (Opening Br.
22 at 27-28), because the statute requires the decision to be issued within 100 days of *receipt* of
23 the transcript; when the transcript is requested is irrelevant. Even if CalPERS had ordered the
24 transcript before, or at the time of, rejecting the decision, it may well have received the
25 transcript after rejection, meaning the 100-day period for issuing a final decision would end
26 (and could even begin) more than 100 days after rejection.

27 The unusual circumstance of contemporaneous running of the 100-day periods was
28 presented in *St. Francis Medical Center v. Shewry* (2005) 134 Cal.App.4th 1556, on which

1 Alexander and this Court have relied. In that case, the agency *received and rejected* the ALJ’s
2 proposed decision on the *same day*. (*Id.* at p. 1559 fn. 2.) In any event, the *St. Francis* court did
3 not even consider the effect of the separate 100-day deadline running from receipt of the
4 transcript, probably because the ALJ in that case had held the record open for preparation of a
5 transcript and submission of post-hearing briefs, and issued a proposed decision after the
6 parties apparently had the transcripts. (*Id.* at p. 1560.) Indeed, that the court in *St. Francis*
7 looked to 100 days after rejection of the proposed decision, rather than the 100 days after
8 receipt of the transcript, as the operative deadline defeats Alexander’s suggestion, noted above,
9 that receipt of the transcript sets only an *earlier* deadline.

10 The 100th day after CalPERS’ receipt of the transcript was February 21, 2006. While
11 that day has come and gone, Alexander’s stay application, granted on February 2, precluded
12 the CalPERS Board from rendering a decision by that date. Moreover, as noted above, the
13 CalPERS Board attempted to meet to conduct a full hearing in the case on February 22, 2006,
14 and it exercised its discretion under the statute to delay the decision for no more than 30 days
15 in light of the change in its meeting date to accommodate a state holiday and its desire to
16 prepare and approve a new decision. (Gov. Code § 11517, subd. (c)(2)(E)(iv).) As a result, it
17 has to date complied with the terms of the statute, and Alexander is not entitled to have the
18 Proposed Decision “deemed adopted” under subdivision (c)(2).

19 **4. The CalPERS Board Did Not Violate the Statute by Deferring the**
20 **Ordering of the Transcript.**

21 Alexander argues that CalPERS violated the statute by not immediately ordering the
22 transcript, and that it should have ordered the transcript before the ALJ issued his Proposed
23 Decision, before the Board rejected that Proposed Decision, or within 100 days after it rejected
24 the Proposed Decision. (Opening Br. at 27-29, 33.) However, Government Code section 11517
25 does not set any time limitation on the agency’s ordering a transcript; nor does it set any time
26 limitation on the agency’s receiving a transcript, which may well be beyond the control of the
27 agency. If an agency elects to reject a proposed decision, chooses to decide the case on the
28 record, and orders a transcript of the administrative hearing, that agency implicitly is given an

1 *unstated* period of time in which to order and receive that transcript, and then is explicitly
2 given an additional 100 days after receipt of that transcript in which to issue its final decision.
3 At most, the agency would presumably have a duty to act in a reasonable manner. More
4 important, there is no “deemed adopted” penalty even if the agency delays for an *unreasonable*
5 period, which is not the situation here. Moreover, an agency would have no reason to order a
6 transcript *before* it even decided whether to reject the proposed decision and decide the case on
7 the basis of the transcript and the rest of the record; certainly there is no basis for Alexander’s
8 contention that CalPERS should have ordered the transcript even before the ALJ issued his
9 Proposed Decision. (*See* Opening Br. at 28-29.)

10 In this case, CalPERS held off on ordering the transcript for a reasonable purpose: to
11 *improve* the decision-making process by soliciting and obtaining the opinion of the Office of
12 Legislative Counsel. CalPERS had to formulate its request for an opinion carefully, as the
13 request involved complex actuarial calculations as part of the neutral, illustrative hypotheticals.
14 Moreover, the request had to be submitted to and forwarded by a member of the California
15 Legislature, and the Legislature was out of session for a month after the Board rejected the
16 Proposed Decision and requested that CALPERS’ staff solicit the opinion. In addition,
17 CalPERS was hindered in preparation of the request by the departure of the staff attorney who
18 had been responsible for this case from its inception and who had considerable expertise in the
19 issues presented. The delay in ordering the transcript was strictly tied to the request for the
20 Office of Legislative Counsel opinion: CalPERS *almost simultaneously* submitted its request to
21 Assembly Member Torrico and ordered the transcripts during the first week of October 2006.
22 In fact, Alexander then opposed CalPERS’ request for the Legislative Counsel opinion,
23 arguing that Alexander’s own prior request for such an opinion, which was submitted through a
24 different legislator and which CalPERS did not know of—had been rejected. CalPERS has yet
25 to receive a response to its request through Assembly Member Torrico. (Seabourn Decl. ¶ 16.)
26 Ultimately, the decision on when to order a transcript is a discretionary act; as noted above, a
27 writ of mandate cannot be used with regard to a discretionary act. (*Miller v. Ostly, supra*, 34
28 Cal.App.3d at p. 195.)

