In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANTONIO CHAVEZ MOSES, III,

Defendant and Appellant.

Case No. S258143

Appellate District Division Three, Case No. G055621
Orange County Superior Court, Case No. 16NF1413
The Honorable Julian Bailey, Judge

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ISSUE PRESENTED

Did the Court of Appeal err in reversing defendant's conviction for human trafficking of a minor (Pen. Code, § 236.1, subd. (c)(1)) on the ground that defendant was communicating with an adult police officer posing as a minor rather than an actual minor?

INTRODUCTION

Sex traffickers often prey upon the most vulnerable members of society—children, and particularly children who are troubled. Due to the rise of the Internet, and the anonymity it provides, it has become increasingly difficult for law enforcement officers to catch these predators. For obvious reasons, officers are not able to use actual children as decoys. And so officers have posed as children in sting operations to lure out the would-be sex traffickers.

The voters who enacted Proposition 35, the Californians Against Sexual Exploitation Act (CASE Act), understood this dynamic all too well. That initiative amended Penal Code[1] section 236.1 both to increase the penalties for sex trafficking and to make the crime easier to prove when the victim is a minor. As relevant here, it amended subdivision (c) to provide in relevant part as follows: "Any person who causes, induces, or persuades, *or attempts to cause, induce, or persuade*, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of [certain enumerated sex offenses] is guilty of human trafficking." (Hereafter "section "236.1(c)," italics added.)

Appellant Antonio Chavez Moses III, a pimp, attempted to persuade a minor to work for him as a prostitute. Unbeknownst to appellant, however,

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[1] All further statutory references are to the Penal Code unless otherwise noted.

the supposed minor was in fact a veteran Santa Ana vice detective. Appellant appealed his conviction for human trafficking of a minor under section 236.1(c), claiming he could only be charged with an attempted violation of that statute under section 664 because there was no actual minor. Focusing principally on the portion of the text requiring "a person who is a minor," a divided panel of the Fourth Appellate District, Division Three, agreed and reversed his conviction.

But read in context of the complete text, the better interpretation is that no actual minor is required. The express language of section 236.1(c) includes *both* completed acts *as well as* attempts to complete those acts as alternative elements. Hence, there is no basis for requiring the prosecution to prove an attempt to commit an attempt, something that one court has aptly described as a "legal merry-go-round." Contrary to the Court of Appeal majority's conclusion, the electorate that enacted section 236.1(c) did not intend to create some new type of criminal attempt that does not include a specific intent requirement or that is susceptible to a defense of factual impossibility. Instead, the most natural reading is that the word "attempts" in that statute means exactly what it has always meant in criminal law. Under well-established case authority, a person may be guilty of a criminal attempt regardless of whether it would ultimately be impossible to complete the crime, as long as the crime would have been completed under the facts as the defendant believed them to be true. Here, appellant specifically believed he was recruiting a minor for prostitution and he undertook a direct but ineffectual act to complete that goal. Nothing more was required to establish his guilt under section 236.1(c).

STATEMENT OF THE CASE

A. Appellant Seeks to Recruit Bella B. as a Prostitute

Hoping to attract the interest of a potential pimp, Detective Luis Barragan of the Santa Ana Police Department vice unit created a user profile for a female named "Bella B." on the social network site Tagged.com. (1RT 135, 155–156, 160, 170.) Tagged.com requires users to be over 18 to establish an account, so Detective Barragan listed Bella B. as a 21-year-old from Santa Ana. (1RT 157, 159.) To complete the profile, he uploaded a photograph he had obtained from the Internet. (1RT 160.)

On April 16, 2016, Bella received a text message sent from "FM Da Prince," saying "Good morning, Gorgeous." (1RT 171, 188.) The profile for FM Da Prince showed a photograph of appellant (1 RT 173; trial exh. 6), and a meme comprised of a photo of hundred dollar bills with the words, "Everybody wants love. I just want money and someone to get it with" (1RT 176). Over a series of weeks, Detective Barragan developed a relationship with appellant, texting back and forth often multiple times a day. (1RT 177; trial exh. 12 [81 pages of text messages].)

Assuming the role of Bella, Detective Barragan responded to appellant's initial messages by saying she was in Vallejo "chasing the paper"—a phrase commonly used in the prostitution subculture to indicate she was out hustling. (1RT 191.) Appellant replied, "You need to find your way to Daddy [a common expression for a pimp], your prince. I will make your life a whole lot easier, bet that." (1RT 192–193.)

After a series of exchanges in which Bella lamented that business was slow in Northern California, appellant responded, "Just get here, Boo. We can take it from there. Come as is. I'm a real one, not hard up for case. I need loyalty, trust, and understanding [followed by a dollar sign emoji]. Going to come. I got enough game in this brain to make us all rich." In

Detective Barragan's expert opinion, this latter text was significant because it was consistent with the beginning of a relationship between a pimp and a prostitute. (1RT 195.) In a follow-up text, appellant wrote: "I'm not a gorilla [i.e., a pimp who acts violently toward his prostitutes], nor am I what they call a pimp nowadays. I'm a true gentlemen [*sic*], baby, best believe and known all over the universe, real international." (1RT 196.)

Appellant sent Bella his telephone number and urged her to call. He also sent another series of texts inviting Bella to "fuck with me," or in other words, work for him. (1RT 200–201.) Bella responded that she would be back in Southern California the following Monday, and that she was "looking for a new start with someone who's smart." (1RT 203.) After more texts, including one in which Bella indicated she did not have a pimp, appellant again urged her to "get to Daddy," and he would step up her game to "at least $1,000 a night." (1RT 207.)

B. Appellant Learns That Bella Is a Minor

The following day, April 17th, appellant sent Bella more text messages, and advised her to "tuck her trap," or hide her earnings from her pimp. (1RT 219.) He also promised to show her how to make $470, which Bella had reported as her night's wages, in one or two tricks by going to bars and casinos. (1RT 220.)

In response, on April 18th, Bella told appellant that she could not go to bars and casinos because she was only 17 years old: "I feel a strong connection, good vibe from you. I'm struggling bad at this game maybe because I'm a youngster, too. Daddy, just know that I'm 17. Don't want to lie to you because you have been 100 with me from the get." (1RT 224.) Appellant asked when her birthday was and added, "Damn, Boo, Damn." (1RT 225.) Bella said her birthday was in November. (1RT 225.) Appellant replied, "I never fucked around like that. You not the police? This Internet shit got niggas knocked off. I'm not trying to go out like a

sucka. When's your birthday?" (1RT 226.) When Bella said her birthday was November 27, 1998, appellant replied, "Oh, you about to be 18. Cool, SMH [shake my head]." (1RT 226.) Bella gave appellant an opportunity to move on, saying, "I don't expect you to stick around. I get it, but just had to be true." (1RT 226.) However, appellant responded, "I got you as long as you keep it 100 always." Because Bella had previously said she was on the train back to Anaheim, appellant asked if she could get off in Los Angeles. (1RT 224, 227.) Bella did not respond to this message, and instead later texted him that she had arrived in Anaheim. (1RT 228.)

Over the next few days, there were miscellaneous exchanges regarding different prostitution tracks Bella was supposedly working in Orange County. (1RT 228–232.) Appellant had gone on to Las Vegas and so there was no immediate talk of meeting up, although they discussed trying to arrange a phone call. (1RT 233–235.)

C. Appellant Expresses Repeated Concerns Based on Bella Being a Minor

On April 27th, appellant called Detective Sonia Rojo, who was posing as Bella. (1RT 237, 239.) Appellant asked Bella when her birthday was; Rojo responded that it was in November. (3CT 675.) Appellant expressed concern that he would get in trouble, saying he was "scared as shit" because he knew a "homie in jail right now fighting life for that shit." (3CT 677.) When Rojo said she needed someone who would be there for her, appellant responded, "Yeah but I'm saying Bella, you got 7 months before you grown. Why don't we just wait like that?" (3CT 677.) The conversation ended with appellant saying that he might drive down from the San Fernando Valley to get her if she called him later. (3CT 678.) After this phone call, the two exchanged an additional 13 text messages over the course of the next week. (2RT 259.)

