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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JANE DOE, A MINOR, BY HER GUARDIAN AD LITEM AGUSTINA KARINA FLORES; JOHN DOE, A MINOR, BY HIS GUARDIAN AD LITEM VICTORIA MACIAS; JANE GJ DOE, A MINOR, BY HER GUARDIAN AD LITEM BLANCA GAMEZ; JANE DR DOE, A MINOR, BY HER GUARDIAN AD LITEM, SILVIA PICOS; JANE DS DOE; JANE RY DOE; AGUSTINA KARINA FLORES; AND VICTORIA MACIAS,
Plaintiffs and Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES,
Respondent;

MOUNTAIN VIEW SCHOOL DISTRICT,
Defendant and Real Party in Interest.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 2, CASE NO. B313874
HON. MARY ANN MURPHY, TRIAL JUDGE
LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BC712514

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INTRODUCTION

The District has yet again changed its theory as to why, in a case involving horrific sexual abuse of an 8 year old child by her teacher, evidence that the child suffered a separate sexual assault by a teenage boy years later, *is admissible at trial* despite California's Rape Shield statutes. At trial, the District argued that the 2013 assault fell outside of Evidence Code section 1106[1] since it was not voluntary sexual conduct and was admissible because Plaintiff Jane DS Doe is claiming emotional distress damages. (Writ Exh. 7, p. 91.) Counsel for the District argued "everyone has a right to privacy, but that was placed at issue with this to show the concurrent cause of the harm and that we have the right, *once she has said I'm emotionally harmed by Baldenebro's conduct* to show alternative causes of that harm. *So she's placed her mental well being at issue in this case*." (*Id.* (emphasis added).) The trial court agreed and admitted the evidence since it is "highly and directly relevant on defense damage case" and, according to the court, its introduction is not unduly prejudicial under Section 352. (Writ Exh. 7, p. 93-95.) Plaintiff filed a Petition for Writ of Mandate, which the court of appeal initially denied.

Following this Court's order granting review and remanding the issue to the court of appeal, the District abandoned its contention that the evidence fell outside of Section 1106 and instead argued, *for the first time,* that the evidence was admissible to impeach Plaintiff's credibility. (Return 7.) Despite the fact that the District had *explicitly disavowed* any intention to admit the evidence to attack the victim's credibility before the trial court (Writ Exh. 10, pp. 149-151), the court of appeal held that its intention was implicit in its filing of a Section 782/783 motion. Although the trial court

[1] Unless otherwise stated, further references to code sections are to the Evidence Code.

never granted a motion under Section 782/783 nor held a hearing as required by these statutes (instead finding the Rape Shield Law statutes inapplicable), the court of appeal affirmed the court's admission of the 2103 sexual assault for the purpose of attacking the victim's credibility.

According to the court of appeal, because the existence of other sexual conduct *itself* impeaches a victim's claim for civil damages against a defendant, such substantive evidence is admissible for purposes of attacking Plaintiff's "credibility" under Section 783. (*Doe v. Superior Court* (2021) 71 Cal.App.5th 227, 239.) In explaining a supposed "tension" between Sections 1106 and 783, the court held:

> That tension is especially pronounced in cases like this one, *where a plaintiff seeking to recover emotional distress damages* will typically need to testify to establish that the defendant's conduct has inflicted emotional distress, and *this testimony* ***will make evidence of emotional distress involuntarily inflicted by others through sexual abuse relevant to impeach her testimony***. In such cases, the very same evidence section 1106 categorically excludes *becomes admissible*—subject to balancing under section 352—under section 783 to impeach.

(*Doe, supra,* 71 Cal.App.5th at pp. 239–240 (emphasis added).) Thus, and advancing an argument that echoes the very flawed relevance argument originally advanced by the District before the trial court, the court of appeal held that the *same evidence* that is excluded under subdivision (a) of Section 1106 to prove an absence of injury, can nonetheless be admissible under Section 783 to impeach a claim of emotional distress injury – in other words, to show an absence of injury.

As detailed in the Opening Brief, such an interpretation is flawed and indeed frustrates the very legislative purpose in creating California's Rape Shield statues. Because emotional distress damages are alleged in nearly every sexual abuse case, the result under the court of appeal's

opinion is that victims will have to endure the disclosure of deeply personal information concerning prior sexual conduct, here evidence that the young plaintiff was victimized by a second molestation, under the guise of "impeaching" a claim for emotional distress damages, subject only to a "case-by-case" Section 352 analysis to defend against the admissibility of their prior sexual conduct at trial. Of course, even without Section 1106, a Section 352 objection would be available. Yet, the court concluded that here the trial court's Section 352 analysis was sufficient in kind to satisfy the rigorous requirements prescribed by Section 783, creating the risk that the entire statutory scheme would be rendered a nullity. None of this right.

