

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

NO. C094735

KELLY CLARK, DIANE WOOTON, and KIONA MILLIRONS,
Petitioners,

vs.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent.

SACRAMENTO COUNTY DISTRICT ATTORNEY'S OFFICE,
SACRAMENTO POLICE DEPARTMENT – *a political subdivision of the
City of Sacramento,* and CITY OF SACRAMENTO,
Real Parties in Interest.

On Petition for Writ of Mandate from the Superior Court of the
State of California for the County of Sacramento
The Honorable Shellyanne Chang
Superior Court Case No. 23-2020-80003417-CU-WM-GDS

**REPLY TO THE JOINT PRELIMINARY OPPOSITION TO WRIT
OF MANDATE**

**KRAMER LEVIN NAFTALIS
& FRANKEL LLP**

*AUSTIN MANES, ESQ. (SBN 284065)
DARREN LAVERNE (*PRO HAC VICE*)
ANDREA MADDOX (*PRO HAC VICE*)
990 Marsh Rd., Menlo Park, CA 94025
Tel.: (650) 752-1700 | Fax: (650) 752-1800
Email: amanes@kramerlevin.com

EVERYTOWN LAW

*MOLLY THOMAS-JENSEN (*PRO HAC VICE*)
JAMES E. MILLER (*PRO HAC VICE*)
ANDREW NELLIS (*PRO HAC VICE*)
JANET CARTER (*PRO HAC VICE*)
450 Lexington Ave., P.O. Box 4184
New York, NY 10017
Tel: (646) 324-8226 | Fax: (917) 410-6932
Email: mthomasjensen@everytown.org

Attorneys for Petitioners

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

Petitioners Kelly Clark, Kiona Millirons, and Dianne Wooton know of no entities or person who require disclosure under subsections (1) or (2) of Rule 8.208(e) of the California Rules of Court. Cal. Rules of Court, rule 8.208(e)(3).

Dated: September 22, 2021

By:



**KRAMER LEVIN NAFTALIS
& FRANKEL LLP**

Austin Manes (SBN 284065)
amanes@kramerlevin.com

Darren LaVerne
(admitted *pro hac vice*)
dlaverne@kramerlevin.com
Andrea Maddox
(admitted *pro hac vice*)
amaddox@kramerlevin.com

EVERYTOWN LAW
Molly Thomas-Jensen
(admitted *pro hac vice*)
mthomasjensen@everytown.org
James E. Miller
(admitted *pro hac vice*)
jedmiller@everytown.org
Andrew Nellis
(admitted *pro hac vice*)
anellis@everytown.org
Janet Carter
(admitted *pro hac vice*)
jcarter@everytown.org

Attorneys for Petitioners

INTRODUCTION

The decision below relied on secret briefing from the Defendants that the Petitioners were not permitted to view, much less to refute. The Petitioners have thus sought relief in this Court, arguing that the superior court's decision was erroneous, and that its reliance on secret briefing violated due process. In response, Defendants hardly bother to defend the superior court's reasoning or ruling, instead asserting that Petitioners forfeited their objection by failing to raise it in a timely manner below.

In the superior court, however, Petitioners objected, not once, but twice that that court's reliance on secret, one-sided briefing was an inappropriate departure from the normal adversarial process. And although the superior court *initially* declined to address Petitioners' objection, it ultimately considered—and explicitly adjudicated—the objection in its July 2 tentative ruling and in its July 22 final order. The objection was therefore raised and fully vetted below, and is properly before this Court, just like the merits decision that encompasses it.

