Case No. 19-50321

In the United States Court of Appeals for the Fifth Circuit

AMERICAN STEWARDS OF LIBERTY, CHARLES SHELL, CHERYL SHELL, WALTER SIDNEY SHELL MANAGEMENT TRUST, KATHRYN-HEIDEMANN, ROBERT V. HARRISON, SR., JOHN YEARWOOD, AND WILLIAMSON COUNTY, TEXAS,

PLAINTIFFS – APPELLANTS,

V.

DEPARTMENT OF THE INTERIOR, UNITED STATES FISH AND WILDLIFE SERVICE, SALLY JEWELL, DANIEL M. ASHE, BENJAMIN N. TUGGLE, CENTER FOR BIOLOGICAL DIVERSITY, TRAVIS AUDUBON, AND DEFENDERS OF WILDLIFE, CENTER FOR BIOLOGICAL DIVERSITY, DEFENDERS OF WILDLIFE, AND TRAVIS AUDUBON,

DEFENDANTS – APPELLEES.

On Appeal from the United States District Court for the Western District of Texas Austin Division

Brief of the Cato Institute, Southeastern Legal Foundation, and Mountain States Legal Foundation as *Amici Curiae* in Support of Plaintiff-Appellants

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Case No. 19-50321,
Am. Stewards of Liberty, et al. v. Dep't of the Interior, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Ilya Shapiro	Counsel to *amici*
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Cato Institute	*Amicus curiae*
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Mountain States Legal Foundation	*Amicus curiae*

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/s/ Ilya Shapiro

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

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This case concerns *amici* because liberty is best preserved by a constitutionally constrained Congress consistent with the Framers' design.

[1] The parties have consented to this filing. No one other than *amici* and their counsel wrote any part of this brief or paid for its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the second time, this court must consider whether to uphold a regulation that severely restricts property rights to protect an entirely useless creature from a threat that is dubious at best. *Cf. GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003). At issue again is a blind, translucent arachnid—the bone cave harvestman, a type of spider—so small and insignificant that it takes nearly 14 surveys to even be sure of its presence. The Endangered Species Act (ESA) prevents a private property owner from effecting a "take" of this creature—a feat that, considering its miniature size, could easily happen accidentally.

The resources expended on this legal challenge are unquestionably the most significant effect the bone cave harvestman has ever had on the world. It is not a marketable commodity. *Cf. Wickard v. Filburn*, 317 U.S. 111, 128 (1942). There is no illicit trade in bone cave harvestman hides or horns— alas, it has none to speak of— for the government to suppress. *Cf. Gonzales v. Raich*, 545 U.S. 1, 22 (2005). It carries no firearms into school zones. *Cf. United States v. Lopez*, 514 U.S. 549, 551 (1995). Its domestic relations are none of the government's business. *Cf. United States v. Morrison,* 529 U.S. 598, 668 (2000). Finally, the bone cave harvestman

has neither purchased health insurance nor plans to do so in the future. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 561 (2012) (*NFIB).*

In upholding the application of the ESA to the bone cave harvestman, the district court made numerous errors that contravene the Supreme Court's Commerce Clause jurisprudence. The court below applied *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), a decision rendered obsolete by the Court's holdings in *Raich* and *NFIB*. It strangely aggregated all listed species together as a single comprehensive scheme, essentially holding that Congress's jurisdiction over a single, wholly intrastate species derives from that species' hypothetical effect on other species. The court reasoned that, just as Angel Raich's homegrown marijuana undermined federal drug prohibition, *Raich*, 545 U.S. at 18, removal of the bone cave harvestman from federal jurisdiction would render the government impotent in protecting other, less-useless creatures, such as bald eagles. *See* 16 U.S.C. § 668(a); 50 CFR 22. This attenuated justification pushes the Commerce Clause too far. Few species could be more remote from eagle feathers, the importation of elephant tusks, 50 CFR 17.40(e), or other commercially relevant species than the bone cave harvestman. Moreover, these spiders are certainly far less consequential

to the broader conservation of the nation's fauna than civil remedies were to the prevention of domestic violence or gun-free schools to the avoidance of firearms deaths. *Morrison*, 529 U.S. at 668; *Lopez*, 514 U.S. at 551.

The Supreme Court has long counseled against antiquarian understandings of commerce that fail to adapt an 18th-century framework to contemporary needs. *See NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937). But nothing here questions longstanding regulations of pollution, food safety, finance, or any other area tied to the economic life of the nation. To broadly define "commerce"— plus those things necessarily and properly related to it—does not mean the term lacks limits.