The District now apparently agrees. In its Answer Brief, the District steers clear of *any* argument that the 2013 sexual assault itself impeaches Plaintiff's claim for damages. Instead, the District crafts an entirely new argument – raised *for the first time* in its Answer Brief – that the 2013 assault caused Plaintiff PTSD which in turn affects her ability to recall events and thus impeaches her testimony as to the extent of abuse she suffered by her teacher. (ABM 9, 14) While this new theory is waived, entirely unsupported by the record, legally meritless and otherwise ridiculous – it is most certainly not the basis upon which the court of appeal held that the evidence of the 2013 sexual assault could be admitted for.

It is clear from the District's brief that it has abandoned any intention of relying on the sexual assault *itself* to impeach Plaintiff's claim for damages and thus reversal is warranted. The District likewise does not attempt to justify the court of appeal's conclusion that the rigorous requirements set forth in Section 783 were met here. Instead, the District argues that Plaintiff's "criticisms" of the procedures followed by the trial court here, and sanctioned by the court of appeal in its published opinion, are "beside the point" since this Court can simply remand the matter and permit the District to *refile* a new Section 783 motion. (ABM 35.)

Sadly, this dismissive and cavalier response is in accord with the attitude taken by the District throughout this litigation. The District's chameleon-like positions concerning the admissibility of the 2013 sexual assault reveal its true intention: rather than defending against its complete failure to protect the students within its care from the known and suspected sexual impropriety of its teacher, the District seeks to exploit a subsequent sexual assault suffered by Plaintiff when she was approximately 13 years old to argue that she is somehow not worthy of recovery. This is not about credibility. It is about smearing the victim. This is precisely what the Legislature fought to guard against with the enactment of the Rape Shield statutes.

Reversal and a new trial are warranted.

ARGUMENT

I.

THE ISSUES BEFORE THE COURT

The District begins its brief by attempting to dilute the issues before this Court. (ABM 6-8.) According to the District, the issues identified by Plaintiffs exceed those originally framed in the Petition for Review and should be rejected in favor of a more narrow analysis of whether a trial court has discretion "to admit evidence of a plaintiff's prior sexual conduct to attack the plaintiff's credibility pursuant to Evidence Code section 783 even though in many cases there will necessarily be a certain amount of overlap between the issues of the plaintiff's damages and the plaintiff's credibility?" (*Id*.) But of course that is not the issue. It is not some amorphous overlap of credibility and damages that is the problem.

The issue is whether the *same evidence* that is expressly inadmissible under subdivision (a) of Section 1106 to prove an absence of injury, can nonetheless be admissible under Section 783 to impeach a claim of emotional distress injury. The second issue concerns the court of appeal's complete disregard for the procedural safeguards prescribed in Section 783.[2] These are precisely the issues identified by this Court in its Pending Issues Summary.

[2] The statement of issues in Plaintiff's Opening Brief were copied verbatim from this Court's "Pending Issues Summary." (See https://www.courts.ca.gov/13648.htm.)

II.

THE COURT OF APPEAL'S FINDING THAT EVIDENCE OF THE 2013 SEXUAL ASSAULT IS *ITSELF* ADMISSIBLE TO IMPEACH PLAINTIFF'S CLAIM FOR DAMAGES IS MISTAKEN

Pursuant to Section 1106, subdivision (a), "opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, ***is not admissible*** by the defendant *in order to prove consent* by the plaintiff ***or the absence of injury to the plaintiff***, unless the injury alleged by the plaintiff is in the nature of loss of consortium." (Evid. Code § 1106(a).)

As recognized by the court of appeal here, while evidence of an independent trauma may generally be probative in a civil action given its tendency to show that the injuries are attributable to someone other than the defendant (*Doe*, *supra*, 71 Cal.App.5th at pp. 238-239), by enacting Section 1106 *to prohibit* the use of prior sexual conduct to prove an absence of injury, *the Legislature has already engaged in the relevant balancing test* and concluded that the prejudicial effect outweighs its probative value on the issue of plaintiff's claimed emotional distress damages. (See *ibid.* ["But section 1106 does that balancing in advance, and has categorically struct the balance in favor of exclusion."].)

