No. 20-

IN THE

Supreme Court of the United States

AHMED ALI MUTHANA,

Petitioner,

v.

ANTONY J. BLINKEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI

CHRISTINA A. JUMP*
ALYSSA F. MORRISON
CONSTITUTIONAL LAW CENTER
FOR MUSLIMS IN AMERICA
100 North Central Expressway, Suite 1010
Richardson, TX 75080
(972) 914-2507
cjump@clcma.org
Counsel for Petitioner

* *Counsel of Record*

304724

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Petitioner served as a diplomat from October 1990 until June 1994; his position officially terminated no later than September 1994. His daughter Hoda Muthana was born in New Jersey in late October 1994. In 2004, Petitioner applied for a U.S. passport on her behalf. The State Department requested proof that his diplomatic position ended prior to her birth. Petitioner provided an official letter certifying that he was recognized as a diplomat and subject to accompanying immunities from 1990 until no later than September 1, 1994. Satisfied, the State Department issued her passport and recognized her as a U.S. citizen. Ms. Muthana renewed her passport without issue in 2014, then traveled to Syria into ISIS-controlled territory.

In 2016, the State Department sent a letter revoking Ms. Muthana's passport, claiming she was not a U.S. citizen. During litigation the government produced a new official letter, tailored to assert that Petitioner's diplomatic immunity continued until February 1995, when the State Department purportedly received notice of that termination. Both lower courts accepted the government's assertion. Both courts also treated the 2019 letter as conclusive, giving no weight to the equally credible 2004 letter despite no new facts arising. Ms. Muthana lost her previously recognized citizenship status without due process of law, rendering her and her young son stateless.

The question presented is:

Is the U.S. State Department's certification of an individual's diplomatic status reasonably considered conclusive and unreviewable evidence, even where it conflicts with the Department's own prior certification for the same individual, and creates legal inconsistency as to the validity of previously recognized U.S. citizenship?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Ahmed Ali Muthana was the Plaintiff in the District Court and the Appellant in the Court of Appeals. Respondents Michael Pompeo, in his official capacity as Secretary of the Department of State; Donald J. Trump, in his official capacity as President of the United States; and William Pelham Barr, in his capacity as Attorney General,[1] were the Defendants in the District Court and the Appellees in the Circuit Court of Appeals for the District of Columbia Circuit.

1. Antony J. Blinken, in his official capacity as Secretary of the Department of State, Joseph R. Biden, Jr., in his official capacity as President of the United States, and Merrick Garland, in his official capacity as Attorney General of the United States are currently in the respective positions and have therefore been substituted pursuant to Federal Rule of Civil Procedure 25(d).

RELATED CASES

There are no related cases other than the opinions identified below in this matter:

The District Court decision of *Muthana v. Pompeo, et al*, No. 1:19-cv-00445, United States District Court of District of Columbia, was entered on December 17, 2019.

The Circuit Court of Appeals for the District of Columbia Circuit issued its decision in *Muthana v. Pompeo, et al.*, No. 19-5362, on January 19, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ahmed Ali Muthana respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS AND ORDERS BELOW

The January 19, 2021 opinion and order of the U.S. Court of Appeals for the District of Columbia Circuit affirming the D.C. District Court's November 15, 2019 grant of summary judgment in favor of Respondents is reported at *Muthana v. Pompeo*, 985 F.3d 893 (D.C. Cir. 2021). Pet. App. 1a-38a. The District Court opinion is available at *Muthana v. Pompeo*, No. 19-445 (RBW), 2019 U.S. Dist. LEXIS 218098 (D.D.C. Dec. 9, 2019). Pet. App. 38a-75a.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the District of Columbia Circuit entered its judgment on January 19, 2021. On March 19, 2020, this Court extended the deadline to petition for a writ of certiorari to 150 days from the date of the lower court judgment. Petitioner timely filed this Petition on June 16, 2021, within 150 days of that judgment. The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

TREATY PROVISIONS

Articles 39 and 43 of the Vienna Convention on Diplomatic Relations state in pertinent part:

Article 39

1.Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2.When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict.

Article 43

The function of a diplomatic agent comes to an end, inter alia:

(a) On notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;

STATUTORY PROVISIONS

22 CFR § 51.2, Passport issued to nationals only, states in pertinent part:

A passport may be issued only to a U.S. national.