The next phone call occurred on May 5th. (1RT 251.) Appellant again asked when Bella's birthday was. When Rojo repeated that it was in November, appellant responded, "Yup. I'm just making sure you ain't telling me no lies, bitch. This is a risk." (3CT 683.) He explained that the risk was that Rojo might be working with the "po-po." (3CT 684.) Appellant threw out the possibility that Rojo could stay with her pimp until November. Rojo protested that she was "done" with him. (3CT 684.) Appellant replied, "Yeah but baby I don't wanna do the minor thing. That shit scares the fuck out of me." He again referenced his "homeboy" who had been "knocked at for the same shit." (3CT 385.) Appellant suggested another alternative: "I want to come get you bad as a mother fucker, but if I do, I'm going to have to take you to my momma[']s house until your birthday." (3CT 385.) Appellant offered to drive over to Rojo's location, but because Rojo knew she needed to assemble a team, she suddenly said she had to go and agreed to call him later that night. (3CT 686–687; 2RT 295.)

D. Despite His Concerns Regarding Her Age, Appellant Drives to Orange County to Pick Up Bella

Five days later, on May 10th, appellant and Rojo spoke again. Rojo told him she (Bella) was back in Orange County and asked appellant if he was going to pick her up. (3CT 689.) Appellant told her to get her belongings and agreed to meet her at a Jack-in-the-Box. (3CT 690.) A few hours later, appellant arranged to meet Bella at a McDonald's on Harbor in Anaheim. (3CT 697.) Rojo said that she would wait in the bathroom so that her pimp would not see her. (3CT 698.)

Appellant pulled into the parking lot of the McDonald's in a Mercedes, and waited for Bella to exit the bathroom. (1RT 121; 3CT 707.) Vice officers from the Anaheim Police Department were already staking out the location, waiting for him. (1RT 121.) At some point after he

parked and waited by the bathroom, appellant texted Bella, "I see you not real. That's fucked up." (2RT 226.) In another text, appellant wrote, "I knew better. SMH [shaking my head]." (2RT 227.) After a brief exchange with Rojo, appellant wrote, "You're the police, LMAO [laughing my ass off]." (2RT 327.)

Appellant drove out of the parking lot and officers conducted a traffic stop a short distance away. (1RT 125.) Officers retrieved an Alcatel cell phone from the car. (1RT 127.) Rojo sent the phone a text, and the phone vibrated; however, because the phone was password protected, the officers were unable to access its contents. (2RT 325, 331.) Detective Barragan called the number appellant had given and the phone lit up, displaying Barragan's cell number. (1RT 199.)

E. Business Records Demonstrate Appellant's Other Recruitment Efforts

Investigators obtained by warrant all of the text messages appellant had sent on Tagged.com, comprising over 1,000 pages of material. (1RT 186; 2RT 335.) Those records contained other examples of conversations with site users consistent with recruitment and pimping activity. (2RT 339, 348, 350.) Appellant sent solicitations to other users, generally advertising his services or identifying himself as a pimp who had the ability to increase earnings. (2RT 342–343, 356, 358.) In some messages, he sought to recruit women onto his "team" and appellant purported to have five women working for him. (2RT 345.)

F. An Orange County Jury Finds Appellant Guilty of Human Trafficking of a Minor

An Orange County jury found appellant guilty as charged of human trafficking of a minor (count 1; § 236.1(c)(1)); attempted pimping of a minor (count 2; §§ 266h, subd. (b)(1), 664); and pandering (count 3; § 266i, subd. (a)). (2CT 478–480.)

After a bifurcated hearing, the trial court found that appellant had previously suffered a prior strike (§§ 667, subd. (b)–(e), 1170.12). (4RT 703.) The court, however, found insufficient evidence to support four prior prison term convictions (§ 667.5, subd. (b)). (4RT 706.)

The trial court sentenced appellant to a total term of 24 years in prison, consisting of the aggravated term for count 1, which was doubled as a result of the strike prior. The court stayed midterm sentences for counts 2 and 3 under section 654. (4RT 737–738.)

G. A Divided Panel of the Court Of Appeal Reverses Appellant's Conviction for Human Trafficking of a Minor

Appellant appealed, asserting that his conviction for human trafficking had to be reversed based on the undisputed fact that the intended victim of his conduct was not a minor, but actually an undercover police officer. A divided panel of the Court of Appeal agreed. Writing for the majority, Justice Goethals reasoned that the language of section 236.1(c) requires as an element that the victim must be "a person who is a minor at the time of commission of the offense," and this requirement distinguishes attempted human trafficking from an ordinary criminal attempt defined in section 21a. (Slip opn. (opn.) 2.) Looking to section 236.1, subdivision (f), which forecloses the defense of a defendant's mistaken belief as to the age of a victim who is a minor, Justice Goethals determined that the defendant need not have the specific intent to traffic a minor, thus again distinguishing attempted sex trafficking under 236.1(c) from an ordinary criminal attempt. (Opn. 2.) The majority concluded it could not reduce the charged offense to an attempt under section 21a because, based on the instructions given, it could not determine whether the jury necessarily concluded appellant had the intent to traffic a minor. (Opn. 12.)

Accordingly, the majority reversed the sex trafficking conviction outright, and ordered the case remanded for resentencing. (Opn. 13.)

In dissent, Justice Aronson concluded that the majority opinion was inconsistent with how this Court and other appellate courts have interpreted similar criminal statutes that specifically penalize criminal attempts. (Dis. opn. of Aronson, J., at 1.) Punishing a sex trafficker such as appellant at one-half the prescribed punishment would also be inconsistent with the stated purposes of section 236.1. (*Id.* at 5-8.)

Justice Aronson took issue with the majority's conclusion that the attempt prong of section 236.1(c) is materially different from the general attempt statute. Contrary to the majority's construction, he concluded that section 236.1(c) has only two elements: (1) a specific intent to commit the proscribed offense and (2) the commission of a direct but ineffectual act towards its completion. (Dis. opn. of Aronson, J., at 8.) Further, even under the majority's construction, general attempt principles would still preclude factual impossibility from operating as a valid defense. (*Ibid.*)

As for the majority's reliance on subdivision (f), which precludes a mistake of age defense where the victim is "a minor at the time," Justice Aronson observed that the mistake of age defense would still be available for human trafficking crimes not involving actual minors. Consequently, it is not necessary to interpret section 236.1(c) as a nonattempt offense in order to harmonize it with section 236.1, subdivision (f). (Dis. opn. of Aronson, J., at 10.)

Finally, Justice Aronson noted that providing full punishment for those who attempt to traffic in children comported with the stated policies behind Proposition 35, which enacted section 236.1(c). As he observed, "Under the majority's construction . . . police preventative measures to ferret out online human traffickers such as the sting operation conducted here would come at the cost of either securing a conviction for a lesser

crime (attempt to attempt human trafficking) or putting an actual child in harm's way (by using an actual minor as the decoy)." (Dis. opn. of Aronson, J., at 11.)

ARGUMENT

I. AN ATTEMPT TO SEX TRAFFIC A MINOR UNDER SECTION 236.1(C) DOES NOT REQUIRE THE EXISTENCE OF AN ACTUAL MINOR

In amending section 236.1 in 2012 as part of Proposition 35, the electorate demonstrated its intent to prevent online predators from being able to sex traffic children. It specifically sought to combat this scourge by adding attempts as part of the new separate offense of child sex trafficking, thereby making the crime both easier to prove and also subject to greater punishment. By using the word "attempts," the electorate intended to give that term its typical legal meaning—a meaning that does not require the completion of any particular element. It would be antithetical to the plain language of the amendments to conclude that such an attempt could only be committed if the victim was actually a minor. The wording of the statute construed as a whole, including the requirement of a minor, supports this construction as a matter of accepted rules of grammar. The language of other subdivisions, including subdivisions (a) and (b), provides additional support, and nothing in subdivision (f) suggests otherwise. Finally, the electorate's findings and express intent in enacting the amendments, as well as the untenable consequences and juror confusion that would result from requiring the prosecution to charge an attempt to attempt to sex traffic a minor, reinforce this conclusion. Such a requirement would only matter in the context of a police sting, and there is no reason the electorate would have wanted to curtail these effective practices.

A. Principles of Statutory Interpretation Require This Court to Determine the Electorate's Intent

"'In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration.'" (*People v. Gonzales* (2017) 2 Cal.5th 858, 868, quoting *In re Lance W.* (1985) 37 Cal.3d 873, 889.) In order to determine this intent, a reviewing court begins by examining the statutory language. (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) "To the extent that uncertainty remains in interpreting statutory language, 'consideration should be given to the consequences that will flow from a particular interpretation' [citation], and both legislative history and the 'wider historical circumstances' of the enactment may be considered." (*People v. Cruz* (1996) 13 Cal.4th 764, 782–783.) And while it is true as a general rule that ambiguities should be interpreted in the defendant's favor, this rule does not apply "if such an interpretation would provide an absurd result, or a result inconsistent with apparent legislative intent." (*Id.* at p. 783.)

