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 REPLY BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The government's defense of the district court's ruling overwhelmingly rests on what amounts to a single proposition: because "legitimated" has a common law meaning that includes a biological requirement, that meaning must be applied here. But, as even the government itself recognizes, a common law definition must give way when a statute shows an intent to depart from it. Aplee. Br. at 17. And that is precisely what the federal law at issue in this case does.

The relevant provision, 8 U.S.C. § 1101(b)(1)(C), refers not, as the government suggests, to a child who is "legitimated," but to a child who is "legitimated under the law of the child's [or father's] residence." This statutory language should be read to mean what it says: that state law ("the law of the child's [or father's] residence"), *not* common law, supplies the meaning of "legitimated."

Moreover, even if the government were correct that, despite this language, courts should not look to state law to define "legitimated," the government still would be wrong to insist on importing into this statutory language any common law biological requirement that might have existed. Congress knows how to impose a biological requirement when it desires one: other provisions in the Immigration and Nationality Act (INA) impose such a requirement by demanding either proof of a relationship to a "natural" parent or sibling, 8 U.S.C. § 1101(b)(1)(D), (E), (F), (G), or proof of a "blood relationship," *id.* § 1409(a)(1). No such proof is required by the statutory provision at issue here; and neither the government's repeated invocation of the "inherent" meaning

of legitimated, Aplee. Br. at 1, 5, 7, 13, 24, nor its reliance on the legislative history of another statute accounts for the absence of similar language in § 1101(b)(1)(C).

The government fares no better in its secondary argument that USCIS's imposition of a biological requirement should be upheld if "legitimated" is ambiguous. The government relies on case law finding that a biological requirement exists as proof of the reasonableness of USCIS's interpretation, but those cases were not about the statutory provision at issue in this case. Instead, they addressed the separate provision that explicitly requires a "blood relationship." Those cases are inapposite here. And the government offers no adequate justification for USCIS's interpretation deeming a "biological," but not "genetic," connection sufficient only if that biological connection is established through the use of assisted reproductive technologies. The improvised nature of this rule, combined with the tension between imposing a rigid biological requirement and advancing Congress's undisputed goal of unifying families, demonstrates that USCIS's biological connection requirement is unreasonable.

The government's brief also makes clear that Lt. Col. Schreiber's constitutional claim should be decided on its merits. The government now concedes that Lt. Col. Schreiber was not required to exhaust his arguments in an optional appeal to the BIA. Nonetheless, the government contends that, once he took a discretionary appeal, he was required to raise every argument or else waive them. Yet the government cites no case applying this rule, and it conflicts with the Supreme Court's instruction that, in Administrative Procedure Act cases, courts cannot impose exhaustion requirements not

mandated by statute or regulation. This Court should therefore reject the government's attempt to foreclose consideration of Lt. Col. Schreiber's constitutional claim.

ARGUMENT

I. The INA Unambiguously Instructs That the Law of the Child's or Father's Residence Controls Whether a Child Qualifies as "Legitimated"

As explained in detail in his opening brief, Lt. Col. Schreiber contends that the statutory phrase "legitimated under the law of the child's [or father's] residence" dictates that state law determines who has been "legitimated." *See* Aplt. Br. at 16-27. The government mischaracterizes this argument as "[b]ased on nothing more than [the] application of the 'clear statement rule.'" Aplee. Br. at 19. To the contrary, this argument rests on the INA's plain language.[1]

In particular, as the Supreme Court explained in *De Sylva v. Ballentine*, 351 U.S. 570 (1956), when a statute requires reference to state law—as the INA's treatment of "legitimated" does here—a court should "draw on the ready-made body of state law to define the" relevant term unless doing so results in a meaning "entirely strange to those

[1] Of the twelve pages the opening brief devotes to this argument, only one paragraph touches on the clear statement rule. Aplt. Br. at 16-17. Furthermore, the government is incorrect that Lt. Col. Schreiber improperly invoked the clear statement rule. It is true that the rule requires courts to leave power in the hands of the states only when a statute is ambiguous. *E.g.*, *Salinas v. United States*, 522 U.S. 52, 59 (1997). But that only underscores the flaw in the government's interpretation: the government's reading should be rejected *even if* the statute were ambiguous, and here it is not even that. Nor do any of the government's cases support its assertion that the rule has no application when family law and immigration law intersect. *See Ojo v. Lynch*, 813 F.3d 533, 540 (4th Cir. 2016) (applying the clear statement rule in the immigration context).