1 Though it has not yet received the requested opinion, the CalPERS Board decided to
2 avoid further delay and proceed with the full hearing on February 22, 2007. (*Id.* ¶ 16.) This
3 approach was fully reasonable, and Alexander offers no evidence that CalPERS acted with a
4 dilatory purpose or to prejudice Alexander in any way. (See Seabourn Decl. ¶ 17.) The Board
5 explained its reasons in detail for finding “special circumstances” and ordering the 30-day
6 delay under Government Code section 11517, subdivision (c)(2)(E)(iv). Although Alexander
7 objects to that order, Alexander’s Opening Brief does not present any real argument or
8 authority as to why the order was improper. All Alexander offered in its original opening brief
9 was the unsubstantiated belief that the provision serves as a safety valve in case the transcripts
10 are late or there are “other concerns outside the agency’s control.” (Opening Br. at 27.) There
11 is no basis in the statutory text, legislative history, or judicial precedent for so limiting the
12 scope of “special circumstances.”

13 **B. The Applicable Timing Requirements of Code Section 11517 Are Directory,
14 Not Mandatory, and Do Not Result in the Proposed Decision Being
15 “Deemed Adopted.”**

16 Even if CalPERS had failed to comply with the statutory provision requiring a final
17 decision by the CalPERS Board within 100 days of its rejection of the Proposed Decision, that
18 specific time restriction is directory, not mandatory, and it does not carry with it the “deemed
19 adopted” penalty. “[T]he ‘directory’ or ‘mandatory’ designation does *not* refer to whether a
20 particular statutory requirement is ‘permissive’ or ‘obligatory,’ but instead simply denotes
21 whether the failure to comply with a particular procedural step will or will not have the effect
22 of invalidating the governmental action to which the procedural requirement relates.” (*Morris*
23 *v. County of Marin* (1977) 18 Cal.3d 901, 908, emphasis added; see also *Edwards v. Steele*
24 (1979) 25 Cal.3d 406, 410 [“If the failure to comply with a particular step does not invalidate
25 the action ultimately taken,...the procedural requirement is referred to as ‘directory.’”].)
26 “Many statutory provisions which are ‘mandatory’ in the obligatory sense are accorded only
27 ‘directory’ effect.” (*Morris, supra*, 18 Cal.3d at p. 908, fn. 4.)

28 “[T]he ‘directory-mandatory’ distinction is concerned only with whether a *particular*
remedy—invalidation of the ultimate governmental action—is appropriate when a procedural

1 requirement is violated; even when invalidation is not appropriate, other remedies—such as
2 injunctive relief, mandamus or monetary damages—may be available to enforce compliance
3 with the statutory provision. Indeed, the availability or unavailability of alternative remedies
4 may have an important bearing on whether a procedure is to be accorded ‘directory’ or
5 ‘mandatory’ effect.” (*Morris, supra*, 18 Cal.3d at p. 908, fn. 4.) Thus, “the provision at issue
6 may be considered mandatory only in the sense that the board ‘could be mandated to act if it
7 took more time than the short period allotted.’” (*Edwards v. Steele, supra*, 25 Cal.3d at p. 412,
8 quotation omitted.) “When the Legislature has specified a time within which an administrative
9 board is to render a decision, that time limit may be mandatory in the obligatory sense, but this
10 does not necessarily mean that a failure to comply with its provisions causes a loss of
11 jurisdiction.” (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10
12 Cal.4th 1133, 1147, quotation omitted.)

13 The default rule is that time limitations are directory and do not invalidate the agency’s
14 acts. “[G]enerally, requirements relating to the time within which an act must be done are
15 directory rather than mandatory or jurisdictional, unless a contrary intent is clearly expressed.”
16 (*Edwards v. Steele, supra*, 25 Cal.3d at p. 410, collecting citations.) “In the absence of express
17 language, the intent must be gathered from the terms of the statute construed as a whole, from
18 the nature and character of the act to be done, and from the consequences [that] would follow
19 the doing or failure to do the particular act at the required time.” (*Pulcifer v. County of*
20 *Alameda* (1946) 29 Cal.2d 258, 262.)

21 In this case, the language of Government Code section 11517 does *not* provide that
22 once an agency timely rejects a proposed decision within 100 days after receipt of the decision,
23 the agency’s later failure to issue a final decision within 100 days of its receipt of a requested
24 transcript, much less its delay in requesting the transcript, results in adoption of an ALJ’s
25 proposed decision. Rather, its express language provides that a proposed decision “shall be
26 deemed adopted” by the agency *if* the agency “*fails to act* as prescribed in subparagraphs (A)
27 to (E), inclusive, *within 100 days of receipt of the proposed decision.*” (Gov. Code § 11517,
28 subd. (c)(2), emphasis added.) In this case, within 100 days of CalPERS Board’s receipt of the

1 Proposed Decision, the Board elected to act as prescribed in subparagraph (E): it rejected the
2 Proposed Decision and chose to decide the case on the record, including the transcript. Thus,
3 this is not a case where the agency, faced with a proposed decision, simply sat on its hands and
4 did not elect one of the options provided by subparagraphs (A) through (E).