In order to place the language of section 236.1 in appropriate context, it is important to consider both the overall structure of the statute as well as its wider historical circumstances. (*People v. Zambia* (2011) 51 Cal.4th 965, 977.)

B. The History and Text of Section 236.1 Reveal an Intent to Punish Mere Attempts to Sex Traffic When the Victims Are Children

The history of section 236.1 demonstrates a legislative intent to increase the penalties for sex trafficking, provide greater protection for children, and enable law enforcement officers to combat online predators.

Section 236.1 was added in 2005 as part of the California Trafficking Victims Protection Act. (Stats. 2005, ch. 240, § 7.) As originally enacted, the statute had both limited reach and also limited penalties. It proscribed

the crime of human trafficking, defined as "Any person who deprives or violates the personal liberty of another with the intent to effect or maintain a felony violation of [specified sex offenses], or to obtain forced labor or services . . . ." (*Id.*, subd. (a).) A violation of that provision was subject to imprisonment in the state prison for three, four, or five years, or, if the victim of the trafficking was under 18 years of age, by imprisonment in the state prison for four, six, or eight years. (*Id.*, subds. (b) & (c).) But while this early version of the statute proscribed increased penalties for crimes against minors, it did not create a separate offense for such victims.

Within a few short years, it became apparent that these measures were not enough. In 2010, the Legislature added additional punishment in the form of fines up to $100,000 when the trafficked person was under the age of 18. (Stats. 2010, ch. 219, § 3.) But this was still not enough.

Two years later, in 2012, the electorate enacted Proposition 35, the CASE Act, which once again increased the penalties and also added three separate violations where there was formerly only one. In the process, the electorate also made the crime easier to prove when the victim is a minor.

As amended by Proposition 35, section 236.1, subdivision (a), created an overarching offense of depriving or violating the personal liberty of another with the intent to obtain forced labor or services; subdivision (b) made it a crime to deprive or violate the personal liberty of another with the intent to effect or maintain a violation of certain specified sex offenses; and subdivision (c) prohibited causing, inducing, persuading, or *attempting* to cause, induce, persuade, any minor to engage in a commercial sex act with the intent to violate any of those same provisions. Thus, subdivision (c), which applies exclusively to minor victims, contains different elements

than the other two subdivisions or the previous version of the statute—and that provision is the only one to punish mere attempts.[2]

Subdivision (f) eliminates certain mistake of fact defenses regarding the age of the victim: "Mistake of fact as to the age of a victim of human trafficking *who is a minor at the time of the commission of the offense* is not a defense to a criminal prosecution under this section." (Italics added.)

Violations of subdivision (a) became subject to imprisonment for 5, 8 or 12 years and a fine of up to $500,000; subdivision (b) increased the punishment to 8, 14, or 20 years and a fine of up to $500,000; and subdivision (c) included punishment of 5, 8, or 12 years and $500,000, or up to 15 years to life when the offense involves fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person.

As part of Proposition 35, the electorate included the following findings and declarations in support of the new law:

> 1. Protecting every person in our state, *particularly our children*, from all forms of sexual exploitation is of paramount importance.
>
> 2. Human trafficking is a crime against human dignity and a grievous violation of basic human and civil rights. Human trafficking is modern slavery, manifested through the exploitation of another's vulnerabilities.

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[2] As amended by Proposition 35, section 236.1(c), with which appellant was charged, provided in relevant part as follows:

"(c) Any person who causes, induces, or persuades, *or attempts to cause, induce, or persuade*, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of Section 266, 266h, 266i, 266j, 267, 311.1, 311.2, 311.3, 311.4, 311.5, 311.6, or 518 is guilty of human trafficking." (Italics added.)

The Legislature made additional non-substantive changes to section 236.1 in 2016. (Stats. 2016, ch. 86, § 223.5.)

3. Upwards of 300,000 American children are at risk of commercial sexual exploitation, according to a United States Department of Justice study. Most are enticed into the sex trade at the age of 12 to 14 years old, but some are trafficked as young as four years old. Because minors are legally incapable of consenting to sexual activity, these minors are victims of human trafficking whether or not force is used.

4. *While the rise of the Internet has delivered great benefits to California, the predatory use of this technology by human traffickers and sex offenders has allowed such exploiters a new means to entice and prey on vulnerable individuals in our state.*

5. *We need stronger laws to combat the threats posed by human traffickers and online predators seeking to exploit women and children for sexual purposes.*

6. We need to strengthen sex offender registration requirements to deter predators from using the Internet to facilitate human trafficking and sexual exploitation.

(Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 35, § 2, p. 101, italics added.)

In addition, the voters provided the following statement of purpose and intent:

1. To combat the crime of human trafficking and *ensure just and effective punishment of* people who promote or engage in the crime of human trafficking.

2. To recognize trafficked individuals as victims and not criminals, and to protect the rights of trafficked victims.

3. To strengthen laws regarding sexual exploitation, including sex offender registration requirements, *to allow law enforcement to track and prevent online sex offenses and human trafficking.*

(*Id.*, § 3, italics added; see also *In re Aarica S.* (2014) 223 Cal.App.4th 1480, 1485-1486 [citing findings as well as purpose and intent of Proposition 35].)

C. By Incorporating Criminal "Attempts," the Plain Language of Section 236.1(c) Makes the Existence of an Actual Minor Unnecessary

By allowing for "attempts" to traffic a minor as an alternative element, the electorate chose to include a legal term of art that is expressly defined in the Penal Code. As this Court and other appellate courts have concluded in interpreting similar statutory provisions, the use of the term "attempts" incorporates the well-established body of decisional authority that construes the requirements of an attempt. In particular, this term includes the requirement that the defendant possess a specific intent, and the limitation that impossibility does not provide a defense. Applying these principles here, it follows that if a defendant had a specific intent to traffic a minor, and he took a direct but ineffectual act toward doing so, then he is guilty of violating section 236.1(c) even if it was impossible for him to complete the offense because the victim was not a minor.

1. A Criminal Attempt Does Not Require the Existence of an Actual Victim

"An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) "In general, the specific intent required by the law of attempt does not require a showing that the intended act would be effective in completing the target crime." (*People v. Chandler* (2014) 60 Cal.4th 508, 517.) Likewise, this Court has held "that the commission of an attempt does not require proof of any particular element of the completed crime." (*Ibid.*; see also *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 187 ["The act need not be an element of the offense, but only constitute an immediate step in the execution of the criminal design"].) If a defendant has the specific intent to complete the target crime, "the impossibility of completing the crimes does not exonerate him from

attempting those offenses." (*Hatch*, *supra*, 80 Cal.App.4th at pp. 185–186.) Applying these principles, cases have found sufficient evidence of a criminal attempt where, for example, a defendant had sex with a body he believed was alive, but was actually dead; or where the defendant attempted to assist a suicide by encouraging the victim to take pills that were not actually lethal. (*Chandler*, *supra*, 60 Cal.4th at p. 517, citing cases.)

It follows from these principles that under the general law governing attempts, an attempt may be completed even without the existence of an actual victim, as in the case of a police sting operation. The decision in *People v. Reed* (1996) 53 Cal.App.4th 389 is instructive. There, an undercover sheriff's detective began a correspondence with the defendant in response to an advertisement in Swing magazine. The detective, posing as a woman, arranged for the defendant to have sex with two imaginary young girls in order to teach them the "facts of life." The defendant was arrested for attempted child molestation when he arrived at a designated motel room and brought with him various sex toys. (*Id.* at pp. 394-396.) On appeal, he claimed that he had committed no more than an act of preparation and not a completed attempt. In particular, he argued that there could not be a completed attempt unless there were potential victims present in the motel room. (*Id.* at p. 396.) The Court of Appeal rejected those claims.

As the *Reed* court reasoned, "The crime of attempt requires two elements: 'a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.'" (*People v. Reed, supra*, 53 Cal.App.4th at p. 398, citing § 21a.) "Just because defendant was not given the opportunity to observe, approach, or actually touch 'real' children under 14 as part of the sheriff's department's 'sting' operation does not mean that he was not culpable or criminally liable for stepping, along with a woman he believed to be his accomplice in crime, into the room where he believed he

would carry out his seduction of 2 girls under the age of 14 years." (*Id.* at p. 399.)