familiar with its ordinary usage." *Id.* at 580-81. Courts have applied this mode of analysis both in the immigration context, *Ojo v. Lynch*, 813 F.3d 533, 540-41 (4th Cir. 2016), and elsewhere, *see, e.g.*, *Advance Stores Co. v. Refinishing Specialities, Inc.*, 188 F.3d 408, 411-12 (6th Cir. 1999) (Lanham Act); *Am. Civil Rights Union v. Philadelphia City Comm'rs*, No. CV 16-1507, 2016 WL 4721118, at *10 (E.D. Pa. Sept. 9, 2016) (National Voter Registration Act); *see also Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992) (collecting cases where state law has been used "to fill the interstices within a federal legislative scheme"). Here, *De Sylva* counsels application of Kansas law and, in turn, the conclusion that Hyebin is Lt. Col. Schreiber's legitimated daughter. *See* Aplt. Br. at 25.

The government's efforts to avoid this case law fail. ***First***, the government contends that *De Sylva* is inapposite because the term "children" in the Copyright Act was "deemed *ambiguous*" in *De Sylva*, whereas Lt. Col. Schreiber contends that the INA is unambiguous. Aplee. Br. at 21 (emphasis in original). That is wrong. What the Supreme Court found ambiguous was the antecedent question of whether a child could share a copyright with a widow upon the copyright holder's death, or whether the child's rights accrued only once the widow passed away. *See* 351 U.S. at 575 (explaining that the word "'or' can be ambiguous when used in such a context as this"). But the Supreme Court did not find the term "children" ambiguous and had no trouble concluding that ascertaining its meaning required application of state law. *Id.* at 580-81. The Supreme Court thus embraced, without reference to "ambiguity" playing *any*

role in its reasoning, that state law supplied the "content" of the federal term. *Id.* And it did so with full understanding that reliance on state law would yield "variations" in the meaning of the term among the various states, finding such an outcome unproblematic so long as a state's definition is not "entirely strange." *Id.* at 581.

Second, even accepting the government's incorrect premise that the term "children" was deemed ambiguous in *De Sylva*, it is unclear why that makes any difference in resolving this case. Lt. Col. Schreiber cites *De Sylva* not to answer the question of *whether* to apply state law here. The answer to that question appears in unmistakable terms on the face of § 1101(b)(1)(C). Rather, *De Sylva* is useful in determining *how* to administer a statute that requires reference to state law: state law controls unless it is outside the range of reasonable definitions, *i.e.*, "entirely strange." It is thus immaterial to this case whether, in *De Sylva*, the Supreme Court first found "children" ambiguous.

The government's attempt to distinguish *Ojo v. Lynch*, 813 F.3d 533 (4th Cir. 2016), fails for a similar reason. The government claims that *Ojo* is inapposite because, there, the Fourth Circuit looked to state law only after determining that the "plain meaning" of "adopted" requires reference to state law, whereas, here, the "common and ordinary" meaning of "legitimated" does not and, instead, purportedly mandates a biological requirement. Aplee. Br. at 23-24. This misses the point. Lt. Col. Schreiber does not cite *Ojo* for its "plain meaning" analysis. Again, "legitimated" does not appear on its own, but is instead modified by "under the law of the child's [or father's]

residence." 8 U.S.C. § 1101(b)(1)(C). Whether the term "legitimated," *on its own*, may "common[ly]" or "ordinar[il]y" include a biological requirement is therefore irrelevant. Rather, *Ojo*, like *De Sylva*, is relevant here for the proposition that, *once* a statute requires reference to state law—as the INA clearly does here—then state law controls. Hence, reference to and application of the state's—here, Kansas's—understanding of "legitimated" is necessary, just as in *Ojo*.

Third, the government contends that, although the analysis in *De Sylva* "may have been appropriate in the context of copyright law," it has no bearing on immigration law, where "the federal government has exclusive authority and control." Aplee. Br. at 22. The government offers this same proposition to attempt to distinguish the range of other statutes and cases that require, as a matter of federal law, the application of state law. *Id.* at 22 n.3.

The government's distinction fails. The government concedes that § 1101(b)(1)(C) necessitates "referencing state law to determine if legitimation has occurred." Aplee. Br. at 25. But the government fails to explain why the government may permissibly cede its "exclusive authority" to determine "if" legitimation has occurred but not to determine (consistent with *De Sylva*) what legitimation requires. A principled application of the government's view of its "exclusive authority" would mean eliminating any usage of state law at all and thus rewriting the INA. Even the government does not go so far; and its stopping short reveals the flaw in its argument.