This Court should affirm the constitutional limits articulated in *Lopez*, *Morrison*, *Raich*, and *NFIB* by holding that the Commerce Clause requires a regulation to be both necessary and proper to a *commercial* concern, and leave commercially useless wildlife to the states, the sovereigns who policed it since our founding. To do otherwise would license a general police power that would turn the remainder of Article I, Section 8 into a mere ink blot.

ARGUMENT

I. THE DECISION BELOW THREATENS TO ELIMINATE ALL LIMITS ON FEDERAL POWER

Congress has been delegated "the power to regulate, that is, to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824). In *Lopez*, the Court noted that there are only "three broad categories of activity that Congress may regulate under its commerce power." 514 U.S. at 558–59. These categories include: 1) the channels of interstate commerce; 2) the instrumentalities of, objects in, and persons engaged in interstate commerce; and 3) activities that have substantial effects on interstate commerce. *Id.* The take regulation challenged here presumably flows, if at all, from the third category. Yet the bone cave harvestman has nothing to do with interstate commerce. Pretending that it does would give Congress unlimited regulatory authority.

A. The Bone Cave Harvestman Is Not Substantially Related to Interstate Commerce

The government seeks to protect an unknown number of commercially irrelevant and wholly intrastate arachnids without regard for whether such regulation has any connection to economic activity, let alone commerce among the several states. *Amici* wishes the eight-legged

critters no ill will and hopes that state authorities handle the population responsibly. Indeed, states can set aside wildlife preserves. But federally fining landowners if they accidentally squish a nearly invisible spider is not a congressional power enumerated in Article I, Section 8.

A hypothetical taking of the bone cave harvestman would exert no substantial effect on interstate commerce. There is no evidence that a decline in the bone cave harvestman population would affect any other species for which a national market exists. Nor does the government make that claim with any specificity. A hypothetical take of the bone cave harvestman is thus a commercial irrelevance, except insofar as its regulation is harming human property owners in Texas.

This is of course not the first case where the ESA has protected a local insect or pest to the detriment of human beings. *See*, *e.g.*, *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (blocking the construction of housing on account of the Arroyo South-Western Toad); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (barring the taking of Red Wolves unless they had actually started killing a resident's family or livestock); *Nat'l Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041 (D.C. Cir. 1997) (blocking construction of a hospital to protect the Delhi Sands Flower-Loving

Fly). Surely the Framers did not intend for the text of the Commerce Clause to spin a web around all the animals in the country. This Court should thus reaffirm that the Constitution's structural limitations exist to protect neither flock, nor fowl, nor spider, but "We the People."

B. The Lower Court Failed to Apply the Limits on Federal Power Described in *Lopez*, *Morrison*, *Raich*, and *NFIB*

As the district court below recognized, there is no conclusive data about the bone cave harvestman population as a whole. *Am. Stewards of Liberty v. DOI*, No. 1:15-CV-1174-LY, 2019 U.S. Dist. LEXIS 52653, at *27, *34 (D.Tex. Mar. 28, 2019). But the court endeavored to find a connection to interstate commerce anyway, claiming that the obsolete *GDF Realty* test still controls. *Id.* at *45-*46. In that case, this Court held that Congress had the authority to regulate individual conduct to protect cave spiders despite the species' lack of commercial value. *See* 326 F.3d at 640–41. It found that the "interdependence of species," writ large, is a sufficient tie to interstate commerce to justify listing a species as endangered, and that the ESA is a larger regulation of economic activities justified by the commercial effects it creates. *Id.* at 639–40.

The lower court was mistaken in applying *GDF Realty*, however, because the decision is out of step with more recent Supreme Court jurisprudence. "Interdependence of species" cannot create commerce where none exists. By the same logic: a healthy environment is good for the national economy; protecting important species is good for the environment; a cave spider in a small corner of Texas is an important species. Ergo, the bone cave harvestman is vital to the national economy.

