NO. 18-3215

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LT. COL. PATRICK SCHREIBER

***Appellant*,**

v.

L. FRANCIS CISSNA, et al.

***Appellee*,**

On Appeal from the United States District Court
for the District of Kansas
Civil Action No. 17-cv-2371-DDC-JPO
Hon. Daniel D. Crabtree

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record for Appellant certifies that there are no other parties, entities, or attorneys who have an interest in the matter and have not been disclosed previously to the court.

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There are no prior or related appeals.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. § 1331. The court entered judgment on September 28, 2018, and Appellant Lt. Col. Schreiber filed a timely notice of appeal on October 5, 2018. Aplt. App. at 6. This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION AND STATEMENT OF ISSUES

Since 2012, Plaintiff-Appellant Lieutenant Colonel Patrick Schreiber (Ret.) and his wife have cared for and shared their home with their now-daughter Hyebin Schreiber. In 2014, when Hyebin was 17 years old, the family in spirit took action to become a family in law: the Schreibers formally adopted Hyebin. To ensure that they could continue to remain together in the United States—the country that Lt. Col. Schreiber had served his entire adult life—Lt. Col. Schreiber sought to obtain an immigrant visa on behalf of Hyebin, who was born in South Korea and was lawfully in the United States on a temporary student visa. Because Kansas law treats adoption as a form of legitimation, Lt. Col. Schreiber requested that United States Citizenship and Immigration Services (USCIS) deem Hyebin his legitimated child and thus eligible for a visa as an immediate relative of a citizen. As support, Lt. Col. Schreiber relied on 8 U.S.C. § 1101(b)(1)(C), which recognizes a parent-child relationship for "a child legitimated under the law of the child's residence or domicile, or under the law of the

father's residence or domicile"—here, both Kansas—"if such legitimation takes place before the child reaches the age of eighteen years."

USCIS denied Lt. Col. Schreiber's petition. Despite the statute's command to look to state law to determine what qualifies as legitimation, USCIS reasoned, in a decision the Board of Immigration Appeals upheld, that federal rather than state law defines "legitimated" and, moreover, that federal law requires a biological connection between the child and citizen parent. The district court affirmed this decision, concluding that the statute *unambiguously* requires such a biological link—a position not even proposed by the government in defending the BIA's ruling.

The issues presented are:

I. Whether the district court and the Agency erred in refusing to abide by a federal statutory command to look to state law to determine when a child has been "legitimated."

II. Assuming *arguendo* that federal law controls whether a child has been "legitimated," whether the district court and the Agency erred in imposing a requirement, found nowhere in the plain text of the statute, that the parent and child must have a biological connection.

III. Whether the district court erred in refusing to consider claims challenging the constitutionality of the Agency's decision when those claims were raised to the BIA and an appeal to the BIA was optional.

STATEMENT OF THE CASE

I. Statutory Framework

Federal law permits U.S. citizens to petition immigration authorities to obtain an immigrant visa for "immediate relatives." 8 U.S.C. § 1151(b)(2)(A). An "immediate relative" includes a child, spouse, or parent of a citizen. *Id.* Unlike for certain other categories of immigrant visas (for example, relatives of green card holders or "employment based immigrants," *id.* §§ 1151(a)(1)-(2)), there is no limitation on the number of visas that immigration authorities may issue for "immediate relatives" of citizens. *Id.* § 1151(b).

A separate section of the U.S. Code articulates several definitions of "child" for purposes of determining who is an "immediate relative" and obtaining a visa. Those definitions include children born in wedlock; stepchildren; legitimated children; children born out of wedlock who have a "bona fide" relationship with a natural parent; adopted children; and certain siblings of adopted children. *Id.* § 1101(b)(1). The provisions governing legitimation, children born out of wedlock, and adoption are of particular salience to this appeal. They provide, in relevant part, that a "child" means an "unmarried person under twenty-one years of age who is":

> (C) a child legitimated under the law of the child's residence or domicile, or the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

> (D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;
>
> (E)(i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years . . . : *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter[.]

Id. §§ 1101(b)(1)(C) -(E). "It has repeatedly been stated that" the provision of visas to immediate relatives "is rooted in a congressional recognition of the desirability of maintaining or fostering the unity of immigrant families." *de los Santos v. Immigration & Naturalization Serv.*, 525 F. Supp. 655, 669 (S.D.N.Y. 1981); *see also* Aplt. App. at 24.

II. Factual Background

Lt. Col. Schreiber, now retired, was an Army Intelligence officer and is a U.S. citizen. Aplt. App. at 201. On January 7, 2000, Lt. Col. Schreiber married his wife, Soo Jin Yu, in Killeen, Texas. *Id.* at 98. On multiple occasions, the Schreibers traveled to South Korea to visit with Mrs. Schreiber's brother and his daughter, Hyebin. *Id.* at 237. The Schreibers formed a deep bond with Hyebin, who was born in 1997, and was three years old at the time the Schreibers married. *Id.* at 112.

Hyebin's positive relationship with the Schreibers stood in marked contrast to her family life in South Korea. Her parents' marriage turned troubled and tumultuous. *Id.* at 85. Eventually, Hyebin's father abandoned her. *Id.* at 138. Throughout this difficult period, Hyebin's relationship with Mrs. Schreiber deepened. *Id.* So, when an

opportunity for Hyebin to study in the United States and live with the Schreibers presented itself, Hyebin enthusiastically agreed. *Id.* She arrived in the United States in 2012, at age 15, on a student visa and began living with the Schreibers in Lansing, Kansas. *Id.* at 9.

The Schreibers' bond with Hyebin continued to strengthen with her arrival in the United States. *Id.* at 52. Within a year of her arrival and before Hyebin had turned 16, Lt. Col. Schreiber consulted an attorney about adoption. When the attorney informed him that Kansas law allows adoption until age 18, the Schreibers decided to postpone going through the formal processes until Lt. Col. Schreiber returned home from a planned military deployment to Afghanistan—one of six tours abroad during his multi-decade military career—that was scheduled to begin shortly. Lt. Col. Schreiber was unaware that a different age cutoff (16 years) applied under federal law if Lt. Col. Schreiber sought to obtain an immigrant visa for Hyebin through a provision of federal law that addresses adoption as a basis for obtaining an immigrant visa.

When Lt. Col. Schreiber returned from his overseas military duty, the Schreibers completed the adoption process. On November 17, 2014, the District Court of Leavenworth County, Kansas, issued an adoption decree. *Id.* at 114. Now adopted, Hyebin became, under Kansas law, "entitled to the same personal and property rights as a birth child of the" Schreibers, and the Schreibers became "entitled to exercise all the rights of a birth parent and . . . subject to all the liabilities of that relationship." Kan. Stat. § 59-2118(b). In the months that followed, Hyebin received a new birth certificate

listing Lt. Col. Schreiber as her father and Mrs. Schreiber as her mother, and a U.S. military ID card. Aplt. App. at 53.

Since coming to the United States—and during the course of these proceedings—Hyebin followed the path of many young adults in this country. She graduated from Leavenworth High School in Kansas with honors. *Id.* at 228. She then entered the University of Kansas, where she is majoring in Chemical Engineering. *Id.* at 229. At all times, Hyebin has remained in the United States on a valid student visa.