The government's emphasis on its authority over immigration law also confuses what Congress has the authority to do with what Congress has actually done in § 1101(b)(1)(C). There is no dispute that Congress *could* have exercised its power to impose a federal definition of "legitimated." But here, by employing the phrase "under the law of the child's [or father's] residence," Congress has chosen to incorporate state law, just as it did in *De Sylva*. That choice is entirely consistent with the federal government's authority over immigration law. As *De Sylva* explained: "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law." 351 U.S. at 580.

Furthermore, the government's assertion that *De Sylva* has no application in the immigration context is contradicted by the government's brief. One of the cases cited there, *Fierro v. Reno*, 217 F.3d 1(1st Cir. 2000), relied on *De Sylva* to find that "'legal custody' . . . should be taken presumptively to mean legal custody under the law of the state in question." *Id.* at 4.[2] *Ojo* likewise cited *De Sylva*. 813 F.3d at 540. And in the

[2] The government's apparent belief that *Fierro* supports its position is misplaced. There, the First Circuit considered a law that provides that a child who is in the "legal custody" of a parent may obtain citizenship if the parent is naturalized. 217 F.3d at 2. The First Circuit applied *De Sylva* to find that state law generally controls whether a parent has legal custody. *Id.* at 4. Because a state court had awarded legal custody to Fierro's mother (who was not naturalized) in 1973, the First Circuit held that Fierro could not derive citizenship from his father when the father was naturalized in 1978. *Id.* at 2, 6. Fierro attempted to avoid this conclusion by obtaining what he called (though the First Circuit doubted was actually) a *nunc pro tunc* order in 1998 that stated his father was awarded custody in 1977. *Id.* at 5. The First Circuit rejected that the state court order controlled, reasoning that Congress could not be "taken as intending to give effect . . . to th[is] kind of *ex post* modification of a custody decree." *Id.* at 6. But this conclusion

similar context of bankruptcy law—where Congress has the exclusive right to enact "uniform Laws on the subject of Bankruptcies," analogous to its authority to "establish an uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4—courts routinely look to state law to define the extent of a debtor's property. *See, e.g.*, *In re Taylor*, 133 F.3d 1336, 1341 (10th Cir. 1998) ("A bankruptcy estate includes 'all legal or equitable interests of the debtor in property as of the commencement of the case,' 11 U.S.C. § 541(a)(1). The *existence* and *extent* of such an interest is determined by state law." (emphasis added)).

Fourth, the government's warning that relying on state law—as § 1101(b)(1)(C) requires—would violate the Supremacy Clause is overblown and erroneous. The Supremacy Clause "creates a rule of decision" that, when "state laws . . . conflict with federal laws," the latter control. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). But where, as here, Congress elects to rely on state law to determine the "content" of the federal statutory term, *see De Sylva*, 351 U.S. at 580, there is no "conflict" at all. *See Am. Civil Rights Union*, 2016 WL 4721118, at *10 ("Because Federal law does not define voter eligibility and instead relies on State law, . . . that State law is

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should not be viewed, as the government claims, as proof that *De Sylva*—which *Fierro* explicitly applied—has no force in the immigration context. At most, it simply represents an application of *De Sylva*'s rule that "entirely strange" applications of state law will be rejected. *Cf. United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 603 (1973) *("*Years after the fact, state law may not redefine federal contract terminology 'in a way entirely strange to those familiar with its ordinary usage.'" (quoting *De Sylva*, 351 U.S. at 581)).

not in conflict with Federal law."). It is true that there may be the rare instance in which state law defines a term in a way that is "entirely strange" and so far outside the range of "permissible variations" of the relevant term that it will conflict with the intent of federal law and must be disregarded, as the Supreme Court has explained. 351 U.S. at 581.[3] But that determination must be made on a state law-by-state law basis and cannot justify disregarding, in every instance, Congress's statutory directive to look to the "law of the child's [or father's] residence."

