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Supreme Court of California
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# 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

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

## REPLY BRIEF ON THE MERITS

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## INTRODUCTION

The Court of Appeal erred in reversing appellant's conviction for human trafficking of a minor[1] on the grounds that there was no actual minor but only an adult police officer posing as one. Section 236.1(c) punishes attempts, and appellant violated that provision when, with the requisite criminal intent, he attempted to persuade an officer into engaging in a commercial sex act. As with any criminal attempt, it does not matter that the intended crime was factually impossible to commit because the targeted victim was actually an adult. What is important is that appellant would have completed the crime if the facts were as he believed them to be.

Appellant offers three principal arguments in response. He contends that the language of section 236.1(c) requires the actual existence of a minor, that there is nothing in the historical materials surrounding the enacting initiative to suggest that the electorate intended to incorporate principles of attempt into the statute, and that his conviction may not be reduced to an attempt to violate section 236.1 under section 664 because the jury instructions did not require a finding that he specifically intended to target a minor. (ABM 14-36.)

While it is certainly true that a "person who is a minor" is an element of the completed offense, the better interpretation of the statute is that the failure to satisfy this element does not defeat the alternative attempt provision of the statute. Every criminal

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[1] Penal Code section 236.1, subdivision (c) (§ 236.1(c)); all further state statutory references are to the Penal Code.

attempt necessarily involves a missing element; otherwise it would be a completed offense and not a mere attempt. Section 236.1(c) is no different. The statute's use of the word "attempts" and its grammatical structure support this view. The history of section 236.1 and the ballot materials surrounding the initiative that amended that provision demonstrate that the electorate recognized the serious threat posed by human traffickers in general, and the difficulty of protecting minors once they have fallen prey to these predators. The electorate sought to prevent minors from being trafficked in the first place, and to punish would-be traffickers with substantial prison sentences. These goals would be undermined, not advanced, by appellant's construction, which would limit the efficacy of police sting operations.

Finally, if this Court disagrees and concludes that an actual minor is a required element for an attempt under section 236.1(c), it may nonetheless reduce the offense to a lesser attempt under section 664. Here, the jury was instructed to find a specific intent to pimp or pander; the verdict therefore necessarily includes such a finding, and there is no additional requirement under section 664 that this specific intent extend to the circumstance of the age of the victim.

## ARGUMENT

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

The word "attempts" as used in section 236.1(c) means precisely what it has always meant in criminal law. It does not

require the completion of any element, and impossibility is not a defense. In analogous circumstances, courts of this State as well as federal courts have interpreted statutes as incorporating the law of attempt. Appellant is unable to distinguish those cases, or provide any reason why this Court should not reach a similar conclusion in the present case. Moreover, a natural grammatical reading of the statute supports respondent's interpretation.

Additional arguments, to which appellant fails to respond, buttress this interpretation. These arguments include reference to the remaining language of subdivision (c), which demonstrates an intent that the "attempts" language be broadly construed. Further, appellant does not try to defend the Court of Appeal's conclusion that subdivision (f) demonstrates an intent to do away with the requirement of a specific intent. Nor does he dispute that the Court of Appeal's decision would lead to untenable results and juror confusion by defining the word "attempt" in two different ways.

While appellant argues that there is no historical basis for interpreting the word "attempts" as incorporating the traditional meaning of that term, he fails to appreciate that this argument cuts *against* his position; indeed, it is he who seeks to define that term in a new and wholly unprecedented manner by doing away with that term's established requirement of a specific intent and by creating a defense of impossibility. It was not necessary for the drafters of the initiative to define the word "attempts" according to its established meaning, but it certainly would have

been necessary to define it if they had intended to give the term a new meaning.

### A. Appellant Is Unable to Distinguish Cases That Have Incorporated the Law of Attempt When Interpreting Analogous Statutes

As respondent has previously argued, a criminal attempt does not require the existence of an actual victim. In fact, "the commission of an attempt does not require proof of any particular element of the completed crime." (*People v. Chandler* (2014) 60 Cal.4th 508, 517; see OBM 25-28.) Appellant does not contend otherwise. Instead, he seeks to distinguish cases holding that attempts to commit sex offenses in the context of police sting operations do not require an actual victim on the theory that those cases involved charges under the general attempt provision of section 664, and not "attempts" as that term in used in section 236.1(c). (ABM 16-18, distinguishing *People v. Reed* (1996) 53 Cal.App.4th 389 & *People v. Herman* (2002) 97 Cal.App.4th 1369.)

The question therefore becomes whether the electorate intended to create a new type of "attempt" that is separate and different from the manner in which that term has been construed in sections 21a and 664. As respondent has observed, it is an "almost irresistible" presumption that once the courts have construed a particular term, and the Legislature subsequently uses that term in the same connection, the Legislature (or the electorate as the case may be) intends to employ the term in the same sense as it has been construed by the courts. (OBM 35; see

*People v. Lopez* (2005) 34 Cal.4th 1002, 1007.) Nothing in section 236.1(c) suggests the electorate intended to break with tradition and give the word "attempts" a new meaning. The term is neither defined by the statute, nor is such a new meaning implicit in the remaining provisions, such as subdivision (f).