Indeed, and as highlighted by this Court in *Vinson*, through the Rape Shield statutes the Legislature "enacted a measure designed to protect the privacy of plaintiffs in cases such as these." (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 843; citing Stats. 1985, ch. 1328, pp. 4654-4659, enacting Code Civ. Proc. § 2036.1 [now § 2017.220] and Evid. Code §§ 783 and 1106.) The legislature's statement of purpose explains:

> The discovery of sexual aspects of complainant's [sic] lives, … has the clear potential to discourage complaints and to annoy and harass litigants. That annoyance and discomfort, as a result of defendant[s]' … inquiries, **is *unnecessary and***

> ***deplorable***. **Without protection against it, individuals whose intimate lives are unjustifiably and offensively intruded upon might face the 'Catch-22' of invoking their remedy *only at the risk of enduring further intrusions into the details of their personal lives* in discovery and in open … judicial proceedings**.
>
> The Legislature is mindful that a similar state of affairs once confronted victims in criminal prosecutions for rape. …
>
> The Legislature concludes that the use of evidence of a complaint's sexual **behavior is *more often harassing and intimidating then genuinely probative*, and the potential for prejudice *outweighs* whatever probabtive value that evidence may have**. ***Absent extraordinary circumstances*, inquiry into those areas should not be permitted, either in discovery or at trial.**

(*Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 564-565, citing Stats. 1985, ch. 1328, § 1, pp. 4654-4655 (emphasis added); see also *Vinson*, *supra*, 43 Cal.3d at p. 843; *Knoettgen v. Superior Court* (1990) 224 Cal.App.3d 11, 13-14.)

While the court of appeal here recognized Section 1106 provides an "absolute bar" to the District's admission of the 2013 molestation as *substantive evidence* to claim that Jane DS Doe did not actually suffer the injury she claimed resulted from Baldenebro's abuse (*Doe*, *supra*, 71 Cal.App.5th at pp. 236-237, 240), the court reasoned that the *very same evidence* of sexual conduct *is admissible* to impeach or undermine Plaintiff's claim for emotional distress damages under Section 783 (*Id*. at pp. 239-2402). According to the court, because the existence of other sexual conduct *itself* impeaches a victim's claim for civil damages against a defendant, such substantive evidence is admissible under the "credibility exception" provided for under Section 783. (*Doe*, *supra*, 71 Cal.App.5th at

p. 239.) As detailed in the Opening Brief, such a construction of the statutes renders subsection (a) of Section 1106 a nullity.

The District seemingly agrees. In the few pages devoted to its legal discussion, the District does not even attempt to justify the court of appeal's analysis. The District never even tries to support the court's interpretation that the 2013 sexual assault is itself admissible to impeach Plaintiff's claim for emotional distress damages. Instead, the District simply parrots the court's reliance on *People v. Rioz* (1984) 161 Cal.App.3d 905 regarding the supposed "tension" between Section 1103 and 782 (the criminal counterpart to Sections 1106 and 783) and argues that the "credibility exception is not limited to instances where the plaintiff made a prior false statement." (ABM 28-35.) The District misunderstands the issue.

Nothing in the District's block quotes from *Rioz* supports the court of appeal's interpretation of the statutes at issue. Further, Plaintiff never argued that the so-called "credibility exception" applies *only* to false statements. Nearly half of the District's legal argument is devoted to this informal fallacy, giving the impression of refuting an argument, without ever addressing the real issue raised. Beyond all of this, the very fact that the District has distanced itself from the credibility theory accepted by the court of appeal and advanced an entirely different theory, offered for the *first time* in its Answer Brief, only underscores the untenable rationale upon which the opinion rests.

A. Evidence of Sexual Conduct Cannot be Admitted for the Very Purpose that it is Inadmissible Under Section 1106(a).

There is no dispute that evidence of the 2013 sexual assault is inadmissible to prove an absence of injury under Section 1106(a). As noted by the court of appeal: "Here, the 2013 molestation would be admitted as substantive evidence to show 'the absence of injury' stemming from Baldenebro's earlier molestation." (*Doe*, *supra*, 71 Cal.App.5th at p. 236.)

The court continued, however, that "in cases like this one, where a plaintiff seeking to recover emotional distress damages will typically need to testify to establish that the defendant's conduct has inflicted emotional distress, [] this testimony will make evidence of *emotional distress involuntarily inflicted by others* through sexual abuse *relevant to impeach her testimony*." (*Id*. at p. 239 (emphasis added).) Thus, pursuant to the court's analysis, it is the sexual conduct itself that undermines the claim for damages. As detailed in the Opening Brief, this makes no sense.

Rather than defend such a position, the District merely parrots the court's statement that while Plaintiff's position that "section 783 is categorically unavailable when the proposed impeachment regards the plaintiff's consent or the absence of injury prohibited as substantive evidence under section 1106 … *would be one way to try to harmonize the inherent tension between sections 1106 and 783*, it is not one supported by the plain text of either statute: Section 1106 expressly names section 783 as an exception to its prohibitions, and section 783 looks to a case-by-case balancing of considerations under section 352." (*Doe, supra*, 71 Cal.App.5th at p. 242 (emphasis added); see also ABM 32.)