Indeed, the government effectively acknowledges that state law can control in this manner. The government relies on *Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005), for the proposition that USCIS should "look[] to state law to determine questions of family relations" in some instances, but—for unexplained reasons—just "not here." Aplee. Br. at 26 (citing *Minasyan*, 401 F.3d at 1077 & n.14). *Minasyan*, however, applied the exact language from *De Sylva* on which Lt. Col. Schreiber relies. The Ninth Circuit explained that, although there may be "some circumstances" in which state law "might not control," it does control as long as it supplies a meaning within the "permissible variations in the ordinary concept." *Id.* at 1077 n.14 (quoting *De Sylva*, 351 U.S. at 581); *see also United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595-96 (1973) (citing *De Sylva* as an example of the rule that, "even assuming in general terms the appropriateness

[3] This limitation also demonstrates that, contrary to the government's argument, Aplee. Br. at 20-21, there is no "uniformity" problem with Lt. Col. Schreiber's interpretation. *Cf. Fierro*, 217 F.3d at 6.

of 'borrowing' state law, specific aberrant or hostile state rules do not provide appropriate standards for federal law").[4]

Fifth, to the extent the government contends that Kansas's treatment of legitimation is an "entirely strange" one, *see* Aplee. Br. at 21-22, both the case law and the government's own approach to this case are to the contrary. Multiple courts have recognized that a person can be the "legitimate" child of a parent even when the two share no biological connection. *See, e.g.*, *Jaen v. Sessions*, 899 F.3d 182, 190 (2d Cir. 2018) (discussing that a child may be deemed legitimate regardless of a "blood relationship"); *Scales v. INS*, 232 F.3d 1159, 1164 (9th Cir. 2000) (describing a child as "legitimate" under state law even though he "may not be the 'natural,' or biological, child of the citizen parent")[5]; *Christopher YY. v. Jessica ZZ.*, 159 A.D.3d 18, 23 (N.Y. App. Div. 2018); *Della Corte v. Ramirez*, 961 N.E.2d 601, 603 (Mass. 2012).

The position advanced by the government in the district court also demonstrates the reasonableness of Kansas's understanding of legitimation. Although the government now defends the district court's finding that § 1101(b)(1)(C) is clear, it

[4] The government also suggests that cases holding that a fraudulent marriage fails to qualify someone for immigration benefits demonstrate that it is not always proper to look to state law to define family arrangements relevant to immigration law. Aplee. Br. at 26. In reality, those cases do not reject a state's definition of marriage, as the government suggests. They simply find a marriage entered into with fraudulent intent insufficient for federal immigration purposes. There is no allegation of fraud here.

[5] The government attempts to distinguish *Jaen* and *Scales* on the ground that they addressed a different statute. Aplee. Br. at 33 n.5. That distinction, however, does not undermine that these cases demonstrate that Kansas law is within the range of "permissible variations" and not "entirely strange." *De Sylva*, 351 U.S. at 581.

argued below that "legitimated" is ambiguous. Aplt. App. at 283. As the government notes, a statute is ambiguous only where susceptible to more than one plausible interpretation. Aplee. Br. at 20. The government has therefore implicitly acknowledged that Kansas's and Lt. Col. Schreiber's interpretation (i.e., no biological requirement) *is* reasonable (and therefore not "entirely strange"). *See also* Aplee. Br. at 16 (acknowledging that not all dictionary definitions "contemplate an immediate biological relationship").

Finally, the government is wrong that this Court must remand to the agency to allow it to construe Kansas law in the first instance. The "ordinary remand" rule does not apply when the open question "does not involve an issue the law commits to the agency's expertise." *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1133 (9th Cir. 2006) (en banc). As this Court has explained, the BIA receives no deference in its interpretation of state law. *Efagene v. Holder*, 642 F.3d 918, 921 (10th Cir. 2011).

Nor need this Court remand simply because, in the government's view, Lt. Col. Schreiber did not discuss in his opening brief the district court's decision not to interpret Kansas law. Aplee. Br. at 30. The district court adopted that approach in the context of declining to reach Lt. Col. Schreiber's Tenth Amendment argument that the INA "abridges Kansas law," which the court deemed unexhausted. Aplt. App. at 25; *see also* Aplee. Br. at 25-26 (asserting this Court should not decide whether Hyebin is "legitimated" under Kansas law because Lt. Col. Schreiber "has declined to pursue his Tenth Amendment claim in this appeal"). But Lt. Col. Schreiber does not raise Kansas

law on appeal in the context of a Tenth Amendment claim—which the agency (according to the government) declined to consider—but in the context of his statutory construction claim—which the agency indisputably *did* decide.