22 CFR § 51.62 Revocation or limitation of passports **and cancellation of Consular Reports of Birth Abroad, states in pertinent part:**

(a) The Department may revoke or limit a passport when:

(1) The bearer of the passport may be denied a passport under 22 CFR 51.60 or 51.61 or any other applicable provision contained in this part;

(2) The passport was illegally, fraudulently or erroneously obtained from the Department; or was created through illegality or fraud practiced upon the Department; or

22 U.S.C. § 2705, Documentation of citizenship states in pertinent part:

The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction:

(1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the U.S. Constitution states in pertinent part that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside."

STATEMENT OF THE CASE

I. INTRODUCTION

Hoda Muthana ("Ms. Muthana") grew up as a U.S. citizen. She was born here, attended and graduated school here, and began her first year of college here. For the first 20 years of her life, Ms. Muthana was a recognized United States citizen, by both her own understanding and official government certification, with all the privileges and rights that accompany that status. With evidence of neither fraud nor misrepresentation, the United States government now erases those 20 years and asserts without offering any new evidence that she is not and never has been a U.S. citizen. The government has afforded her no due process of law in making this change.

II. FACTUAL AND REGULATORY BACKGROUND

Petitioner Ahmed Ali Muthana ("Petitioner") officially served as the First Secretary of the Permanent Mission of Yemen to the United Nations from October 1990 until June 2, 1994.[1] That June, following the Yemeni civil war,

1. Declaration of Ahmed Ali Muthana, Doc. 25-1, Exhibit A at ¶¶ 4-7.

the Yemeni Ambassador Al-Aashtal required him to surrender his diplomatic identity card and terminated his diplomatic position.[2] Nearly five months later, in late October 1994, Petitioner's youngest daughter Hoda Muthana was born in Hackensack, New Jersey.[3] In 2004, when Ms. Muthana was ten years old, her father applied for a U.S. passport on her behalf.[4]

Under the Fourteenth Amendment to the U.S. Constitution, all persons born on U.S. soil automatically acquire citizenship at the time of their birth. U.S. CONST. amend. XIV, § 1. An exception to this rule exists for children born to individuals holding diplomatic immunity at the time of their births. These children are not considered to be born "subject to the jurisdiction of the U.S.[,]" and therefore do not automatically acquire citizenship. The Secretary of State is only empowered to issue passports to U.S. nationals. 22 C.F.R. § 51.2. Accordingly, upon receipt of Petitioner's passport application, the State Department requested confirmation of Ms. Muthana's eligibility for a U.S. passport to clarify the timing of

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2. *Id.* at ¶¶ 5-7.

3. Birth Certificate of Hoda Muthana, Doc. 1-4.

4. Doc. 25-1 at ¶ 12. Around this time, Petitioner initiated proceedings for his older children to become lawful permanent residents (and later citizens) of the United States. All of Petitioner's children, as well as Petitioner and his wife, are now U.S. citizens. Reasonably relying on the U.S. government's recognition of Ms. Muthana as a citizen, Petitioner did not initiate those proceedings on her behalf. Had such recognition not occurred, Ms. Muthana would have become a citizen alongside her siblings. However, because of the government's actions with respect to her status, she had neither need nor opportunity to do so.

her father's diplomatic service.[5] In response, Petitioner provided the government with a certification from the U.S. Mission to the U.N., signed by Russell F. Graham, the then-Minister Counselor for Host Country Affairs, which was addressed to the Bureau of Immigration and Citizenship Services (the "Graham Letter"). The Graham Letter certified that Petitioner was "notified to the United States Mission as a diplomatic member ... from October 15, 1990 to September 1, 1994[,]" and specified that "[d]uring this period of time, [Petitioner] was recognized by the United States Department of State as entitled to full diplomatic privileges and immunities."[6] Satisfied, the State Department issued Ms. Muthana the requested passport in January 2005, listing her nationality as "United States."[7] She renewed this passport without issue in 2014. Once duly issued, a passport constitutes proof that the United States has certified an individual's status as a citizen. 22 U.S.C. § 2705; *see also United States v. Wong Kim Ark,* 169 U.S. 649, 693 (1898).

In November 2014, Ms. Muthana traveled to Syria via Turkey, and into ISIS-controlled territory.[8] While in Syria, Ms. Muthana gave birth to her son, Minor John Doe.[9] Thereafter, in January 2016, the State Department sent a letter to her parents' residence revoking Ms. Muthana's

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5. *Id.* at ¶ 12.

