No. 05-7053

In the Supreme Court of the United States

KESHIA CHERIE ASHFORD DIXON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

This Court granted the petition for a writ of certiorari limited to question one as presented in the petition, which asks: Where a criminal defendant raises a duress defense, whether the burden of persuasion should be on the government to prove beyond a reasonable doubt the defendant was not under duress, or upon the defendant to prove duress by a preponderance of the evidence.

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OPINION BELOW

The opinion of the court of appeals (J.A. 325-332) is reported at 413 F.3d 520.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2005. A petition for rehearing was denied on July 20, 2005 (J.A. 11). The petition for a writ of certiorari was filed on October 17, 2005, and was granted on January 13, 2006, limited to question one presented by the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was

convicted of one count of acquiring a firearm while under indictment, in violation of 18 U.S.C. 922(n); and eight counts of making a false statement in connection with the acquisition of firearms, in violation of 18 U.S.C. 922(a)(6). She was sentenced to nine concurrent terms of 34 months of imprisonment, to be followed by three years of supervised release, and ordered to pay a $900 special assessment. J.A. 318-321. The court of appeals affirmed. J.A. 325-332.

1. Section 922(a)(6) of Title 18 makes it unlawful "knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive" a licensed firearms dealer "with respect to any fact material to the lawfulness of the sale" of a firearm. 18 U.S.C. 922(a)(6). Section 922(n) makes it unlawful for "any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to * * * receive any firearm" that has traveled in interstate or foreign commerce. The relevant sentencing provisions require that a violation of Section 922(n) be committed "willfully." See 18 U.S.C. 924(a)(1)(D).

2. On January 4 and 11, 2003, petitioner purchased multiple firearms at two separate gun shows in Texas by providing false information to gun dealers. Petitioner provided an incorrect address and stated that she was not under indictment for a felony, when in fact she was under federal indictment for her role in a check-cashing scheme. J.A. 13-15, 326.[1] In each instance, the dealer

[1] At the time of both gun shows, petitioner had pleaded guilty to the check-cashing scheme but had not yet been sentenced. J.A. 158, 213-214, 222. She nevertheless remained "under indictment." See *United States* v. *Chapman*, 7 F.3d 66, 67-68 (5th Cir. 1993), cert. denied, 512 U.S. 1223 (1994).

sold petitioner a firearm after running her information through the National Instant Criminal Background Check System and receiving a "proceed" response. J.A. 326.

3. a. On March 5, 2003, a federal grand jury returned an indictment charging petitioner with one count of acquiring a firearm while under indictment and eight counts of making false statements in connection with acquiring a firearm. J.A. 13-17.

At trial, petitioner admitted that she was under indictment for a felony when she purchased the firearms, and that she knew at the time of the purchases that she was under indictment. J.A. 222; see J.A. 173. She further testified that on each of the forms that she completed in order to purchase the firearms she made several false statements, including denying that she was under indictment and lying about her current address. J.A. 221-222. She acknowledged that she understood that the gun dealers wanted her to answer truthfully and that she signed a statement on the form attesting that her answers were truthful. J.A. 222. She further admitted that "I knew I was" committing a crime when she purchased the first firearm and each of the firearms thereafter. J.A. 222, 239.

In defense, petitioner claimed that her boyfriend, Thomas Earl Wright, had coerced her into purchasing the firearms. Petitioner testified that she had been in an abusive relationship with Wright for several months and that the abuse escalated in December 2002 and January 2003. J.A. 158-159, 163-164, 166, 215. Petitioner testified that on the evening before the January 4 gun show, Wright awakened her and announced that they were going to a gun show and that she was going to purchase some guns for him. According to petitioner, at

that time, Wright pointed a gun at her face, threatened to kill her, and split her lip. J.A. 170-171.[2] Petitioner further testified that the following day, she, Wright, Wright's sister, and two of Wright's companions went to the gun show. She claimed that Wright instructed her on which guns to purchase and how to fill out the forms for the dealers, and he provided her with money to make three purchases. She testified that she complied with his requests because she was afraid that Wright would kill her or her daughters if she did not. J.A. 173-177. She claimed that Wright told her that someone was home with her daughters and that they were only a telephone call away. J.A. 171.[3]

Petitioner testified that, after the January 4 gun show, her relationship with Wright deteriorated further. J.A. 178-179. She claimed that, one week after the first gun show, on January 11, Wright again awakened her, pointed a gun at her, and made her go to another gun show with him and one of his companions. J.A. 180-181. She purchased four additional firearms at that gun show, and testified that she did so because she was afraid that Wright would kill her or that something would happen to her daughters. She testified that a fifth

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[2] On cross-examination, petitioner testified that it was late on Friday night when Wright awakened her, that she went back to sleep and slept until approximately 2 p.m. Saturday afternoon, and that they went to the gun show about an hour later. J.A. 216.

[3] Although petitioner's description of her abusive relationship with Wright was largely corroborated by her daughters Ve'Queshia and Jocelyn, aged 16 and 14 at the time of trial, J.A. 106-149, Ve'Queshia testified that she and her sisters were alone at home while her mother went to the first gun show, and that her mother returned alone in her car from that show, arriving before Wright. J.A. 119-120; see J.A. 225-226 (petitioner admitted that she returned home before Wright, but contended that Wright's sister was with her).

attempted purchase failed, but that she persisted in attempting to make the purchase under threats from Wright. J.A. 181-189.

On cross-examination, petitioner admitted (as she had on direct), that she did not believe that Wright would harm her while they were at the gun shows. J.A. 175, 189, 239 ("I didn't think it was going to happen right then and there."). She testified that they were at each gun show for a couple of hours, wandering around and looking at guns. J.A. 224, 242. She further admitted that there were security guards at both gun shows, but that she did not alert them to the fact that she was being forced to purchase firearms. J.A. 220. She admitted that she did not tell any of the gun dealers that she was being threatened, nor did she indicate when she filled out the forms that she was under any kind of duress. J.A. 240 (admitting that she did not write "help me" or "I am being threatened" on the forms). She also admitted that if she had answered the questions on the forms truthfully, she could have avoided purchasing the firearms, which she claimed she did not want to do. *Ibid.*

Petitioner also testified—and her daughters confirmed—that on or around the day of the second gun show, the police had been summoned to her apartment as a result of a disagreement that petitioner was having with one of Wright's associates. J.A. 234-236; see J.A. 126-127, 141. Petitioner admitted that she spoke with the police at that time, but that she did not report to them that she was being abused by Wright or that she had been forced by him to purchase firearms. J.A. 234-

236; see J.A. 126-127, 141.[4] Petitioner also admitted that between the first and second gun shows, her daughters continued to attend school. J.A. 237. She further admitted that she never called the police to send a car to the school to ensure their safety, nor did she tell her daughters to tell the teachers, counselors, or security personnel at the school to report the dangerous situation that her family was experiencing or to call their grandparents for help. J.A. 237, 245. She agreed that she had been negligent in letting her daughters return home and in not calling the police, and that those were options available to her. J.A. 233-234, 237.[5]

During the government's case, the gun dealers who sold firearms to petitioner at the two gun shows testified that while petitioner was accompanied by several young black males, her companions did not appear to be controlling her purchases or advising her on what to pur-

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[4] Petitioner further admitted that towards the end of her marriage with her ex-husband, she had obtained a restraining order against him. J.A. 199.

[5] In addition, petitioner admitted that, from November 2002 through January 2003, she had telephone and in-person contacts with her pretrial services officer and her attorney in the check-cashing case (J.A. 210-212; see J.A. 128, 144-145), as well as her mother, father, stepfather, sisters, and ex-husband (J.A. 208-210, 213-214, 232-233), but that she never told any of them that she was being abused by Wright or that he had forced her to purchase firearms illegally. She further admitted that on January 15, 2003, four days after the second gun show, she appeared in federal district court, after meeting with her attorney, to be sentenced in the check-cashing case. She did not tell her attorney or the district court that she was being abused, or that she had been forced to buy firearms at the gun shows. J.A. 213-214. Finally, while petitioner insisted that she was afraid at the time of the firearms purchases that Wright would kill her or her children, she placed Wright's name on her visitation list at the jail following her arrest on the firearms charges. J.A. 248-251.

chase; one dealer testified that the young men accompanying petitioner appeared bored. They all testified that if they had believed that petitioner was making a straw purchase on behalf of someone else, they would not have sold her the firearms because such a transaction would have been an illegal one for which they could have lost their dealer's license. J.A. 61-62, 76-82, 84-85, 87, 91, 94, 100, 103-104. While one gun dealer's wife, who assisted her husband at the January 4 show, testified that it appeared that petitioner was unsure which gun to purchase and that petitioner's companion was possibly providing her with information about the guns, she also testified that petitioner did not appear to be anxious or afraid. J.A. 66-69. Further, many of the gun dealers testified that the men accompanying petitioner remained in the background during their transactions with petitioner. J.A. 80, 91-92, 94, 100. One dealer testified that at one point, petitioner returned to his table at the show to report that an attempted purchase from another dealer had been delayed, and that on that occasion petitioner was by herself. J.A. 83.