Respondent has pointed to three similar provisions which courts have concluded incorporate standard and accepted principles of the law of attempt. (OBM 29-33.) Appellant seeks to distinguish those provisions, and the cases that have interpreted them, but his efforts to do so are unsuccessful.

### 1. Escape from Custody Cases

Sections 4532, subdivision (b), and 4530, subdivision (b), both proscribe the escape or attempt to escape from specified institutions. In *People v. Gallegos* (1974) 39 Cal.App.3d 512, the Court of Appeal concluded that the inclusion of the alternative element of an attempt to escape in section 4532 meant that "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.) In particular, the court concluded that the attempt language incorporated the requirement of a specific intent. (*Ibid.*) Later, this Court adopted the reasoning of *Gallegos* when interpreting the related provision of section 4530. (*People v. Bailey* (2012) 54 Cal.4th 740, 751.)

Appellant claims that "[t]hese cases did not hold . . . that escape statutes apply to someone who attempts an escape while

falsely believing they are in custody in a facility listed in the statute." (ABM 20.) It is true that both cases focused on the specific intent requirement of attempt and did not specifically address issues of impossibility. Nonetheless, appellant's response misses the point. *Gallegos* held that the Legislature incorporated the "essential elements" of criminal attempt by using the term "attempt." (*Gallegos*, *supra*, 39 Cal.App.3d at p. 516.) Specific intent is one such "essential element"; a direct but ineffectual act toward the commission of the crime is another. (§ 21a.) From these principles it follows a fortiori that if the defendant had the specific intent, the impossibility of completing the crime does not absolve him or her of responsibility. (OBM 25-26; *Chandler*, *supra*, 60 Cal.4th at p. 517.)

Appellant rejoins that "[n]othing in *Gallegos* or *Bailey* holds use of the word 'attempt' in a statute necessarily incorporates broader attempt law jurisprudence." (ABM 21.) But *Gallegos* did not hold that use of the word "attempt" included only the specific intent requirement; instead, the term incorporated all the "essential elements" of attempt without limitation. In *Bailey*, this Court saw "no reason" to depart from the holding of *Gallegos* (*People v. Bailey*, *supra*, 54 Cal.4th at p. 751)—and correctly so. In the absence of any contrary language in the statute, it would make no sense to conclude that use of a term such as "attempt" includes some principles of a criminal attempt but not others. Instead, when the electorate used the word "attempts," the electorate intended that term to mean precisely what it is

commonly and typically understood to mean when used in a legal sense.

The Court of Appeal majority in this case recognized that its interpretation hinged on the notion that the meaning of the word "attempt" can "vary with the criminal context." (Opn. 7, citing *People v. Colantuono* (1994) 7 Cal.4th 206, 216.) As respondent has thoroughly discussed, however, this Court rejected a similar argument in *Bailey*, where this Court declined to adopt an historically anomalous and antiquated definition of "attempt" taken from the assault context. (OBM 35; *People v. Bailey*, *supra*, 54 Cal.4th at p. 750.) Appellant does not directly try to defend the majority's reliance on *Colantuono*, principles of assault law, or even the broader notion that the meaning of "attempt" may vary with the criminal context.

Rather than adopting the Court of Appeal's position or disputing this Court's rejection of that view in *Bailey*, appellant tries a different tack. He argues that section 236.1 differs from section 4532 insofar as the "intent requirement is stated in the attempt prong of human trafficking, but not for the attempt prong of escape." (ABM 21.) Based on this perceived difference in the statutory language, appellant maintains it was necessary for the *Gallegos* court and later this Court in *Bailey* to look beyond the statutory language and consider the use of the word "attempt." (ABM 21.) While it is not entirely clear what appellant means by this response, under any possible construction it does not advance his position.

First, it is not clear what appellant means when he asserts that the intent requirement is stated in the attempt prong of human trafficking. Section 236.1, subdivision (c), states that it applies to persons who either cause, induce or persuade a minor to engage in a commercial sex act, or who attempt to do so, with "the intent to effect or maintain a violation" of certain specified criminal provisions. The required intent to "effect or maintain a violation" of the specified criminal statutes would appear to require a specific intent. If this is the intent that appellant references, then it would seem that he disagrees with the Court of Appeal majority's deduction from subdivision (f) that the statute requires only a general intent. (Opn. 2.)

Appellant relies on the conclusion in *Shields* that the intent required to commit human trafficking of a minor is included in the statute itself, not in collateral authority. (ABM 21, citing *People v. Shields* (2018) 23 Cal.App.5th 1242, 1250.) But the *Shields* decision does not support appellant's position regarding the meaning of the word "attempts." The *Shields* court rejected the defendant's argument that section 236.1(c) violates due process because an attempt requires a specific intent, but section 236.1(c) does not require a specific intent to target a minor. Noting multiple problems with the defendant's argument, the *Shields* court reasoned in particular that the attempt required a specific intent to cause, induce or persuade a person to commit a target sex act, but the statute does not require that the defendant specifically intend or even know that the victim is a minor. (*Shields*, *supra*, 23 Cal.App.5th at p. 1250.) Hence, the *Shields*

court did not contest that the use of the word “attempts” required a specific intent; instead, its conclusion was limited as to what this specific intent modified.