III. Procedural History of the Litigation

After formally adopting Hyebin, Lt. Col. Schreiber moved to ensure that she could remain in the country and their family could stay together in the United States. Initially, and on the advice of a USCIS employee, Lt. Col. Schreiber filed a Form N-600, Application for a Certificate of Citizenship, on Hyebin's behalf. Aplt. App. at 9. When that was denied, Lt. Col. Schreiber again sought the assistance of USCIS and was directed to file a Form I-130 Petition for Alien Relative to classify Hyebin as his child and obtain an immigrant visa on her behalf. *Id.* Lt. Col. Schreiber filed the Petition requesting that USCIS classify Hyebin as his legitimated child under 8 U.S.C. § 1101(b)(1)(C), the provision governing legitimated children. *Id.*

USCIS issued a Notice of Intent to Deny the Petition on November 10, 2015. *Id.* at 173. The Notice asserted that Hyebin could not be classified as Lt. Col. Schreiber's child without further evidence demonstrating that Hyebin and Lt. Col. Schreiber had satisfied 8 U.S.C. § 1101(b)(1)(E), the definition of "child" pertaining to adoptions,

which requires adoption before the child turns 16 in order to obtain an immigrant visa. *Id.* at 173-76. In his response to the Notice, Lt. Col. Schreiber explained that Kansas law treats adopted children as legitimated and therefore reiterated that he sought to classify Hyebin as his child under § 1101(b)(1)(C), the provision dealing with legitimated children. *Id.* at 167. USCIS refused to do so, however. In a final decision that departed from the applicable statutory text, USCIS concluded that "[i]n order to qualify as a child legitimated under [§ 1101(b)(1)(C)] the petitioner must be the natural father of the beneficiary," Aplt. App. at 167, which Lt. Col. Schreiber was not.[1]

Lt. Col. Schreiber appealed to the Board of Immigration Appeals. On appeal, Lt. Col. Schreiber explained, again, that he sought to classify Hyebin as his legitimated child under § 1101(b)(1)(C) because Kansas law treats her as such and federal law requires "total deference to State law to determine whether or not the child is considered 'legitimated.'" *Id.* at 88.

Additionally, Lt. Col. Schreiber argued that denying his application based on the definition of "legitimated" that USCIS had articulated in its final decision, which required him to be Hyebin's natural father, would violate the Fifth Amendment. *Id.* at 92. As support, Lt. Col. Schreiber cited *United States v. Windsor*, 570 U.S. 744, 769 (2013), which held that the federal government had violated "basic due process and equal

[1] USCIS's denial incorrectly stated that Lt. Col. Schreiber had also requested that Hyebin be classified as an adopted child under § 1101(b)(1)(E) (ii). Lt. Col. Schreiber noted USCIS's error in his appeal to the BIA. *See* Aplt. App. at 87.

protection principles" in its refusal to recognize same-sex marriages carried out under state law. He noted further that not even USCIS's own policy guidance always imposes a requirement of a biological connection because, when women use assisted reproductive technologies to give birth to children with whom they do not share a genetic connection, USCIS allows them to classify their children as "legitimated." Aplt. App. at 89 n.2. These women, like Lt. Col. Schreiber, are not the "natural" parents of the child. The Washburn Law Clinic and the Children and Family Law Center at Washburn University Law School also submitted a joint amicus brief on Lt. Col. Schreiber's behalf that addressed the operation of Kansas law and explained why USCIS's final decision, if affirmed, would violate Lt. Col. Schreiber's equal protection rights. *Id.* at 137-47.

The BIA denied Lt. Col. Schreiber's appeal in a one-member decision. *Id.* at 129-30. With respect to Lt. Col. Schreiber's statutory argument, the BIA found itself bound by a prior decision, *Matter of Bueno*, 21 I. & N. Dec. 1029 (BIA 1997), interpreting "legitimated" under § 1101(b)(1)(C) to require a biological relationship between parent and child. Aplt. App. at 129. The Board acknowledged that it had "considered amicus curiae's arguments," but found them unpersuasive, and it addressed the full sweep of constitutional claims raised to the court by saying that, "[t]o the extent that constitutional arguments have been raised, the Board does not have jurisdiction to rule on the constitutionality of the laws it administers." *Id.* at 129.

Lt. Col. Schreiber then filed suit in the U.S. District Court for the District of Kansas under the Administrative Procedure Act, seeking to set aside the agency's determination. *Id.* at 38. Lt. Col. Schreiber advanced and elaborated on the same claims presented to the agency.[2] *Id.* at 231-54. In response, the government argued that "legitimated" is an ambiguous term such that the BIA's interpretation should receive deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Aplt. App. at 283. It also urged the district court not to consider Lt. Col. Schreiber's constitutional claim on the theory that he did not exhaust this claim before the agency. *Id.* at 292-93.

The district court affirmed the BIA's decision. Embracing a view not even the government had taken, the district court concluded that the term "legitimated" in § 1101(b)(1)(C) is unambiguous and requires a biological connection between parent and child. *Id.* at 19. The court began by consulting dictionary definitions of the term "legitimate"—rather than looking to Kansas law to determine when a child is "legitimated." *Id.* at 20. Although none of the many definitions that the court identified mentioned a biological requirement, the court concluded that references to birth in some definitions meant that the word "'legitimate' *assume[s]* a biological connection between a parent and a legitimate child." *Id.* at 21 (emphasis added).

[2] Lt. Col. Schreiber also added a claim under the Tenth Amendment, but he does not pursue that claim in this appeal.

The district court then considered three sources unrelated to the text of § 1101(b)(1)(C). First, the court looked to a State Department regulation discussing "illegitimate children" that was issued in 1946—six years before the Immigration and Nationality Act (INA), of which § 1101(b)(1)(C) is a part, was enacted. *Id.* at 22. Although that regulation also contained no reference to biology, the court nonetheless concluded that it, too, carried a "presumption" of a biological link. *Id.* at 23. Second, the court considered the statutory purpose of "maintaining or fostering the unity of immigrant families." *Id.* at 23-24. The court recognized that its interpretation of "legitimated" hampered, rather than advanced, that purpose, but it nevertheless concluded that it could not override what it considered to be an interpretation supported by "plain meaning and statutory history." *Id.* at 24-25. Third, the court consulted the legislative history of a separate statute, the Nationality Act of 1940. *Id.* at 25-26. That legislative history contemplated that a "legitimated" child is one that "the law treated 'just as if it had been born legitimately.'" *Id.* at 25 (quoting *de los Santos*, 525 F. Supp. at 667). The court interpreted this commentary—which contained no reference to biology and pertained to another statute—to validate the conclusion that § 1101(b)(1)(C) contains a biological link requirement. *Id.*

Having concluded that the statute's text precludes finding that Hyebin is Lt. Col. Schreiber's "child," the court then refused to consider the claims that such a ruling would be unconstitutional. The court found that Lt. Col. Schreiber had not exhausted his claim, *id.* at 33, notwithstanding that the BIA had explicitly noted that Lt. Col.

Schreiber had indeed raised the claim (but found that it lacked jurisdiction to rule on it). The court did consider amicus curiae's argument at all. Finally, the court held that it lacked jurisdiction to hear the constitutional arguments in the first instance because Lt. Col. Schreiber was required to exhaust each "specific argument[]" to the BIA before the court would entertain it. *Id.* at 32.

This appeal followed.

STANDARD OF REVIEW

This Court "review[s] de novo a district court's decision in an APA case." *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1059 (10th Cir. 2014). The BIA's determination may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (quoting 5 U.S.C. § 706(2)(A)).

This Court also "review[s] de novo the district court's finding of failure to exhaust administrative remedies." *Little v. Jones*, 607 F.3d 1245, 1249 (10th Cir. 2010) (quoting *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002)).