Another dealer—the one who received the "delay" response when he conducted a criminal background check on petitioner (J.A. 95-99)—testified that petitioner angrily insisted that she had been able to purchase firearms from other dealers and that she ultimately had accused the dealer of "ripping" her off, stating: "I can buy a gun anywhere in this show except for you." J.A. 98-99. The dealer testified that petitioner also was "mad" that he would not return the nonrefundable $15 transaction fee. J.A. 99. This same dealer testified that petitioner had approached his sales area several times during the course of her attempted purchase from him and that she was "alone as far as any

transactions." J.A. 100. He explained that "[w]hen she came back the second or third time, I thought there were perhaps two men in the background," but "[t]hey never got into the conversation at all." *Ibid.*[6]

b. At the charge conference, the government objected to the jury receiving any instruction on the defense of duress on the ground that petitioner had failed to introduce evidence sufficient to warrant an instruction. J.A. 290; see J.A. 252-256. The district court overruled the government's objection. The court believed that whether the evidence warranted an instruction was "frankly a close call in my mind, but when it is a close call, better to give it than not." J.A. 290. For her part,

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[6] In support of her duress defense, petitioner sought to introduce expert testimony from Dr. Toby Myers about the reactions of battered women to their abusers. The district court held that Myers's testimony was inadmissible to show duress because it addressed petitioner's subjective perceptions of her situation, and the duress defense turns on how an objectively reasonable person would have acted under the circumstances. Tr. 727; J.A. 257-258; see J.A. 326-327. The district court also disallowed testimony proffered from the defense by Alcohol, Tobacco and Firearms Agent Kelly Oates. Petitioner sought to elicit from Oates out-of-court statements made by Wright and one of his companions after petitioner's arrest to the effect that petitioner had purchased the firearms for them because they were convicted felons and could not purchase firearms themselves. Tr. 724-725, 728, 731-740; see J.A. 332. Defense counsel argued that the statements were admissible pursuant to Federal Rule of Evidence 804(b)(3) because the statements were against Wright's penal interest and Wright was unavailable to testify, inasmuch as Wright's attorney had represented that Wright would exercise his Fifth Amendment privilege against self-incrimination. Tr. 733-734, 738. The district court held (Tr. 738-740) that Wright's statements did not satisfy the requirements of Rule 804(b)(3) because they were not exculpatory of petitioner and because corroborating circumstances did not "clearly indicate the trustworthiness of the statement." Fed. R. Evid. 804(b)(3).

petitioner requested that the district court instruct the jury that she had the burden of producing evidence to support each element of the duress defense and that, if she did so, "then the government must prove beyond a reasonable doubt the absence of duress or coercion." J.A. 47; see J.A. 45-48, 300. The court denied that request. J.A. 300.

In its instructions, the district court set forth, *inter alia*, the elements of the firearms offenses and informed the jury that the government had to prove each element of the offenses beyond a reasonable doubt. J.A. 310-312. The instructions admonished that the jury should make that determination after consideration of "all the evidence in the case." J.A. 305; see J.A. 307. The district court further instructed the jury that "[i]f you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, you must then consider whether the defendant should nevertheless be found 'not guilty' because her actions were justified by duress or coercion." J.A. 312. The court set forth the elements of the duress defense, and instructed the jury that petitioner had "the burden of proof to establish the defense of duress by a preponderance of the evidence." *Ibid.*

The jury found petitioner guilty on all counts. J.A. 316-319.

4. The court of appeals affirmed, rejecting petitioner's claim that the district court erred in instructing the jury that petitioner bore the burden of proving her duress defense by a preponderance of the evidence. J.A. 332. The court explained that the defense has four requirements: (1) a present and imminent threat of "such a nature as to induce a well-grounded apprehension of death or serious bodily injury," such that "a person of

reasonable firmness in [petitioner's] situation would have been unable to resist the threat"; (2) no reasonable, legal alternative to violating the law; (3) no negligent or reckless conduct by petitioner that placed her in a situation in which it was probable that she would be forced to choose the criminal conduct; and (4) a direct causal relationship between the criminal action and avoidance of the threatened harm. J.A. 328 (internal quotation marks and citations omitted).[7] Relying on circuit precedent, the court held that "[s]ince a justification defense is an affirmative defense, the burden of proof is on the defendant. To succeed, the defendant must prove each element of the defense by a preponderance of the evidence." J.A. 332 (quoting *United States* v. *Willis*, 38 F.3d 170, 179 (5th Cir. 1994), cert. denied, 515 U.S. 1145 (1995)).[8]

SUMMARY OF ARGUMENT

A defendant must bear the burden of proof on the affirmative defense of duress. Because the concept of a duress defense is deeply rooted in the common law, it represents a background principle that may be read into federal criminal statutes absent a contrary congressional intent. Cf. *United States* v. *Bailey*, 444 U.S. 394, 409-410, 415-416 n.11 (1980). But consistent with the

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[7] Petitioner does not contest the court of appeals' statement of those elements.

[8] The court of appeals also rejected petitioner's claims that the district court erred in excluding Dr. Myers's testimony and Wright's out-of-court statements. J.A. 327-331. Although petitioner devotes (Pet. Br. 9-13) considerable space in her brief to discussing Dr. Myers's proffered testimony, this Court did not grant review on the question in the petition for a writ of certiorari (see Pet. i) that challenged the exclusion of her testimony. See 126 S. Ct. 1139 (2006).

common law and its underlying policies, a defendant must bear the risk of non-persuasion of the issue of duress by establishing that defense by a preponderance of the evidence.

A. The defense of duress responds to the notion that a defendant who committed a crime because of the coercive effect of a threat of imminent death or serious bodily injury should not be punished criminally, even though she has violated the criminal law. But the defense has never been a favored one. Rather, it has always been surrounded by strict rules of proof to prevent abuses. One of those rules is that defendants must carry the burden of proof to establish duress.

Sound policy considerations support the common-law rule. The burden of proof is sensibly allocated to the party that has readier access to the facts supporting the defense. Allocating the risk of non-persuasion to the defendant also accords with the policy of making it more difficult to establish a disfavored defense. And the common law frequently assigned the burden of proof to the party seeking to establish the less likely or more unusual occurrence.

B. All of those considerations are applicable to the duress defense. First, a defendant is in a substantially better position than the government to produce evidence that she has been subject to duress. Second, the government will often find it difficult to obtain evidence to refute the defense. Third, requiring the defendant to carry the burden of proof helps to protect against false claims of duress—a substantial concern with a defense that is easy to assert but hard to disprove. Finally, requiring the government to shoulder the burden of proof—beyond a reasonable doubt—to refute duress would impose substantial costs on society.

Petitioner contends that only one practical consideration supports placing the burden of proof on the government, namely, avoidance of the risk of jury confusion on the burden of proof of guilt. But this Court has already rejected that argument, recognizing that juries are readily capable of making distinctions between the burden to establish guilt and the burden to establish an affirmative defense. *Leland* v. *Oregon*, 343 U.S. 790 (1952).

C. Petitioner cannot establish that there is any common-law trend that supports placing the burden of proof on the government. *Davis* v. *United States*, 160 U.S. 469 (1895), which departed from the common law by requiring the government to disprove the defense of insanity beyond a reasonable doubt, rested on a particular view about the relationship between the insanity defense and the mens rea required for the murder offense at issue. Not only has Congress rejected the result in *Davis* by statute—thus making *Davis* a questionable foundation and signaling that Congress's views are, in fact, closer to that of the common law than to the reasoning in *Davis*—but the established presumption when Congress expressly creates an affirmative defense is that the defendant must "set it up and establish it." *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922). The same presumption should apply to defenses that are borrowed from the common law and read into federal statutes, and whose common-law origins placed the burden of proof on the defendant.

In any event, the rationale of *Davis* does not apply to the common-law defense of duress. The common-law defense of duress clearly does not negate the mens rea element of the offense. Rather, the duress defense applies only when the defendant has committed both a vol-

untary act and had the mens rea required for the crime. *Bailey*, 444 U.S. at 402. Duress goes to the motivation for the crime—not to whether the defendant had the mental state necessary for its commission. The lower federal courts have recognized the distinction between motive and mens rea as applied to the defense of duress. And the current general trend in the lower federal courts requires the defendant to bear the burden to prove duress.