Amici will not quarrel directly with this chain of inferences except to point out that two Supreme Court dissents also dealt in this logic—and there's a reason they were dissents. In his *Lopez* dissent, Justice Breyer argued that Congress could outlaw guns in school zones because a healthy economy requires quality education, which is undermined when people carry guns around schools. *Lopez,* 514 U.S. at 618 (Breyer, J., dissenting). Likewise, in *Morrison*, Justice Souter wrote a dissent arguing that Congress could create a civil remedy for women who suffer domestic or sexual violence because women vitally contribute to commerce and domestic and sexual violence harm their ability to contribute. *Morrison*, 529 U.S. at 631 (Souter, J., dissenting). Remarkably, the dis-

trict court here took issue with the appellants using Supreme Court concurrences as proof that the court should not apply *GDF Realty*, when the *GDF Realty* opinion itself was based on the same misguided reading of the Commerce Clause as the dissents in *Morrison* and *Lopez*. *Am. Stewards of Liberty*, 2019 U.S. Dist. LEXIS 52653 at *49-*50.

The lower court insists that the ESA in itself "is a general regulatory statute that is economic in nature and has a substantial relation to commerce." *Id.* at *46. But the ESA's economic nature, if any, comes from the government's restricting possible commercial activity related to a take, not the commercial nature of the take itself. 326 F.3d at 639. To hold otherwise is to conclude that the ESA is a self-justifying law, generating an economic effect where there is none so it can retroactively seek refuge in the Commerce Clause. And as much as Congress may wish create economic effects in order to regulate them, it cannot do so, *NFIB,* 567 U.S. at 561, for the same reason that it may not invade a country to declare war. *Cf. Bolton Argues War with Iran Only Way to Avenge Americans Killed in Upcoming War with Iran*, The Onion, June 20, 2019, https://bit.ly/2YdAxGf. Nor may it "pile inference upon inference" in order to regulate the whole of American life. *Lopez,* 514 U.S. at 567.

To be sure, Congress's power to regulate commerce includes its right to undermine certain economic activity—even to ban certain commerce, like marijuana growing, outright. *Raich*, 545 U.S. at 18; *Champion v. Ames*, 188 U.S. 321 (1903). But Congress's jurisdiction over marijuana doesn't come from the fact that prohibition creates a black market and thereby triggers the Commerce Clause. Instead, unlike the bone cave harvestman, marijuana is a bought-and-sold commodity *before* government prohibition creates a black market. If the effects of Congress's own laws can create the jurisdictional hook for Commerce Clause regulation, then Congress is the progenitor of its own power.

Wickard and *Raich* stand for the proposition that when dealing with a fungible commodity, there is no zone of consumption that can be considered truly detached from the national market for that commodity. Aggregate demand is aggregate demand, so that which is satisfied at home might as well be satisfied at market. *Wickard*, 317 U.S. at 127; *Raich*, 545 U.S at 18. That holding has a certain internal logic when the commodities in question are the same, like backyard marijuana and commercial marijuana. But different commodities are treated differently and, more importantly, the bone cave harvestman is neither a commodity

nor the same thing as a wolf bounding across Yellowstone National Park. Species aren't fungible.

It's easy to see how a constitutional exemption for something like medicinal homegrown marijuana could undermine federal marijuana prohibition. After all, marijuana grown for personal, medical use could—and likely is—flooding the interstate market. But exempting citizens of Texas from federal prosecution if they take the bone cave harvestman would not undermine any federal program. Surely wolves, eagles, and other endangered wildlife will still receive adequate protection if private property owners no longer fear accidentally stepping on a small spider.

Or perhaps, as the lower court seemed to believe, carving out an exemption for one species would undermine the ESA because it would open the floodgates, so to speak, on exempting other animals from federal protection. That is an even odder argument. It essentially claims that the Constitution is an impediment to comprehensive federal protection of all species in the nation, which is of course the point of a founding document that severely limits federal power. *Amici* will gladly concede that the Constitution, by design, impedes many comprehensive federal schemes—but feels compelled to restate a fundamental, if forgotten, truism in our

constitutional system: if the federal government can't do something, that doesn't mean it won't be done.

C. The Opinion Below Has No Limiting Principle and Would Grant Congress Unlimited Power

The district court arrived at the foregoing errors in part by upholding *GDF Realty*'s aggregation of all listed species for purposes of Commerce Clause analysis. 326 F.3d at 640. That is, it did not look for a substantial connection between the bone cave harvestman and some commercial end but instead applied *GDF Realty*, which defined the harvestman as a part of a larger regulation of economic activity. *Am. Stewards of Liberty*, 2019 U.S. Dist. LEXIS 52653 at *50. Thus, Congress would be justified in preventing an individual from using his own private property for the benefit of human beings because hypothetically, somewhere along the line, the bone cave harvestman *might* affect another species.