5 Reading section 11517 as a whole, subdivision (c)(2)(E) cannot reasonably be
6 construed as requiring an agency that has timely rejected a proposed decision and chosen to
7 decide the case on the record, including the transcript, to issue its final decision within 100
8 days of its initial receipt of the proposed decision, and thereby avoid a “deemed” adoption of
9 the proposed decision for a failure to “act” under subdivision (c)(2). That subdivision expressly
10 provides that an agency may act by rejecting the proposed decision and deciding the case on
11 the record, including the transcript. There is no indication that the Legislature intended to deny
12 the agency sufficient time to obtain that record and then consider it in finally deciding the case.
13 In fact, subdivision (c)(2)(E)(iv) provides that if an agency rejects a proposed decision and
14 chooses to decide the case on the record, “the agency shall issue its final decision not later than
15 100 days *after rejection of the proposed decision*,” and if the agency has ordered a transcript,
16 “the agency shall issue its final decision not later than 100 days *after receipt of the transcript*.”

17 Thus, there are four separate time periods that apply in the event an agency elects to act
18 in that manner. First, there is the initial 100-day period *after receipt of the proposed decision*
19 during which the agency may elect to act under subparagraphs (A) to (E). (Gov. Code § 11517,
20 subd. (c)(2).) Second, there is the implicit, unstated period of time in which to obtain a copy of
21 the administrative hearing transcript after an agency elects to reject the proposed decision and
22 decide the case on the record, including the transcript. (Gov. Code § 11517, subd.
23 (c)(2)(E)(iv).) Third, there is a second 100-day period *after receipt of that transcript* during
24 which the agency must issue its final decision. (*Id.*) Finally, the second 100-day period may be
25 extended for up to an additional 30 days if, as here, the agency “issue[s] an order delaying the
26 decision ... and specif[ies] the reasons” for that delay. (*Id.*) Under the express terms of the
27 statute, only the failure to comply with the first period results in “deemed” adoption of the
28 proposed decision. The Legislature did not impose a similar penalty with respect to the other

1 three periods. That provision cannot reasonably be construed as requiring that *all* of those
2 events to occur *within 100 days after receipt of a proposed decision* to avoid the “deemed
3 adopted” penalty; indeed, if that were the Legislature’s intention, the additional three time
4 provisions would be superfluous. Moreover, had the Legislature intended to provide such a
5 penalty for all four time periods, it would presumably would have done so expressly.

6 Moreover, other provisions in section 11517 similarly lack an express consequence or
7 penalty for delay. For example, if an agency within 100 days after receipt of a proposed
8 decision elects to reject that proposed decision and refers the case to the same or another ALJ
9 to take additional evidence, there is no express time limitation (much less a consequence or
10 penalty) for that ALJ to issue a revised proposed decision. (Gov. Code § 11517, subd.
11 (c)(2)(D).) Also, if an agency (rather than an ALJ) *originally* hears a case, the agency is
12 required to issue its decision within 100 days of submission of the case, but there is no
13 consequence or penalty provided in the event the agency does not timely issue its decision.
14 (Gov. Code § 11517, subd. (b)(3).) Where, as here, the Legislature includes a restriction in one
15 subparagraph of a statute but omits it in another, the courts will not imply the restriction in the
16 second subparagraph. (*Metropolitan Water Dist. of Southern California v. Superior Court*
17 (2004) 32 Cal.4th 491, 502.) As the California Supreme Court has held, “where the Legislature
18 makes express statutory distinctions, we must presume it did so deliberately, giving effect to
19 the distinctions, unless the whole scheme reveals the distinction is unintended.” (*Id.* at p. 502,
20 quotation omitted.) Here, the Legislature imposed a penalty for violation of only one of many
21 applicable time periods; the Court should not imply it as to other periods.

22 Alexander’s reliance on *Outdoor Resorts/Palm Springs Owner’s Ass’n v. Alcoholic*
23 *Beverage Control Appeals Bd.* (1990) 224 Cap.App.3d 696, is unavailing. First, the issue
24 before the court was not the scope of the “deemed adopted” penalty, but whether failure to
25 serve a copy of the proposed decision on the parties within 30 days of receipt, as required by
26 statute, divested the agency of jurisdiction. (*Id.* at 702.) The court, in determining that the 30-
27 day requirement was directory rather than mandatory, simply pointed out that depriving the
28 agency of jurisdiction for failure to comply would conflict with subdivision (d)’s requirement

1 that “[t]he proposed decision shall be deemed adopted by the agency 100 days after delivery to
2 the agency by the Office of Administrative Hearings, unless within that time the agency
3 commences proceedings to decide the case upon the record.” (*Id.* at 703.)

4 Perhaps more important, the *Outdoor Resorts* court, in *rejecting* the argument that
5 “Department failed to take final action within 100 days after the ALJ’s proposed decision,”
6 *distinguished* between the provision that “[t]he proposed decision shall be deemed adopted by
7 the agency 100 days after delivery to the agency...unless within that time the agency
8 commences proceedings to decide the case on the record” and the additional provision that “the
9 agency shall issue its decision within 100 days of submission of the case, [recognizing that i]n
10 a case where the agency has ordered a transcript of the proceedings, the 100-day period shall
11 begin upon delivery of the transcript.” (*Id.* at 703-04.) Specifically, the court determined that
12 the agency had met the former requirement on June 29, 1989 by rejecting the May 3, 1989
13 proposed decision, ordering the transcript, and requesting written arguments. (*Id.* at 703.) In
14 comparison, the agency met the separate, latter requirement by rendering its final decision on
15 December 1, 1989, less than 100 days after delivery of the transcripts on August 29, 1989. (*Id.*
16 at 704.) Clearly, even under the former, less-clear version of the statute, courts treated the
17 initial 100-day period for rejecting the proposed decision, which carries the “deemed adopted”
18 penalty, as separate from the subsequent 100-day period for rendering a final decision.