D. Finally, there is no constitutional impediment to placing the burden of proof on a defendant claiming duress. This Court has settled that the reasonable-doubt standard applies to the elements of an offense as defined by the legislature, not to affirmative defenses. See *Martin* v. *Ohio*, 480 U.S. 228 (1987); *Patterson* v. *New York*, 432 U.S. 197 (1977). That rule cannot be avoided here on the theory that evidence of duress may also be relevant to mens rea; the same argument was rejected in *Martin*. And there is no basis for viewing duress as implicating a "fundamental component of *mens rea*, freedom of choice," Pet. Br. 45, such that due process requires the government to disprove duress. Freedom of choice in that sense is not a component of mens rea; indeed, the entire point of the duress defense is that the defendant made a choice to commit a crime in order to avoid a threatened harm. It is not fundamentally unfair to require a defendant to bear the risk of nonpersuasion that her choice to commit a crime was the product of coercive threats that gave her no reasonable alternative but to violate the criminal law.

ARGUMENT

A DEFENDANT SHOULD BEAR THE BURDEN OF PERSUASION ON THE AFFIRMATIVE DEFENSE OF DURESS

The government proved each of the statutory elements of petitioner's offenses beyond a reasonable doubt. Under Section 922(a)(6), it is unlawful for anyone, in connection with the acquisition or attempted acquisition of a firearm, to knowingly make a false statement that is intended or likely to deceive a licensed firearms dealer with respect to any fact material to the lawfulness of the sale. See 18 U.S.C. 922(a)(6). Section 922(n) makes it unlawful for anyone, while under indictment for a crime punishable by imprisonment for a term exceeding one year, to willfully acquire a firearm that has been shipped or transported in interstate commerce. See 18 U.S.C. 922(n) and 924(a)(1)(D). Petitioner admitted the essential elements of both offenses, including the requirements of knowledge and willfulness. Indeed, petitioner admitted that she knew that her conduct was illegal. J.A. 221-222, 239.

Having admitted the statutory elements of the firearms offenses, petitioner sought to raise the affirmative defense of duress and to saddle the government with the burden to disprove that claimed defense beyond a reasonable doubt. Because "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law, * * * a defense of duress or coercion may well have been contemplated by Congress when it enacted" the firearms statute. See *United States* v. *Bailey*, 444 U.S. 394, 415-416 n.11 (1980). It is therefore reasonable for the courts to apply such a defense as a background principle of construction, cf. *Morissette* v. *United States*, 342 U.S. 246, 262-263 (1952), absent con-

trary indication of congressional intent. See *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490-491 (2001) (medical necessity defense to the offense of manufacturing and distributing marijuana held to be "at odds with the terms of the Controlled Substances Act").[9] But the common-law history and rationale for the duress defense, as well as traditional and practical considerations informing the allocation of burdens of persuasion, all point to the conclusion that the risk of nonpersuasion should lie with the proponent of the duress defense. And this Court's precedents compel the conclusion that placing that burden of persuasion on petitioner does not violate the Due Process Clause.[10]

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[9] As the Court recognized in *Oakland Cannabis*, this Court has never definitively held that courts can recognize well-established common-law defenses and that doing so is at least in some tension with the Court's longstanding refusal to recognize common-law crimes. Nevertheless, the federal courts, including this Court, have addressed such non-statutory defenses for almost 200 years since the Court recognized that only Congress could create crimes, *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Moreover, the question presented assumes the existence of a duress defense. Nonetheless, the practice of formulating such defenses is one that federal courts should approach with caution, and invitations to depart from the common-law nature of affirmative defenses should be viewed with skepticism.

[10] The term "burden of proof" has been used to refer to two distinct concepts: "the 'burden of persuasion,' *i.e.*, which party loses if the evidence is closely balanced, and the 'burden of production,' *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding." *Schaffer* v. *Weast*, 126 S. Ct. 528, 533-534 (2005) (citing *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 272 (1994)). The issue in this case concerns the allocation of the burden of persuasion. Petitioner does not challenge (Pet. Br. 40-41) the proposition accepted by all of the courts of appeals to have considered

A. At Common Law, Duress Was An Excuse To Criminal Conduct On Which The Defendant Bore The Burden Of Persuasion

1. Under the common-law affirmative defense of duress, a person is not held criminally liable if, under certain circumstances, he has been forced by another to commit an offense by an unlawful threat of harm. 2 Wayne R. LaFave, *Substantive Criminal Law* § 9.7, at 72 (2d ed. 2003). The defense is one of excuse. As Blackstone explained, "it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion." 4 William Blackstone, *Commentaries* *27.[11]

Although the societal justification for the defense is that the defendant's coerced conduct should not be punished, the premise of the defense is that the defendant committed the crime. See *Bailey*, 444 U.S. at 409 ("Duress was said to excuse criminal conduct * * * violating the literal terms of the criminal law."). The rationale of the duress defense is thus not that the defendant has

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the question that the initial burden of producing evidence to support an affirmative defense is properly placed on the defendant. See *Bailey*, 444 U.S. at 415.

[11] The common-law defense of compulsion, recognized as long ago as 1550 in *Reniger* v. *Fogossa*, 75 Eng. Rep. 1 (K.B.), distinguished between the defenses of "duress" and "necessity." See 1 Matthew Hale, *The History of the Pleas of the Crown* 49-57 (1847). "While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *Bailey*, 444 U.S. at 409-410. "Modern cases have tended to blur the distinction between duress and necessity," *id.* at 410, and some courts have used the terms interchangeably.

"somehow los[t] his mental capacity to commit the crime in question" or that he "has not engaged in a voluntary act." 2 LaFave, *supra*, § 9.7(a) at 73. "Rather, it is that, even though he has done the act the crime requires and has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is excused because he lacked a fair opportunity to avoid acting unlawfully." *Ibid*. (internal quotation marks omitted).

Because the duress defense operates to free defendants who have committed all of the elements of a criminal offense, the common law recognized that the doctrine "held within it the germs of potential disorder." Lawrence Newman & Lawrence Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. Cal. L. Rev. 313, 314 (1957). "If the doctrine was not to be the plaything of the shrewd and the unscrupulous (and were not those suspected of crimes already questionable in that respect?) it had to be well hedged and strict of proof." *Ibid*. The duress defense was thus disfavored in the common law, in part because of "the difficulty of assessing degrees of participation in joint criminal conduct, of influence and control, of passivity, suggestibility, and so on." See Jerome Hall, *General Principles of Criminal Law* 444 (2d ed. 1960) (noting "judicial hostility" to the defense of coercion); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. Cal. L. Rev. 1331, 1331-1332 (1989).

Accordingly, the common law has long placed several significant restrictions on the duress defense. See 1 Wm. L. Burdick, *The Law of Crime*, § 199, at 262 (1946) ("[T]he doctrine [of compulsion or necessity] is hedged about with certain positive rules of law, and is recog-

nized only in clear cases."). These restrictions include that the defendant must have acted under fear of death or serious bodily harm. *Id.* at 262-263. The fear had to be a reasonable one, and the danger to the defendant had to be imminent and impending. See *ibid.*; Hall, *supra*, at 443. Fear of "future bodily harm do[es] not excuse an offense." Burdick, *supra*, § 199, at 263. The defendant also must bear no "fault or blame" in causing the coercion. See *ibid.* In addition, the defendant must have had no reasonable opportunity to avoid the threatened harm. See 2 LaFave, *supra*, § 9.7(b) at 76-79. As this Court has recognized, "if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defense[] will fail." *Bailey*, 444 U.S. at 410 (quoting Wayne R. LaFave & Austin W. Scott, Jr., *Handbook on Criminal Law* 379 (1972)).