In *Reed*, there was substantial evidence of a criminal attempt even though the victims did not exist. (See also, *Hatch*, *supra*, 80 Cal.App.4th at pp. 185-188 [fact that an intended victim of a lewd act is over the age of 14 does not prevent a defendant from being convicted of attempting to commit such a crime where he believes the victim is under 14].) The same result follows with an attempt to induce or persuade a minor under section 236.1(c). This is because, as noted, "the commission of an attempt does not require proof of any particular element of the completed crime." (*People v. Chandler, supra,* 60 Cal.4th at p. 517.)

Likewise, it also follows from these principles that a defendant could attempt a given crime even without identifying a specific victim. For instance, a defendant who brings candy to an elementary school for the expressed purpose of persuading a child to commit a sex act would satisfy the requirements of an attempted lewd act even if police arrested him before he approached a specific victim. In this example, the defendant would have satisfied the requisite intent plus a direct but ineffectual act towards its commission. (See *People v. Herman* (2002) 97 Cal.App.4th 1369, 1392 [rejecting assertion that the defendant could not have committed an appreciable fragment of his crime necessary for an attempted lewd act until he found a willing victim].)

Attempts are generally punishable under section 664, subdivision (a), at one-half the term proscribed for the completed offense. However, this provision applies by its express terms "where no provision is made by law for the punishment of those attempts." (§ 664.) Some statutes specifically incorporate attempts into the definition of the criminal offense and thus provide punishment for those attempts. (E.g., §§ 455 [attempted arson]; 4532, subd. (b)(1) [attempted escape from custody]; see generally, 1 Witkin

& Epstein, Cal. Criminal Law (4th ed. 2012) Elements § 61, p. 351.) Section 236.1(c) is one such statute, and its penalty provisions, rather than those of section 664, control.

By using the word "attempts," "section 236.1, subdivision (c), incorporates 'attempt into the crime itself'" and therefore "no separate attempt charge is required." (Dis. opn. of Aronson, J., at 8, quoting *People v. Korwin* (2019) 36 Cal.App.5th 682, 688.)

2. This Court and Others Have Incorporated the Law of Attempt When Interpreting Analogous Penal Code Provisions

Cases construing other Penal Code provisions that incorporate attempts as alternative elements are instructive in interpreting similar language in section 236.1(c). Particularly useful is this Court's decision in *People v. Bailey* (2012) 54 Cal.4th 740, 749-750, which was penned only a few months before the electorate voted on Proposition 35. Equally instructive is federal law, which section 236.1 specifically references.

In interpreting initiative measures enacted by the voters, "[t]he adopting body is presumed to be aware of existing laws and judicial construction thereof [citation] . . . ." (*In re Lance W., supra,* 37 Cal.3d at p. 890, fn. 11.) The electorate was therefore presumably aware when it used the term "attempt" that this term would incorporate the essential elements from the law of attempt. Under these principles of attempt, the crime could be committed even without an identified victim or a minor. Moreover, the impossibility that the defendant could commit the offense is immaterial; the relevant question is whether the crime could be committed under the facts as the defendant believed them to be.

a. The Attempt to Escape From Custody Cases and Statutes

Over four decades ago, Division One of the Fourth Appellate District concluded that section 4532, subdivision (b), which proscribes the "escape or attempt to escape" from specified institutions, specifically incorporates the "essential elements of an attempt to commit a crime." (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 515–518.) There, the defendant claimed on appeal that the trial court committed error in refusing to instruct the jury that an attempt to commit a crime consists of a specific intent to commit the crime and a direct but ineffectual act done toward its commission. In agreeing with the defendant that the instruction should have been given, the appellate court specifically concluded that even though the attempt to escape was made punishable under section 4532 and not under the general attempt provisions of Penal Code section 664, "the *essential elements* of an attempt to commit a crime, so as to make the attempt itself punishable, are present in an attempt to escape *as well as* in those attempts made punishable under Penal Code section 664." (*Id.* at p. 516, italics added.) The court rejected the People's argument that because the attempt to escape was included in section 4532, rather than section 664, only a general intent was required:

> The argument is unsound that because the punishment for attempted escape is specifically provided for in section 4532, the crime is moved out of the class of attempts of which a specific intent is an element, to the status of a substantive crime that requires only a general intent to commit the act: that act being an attempt to escape. *The argument, in opening the possibility that there is such a crime as an attempt to attempt to escape, leads onto a logical merry-go-round.*

(*Ibid.*, italics added.) Thus, the *Gallegos* court concluded that by using the term "attempt," the Legislature incorporated the traditional rules relating to attempt into the statute.

Interpreting the related provisions in section 4530, subdivision (b), which likewise proscribes an escape or attempt to escape from a specified institution, this Court specifically agreed with *Gallegos* and reaffirmed the conclusion reached in that decision regarding the specific intent required for an attempt to escape. (*People v. Bailey*, *supra*, 54 Cal.4th at pp. 749-750.) The issue in *Bailey* was whether attempt to escape is a lesser included offense of escape, such that an appellate court could modify an escape conviction to attempt to escape where there is insufficient evidence of escape. (*Id.* at p. 747.) This issue arose because the trial court did not instruct the jury regarding attempt as an alternative element, and the prosecution proceeded solely on the incorrect theory that there had been a completed offense. (See *id.* at pp. 745-747, 752.)

Under the elements test, attempt to escape is not a lesser included offense of escape, since it requires additional proof that the prisoner actually intended to escape. (*Bailey*, *supra*, 54 Cal.4th at p. 1125.) The People argued that because section 4530 codified the offense of attempt to escape in a different provision, the specific intent requirements of sections 21a and 664 did not apply, and the crime could therefore be reduced. In so arguing, the People analogized attempt to escape to assault, which requires only a general intent. (*Id.* at p. 750.) This Court rejected that argument, noting that "[u]nlike assault, the act constituting an attempt to escape is not defined in terms of its proximity to the completed escape," and pointing out that respondent had provided no legislative history or case law to support this argument, which *Gallegos* had already rejected. (*Id.* at p. 750.) The Court not only declined to overrule *Gallegos*, but saw "no reason to depart from its holding." (*Id.* at p. 751.)

b. Attempts to Dissuade a Witness/Victim from Testifying Under Section 136.1

Cases interpreting section 136.1, subdivision (a)(2), are also instructive. That section proscribes any person from "[k]nowingly and maliciously attempt[ing] to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." Under this statute, "[a] threat need not actually deter or reach the witness because the offense is committed when the defendant makes the attempt to dissuade the witness." (*People v. Foster* (2007) 155 Cal.App.4th 331, 335 [defendant violated statute by instructing third party to deliver message to witness, even though third party never did so].) In *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1519, for instance, the defendant was properly convicted of a separate count for each telephone call he made to his sister to contact a witness. (*Ibid.* ["crime is completed once the defendant takes an immediate step toward having another person knowingly and maliciously attempt to persuade a witness from assisting in a prosecution"].)

Here, appellant argued in the court below that cases interpreting section 136.1 have not held that there can be a violation of that statute if someone attempts to prevent or dissuade a decoy who is not a victim or witness. (AOB 35.) But he failed to recognize the significance of cases such as *Foster* and *Kirvin*. Because the crime in those cases was complete once the defendant made his calls to an intermediary, it did not matter whether the message ever reached the victim or witness. Whether the victim/witness was dead, never actually witnessed any event, or was an undercover police officer would not matter, because the crime was complete based on the events that the defendant perceived to be true. By parity of reasoning, the crime of attempting to cause, induce, or persuade a minor under section 236.1(c) is complete once the defendant takes an

immediate step toward persuading the minor, even if that message never reaches the minor or even if there was no actual minor to begin with.

c. Attempts to Entice a Minor for Illegal Sexual Activity Under Federal Law

Finally, federal law is also instructive. Prior to enactment of Proposition 35, several federal courts had interpreted similar attempt language in title 18 of United States Code section 2422(b),[3] regarding attempts to entice a minor to engage in illegal sexual activity, and consistently rejected arguments that there could be no conviction under that statute without an actual minor in the context of police sting operations. (See, e.g., *United States v. Lee* (11th Cir. 2010) 603 F.3d 904, 912-913 [defendant could properly be convicted of attempted enticement of a minor even though he attempted to exploit only fictitious minors]; *United States v. Coté* (7th Cir. 2007) 504 F.3d 682, 684-688 [defendant could be guilty if he mistakenly believed victim was a minor]; *United States v. Pierson* (8th Cir. 2008) 544 F.3d 933, 939 [factual impossibility is not a defense]; *United States. v. Helder* (8th Cir. 2006) 452 F.3d 751, 753-756 [intended victim need not be an actual minor]; *United States v. Meek* (9th Cir. 2004) 366 F.3d 705, 718 [same]; *United States v. Root* (11th Cir. 2002) 296 F.3d 1222, 1227 ["The fact that Root's crime had not ripened into a completed offense is no obstacle to an attempt conviction"]; *United States v. Franer* (5th Cir. 2001) 251 F.3d 510, 513 [rejecting legal impossibility defense to violate § 2422].) In *Meek*, for instance, the court squarely framed the question as whether that section "imposes criminal liability when the

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[3] That provision provides in relevant part: "Whoever. . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, *or attempts to do so,* shall be fined under this title and imprisoned. . . ." (Italics added.)

defendant believes he is inducing a minor, but the object of his inducement is really an adult." (*Ibid.*, fn. omitted.) The Ninth Circuit answered that question in the affirmative: "We join our sister circuits in concluding that 'an actual minor victim is not required for an attempt conviction under 18 U.S.C. § 2422(b).'" (*Meek*, *supra*, 366 F.3d at p. 718.)