19 An interpretation of section 11517, subdivision (c)(2)(E)(iv) as directory would not
20 give the CalPERS Board unlimited time to decide Alexander’s case. Rather, the Legislature’s
21 imposition of the second 100-day period under subdivision (c)(2)(E)(iv) notifies a claimant that
22 the Board is required to decide his or her case within that second 100-day period (after
23 rejecting a proposed decision and choosing to decide the case on the record, including the
24 transcript) thereby precluding any “[a]dministrative limbo” and lengthy periods of
25 uncertainty.” (*Poliak v. Board of Psychology* (1997) 55 Cal.App.4th 342, 350-351 [construing
26 prior version of section 11517].) If the CalPERS Board had, after timely rejecting the proposed
27 decision, simply refused to order or pay for the transcript without justification, there would be
28 alternative remedies available, which is a factor in determining whether a statutory time

1 requirement for agency action is directory or mandatory. For example, the availability of a writ
2 of mandate under Code of Civil Procedure section 1085 to require the agency to order the
3 transcript or comply with the time requirement would support a determination that it is only
4 directory. (*Morris, supra*, 18 Cal.3d at pp. 908-909, fn. 4.) Thus, in *Board of Education v.*
5 *Sacramento County Board of Education* (2001) 85 Cal.App.4th 1321, the court held that a
6 statutory time requirement was only directory and not mandatory where “any delay beyond the
7 40-day statutory deadline for decisionmaking is remediable by petition for writ of ordinary
8 mandamus to compel the School Board to perform its duty.” (*Id.* at p. 1332; see also *Edwards*
9 *v. Steele, supra*, 25 Cal.3d at p. 412 [“We conclude that although the board could have been
10 mandated to comply with the 15-day and 40-day requirements, these provisions are not to be
11 deemed jurisdictional...”]; *Kaiser Foundation Hospitals v. Sacramento County Superior*
12 *Court* (2005) 128 Cal.App.4th 85, 105, review denied [failure to comply with 60-day limitation
13 for peer review hearing did not result in exhaustion of remedies because “Dr. Dennis could
14 have sought a writ of mandate from the superior court to compel the Hospital to begin the
15 hearing”].)

16 Indeed, the Legislature’s express provision for judicial review by writ of mandate of
17 30-day delay orders under section 11517, subdivision (c)(2)(3)(iv), indicates that the time
18 limits in that subdivision are not mandatory. As the California Supreme Court noted in finding
19 a time limitation to be directory, “the Legislature did not clearly express an intent that the time
20 limit be ‘mandatory’ (as opposed to ‘directory’) when it gave the employee the power to
21 pursue a judicial remedy immediately if the Board failed to meet the time limit for decision of
22 an appeal.” (*California Correctional Peace Officers Assn., supra*, 10 Cal.4th at p. 1145-1146.)

23 Because the CalPERS Board complied with the 100-day period under subdivision (c)(2)
24 by timely rejecting the Proposed Decision on June 21, 2006, the Proposed Decision cannot be
25 deemed adopted. While the CalPERS Board has in fact complied with all of the express time
26 requirements in section 11517, any failure to comply with the remaining requirements does not
27 carry the “deemed adopted” penalty, deprive the Board of jurisdiction, or justify the other relief
28

1 requested. Moreover, because the Board had already scheduled a full hearing for February 22,
2 2007—less than a week after the writ hearing—no injunctive or other relief was appropriate.

3 Alexander and the Court’s February 2 order rely on *St. Francis Medical Center v.*
4 *Shewry*, in which the court noted that “[i]f the agency fails to act or, as here, fails to issue a
5 final decision within 100 days of the act of rejection of the proposed decision, it ‘shall be
6 deemed adopted by the agency.’” (134 Cal.App. 4th at p. 1558-59, quoting subd. (c)(2).) This
7 ruling is inconsistent with the explicit terms of subdivision (c)(2); moreover, the court
8 conceded that “[c]alling this a 100-day rule is somewhat of a misnomer” because “[i]n the case
9 where the agency acts to reject a proposed ALJ decision within 100 days of its receipt it has an
10 additional 100 days within which to file its final decision.” (*Id.* at p. 1559, fn. 2.) Importantly,
11 the agency in *St. Francis* had *received and rejected* the ALJ’s proposed decision on the *same*
12 *day*, creating the unlikely situation where the two 100-day timeframes were identical. (*Id.*)

13 In addition, the court did not offer any explanation of why the second 100-day
14 limitation in subdivision (c)(2)(E)(iv) would carry the “deemed adopted” penalty, despite the
15 explicitly restricted language of subdivision (c)(2). This is explained by the posture of the case.
16 The agency in *St. Francis* failed to raise the issue whether the second 100-day provision was
17 directory. As the court noted, “[t]he Department *concede[d]* the 100-day rule of section 11517,
18 subdivision (c)(2)(E)(iv) was violated,” and it instead relied on a putative conflict between the
19 Government Code provisions and a 420-day rule under Health & Safety Code section 100171.
20 (*Id.* at p. 1561, emphasis added.) Indeed, the appellate briefs in *St. Francis* show that *neither*
21 *party* briefed whether the 100-day period running from rejection carried a “deemed adopted”
22 penalty. (Ex. A hereto [excerpts of all briefs].) The critical issue thus was not litigated, and the
23 court’s opinion focused on the arguments as to whether the Government Code applied at all.