SUMMARY OF ARGUMENT

I. As the district court recognized, Congress's animating goal in providing immigrant visas to immediate relatives of U.S. citizens and in creating an expansive definition of the term "child" was to maintain and foster unity among immigrant families. With respect to legitimated children, the surest way to accomplish that end is to follow the statute's plain text. The INA provides that a "child" includes a person "legitimated under the law of the child's residence or domicile, or under the law of the

father's residence or domicile." 8 U.S.C. § 1101(b)(1)(C). On its face, this language instructs that state law determines whether a child has been "legitimated" for purposes of federal law. That directive, moreover, is consistent with the settled understanding that there is no fixed concept of legitimation and that state law is best equipped to keep pace with changing societal understandings of what it means to be a "family" and to be "legitimated."

The district court's contrary determination that Hyebin is not Lt. Col. Schreiber's "child" for purposes of obtaining an immigrant visa flowed from the court's misguided search for a federal definition of "legitimated." That search was contrary to the statutory text in light of the explicit instruction from Congress to follow state law. Moreover, a "plain statement" is required before federal law will displace the state's control over matters traditionally reserved to the states, such as the family law definition of "legitimated" at issue in this case. *See generally Gregory v. Ashcroft,* 501 U.S. 452, 461 (1991). Not only was that clear statement absent here, but there was an affirmative instruction to look to—and *not* displace—the "law of the child's [or father's] residence." 8 U.S.C. § 1101(b)(1)(C). The district court's decision puts it at odds with multiple federal courts, including the Fourth Circuit, that have refused to graft additional federal requirements onto aspects of the definition of "child" that state law controls. *See Ojo v. Lynch*, 813 F.3d 533, 540 (4th Cir. 2016).

Once it is recognized that state law controls, the result here is clear. Kansas has long recognized that a child may be legitimated through adoption. Hyebin thus

became Lt. Col. Schreiber's legitimated daughter when the Schreibers obtained an adoption decree from the Kansas district court in 2014. This conclusion will not, as the government argued below, render superfluous § 1101(b)(1)(E), which pertains only to adoptions. States and foreign countries are under no obligation to treat adopted children as legitimated children. At the time the INA was amended to define "child" to include adopted children, at least ten states denied adopted children the same inheritance rights as legitimate children. In such jurisdictions the adoption provision will be determinative. Further, Congress did not structure the multiple definitions of "child" to be mutually exclusive, so the possibility of satisfying multiple definitions is unproblematic. What matters for present purposes is that Congress instructed that state law controls who has been "legitimated"; and, under Kansas law, Hyebin has been.

II.A. Even if, contrary to the statute's plain text, the district court were correct that federal law controls when a child is "legitimated," the court's determination that federal law injects a biological requirement cannot be squared with the relevant statutory text. The district court overlooked that the surrounding definitions of "child" in the INA state in clear terms when a biological relationship is required. At various points, definitions of "child" reference a "natural mother," a "natural father," a "natural sibling," and a "natural parent." 8 U.S.C. §§ 1101(b)(1)(D)-(E). But, notably, no reference to a "natural" parent appears in the provision governing legitimated children, which, instead refers to the "legitimating parent or parents."

8 U.S.C. § 1101(b)(1)(C). Congress has thus demonstrated that it is capable of articulating when a biological relationship is necessary; and the unambiguous text demonstrates that it declined to impose one on legitimated children.

The district court largely ignored these explicit references to biological connections. Instead, it found support for its interpretation that "'legitimate' assume[s] a biological connection" in a State Department regulation that used different language, and in the legislative history of a separate statute. The district court's error is made particularly clear by the court's explicit recognition that imposing a biological requirement runs contrary to the underlying aim of the INA.

B. If this Court finds "legitimated" ambiguous, the BIA's interpretation is an unreasonable one and should therefore be rejected. As the district court acknowledged, the BIA's rule undermines Congress's aim to maintain and foster unity among immigrant families. The BIA has also carved out an exception in its treatment of women who use assisted reproductive technologies. This conflict with the statutory purpose and the BIA's selective application of a biological requirement demonstrate that the BIA's construction is "arbitrary, capricious, or manifestly contrary to the statute." *See, e.g., Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1149 (10th Cir. 2004). The government nonetheless attempts to support the blanket biological requirement on the ground that such a requirement would deter fraud, but that "places undue emphasis on the 'fear [of] fraudulent'" acts of legitimation at the expense of

"meritorious, non-fraudulent" petitions, like Lt. Col. Schreiber's. *Gonzalez-Martinez v. Dep't of Homeland Security*, 677 F. Supp. 2d 1233, 1237 (D. Utah 2009).

C. Because federal law does not impose a blanket biological requirement, the same conclusion as the one reached under state law follows: Hyebin is Lt. Col. Schreiber's "legitimated" daughter. If federal law applies, it requires only that the child be given "the same legal status as a child born in wedlock." Aplt. App. at 20 (quoting The Merriam Webster Dictionary (2016)). Under Kansas law, then, when the Schreibers adopted Hyebin, she was given the same status that she would have possessed if she were born to them.

III. The district court further erred in declining to consider the constitutional challenges to USCIS's determination. The district court concluded that it could not hear these arguments in the first instance because they had not been exhausted in front of the BIA. This reasoning overlooked that Lt. Col. Schreiber and *amicus curiae* did present the claims to the BIA. Indeed, the BIA's decision openly acknowledged the arguments, but found that it lacked jurisdiction to consider them. The BIA's refusal to consider a claim does not render it "unexhausted." Such a rule would allow the BIA's mistaken understanding of its jurisdiction to control a litigant's ability to obtain a ruling on the merits.

More fundamentally, exhaustion was not required as a matter of law. The Supreme Court has held that a litigant is required to exhaust only *mandatory* intra-agency appeals. *See Darby v. Cisneros*, 509 U.S. 137, 147 (1993). Appeal to the BIA

from a denial of a petition for a visa, however, is *optional*. As a result, Lt. Col. Schreiber was not required to raise his constitutional arguments to the BIA. Accordingly, this Court should remand this case to the district court for full consideration of the arguments that USCIS violated Lt. Col. Schreiber's rights under the Fifth Amendment.

ARGUMENT

I. Because Hyebin Has Been "Legitimated" Under Kansas Law, She Is Lt. Col. Schreiber's "Child" for Purposes of Federal Immigration Law

A. The INA unambiguously instructs that state law controls whether a child has been "legitimated"

To determine whether the district court's and BIA's interpretation of "legitimated" should be upheld, this Court follows a familiar process. It first decides whether the text of the challenged statute is ambiguous. *See Walker v. United Parcel Serv., Inc.,* 240 F.3d 1268, 1274 (10th Cir. 2001). "If it is not, [this Court] must give effect to the unambiguously expressed intent of Congress." *Id.* If the statute is ambiguous, this Court then defers to the agency's interpretation only if Congress has "charged [the agency] with the task of interpreting" the provision at issue and if the interpretation is "not arbitrary, capricious, or manifestly contrary to the statute." *Efagene v. Holder*, 642 F.3d 918, 920-21 (10th Cir. 2011) (explaining that BIA's interpretation of "the substance of [a] state-law offense" receives no deference).

In this case, the analysis ends at the first step: § 1101(b)(1)(C) is clear that state law determines whether a child has been legitimated. In general, when legislation has

the potential to interfere in areas traditionally reserved to the states, the Supreme Court has required a "plain statement" that Congress intends to displace the normal federal-state "balance." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Because "[f]amily relations are a traditional area of state concern," *Moore v. Sims*, 442 U.S. 415, 435 (1979); *see also De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956), the clear statement rule applies here. *See Ojo*, 813 F.3d at 540. Not only is there is no such statement *displacing* state law, but there is an unequivocal direction to *apply* state law. In recognizing "legitimation" as a means of establishing a sufficient parent-child relationship for immigration purposes, § 1101(b)(1)(C) instructs that "the law of the child's residence or domicile" and "the law of the father's residence or domicile" control whether a child has been "legitimated." It follows that, if the child can demonstrate that she has been legitimated in any of these jurisdictions, then she qualifies as a "child" for purposes of immigration law.