As described above, "endangered species" as a whole are not a fungible commodity. *Raich,* 545 U.S at 18; *Wickard,* 317 U.S. at 127. Some species of course rely on others as a source of food and sundry benefits, but the claim that the fate of the Puerto Rican Sharp-Shinned Hawk, Swayne's Hartebeest, or Dwarf Wedgemussel—*see Find Endangered*

Species, U.S. Fish & Wildlife Service, http://bit.ly/2gGnDwg—are critically tied to the fate of Texas's bone cave harvestman is built on a foundation of far-fetched assumptions that should do little to persuade this Court that expansive federal regulation is an appropriate, constitutional solution. The butterfly effect does not establish federal jurisdiction. Peter Dizikes, *When the Butterfly Effect Took Flight*, MIT Tech. Rev., Feb. 22, 2011, http://bit.ly/2gGp26d.

Indeed, the Supreme Court has explained that this six-degrees-of-separation approach to Commerce Clause analysis renders the principle of enumerated powers a fiction. *Lopez,* 514 U.S. at 565 (the argument "lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial"). The approach sweeps so broadly that it reduces Article I, Section 8 to a very large ink blot. *Id.* at 589 (Thomas, J., concurring). If courts were meant to read such broad authority into the Commerce Clause, it would have been unnecessary for the Framers to enumerate any other powers. It is unlikely that, in the words of Benjamin Franklin, such an "august and respectable assembly" made such a grievous error in judgment. Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* 83 (2016).

If the district court's reasoning were drawn out to its logical conclusion, Congress's power must extend to all flora and fauna in the United States, endangered or not. Being "endangered" is not a jurisdictional hook, after all; not even the government claims that it is. The lower court's holding would thus apply to all animals, meaning that a general jurisdiction over all wildlife is hidden in the Commerce Clause. Congress, it is said, does not "hide elephants in mouseholes," and likewise the Constitution does not hide all the country's animals in a spider cave. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Moreover, because the ESA isn't limited to animals but includes plants too, 16 U.S.C. § 1541, Congress seems to have the power to oversee all living organisms because some living organisms may have a substantial effect on interstate commerce. We therefore stand on the threshold of what James Madison derided as "an indefinite supremacy over all persons and things." *The Federalist* No. 39, at 245 (C. Rossiter ed. 1961).

II. THIS COURT SHOULD HOLD THE LINE AGAINST FURTHER EXPANSION OF THE COMMERCE POWER

A. *Raich* and *NFIB* Limit Congressional Jurisdiction over Noncommercial Activity to What Is Necessary and Proper to a Commercial Regulation

As discussed above, *GDF Realty* has been superseded, based as it is on the same faulty reasoning as the dissents in *Lopez* and *Morrison*. The lower court thus erred in applying that case here. Instead, the Supreme Court's more recent decisions in *Raich* and *NFIB* expand on the third *Lopez* category and reflect the current concept of the Commerce Clause.

The first two *Lopez* categories—those that constitute actual regulations of commerce—do not apply here and are not at issue. The sole remaining justification is in in the third *Lopez* category: those laws that are necessary and proper for carrying into execution Congress's power to regulate interstate commerce. *Raich*, 545 U.S. at 34 (Scalia, J., concurring) (distinguishing the core "commerce" that Congress can directly regulate from things it regulates incidentally). The government must therefore rely on that "last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause." *Printz v. United States*, 521 U.S. 898, 923 (1997).

In his concurring opinion in *Raich*, Justice Scalia clarified the often-overlooked nuances at the core of the commerce power. 545 U.S. at 33 (Scalia, J., concurring). He explained that the "substantial effects" prong comes not from the Commerce Clause alone but from the Necessary and Proper Clause:

> [U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs*, 12 Pet. 72, 9 L.Ed. 1004, (1838), Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.

Id. at 34 (Scalia, J., concurring).

While many cases involving economic regulation by Congress are referred to as "Commerce Clause cases," this is often not technically accurate. In the words of prominent scholars, "[m]any of the cases that drastically expanded Congress's regulatory reach during the New Deal are actually Necessary and Proper Clause cases." Brief of Authors of *The Origins of the Necessary and Proper Clause* as Amici Curiae at 5, *NFIB v. Sebelius*, 567 U.S. 519 (2012) (No. 11-398). The "substantial effects"

decisions *Jones & Laughlin* and *Wickard*, for example, are "applications of the Necessary and Proper Clause in the context of the commerce power." Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 591 (2010).