24 Under California law, “[a]n opinion is not authority for a point not raised, considered or
25 resolved therein.” (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57.) CalPERS contends that the
26 “deemed adopted” penalty applies only to the first 100-day deadline, while the subsequent 100-
27 day periods for issuing a final decision are only directory. That issue was not truly considered
28

1 in *St. Francis*, and, as a result, the opinion cannot be considered the last word on this issue of
2 statutory interpretation of truly first impression.

3 The error in relying on *St. Francis* as controlling authority for an issue it barely
4 mentioned is further exacerbated by the fact that another California Court of Appeal directly
5 addressed the issue in an unpublished decision issued the same month as *St. Francis*; it
6 concluded that the 100-day period running from rejection of the proposed decision was only
7 directory and did not carry the “deemed adopted” penalty. While CalPERS certainly does not
8 attempt to cite to or rely on any unpublished decisions as controlling precedent, (Cal. R. Ct.
9 8.1115(a)), it simply brings this conflict to the Court’s attention as the Court may, in its own
10 judgment, consider unpublished cases “simply to illustrate” that courts have previously
11 considered a “recurring issue [that] remains unresolved.” (*Mangini v. J.G. Durand Int’l* (1994)
12 31 Cal.App.4th 214, 219-20; see also *People v. McDaniels* (2005) 21 Cal.App.4th 1560, 1566
13 fn. 2 [“[T]he analysis in an unpublished opinion may properly be considered.”].)

14 In the end, this Court’s February 2 order turns California precedent on its head by
15 recognizing as mandatory a 100-day deadline for ordering the transcript that does not even
16 appear on the face of the statute. As noted above, the statute does not expressly set *any* time
17 period in which the agency must order the transcript. This Court *inferred* the 100-day deadline
18 judicially, and then made the judicially created deadline mandatory. Not only was the
19 legislative intent to create a *mandatory* requirement not “clearly expressed,” (*Edwards v.*
20 *Steele, supra*, 25 Cal.3d at p. 410), but the requirement itself was not “clearly expressed.”
21 *California agencies have had no notice of the existence of any such deadline or the penalty for*
22 *violating it.* Agencies are entitled to rely on the statute as written, particularly procedural
23 statutes governing their decision making. As noted above, the Court’s prior ruling contravenes
24 well-established, statutorily recognized canons of construction by adding a new deadline for
25 ordering the transcript that the statute does not contain. (*See supra* at pp. 9-10.) The Court’s
26 ruling then compounds that error by imposing a drastic penalty for violating that inferred
27 deadline: the agency loses its ability to decide the claim on the merits. The ramifications for
28 countless agencies throughout the state, which have no more warning of this requirement than

1 CalPERS had, may be severe. This Court should not impose a new procedural requirement
2 judicially. At the very least, the new deadline should be considered directory, which would
3 allow a court to issue a writ to compel a tardy agency to request a transcript, but would not
4 preclude the agency from thereafter deciding the issues on the merits.

5 Finally, the Court should not issue a writ of mandate because Alexander has alternative
6 remedies that are plain, speedy, and completely adequate. (Code Civ. Proc. § 1086.) The full
7 hearing before the Board was scheduled for February 22, 2007; Alexander chose to forgo this
8 hearing, which would have been held within section 11517's timeline requirements. If the
9 Board is able to go forward with the hearing at a later date, it will not be burdensome or
10 extensive; it will consist of less than an hour of legal argument by counsel. The Board will
11 issue its final decision in less than 30 days after the hearing. If the decision is adverse to
12 Alexander, there will be a right of review of the final decision by administrative mandamus
13 under Code of Civil Procedure section 1094.5. If the Board upholds Alexander's claim after
14 the hearing, Alexander will not require an additional remedy. This writ proceeding is thus
15 entirely unnecessary.

16 **II. Alexander's Remaining Constitutional Arguments Are Frivolous.**

17 Alexander argues that CalPERS has violated Alexander's constitutional rights to due
18 process and equal protection. (Opening Br. at 48-49.) As to the due process argument,
19 Alexander offers legal maxims but no explanation of how CalPERS has denied anyone the
20 right to be heard at a meaningful time and in a meaningful manner. (*Id.*) Alexander had a full
21 opportunity to participate in the evidentiary hearing before the ALJ, and Alexander will also
22 have a full opportunity to submit a brief to the CalPERS Board and to offer additional
23 argument at a hearing before the Board reaches a final decision. Alexander cites no authority
24 supporting a due process violation in such circumstances. In particular, Alexander cites no
25 legal basis for the suggestion that Alexander's counsel was entitled to "address the Board" at
26 the June 21, 2006 meeting at which the Board decided to reject the Proposed Decision and
27 decide the case itself based on the record. (Opening Br. at 9-10.)
28

1 Curiously, Alexander argues that CalPERS prejudiced Alexander because it held a
2 hearing in 1998 as to two other claims but “failed to inform or include Alexander,” and
3 Alexander discovered the claim and presented it to CalPERS in October 2003. (Opening Br. at
4 4-5, 7.) Alexander does not explain the legal basis for the suggestion that CalPERS had a duty
5 to notify Mrs. Alexander of proceedings on claims by others, particularly when she had not
6 herself made any claim. Moreover, Alexander’s various allegations about the events that led up
7 to the hearing before the ALJ are irrelevant to Alexander’s present petition for a writ of
8 mandate based on violation of the time limitations of Government Code section 11517.