The *Shields* court did not examine other statutes that incorporate the principle of attempt, and it did not have the benefit of considering decisions such as *Gallegos* and *Bailey*. After rejecting the defendant’s due process argument, the court went on to reach an argument not raised by the parties regarding whether there could be a conviction without an actual minor. (*Shields*, *supra*, 23 Cal.App.5th at pp. 1252-1257.) The court concluded that there was no completed offense under section 236.1(c) because “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.” (*Id*. at p. 1257.) In reaching this conclusion, however, the court simply begged the question presented. The court concluded that while factual impossibility would not be a defense to a typical attempt, it nonetheless served to bar a conviction under section 236.1(c) because that provision requires the existence of an actual minor. (*Id*. at pp. 1256-1257.) The court assumed the very question to be answered.

Even if the *Shields* court were correct that the intent element required to show a violation of section 236.1(c) is different than the specific intent otherwise required for an attempt, it does not follow that the electorate eschewed the other “essential elements” of that term when it chose to use the word

"attempts." The issue in the present case does not directly involve the specific intent requirement, but rather whether the defendant must do more than take a direct but ineffectual step toward completion of the crime. The question is whether the defendant must complete a given element by taking action directed toward an actual minor, or whether instead his actions are sufficient based on the facts as he perceived them to be. According to accepted principles regarding the law of attempt, the defendant need not complete any particular element of the offense, and impossibility does not provide a defense. (OBM 25-28.) Even if the electorate limited the intent requirement for an attempt, appellant points to no reason to suggest the electorate limited the doctrine of attempt in these other respects as well. *Gallegos* and *Bailey* teach that use of the word "attempt" brings with it the "essential elements" of that term. Appellant provides no reason to conclude the electorate meant to reach a contrary conclusion.

**2. Attempts to Dissuade a Witness**

Respondent previously noted that attempts to dissuade a witness or victim from testifying under section 136.1 also provide an instructive illustration of the Legislature incorporating attempts into a substantive Penal Code provision. (OBM 31-32.) In keeping with traditional principles of attempt, cases interpreting this provision have concluded that the threat need not actually reach the intended victim or witness in order for the statute to apply. (OBM 31, citing *People v. Foster* (2007) 155

Cal.App.4th 331, 335 & *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1519.)

Appellant repeats the Court of Appeal majority's response that this statute is inapposite because section 236.1(c), requires a victim who is a minor at the time of the crime, "while section 136.1 does not require any special definition of victim." (ABM 22.) But as respondent has explained, section 136.1 does in fact require a special definition of victim. As subdivision (b) of that provision clarifies, the intended target must be "a victim of a crime" or "a witness to a crime." These are special definitions of the class of persons protected by the statute. A threat directed toward someone else would not be sufficient, at least not for a completed act under the statute. Nonetheless, applying principles of attempt law, the court in *People v. Foster*, *supra*, 155 Cal.App.4th at page 335 concluded that the threat need not actually reach the intended witness because the statute also punishes attempts.

Appellant responds that *Kirvin* and *Foster* did not hold that the statute would be violated if a defendant attempted to prevent or dissuade a decoy who was not a victim or witness. (ABM 22.) Appellant is correct insofar as neither case involved a decoy. But his response again misses the larger point that these courts applied principles of attempt law based on the statute's incorporation of that term. In *Foster*, for instance, the court applied the principle that an attempt is complete when the defendant undertakes an action that goes beyond mere preparation. (*Foster*, *supra*, 155 Cal.App.4th at p. 335, quoting

*People v. Toledo* (2001) 26 Cal.4th 221, 230.) The attempt was complete as soon as the defendant conveyed it to an intermediary, and even though the intermediary never communicated the threat to the victim. (*Ibid*.)

Pointing to language in *Foster* that the Legislature could have chosen to include limiting provisions to require that the threat be made in the presence of the witness or be personally delivered by the defendant, appellant urges that these limitations are exactly what the electorate chose to include in the context of section 236.1. (ABM 22.) This is incorrect. Subdivision (c) does not impose a personal presence or personal delivery requirement. Similar to the facts in *Foster*, if a pimp were to attempt to persuade a minor to sex traffic by delivering a message to a third person, the crime would be complete even if the minor never received the message. Nothing in the language of the statute would suggest otherwise. It follows by extension under the law of attempt that the crime would also be complete even if the minor did not actually exist.

### 3. Attempts to Entice a Minor Under Federal Law

Respondent has observed that prior to the enactment of Proposition 35, federal courts had consistently interpreted similar attempt language in title 18 of United States Code section 2422(b) as not requiring an actual minor in the context of police sting operations. (OBM 32-33.)

Appellant argues this Court should decline to follow the federal cases that have applied section 2422(b) to attempts. Appellant urges that federal law must be considered in context,

because there is no stand-alone attempt provision under federal law; instead, Congress outlaws attempts on a statute-by-statute basis. (ABM 23.) However, appellant fails to explain what significance should be drawn from the absence of a general federal attempt statute. Appellant does not dispute that an actual minor is not required under the federal enticement statute. More importantly, he does not contest the larger point that the drafters of section 236.1 were not only familiar with federal law, but specifically incorporated it into the definition of human trafficking. (OBM 33.) Whatever consequence appellant draws from the absence of a separate attempt provision under federal law, there is no reason to believe that the drafters of Proposition 35 or the electorate drew this same conclusion. What is significant is that federal law had long punished mere attempts to entice minors regardless of whether there was an actual minor and that the courts have done so based on the attempt language in the statute itself.