Accordingly, this Court has authority to construe Kansas law. *See Hussain v. Gonzales*, 477 F.3d 153, 158 & n.4 (4th Cir. 2007) (remand unnecessary where remaining legal issue is reviewed *de novo*). Because the government has not offered any alternative explanation of Kansas law, this Court should remand with instructions to the BIA to grant Lt. Col. Schreiber's petition to obtain an immigrant visa given that Hyebin has been "legitimated" under Kansas law and for purposes of § 1101(b)(1)(C).[6]

II. Reading "Legitimated" in Context Demonstrates There Is No Requirement of a Biological Connection Even Under Federal Law

Even if this Court accepts the government's premise that federal law supplies the definition of legitimated, the same conclusion results: there is no biological requirement. As Lt. Col. Schreiber explained in his opening brief, Congress knows how to impose a biological requirement and, in fact, did so in multiple other provisions in the INA that reference a "natural" parent or other relative. *See* 8 U.S.C. § 1101(b)(1)(D)-(G). But no such limitation appears in § 1101(b)(1)(C), which refers only to "the legitimating parent or parents." This contrast makes clear that the statute rejects the imposition of a biological requirement for "legitimated" children. *Fish v.*

[6] Lt. Col. Schreiber does not oppose a remand to determine any factual issues that might need to be resolved to ascertain whether § 1101(b)(1)(C) has been satisfied.

Kobach, 840 F.3d 710, 740 (10th Cir. 2016) ("When Congress knows how to achieve a specific statutory effect, its failure to do so evinces an intent not to do so."); *see also* Aplt. Br. at 27-32.

In response to this contrast in language, the government principally contends that the "inherent" and "common" understanding of "legitimated" includes a biological requirement. *E.g.*, Aplee. Br. 5, 13, 17, 33 n.5. But that purported "inherent" meaning must give way where the statute's context evinces Congress's intent to alter it. As the government recognizes, courts should "infer . . . Congress means to incorporate the established meaning of [a] term[]" "*unless* the statute otherwise dictates." Aplee. Br. at 17 (quoting *Neder v. United States*, 527 U.S. 1, 21 (1999)) (emphasis added); *Johnson v. United States*, 559 U.S. 133, 139 (2010) (refusing to apply the common law meaning of "force" because, "[u]ltimately, context determines meaning"). The INA dictates otherwise here, as the existence of provisions requiring a "natural" parent or sibling demonstrates. The underlying—and uncontested—legislative goal of "unifying immigrant families," Aplee. Br. at 28, further counsels against adhering to any rigid common law meaning in this context.

None of the cases the government cites for the proposition that a biological requirement exists supports the government's invocation of a common law meaning. The courts that have found that there is a "requirement of a blood relationship . . . for an illegitimate child," *Scales*, 232 F.3d at 1166; Aplee. Br. at 34 n.5, did so in the course of considering a separate statutory scheme that governs when a person obtains

citizenship. *See, e.g.*, *Miller v. Albright*, 523 U.S. 420, 431 (1998); *Martinez-Madera v. Holder*, 559 F.3d 937, 942 (9th Cir. 2009); *Scales*, 232 F.3d at 1166; *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1093 (9th Cir. 2005).[7] Critically, the statute discussed in those cases explicitly provides that the person must establish "a blood relationship between the person and the father . . . by clear and convincing evidence." 8 U.S.C. § 1409(a)(1). In fact, this showing is *in addition to* the person's obligation to show that she has been "legitimated" or that the natural father's paternity has been established through acknowledgment or a court order. *Id.* § 1409(a)(4). The lack of similar language in § 1101(b)(1)(C) speaks directly to the question presented here. *Cf. Fish*, 840 F.3d at 740.

The government's attempt to account for the absence of an explicit reference to a "blood relationship" or a "natural parent" in § 1101(b)(1)(C) is unconvincing. The government acknowledges that the use of "legitimating parent" instead of "natural parent" reflects Congress's intent to "refer to two different groups," Aplee. Br. at 14, but nonetheless contends that the result is the same. Relying on dicta from the Ninth Circuit that, in turn, cited Black's Law Dictionary, the government contends that a "legitimate child" is one "born of legally married parents, or born or begotten in lawful wedlock or legitimized by the parents' later marriage." Aplt. Br. at 14 (quoting *Scales*, 232 F.3d at 1163 n.8). The government apparently concludes that this definition

[7] *De los Santos v. INS*, 525 F. Supp. 655 (S.D.N.Y. 1981), on which the government repeatedly relies, also does not support a biological requirement. That case addressed only whether a child must have the same exact rights as a child born in wedlock or merely similar rights to be deemed "legitimated." *Id.* at 667.

supports finding that the phrase "legitimating parent" (which is what actually appears in § 1101(b)(1)(C)) includes a biological requirement as well.