2. Given the traditional distrust of the duress defense—proof of which often consisted of little more than the accused's self-serving assertions—it is not surprising that the common law placed the burden of proof on the defendant. Indeed, this was the common law rule with respect to all affirmative defenses. See Blackstone, *supra*, at *201 ("[A]ll these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed."); Michael Foster, *Crown Law* 255 (2d ed. 1791) ("In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him.") (emphasis omitted). This Court repeat-

edly has so recognized. *Patterson* v. *New York*, 432 U.S. 197, 202 (1977) ("[A]t common law the burden of proving [the defense of heat of passion on sudden provocation], as well as other affirmative defenses—indeed, 'all . . . circumstances of justification, excuse or alleviation'—rested on the defendant.") (quoting Blackstone, *supra*, at *201); *Martin* v. *Ohio*, 480 U.S. 228, 235 (1987) ("the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove"); *Mullaney* v. *Wilbur*, 421 U.S. 684, 693-694 (1975) (same). Moreover, as petitioner acknowledges (Pet. Br. 18 & n.14), "[t]his was the rule when the Fifth Amendment was adopted." *Patterson*, 432 U.S. at 202.[12]

The historical allocation of the burden of proof at common law accords with basic principles that inform which party should bear the risk of nonpersuasion. Generally, "the party having in form the affirmative allegation" pulls the laboring oar—that is, the proponent of a proposition should prove it, rather than the other party having to prove a negative. 9 John Henry Wigmore, *Evidence* § 2486, at 288 (1981) (emphasis omitted). The burden of proving a fact also is commonly placed on the one "who presumably has peculiar means of knowledge" enabling him to prove it. *Id.* at 290 (emphasis omitted). Furthermore, placing the risk of nonpersuasion on the

[12] Relying upon scholarly commentary on the case of *The King* v. *Oneby*, 92 Eng. Rep. 465 (K.B. 1727), petitioner contends (Pet. Br. 18 & n.15) that the common-law rule was "the product of flawed reasoning." Petitioner acknowledges, however, that common-law courts in England and the United States did place the burden of proving affirmative defenses on the defendant. *Ibid.* Moreover, this Court has previously noted the same scholarly commentary, see *Mullaney*, 421 U.S. at 694 n.16, but it nevertheless has consistently recognized that the common law placed the burden of proof of affirmative defenses on the defendant.

defendant with respect to the duress defense is consistent with "[t]he policy of handicapping a disfavored contention." 2 John W. Strong, *McCormick on Evidence* § 337, at 413 (5th ed. 1999). Finally, that allocation accords with the "frequently significant consideration" of assigning the burden of proof based on "the judicial estimate of the probabilities of the situation." *Ibid.*; see *ibid.* ("The risk of failure of proof may be placed upon the party who contends that the more unusual event occurred.").

B. Substantial Practical Considerations Support Placing The Burden On The Defendant To Prove The Duress Defense

The same general principles that doubtless informed the historical practice of requiring the defendant to prove a claim of duress apply equally forcefully today.

1. First, the defendant will usually be in a far better position than the government to adduce evidence on a purported duress defense. Often, as in this case, the sole evidence of duress will be testimony offered by the defendant and close associates who have an incentive to protect the defendant. As such, if the government bears the burden of disproving duress, "[e]ven if the government is effective in impeaching the credibility of the defendant, it may not meet its burden." *United States* v. *Dominguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir.) (per curiam), cert. denied, 502 U.S. 958 (1991). Moreover, the claim of duress will generally rest on alleged events that occurred before the criminal conduct, *i.e.*, before the events that caused the government to become involved. Because the defendant is the one with better access to knowledge of the facts needed to prove the defense, it is fair to place the burden on him to establish

the defense. See *United States* v. *Unser*, 165 F.3d 755, 765 (10th Cir.) ("Often it is the defendant who is most likely to have access to the facts needed to prove [a defense of necessity], and this case seems to be of that type."), cert. denied, 528 U.S. 809 (1999).[13]

Second, in most cases where a claim of duress is raised, the prosecution will be unable to call the witness most likely to have information bearing on the point: the person alleged to have coerced the defendant into committing the offense. Because such conduct itself constitutes a criminal offense, the person who allegedly made the threat will generally assert his Fifth Amendment rights. This case bears that point out all too well: in seeking to adduce Wright's out-of-court statements (see note 6, *supra*), petitioner's counsel argued at trial that, although Wright was present in the courthouse, he was unavailable to testify because his attorney would advise him to claim his Fifth Amendment privilege against compelled self-incrimination. Tr. 738.[14] Petitioner thus errs in asserting (Pet. Br. 40) that the gov-

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[13] The United States advances "preponderance of the evidence" as the measure of the defendant's burden because that is the standard supported by commentators, see Hall, *supra*, at 443; Newman & Weitzer, 30 S. Cal. L. Rev. at 321, applied by the lower federal courts that place the burden of persuasion on the defendant, see, *e.g.*, J.A. 332; *United States* v. *Deleveaux*, 205 F.3d 1292, 1299 (11th Cir.), cert. denied, 530 U.S. 1264 (2000); *Dominguez-Mestas*, 929 F.2d at 1384, and set forth by Congress in several affirmative defenses in Title 18, see 18 U.S.C. 373(b); 18 U.S.C. 1512(e) (Supp. II 2002); 18 U.S.C. 2320(c).

[14] It is no answer to note that the government has the ability to grant immunity to the person who applied the alleged coercion in order to procure his testimony. That individual may bear equal or even greater culpability for the charged crime, and the government should not be required to surrender or greatly complicate the prosecution of one wrongdoer in order to refute a claimed excuse by another.

ernment had an opportunity to test petitioner's claim of duress by examining Wright. There is thus no foundation for petitioner's suggestion that duress cases "present no special burden" on the government. Pet. Br. 40.[15]

Moreover, while the defendant will presumably know whether he will raise a coercion defense, the defendant is generally under no obligation to notify the government before trial that the defense will be raised. The government will thus often have little, if any, opportunity to investigate the claim and to identify and locate witnesses capable of rebutting such a defense, much less *disproving* it beyond a reasonable doubt. Although, as petitioner notes (Pet. Br. 39-40), the government did have advance notice in this case, that was only because petitioner sought to introduce the testimony of an expert witness, and the district court therefore required her to give advance notice of that fact pursuant to Federal Rule of Criminal Procedure 12.2(b). See 8/6/2003 Pretrial Conf. Tr. 12-13; J.A. 18-20.[16]

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[15] In addition, in many cases, "those to whom the defendant refers either cannot be located or are outside the United States and not subject to subpoena power." *Dominguez-Mestas*, 929 F.2d at 1384. For example, it is increasingly common for federal prosecutions to involve criminal activity with international ties and, in at least several recent cases, defendants have asserted that their alleged coercer was in a foreign country. See, *e.g.*, *Chavez* v. *United States*, petition for cert. pending, No. 05-9280 (filed Feb. 13, 2006) (defendant claims that he transported marijuana into the United States from Mexico because his father owed a debt to an alleged leader of a Mexican drug cartel, who had threatened to kill his father and other family members if the defendant did not transport the marijuana). A defendant may thus raise a duress defense with full knowledge that the witnesses who could refute it are beyond the reach of the court's process.

[16] Notably, however, petitioner's counsel contended in the district court (J.A. 18-20; 8/6/2003 Pretrial Conf. Tr. 4-5) that Rule 12.2(b) did

Third, requiring the defendant to establish the defense of duress helps protect against spurious claims of duress. The Court recognized this in an analogous context involving a possible defense to the forfeiture of a vessel that ran the Union blockade of Confederate ports during the Civil War. See *The Diana*, 74 U.S. (7 Wall.) 354 (1869). The Court there observed that the situation "must be one of absolute and uncontrollable necessity," *id.* at 360: "Any rule less stringent than this would open the door to all sorts of fraud. Attempted evasions of the blockade would be excused upon pretences of distress and danger, not warranted by the facts, but the falsity of which it would be difficult to expose." *Id.* at 361. The potential for abuse that inheres in the duress defense, and that informed the development at common law of the strict standards governing its use, should also inform which party should shoulder the burden of proof of the defense.

Finally, the reasonable doubt standard, as applied to the duress defense, would overprotect defendants while jeopardizing important interests in punishing those who violate the law. "The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is * * * an increased risk that the guilty will go free." *Patterson*, 432 U.S. at 208. Although "our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits." *Ibid.* In the context of the duress defense, where the defendant has engaged in the acts that violate the criminal law with the requisite mental state but seeks to be excused from that violation,

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not apply to the expert evidence he intended to offer, which he asserted did not "relat[e] to a mental disease or defect or any other mental condition of the defendant." Fed. R. Crim. P. 12.2(b).

society should not have to bear the risk that the government may be unable to negate the excuse. District courts may allow the issue of duress to go to the jury even when the evidence on duress is extremely thin. See J.A. 290 (district court observing that "when it is a close call, better to give [the instruction] than not"). To protect against the very real risk that the guilty will thereby erroneously go free, the defendant, as the proponent of the defense, should bear the burden of persuading the jury that his criminal conduct should be excused.