However, and as detailed in the Opening Brief, the so-called credibility exception is reserved for when the conduct being placed before the jury has bearing on credibility because it tends to call into question whether the victim is offering false testimony. This is something other than the fact that there has simply been ***other sexual conduct itself***.

In this way, subdivision (e) is not really an "exception" to subdivision (a). The language of subdivision (e) itself is phrased not as an exception but rather simply describes the flip side of the same coin which is defined in subdivision (a). Subdivision (e) states: "This section *shall not be construed* to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783." (Evid. Code §

1106(e) (emphasis added), cf. subd. (b) which states "Subdivision (a) *does not apply* to evidence of the plaintiff's sexual conduct with the alleged perpetrator.") Subdivision (e) simply recognizes that evidence of sexual conduct may be admissible for some reason *other than to prove consent or absence of injury*. Similar to the familiar NOTMA (not offered for the truth of the matter asserted) principle, it is *the purpose* for which the evidence is being introduced that determines its admissibility under Subdivision (e).

Here, under the court of appeal's analysis, the purpose is the same – the fact that the plaintiff was victimized by a prior sexual assault may tend to prove that the plaintiff's claimed damages were not all caused by defendant's wrongful conduct.

Attempting to create an issue where there is none, the District devotes much of its legal discussion negating an argument never made by Plaintiff. According to the District, "the credibility exception is not limited to instances where the plaintiff made a prior false statement." (ABM 33.) Plaintiff never argued it was so limited.[3] Instead, and citing *People v. Franklin* (1994) 25 Cal.App.4th 328, Plaintiffs merely highlighted that evidence of sexual conduct *may* be admissible where it is not used to prove consent or an absence of injury – i.e. where "'the sexual conduct is not the

[3] The District represents in its brief: "Plaintiffs invite this court to dictate how trial courts exercise their discretion under Evidence Code section 783 by strictly limiting the admissibility of evidence of a plaintiff's sexual conduct to instances where the plaintiff made 'a false statement' about sexual conduct. (OBM, p. 6.) The Court of Appeal correctly rejected this argument because it is not 'supported by the plain text of' Evidence Code sections 783 and 1106. (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 242.)" (ABM 11.) None of this is accurate. Plaintiff never made this argument, and the court of appeal did not reject it. Instead, Plaintiff argued that Section 783 cannot be used when the proposed impeachment seeks to admit the evidence for the very purpose of disputing Plaintiff's consent or the absence of injury. It is this argument that the court of appeal declined to accept. (*Doe*, *supra*, 71 Cal.App.5th at p. 242.)

fact from which the jury is asked to draw an inference about the witness's credibility.'" (OBM 12, 32, citing *Franklin*, *supra*, 25 Cal.App.4th at p. 335.) In *Franklin*, which concerned a prior false accusation of molestation, that meant that it was not the prior molestation that the jury was asked to draw an inference about the witness's credibility – but "the fact that she stated as true something that was false." (*Franklin*, at p. 335.) Here, unlike in *Franklin*, *it is the fact of the 2013 sexual assault* "from which the jury is asked to draw an inference about [her] credibility." (*Franklin, supra*, 25 Cal.App.4th at p. 335.)[4]

Thus, the credibility exception must concern the use of evidence involving prior sexual conduct in a manner different in kind then proving consent or absence of damages. Indeed, this is precisely how the credibility exception has been interpreted by the courts.

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[4] The District relies extensively on *People v. Tidwell* (2008) 163 Cal.App.4th 1447 to dispute the strawman argument that it is *only* a false statement that may be admissible to attack a victim's credibility under Section 783 (which again was not the argument made by Plaintiff). In *Tidwell*, the defendant chiefly wanted the court to hold a hearing to allow him to force the victim into recanting rape complaints she had alleged against others, which he would then use to attack her credibility as untruthful. (*Tidwell*, at p. 481.) The court held that a Section 782 hearing was not required and there was no abuse of discretion in refusing the defendant to pursue this line of inquiry because there was no credible evidence that victim's prior rape complaints were false. (*Ibid.*) *Tidwell* has no application here. Furthermore, and although not dispositive of the issues here, Plaintiff notes that to the extent *Tidwell* and *Franklin* hold or suggest that sexual conduct evidence offered to prove a false statement is *not subject to Section 782* (or Section 783 in the civil context), such conclusions are mistaken. These sections apply to sexual conduct broadly and detail a specific procedure for its use when offered to discredit testimony under Section 780, including the giving of false statements concerning sexual conduct. There is no statutory basis to exempt such evidence from the procedural requirements of Sections 782 and 783.