Chief Justice Roberts endorsed this view in his majority opinion in *NFIB*. In the Court's view, the terms "necessary" and "proper" each have meaningful content that cannot be ignored. *NFIB*, 567 U.S at 560. That is, the regulation must be *both* necessary *and* proper for executing the Commerce Clause. *Id.* Without those limitations, courts would "license the exercise of . . . great substantive and independent power[s] beyond those specifically enumerated." *Id.* at 559 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 411 (1819)) (cleaned up).

Allowing Congress to claim jurisdiction over every animal in the country would license a "great substantive and independent power" that would undermine the Supreme Court's multi-decade effort to keep the Commerce Clause from swallowing the enumeration of powers. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 Fordham L. Rev. 411, 428–31 (2013) (describing the Court's approach to the Commerce

Clause as "this far and no farther"). The Court has emphasized that, broad as the commerce power may be, it must be limited to its rightful scope. *Morrison,* 529 U.S. at 615. To do otherwise would be to grant a "great substantive and independent power" devoid of all limitation.

B. Constitutionally Limiting the Endangered Species Act Would Be Consistent with the Supreme Court's Delineation of Federal Power

The bone cave harvestman occupies a small, discrete portion of one state, so a ruling in favor of the appellants need only occupy a small, discrete portion of Commerce Clause doctrine. While the damage in allowing Congress regulatory authority over all living things would prove substantial, nothing in this case questions the longstanding power of Congress to regulate our economic life—even our backyard agriculture—or the species that *do* substantially affect commerce.

GDF Realty, which the district court applied, aggregated all endangered species and treated even the bone cave harvestman as essential to the ESA. 326 F.3d at 640. But placing intrastate, noncommercial species outside the ESA would not limit Congress's ability to protect species that are important to the nation's economic life. A ruling for the appellants here will simply confine Congress to national problems and leave to the

states their traditional ability to protect local wildlife, upholding our federalist system. *Lopez,* 514 U.S. at 583 (Kennedy, J., concurring).

Nor would a small limitation on the ESA undermine the longstanding regulation of those things substantially related to commerce, from the production of and traffic in food and drugs, to the maintenance of workplace standards, to the prevention of environmental degradation. To be sure, there would be questions about whether a *de minimis* local activity is properly within the scope of federal power, but that's the nature of judicial review in a system of enumerated powers.

As stated in Section I, *supra*, the district court's premise is precisely the one rejected in *Lopez* and *Morrison*. Those cases show that there are some constitutional limits on comprehensive, nationwide schemes—and that sometimes states must fill in those gaps. In *Lopez*, Congress passed a multifaceted piece of legislation to curtail gun violence, whereby prosecuting those who brought guns into school zones furthered that end. 514 U.S. at 551. In *Morrison*, Congress likewise passed a multifaceted piece of legislation to curtail domestic and sexual violence, whereby providing injured woman a civil remedy furthered that end. 529 U.S at 605. But the

Supreme Court found that neither of these schemes—or at least the specific provisions extending from them—was sufficiently connected to Congress's power over interstate commerce. The district court's reasoning ignores and even contradicts the Court's analysis of *Lopez* and *Morrison*.

Nor did *Raich* justify every small part of a larger regulatory scheme. Instead, it recognized that the Constitution authorizes only the regulatory pieces without which the whole scheme would collapse. 545 U.S. at 23. While allowing millions of people to grow marijuana could stymie federal drug prohibition, leaving to local authorities the ability to impose civil remedies for domestic violence or criminal prosecutions for school-zone gun possession still allows the remaining federal initiatives to carry on unabated. So too leaving to state authorities the protection of a particular species just removes a small tool from Congress's utility belt, while allowing federal regulators to continue with their broader mission.

That is, reserving wholly intrastate, noncommercial species to state regulation would reduce the number of species Congress oversees, but it would not undermine the protection of those species concededly within its jurisdiction. This Court should therefore feel no compunction that it is drawing some large area of federal regulation into question. Despite

protestations to the contrary, a ruling for the appellants would not endanger the ESA any more than stepping on a bone cave harvestman endangers a red wolf.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's determination that the Interstate Commerce Clause gives Congress the authority to regulate wholly intrastate noncommercial species.

Respectfully submitted,

/s/ Ilya Shapiro

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September 16, 2019

Certificate of Filing and Service

On September 16, 2019, I filed this *Brief of the Cato Institute, Southeastern Legal Foundation, and Mountain States Legal Foundation as Amici Curiae* using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

s/ Ilya Shapiro

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,085 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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s/ Ilya Shapiro