This Court has recognized that pragmatic factors are properly taken into account in assessing where to place the burden of proving a particular defense. Thus, as this Court observed in *Patterson*: "[t]he placing of the burden of proof on the defense [of acting under extreme mental distress], with a lower threshold * * * is fair because of defendant's knowledge or access to the evidence other than his own on the issue. To require the prosecution to negative the 'element' of mitigating circumstances is generally unfair." 432 U.S. at 212 n.13 (quoting with approval *People* v. *Patterson*, 347 N.E.2d 898, 909 (N.Y. 1976) (Breitel, C.J., concurring), aff'd, 432 U.S. 197 (1977)). See *Cooper* v. *Oklahoma*, 517 U.S. 348, 366 (1996) ("[T]he difficulty of ascertaining where the truth lies may make it appropriate to place the burden of proof on the proponent of an issue."); *Morrison* v. *California*, 291 U.S. 82, 91 (1934) (observing that the burden of proof may properly be placed on the defendant if there exists "a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one

who is unable to bring himself within the range of an exception").[17]

2. Petitioner posits (Pet. Br. 31) only one practical consideration in support of her approach. She contends that placing the burden of proof on the defendant to establish the defense by a preponderance of the evidence creates "an unacceptable risk that a jury will be confused and thereby apply the wrong burden of proof when determining guilt." The creation of different burdens, she argues, will create a risk that the jury will find guilt solely because of the failure of a defense. This Court, however, has long rejected the notion that a jury is incapable of making just such distinctions.

In *Leland* v. *Oregon*, 343 U.S. 790 (1952), the Court easily put aside concerns that instructions placing the burden on the defendant to establish his insanity defense would confuse the jury. "Juries have for centuries made the basic decisions between guilt and innocence and between criminal responsibility and legal insanity

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[17] Petitioner asserts (Pet. Br. 39) that in *Tot* v. *United States*, 319 U.S. 463 (1943), this Court rejected disparity in convenience of proof and opportunity for knowledge as rationales for placing the burden of proof on the defendant. But *Tot* involved a statutory presumption of an element of an offense, and the Court found the presumption unconstitutional because there was no rational connection between the fact proved and the fact presumed. *Id.* at 467-468; see *Leland* v. *Oregon*, 343 U.S. 790, 799 (1952) (explaining *Tot*). In that very different context, the Court noted that the defendant's "better means of information, standing alone," did not justify creating such a presumption. *Tot*, 319 U.S. at 469. Significantly, however, the Court left open the possibility of such an "argument from convenience * * * where the inference is a permissible one, where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship." *Id*. at 469-470.

upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, the placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc." *Id.* at 800. The Court concluded that "to condemn the operation of this system here would be to condemn the system generally," and declined to do so. *Ibid.* Similarly, in *Martin*, the Court rejected a claim that an instruction that placed the burden on the defendant to prove self-defense by a preponderance of the evidence would create jury confusion: "We do not harbor [such] mistrust of the jury." 480 U.S. at 234-235 n.*.

C. The "More Recent Common Law" Does Not Support Requiring The Government To Disprove A Claim of Duress

Despite acknowledging that the common law historically placed the burden of proof on the defendant to prove duress (Pet. Br. 17-19), petitioner contends (Pet. Br. 15, 20-31) that "[t]he more recent common law" supports placing the burden on the government to disprove duress beyond a reasonable doubt. That is not so.

1. Petitioner principally relies on this Court's decision in *Davis* v. *United States*, 160 U.S. 469 (1895), in which the Court abandoned the common-law view with respect to the insanity defense, and fashioned a new rule for the federal courts that the government must prove a defendant's sanity beyond a reasonable doubt if the defendant produces sufficient evidence to place his sanity at issue. That case cannot bear the weight petitioner places upon it.

a. As petitioner acknowledges (Pet. Br. 22-23 & n.22), Congress has rejected *Davis* by statute, placing the burden on defendants to prove their insanity by

"clear and convincing" evidence. 18 U.S.C. 17(b).[18] While that action may not speak directly to the burden of proof for other affirmative defenses, it strongly counsels against using *Davis* to fashion general principles for other affirmative defenses and suggests that Congress's view on the appropriate allocation of the burden of proof is closer to that of the common law than to the position taken in *Davis*. That indication of congressional intent is highly significant because Congress has plenary authority to create affirmative defenses, *Oakland Cannabis*, 532 U.S. at 490, and Congress has never expressly adopted defenses that justify or excuse the commission of an otherwise unlawful act on the basis of duress or necessity, much less required the government to disprove such a defense beyond a reasonable doubt. See National Comm'n on Reform of Fed. Crim. Laws, *Study Draft of a New Federal Criminal Code* 38 (1970).[19] To

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[18] In response to the acquittal of John Hinckley for the attempted murder of President Ronald Reagan, Congress enacted the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. IV, 98 Stat. 2057, which provides that "[t]he defendant has the burden of proving the defense of insanity by clear and convincing evidence." 18 U.S.C. 17(b).

[19] On at least one occasion, Congress considered a bill that would have codified the duress defense, and nothing in that proposal would have shifted the burden of proof to the government. The initial version of a bill designed to revise the federal criminal code, S.1, 94th Cong., 1st Sess. § 531 (1975), provided that "[i]t is an affirmative defense to a prosecution under any federal statute, other than a prosecution under Section 1601 (Murder), that the defendant engaged in the conduct charged because another person coerced him to do so by a clear threat of imminent and inescapable death or serious bodily injury to himself or any other person." The amended version of the bill, S. 1437, 95th Cong., 2d Sess. § 501 (1978), eliminated this section in favor of a general provision recognizing "an affirmative defense of * * * duress * * * [which] shall be determined by the courts of the United States

the extent that federal courts treat the duress defense as a background principle of the common law that is generally read into federal criminal statutes absent contrary indications of congressional intent, see *Oakland Cannabis*, 532 U.S. at 490-491; *Bailey*, 444 U.S. at 415-416 n.11, there is no foundation for overriding the common law's historical allocation of the burden of proof to the defendant.

Indeed, where Congress expressly creates an affirmative defense to criminal conduct, it is well-established that the defendant bears the burden of establishing that defense:

> By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the ele-

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according to the principles of the common law as they may be interpreted in the light of reason and experience." In that regard, the National Commission on Reform of Federal Criminal Laws proposed:

> *Duress an Affirmative Defense.*—Duress is an excuse for criminal conduct, not a justification. Since we are dealing with conduct which is, objectively considered, criminal, it seems quite appropriate to place the burden of proof on the defendant to establish an excuse. This is accomplished, under the proposal, by denominating duress an "affirmative defense". It is contemplated that affirmative defenses would require a defendant to present a preponderance of evidence to convincingly exculpate himself from responsibility for his proven acts. This would be unlike an ordinary defense, in which a defendant would be required merely to raise an issue, which the government must still prove beyond a reasonable doubt. The distinction here adopted is used in the New York Revised Penal Law of 1967 (§ 25.00).

1 National Comm'n on Reform of Fed. Crim. Laws, *Working Papers of the National Commission on Reform of Federal Criminal Laws* 278 (1970).

> ments of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up *and establish it*.

McKelvey v. *United States*, 260 U.S. 353, 357 (1922) (emphasis added). And several affirmative defenses established in Title 18 explicitly require the defendant to carry the burden of proof. See note 24, *infra*. It would be strange, to say the least, to place a greater burden on the government where, as here, a court infers the existence of an affirmative defense as the basis of background assumptions about congressional intent, and both the common-law origins of the defense and sound policy considerations counsel in favor of placing the burden of proof on the defendant.[20]

b. In any event, the reasoning of *Davis* does not aid petitioner. In *Davis*, the Court concluded that the elements of the charged murder included that the defendant could not have acted with the requisite mens rea,

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[20] Petitioner's reliance (Pet. Br. 22 & n.20) on this Court's approach to the entrapment defense provides no support for placing the burden of proof on the government in cases involving duress. Cf. *Jacobson* v. *United States*, 503 U.S. 540, 549 (1992) (upon a showing of inducement, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act"). Unlike in the entrapment context, where "Government agents * * * originate a criminal design" and there is a risk that an "innocent person[]" may commit a crime because "the Government has induced an individual to break the law," *id.* at 548-549, duress involves no conduct by the government that causes the commission of a criminal act. In addition, entrapment is a defense created by this Court, see *Sorrells* v. *United States*, 287 U.S. 435 (1932), and does not share with duress a common-law tradition in which the defendant bears the burden of proof.

including "malice aforethought," if he lacked "sufficient mind to comprehend the criminality or the right and wrong of such an act." 160 U.S. at 485. Given that conclusion, the Court rejected the government's reliance on a presumption of sanity to satisfy its burden of proof, where the evidence called that presumption into question. *Id*. at 488.