9 As to the equal protection argument, Alexander’s sole claim is that Alexander and
10 CalPERS are “similarly situated” and that “Alexander’s ordering of the transcripts should also
11 start the statute running under GC 11517.” (*Id.* at 48.) However, there is no constitutional
12 requirement that public agencies and private persons be treated alike. (See *Westlands Water*
13 *Dist. v. Amoco Chem. Co.* (9th Cir. 1991) 953 F.2d 1109, 1113 [rejecting equal protection
14 argument that California statutory bar of punitive damages claims by private persons against
15 public agencies required similar bar against punitive damage claims by public agencies against
16 private persons], citing *McAllister v. South Coast Air Quality Mgmt. Dist.* (1986) 183
17 Cal.App.3d 653, 659 [same; holding that distinction between public entities and private
18 individuals did not violate equal protection].)

19 As the California Court of Appeal noted in *McAllister*, the equal protection clause
20 “does not prohibit legislative classification and imposition of statutory restraints on one class
21 which are not imposed on another. The classification is constitutionally infirm only if it bears
22 no rational relationship to the achievement of a legitimate state objective.” (183 Cal.App.3d at
23 p. 659, quotation omitted.) “A statutory discrimination will not be set aside as a denial of equal
24 protection of the laws if any state of facts reasonably may be conceived to justify it.” (*Id.*,
25 quotation omitted.) In this case, the statute specifies that the time for an agency to issue a final
26 decision runs from the agency’s receipt of the transcript rather than the claimant’s because it is
27 the agency that must consider the transcript and then issue the decision. That is a rational basis
28 for the distinction; indeed, it is Alexander’s proposed rule that is irrational, as the time for

1 decision could run even though the agency had never received the transcript. CalPERS did not
2 receive the transcript for over a month after it ordered the transcript, even though, according to
3 Alexander, the transcript had already been prepared. (See *id.* at p. 659, quotation omitted
4 [holding that “the classification made between governmental and nongovernmental tort victims
5 may be said to have a fair and substantial relation to the object of the legislation and to
6 promote a number of legitimate state interests”].) Alexander’s constitutional arguments are
7 thus without merit.

8 **Conclusion**

9 For the foregoing reasons, the Court should deny Alexander’s petition and request for
10 damages, attorneys’ fees, and costs.

11 DATED this 2nd day of April, 2007.

12 STEPTOE & JOHNSON LLP

13 By 
14 Bennett Evan Cooper

15 633 West Fifth Street, Suite 700
16 Los Angeles, California 90071

17 Attorneys for Respondents-Defendants

1 **PROOF OF SERVICE**

2 I am an active member of the State Bar of California and am not a party to this action. My
3 business addresses are Steptoe & Johnson LLP, 633 West Fifth Street, Suite 700, Los Angeles, California
4 90071; and 201 East Washington Street, Suite 1600, Phoenix, Arizona 85004-2382.

5 On April 2, 2007, I served the Amended Opposition Brief in Response to Petition for Writ of
6 Administrative Mandamus, Writ of Mandate, or Other Relief by the method indicated below, on the
7 parties or counsel for parties in this action listed below

8 John M. Jensen
9 ROBERTI JENSEN LLP
10 3600 Wilshire Boulevard, Suite 714
11 Los Angeles, California 90010

12 **BY U.S. MAIL**

13 By placing the original / a true copy thereof enclosed in a
14 sealed envelope(s), with postage fully prepaid, addressed as per the
15 attached service list, for collection and mailing at Steptoe &
16 Johnson LLP in Phoenix, Arizona, following ordinary business
17 practices. I am readily familiar with the firm's practice for
18 collection and processing of document for mailing. Under that
19 practice, the document is deposited with the United States Postal
20 Service on the same day in the ordinary course of business. I am
21 aware that upon motion of any party served, service is presumed
22 invalid if the postal cancellation date or postage meter date on the
23 envelope is more than one day after date of deposit for mailing
24 contained in this affidavit.

25 **BY OVERNIGHT DELIVERY**

26 By delivering the document(s) listed above in a sealed envelope(s)
27 or package(s) designated by the express service carrier, with
28 delivery fees paid or provided for, addressed as per the attached
service list, to a facility regularly maintained by the express service
carrier or to an authorized courier or driver authorized by the
express service carrier to receive documents.

BY PERSONAL SERVICE

By personally delivering the document(s) listed above to the
offices at the addressee(s) as shown on the attached service list.
 By placing the document(s) listed above in a sealed envelope(s)
and instructing a registered process server to personally deliver the
envelope(s) to the offices at the address(es) set forth on the attached
service list. The signed proof of service by the registered process
server is attached.

**BY ELECTRONIC SERVICE
(via electronic filing service provider)**

By electronically transmitting the document(s)
listed above to LexisNexis File and Serve, an
electronic filing service provider, at
www.fileandserve.lexisnexis.com pursuant to the
Court's _____ Order mandating
electronic service. See Cal. R. Ct. R. 2053, 2055,
2060. The transmission was reported as complete
and without error.