As a fallback position, appellant argues that "federal courts have treated a defendant's mental state as the dispositive issue rather than the plain wording of the statute." (ABM 23-24.) He summarizes that these cases effectively "ignore the absence of an element required to violate the attempt prong of the statute" and he contends that a "defendant's mental state should not be dispositive if there is no actual victim under age 18." (ABM 24.) Rather than ignoring the absence of an element, these cases correctly interpret the rule that "the commission of an attempt does not require any particular element of the completed crime."

(*People v. Chandler, supra,* 60 Cal.4th at p. 517, citing cases.) Appellant's true complaint appears to lie with the principle that factual impossibility does not serve as a defense to any attempt—whether under federal or state law. But in doing so, he swims against the strong current of not only the seven federal circuit court of appeals decisions cited in the Opening Brief on the Merits (OBM 32), but also this Court's established authority as well (see, e.g., *People v. Chandler*, *supra*, 60 Cal.4th at p. 517).

Far from ignoring any element, courts interpreting the federal enticement statute as not requiring an actual victim have recognized that this interpretation best comports with the structure, content, and purpose of the statute. (See OBM 53-54.) Appellant's naked and unsupported complaint that a "defendant's mental state should not be dispositive if there is no actual victim under 18" (ABM 24) fails to appreciate why attempts are criminally punishable in the first place. As the Ninth Circuit has explained:

> The statute requires mens rea, that is, a guilty mind. The guilt arises from the defendant's knowledge of what he intends to do. In this case, knowledge is subjective—it is what is in the mind of the defendant. Thus, a jury could reasonably infer that Meek knowingly sought sexual activity, and knowingly sought it with a minor. That he was mistaken in his knowledge is irrelevant. Meek possessed the guilty mind required by the statute.

(*United States v. Meek* (9th Cir. 2004) 366 F.3d 705, 718.) Once a defendant acts upon his criminal intent he is guilty. The police need not sit by helplessly until he is eventually successful.

### B. Appellant Fails to Recognize the Significance of His Concession That "A Person Who Is a Minor" Is the Direct Object of the Sentence

Respondent previously argued that a natural reading of section 236.1(c) reveals an intent to create a typical attempt statute. Specifically, the grammatical structure of the subdivision does not support the Court of Appeal majority's reading of the statute as requiring an attempt plus a separate, stand-alone element of a person who is a minor at the time of the commission of the offense. Instead, the phrase "a person who is a minor" is the direct object of the verb phrase "attempts to cause, induce, or persuade" and is the recipient of the action of the transitive verb. Together, the verb phrase and its direct object make up a single grammatical unit. (OBM 36-40.) To consider "a person who is a minor" to be a separate element would effectively turn it into an optional indirect object. A transitive verb, however, requires a direct object. After all, it would not make any sense to say that someone simply attempted to cause/induce/or persuade without specifying who the action was directed towards.

Appellant correctly recognizes that "a person who is a minor" is the direct object of the verb phrase "attempts to cause, induce, or persuade." (ABM 14.) He also recognizes, as he must, that an essential part of the verb phrase is a victim who is a minor. (ABM 14.) However, he does not appreciate the significance of these necessary grammatical concessions. Appellant concludes that "[t]herefore, an essential element of each prong of the statute is a victim who is a minor." (ABM 14.) It is at this point

that appellant makes a leap of logic. He transforms the grammatical rule requiring a direct object for a transitive verb into a legal requirement that the direct object must be a *separate* and indispensable legal element. But this does not follow either as a matter of logic or grammar.

The direct object and the transitive verb must be read together as a whole. The Court of Appeal majority read the statute as requiring the two elements required for any attempt—1) criminal intent; and 2) an ineffectual act toward the commission of the crime—plus the additional third element of a minor. (Opn. 7.) But grammatically the minor is not a separate requirement; it is what the verb acts upon and a necessary companion of the transitive verb. The minor is a necessary object of the actor's intent, and it therefore does not follow that the minor is also a *separate* element.

Expressed mathematically, the question is whether the verb "attempts" modifies the entire phrase, so as to read: attempts(cause/induce/persuade + person who is a minor). The Court of Appeal and appellant would read the phrase instead as attempts(cause/induce/persuade) + (person who is a minor). The trouble with appellant's construction is that it artificially isolates one portion of the direct object from the verb. The entire infinitive phrase "to cause, induce, or persuade, a person who is a minor" is the direct object of the verb "attempts." Nothing in the grammar of section 236.1(c) suggests the electorate sought to create a separate and distinct grammatical unit; instead, the

minor victim is the person who is being acted upon and must be considered together with the verb "attempts."

For similar reasons, there is no reason to believe the electorate intended to have "a person who is a minor" act as a separate, stand-alone independent legal element. To do so would transform "a person who is a minor" from being the recipient of the action (a direct object) into an optional indirect object that describes for whom the action is being performed. But if this were so, then the sentence would be left without any recipient of the action. Together, "to cause, induce, or persuade, a person who is a minor" forms an infinitive phrase that acts as the direct object of "attempts." "Attempts" therefore acts upon the entire phrase, not just part of it. (See Purdue University Online Writing Lab <https://owl.purdue.edu/owl/general_writing/mechanics/gerunds_participles_and_infinitives/infinitives.html > (as of April 14, 2020) [citing "Phil agreed to give me a ride" as example of infinitive phrase functioning as direct object].)