This statutory regime will, of course, lead to varying applications of "legitimated," depending on the applicable state law in any particular situation. But that is a reality that the BIA has rightly already embraced. In discussing § 1101(c)(1), which also defines "child" to include persons "legitimated under the law of the child's [or father's] residence or domicile," the BIA explained:

> By tying the meaning of "legitimation" to the requirements of the law of the child's residence or domicile (or that of the father), *Congress anticipated that the meaning of the term would vary depending upon . . . the law in the country or State of residence or domicile* . . . . "Legitimation" is thus an evolving, rather than a fixed, concept.

Matter of Cross, 26 I. & N. Dec. 485, 492 n.8 (BIA 2015) (emphasis added); *Cf. also Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989) ("Illegitimacy is a legal construct, not a natural trait."). Lt. Col. Schreiber asks for no more than application of these principles—that is, for the BIA to determine whether Kansas law treats Hyebin as "legitimated."

The Supreme Court approved this mode of analysis in the context of copyright law in *De Sylva v. Ballentine*, 351 U.S. 570 (1956). *De Sylva* presented the question of how to determine who qualified as a "child" of a copyright holder and therefore who was entitled to share in the right to renew a copyright after the copyright holder's death. *Id.* at 571. Because "child" was undefined in the statute and "there is no federal law of domestic relations," the Supreme Court held that state law determines who is a "child." *Id.* at 580. The Court therefore "dr[e]w on the ready-made body of state law to define" the term. *Id.* at 580-81. In doing so, the Court—like the BIA in *Matter of Cross*—noted the potential for variation, but found it unproblematic because application of state law, as a general matter, "does not mean that a State would be entitled to use the word 'children' in a way entirely strange to those familiar with its ordinary usage." *Id.* at 581. So long as state law usage falls within the range of "permissible variations in the ordinary concept" of the term, it is "controlling." *Id.*

The analysis applied in *De Sylva* should be followed here, particularly because § 1101(b)(1)(C) explicitly instructs that state law determines whether a child has been

"legitimated."[3] As explained below, *see infra* Section I.E, following the express direction of § 1101(b)(1)(C), and the analysis in *De Sylva*, demonstrates that Hyebin has been "legitimated."

B. The Fourth Circuit has rejected supplanting state law with federal requirements in order to determine whether a child is "adopted"

In the closely related context of establishing a "child"-parent relationship solely through adoption, the Fourth Circuit has instructed immigration authorities to apply state law and refused to impose any additional requirements. A separate provision, 8 U.S.C. § 1101(b)(1)(E)(i), classifies as a "child" anyone "adopted while under the age of sixteen years" (so long as other requirements, not relevant here, are satisfied). In *Ojo v. Lynch*, 813 F.3d 533 (2016), the Fourth Circuit held that state, not federal, law controls whether a child has been "adopted." There, the child, Ojo, lived with his uncle, who filed a petition for Ojo's adoption when Ojo was sixteen—*i.e.*, after the statutory cutoff—and an adoption decree issued when Ojo was seventeen. *Id.* at 535-36. Ojo then obtained a "nunc pro tunc order" stating that his adoption became effective the day before he turned sixteen and therefore before the statutory cutoff. *Id.* at 536. The BIA denied that this qualified Ojo as a "child," applying precedent

[3] To be clear, Lt. Col. Schreiber does not contend that state law controls the definition of "child" under the INA. Rather, the Supreme Court's method of analysis to determine the meaning of "child" in *De Sylva* should guide the analysis to find the meaning of "legitimated" here, which, just as with "child" in *De Sylva*, requires reference to state law.

that the BIA "does not recognize nunc pro tunc adoption decrees after a child reaches the age limit for both the filing of the adoption petition and decree." *Id.*

The Fourth Circuit vacated the BIA's order. It explained that "[t]he term 'adopted' . . . carries with it the understanding that adoption proceedings in this country are conducted by various *state courts* pursuant to *state law*." *Id.* at 539-40 (citing the Black's Law Dictionary definition of "adoption" as a "[l]egal process pursuant to *state* statute") (alteration in original, emphasis added). From that premise, the court concluded, "a child is 'adopted' for purposes of § 1101(b)(1)(E)(i) on the date that a state court rules the adoption effective." *Id.* at 540. The court declined to defer to the BIA's contrary interpretation, reasoning that, if Congress intended "to place the interpretation [of the term adopted] in the hands of an administrative agency, such as the BIA, Congress would have made that intention 'unmistakably clear.'" *Id.* (quoting *Gregory*, 501 U.S. at 460, and citing *De Sylva*, 351 U.S. at 580). Because Congress had not "specif[ied] requirements in the INA that, if met, would confer upon a child the status of 'adopted' for purposes of federal immigration law," state law governed. *Id.*

C. Congress has provided that state law governs the application of federal law in multiple different statutes

The Congressional instruction that immigration authorities and courts look to state law is not a novel innovation. As noted, the Supreme Court has long recognized that the "scope of a federal right" may be a "federal question, but that does not mean

that its content is not to be determined by state, rather than federal law." *De Sylva*, 351 U.S. at 580.

In addition to the use of state law in the copyright context, other examples illustrate this legislative practice. The Federal Tort Claims Act, for instance, renders the federal government liable for certain tortious conduct "if a private person . . . , would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). In other words, the FTCA "mandates application of state law to resolve questions of substantive liability," *Cannon v. United States*, 338 F.3d 1183, 1192 (10th Cir. 2003). For that reason, a state's control of tort law can have the effect of expanding or restricting the ability to recover compensation from the federal government.

Congress has taken a similar approach for constitutional tort cases brought under 42 U.S.C. § 1983. As this Court has observed, in enacting 42 U.S.C. § 1988, Congress "directed the courts to look to state law" to fill in gaps, such as the applicable statute of limitations, in the operation of § 1983. *Baker v. Bd. of Regents of State of Kan.*, 991 F.2d 628, 630 (10th Cir. 1993); *see also, e.g.*, *Am. Civil Rights Union v. Philadelphia City Comm'rs*, No. CV 16-1507, 2016 WL 4721118, at *10 (E.D. Pa. Sept. 9, 2016) (explaining that statutory instruction in National Voter Registration Act regarding removing registered voters due to criminal convictions "as provided by State law" requires deference to "state law definitions" of crimes) (capitalization omitted).

The Sixth Circuit's decision in *Advance Stores Co. v. Refinishing Specialities, Inc.*, 188 F.3d 408 (6th Cir. 1999), a case that considered a provision of the Lanham Act, is instructive on the proper application of a direction to look to state law. The Lanham Act provides that a registered trademark becomes "incontestable" but, in language parallel to that of § 1101(b)(1)(C), carves out an exception when "the use of [the] mark . . . infringes a valid right acquired under the law of any State or Territory." 15 U.S.C. § 1065. The defendant in *Advance Stores* argued that federal common law controlled whether the user of a mark had "acquired" rights that trumped the registered mark, citing cases from the Third Circuit and Eight Circuit as support. *Advance Stores*, 188 F.3d at 412.