**BY ELECTRONIC SERVICE
(to individual persons)**

By electronically transmitting the document(s)
listed above to the email address(es) of the
person(s) set forth on the attached service list. The
transmission was reported as complete and
without error. See Cal. Rule of Court 2060.

BY FACSIMILE

By transmitting the document(s) listed above from
Steptoe & Johnson LLP in Phoenix, Arizona, to
the facsimile machine telephone number(s) set
forth in the Proof of Service. Service by facsimile
transmission was made pursuant to agreement of
the parties, confirmed in writing.

25 I declare under penalty of perjury under the laws of the State of California that the foregoing
26 is true and correct.

27 
28 Bennett Evan Cooper

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

ST. FRANCIS MEDICAL CENTER,)	No. C047027
)	
Plaintiff-Appellant,)	
)	
v.)	Superior Court No. 02CS01130
)	
DIRECTOR, DEPARTMENT OF HEALTH)	
SERVICES, STATE OF CALIFORNIA,)	
)	
Defendant-Respondent.)	
_____)	

Appeal from the Judgment of the Superior Court
State of California for the County of Sacramento
The Honorable Trena H. Burger-Plavan
Judge Presiding

APPELLANT'S OPENING BRIEF

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Exhibit A

ARGUMENT

D. STANDARD OF APPELLATE REVIEW

In reviewing DHS' final agency decision, this Court must perform the very same function the trial court performed in reviewing the decision pursuant to Code of Civil Procedure Section 1094.5. The appeal must be treated as a "renewed petition for a writ of mandate." *Mixon v. Fair Employment Housing Co.*, 192 Cal.App.3d 1306, 1311 (1987) . The Court is not bound by the trial court's decision or conclusions. *See Will v. Kizer* 208 Cal.App.3d 709, 715 (1989).

E. THE FINAL DECISION IS UNTIMELY

1. The Proposed Decision must Be Reinstated Because the Final Decision Is Untimely under Government Code §11517(c)(2).

a. The Final Decision Was Issued After the Deadline Established by Section 11517.

As discussed below, the Medi-Cal administrative appeal process is subject to the California Administrative Procedure Act, Government Code Section 11500 *et seq.* Pursuant to Section 11517(c)(2), an agency is required to take one of five actions within 100 days of receipt by the agency of a proposed decision. If the agency fails to act within the 100-day period, the proposed decision becomes the final agency decision. One of the actions the agency may take within the 100-day period is to advise the parties that the proposed decision is rejected and that a new decision will be issued. The final decision must then be issued within 100 days of the rejection of the proposed decision. Cal.Gov't Code § 11517(c)(2)(E).

DHS rejected the proposed decision on the date it was issued pursuant to Section 11517(c), October 23, 2001. However, DHS did not issue a Final Decision

until February 23, 2002, 113 days after it had rejected the proposed decision and thirteen days after the deadline imposed by Section 11517(c). As such, the Proposed Decision must be reinstated because the Final Decision was not issued within the statutorily authorized time period.

b. DHS' Decision is Subject to the Administrative Procedures Act

Health & Safety Code Section 100171 requires that DHS' adjudicative hearings be conducted pursuant to the California Administrative Procedure Act, subject to limited exceptions. The only provision under which DHS adjudicative hearings may be excused from compliance with the deadlines specified in Government Code Section 11517 is set forth in Health & Safety Code Section 100171(e).

Section 100171 provides, in relevant part:

“notwithstanding any other provision of law, whenever the Department is authorized or required by statute, regulation, due process . . . or a contract, to conduct an adjudicative hearing leading to a final decision of a Director of the Department, the following shall apply:

- (a) The proceedings shall be conducted pursuant to the administrative adjudication provisions of Chapter 4.5 (commencing with section 11400) and Chapter 5 (commencing section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except as specified in this section.”

Section 100171(e) provides that the time lines in Section 11517 “shall not apply to any adjudicative hearing conducted by the Department to the extent that the Department has, by regulation, specified different time lines for the particular type of hearing at issue.” (Emphasis added). While DHS has by regulation adopted certain

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ST. FRANCIS MEDICAL CENTER,

Plaintiff-Appellant,

v.

DIRECTOR, DEPARTMENT OF HEALTH
SERVICES, STATE OF CALIFORNIA,

Defendant-Respondent.

C047027

Superior Court of California, County of Sacramento, Case No. 02CS01130
The Honorable Trena H. Burger-Plaven

RESPONDENT'S BRIEF

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Services

regulations, it must be upheld, even if appellant's interpretation of the regulations is also reasonable. (*Dept. of Health Services, supra*, at 782) In other words, merely arguing that the agency was "wrong," as does appellant, or that one's interpretation of a regulation is "more reasonable" or "better" than the one adopted by the agency, appellant also does, is insufficient to overturn an administrative decision. One must clearly demonstrate that the decision is irrational; one that "could not have been reached by a reasonable person." (*Torres v. Department of Beverage Control* (1961) 192 Cal.App.2d 541.) Thus, the Department's decision should not be overturned unless it is clearly demonstrated to be wholly irrational, unreasonable or plainly erroneous.

ARGUMENT

I.

THE DEPARTMENT'S FINAL DECISION WAS TIMELY AND IS NOT SUBJECT TO THE ADMINISTRATIVE PROCEDURE ACT.