6. Graham Letter, Doc. 1-5.

7. Passport of Hoda Muthana, Doc. 25-1, Exhibit 1 to Exhibit A, at 58.

8. Doc. 25-1, Exhibit A at ¶¶ 19-20.

9. *Id.* at ¶ 21.

passport under 22 C.F.R. § 51.62, on the grounds that it had been issued in error.[10] The State Department now took the position that Ms. Muthana never had been a U.S. citizen. The State Department agreed that its records showed that Petitioner's diplomatic position ended no later than September 1, 1994. However, the government asserted for the first time that Petitioner actually continued to hold immunity until February 6, 1995, the date that the State Department purportedly received *notification* of his termination through the Department's communications with the U.N. Office of Protocol.[11] The State Department now claimed that this notification, not termination of duties or end of position, constituted the sole relevant trigger for the end of diplomatic immunity.[12] The government did not offer any new evidence that had come to light in the intervening years, or point to a change in law that explained the reversal in its official 2004 stance on Petitioner's status that followed his daughter's departure from the country.

The terms, functions and rights of diplomats, including the provision of diplomatic immunity, are controlled by the Vienna Convention on Diplomatic Relations ("VCDR"). The provisions relevant to Ms. Muthana's status as a U.S.

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10. January 15, 2016 Letter from the State Department, Doc. 1-6. 22 C.F.R. § 51.62 describes the circumstances under which the State Department may revoke or limit a passport. In relevant part, it permits revocation where the passport was "erroneously obtained" from the Department.

11. Declaration of James B. Donovan, Doc. 19-2 (describing the State Department's procedures with respect to incoming and outgoing diplomats).

12. Doc. 1-6.

citizen and relied upon by the State Department are found in Articles 39 and 43. Article 39 states, in relevant part, that "[w]hen the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease" when the diplomat leaves the country or after a "reasonable period in which to do so, but shall subsist until that time." 23 U.S.T. 3227, art. 39. Article 43 in turn provides that "the function of a diplomatic agent comes to an end, *inter alia*: (a) [o]n notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end." 23 U.S.T. 3227, art. 43 (emphasis added).

The State Department newly asserted in 2016 that Petitioner still held diplomatic immunity until February 1995, the time that it purportedly received notification of Petitioner's termination by way of relying on the publication date of the Blue List. Therefore, Ms. Muthana was not born subject to the jurisdiction of the United States after all.[13] The State Department does not dispute that it had all the same evidence before it in 2004, when it came to the opposite conclusion; the Agency instead relied exclusively and without further explanation on its conclusory assertion that the previous determination was simply an error. The State Department revoked Ms. Muthana's passport document through the letter sent to her parents' home, but maintained that she is not entitled to the due process that would necessarily accompany an alteration in citizenship status because it determined in hindsight that she simply never held that status. With the sending of a single administrative letter, Ms. Muthana lost her status as a citizen and was rendered stateless, along

13. Doc. 1-6.

with her young son; the contrast between the ease with which the State Department effectuated this change and the severity of its consequences for Ms. Muthana is stark.

III. LOWER COURT PROCEEDINGS

Ms. Muthana, at the time unaware that her citizenship might even be in question, contacted her father in 2018 and informed him of her deep regret for her actions and her intention to escape ISIS-controlled territory with her son and surrender to American forces.[14] When Petitioner's counsel communicated this information to the U.S. Attorney for the Northern District of Alabama, the State Department abruptly ended discussions. The State Department instead announced on its website that "Ms. Hoda Muthana is not a [United States] citizen and will not be admitted to the United States[;] [s]he does not have any legal basis, no valid [United States] passport, no right to a passport, nor any visa to travel to the United States."[15] That same day, then-President Trump tweeted that "I have instructed Secretary of State Mike Pompeo, and he fully agrees, not to allow Hoda Muthana back into the

14. Doc. 25-1, Exhibit A at ¶¶ 31-32. Ms. Muthana has repeatedly communicated to Petitioner and Petitioner's counsel her willingness to face any charges that the U.S. justice system may find appropriate once she returns to the U.S. She has also indicated her desire to use her own first-hand experience as a resource to expose the deceptive tactics that are used to convince people to join radical groups, in the hopes of dissuading others who may consider doing so.

15. Press Release, *Statement on Hoda Muthana*, Global Public Affairs, U.S. DEP'T OF STATE (Feb. 20, 2019), https://2017-2021-translations.state.gov/2019/02/20/statement-on-hoda-muthana/index.html.