Whatever the merits of the reasoning in *Davis* with respect to the elements of the murder charge there or the insanity defense as understood by the Court in 1895, its reasoning does not apply with respect to the defense of duress. A common-law claim of duress does not call into question any presumption relied upon by the government (as there is none) nor does it suggest that the defendant lacked the capacity to form the requisite mens rea for murder, or any other offense.[21] That the duress defense does not negate mens rea is demonstrated by the unavailability of the defense at common law for the intentional killing of an innocent third person. See Burdick, *supra*, § 199, at 262; 2 LaFave, *supra*, § 9.7, at 72. "If duress negatived state of mind, there would be no rule that intentional killings cannot be excused by duress * * * for the threat of harm would negative the defendant's capacity to intend death and so constitute a defense to murder of the intent-to-kill sort." *Id.* at 73 n.5.

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[21] The Court in subsequent cases has made it clear that the States and Congress have substantial latitude to adjust the insanity defense and the burdens for establishing it. See pp. 38-41, *infra*. In the same way, Congress presumably could eliminate the duress defense entirely, shift the burden to the government, or otherwise determine that it is related to the elements of a particular crime. The relevant point is simply that the factors that led this Court to deviate from the common-law rule in *Davis* are inapplicable to the common-law defense of duress.

In *Bailey*, the Court understood the duress defense to excuse criminal conduct "*even though* the necessary *mens rea* was present." 444 U.S. at 402 (emphasis added). Although the Court left open the theoretical possibility that a "heightened *mens rea*" requirement "might be negated by [a] defense of duress or coercion," *id.* at 415-416 n.11, it recognized that the duress defense did not negate the mens rea requirement that applied to the federal statute of escape at issue in that case: "knowingly" exceeding the bounds of confinement without authorization, *id.* at 408. And the Court further recognized that "except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction." *Ibid.*[22]

Indeed, duress would not negate mens rea regardless of whether the required culpability was willfulness, purpose, knowledge, recklessness, or negligence. See *Bailey*, 444 U.S. at 404 (listing commonly identified levels of mens rea). Petitioner's suggestion (Pet. Br. 15, 21-24) to the contrary "confuses the notions of objective and motive." *Walker* v. *Endell*, 850 F.2d 470, 473 (9th Cir. 1987), cert. denied, 488 U.S. 926 and 981 (1988). As

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[22] Although *Bailey* did not squarely address the burden of persuasion issue, it has language pointing toward placing the burden on the defendant rather than the government. *Bailey* repeatedly referred to the duress defense as an "affirmative defense," 444 U.S. at 416, and in concluding that the defendants there had failed to adduce sufficient evidence to warrant a jury instruction on the defense, *Bailey* held that to be entitled to an instruction, a defendant must produce sufficient evidence "as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense." *Id.* at 415; see *id.* at 425-426 (Blackmun, J., joined by Brennan, J., dissenting) (agreeing that "[c]ircumstances that compel or coerce a person to commit an offense, * * * traditionally have been treated as an affirmative defense, with the burden of proof on the defendant").

one court has explained, criminal statutes generally "prohibit particular action undertaken with a particular objective. * * * But the reason that the defendant has this objective involves the separate issue of motive." *Ibid.* If the reason or motivation for a defendant's conduct rises to the level of duress, society excuses his conduct, but that reason or motivation does not alter the fact that the defendant acted with the requisite mens rea. See *ibid.*

This point is illustrated by petitioner's case. The mens rea element under Section 922(a)(6) requires that petitioner acted "knowingly," that is, that she had knowledge of the facts that constituted the offense. See, *e.g.*, *Bryan* v. *United States*, 524 U.S. 184, 193 (1998). As *Bailey* recognized, 444 U.S. at 415-416 n.11, even if petitioner were forced to commit illegal acts, that would not alter her knowledge of the facts (*e.g.*, the falsity of her statements to the gun dealers, see J.A. 221-222) that constituted the Section 922(a)(6) offense. Section 922(n) requires the government to prove the heightened mens rea of "willfulness"—*i.e.*, that petitioner acted with knowledge that her conduct was unlawful, see *Bryan*, 524 U.S. at 191-193—but a claim of duress does not negate that heightened level of intent. Plainly, a person can be coerced into taking an action that she nonetheless knows is unlawful. Indeed, that is precisely what petitioner claims happened here: she readily admitted that she knew at the time that she purchased the firearms that her conduct was unlawful, see J.A. 222, 239, but she claims she was forced to engage in it.[23]

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[23] The willfulness requirement of the Section 922(n) offense derives from the catchall provision of Section 924(a)(1)(D), which requires that the violation of certain provisions of Section 922, including Section 922(n), be committed "willfully." See 18 U.S.C. 924(a)(1)(D). On the

Lower courts have recognized this distinction between mens rea and motivation. In *United States* v. *Hernandez-Franco*, 189 F.3d 1151 (9th Cir. 1999), cert. denied, 530 U.S. 1206 (2000), the court rejected the contention that the defense of duress negated the mens rea required by the offense of attempting to transport undocumented aliens, which required proof that the defendant "knew that the alien was illegal and intended to further the alien's illegal presence in the United States." *Id.* at 1158. The court explained that the defendant "could intend to drive a truck with undocumented aliens to further their illegal presence in the United States, but act in that manner because someone had a gun to his head." *Ibid.* Similarly, the Sixth Circuit reasoned in *United States* v. *Brown*, 367 F.3d 549, 556 (2004), with respect to the felon-in-possession offense, that "[p]roving necessity does not necessarily undercut the element of 'knowing possession;' one can knowingly possess a firearm but still do so under circumstances of necessity that justify an otherwise illegal act." See *United States* v. *Fei Lin*, 139 F.3d 1303, 1307 (9th Cir.) (duress does not negate the specific intent necessary to establish

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Section 922(n) count, the district court instructed the jury that petitioner had to receive a firearm "knowingly" (rather than "willfully") while under indictment. J.A. 310. Petitioner did not object to this instruction in the district court, see J.A. 287-303, or at any other time. See Pet. Br. 43 (stating that a Section 922(n) "requires a showing that she 'willfully' violated a prohibition on the receipt of a firearm by a person under indictment," but raising no issue with respect to the jury instruction). This failure to object is not surprising, and even if it had been raised on appeal, any claim of error could not satisfy the applicable plain-error standard, given petitioner's express admission at trial (J.A. 222, 239) that she knew at the time that she purchased each firearm that she was violating the law in doing so. See *Johnson* v. *United States*, 520 U.S. 461, 470 (1997).

the offenses of hostage taking (18 U.S.C. 1203) and making ransom demands (18 U.S.C. 875(a)), supplemented by 141 F.3d 1180 (9th Cir.) (Table), cert. denied, 525 U.S. 904 (1998); *Dominguez-Mestas*, 929 F.2d at 1382 ("[Defendant] admits that he knowingly brought heroin into the United States. Whether he was forced to do so does not negate his criminal knowledge."); *Walker*, 850 F.2d at 473 (noting with respect to a state offense for kidnapping: "a defendant can restrain another with the intent to inflict injury, in the sense that he knows that his actions will lead to injury or that his purpose is to cause injury, but act in this manner in order to comply with the demands of another").

2. As these cases suggest, petitioner's proposed rule of practice cannot be justified by any purported trend (Pet. Br. 25-34) in the lower federal courts. As an initial matter, to the extent that the cases on which she relies merely followed *Davis*—which this Court has recognized "had wide impact on the practice in the federal courts with respect to the burden of proving various affirmative defenses," *Patterson*, 432 U.S. at 202—they are of questionable value, especially in the duress context, for the reasons discussed above. This is particularly true to the extent that those cases reflect rules adopted in the wake of *Davis* but before this Court clarified in *Leland* that *Davis* did not prescribe a constitutional mandate. *Id.* at 203 ("*Davis* was not a constitutional ruling * * * as *Leland* v. *Oregon*, *supra*, made clear."); *Leland*, 343 U.S. at 797.[24]

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[24] The Model Penal Code, upon which petitioner relies (Pet. Br. 25-26 & n.26), not surprisingly reflects the trend that occurred in the wake of *Davis*. Of course, Congress has not enacted into law the Model Penal Code's suggestion with respect to the burden of persuasion of the duress defense. Cf. Model Penal Code § 2.09 comment at 377 (1985)

Moreover, if anything, the "more recent common law" in the federal courts has trended toward an approach that places the burden of persuasion of the defense of duress on the defendant. As petitioner acknowledges (Pet. Br. 34-41), cases in the Fifth, Ninth, and Eleventh Circuits have placed the burden of persuasion on the defendant. See, *e.g.*, J.A. 332 (5th Cir.); *Fei Lin*, 139 F.3d at 1307-1308 (9th Cir.); *United States* v. *Deleveaux*, 205 F.3d 1292, 1298-1301 (11th Cir.), cert. denied, 530 U.S. 1264 (2000). The Sixth Circuit has also done so. See *Brown*, 367 F.3d at 555-556.[25] In addition, the Third Circuit has placed the burden of persuasion on the defendant in the context of a virtually identical justification defense, where the defense did not negate the mens rea element of the charged crime. See *United States* v. *Dodd*, 225 F.3d 340, 347-350 (2000), cert. de-

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(observing that its approach with respect to the requirements of the duress defense is "plainly more liberal toward the victims of coercion than traditional law"). And, indeed, Congress has moved in the opposite direction in the specific context that gave rise to *Davis* by making clear that the burden to establish an insanity defense rests with the defendant and the defendant must establish the defense by clear and convincing evidence. See 18 U.S.C. 17(b); see also 18 U.S.C. 373(b) (establishing burden on defendant to prove affirmative defense by a preponderance of the evidence); 18 U.S.C. 1512(e) (Supp. II 2002) (same); 18 U.S.C. 2320(c) (same).