The drafters of California's initiative measure were well familiar with federal law and its requirements. In fact, section 236.1, subdivision (g), specifically states that the definition of human trafficking is intended to be the equivalent to the felony definition of an aggravated form of trafficking found in the United States Code. Thus, it is a reasonable inference the drafters were also familiar with section 2422(b) of title 18 of the United States Code, and the interpretation of its attempt language in the context of sting operations.

d. The Court of Appeal Majority Largely Failed to Respond to These Other Statutes

The Court of Appeal majority did not address *Gallegos* or *Bailey*,[4] the escape statutes, or the federal enticement statute. Instead, the court relied in large part on the First Appellate District's decision in *People v. Shields* (2018) 23 Cal.App.5th 1242. (Opn. 5-7.) In *Shields*, as in the present case, officers created an Internet profile for an imaginary prostitute. (*Shields*, *supra*, at p. 1250.) On appeal, the defendant claimed that section 236.1(c) violates due process because it authorizes the prosecution to prove attempted human trafficking of a minor without requiring the prosecution to establish the defendant specifically intended to commit this crime. (*Ibid.*) He also maintained that by instructing the jury that mistake about a victim's age is not a defense, the instructions permitted the jury to find him guilty

[4] The majority confined its discussion of *Bailey* to a footnote concerning an unrelated point regarding when an attempt constitutes a lesser included offense of a completed crime. (Opn. 13, fn. 7.)

for an attempt crime without proof that he specifically intended to cause, induce, or persuade a minor to engage in a commercial sex act. (*Ibid.*) The *Shields* court rejected both of these contentions, concluding that the "statute requires that the other person must be a minor under the age of 18, but it does not require that the defendant specifically intend or even know that his victim is a minor." (*Ibid.*)

The *Shields* court then turned to an issue not raised by the parties. After ordering supplemental briefing on the question of whether the absence of an actual minor precluded a conviction under section 236.1(c), the court rejected the People's argument that section 236.1(c) punishes attempts and completed offenses identically. The *Shields* court described this argument as "summarily" made, and chided the People for not "identify[ing] any statute that punishes an attempt and a completed offense identically." (*Shields*, *supra*, 23 Cal.App.5th at p. 1257.)

In this case, unlike *Shields*, the People did identify several statutes that punish attempts and completed offenses identically, as well as cases interpreting those provisions, as Justice Aronson specifically noted in dissent. (See dis. opn. of Aronson, J., at 11.) Rather than address the escape statutes, the majority responded generally that "as the Supreme Court has explained, 'the meaning of "attempt" can vary with the criminal context.' (*People v. Colantuono* (1994) 7 Cal.4th 206, 216, abrogated by statute on another ground as stated in *People v. Conley* (2016) 63 Cal.4th 646, 660, fn. 4.)" (Opn. 7.)

It is noteworthy that the majority cited *Colantuono* and not *Bailey*. *Colantuono* was an assault case that reiterated that this crime requires only a general intent. In reaching that conclusion, this Court traced the "confusion" and "consternation" on the subject to the historical shorthand characterization of assault as an "attempted battery," and the conclusion that as such, it must require a specific intent. (*Colantuono*, *supra*, 7 Cal.4th

at p. 215.) As this Court recognized, the definition of assault as an "attempt" to create a violent injury (§ 240) was an historical anomaly: "In defining it as an 'attempt' (Pen. Code, § 240), the Legislature of 1872 used the reference only in its ordinary sense, not as the term of art we currently conceptualize, i.e., a failed or ineffectual effort to commit a substantive offense." (*Colantuono*, *supra*, 7 Cal.4th at p. 216, fn. omitted.)

For similar reasons, this Court in *Bailey* specifically declined to rely on the definition of attempt as used in the assault context (*Bailey*, *supra*, 54 Cal.4th at p. 750), and it should do so once again here. When the electorate used the word "attempts" in section 236.1(c) in 2012, it did not mean to employ an antiquated use of the term from the 1870's. Unlike an assault, as this Court reasoned in *Bailey*, the act constituting an attempt to sex traffic is not defined in terms of its proximity to the completed sex trafficking. (*Bailey*, *supra*, 54 Cal.4th at p. 750.) The Court of Appeal here pointed to no legislative history or case law to support any analogy of attempt to sex traffic a child to assault. And while it is perhaps true that the meaning of any term can vary with the criminal context, it is equally true, as Justice Aronson explained, that """"It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts.""""" (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007.) ""This principle applies to legislation adopted through the initiative process."" (*People v. Lawrence* (2000) 24 Cal.4th 219, 231.)" (Dis. opn. of Aronson, J., at 4, parallel citations omitted.)

In contrast to its treatment of the escape statutes and cases, the majority sought to distinguish attempts to dissuade a witness or victim from testifying under section 136.1. As the majority reasoned, that statute and

the cases interpreting it are inapposite because section 236.1(c) "on its face requires the victim maintain a specified status at the moment the crime is committed—that of a minor—while section 136.1 does not." (Opn. 11.) This argument, however, misses the point. Section 136.1, subdivision (a)(2), also "on its face" requires the existence of a "witness or victim"—a person with a particular and specified status. The reason that an attempt may be sufficient under that provision even if the threat never reaches the witness or victim is not because of a statutory absence of any such required person or that person's status. Instead, it follows from the well-accepted principle "that the commission of an attempt does not require proof of any particular element of the completed crime." (*People v. Chandler, supra,* 60 Cal.4th at p. 517.) This principle holds true regardless of whether the crime involves the rape of a (deceased) victim, a (nondelivered) threat to a victim/witness not to testify, or even the sex trafficking of a (fictitious) victim.

D. A Natural Reading of the Grammatical Structure of Section 236.1(c) Reveals an Intent to Create a Typical Attempt Statute

The grammatical syntax of section 236.1(c) supports the view that the electorate intended that provision to operate as a typical attempt statute, rather than create a previously unknown hybrid form of attempt that does not include a specific intent. Appellant and the Court of Appeal majority artificially bisect the operative statutory language and read it in an unnatural manner so that the attempt language is a stand-alone requirement that does not modify the supposedly separate requirement of an actual minor.

As noted, the relevant language of section 236.1(c) applies to "[a]ny person who . . . attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial

sex act." The Court of Appeal majority interpreted this language as requiring three separate elements. While an attempt requires two elements—1) criminal intent; and 2) an ineffectual act toward omitting the crime—the majority concluded that section 236.1(c) requires an additional and separate third element that the victim be a minor. (Opn. 7.) But this interpretation artificially isolates the attempt language from the remaining portions of subdivision (c), yielding an unnatural and grammatically incorrect reading. The phrase "a person who is a minor" is the object of the verb "attempts" and a necessary part of the verb phrase, "attempts to cause, induce, or persuade." Each of the three infinitives "cause, induce, or persuade," are transitive verbs, meaning that they take a direct object. The phrase "attempts to cause, induce, or persuade" requires this object or otherwise it makes no sense. (See *People v. Hobbs* (2007) 152 Cal.App.4th 1, 10 (Richli, J., dissenting) ["As we all learned in high school, a transitive verb has a direct object"].) The two clauses should therefore not be considered separately, but instead together as part of a single grammatical unit. (See *Flores-Figueroa v. United States* (2009) 556 U.S. 646, 650 ["In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb . . . that modifies the transitive tells the listener how the subject performed the entire action, including the object as set forth in the sentence"]; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132 [interpreting verb, direct object, and prepositional phrase together as a whole in context of gang statute].)