ARGUMENT

I. Petitioners have not forfeited their objection to the superior court’s reliance on secret briefing.

Petitioners’ objection cannot have been forfeited for the simple reason that the superior court ruled on it. “The critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court.” (*DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 178 [62 Cal.Rptr.3d 722], quoting *Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649 [40 Cal.Rptr.3d 501].) After all, the “purpose” of the forfeiture doctrine ““is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.”” (*Ibid.*, quoting *Boyle*, at p. 649.) Here, Petitioners did more than just bring their arguments to the superior court’s attention: they obtained a decision explicitly ruling on their merits. That defeats any possibility of forfeiture. (See, e.g., *People v. Thomas* (2021) 63 Cal.App.5th 612, 627 [277 Cal.Rptr.3d 818] [“Given the trial court considered and ruled on the theory now presented on appeal, defendant did not forfeit her claim.”].)¹

¹ A secondary consideration is fairness to the opposing party. (See *Hewlett-Packard Co. v. Oracle Corp.* (2021) 65 Cal.App.5th 506, 548 [280 Cal.Rptr.3d 21].) This also cuts against forfeiture, as Defendants were not only aware of Petitioners’ objection to secret briefing below, but also opposed the objection—twice. (See PA, vol. IV, p. 905 [City Opposition to Motion for Reconsideration]; PA, vol. IV, pp. 937-939 [Counsel for both

A review of the proceedings below reveals why Defendants’ argument fails. On April 8, 2021, the superior court sua sponte—and unexpectedly—requested secret supplemental briefing from the Defendants. (PA, vol. IV, pp. 882-883.) Petitioners objected to this request via written motion, arguing that secret briefing was impermissible because “adversarial input is critical to the judicial decision-making process.” (PA, vol. IV, pp. 890-892.) Although the superior court initially denied that motion on procedural grounds (PA, vol. IV, p. 909),² it ultimately considered the substance of Petitioners’ objection and rejected it on the merits in a tentative ruling dated July 2, 2021 (PA, vol. IV, p. 917 [ruling that the

defendants opposing Petitioners’ due process objections, and arguing for superior court to resolve underlying public records claims on the basis of secret, one-party briefing].)

² The superior court denied Petitioners’ motion in part because Petitioners did not request oral argument in the few hours between when the April 8 tentative ruling issued and the 4:00 p.m. deadline to do so expired. (See PA, vol. IV, p. 909.) This is the ground Defendants now urge as the basis for forfeiture. (Joint Prelim. Opp’n, p. 8.) But Defendants are mistaken to suggest that failure to lodge an immediate objection constitutes forfeiture. “Submission on a tentative ruling is neutral; it conveys neither agreement nor disagreement with the analysis.” (*Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1406 [138 Cal.Rptr.3d 464].) Consequently, even if Petitioners “had not challenged the tentative ruling at all, they could have appealed all the issues decided by the trial court” anyway. (*Howard Jarvis Taxpayers Assn. v. Bay Area Toll Authority* (2020) 51 Cal.App.5th 435, 446, fn. 7 [265 Cal.Rptr.3d 235].)

Public Records Act “provides support for the in camera review of a party’s arguments”]).

Petitioners timely objected to this July 2, 2021 tentative ruling and, at the ensuing hearing, reiterated their argument that the court’s reliance on secret briefing was improper. (See, e.g., PA, vol. IV, p. 922 [“We object to the entry of this order and ask the Court to stay entry of any order until Petitioners have had a meaningful opportunity to review the Respondent’s in-camera briefing and have a chance to be heard.”]; see also *id.* at pp. 922-923 [“[W]e’d like to present our objections in three parts for the Court’s consideration. Number 1. The Court’s course of action has no stated basis in the law. Number 2. The Court shut out Petitioners completely from the operative part of this case, and Number 3, the Court’s tentative order is vague and does not comport with the requirements of due process.”]; *id.* at p. 924 [“Basing this Court’s decision only on the briefs submitted by Respondents, one side only with no review by Petitioners[,] elevates this case to a level of concern intolerable to any meaningful conce[pt]ion of due process.”]; see generally *id.* at pp. 922-930.)

The superior court then considered the matter further and, on July 22, 2021, issued a final ruling that reaffirmed its “decision to review the [Defendants’] supplemental briefing in camera” and that specifically responded to the arguments that Defendants now contend were forfeited.