As recognized by the court of appeal in *People v. Chandler* (1997) 56 Cal.App.4th 703, "**the credibility exception has been *utilized sparingly*, most often in cases where the victim's prior sexual history is one of prostitution**. [Citations]" as prostitution has been held to be considered "conduct involving moral turpitude which is admissible for impeachment purposes." (*Ibid.*)[5]

Such an interpretation preserves the intent of the Legislature and harmonizes the credibility exception in subsection (e) with the absolute bar prescribed by subsection (a) in Section 1106.

As held by this Court, in light of the Legislature's intent in enacting California Rape Shield Laws to encourage victims of sex-related offenses to come forward and protect them from having their personal lives paraded in a trial where they happen to be the unfortunate victim of sexual assault by the defendant, the discretion afforded to trial courts to permit evidence of sexual conduct to be admissible on the issue of credibility must be "***narrow***." (*People v. Fontana* (2010) 49 Cal.4th 351, 363, citing *People v. Chandler* (1997) 56 Cal.App.4th 703, 708.) As highlighted by this Court:

> **Great care must be taken to insure that this [credibility] exception to the general rule barring evidence of a complaining witness' prior sexual conduct,** … ***does not impermissibly encroach upon the rule itself* and *become a 'back door'* for admitting otherwise inadmissible evidence**.

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[5] These prostitution cases obviously do not involve a false statement. This fact alone dispels the District's representation that Plaintiffs are only arguing that false statements can be admitted to attack a victim's credibility under Section 783. As noted in the Opening Brief, *Chandler* provides an example of a situation where although the evidence did concern sexual activity (prostitution), it may be admissible to call into question whether a victim is offering false testimony (prostitution being a crime of moral turpitude that can be used for impeachment purposes) because it is *not offered* for an improper substantive purpose (to prove consent). (OBM 32.)

(*Fontana*, 49 Cal.4th at p. 363, citing *Rioz* (1984) 161 Cal.App.3d at pp. 918–919.) The court's finding here that the independent sexual abuse suffered by Plaintiff in 2013 is admissible to impeach her claim for emotional distress damages caused by the sexual abuse of her teacher is the ultimate "back door" admission of prior sexual conduct.

Indeed, in *Vinson v. Superior Court* (1987) 43 Cal.3d 833, this Court rejected the notion that the mere fact that a plaintiff claims emotional distress damages is sufficient to justify intrusion into a plaintiff's sexual history: "We cannot agree that the mere initiation of a sexual harassment suit, even with the rather extreme mental and emotional damage plaintiff claims to have suffered, functions to waive all her privacy interests, exposing her persona to the unfettered mental probing of defendants' expert." (*Id.* at p. 841; accord *Knoettgen*, *supra*, 224 Cal.App.3d at p. 14 [rejecting argument that a subsequent sexual assault is relevant as an "alternative explanation" for the injuries claimed by the plaintiff]; *Mendez*, *supra*, 206 Cal.App.3d at p. 573 [rejecting a similar argument, the court noted that an "essential aspect of the damage in any case of sexual harassment, sexual assault or sexual battery is the outrage, shock and humiliation of the individual abused. We cannot conceive of a circumstance where a cause of action for sexual assault, battery, or harassment could accrue devoid of any consequential emotional distress."].)[6]

[6] As Plaintiffs further explained in the Opening Brief, the court of appeal erroneously relied on *People v. Fontana* (2010) 49 Cal.4th 351 for the proposition that a defendant should be permitted to use evidence of a plaintiff's sexual activity with other persons as an alternative explanation for the plaintiff's injuries. That was because *Fontana* analyzed Section 1103, the criminal counterpart to Section 1106, and Section 1103 does not prohibit evidence of sexual conduct to prove an absence of injury. (OBM 33-34.) Tellingly, at no point in its Answer Brief does the District even

Lastly, while the District makes much of the fact that in *Rioz, supra,* the court of appeal recognized the tension between Section 782 and Section 1103 concerning the overlap between a victim's consent in a sex offense case and the victim's credibility, the argument is a non-starter. In *Rioz*, a criminal case, it was alleged that the defendants had raped the victim. (161 Cal. App.3d at p. 911.) The defendants, however, argued that the victim willingly had sex with them for money. (*Ibid.*) At trial, the defendants sought to introduce evidence under Section 782 that the victim had been *convicted for prostitution* as well as other activities she engaged in as a prostitute. (*Id.* at p. 914.) It was based on these facts that the court of appeal noted the tension between sections 782 and 1103, for the defendants' defense was based on one of consent. (*Id.* at p. 916.)

Thus, it was not the prior sexual conduct itself that would dispute whether or not the victim consented to the sex, but the conviction for prostitution, a crime of moral turpitude, from which the jury could infer that her testimony was not truthful. (See *Chandler*, *supra*, 56 Cal.App.4th at p. 708 [observing the credibility exception has been utilized sparingly, most often in cases where the prior sexual history involved prostitution because prostitution is a crime of moral turpitude, and evidence that a victim participated in conduct involving moral turpitude is admissible for impeachment purposes]; *People v. Varona* (1983) 143 Cal.App.3d 566, 569 [another case where the sexual conduct involved prostitution].)[7]

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bother to defend the court of appeal's reliance on *Fontana*. (See generally ABM [no citation to *Fontana*].)