This argument rests on an obviously incomplete definition of "legitimate child." It is settled that there are now many ways to legitimate a child beyond the "later marriage" of the biological parents (for example, by a declaration of paternity), as Black's Law Dictionary itself recognizes. *See* Black's Law Dictionary (10th ed. 2014) (defining "legitimate child" as "[m]odernly, a child . . . legitimated either by the parents' later marriage or *by a declaration or judgment of legitimation*" (emphasis added)). Thus, the foundation for the government's logical leap—from "legitimate child" relates to married parents, to "legitimating parent" requires a biological connection—simply does not exist.

Finally, the government attempts to bolster its proposed interpretation with the legislative history of another statute. As Lt. Col. Schreiber explained in his opening brief, resort to legislative history in the face of clear statutory text is improper. Aplt. Br. at 30. The government complains that Lt. Col. Schreiber did not cite "any authority" for this proposition, Aplee. Br. at 16, but the cases are legion and consistent: "when the meaning of the statute is clear, it is both unnecessary and improper to resort to legislative history to divine congressional intent." *Ausmus v. Perdue*, 908 F.3d 1248, 1254 (10th Cir. 2018) (quoting *Ribas v. Mukasey*, 545 F.3d 922, 929 (10th Cir. 2008)); *see also, e.g.*, *Miller v. Comm'r*, 836 F.2d 1274, 1283 (10th Cir. 1988) ("[L]egislative history should be used to resolve ambiguity, not create it."). Although "legislative intent" may

undermine otherwise unambiguous statutory language, "[s]uch an expression of contrary legislative intent must appear on the *face of the statute*, read in its entirety." *In re Roberts*, 906 F.2d 1440, 1442 (10th Cir. 1990) (emphasis added). Here, reading the INA as a whole supports Lt. Col. Schreiber's interpretation, as does the clear legislative purpose of keeping families unified.

Resort to legislative history is especially inappropriate because the history discussed by the district court concerned not only a different statute but also one that addressed citizenship, not visas. Citizenship is a more carefully guarded privilege than a visa, and so congressional intent regarding the former does not extend automatically to the latter. *See* Aplt. Br. at 31. The government accuses Lt. Col. Schreiber of relying on "speculation and conjecture" for this conclusion. Aplee. Br. at 18. But the difference in treatment appears on the face of the INA. As noted, the statute addressing citizenship at birth requires clear and convincing evidence of a blood relationship *in addition to* proof that a child has been legitimated. 8 U.S.C. § 1409(a)(1), (4). And it further requires the father to agree "in writing" to provide financial support to the child. *Id.* § 1409(a)(3). Likewise, the definition of "child" that applies to naturalization and citizenship requires that a child be legitimated before age 16, rather than by age 18, as in the case of visas. *Compare id.* § 1101(b)(1)(C) *with id.* § 1101(c)(1). In short, Congress consistently has imposed more onerous conditions when citizenship is at issue.

The government's brief also illustrates the dangers attendant to using legislative history. In discussing a change in the definition of child that replaced the terms

"legitimate" and "illegitimate" with "born in wedlock" and "out of wedlock," the government notes that one Member of Congress remarked that the "change in terminology does not provide a substantive change in the immigration laws." 141 Cong. Rec. H11386-01 (1995); *see* Aplee. Br. at 7. But the very next speaker explained that the amendment would have "enormous impact in the area of international child adoption." *Id.* Separately, the government's discussion overlooks that the same Senate report the district court cited, Aplt. App. 23-24, elsewhere recognized that the "establishment of legitimation is a matter of complying with the laws of the place of legitimation" and the importance of not erecting unnecessary barriers for "servicem[e]n." S. Rep. No. 1515, 81st Cong., 2d Sess. at 692-93 (1950) (discussing naturalization). These aspects of the legislative history support Lt. Col. Schreiber's position.

This is why, when the text of the statute is clear, as it is here, that text controls. Accordingly, this Court should find that there is no biological requirement in § 1101(b)(1)(C), even if federal law supplies the definition of "legitimated."

III. Even If the Meaning of "Legitimated" Is Ambiguous, Imposing a Biological Requirement Would Be Unreasonable

The government's attempt to impose a biological requirement should be rejected even if the Court finds "legitimated" ambiguous. Lt. Col. Schreiber's opening brief demonstrated that the application of a biological requirement is unreasonable under *Chevron* because it unduly elevates Congress's concern for fraud to the detriment of its aim to promote family unity, and because USCIS has not applied it consistently. *See*

Aplt. Br. at 32-34. The government's responses to these points cannot save USCIS's invention of a biological requirement.