It is wrong to read the statute as requiring an attempt plus an additional element of a minor; instead, the minor is an integral part of whom the defendant must attempt to persuade.[5] The defendant cannot

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[5] By way of example, consider the phrase, "She smells the pizza." Dividing the verb from the object gives rise to the incorrect reading that she

(continued...)

simply attempt to cause, induce or persuade; he must attempt to cause, induce, or persuade *someone*. (Cf. *In re Sergio R.* (1991) 228 Cal.App.3d 588, 600-601 ["In order to invoke the enhancements of section 12022.7 or 12022.55, it is not enough to prove only that the defendant intentionally set the injury-causing force in motion; it is also necessary to prove that in doing so the defendant intended to inflict the great bodily injury on a person"].)

It is an accepted cannon of statutory construction that ordinary rules of grammar apply unless they lead to an absurd result. (*Busching v. Superior Court* (1974) 12 Cal.3d 44, 52.) Here, there is nothing absurd about holding that the attempt to cause/induce/persuade is modified by the requirement of a person who is a minor. To the contrary, and as discussed further below, the absurdities result when the prosecution is required to overlay this attempt with another attempt.

The majority below did not undertake a grammatical analysis of section 236.1(c). Instead, it relied on *Shields*, which likewise concluded that "the attempt prong of the statute is distinct from the separate crime of attempt because a completed violation of the statute requires a person under the age of 18 while an attempt to violate the statute does not." (*Shields, supra,* 23 Cal.App.5th at p. 1257.) But the *Shields* court simply begged the question in so concluding, and the majority here did nothing more than adopt the same unexamined reasoning. Neither court questioned whether the direct object of a minor modifies the verb "attempts," or instead created a separate grammatical unit. In fact, in response to respondent's argument that the *Shields* court improperly added a separate element, rather than

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"smells"; it is only when the object is considered as part of the verb phrase that the meaning of the verb becomes clear.

consider the phrase together as a single grammatical unit, the majority simply responded that this separate element was added by the electorate, rather than by that court or *Shields*. (Opn. 7-8.)

Later, the majority rejoined that the electorate could easily have drafted the statute to specify that it applies to a "'person who is a minor or is reasonably believed to be a minor'" rather than limiting the language to a person who is a minor. (Opn. 11.) In this way, claimed the majority, the electorate would have made clear its intent that the case of non-existent police decoys should nonetheless be prosecuted under section 236.1(c), rather than as attempts. (*Ibid.*)

As an initial matter, however, the electorate may well have declined to expand the statute in this manner by opening the door to attempt offenses based on what a defendant should *reasonably* have known regarding the victim's age, as opposed to what he *actually* believed. As discussed further below, and as the majority itself underscores, subdivision (f) went to great lengths to remove certain defenses regarding the defendant's belief in the victim's age, while at the same time retaining other defenses that would apply only in the context of a sting operation involving a non-existent minor.

In contrast, in enacting Proposition 83 in 2006, which added section 288.3, and which includes language similar to that suggested by the majority, the electorate did not include wording like that found in subdivision (f) regarding mistakes of age. Section 288.3 proscribes contacting or attempting to contact a person the defendant "knows or reasonably should know" is a minor with the intent to commit a specified sex offense.[6] Unlike the substantial penalties provided in section 236.1(c),

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[6] Section 288.3, subdivision (a), provides: "Every person who contacts or communicates with a minor, or attempts to contact or

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violations of section 288.3 are punished the same as attempts to commit the underlying sex crime, or in other words at one-half the term of the completed offense. (§§ 288.3, subd. (a), 664.) Given these reduced penalties in section 288.3, the electorate may well have believed it is appropriate to punish a defendant based on a reasonable person standard, rather than actual knowledge or belief. (See generally *People v. Korwin*, *supra*, 36 Cal.App.5th at pp. 688–690 [rejecting challenge to conviction under § 288.3 based on the ground that undercover agent was not a minor].) The fact that the drafters of Proposition 35 decided not to include similar language in section 236.1 does not mean, however, that the statute did not incorporate the requirements for an attempt. (See *United States. v. Banker* (4th Cir. 2017) 876 F.3d 530, 539 [noting that attempt clause of federal enticement offense puts the defendant's knowledge "at issue in a different way than the completed offense"].)

E. The Language of Other Portions of Section 236.1 Supports the Conclusion That No Actual Minor Is Required

The electorate's intent for section 236.1(c) to apply regardless of the actual existence of a minor is especially evident when comparing the different language of subdivisions (a) and (b) with subdivision (c). Of these three subdivisions, only subdivision (c) applies to minor victims. And commensurate with protecting such particularly vulnerable victims, the electorate used the broadest language possible in defining that crime. Whereas subdivisions (a) and (b) are couched in terms of the completed acts of any person who "deprives or violates" the personal liberty of

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(...continued)
communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit [a specified sex offense], involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense."

another, subdivision (c) speaks in terms of a person who "causes, induces, or persuades." By themselves, and even without consideration of the alternative attempt provisions, these terms are already much broader than the counterparts in subdivisions (a) and (b). Unlike "depriv[ing]" or "violat[ing]," the verb "persuades" in particular does not require a successfully completed act. The term "persuade" is defined as "1: to move by argument, entreaty, or expostulation to a belief, position, or course of action; 2: to plead with: URGE." (Merriam Webster's Online Dictionary (2019) <http://www.merriam-webster.com/dictionary/persuade> [as of Dec. 5, 2019].)

Pleading and urging do not require successful convincing; and even when a listener is "moved" to a position, it does not follow that the listener will ultimately act on that position. Notably, the crime of pandering includes similar elements without "attempt" language (see § 266i, subds. (a)(2) & (4)), yet appellant does not challenge his conviction for violating that provision as a completed offense under the facts here.

The difference in this language in subdivision (c), compared to that in subdivisions (a) and (b), underscores the electorate's emphasis on prevention of child sex trafficking, rather than simply punishing defendants once they have already successfully trafficked and imperiled children. Even if the electorate had not included the alternative attempt language within subdivision (c), that offense by its terms would already have included a pimp who sought to entice a minor into committing acts of prostitution, even if the minor did not ultimately do so or the minor was unconvinced in the benefits of the pimp's proposal. By including the alternative attempt language, the electorate therefore meant to go beyond what was already included in the word "persuade" and capture additional conduct under the inchoate offense of attempt—an offense that while requiring more than mere acts of preparation does not necessitate that the

defendant had to take the final step of pleading with or urging a particular minor.

In light of the statute's broad and alternative language, it would have been inconsistent for the electorate to give with one hand and take with the other by nonetheless requiring the existence of an actual minor as an additional element.

F. Subdivision (f) Does Not Demonstrate the Need for a New Definition of "Attempts"

As previously noted, subdivision (f) eliminates certain mistake of fact defenses regarding the age of the victim: "Mistake of fact as to the age of a victim of human trafficking *who is a minor at the time of the commission of the offense* is not a defense to a criminal prosecution under this section." (Italics added.)

The majority summarized this provision as providing that "a defendant's mistaken belief that the minor was of age is not a defense to attempted human trafficking." (Opn. 2; see also *id.* at 8.) From this (incorrect) summary, the majority concluded that the electorate had therefore eliminated any requirement of a specific intent to traffic a minor in subdivision (c): "In other words, the defendant need not harbor the specific intent to traffic a minor—thus distinguishing the attempted trafficking defined in section 236.1(c) from an ordinary criminal attempt under section 21a." (Opn. 2.)

But the majority's argument founders at the inception based on its incorrect summary of the statute. Moreover, requiring a specific intent to commit an attempt is wholly consistent with the electorate's intent to punish inchoate acts—regardless of whether that specific intent applies to each of the requirements for committing a violation. Finally, even if subdivision (f) makes the offense *easier* to prove by eliminating the requirement of a specific intent, there is no reason to believe it would, at the

same time, make the offense *more difficult* to prove by creating an otherwise unavailable defense of impossibility.

1. The Mistake of Fact Defense Applies When a Victim is Not Actually a Minor

Contrary to the majority's suggestions, subdivision (f) does not broadly do away with any and all mistake of age defenses; rather, that provision applies if and only if the victim is actually "a minor at the time of the commission of the offense." If the electorate had wanted to completely do away with any reliance on a mistake of age, it would not have added this limitation.