To commit a murder, rape, or robbery, there must of course be a living human victim. If the victim is already dead, there can be no completed offense. There can, however, be an attempt if the defendant commits an act beyond mere preparation toward the commission of the crime and possesses the requisite intent. (See, e.g., *People v. Chandler*, *supra*, 60 Cal.4th at p. 517.) The absence of a single element does not defeat an attempt from occurring in the context of section 236.1(c) any more than it does in these examples of murder, rape, and robbery.

If the electorate had intended to require that the existence of a minor be considered a separate element independent of the use of the word "attempts," it could easily have specified that the crime is committed "if and only if" an actual minor is involved. The electorate, however, declined to do so. The long-accepted meaning of the term "attempt" and the special context surrounding the need to protect young victims of sex trafficking reveal that the electorate did not intend such a result.

### C. Appellant Does Not Respond to the Argument That the Broad Language of the Alternative Elements of Subdivision (c) Supports the Conclusion That No Actual Minor Is Required

Subdivision (c) can be violated either when a defendant actually "causes, induces or persuades" a victim who is a minor to engage in a commercial sex act, or alternatively when the defendant attempts to do so. Respondent has addressed how the alternative language of section 236.1(c), regarding completed acts of causing, inducing, or persuading a victim, demonstrates an intent to apply the attempt provision broadly. In particular, and in contrast to the verbs used in subdivisions (a) and (b), the verbs "cause, induce or persuade" already encompass broad conduct that does not include successfully convincing someone to engage in a commercial sex act. (OBM 40-42.) Hence, when the electorate added attempts to do these acts as an alternative element, it signaled its intent to go beyond what was already captured by these broad verbs. As respondent pointed out, it would have been inconsistent for the electorate to add inchoate attempts to the already broad language, yet at the same time

create an additional requirement of an actual victim to complete the inchoate offense; there would have been little gained by the additional attempt language in such a case. (OBM 42-42.) Appellant does not respond to this argument.

### D. Appellant Does Not Adopt the Court of Appeal Majority's Incorrect Summary of Subdivision (f) or Its Conclusion That This Subdivision Demonstrates the Electorate Eliminated the Requirement of a Specific Intent

The Court of Appeal majority in the present case sought to bolster its interpretation of the attempt language in subdivision (c) by looking to subdivision (f), which forecloses the defense of a defendant's mistaken belief as to the age of a victim who is actually a minor. The majority interpreted this subdivision as eliminating any requirement that the defendant have a specific intent to traffic a minor, thereby distinguishing attempted sex trafficking under subdivision (c) from an ordinary criminal attempt. (Opn. 2.) Respondent noted that this interpretation was based on a mistaken reading of subdivision (f): the statute does not eliminate all defenses based on mistake of fact regarding the age of a victim, but only "[m]istake 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*." (§ 236.1, subd. (f), italics added.) Alternatively, the majority simply assumed that the requirement of a specific intent means that the defendant must specifically intend each of the requirements for committing a violation; however, a defendant need not specifically intend that his victim be a minor in order to satisfy the specific intent requirement.

Finally, even if subdivision (f) makes the offense easier to prove by eliminating the requirement of a specific intent, nothing in the language of that provision suggests the electorate at the same time made the crime more difficult to prove by creating an otherwise unavailable defense of impossibility. (OBM 42-48.)

Appellant claims that respondent "interprets subdivision (f) as stating something it doesn't state." (ABM 26.) According to appellant, subdivision (f) is "silent" about mistakes of fact in which the defendant believes an adult is a minor. (ABM 26.) But this is not accurate. The Court of Appeal majority's reasoning hinges on the notion that subdivision (f) removes *all* mistakes of fact regarding age; based on this premise of a complete elimination, the Court of Appeal leaps to its further conclusion that no specific intent is required notwithstanding the language of attempt used in subdivision (c). But subdivision (f) does not extinguish *all* mistakes of fact regarding the age of a victim. Instead, it abolishes only those mistakes of age where the victim is "a minor at the time of the commission of the offense." If the victim is not a minor at the time of the commission of the offense, as when the victim is a police detective conducting a sting operation, a mistake of fact defense is still possible under the express language of the statute.

Appellant argues that "[i]f the intent was to include the opposite mistake of fact [i.e., where the defendant intended to target a minor, but actually targeted an adult], that language could have been made part of the statute." (ABM 26.) But that is precisely what the electorate did when it added the attempt

language. The critical point is that nothing in subdivision (f) removed such mistakes from the well-accepted meaning of the word “attempt.” Just as a defendant may attempt to rape a body he incorrectly believes to be alive (see *People v. Chandler*, *supra*, 60 Cal.4th at p. 517, citing *People v. Thompson* (1993) 12 Cal.App.4th 195, 202-203), so, too, can he attempt to commit human trafficking based on the mistaken belief that the victim was a minor.