[7] To the extent the court of appeal in *Rioz* went beyond the fact that the victim was a prostitute, and permitted the prior sexual conduct itself to impeach her testimony of non-consent, such a basis would be mistaken.

B. The District has Waived its Newly-Minted Credibility Theory Asserted for the First Time in its Answer Brief. In Any Event, *Even if* Considered, the Argument is Meritless.

As alluded to above, the District studiously avoids the theory articulated by the court of appeal supposedly justifying the admission of the 2013 assault as bearing on Plaintiff's credibility. Nowhere does the District embrace the court of appeal's conclusion that the 2013 sexual assault itself impeaches Plaintiff's claim for emotional distress injuries. Perhaps recognizing its faulty basis upon which the court of appeal's justification for the admission of the evidence rests, the District creates an entirely *new argument*, raised for the first time in its Answer Brief.

According to the District, and taking great liberties with the record before this Court, the 2013 sexual assault caused Plaintiff "chronic post-traumatic stress disorder (PTSD)" which "significantly affects her capacity to recollect what happened with Baldenebro and likely distorted her memories, as Dr. Welty will testify." (ABM 9-10, 34.) The District argues that the 2013 incident was "a perfect storm for the creation of false memories" concerning the alleged abuse and torment she suffered by her teacher and "explains why Susana D.'s allegations differ so significantly from her fellow plaintiffs." (AB at 9-10, 34.)

The District's newly crafted theory that a single incident sexual assault by a teenage boy in 2013, *which the record reveals no details about*, caused Plaintiff chronic PTSD and thereby "significantly affected" and distorted her recollection of the horrific and repeated sexual abuse she suffered by her teacher when she was just eight years old is deplorable.

At the outset, nowhere in the multiple briefings before the trial court, the court of appeal, or this Court, has the District argued that Plaintiff is so damaged by the 2013 sexual assault that her testimony of the abuse and manipulation she suffered by her teacher is untruthful. Having not been

raised or addressed below, the District has forfeited such an argument and it should not be considered by this Court. (See *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 919, fn. 2 [declining to consider argument raised for the first time in answer brief]; *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481 [declining to consider argument not raised in the trial court, court of appeal, or petition for review].)

Even assuming the argument could be pursued by the District despite failing to raise it below, the argument is unsupported by the record. The District relies entirely on a report prepared by its expert Dr. Welty. (See Answer at 14, 19, 34, 36.) While the District states that Dr. Welty *will testify* that (1) the onset of Jane DS Doe's PTSD began in 2013 around the time she was molested by a family friend (2) the 2013 trauma "significantly affects [Jane DS Doe's] capacity to recollect what happened with Baldenebro and likely distorted her memories" and (3) Jane DS Doe cannot separate the 2013 incident and the incident with Baldenebro in her mind – none of this is in the report. (Answer at 14, 19, 34.)

The report identifies the significant sexual abuse and manipulation Jane DS Doe suffered by her teacher, Baldenebro, in 2009. (See Writ Exh. 9, pp. 135-136 [sealed].) The report notes that Plaintiff has suffered depression as well as PTSD as a result of the sexual abuse she endured in 2009. (Writ Exh. 9, p. 146 [sealed].) Indeed, the records reveal that Jane DS Doe began exhibiting signs of trauma in 2009 following the abuse by Baldenebro. (See Writ Exh. 9, pp. 135-136 [sealed].) [8] While, according to

[8] There is no basis for the District's representation that Jane DS Doe's PTSD developed only after the 2013 incident. (ABM 14) The District cites only the records from the school counselor in 2016, when as a result of performing poorly at school, Plaintiff saw a counselor and disclosed the 2013 assault. At that time of course Plaintiff had not yet disclosed the sexual abuse and manipulation she suffered by her teacher when she was just 8 years old.

Dr. Welty, both the 2009 abuse and the 2013 sexual assault caused Plaintiff PTSD, at no time does Dr. Welty opine that the single incident assault in 2013 alone caused Plaintiff's PTSD – nor that the 2013 assault distorted Plaintiff's memories in recalling the earlier abuse by her teacher. (Writ Exh. 9, pp. 134-146 [sealed].)

The District seemingly relies on a list of *possible symptoms of PTSD* identified by Dr. Welty *generally* to argue that here the 2013 assault distorted Plaintiff's memories of the earlier abuse. (Writ Exh. 9, pp. 143–145 [sealed].)