First, as above, the government relies on inapposite case law to claim that the BIA's interpretation deserves deference. According to the government, because other courts "have interpreted 'legitimate' in the immigration context to require an immediate biological connection," the BIA's interpretation is reasonable. Aplee. Br. at 33. As already explained, though, those cases addressed a statute governing citizenship statute that expressly includes a reference to a "blood relationship."[8]

Nor do *Matter of Reyes*, 17 I. & N. Dec. 512 (BIA 1980), or *Pfeifer v. Wright*, 41 F.2d 464 (10th Cir. 1930), lend support to the government's argument. The "consistent application" that the BIA identified in *Reyes* and on which the government relies, Aplee. Br. at 32, concerned a rule that a "legitimated" child must have the same rights as a child born in wedlock, not merely similar rights. 17 I. & N. Dec. at 515. It did not address the existence of a biological connection requirement. *Pfeifer* is equally irrelevant, as the discussion there involved the common law meaning of legitimation and prior Kansas law—which are not properly at issue here—not what the phrase "legitimated under the law of the child's [or father's] residence" means in the context of federal immigration law. 41 F.2d at 466.

[8] *Rios v. Civiletti*, 571 F. Supp. 218 (D.P.R. 1983), and *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018), addressed a predecessor citizenship statute that did not use the phrase "blood relationship," but still concerned proof of "paternity" in the context of obtaining citizenship (not visas). Neither is at issue here.

Second, to counter Lt. Col. Schreiber's argument that a blanket biological requirement would read into the statute an overly broad response to concern about fraud and undermine Congress's goal of unifying bona fide families, the government defends the rationality of Congress's decision to set the age cut-off for qualifying as a "child" through adoption at 16 years. Aplee. Br. at 36-37. This misconstrues Lt. Col. Schreiber's challenge. It is the biological requirement the government seeks to impose on § 1101(b)(1)(C) that Lt. Col. Schreiber argues overemphasizes fraud prevention, not any age cut-off applicable to adoptions under § 1101(b)(1)(E).

Regardless, the government is incorrect that "[a]llowing an adopted child over 16 to be classified as legitimated would undoubtedly circumvent Congress's age mandate for adopted children." Aplee. Br. at 36-37. As Lt. Col. Schreiber explained in his opening brief, historically, adoptees have not been afforded the same rights as legitimated children. *See* Aplt. Br. at 26 (collecting examples); *see also, e.g.*, *de los Santos v. INS*, 525 F. Supp. 655, 668 n.10 (S.D.N.Y. 1981) ("[I]t has consistently been held that the 'adoption' need not have conferred the full rights of a legitimate child on the person in question."). Congress, it is apparent, saw fit to allow more time when a child is legitimated and receives the greater rights attendant to that status, as Hyebin has here. Recognizing her status as legitimated under state law thus comports with, rather than contradicts, Congress's design. In fact, it is the government's position—that a child legitimated by adoption at age 17 under state law, even by a biological father, cannot be

"legitimated" under the INA—that conflicts with the statute's language and Congress's intent.

Third, the government asserts that USCIS's application of a biological requirement is unproblematic because there is a difference between a "biological relationship"—which, apparently, USCIS consistently demands—and a "genetic relationship"—which USCIS claims is not a prerequisite to a visa. Aplee. Br. at 35. If anything lacks a basis in how legitimation has been treated historically, it is this approach by USCIS. Its genetic-biology distinction appears to have been made up out of whole cloth. And it leaves unclear how much of a "biological" connection is sufficient. Under USCIS's approach, would Lt. Col. Schreiber possess the requisite biological connection if he had donated blood to Hyebin? Or a kidney? And on what ground has USCIS determined that a biological link can form the basis for an exception but emotional and financial support cannot? A "sometimes-yes, sometimes-no, sometimes-maybe policy . . . cannot . . . be squared with" the prohibition on "arbitrary and capricious" agency action. *NLRB v. Wash. Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984).[9]

[9] Although the government suggests that Lt. Col. Schreiber's discussion of the policy governing assisted reproductive technologies comes "precariously close to the same . . . arguments" that the district court found were not raised in front of the BIA, the government does not *actually* claim that this point was not raised. Aplee. Br. at 35 n.6 (suggesting the argument should not be considered "[t]o the extent" it exceeds what the district court found was raised in the BIA). In fact, Lt. Col. Schreiber argued to the BIA that a biological requirement was improper partly because USCIS had "minimized" it through this policy. *See* Aplt. App. at 89. Given that the government cannot even identify what it thinks might be unexhausted, this Court should reject the government's half-hearted attempt to evade scrutiny of the assisted reproductive technologies policy.