Because the electorate did not wholly abrogate all mistakes of fact, or even all mistakes of fact regarding the age of the victim, the Court of Appeal majority’s conclusion that the electorate removed the specific intent requirement from the word “attempt” in subdivision (c) by adding the language in subdivision (f) is unsupported. So, too, therefore is the Court of Appeal’s conclusion that “attempts” as used in subdivision (c) defines a new and previously unknown use of that term.

But even if the Court of Appeal were correct in its reading of subdivision (f), the majority commits a series of more fundamental errors. Above all else, it confuses the removal (or partial removal) of a defense with the mens rea requirement of specific intent. The mere fact that the electorate removed one defense regarding one type of mistake of fact does not mean that it eliminated all other defenses otherwise available in cases requiring a specific intent, or that it otherwise intended only a general intent. (See generally *People v. Hood* (1969) 1 Cal.3d 444, 455 [“The distinction between specific and general intent crimes evolved as a judicial response to the problem of the

intoxicated offender"].) Appellant responds by requoting the conclusion of the Court of Appeal that a specific intent would be inconsistent with the broad purpose of subdivision (f) to protect minors, and would otherwise allow a defendant to claim that he intended to target an adult. (ABM 27, quoting opn. 8-9.) This re-quoting of the passage cited in the Opening Brief on the Merits (OBM 44), however, does not respond to the points respondent raises.

First, as respondent has noted, the majority incorrectly assumes that the specific intent requirement inherent in all attempts necessarily means that the defendant must specifically intend each of the requirements for a violation, including the circumstance that the victim is actually a minor. As respondent has explained, this unexamined assumption runs contrary to the approach of the Model Penal Code. (OBM 45.) Appellant simply ignores these points. (ABM 26.)

Second, regardless of whether a specific intent otherwise applies to the age of the victim, there is nothing inconsistent with requiring a specific intent in order to commit an attempt and furthering the broad purpose of protecting minors. Where an act is inchoate, such as an attempt, a heightened mental state is appropriate in order to separate criminality from otherwise innocuous behavior. (See OBM 46, citing *United States v. Bailey* (1980) 444 U.S. 394, 405; *People v. Fontenot* (2019) 8 Cal.5th 57, 67.) The mere fact that the electorate (partially) removed one type of defense in subdivision (f), which applies to all offenses under section 236.1, does not mean that it sought to alter the

specific intent mens rea inherent in the concept of attempt as used in subdivision (c).

By way of illustration, if a defendant who is drunk offers a minor $50 to engage in a commercial sex act, it would not defeat the purpose of the statute to allow the defendant to claim that his intoxication prevented him from forming the requisite intent to cause, induce, or persuade the minor to do so. The jury would be free to accept or reject this defense based on the evidence and circumstances of the case. As this illustration underscores, the majority opinion conflates the elimination of one type of defense with the complete and wholesale removal of specific intent. Again, appellant has no response.

Finally, irrespective of the effect of subdivision (f) on the question of specific intent, nothing in that provision creates a defense of impossibility. Even if the electorate signaled that subdivision (f) changed the meaning of the word "attempt" as used in subdivision (c) to require only a general intent, nothing demonstrates that the electorate also sought to change that term in other respects, thereby making it more difficult to obtain convictions by allowing a defense of impossibility. Appellant does not directly address this argument. (ABM 27.) His re-quotation of the Court Appeal's decision does not even mention the separate doctrine that factual impossibility is not a defense to an attempt crime.

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

In the Opening Brief on the Merits, respondent observed that the electorate's findings as well as its express purpose in enacting Proposition 35 demonstrate its intent to make attempts fully punishable as completed offenses. These findings revealed the electorate was concerned with not only deterring sex trafficking, but also *preventing* it. This evidence of the electorate's intent constitutes a "special context" that should be considered when interpreting the statute's meaning. (OBM 48-49.)

In response, appellant urges that this Court "should decline to assume the voters intended something not included in the language of the statute." (ABM 28.) Namely, appellant asserts that respondent has focused only on the overarching goals of the initiative, rather than point to any evidence of an intent to incorporate the general law of attempt or reference section 21a. (ABM 29.)

The question before the Court is whether the electorate intended to give the word "attempts" its ordinary and accepted meaning, or whether instead it chose to give that term a previously unknown definition involving a general intent that is subject to claims of factual impossibility. While it is true that this Court should turn first to the express language of the statute, the initiative includes no definition of what is meant by the word "attempts." It is therefore both appropriate and proper

to look beyond the statutory language to discern the electorate's intent.

The general goals the initiative sought to achieve are a valuable resource in determining the electorate's intent. Appellant ignores the cases respondent cited that describe when courts should consider a statute's "special context" in construing the terms of the statute. (See OBM 49-50.) As the Supreme Court has recognized, "the inquiry into a sentence's meaning is a contextual one." (*Flores-Figueroa v. United States* (2009) 556 U.S. 646, 652.) Federal courts have specifically recognized in interpreting laws involving trafficking of minors that congressional intent to provide minors special protection is a "special context" that must be considered when interpreting statutory language. (E.g., *United States v. Washington* (4th Cir. 2014) 743 F.3d 938, 943 [citing cases].) Here, the Court may certainly consider that section 236.1(c) was designed to "provide minors with special protection—not make the provision protecting minors more difficult to prove." (*Ibid*.)