In a decision that mirrors the analysis in *De Sylva* and *Ojo*, the Sixth Circuit rejected this attempt to graft a federal meaning onto the term "acquired." It explained that "[t]he language of § 1065 explicitly states that the registrant's incontestability is limited to the extent that the prior user (i.e. Defendant) has valid rights 'acquired under the law of any state or Territory by use of a mark or trade name.'" *Id.* The court therefore "follow[ed] the clear directive of the statute and . . . look[ed] to Kentucky law to determine" the defendant's rights. *Id.* at 413.

The same analysis should be applied here. Like the Lanham Act's instruction that "the law of any State or Territory" determines whether trademark rights have been "acquired," the INA directs that "the law of the child's [or father's] residence or domicile" determines whether a child has been "legitimated." Nonetheless, the

district court and the BIA disregarded the INA's clear direction and instead created the equivalent of a federal common law definition of "legitimated" by imposing a biological requirement. That interpretation should be rejected in favor of application of Kansas law, just as the INA's plain text requires.

D. Deference to state law furthers the aims of the INA

Not surprisingly, the Supreme Court has instructed that a statute should be "interpret[ed] . . . in a way that is consistent" with its underlying purpose. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). As noted, Congress's aim in providing immigrant visas to immediate relatives was "maintaining or fostering the unity of immigrant families." Aplt. App. at 24; *see also Cantwell v. Holder*, 995 F. Supp. 2d 316, 321 (S.D.N.Y. 2014) (finding that the BIA's refusal to recognize nunc pro tunc orders runs afoul of "Congress' intent and purpose of keeping families together"). Application of state law to determine whether a child has been "legitimated" naturally advances this end.

What constitutes a "family" is not a static determination. Consequently, Congress has consistently expanded the definition of "child." The Immigration and Nationality Act of 1952 limited the definition of "child" to children born legitimate, certain stepchildren, and children legitimated under the law of the child's or father's residence. *See* Immigration and Nationality Act of 1952, Pub. L. 82–414, 66 Stat. 163, at 171. Five years later, in 1957, Congress recognized additional categories of "children" in order "to provide for a liberal treatment of children" out of "concern[]

with the problem of keeping families of United States Citizens and immigrants united." H.R. Rep. 85-1199, § 2 (1957); 1957 U.S.C.C.A.N. 2016, 2020. Those categories allowed an illegitimate child to qualify as a "child" through a relationship with a mother and also permitted certain adopted children to qualify. Immigration and Nationality Act Amendments of 1957, Pub. L. 85–316, 71 Stat. 639. In another example, in 1995 Congress replaced certain (but not all) references to legitimacy and illegitimacy with language describing whether a child was born in or out of "wedlock" to fix a "problem of definitions" that had "ground to a halt international adoptions by U.S. families." 141 Cong. Rec. H11386 (daily ed. Oct. 30, 1995); An act to amend the Immigration and Nationality Act, Pub. L No. 104-51, 109 Stat. 467. While a full recounting of the persistent statutory expansion is unnecessary here, the list grew until it reached its present state, with seven categories and multiple subcategories.

Against this backdrop, it is clear that following the plain text of § 1101(b)(1)(C) accords with and effectuates Congress's desire for family unity. States are generally charged with responsibility for matters of family law and are best equipped to handle the shifting definitions of families, of parent-child relationships, and of legitimation. *See generally Santosky v. Kramer*, 455 U.S. 745, 773 (1982) (Rehnquist, J., dissenting) (recognizing that states serve as laboratories of "experimentation" in the field of family law). States are thus at the front lines of these matters and have responded accordingly. *See, e.g.*, *Christopher YY. v. Jessica ZZ.*, 159 A.D.3d 18, 23 (N.Y. App. Div. 2018) (holding that the child of a woman married to the biological mother—*i.e.*, a woman with zero

possible biological connection to the child—was "entitled to the presumption of legitimacy afforded to a child born to a marriage"). An interpretation of § 1101(b)(1)(C) that looks to state law to determine who is "legitimated" and that incorporates states' efforts to keep pace with changing societal normal aligns with Congress's efforts to keep families together.

E. Kansas law recognizes Hyebin as Lt. Col. Schreiber's legitimated daughter

Following § 1101(b)(1)(C)'s instruction to apply state law compels the conclusion that Hyebin is Lt. Col. Schreiber's "legitimated" daughter. Kansas has long recognized "[s]everal different methods of legitimation . . . includ[ing] . . . adoption." *Aslin v. Seamon*, 225 Kan. 77, 79 (1978). Per statute, adoption effectuates legitimation: "When adopted, a person shall be entitled to the same personal and property rights as a birth child of the adoptive parent. The adoptive parent shall be entitled to exercise all the rights of a birth parent and be subject to all the liabilities of that relationship." Kan. Stat. § 59-2118(b). No biological element must be established before an adopted child is treated as though she had been born in wedlock to two married parents. Because Lt. Col. Schreiber and Hyebin followed Kansas procedures for adoption (an uncontested fact), she is his legitimated daughter—for purposes of Kansas law and thus for purposes of § 1101(b)(1)(C).

F. Lt. Col. Schreiber is not limited to § 1101(b)(1)(E) in pursuing an immigrant visa on Hyebin's behalf

Below, the government argued that embracing a state's determination that adoption is a means of legitimation would have the effect of rendering superfluous § 1101(b)(1)(E), which defines "child" based on adoption. The district court did not rely on this argument, but it bears noting that it is both incorrect and irrelevant. It is incorrect because states and foreign countries do not necessarily treat adopted children as legitimated children. For example, at the time the definition of "child" in the INA was amended in 1957 to include certain adopted children, at least ten states did not afford adopted children the same inheritance rights as legitimate children. *See* Comment, *Intestate Succession, Sociology and the Adopted Child*, 11 Vill. L. Rev. 392, 396-97 (1966). This remains the law in South Dakota today. *See In re Eddins' Estate*, 279 N.W. 244, 246 (S.D. 1938) (construing statute that remains in effect); *see also* Sarah Ratliff, *Adult Adoption: Intestate Succession and Class Gifts Under the Uniform Probate Code*, 105 Nw. U. L. Rev. 1777, 1796 & n.164 (2011); *MacCallum v. Seymour*, 686 A.2d 935, 936, 959-60 (Vt. 1996) (noting that Vermont did not amend its law until 1996 and discussing discrimination against adopted children). In such jurisdictions, § 1101(b)(1)(E) would not be redundant of § 1101(b)(1)(C), and petitioners whose children were adopted would be unable to take advantage of the latter.

Further, the government's argument is irrelevant because nothing in the INA suggests that the different definitions of "child" are intended to be mutually exclusive.

For example, a person could qualify as a "child" by being "legitimated" under § 1101(b)(1)(C) and by establishing a "bona fide parent-child relationship" with a "natural" parent under § 1101(b)(1)(D). In other words, Congress's chosen design predictably leads to overlap in individual cases and, therefore, contemplates that a person may qualify as a "child" under multiple provisions.

Here, all that matters for purposes of resolving this case is that Kansas law treats Hyebin as legitimated. Lt. Col. Schreiber's petition thus satisfies § 1101(b)(1)(C). Consequently, this Court should remand to the BIA with instructions to grant Lt. Col. Schreiber's petition to classify Hyebin as his child.

II. Nothing in the INA Imposes a Blanket Biological Requirement to Establish that a Child Has Been Legitimated

Even if the district court was correct to look for a federal meaning of "legitimated," the court's conjuring of a biological element is contrary to the unambiguous text of the statute when read in the context of the surrounding definitions of "child." At a bare minimum, if some ambiguity in the statute can be discerned, application of a blanket rule requiring a biological connection in all cases would be unreasonable.