The District further manipulates the record by representing to this Court that at trial, after describing the 2013 assault, counsel for the District told the jury that "Dr. Welty will testify *she 'can't just separate' the 2013 incident and the incident with Baldenebro in her mind*." (RB 19.) This did not happen. What the District actually argued was: "And our expert, Dr. Welty, will tell *you* ***you*** can't just separate them, that the mental issues she's got are in part caused by her interaction with Baldenebro, whatever that was, and the completely unrelated molestation in 2013 that she's still suffering separately and apart. That too – that's part of what's going on in her psychological composition." (SC Reply Exh. 1, p. 73.) Thus, far from arguing that Jane DS Doe cannot separate the two incidents *in her mind*, the District argued instead that it should not be entirely liable for the devastating injuries Jane DS Doe has experienced because there is an alternative source of such harm.[9]

Therefore, the District's argument that Plaintiff suffered PTSD as a result of the 2013 assault and this diagnosis "significantly affects her capacity to recollect what happened with Baldenebro and *likely distorted*

[9] Further, Dr. Welty's report never made a finding that Jane DS Doe cannot separate the assaults in her mind. (See Writ Exh. 9, pp. 143–145 [sealed].)

her memories, as Dr. Welty will testify," (AB at 9-10, 34) is nowhere in the record. Nothing in Welty's report suggests that the 2013 assault "likely distorted" Jane DS Doe's memories about the abuse by her teacher. The theory is particularly troubling as nothing in the record even details the 2013 assault. (See Writ Exh. 9, p. 137 [merely stating she suffered a traumatic event].) There is no specific testimony from Dr. Welty or anyone else showing that the 2013 assault caused Jane DS Doe to recall false memories about how at just 8 years old her teacher repeatedly tormented and sexually abused her, including such horrific acts as digital penetration, oral copulation and ejaculating on her hands and telling her that is where babies come from after she excitedly shared the news that her mother was pregnant. (SC Reply Exh. 1, pp. 42-43.)

Even setting aside the District's misrepresentations of the record, the District's theory of admissibility is legally flawed. The District fails to cite any authority that when a victim suffers PTSD due to an event in their life, from whatever source, the existence of that separate trauma is admissible at trial to impeach the witness's testimony. *Knoettgen*, discussed in the Opening Brief, is again instructive. (OBM 29-30.)

In *Knoettgen*, a female truck driver brought an action for battery and employment discrimination after allegedly being sexually harassed at work. After refusing to answer questions regarding two incidents of sexual abuse she suffered as a child at her deposition, the employer moved to compel, arguing that inquiry into the prior sexual conduct was necessary to evaluate the plaintiff's claimed emotional damages. (*Knoettgen, supra*, 224 Cal.App.3d at p. 14.) Similar to the District here, the employer argued that such prior history "***may well have affected Plaintiff's perception of what transpired,*** her response thereto, and the nature and extent of emotional distress she may have suffered." (*Id*. at p. 14.) The employer submitted a declaration of a forensic psychiatrist, stating: "In order to conduct a

meaningful evaluation of Plaintiff's alleged emotional damages, it is necessary to inquire into sexual assaults that Plaintiff may have suffered in the past. Such incidents are directly relevant to the issues of whether there is an alternative source of any emotional distress suffered by Plaintiff and the extent of damages Plaintiff allegedly has suffered from the acts alleged in her Complaint. In addition, traumatic sexual experiences in childhood often play a significant role in sexual perceptions, attitudes and behavior. It would be necessary to inquire into these aspects of Plaintiff's history and development in order to better understand her adult perceptions, reactions and attitudes." (*Id*. at p. 14.) The trial court granted the motion.

The court of appeal issued a writ of mandate commanding the trial court to set aside its order granting defendant's discovery motion and to enter a new order *denying* the motion. In concluding that the defendant failed to make the requisite showing of exceptional circumstances, the court held: "We do not perceive that this showing differentiates this case from any other sexual harassment case. *If this be good cause, then this type of discovery is automatically available in every case*, and Code of Civil Procedure section 2017, subdivision (d) is meaningless." (*Id*. at p. 14 (emphasis added).) The court added: "The discovery the employer demands in this action ***is precisely that which the Legislature has declared offensive, harassing, intimidating, unnecessary, unjustifiable, and deplorable***." (*Id.* at p. 15 (emphasis added).)

The same is precisely true here. The District's position that the 2013 assault is admissible because such prior experiences impact how the victim is emotionally affected by the abuse would be true in all cases. The protections afforded by the legislature would always be swallowed up by the standing "relevance" the District asserts prior sexual history has to emotional distress damages and a victim's testimony.

III.