Moreover, this Court has often looked to an initiative's declared purpose and factual findings when construing the scope of that measure. (See, e.g., *People v. Dehoyos* (2018) 4 Cal.5th 594, 603 [examining breadth of declared purpose in Voter's Information Guide in discerning intent behind proposition]; *People v. Canty* (2004) 32 Cal.4th 1266, 1281 [relying on uncodified findings and declarations in construing initiate]; *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 115 [pointing to proposition's statements of findings and purpose].)

Here, the electorate's declared findings and statement of intent demonstrated the measure was designed to ensure effective punishment, strengthen laws relating to sexual exploitation, and prevent human trafficking. (OBM 49.) Appellant does not dispute these goals, or the fact that the Court of Appeal's construction would run contrary to these objectives by undermining police sting operations that seek to prevent sex trafficking before it can occur. (OBM 50.) Appellant's response is a limited one: He maintains that nothing in the ballot provisions specifically points to an intent to incorporate the general law of attempt, and he insists that this Court would be required to incorporate a reference to section 21a that is not mentioned in the statutory language. (ABM 29.)

The initiative's failure to specifically mention the meaning of the word "attempts," however, demonstrates nothing more than that the drafters intended to apply the accepted meaning of that term. It was not necessary to specifically reference section 21a in order to include this settled and established meaning any more than it was in the context of sections 4532 and 4530, as construed in *Gallegos* and *Bailey*. (See *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571 [words in initiative are construed to give them their ordinary meaning]; *Russell City Energy Co., LLC v. City of Hayward* (2017) 14 Cal.App.5th 54, 64 [absence of statutory definition leads to presumption that Legislature intended to give words their ordinary meaning].) Appellant fails to recognize that it is *his* construction that would add words to the statute by creating a new definition of "attempts" that does

not require a specific intent and that creates a defense of factual impossibility. The absence of any such reference to a new definition of the term cuts against his position rather than support it.

Switching gears away from the word “attempts,” appellant insists that if the drafters had intended to include persons other than actual minors, they would have added wording to include any “‘person who the defendant subjectively believes is a minor.’” (ABM 30, quoting *People v. Clark* (2019) 43 Cal.App.5th 270, 299-300 (dis. opn. of O’Leary, P.J., italics omitted).) In the Opening Brief on the Merits, respondent addressed an identical argument in the context of discussing why a grammatical reading of the statute supports an intent to create a typical attempt statute. (OBM 39-40.) As respondent pointed out, expanding the statute to apply to what a defendant reasonably should have known regarding a defendant’s age would potentially extend culpability too far in the context of an inchoate offense such as attempt. The very purpose of a heightened intent for attempts is to ensure that only those persons who are a “pronounced threat” are held to be criminally culpable. (*People v. Fontenot, supra,* 8 Cal.5th at p. 67; see OBM 46-47.)

That the drafters did not include language regarding what a defendant should have known shows nothing more than that they drew a delicate balance between increasing the punishment for attempts while at the same time not diluting the traditional intent requirements necessary to show an inchoate offense. And while completely eliminating a defendant’s subjective intent

regarding the age of the victim might make the crime easier to prove in some cases, at the same time the drafters may have concluded it would go too far by subjecting persons to substantial penalties without a clear showing of criminal intent. The language of subdivision (f), which does not eliminate the mistake of age defense in sting situations, suggests that the drafters did not intend to go this far. Once again, the drafters' failure to include a reasonable person standard where they easily could have cuts against appellant's position because it shows that they did not intend to undermine the traditional specific intent requirement for attempts.

Seeking to distance himself from section 288.3, which does include language that the defendant "knows or reasonably should know" a victim is a minor but which punishes an attempt at only one half the punishment of the completed offense, appellant insists that this provision "has no bearing on the issue in this case." (ABM 31.) In support of this contention, appellant cites to *People v. Korwin* (2019) 36 Cal.App.5th 682, 689, which in turn relied on *People v. Shields, supra,* 23 Cal.App.5th at page 1257, for the proposition that section 236.1(c) requires the victim to be a person under the age of 18, whereas the separate crime of attempt does not. (ABM 31.) But as discussed above, the *Shields* response simply begs the question presented.

Finally, appellant argues that the voters' intent to punish would-be sex traffickers is adequately preserved by charging a separate attempt under section 664 in those cases where the defendant targets an adult decoy. (ABM 32.) This argument,

however, fails to address the electorate's expressed desire for additional punishment to both combat and *prevent* online sex trafficking. (See OBM 49.) The very reason that the attempt language was added to subdivision (c) and not to the other subdivisions of section 236.1 was because of the recognized difficulty in apprehending such online predators before they strike. As respondent has pointed out, appellant's construction would realistically only come into play in the context of sting operations. (OBM 50.) Given the initiative's emphasis on both *increased* punishment and *increased* preventative measures, it would be inconsistent for section 236.1(c) to have *decreased* punishment for this situation involving child predators who are so difficult to apprehend. Respondent previously challenged appellant to suggest any policy or legislative purpose that would be undermined by imposing full-strength culpability in the sting operation context. (OBM 51.) Appellant has not accepted this challenge and still does not identify any purpose.