A. Read in context, § 1101(b)(1)(C) does not mandate a biological relationship between parent and child

The district court concluded that, for a child to be "legitimated" under § 1101(b)(1)(C), she must be the biological child of the legitimating parent and the parent must confer to that child the "same legal status as a child born in wedlock."

Aplt. App. at 20 (quoting The Merriam-Webster Dictionary (2016)). Lt. Col. Schreiber does not dispute the second aspect of the district court's interpretation—that, if federal law defines "legitimated," it requires that the child receive "full filial rights." *See de los Santos*, 525 F. Supp. at 669. As explained above, the Schreibers conferred those rights on Hyebin when they legally adopted her in accord with Kansas law. *See supra* Section I.E; *infra* II.C.

The district court's imposition of a biological requirement, however, was contrary to the INA's text. The district court focused its analysis on the term "legitimated" in isolation. But when construing statutory language—and "[p]articularly" an "elastic" term—courts should consider the relevant term "in light of the terms surrounding it." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004); *see also Matter of Cross,* 26 I. & N. Dec. at 492 n.8 (noting that legitimation is an "evolving" concept). Here, the definitions of "child" adjacent to § 1101(b)(1)(C) demonstrate the absence of a biological requirement. In § 1101(b)(1)(D), Congress provided that the definition of "child" extends to a person born out of wedlock who has a bona fide relationship with her parent, but limited this definition to relationships with a "natural mother" or "natural father," terms synonymous with "biological" mother or father. Likewise, Congress provided that a "natural sibling" of an adopted "child"—but not a step-sibling—could be deemed a "child" even if that sibling had aged out of the statutory cut-off for classification as a "child" through adoption. 8 U.S.C. § 1101(b)(1)(E) (ii); *see also id.* § 1101(b)(1)(E)(i) (discussing the rights of the "natural parent" after

adoption). By contrast, there is no reference to a "natural" parent in § 1101(b)(1)(C), which, instead, refers to the "legitimating parent or parents."

Congress was thus quite clear when it meant to include a biological connection. As courts have long recognized, "[w]here Congress knows how to say something but chooses not to, its silence is controlling." *Ela v. Destefano*, 869 F.3d 1198, 1202 (11th Cir. 2017); *see also, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 740 (10th Cir. 2016). Here, Congress's omission of any mention of "natural" parents in the provision governing "legitimated" children is dispositive as to whether "legitimated" can be read to include a biological element: it cannot.

The sources on which the district court relied do not undermine this conclusion.[4] First, the district court consulted multiple dictionary definitions. None of those definitions, however, mentioned any biological requirement. Three of the definitions, as the district court acknowledged, "never refer[] to a biological relationship." Aplt. App. at 21. They define "legitimate" as "to make (someone or something) legitimate: (1) to give legal status or authorization to; (2) to show or affirm to be justified; (3) to lend authority or respectability to." Aplt. App. 20 (quoting The Merriam-Webster Dictionary (2016)). Despite those definitions aligning with Kansas

[4] The district court's opinion drew from the analysis in *de los Santos v. INS*, 525 F. Supp. 655 (S.D.N.Y. 1981). There was no dispute that the plaintiff-father in *de los Santos* was the biological father of the child seeking to immigrate, and the presence or absence of a biological requirement was not at issue in the case. The decision in *de los Santos* also predated amendments to the INA that replaced certain references to legitimacy with references to "wedlock."

law and modern treatment of legitimation, the district court swept them aside in favor of a fourth definition that defines "legitimate" as "to give (a child born out of wedlock) the same legal status as a child born in wedlock." *Id.* But even that definition had no biological component, and the district court injected its own gloss on the definition in a strained effort to conclude that it "assume[d] a biological connection." *Id.* at 21. This is not an application of the plain text, but a modification of it.

Second, the district court relied on a 1946 State Department regulation concerning illegitimate children that, according to the district court, supports finding a biological requirement. That regulation, as the district court noted, stated that an "illegitimate child" may obtain immigrant status if the child's father has "legitimated the child under the law of his domicil," language in some ways similar to the current wording of § 1101(b)(1)(C). The district court appears to have reasoned that, because the regulation contemplated a transition from "illegitimate" to "legitimate" and because the regulation was codified at one point, an implicit biological requirement exists in § 1101(b)(1)(C). Aplt. App. at 22-23. If anything, the regulation undermines the district court's conclusion. Unlike the regulation, § 1101(b)(1)(C) contains no reference to the term "illegitimate" and thus lacks the anticipation of a transition that the court erroneously found to carry a tacit biological requirement. Further, the regulation pre-dated the INA, which has since been amended.

Third, to reach its conclusion, the district court resorted to legislative history. It had no occasion to do so because the applicable statutory text is clear. And the

court wrongly relied on the legislative history of another statute, the Nationality Act of 1940, that concerned parent-child relationships in the context of citizenship, not immigrant visas. Assuming, *arguendo*, that the Nationality Act's legislative history supports a biological requirement, a decision to impose tighter restrictions before conferring *citizenship* on an individual would not be in tension with a decision to provide a more relaxed definition for *immigrant visas*. A broader definition for visas would serve the statutory aim of keeping a family together without requiring the government to bestow the "treasured" right of U.S. citizenship. *Fedorenko v. United States*, 449 U.S. 490, 522 (1981).

None of these considerations overrides the plain text of the statute, which contains no reference to biology and stands in contrast to multiple surrounding provisions that do. Nor does the BIA's decision in *Matter of Bueno*, 21 I & N Dec. 1029 (1997), dictate any other result. The BIA there summarily concluded—without any analysis—that "natural paternity . . . is implied by the very nature of legitimation." *Id.* at 1031. That holding ignored § 1101(b)(1)(C)'s instruction that state law determines when a child is "legitimated." Following that instruction, as noted in the above discussion of Kansas law, demonstrates that "natural paternity" is not, in fact, always required. The BIA's determination is also contrary to settled rulings that a child born in wedlock, but not the biological child of the father, is nonetheless the father's legitimate child. *See, e.g.*, *Jaen v. Sessions*, 899 F. 3d 182, 190 (2d Cir. 2018) ("[B]ecause [the] petitioner was born in wedlock, he acquired citizenship from his U.S. citizen

father although there was likely no biological link between them." (citing *Scales v. INS*, 232 F.3d 1159, 1161 (9th Cir. 2000))).

B. If "legitimated" is ambiguous, it is unreasonable to impose a blanket biological requirement

Below, the government argued that "legitimated" is an ambiguous term. Even if this contention were correct, any interpretation of the term that imposes a blanket requirement of a biological connection is unreasonable. An interpretation may be deemed "arbitrary, capricious, or manifestly contrary to the statute" where it undermines Congress's purpose. *See, e.g.*, *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1149 (10th Cir. 2004) ("Courts must guard against interpretations that might defeat a statute's purpose[.]"). In this case, the district court openly "acknowledge[d]" that its and the BIA's construction of "legitimated" conflicts with Congress's aim of maintaining and fostering unity of immigrant families. Aplt. App. at 24.

Further evidence of the district court's error is found in USCIS's own guidance. USCIS has concluded that a "non-genetic gestational mother may legitimate her child." USCIS Policy Manual, Volume 12, Part H, Chap. 2.[5] Put in the terms of the INA, this means that USCIS has determined that § 1101(b)(1)(C)'s definition of "child" encompasses children legitimated by non-natural mothers. That conclusion—with which Lt. Col. Schreiber agrees—cannot be reconciled with the interpretation of the

[5] *See* The USCIS Policy Manual is available at the following link: https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter2.html#footnotelink-9.

district court and the BIA in *Matter of Bueno* that the statute mandates a connection to a natural parent in all instances. *Cf. Harbert*, 391 F.3d at 1149 (finding a rule unreasonable where, among other things, it was arbitrarily imposed only on "joint employers," but not on "sole employers").