Appellant argues the final decision is untimely under Government Code section 11517(c)(2)(E), and as a result the proposed decision should be instated as the Department's final decision. (AOB, pp. 10-11.) However, appellant acknowledges that Welfare and Institutions Code section 14171 is the controlling statute for the administrative appeals process regarding audits or examination findings. (AOB, p. 4, lines 9-20.) The general provisions of Government Code section 11500 et seq. relating to administrative procedure in hearings must yield to a special statute where a

variance exists. (*Lacy v. Orr* (1969) 276 Cal.App. 2nd, 198.) Welfare and Institutions Code section 14171 as well as the contract provides specific procedures for the appeal of audits and examinations of amounts paid. (AR, Vol. 5, Tab 18 [Art. 4, section 4.5(c)].) The use of Welfare and Institutions Code section 14171 by the Department is supported by the trial court's ruling on petition for writ of mandate, in which it states that "[Welfare and Institutions Code] section 14087.27, regarding the availability of judicial and administrative review, provides that recoupment efforts based upon an audit or review of hospital performance subject to a negotiated contract shall be reviewable pursuant to section 14171." (CT, p.187, lines 24-28.) Thus, the use of Welfare and Institutions Code section 14171 by the Department and the court below in determining the timeliness of the final decision of the Department was correct.

Welfare and Institutions Code section 14171 requires the Director of the Department to establish an administrative appeals process to review grievances or complaints arising from findings of an audit or examination. Welfare and Institutions Code section 14171, subdivision (e), outlines the procedures for the appeals process, and subdivision (f) requires that, in the event the Director intends to modify a proposed decision, he or she must provide written notice of such intent 300 days following the closure of the record of the hearing and must issue a final decision on or before the 420th day following the closure of the record:

///

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v.)	
)	
DIRECTOR, DEPARTMENT OF HEALTH)	
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)	
Defendant-Respondent.)	

Appeal from the Judgment of the Superior Court
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The Honorable Trena H. Burger-Plavan
Judge Presiding

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renegotiate its contract in light of the Department's new interpretation as the services had already been furnished and reimbursed.

The Department offers in its opposition no compelling rationale for this sudden and unexpected reinvention of St. Francis' Medi-Cal contract. The Department does not, and cannot, contend that St. Francis failed to provide services for which it billed, provided services of substandard quality, or furnished the Department with false or inaccurate information in connection with its Medi-Cal claims for payment.

In attempting to justify its audit position, the Department relies in its opposition on erroneous characterizations of the applicable law, misapplies the law to the facts in the administrative record, and ignores important arguments made by St. Francis in its opening brief (Appellant's Opening Brief, or "AOB"). More specifically:

- A. Scope of Review: Although the Department has correctly stated that the standard of review for legal issues, including interpretations of St. Francis' Medi-Cal contract, is *de novo*, the Department fails to recognize that virtually all of the key issues in this matter are legal issues and improperly contends that this Court should defer to the Department's position.
- B. Application of APA: The Department does not dispute that the application of the California Administrative Procedure Act ("APA") would require the reinstatement of the

Administrative Law Judge's proposed decision in favor of St. Francis. Rather, the Department contends that the APA is not applicable even though the Legislature has decreed that the APA is to be applied to all hearings conducted by the Department "notwithstanding any other provision of law."

The Department fails to address this statutory language.

- C. Timeliness: The Department reprises the argument it made below that the limitations period in Welfare & Institutions Code § 14170 does not apply because the Department's audit was a "billing review" rather than a cost report review. The issue here, however, is not the proper characterization of the audit; rather it is whether the data in St. Francis' Medi-Cal cost reports, which includes the number of Medi-Cal NICU days, must be deemed true and correct under §14170. As St. Francis discussed in its opening brief, because the cost reports for the 1994 and 1995 fiscal years were not reviewed timely, the number of NICU days for those fiscal years must be deemed true and correct regardless of whether the Department has conducted a cost report audit or a billing review. Notably, the Department has failed to address at all the position of St. Francis that, even if §14170 does not apply, the Department is barred by laches from implementing the

**III. THE PROPOSED DECISION MUST BE REINSTATED
UNDER THE CALIFORNIA APA.**

The Department does not dispute in its opposition that, if the California APA is applicable, the Department's final decision was untimely and the proposed decision must be reinstated as required by Government Code §11517(c)(2)(E). The Department argues only that the APA does not apply because Welfare & Institutions Code § 14171 contains the procedures to be followed in a Medi-Cal audit appeal, and §14171 controls because it is a "special statute." The DB at 15-16.

The Department conveniently ignores Health & Safety Code § 100171(e), cited and relied on by St. Francis in its opening brief. Section 100171(e) states:

"Notwithstanding any other provision of law,
whenever the Department is authorized or
required by statute, regulation, due process . . .
or a contract, to conduct an adjudicative hearing
leading to a final decision of the director of the
department, the following shall apply:

(a) The proceedings shall be conducted
pursuant to the administrative adjudication
provisions of Chapter 5 (commencing with
section 11500) of Part 1 of Division 3 Title 2 of
the Government Code except as specified in this
section." (Emphasis added).

No Government Code § 11517 is within Part 1 of Division 3 of Title 2.

The phrase "notwithstanding any other provision of law"
demonstrates the intent of the Legislature that the California APA will