(PA, vol. IV, pp. 961-962.)³ Nowhere in the July 2, 2021 tentative ruling or in the July 22, 2021 final ruling does the superior court state that Petitioners' due process arguments had been waived or forfeited. (See *id.* at pp. 953-962.) Defendants' assertion to the contrary is thus baseless, and their citation to *Sommer v. Gabor* (1995) 40 Cal.App.4th 1455 [48 Cal.Rptr.2d 235], which involved an objection that had "never" been put before the trial court (see *id.* at pp. 1468-1469), is plainly inapt.

II. The superior court does not have "discretion" to exclude the Petitioners from the adversarial process.

In their opening memorandum of points and authorities, Petitioners described at length why the superior court's decision to rely on secret, one-sided briefing was legally impermissible. (Pet., pp. 27-47.) In response, Defendants assert only that "[i]n camera review . . . is left to the sound discretion of the trial court." (Joint Prelim. Opp'n, p. 9, quoting *Coronado Police Officers Ass'n v. Carroll* (2003) 106 Cal.App.4th 1001, 1013 [131 Cal.Rptr.2d 553].) But as Petitioners already explained (see Pet., p. 42), this language from *Coronado* concerns in camera review of requested records, not the parties' briefs. (See *Coronado*, at pp. 1012-1013.) Nothing in

³ Tellingly, the court's July 22, 2021 final ruling, which explicitly rejects Petitioners' arguments, is not cited a single time in Defendants' preliminary opposition.

Coronado—or any other authority cited by Defendants or by the superior court—countenances what occurred in this case.

CONCLUSION

For the reasons set forth above and in their Petition for Writ of Mandate, Petitioners ask this court to issue a writ of mandamus directing the superior court to grant the petition below and to order disclosure of the requested records to Petitioners.

Respectfully submitted,

DATED: September 22, 2021

By:



**KRAMER LEVIN NAFTALIS
& FRANKEL LLP**

Austin Manes (SBN 284065)

amanes@kramerlevin.com

Darren LaVerne

(admitted *pro hac vice*)

dlaverne@kramerlevin.com

Andrea Maddox

(admitted *pro hac vice*)

amaddox@kramerlevin.com

EVERYTOWN LAW

Molly Thomas-Jensen

(admitted *pro hac vice*)

mthomasjensen@everytown.org

James E. Miller

(admitted *pro hac vice*)

jedmiller@everytown.org

Andrew Nellis

(admitted *pro hac vice*)

anellis@everytown.org

Janet Carter

(admitted *pro hac vice*)

jcarter@everytown.org


Attorneys for Petitioners

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Reply is produced using 13-point Times Roman scalable type, including footnotes, and contains 1,215 words. Counsel relies on the word count generated by the word processor used to prepare this Reply.

DATED: September 22, 2021


Austin Manes, Esq.

PROOF OF SERVICE

I, Austin Manes, am employed in the Menlo Park, California office of Kramer Levin Naftalis & Frankel LLP. I am over the age of 18 and not a party to the within action. My business address is 990 Marsh Road, Menlo Park, California 94025. I am readily familiar with the firm’s practice of collecting and processing of mail for mailing with the U.S. Postal Service and overnight delivery services.

On September 22, 2021, I caused the following document(s) to be served:


REPLY TO THE JOINT PRELIMINARY OPPOSITION TO WRIT OF MANDATE

by electronic means, addressed as follows:

Leslie Z. Walker, Susana A. Wood
Senior Deputy City Attorney
LWalker@cityofsacramento.org
sawood@cityofsacramento.org
*Counsel for the Sacramento
Police Department and the City of Sacramento*

Kelsey Johnson
Deputy County Counsel
johnsonkel@saccounty.net
*Counsel for the Sacramento
County District Attorney’s Office*

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 22, 2021 in San Francisco, CA.


Austin Manes