The government attempted to prop up its blanket biological requirement below by arguing that it advances Congress's effort to reduce fraudulent petitions for visas. Aplt. App. at 296. If no biological requirement existed, the government contended, petitioners for visas could "skirt[]" the age limitation that governs adopted children in § 1101(b)(1)(E). *Id.* at 296-97. Preventing fraud is, of course, a relevant concern for Congress to consider. Yet, that does not render an across-the-board biological requirement reasonable when, as here, Congress did not provide for it, and, in any event, case-by-case consideration of fraudulent intent is feasible.

Again, federal courts' treatment of adoption cases is instructive. While the Fourth Circuit in *Ojo* struck down the BIA's refusal to consider nunc pro tunc orders at *Chevron*'s first step, *see* 813 F.3d at 541, other courts have done so at the second step. Those courts have reasoned that the BIA's rigid prohibition improperly elevated a concern for fraud at the expense of an interpretation that aligns with Congress's aim to keep immigrant families unified. For example, in *Gonzalez-Martinez v. Department of Homeland Security*, 677 F. Supp. 2d 1233 (D. Utah 2009), the court concluded that the BIA's rule "fail[ed] to give recognition to the overriding purpose of Congress in the immigration statutes to keep families 'united,' and place[d] undue emphasis on the 'fear

that fraudulent adoptions would provide a means of evading the quota restrictions.'" *Id.* at 1237. The result, the court explained, was the "sweeping aside" of "meritorious, non-fraudulent" petitions. *Id.*; *see also, e.g.*, *Amponsah v. Holder*, 709 F.3d 1318, 1323 (9th Cir.), *opinion withdrawn*, 736 F.3d 1172 (9th Cir. 2013) (rejecting the BIA's interpretation because, among other reasons, "rather than addressing the possibility of fraud on an individual basis, the BIA's blanket rule conclusively lumps all nunc pro tunc decrees together as invalid"); *Brown v. Dep't of Homeland Sec.*, 313 F. Supp. 3d 1252, 1260 (W.D. Wash. 2018) ("Defendants do not provide persuasive argument that this new rule acts as a tool to prevent fraud such that it should be emphasized over the goal of preservation of family unity."); *Cantwell v. Holder*, 995 F. Supp. 2d at 320.

The same considerations apply here. There is no hint of fraud in Lt. Col. Schreiber's relationship to Hyebin. Nevertheless, he and Hyebin have been made collateral damage in the application of an overbroad policy that, as the district court recognized, runs contrary to Congress's aim of keeping families together. That USCIS has provided exceptions before—in the case of mothers using assisted reproductive technologies—demonstrates that individualized consideration is warranted here, too. The contrary rule endorsed by the district court and the BIA is "arbitrary, capricious, [and] manifestly contrary to the statute." *Harbert*, 391 F.3d at 1149.

C. The Agency's Denial of Lt. Col. Schreiber's Petition Under Federal Law Was Erroneous

The foregoing demonstrates that, even if it were correct to go beyond Kansas law and look to federal law to determine whether Hyebin is Lt. Col. Schreiber's "legitimated" daughter, Lt. Col. Schreiber's petition should have been granted. As explained, under a proper reading of federal law, there is no blanket requirement that the "child" be the "natural," or biological, child of the legitimating parent. Thus, because the Schreibers' adoption put Hyebin on equal footing with a natural child born to the Schreibers and because there has never been a suggestion of fraud in this case, Hyebin is a "child" under § 1101(b)(1)(C).

III. The District Court Improperly Refused to Consider Lt. Col. Schreiber's Constitutional Claim

If this Court agrees that the combination of the INA and Kansas law required that Lt. Col. Schreiber's petition on behalf of his daughter be granted, it need go no further. If the Court instead accepts the district court's conclusion regarding the meaning and application of "legitimated" as a statutory matter, it should nevertheless remand this case to the district court because that court erred in declining to consider whether the denial of Lt. Col. Schreiber's petition violates his rights under the Fifth Amendment. It has been argued in front of the BIA and in front of the district court that the refusal to treat Hyebin as Lt. Col. Schreiber's "legitimated" child discriminates against him as a non-natural father and discriminates against the Schreibers as a family that legitimated through adoption. These are serious constitutional claims that raise

questions deserving heightened scrutiny. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017).

The district court declined to address these claims because it concluded that the issues had not been exhausted before the BIA. That determination was erroneous for two reasons. First, as reflected in the BIA's explicit refusal to address the constitutional arguments, they were, in fact, presented to the BIA. Second, exhaustion before the BIA is not required as a matter of law when, as here, an appeal to the BIA is optional.

A. Lt. Col. Schreiber raised his constitutional claim before the BIA

Lt. Col. Schreiber and his *amicus curiae* presented their constitutional claims to the BIA, as proven by the BIA's own opinion. The BIA acknowledged the claims but nonetheless concluded that, "[t]o the extent that constitutional arguments have been raised, the Board does not have jurisdiction to rule on the constitutionality of the laws it administers." Aplt. App. at 125. That observation would be quite odd had no constitutional challenge actually been advanced. Indeed, at least with respect to *amicus*'s constitutional argument, the district court acknowledged that "[t]he BIA . . . explained that it had considered the amicus curiae's arguments," which included "that the USCIS decision in this case violated plaintiff's equal protection rights." *Id.* at 11 & n.4.

The district court nonetheless found the constitutional claims unexhausted. In so ruling, the district court ignored the constitutional theory articulated by *amicus curiae*.

Courts have discretion to reach arguments raised only in an *amicus curiae* brief when the argument is jurisdictional, when the argument "touche[s] on an issue of federalism or comity" that may be raised *sua sponte*, or when "other exceptional circumstances exist." *In re McGough*, 737 F.3d 1268, 1277 n.8 (10th Cir. 2013); *see also Nakayama v. Sanders*, No. 17-CV-00285-WJM-NYW, 2017 WL 8944006, at *7 (D. Colo. Mar. 21, 2017) (observing that the district courts possess this discretion). This case presents an exceptional circumstance: (1) *amicus curiae* raised a pure issue of law closely related to Lt. Col. Schreiber's own argument, (2) the BIA considered the argument, and (3) refusal to consider the issue (if the Court declines to accept Lt. Col. Schreiber's other arguments) will result in separating Lt. Col. Schreiber's family or forcing a high-ranking veteran to move abroad to remain near his daughter. Further, although *amicus curiae*'s argument here is not one that may be raised *sua sponte*, it is grounded in concerns of federalism and comity, as it challenges federal law's discrimination against state law.[6]

As for Lt. Col. Schreiber's constitutional argument, the district court declined to consider it on the ground that he allegedly did not raise it in sufficient detail in front of the BIA. The district court's ruling demands an unnecessary degree of specificity. Under this Court's precedent, a party is required only to raise an argument in a manner that "allow[s] the agency to give the issue meaningful consideration." *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 430 (10th Cir. 2011) (citation omitted). Here, Lt. Col.

[6] If this matter is remanded as requested, Lt. Col. Schreiber intends to advance *amicus curiae*'s argument as his own.