[25] The Sixth Circuit does have dicta in cases looking the other way. See *United States* v. *Campbell*, 675 F.2d 815, 821 (6th Cir.) (stating in dicta that government would bear burden of persuasion of duress defense), cert. denied, 459 U.S. 850 (1982); *United States* v. *Riffe*, 28 F.3d 565, 568 n.2 (6th Cir. 1994) (setting forth a pattern instruction on duress and coercion that placed the burden of persuasion on the government but not addressing its propriety).

nied, 532 U.S. 959 (2001).[26] Similarly, although the Tenth Circuit has case law suggesting that the government bears the burden of persuasion of a duress defense, see *United States* v. *Scott*, 901 F.2d 871, 873 (1990); *United States* v. *Falcon*, 766 F.2d 1469, 1477 (1985), it more recently has held that the defendant should bear that burden of persuasion of a necessity defense where the defense does not negate the mens rea element of the charged offense and the defendant is more likely to have better access to the relevant evidence. See *United States* v. *Unser*, 165 F.3d at 764-765 (involving strict liability offense).[27] Although the reasoning of these cases suggests the possibility that a duress defense might negate the intent element of some crime, and Congress, in theory, could create such an

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[26] Although, as petitioner notes (Pet. Br. 38 n.48), *Dodd* purported to limit its decision to the defense of "justification," as opposed to "duress or coercion," 225 F.3d at 348 n.6, the requirements of the Third Circuit justification defense it was addressing, see *id.* at 342, are virtually identical to the requirements of the duress defense as formulated by the Fifth Circuit, see J.A. 328. Moreover, the court's reasons for placing the burden on the defendant—including that the defense of justification did not negate an element of the offense, that the relevant evidence is "more easily accessible to the defendant," and that the common law placed the burden on the defendant, see *Dodd*, 225 F.3d at 346-350—apply equally to the defense of duress.

[27] The law in the First Circuit is "unsettled." *United States* v. *Diaz*, 285 F.3d 92, 97 (1st Cir. 2002). Compare *id.* at 96 (upholding, against challenge of plain error, a jury instruction placing the burden of proof on the defendant) with *United States* v. *Arthurs*, 73 F.3d 444, 448 (1st Cir. 1996) (upholding, on plain error review, refusal to instruct on duress defense, but indicating that government bears the burden of proof on duress when an instruction is warranted); *United States* v. *Amparo*, 961 F.2d 288, 291-292 (1st Cir.) (rejecting sufficiency of the evidence challenge and indicating the government bears the burden of proof on duress defense), cert. denied, 506 U.S. 878 (1992).

element, under a proper application of such an approach (see pp. 30-34, *supra*), it is unlikely that a duress defense ever will negate any of the traditionally used mens rea requirements.[28]

Of the circuits that have addressed the issue,[29] this leaves the Second, Seventh, and Eighth. The two Second Circuit decisions to which petitioner points (Pet. Br. 27-28 & n.31), did not need to definitively resolve the burden-of-persuasion issue. See *United States* v. *Mitchell*, 725 F.2d 832, 836-837 (2d Cir. 1983) (holding that defendant was not entitled to any instruction); *United States* v. *Smith*, 160 F.3d 117, 123 (2d Cir. 1998) (holding, while not taking a position on which party bears the burden of persuasion, that Federal Rule of Criminal Procedure 11(f) did not require district court to reopen its inquiry into the factual basis for defendant's guilty plea to explore a possible defense of justification, in part because the defense does not negate the elements of an offense). The Eighth Circuit cases on which petitioner relies (Pet. Br. 27 n.29) contain no analysis in support of petitioner's proposed rule. See *United States* v. *Campbell*, 609 F.2d 922, 925 (8th Cir. 1979), cert. denied, 445 U.S. 918 (1980); *United States* v. *Norton*, 846 F.2d 521, 524-525 (8th Cir. 1988). Finally, petitioner relies (Pet. Br. 29-30 & n.34) on the Seventh Circuit, which has held that a court has no power to allocate the burden of persuasion to the defendant absent a statute so doing. See

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[28] In addition, in apparently the only published Fourth Circuit decision to address the issue, that court upheld, on plain-error review, an instruction that placed the burden of proof on duress on the defendant, even though the court suggested a belief that the defense might negate the intent element of the offense charged in that case. See *United States* v. *Carrier*, 344 F.2d 42, 46-47 (4th Cir. 1965).

[29] The D.C. Circuit does not appear to have addressed the issue.

United States v. *Talbott*, 78 F.3d 1183, 1185 (1996) (per curiam). Every court to consider *Talbott*'s reasoning, however, has correctly rejected it. See *United States* v. *Beasley*, 346 F.3d 930, 934 (9th Cir. 2003), cert. denied, 542 U.S. 921 (2004); *Dodd*, 225 F.3d at 344-345; *Deleveaux*, 205 F.3d at 1299-1300; see also *United States* v. *Hartsock*, 347 F.3d 1, 9 & n.10 (1st Cir. 2003) (declining to apply *Talbott*). When an affirmative defense is read into a statute as a reflection of background understandings of congressional intent, "it is within the province of the courts to determine where the burden of proof on that defense is most appropriately placed." *Dodd*, 225 F.3d at 345.[30]

D. Placing The Burden On The Defendant To Establish Duress By A Preponderance Of The Evidence Does Not Violate The Due Process Clause

Near the end of her brief (Pet. Br. 41-45), petitioner argues that placing the burden on her to prove her affirmative defense of duress by a preponderance of the evidence would violate the Due Process Clause. As petitioner implicitly acknowledges, that argument is contrary to well-settled law. See, *e.g.*, *id.* at 45 ("[T]he reasoning of *Martin* v. *Ohio* cannot stand."); *id.* at 44 n.51 (relying on the dissenting opinions in *Leland* and *Martin*).

1. In a series of cases dealing with the issue of affirmative defenses, this Court has made clear that placing

[30] In addition, petitioner makes too much of the States' various practices. See Pet. Br. 32-33 & n.38. Even by petitioner's count, a significant number of States (fourteen) place the burden of persuasion of the defense of duress on the defendant. This number demonstrates that there is nothing inherent in the defense of duress that should require the prosecution to bear the burden of its negation, either as a matter of federal common law or under the Due Process Clause.

the burden on a criminal defendant to establish an affirmative defense does not violate the Due Process Clauses of the Fifth or Fourteenth Amendment. In *Leland*, the Court upheld, against a due process challenge by a defendant on trial for first-degree murder, a state statute requiring a defendant pleading insanity to establish the defense beyond a reasonable doubt. 343 U.S. at 792-793, 799. The Court upheld that statute even though Oregon was the only state imposing a beyond-a-reasonable-doubt standard on the defendant. *Id.* at 798. In so ruling, the Court clarified that *Davis* was deviating from the common law and was not a constitutional ruling. *Id.* at 797.

Subsequently, in *Patterson*, 432 U.S. at 204-205, the Court made clear that the rule established in *Leland* survived its decision in *In re Winship*, 397 U.S. 358 (1970), which accorded due process protection to the longstanding common-law rule that prohibited a defendant's conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364 (rejecting claim that "*Leland* had been overruled by *Winship*"). In *Patterson*, the Court upheld the constitutionality of requiring a defendant charged with second-degree murder—which was defined as the intentional killing of another person—to prove the affirmative defense of extreme emotional disturbance, which reduced the crime to manslaughter. 432 U.S. at 198, 206-207. The Court explained that the statutory scheme was comparable to that upheld in *Leland*, whereby "once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless dem-

onstrated by a preponderance of the evidence." *Id.* at 206. The Court found that the affirmative defense of extreme emotional disturbance "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder," but rather "constitutes a separate issue on which the defendant is required to carry the burden of persuasion." *Id.* at 206-207.