Under the statute as written, a defendant can still claim mistake of age where the minor does not exist, and is therefore not "a minor at the time of the commission of the offense," as in the case of a police sting operation. And this allowance makes perfect sense. In the case of an attempt to persuade a non-existent, imaginary victim, it is reasonable to require a higher level of intentionality to traffic a minor. While it may well be the case that for completed acts of sex trafficking a defendant bears the risk that the victim is actually a minor, and therefore the defendant cannot claim a mistake of age, different considerations apply in the context of a mere inchoate attempt.

Subdivision (f) applies to both completed acts of sex trafficking and attempts to sex traffic under subdivision (c). There is nothing intrinsically inconsistent with treating those acts in a different manner. (See *United States. v. Banker*, *supra*, 876 F.3d at p. 539 [distinguishing cases construing the knowledge requirement under 18 U.S.C. § 2422 for attempts as opposed to completed acts]; *United States v. Daniels* (11th Cir. 2012) 685 F.3d 1237, 1250 [same].) In this sense, section 236.1(c) is once again similar to the escape statutes, which provide for a general intent for completed offenses, but a specific intent for attempted ones. (See *People v. Bailey*,

supra, 54 Cal.4th at p. 749 ["Unlike escape, attempt to escape requires a specific intent to escape"].)

Because subdivision (f) does not eliminate all mistakes of age, particularly in cases of attempts, it does not follow that this provision demonstrates that only a general intent is required for attempts under subdivision (c) regarding the age of the victim. The majority's effort to distinguish an attempted trafficking under subdivision (c) from an ordinary criminal attempt under section 21a therefore also falters.

2. Requiring a Specific Intent for Attempts is Consistent with the Electorate's Intent to Punish Inchoate Offenses

Contrary to the majority's reasoning, requiring a specific intent as to the attempt clause of section 236.1(c) would not negate the protections for minors that would otherwise follow from the majority's broad reading of subdivision (f). (Opn. 8.) The majority incorrectly reasoned that "[i]f a perpetrator targeted a person who was actually a minor, but the jury believed he intended to traffic an adult, and therefore his conduct did not meet section 21a's specific intent threshold, such a mistake *would be* a defense to prosecution under section 236.1(c)'s attempt prong—contrary to the electorate's express direction." (Opn. 8–9.) "By expressly foreclosing this defense," reasoned the majority, "the electorate closed the door on the Attorney General's argument." (Opn. 9.)

At the outset, the majority made an unexamined leap of logic by assuming that since an attempt under section 21a requires a specific intent, this means that there must be a specific intent to commit *each* of the requirements for a violation, including the circumstance that the targeted victim must be a minor. But as Justice Kruger has recently explained, this premise is not necessarily correct. (See *People v. Fontenot* (2019) 8 Cal.5th 57, 82 ["We have not further required that the defendant act with a

purpose of performing the prescribed acts under the particular circumstances that render them illegal"] & 84 ["it does not follow that the prosecution must prove the defendant's conscious purpose with respect to every element of the offense, including the existence of victim consent or other circumstances of the crime] (conc. & dis. opn. of Kruger, J.).) Under the Model Penal Code, for example, "where a statute prohibits sexual intercourse with a female under a certain age, the required culpability as to the victim's age would be no greater for attempt than for the completed offense. (Model Pen. Code & Commentaries, com. 2 to § 5.01, pp. 301–303.) Attempt requires the person act with the purpose of committing the criminal conduct defining the completed offense, 'but his purpose need not encompass all of the circumstances included in the formal definition of the substantive offense.' (*Id.* at p. 301.)" (*Ibid.* at p. 83 fn. 3.) As the Model Penal Code explains, because the substantive statutory rape offense as defined makes a mistake as to age irrelevant, "it is likewise irrelevant with respect to the attempt." (Model Pen. Code & Commentaries, com. 2 to § 5.01, p. 302.) The mistake of age defense does not alter the mens rea requirement.

Hence, while attempts require a specific intent, the question remains: a specific intent to do what? Here, the trial court correctly threaded this needle, instructing the jury that the required specific intent was to commit pimping or pandering.[7]

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[7] In keeping with this interpretation, the trial court instructed the jury as follows:

> In order to prove the defendant is guilty of this crime, the People must prove beyond a reasonable doubt that:
>
> 1) The defendant attempted to cause, induce or persuade a person who is a minor to engage in a commercial sex act;

(continued...)

But even assuming, arguendo, the specific intent required for an attempt also extends to the age of the victim, the result in the majority's hypothetical would flow from the requirement of a specific intent for an attempt, not from the partial removal of a mistake of fact defense. In the context of an inchoate offense such as an attempt, a heightened mental state of specific intent is required to separate criminality from otherwise innocuous behavior. (See *United States v. Bailey* (1980) 444 U.S. 394, 405; *People v. Fontenot, supra,* 8 Cal.5th at p. 67 ["To ensure that only those whose intentions and actions made them a pronounced threat to accomplish what a given criminal statute prohibits may be found criminally liable, courts impose a 'heightened intent requirement' for attempts—even when the completed crime requires a less demanding mental state"].) The majority hangs its hat on the notion that subdivision (f) demonstrates an intent to apply a lesser mens rea because it completely does away with mistakes of fact regarding age. As discussed above, however, the majority's interpretation is undercut by the fact that subdivision (f) did not completely remove all mistake of age defenses, and instead specifically preserved that defense where the victim is not actually "a minor at the time of the offense." To conclude that an attempt requires something less than a specific intent "cuts sharply against the distinctions" this Court has "repeatedly drawn between the intent that must be shown to establish a

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(...continued)

AND

> 2) When the defendant did so, he had the *specific intent* to effect or maintain a violation of section 266h (Pimping) or 266i (Pandering) of the Penal Code[.]

(2 CT 457, italics added.)

defendant's guilt of a completed offense, and the intent that establishes attempt." (*People v. Fontenot, supra*, 8 Cal.5th at p. 69, citing, inter alia, *People v. Bailey, supra*, 54 Cal.4th at pp. 750–751.) Certainly, the electorate would not seek to create such a new attempt offense with a lessened level of intent based on nothing more than the mere implications contained in a separate subdivision regarding the partial removal of the mistake of age defense.

3. Nothing in Subdivision (f) Creates a New Defense of Impossibility That is Otherwise Unavailable for an Attempt

The distinction between the specific intent otherwise required for an attempt and the (partial) removal of a mistake of fact defense in subdivision (f) is an important one. A mistake of age defense is just that—a defense. It is not co-extensive with the mens rea of specific intent. (See *People v. Clark* (Dec. 12, 2019) __Cal.App.5th __, __ [2019 WL 6768757 *9] [Rejecting the majority's interpretation, different panel of court reasoned, "Although the mistake of age defense is unavailable, the prosecution still has the burden to prove that defendant specifically intended to take a direct act to cause, induce, or persuade a minor to commit a commercial sex act intending to effect or maintain a violation of one of the enumerated sex offenses, and actually took the direct act, even though the act was ineffectual"].)

Even if the majority were otherwise correct that subdivision (f) reveals only a general intent should apply to attempts under section 236.1(c), it still does not follow that an actual minor would be required. Implicit in the majority's argument is the premise that if the electorate changed the meaning of attempt insofar as it relates to the underlying mens rea, then it also sub silentio eliminated the rule that impossibility is not a defense to an attempt. But nothing supports this implicit assertion. Even if

the electorate modified the word "attempts" as used in section 236.1(c) to delete a specific intent in order to *expand* its reach, make such offenses *easier* to prove, and *prevent* situations in which defendants escape punishment based on false beliefs in a victim's age, there is no basis for further suggesting that the electorate at the same time sought to *narrow* the word "attempts" by creating an otherwise unavailable defense of factual impossibility. As Justice Aronson notes, "even under the majority's construction of the attempt prong of section 236.1, subdivision (c), a minor victim is not required because factual impossibility is not a defense to even that type of attempt offense." (Dis. opn. of Aronson, J., at 8; see also Model Pen. Code & Commentaries, § 5.01(1)(a), p. 295 [a person is guilty of an attempt if he "purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be"].)

G. The Electorate's Findings as Well as Its Express Purpose Demonstrate Its Intent to Make Attempts Fully Punishable

Fortunately, it is not necessary to guess at the electorate's intent in enacting Proposition 35 or divine that intent based solely on the language of the statute. As previously discussed, in enacting Proposition 35, the electorate included both findings of fact and declarations of its intent. Those findings of fact emphasized the importance of protecting "every person in our state, *particularly our children*, from all forms of sexual exploitation"; recognized the Internet has allowed sex traffickers "a new means to entice and *prey on vulnerable individuals* in our state; and underscored the need for "*stronger laws to combat the threats posed by human traffickers and online predators seeking to exploit women and children for sexual purposes*." (Ballot Pamp., Gen. Elec., text of Prop. 35, § 2, p. 101, italics added.) In keeping with these findings, the voters approved the initiative's declared its intent to "combat the crime of human

trafficking and *ensure just and effective punishment of* people who promote or engage in the crime of human trafficking," and to "*strengthen* laws regarding sexual exploitation, including sex offender registration requirements, to allow law enforcement to *track and prevent* online sex offenses and human trafficking." (*Id.*, § 3, italics added.)