THE DISTRICT DOES NOT EVEN TRY TO SUPPORT THE COURT OF APPEAL'S HOLDING THAT THE STRINGENT PROCEDURAL REQUIREMENTS OUTLINED IN SECTION 783 WERE MET HERE

As outlined in the Opening Brief, the court of appeal's published opinion reflects dangerous authority sanctioning the admission of deeply personal evidence relating to a victim's other sexual conduct without compliance with the procedural safeguards mandated in Section 783. The District apparently agrees. It offers nothing in support of the court of appeal's opinion. Instead, the District attempts a different approach. According to the District, "[t]here is no need for this Court to address "'what procedures and quantum of proof are required to "admit" evidence of sexual conduct to attack the credibility of a plaintiff,'" since the Court can simply permit the District to refile its motion upon remand. (RB 12, 35-36.) This is not the way an appeal works.

While it is helpful that the District implicitly, if not explicitly, concedes that the court of appeal's holding is entirely flawed given the complete absence of any argument otherwise – the District's "simple solution" is for this Court remand the matter and permit the District to try again. This is no solution at all. A victim of sexual assault must have confidence in the safeguards created by Section 783 before initiating an action and the court of appeal's published opinion disregarding such safeguards must be reversed.

As detailed in the Opening Brief, under no analysis did the trial court's ruling as to the admissibility of the 2013 sexual assault comply with Section 783. Indeed, the court found that the evidence did not even fall within the protections of Section 1106 and 783. As detailed in the Opening Brief, there was no Section 783 motion, no written offer of proof as to why the evidence is relevant to credibility, and no hearing where the victim

testifies outside the presence of the jury regarding the incident. Indeed, the District disavowed any argument that the sexual assault was admissible to attack Plaintiff's credibility. (Writ Exh. 10, pp. 149-151) And under no scenario was there an argument or offer of proof concerning the District's latest argument that the assault caused Plaintiff PTSD thereby affecting her ability to give truthful testimony.

Furthermore, the Section 352 analysis conducted by the trial court here in no way resembles the appropriate balancing required under Section 783 since the court's analysis of prejudice necessarily *fell outside* of Sections 1106 and 783. By finding that Sections 1106 and 783 did not apply, the court implicitly rejected the *presumed prejudice* that the Legislature assigned to evidence of sexual conduct. In rejecting the presumed prejudice that evidence such as the 2013 assault possesses, it by definition could not properly have weighed the probative and prejudicial value of the evidence under a Section 352 analysis.

With no argument offered otherwise, the District concedes the issue and reversal is warranted.

With respect to the District's position that this Court should remand the matter and permit the District to file a new Section 783 motion, such relief is inappropriate. The District should not be allowed to cycle through theory after theory until it finds one that sticks to try and justify the introduction of such highly prejudicial and sensitive evidence. This is especially true here where – (1) in response to Plaintiff's original motion in limine to exclude such evidence, the District filed nothing in response; (2) only after the trial court held that that any ruling concerning evidence of sexual history of the victims must be the subject of an "Evidence Code Section 783 – 782" (see Exh. 6, pp. 75-76), did the District file a Section 782 motion and again maintained its position that the filing was unnecessary (Writ Exh. 10, p. 151); (3) in its motion, the District

specifically represented that *it was not seeking to admit the 2013 assault to impeach Plaintiff's credibility* (Writ Exh. 10, p. 149); and (4) it is not until the filing of its Answer Brief before this Court that the District for the first time raises the credibility theory now relied upon – a theory completely unsupported by the record and the law.

The scrutiny required in the very procedures enacted by the Legislature to protect victims of sexual assault bely the District's "simple solution" that this Court remand the matter for the District to try again and find a new theory to justify the already introduced evidence of the 2013 assault. As explained by numerous courts, including this one, a victim of sexual assault or harassment has a constitutional right of privacy to his or her other sexual conduct and "***great care must be taken***" to protect the victim from disclosure of such deeply personal information in discovery and at trial. (See *People v. Fontana, supra,* 49 Cal.4th at p. 362-363; see also p. 370 [citing *United States v. One Feather* (8th Cir.1983) 702 F.2d 736, 739 [the policy of the rape shield law "to guard against unwarranted intrusion into the victim's private life[ ] *may be taken into account in determining the amount of unfair prejudice*"].)

The District's improvisational approach is completely antithetical to this policy and should not be entertained.

CONCLUSION

For the foregoing reasons and those detailed in the Opening Brief, Plaintiffs urge this Court to issue an order directing the respondent superior court to vacate its erroneous July 28, 2021 order permitting introduction of this highly sensitive and inadmissible evidence, discharge the current jurors, and begin trial anew upon remand.

Dated: August 15, 2022

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CERTIFICATE OF WORD COUNT
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(S272166 | B313874 | BC712514)

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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S272166**
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/s/Kelsey Wong

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