The Court noted that it would be unwise to require a State to establish beyond a reasonable doubt "every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability." *Patterson*, 432 U.S. at 207. The Court explained that, if it were so, a State might be unwilling to liberalize its laws, and afford affirmative exculpatory or mitigating defenses to conduct that would otherwise be criminal, for fear that too many offenders would escape just punishment. *Ibid.* The Court observed that New York's new code of criminal conduct contained "some 25 affirmative defenses which either exculpate or mitigate but which must be established by the defendant to be operative." *Ibid.* "The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment." *Id.* at 207-208.

The Court thus declined to "adopt as a constitutional imperative" a requirement that a State "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused." *Patterson*, 432 U.S. at 210. As the Court explained:

> We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required.

Ibid.[31]

The Court expressly reaffirmed *Patterson* and *Leland* in *Martin* v. *Ohio*, 480 U.S. 228, 236 (1987). In *Martin*, the Court held that placing the burden on a defendant charged with aggravated murder to prove the affirmative defense of self-defense by a preponderance of the evidence did not violate due process. The Court was "not moved by assertions that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former." *Id.* at 234. See *Gilmore* v. *Taylor*, 508 U.S. 333, 341 (1993) ("States must prove guilt beyond a reasonable doubt with respect to every element of the

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[31] In so doing, *Patterson* distinguished and limited (see 432 U.S. at 214-215 & n.15) the Court's earlier decision in *Mullaney*, *supra*, which held unconstitutional a Maine statute requiring a defendant charged with murder to rebut a presumption of malice and prove that he acted "in the heat of passion on sudden provocation" in order to reduce the murder charge to manslaughter. As *Patterson* explained, *Mullaney* held only that a State that chooses to define a particular fact as an element of an offense must prove every ingredient of the offense beyond a reasonable doubt and "may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." 432 U.S. at 215; see *Jones* v. *United States*, 526 U.S. 227, 241 (1999) ("[In *Mullaney*] [w]e identified the use of a presumption to establish an essential ingredient of the offense as the curse of the Maine law.").

offense charged, but * * * they may place on defendants the burden of proving affirmative defenses.").

2. Petitioner asserts that placing the burden of persuasion of duress on the defendant violates due process because "the duress defense traverses a fundamental component of *mens rea*, freedom of choice." Pet. Br. 45. This misperceives the pertinent inquiry under *In re Winship*, *supra*. This Court "has never articulated a general constitutional doctrine of *mens rea*." *Powell* v. *Texas*, 392 U.S. 514, 535 (1968) (plurality). Rather, the *Winship* line of cases requires the government to prove the elements of the crime, including the mens rea element, as defined by the legislature and interpreted by the courts. See, *e.g.*, *Martin*, 480 U.S. at 231-232, 235; *Engle* v. *Isaac*, 456 U.S. 107, 120-121 (1982). As the Court observed in *Patterson*, "[t]he applicability of the reasonable-doubt standard * * * has always been dependent on how a State defines the offense that is charged in any given case." 432 U.S. at 211 n.12; see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("*Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive."); *Liparota* v. *United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.").[32]

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[32] Nothing in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny alters the analysis employed by the Court in its affirmative defense line of cases. In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. That

Indeed, petitioner's argument (Pet. Br. 42) that duress negates the mens rea element of all criminal offenses, because one who acts "without a free choice" cannot be guilty of a crime, is merely a variant of one rejected by the Court in *Martin*. There, the defendant argued that because "self-defense renders lawful what would otherwise be a crime," and because "unlawfulness" and "'criminal' intent" were both essential for conviction, the government had to disprove self-defense to prove the elements of its case. 480 U.S. at 235. In rejecting this argument, the Court measured the government's burden by the elements of the crime as defined by state law, reasoning that the "unlawfulness" for which the government bore the burden of proof was "conduct satisfying the elements of aggravated murder," and that the "'criminal' intent" for which the government bore the burden was the "mental state" for aggravated murder as defined by state law. *Ibid.*

The argument that duress negates a fundamental component of mens rea is particularly misplaced because the criminal law has always recognized that a showing of duress does not refute the existence of the "voluntary"

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holding "leaves undisturbed the principle that while the prosecution must indeed prove all the elements of the offense charged beyond a reasonable doubt * * * the legislation creating the offense can place the burden of proving affirmative defenses on the defendant." *United States* v. *Brown*, 276 F.3d 930, 932 (7th Cir.) (citations omitted), cert. denied, 537 U.S. 829 (2002). As it had in *Patterson*, the Court in *Apprendi* cautioned that there was a limit to a legislature's ability to reallocate burdens of proof "by placing the affirmative defense label on 'at least some elements' of traditional crimes." 530 U.S. at 475 (quoting *Patterson*, 432 U.S. at 210). But the Court has made clear that such limit is "easily satisfied" when "'at common law the burden of proving' the mitigating circumstances * * * 'rested on the defendant.'" *Jones*, 526 U.S. at 240.

act that is traditionally required for criminal liability. 1 LaFave, *supra*, § 6.1(c) at 425-426. A defendant who is unconscious or asleep during an alleged crime does not act voluntarily, nor does a defendant who is physically forced into bodily movement and thereby strikes another person. *Id.* at 427. But that view of voluntariness has never extended to "the situation where A by threats, rather than by physical force, causes B to strike C." *Id.* at 428 n.33. As one commentator has explained, "[i]n such a case, B has engaged in a 'voluntary act', in the sense in which that term is used [in the criminal law], even though he would not have so acted but for A's threats." *Ibid.*; see Dressler, 62 S. Cal. L. Rev. at 1360 ("His act may be unwilling, but it is not unwilled."). The commentator concludes that "B may, however, be able to assert the defense of duress." 1 LaFave, *supra*, § 6.1(c) at 428 n.33. There is, therefore, no inconsistency between the general requirement that the government must prove a voluntary act to establish an offense and a requirement that the defendant prove duress to establish a defense.[33]

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[33] Although in some legal contexts, the concepts of voluntary action and coercion are opposite sides of the same coin, see, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973), the law of extortion similarly presupposes that voluntary action can be induced by threats. For example, the Hobbs Act, 18 U.S.C. 1951, defines extortion to "mean[] the obtaining of property from another, *with his consent*, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. 1951(b)(2) (emphasis added). The same Act defines "robbery" to mean the "unlawful taking or obtaining of property from the person or in the presence of another, *against his will*, by means of actual or threatened force, or violence, or fear." 18 U.S.C. 1951(b)(1) (emphasis added). Although the "consent" in the extortion context is plainly coerced, it nonetheless is treated as the voluntary act of the victim, produced by unlawful pressure.

As the Court observed in *Patterson*, placing a burden of persuasion on the defendant in circumstances that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" could be subject to proscription under the Due Process Clause. 432 U.S. at 202 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958)). Allocating to the defendant the burden of proving the affirmative defense of duress, however, does not remotely run afoul of that limitation: the defendant is merely required, consistent with the common-law rule, to prove a separate issue, as to which he has superior access to the evidence. See *Martin*, 480 U.S. at 233-234. Indeed, because the "primary guide in determining whether the principle in question is fundamental is * * * historical practice," see *Montana* v. *Egelhoff*, 518 U.S. 37, 43 (1996) (plurality); *Medina* v. *California*, 505 U.S. 437, 446 (1992), the fact that the common law placed the burden of proving the affirmative defense of duress on the defendant soundly dispels any notion that such practice offends any fundamental principle of justice. Accordingly, the Constitution does not override the conclusion dictated by the common law and common sense: a defendant must bear the risk of nonpersuasion in establishing that she was subjected to duress that left her no reasonable legal alternative but to violate the criminal law.[34]

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[34] Petitioner contends (Pet. Br. 46) that, if the government bears the burden of persuasion of her claimed defense, the district court's contrary instruction to the jury was "structural error" requiring automatic reversal. That contention is without merit. See, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497, 501-503 (1987) (holding harmless-error review applicable to an instruction that erroneously informed the jury about the standard of proof of one of the elements of the crime where the jury was not precluded from considering the element). If the Court concludes that

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DEANNE E. MAYNARD
Assistant to the Solicitor General
DEBORAH WATSON
Attorney

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the instruction here was erroneous, it should remand to the court of appeals to consider in the first instance whether the error was harmless. That would include consideration of whether petitioner was entitled to an instruction in the first place. As explained in our opposition to the petition for a writ of certiorari (Br. in Opp. 10-12), petitioner did not introduce sufficient evidence to warrant an instruction. See *Bailey*, 444 U.S. at 415.