As the above-italicized language underscores, the electorate recognized the threat to children and the need for more effective law enforcement measures in order to both deter and *prevent* these crimes from ever occurring. In enacting Proposition 35, the electorate substantially increased the penalties formerly available for sex trafficking: Whereas sex trafficking was formerly subject to a five-year maximum term, child sex trafficking became subject to a term of up to 15 years to life—a term otherwise given to second degree murderers. The electorate's intent is particularly evident regarding the threat of online predators. Section 236.1 recognizes the difficulty in apprehending child sex traffickers. It is for this reason that subdivision (c), which applies where the victim is a minor, has the alternative attempt language, whereas subdivisions (a) and (b), which apply to all other victims, do not. By adding the attempt language into the statute itself, subdivision (c) seeks to punish such attempts on children more severely by making those attempts subject to full strength punishment, rather than the one-half terms otherwise available under section 664, subdivision (b).

This evidence of the electorate's intent constitutes a "special context" that should not be ignored when interpreting the statute's meaning. (See *Flores-Figueroa v. United States*, *supra*, 556 U.S. at p. 652; *id.* at p. 660 (Alito, J. concurring) [noting examples of situations calling for special context consideration]; see also *United States v. Washington* (4th Cir. 2014) 743 F.3d 938, 943 [recognizing Congress intended to provide minors with "special protection" and therefore interpreting this intent as a "special

context" when interpreting statutory language of 18 U.S.C. § 2423]; *United States. v. Daniels*, *supra*, 685 F.3d at p. 1250 ["We honor the congressional goal inherent in the Child Protection and Sexual Predator Punishment Act of 1998, and reach a holding that aims to protect minors—not make conviction more difficult for crimes that affect them," fn. omitted]; *People v. Medina* (2007) 41 Cal.4th 685, 698 ["Given the Legislature's view on the seriousness and dangerousness of section 209.5(a), it follows that the Legislature would perceive attempts to commit section 209.5(a) the same way"].)

The Court of Appeal majority's construction does not comport with the purpose or intent behind the electorate's amendments to section 236.1. Its limiting construction would realistically only come into play in situations involving sting operations such as the present case. But there is no reason to believe the electorate would have wanted to apply a lesser punishment in such situations. As one court has observed, "The public has a duty to protect children from the predations of adults, and proper police activities in trying to locate and punish those bent on perpetrating sex crimes against children should not be discouraged." (*People v. Reed*, *supra*, 53 Cal.App.4th at p. 399.) The electorate was well aware that the Internet has opened up new opportunities for pimps and other predators to reach out to minors. To combat such efforts, law enforcement agents have responded by conducting their own Internet sting operations. (See, e.g., *id.* at pp. 394–396.) Nothing suggests that the electorate wanted to hamstring police in their ability to combat online predators by posing as minors; if anything, the contrary is true. A defendant who believes he is communicating with a minor online is no less culpable than a defendant who actually communicates with a minor. (See *United States v. Meek*, *supra*, 366 F.3d at p. 720 ["The fact that Meek was mistaken in his belief that he was corresponding with a minor does not mitigate or absolve his

criminal culpability; the simple fact of Meek's belief is sufficient as to this element of a § 2422(b) violation"].)

Appellant has never identified any policy or legislative purpose that would be undermined by imposing full criminal liability under these circumstances. (See *United States. v. Meek*, *supra*, 366 F.3d at p. 719 ["As *Meek* interprets the statute, detectives and undercover officers would be unable to police effectively the illegal inducement of minors for sex. Taking such a restrictive view of the statute would frustrate its purpose. Indeed, police preventative measures such as the sting operation conducted here would come at the cost of either rarely securing a conviction or putting an actual child in harm's way. In that scenario, the child molester gains at the tremendous expense of the child, a result sharply at odds with the statute's text and purpose. In declining *Meek's* interpretation, we opt for the integrity of the statute as a whole"].)

Indeed, the Court of Appeal reached a similar conclusion in *People v. Korwin*, *supra*, 36 Cal.App.5th 682 in interpreting section 288.3. That provision, which was enacted in 2006 as part of The Sexual Predator Punishment and Control Act: Jessica's Law (Proposition 83), prohibits any person from communicating, or attempting to communicate, with a known minor, or a person reasonably believed to be a minor, with the intent to commit certain sex offenses. (§ 288.3, subd. (a).) As in the present case, Korwin was caught in a sting operation and he claimed on appeal he could not be convicted because he did not communicate with an actual minor. In rejecting this claim, the court noted the initiative's stated intent to protect children from Internet predators, and concluded its interpretation advanced "the statutory purpose of supporting law enforcement officers who use undercover measure to identify, deter, and punish Internet predators who attempt to sexually victimize children before they reach minor victims." (*Korwin*, *supra*, 36 Cal.App.5th at p. 690.)

So, too, here, in light of this express intent to both punish child sex traffickers more severely and make it easier to catch such traffickers of children, it would seem remarkable that the electorate would have intended to hinder law enforcement sting operations by adopting appellant's construction of requiring the existence of a minor-age victim in order to find a defendant guilty under the statute. Accordingly, that construction should be rejected.

H. The Majority's Construction Would Lead to Untenable Results and Juror Confusion

The notion of an attempt to attempt a crime "leads onto a logical merry-go-round." (*People v. Gallegos, supra,* 39 Cal.App.3d at p. 516.) To attempt a crime one must intend to succeed; to attempt an attempt, one must seek to fail. Requiring the prosecution to plead a separate attempt to violate section 236.1(c) would run afoul of section 664, which allows for an attempt charge "only when no other provision is made by law for such an attempt." (*People v. Korwin, supra,* 36 Cal.App.5th at p. 689.) Appellant has not pointed to a single other statute that would require the prosecution to charge an attempt to attempt.

The majority nonetheless posits that there is no logical absurdity because what is really required is only an attempt to commit an "attempt," where an "attempt" as used in section 236.1(c) means a new type of attempt that does not require a specific intent. (Opn. 9.) The majority, however, makes no effort to suggest how a jury instruction could be crafted to explain these different uses of the word "attempt" without causing the jury to become confused. Pragmatics aside, the majority's analysis only serves to underscore the accepted wisdom of construing like terms in a like manner.

In fact, far from supporting their construction, subdivision (f) demonstrates the insupportable nature of appellant's and the majority's

position. Under subdivision (f), a defendant who successfully induces a person to commit the specified sex acts but who mistakenly believes that the victim is an adult when she is actually a few days shy of her 18th birthday, would be guilty of violating subdivision (c) notwithstanding the defendant's perhaps reasonable belief in the victim's majority. On the other hand, under appellant's construction, a defendant would not be guilty if he targeted a victim whom he believed to be in kindergarten, but was actually an undercover cop posing as a child on the Internet. Surely, the electorate would not have intended to punish the second defendant, whose mens rea and criminal culpability were clearly worse, at *one-half* the punishment that the first defendant would receive. The purpose of statutory construction is to ascertain the electorate's intent so as to effectuate the purpose of the law; a reviewing court does so by adopting "the construction that is most consistent with the apparent legislative purpose and avoids absurd consequences." (*People v. Barker* (2004) 34 Cal.4th 345, 357.) Appellant's and the majority's construction would do the exact opposite.

CONCLUSION

Accordingly, for the reasons stated above, the decision of the Court of Appeal should be reversed and the judgment should be affirmed.

Dated: January 21, 2020

Respectfully submitted,

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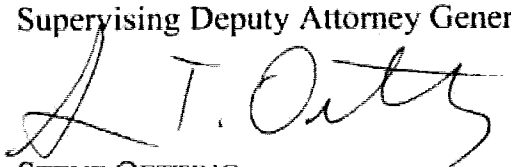

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 13,362 words.

Dated: January 21, 2020

XAVIER BECERRA
Attorney General of California

STEVE OETTING
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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Moses**
No.: **S258143**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On January 21, 2020, I electronically served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on January 21, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 21, 2020, at San Diego, California.

E. Blanco-Wilkins
Declarant

Signature