Schreiber presented his Fifth Amendment claim to the BIA in clear terms. In addition to other points made in his brief, Lt. Col. Schreiber summarized his claim by asserting that, because Kansas recognizes him as Hyebin's legitimate father,

> the federal government['s] failure to recognize [Kansas's] process would impermissibly impose a "restriction and disability [causing] injury and indignity [and] deprive . . . an essential part of the Liberty protected by the Fifth Amendment," on those U.S. citizens who wish to have their children recognized under immigration laws. In essence, what the State of Kansas "treats [as] alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect."

Aplt. App. at 92. (quoting *United States v. Windsor*, 570 U.S. 744, 768 (2013)). This was not a "vague[] and cryptic[]" reference insufficient to put the agency on notice, but an acceptable articulation of a legal theory with citations to the relevant constitutional provision and a leading, recent Supreme Court case, *Windsor*, about the scope of the right to equal protection and its applicability to family relations. *Compare Ark. Initiative v. U.S. Forest Serv.*, 660 F.3d 1256, 1261-62 (10th Cir. 2011) (finding general references to "other components of the environment" insufficient to put agency on notice of a challenge based on a threat to "wildlife[,] air quality, water quality, litter, solid waste generation, [and] visual quality").

The district court did not discuss this component of Lt. Col. Schreiber's brief to the BIA. Instead, it incorrectly faulted him for "[m]erely mentioning the agency's ART policy" that governs non-natural mothers who use assisted reproductive technologies rather than including an expansive discussion of the policy. Aplt. App at 31-32. This statement misunderstands Lt. Col. Schreiber's constitutional claim. He is

not challenging the ART policy in isolation, because that policy was not being applied to him. Rather, he is challenging the BIA's construction of the INA in manner that discriminates against non-natural fathers. That argument was raised in a manner sufficient to put the BIA on notice—as evidenced, again, by the BIA's recognition of the claim and its decision not to analyze it.

Finally, the district court should have recognized that providing greater detail to the BIA would have made no difference. The BIA found that it lacked jurisdiction to consider the constitutional claims raised. Whether that conclusion was correct or not, it is clear that additional argument before the BIA would not have changed the result. Where exhaustion to the BIA would be futile, exhaustion is not required. *See, e.g.*, *Baquera v. Longshore*, 948 F. Supp. 2d 1258, 1259 (D. Colo. 2013) (citing *Goodwin v. State of Okl.*, 923 F.2d 156, 157 (10th Cir. 1991)).

B. Exhaustion is not required when an intra-agency appeal is optional

In any event, exhaustion to the BIA was not required as a matter of law. The district court's ruling on exhaustion ran afoul of the Supreme Court's instruction that a party challenging agency action under the APA is not required "to exhaust optional appeals." *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). Once "all intra-agency appeals mandated either by statute or by agency rule" have been exhausted, the federal courts must hear challenges to agency action. *Id.* To require additional exhaustion, the

Supreme Court explained, "would be inconsistent with the plain language" of the APA. *Id.*

Application of this settled principle demonstrates that the district court had an obligation to entertain Lt. Col. Schreiber's constitutional claim. When USCIS denies a petition for a visa, an appeal to the BIA is discretionary, taken, or not, at the option of the petitioner. *See Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (citing 8 C.F.R. § 103.3(a)(ii)). Thus, "the INA and its implementing regulations do not require Plaintiffs to exhaust their administrative remedies before seeking review [of a visa denial] in federal court." *Id.* As a result, Lt. Col. Schreiber was not required to press his constitutional claims (or any claims) before the BIA. The district court's contrary conclusion violates the rule announced in *Darby*.

That Lt. Col. Schreieber did not advance his constitutional claim in front of USCIS also does not affect the district court's ability to consider his claim. USCIS's initial Notice of Intent to Deny rested on Lt. Col. Schreiber's failure to comply with the requirements of § 1101(b)(1)(E)—a provision he had not invoked—and so he focused his response on explaining that he was seeking to classify Hyebin as a child under § 1101(b)(1)(C) only. Aplt. App. at 167, 173-76. It was not until USCIS's final decision that USCIS articulated that it was denying Lt. Col. Schreiber's petition based on the purported biological requirement that Lt. Col. Schreiber now challenges as unconstitutional. *Id.* at 167. When an issue arises only as a result of a final decision, it cannot be deemed "unexhausted."

The D.C. Circuit's decision in *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076 (D.C. Cir. 2009), is instructive on this point. There, the petitioner brought a challenge to an aspect of a rulemaking carried out by the Surface Transportation Board that did not arise until the rule became final. *Id.* at 1078-79. The Board argued that the issue was unexhausted because the petitioner had not presented its argument to the Board through administrative channels by way of a petition for rehearing. *Id.* at 1078. The D.C. Circuit disagreed. Because the petitioner lacked any "[]ability to raise [its] arguments before issuance of the final rule" and because seeking rehearing in front of the Board was permissive, not mandatory, the D.C. Circuit concluded that it had jurisdiction to hear the petitioner's argument. *Id.* at 1079. To require the petitioner to first pursue an optional petition for rehearing in front of the Board, the court explained, would violate the rule announced in *Darby*. *Id.*

The same reasoning applies here. Just as the petitioner in *CSX* had no reason to raise its argument after the notice of proposed rulemaking since the issue only arose once the rule had become final, Lt. Col. Schreiber had no reason to raise his constitutional argument upon receiving USCIS's Notice of Intent to Deny because the issue arose only upon USCIS's final decision. So, for the same reason exhaustion posed no barrier to review in *CSX*, it poses no barrier here.

The district court avoided this straightforward application of *Darby* by reasoning that it "must ask not only whether plaintiff exhausted his remedies," but also "whether he exhausted specific arguments." Aplt. App. at 32. But there is no practical

difference between those two questions. Lt. Col. Schreiber had no obligation to raise any arguments to the BIA. The district court's reasoning thus improperly turned an appeal to the BIA from an optional appeal into a mandatory one, which *Darby* prohibits.

Garcia-Carbajal v. Holder, 625 F.3d 1233 (10th Cir. 2010), on which the district court relied, is not to the contrary. That case concerned exhaustion in the context of a challenge to an order of removal. *Id.* at 1235. When challenging an order of removal, unlike when challenging the denial of a visa, an appeal to the BIA is mandatory. *See Bangura*, 434 F.3d at 498 (citing 8 U.S.C. § 1252(d)(1)). *Garcia-Carbajal* specifically emphasized this point in refusing to excuse the petitioner's failure to raise his claims in front of the BIA. *See* 625. F.3d at 1237 (citing 8 U.S.C. § 1252(d)). Therefore, requiring the petitioner in *Garcia-Carbajal* to exhaust "specific arguments" was consistent with *Darby* and does not compel exhaustion here.

CONCLUSION

The judgment of the district court should be reversed, and this Court should remand with instructions to the BIA to grant Lt. Col. Schreiber's petition to obtain an immigrant visa. Alternatively, this Court should vacate the district court's judgment and remand the case for consideration of the constitutional claims that USCIS's decision violated Lt. Col. Schreiber's equal protection rights.

STATEMENT REGARDING ORAL ARGUMENT

Counsel request oral argument. This appeal presents issues of first impression in this Circuit and carries serious consequence for Appellant. Counsel believe that this Court's disposition of this case would be aided by oral presentation to this Court.

Respectfully submitted this 24th day of December, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for Petitioner certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and contains 10,788 words, excluding the corporate disclosure statement, table of contents, table of authorities, addendum, and certificates of counsel.

/s/ Rekha Sharma-Crawford
Rekha Sharma-Crawford

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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Date: December 24, 2018

/s/ Rekha Sharma-Crawford
Rekha Sharma-Crawford

CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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Date: December 24, 2018

/s/ Rekha Sharma-Crawford
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