IV. The District Court Should Have Decided Lt. Col. Schreiber's Constitutional Claim

The district court further erred in refusing to reach the merits of Lt. Col. Schreiber's constitutional claim. The government acknowledges that Lt. Col. Schreiber raised a constitutional claim in front of the BIA, Aplee. Br. at 42, but contends it was a different one from what he raised in the district court. Even assuming that is true—which Lt. Col. Schreiber disputes, *see* Aplt. Br. at 37-39—the district court was incorrect that the exhaustion doctrine bars federal court review of the purportedly "new" claim. Indeed, the government concedes that Lt. Col. Schreiber was not required to exhaust his arguments by appealing to the BIA because that appeal was discretionary. Aplee. Br. at 44.

Nonetheless, the government now argues that, once Lt. Col. Schreiber decided to raise one issue with the BIA, he was required either to raise every issue or else to waive them. *Id.*[10] Notably, the government cites no case applying this supposed rule. But at least one court has rejected it. *See AAA Bonding Agency Inc. v. U.S. Dep't of Homeland Sec.*, 447 F. App'x 603, 612 (5th Cir. 2011) (rejecting government's argument that the plaintiff waived a claim by not raising it when the plaintiff filed a discretionary motion for reconsideration).

[10] The government does "not concede" that Lt. Col. Schreiber was not required to raise his constitutional claim to USCIS, Aplee. Br. at 45, but it offers no argument rebutting his explanation that he had no reason to raise the claim to USCIS since the issue did not arise until USCIS's final decision, *see* Aplt. Br. at 40-41.

Adopting the government's proposed rule also would run counter to the Supreme Court's admonition that, in APA cases, courts cannot "impose additional exhaustion requirements beyond those provided by Congress or the agency"—that is, exercising appeals *mandated* by statute or regulation. *Darby v. Cisneros*, 509 U.S. 137, 146-47 (1993). The government argues otherwise, citing *CSX Transportation, Inc. v. Surface Transportation Board* for the proposition that "nothing in [*Darby*] extinguished the general requirement that parties give the agency a chance to rule on all objections in the first instance." Aplee. Br. at 45 (quoting 584 F.3d 1076, 1078 (D.C. Cir. 2009)). That understanding of *Darby*, however, was precisely what the D.C. Circuit reversed on rehearing when it rejected the government's argument (and the panel's earlier decision) that *Darby* left "in place the requirement that a petitioner present its argument to the agency at least once before seeking judicial review." *CSX*, 584 F.3d at 1079.

United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952), which the government also cites, likewise offers little help to its argument. That case did not address the distinction between mandatory and discretionary appeals and, in any event, spoke only to the "general rule" that an argument must first be presented to an agency before it is considered by a court. *Id.* at 37. That "general rule," by its nature, does not always apply. *CSX Transportation* made this clear, and the government does not suggest the case was wrongly decided. It was not; and it should guide this Court to a similar approach here.

The government's proposed rule suffers from the additional flaw that it would discourage discretionary appeals. Intra-agency appeals often must be briefed in a significantly shorter time frame than the one applicable to filing an APA complaint in federal court, for which the statute of limitations is six years. *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1245 (10th Cir. 2012). In a case like Lt. Col. Schreiber's, for example, a person denied a visa has only 63 days to file an appeal brief with the BIA. Aplt. App. at 168. When an issue is raised for the first time in the final ruling of the initial decision maker—as it was here by USCIS—the government's rule will create a strong incentive for the subject of the adverse decision to skip the discretionary appeals process entirely to secure more time to consider possible claims. This will result in more work for the federal courts, including in cases where straightforward issues may have been quickly resolved through an optional administrative appeal.

In the end, the government's proposed rule makes the same fundamental error committed by the district court. By seeking to compel Lt. Col. Schreiber to "exhaust[] specific arguments," Aplt. App. at 32, the government's rule, like the district court's holding, would mandate that Lt. Col. Schreiber exhaust what should be a discretionary appeal. This runs afoul of *Darby*.

CONCLUSION

The judgment of the district court should be reversed.

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 6,495 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:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Avast Business Antivirus, version 4.2.2 which is updated daily as a matter of course, and according to the program is free of viruses.

Date: April 12, 2019

/s/ Rekha Sharma-Crawford
Rekha Sharma-Crawford

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2019, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. Those who are not will be served by e-mail/regular mail.

Date: April 12, 2019

/s/ Rekha Sharma-Crawford
Rekha Sharma-Crawford