### F. The Court of Appeal Majority's Construction Would Lead to Untenable Results and Juror Confusion

Finally, respondent previously argued that the majority's construction would lead to untenable results and juror confusion. Among other ways, jurors would be confused by any charge of an attempt to commit an attempt, especially when the two attempts would be defined differently under appellant's construction. Also, punishing persons who are guilty of an attempt to violate the attempt provision of subdivision (c) based on a police sting operation would be disproportionately punished at one-half the

completed offense, even though the culpability of such defendants is potentially much greater than other completed offenses where the defendants incorrectly believe they are targeting adults. (OBM 52-53.)

Appellant offers no response regarding the potentially disproportionate outcome of his interpretation. As for the paradox of creating an attempt to commit an attempt, appellant hopes to avoid this difficulty by characterizing the crime as "an attempt where the completed crime fails because there is no underage victim." (ABM 33.) This response misses the point. The problem arises because the completed crime uses the word "attempt," but appellant ascribes different meaning to that term than a traditional attempt. Any jury instruction would therefore have to describe the word "attempt" in two different ways. More fundamentally, notwithstanding appellant's efforts to ascribe a different meaning to the word "attempts" as used in subdivision (c), the paradox of an attempt to attempt arises because an attempt involves a failed or incomplete crime, and it is illogical for one to attempt not to succeed.

## II. TO THE EXTENT AN ACTUAL MINOR IS REQUIRED, THE CRIME IN THIS CASE MAY BE REDUCED TO AN ATTEMPT TO TRAFFIC A MINOR BECAUSE THE JURY INSTRUCTIONS REQUIRED THE JURY TO FIND A SPECIFIC INTENT AND THE VERDICT NECESSARILY INCLUDES SUCH A FINDING

After concluding that an actual minor is required for a completed offense under section 236.1(c), the Court of Appeal majority determined that it could not reduce the charged offense to an attempt under sections 21a and 664 because it could not

determine from the instructions given that the jury necessarily found that appellant had the intent to traffic a minor. (Opn. 12; see *People v. Bailey*, *supra*, 54 Cal.4th at p. 752 [declining to reduce charged escape to an attempt to escape where the jury did not impliedly find all the elements of the lesser offense].) Appellant now echoes that conclusion, reasoning that the crime may not be reduced because the instructions did not require that appellant specifically intended to target a minor. (ABM 34-35.)

Appellant, however, simply assumes that the specific intent requirement for an attempt under section 664 necessarily includes a specific intent to target a minor. As respondent has previously explained, while an attempt requires that the defendant act with the purpose of committing the completed criminal offense, this purpose does not necessarily encompass all of the circumstances included in the formal definition of the substantive offense; further, this principle has been applied specifically in the context of crimes specifying the age of a victim as a requirement. (See OBM 44-45, citing *People v. Fontenot*, *supra*, 8 Cal.5th at pp. 82 & 84 (conc. & dis. opn. of Kruger, J.), and Model Pen. Code & Commentaries, com. 2 to § 5.01, pp. 301-303.) Here, the instructions required a specific intent to pimp or pander. (OBM 45 & fn. 7; 2CT 457.) In the event this Court, like the Court of Appeal majority, concludes that subdivision (f) eliminated the mistake of age defense, then nothing more was required to show a specific intent necessary for an attempt—whether under section 236.1(c) or section 664. Accordingly, to the extent this Court concludes that an actual minor is required

under section 236.1(c), it may appropriately reduce the crime to an attempt under section 664 as a lesser offense based on the jury's implied findings.[2]

Appellant does not acknowledge respondent's argument regarding the requirements of a specific intent as applied to the circumstances of an offense. His argument is premised on the unexamined conclusion that the defendant's specific intent extends to the age of the victim. Because that premise is faulty, so too is his conclusion that the crime may not be reduced to an attempt.

[2] Respondent recognizes that superficially this view may be seen as potentially coming into tension with the interpretation that the electorate sought to permit limited mistakes of age in subdivision (f) in the attempt context when the victim is actually an adult. However, as the Model Penal Code explains, the required culpability as to age is "no greater" for attempt than for the completed offense. (Model Pen. Code & Commentaries, com. 2 to § 5.01, pp. 301-303.) If the Court of Appeal majority is correct that subdivision (f) eliminated the requirement of a specific intent to traffic a minor (see opn. 2 & 8), then the same would be true of an attempt under section 664.

## CONCLUSION

Accordingly, for the reasons stated above, respondent respectfully requests that this Court reverse the decision of the Court of Appeal and reinstate the judgment.

Dated: May 7, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 8,239 words.

Dated: May 7, 2020

XAVIER BECERRA
Attorney General of California

/s/ Steve Oetting

STEVE OETTING
Supervising Deputy Attorney General
*Attorneys for Plaintiff and Respondent*

**DECLARATION OF SERVICE BY E-MAIL and 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 collection and processing of correspondence for mailing with the United States Postal Service. 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.

On May 7, 2020, I served the attached **REPLY BRIEF ON THE MERITS** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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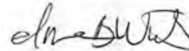
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 7, 2020, at San Diego, California.

| E. Blanco-Wilkins |  |
| --- | --- |
| Declarant | Signature |

Supreme Court of California
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**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

Case Name: **PEOPLE v. MOSES**
Case Number: **S258143**
Lower Court Case Number: **G055621**

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5/7/2020
Date

/s/Elmer Blanco-Wilkins

Signature

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Department of Justice, Office of the Attorney General-San Diego

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