Country!"[16] And, Secretary Pompeo reiterated his beliefs on the Today Show, proclaiming that "she is a terrorist. She is not a United States citizen. She ought not return to this country."[17]

Petitioner then filed suit in the U.S. District Court for the District of Columbia as next friend on behalf of his daughter and minor grandson, asserting in relevant part that the State Department erroneously revoked Ms. Muthana's citizenship without any due process of law.[18] The State Department responded that it had merely revoked a travel document, not any status itself, and had therefore satisfied all due process requirements.[19] With its Response, the State Department submitted a 2019 letter signed by James B. Donovan, the current Minister Counselor for Host Country Affairs (the same position held by the individual who wrote the Graham Letter), newly certifying that Mr. Muthana had diplomatic immunity at

16. Felicia Sonmez & Michael Brice-Saddler, *Trump says Alabama woman who joined ISIS will not be allowed back into U.S.*, WASH. POST (Feb. 20, 2019, 6:43 PM), https://www.washingtonpost.com/politics/trump-says-alabama-woman-who-joined-isis-will-not-be-allowed-back-into-us/2019/02/20/64be9b48-3556-11e9-a400-e481bf264fdc_story.html; Donald Trump (@realdonaldtrump), TWITTER (Feb. 20, 2019) http://twitter.com/realdonaldtrump/status/1098327855145062411?s=21. (due to former President Trump's suspension from Twitter's platform, a direct link to his tweet is no longer available).

17. TODAY SHOW, https://www.today.com/video/mike-pompeo-on-hoda-muthana-she-is-not-a-us-citizen-1446009923715. NBC television broadcast (Feb. 21, 2019).

18. *See generally* Doc. 1.

19. Doc. 19 at 16-31.

the time of Ms. Muthana's birth (the "Donovan Letter"), because notification had purportedly not been received until later.[20] The District Court approved the government's position, and then went a step further and announced that Ms. Muthana is not and never has been a U.S. citizen, and that the State Department reasonably interpreted the VCDR to reach its new position that diplomatic immunity ceases exclusively upon receipt of notification.[21] The District Court next held that the tailored and litigation-produced Donovan Letter constituted conclusive proof that Petitioner still had diplomatic immunity on the day Ms. Muthana was born, and that the Court therefore could not consider the earlier Graham Letter or any other contradictory evidence.[22]

On appeal, the D.C. Circuit Court acknowledged that the deprivation of American citizenship without due process of law is a judicially cognizable injury in fact.[23] However, the three-judge Circuit Court panel affirmed that Ms. Muthana is not a citizen, with one Judge concurring.[24] As did the District Court, the Circuit Court accepted the position that receipt of notification was the sole trigger point for the end of diplomatic immunity under the VCDR,

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20. Donovan Letter, Doc. 19-3.

21. Pet. App. at 67a ("the Court is compelled to conclude that Ms. Muthana is not a United States citizen by virtue of having been born in the United States") (internal quotations omitted).

22. *Id.* at 59a ("The Court finds it appropriate to convert the defendants' Rule 12(b)(6) motion to dismiss ... into a Rule 56 motion for summary judgment").

23. *Id.* at 10a.

24. *Id.* at 2a.

and that the State Department's most recent certification deserved conclusive deference. The lower courts failed to properly recognize the significance of the fact that in Petitioner's case, there are two internally contradictory certifications regarding Petitioner's diplomatic status (the Graham Letter and the Donovan Letter), both of which speak to the duration of his diplomatic immunity.[25] The Circuit Court instead resolved this conflict by seemingly creating a new rule, one that the government itself didn't even argue for, that the second letter was the only true certification because it had been produced in litigation, and therefore deserved conclusive deference.[26] The Circuit Court therefore held that it was required to accept the government's reversal of its own previous finding as to Ms. Muthana's citizenship status.

To date, no proceedings to rescind or revoke Ms. Muthana's citizenship have ever occurred. The State Department instead maintains that it has only revoked the passport document based on its revised determination of Ms. Muthana's diplomatic status at the time of her birth. Although the government's pleadings never asserted the right to administratively revoke or rescind Ms. Muthana's citizenship status, the lower courts nonetheless did exactly that. These holdings render Ms. Muthana and her young son stateless in a Kurdish detention camp, where they remain today.[27]

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25. *Id.* at 20a-26a.

26. *Id.* at 34a-35a.

27. This Petition comes at a time of significant international conversation and concern regarding the repatriation of individuals accused of leaving their home countries to join ISIS and the approaches that different countries may take under their

REASONS FOR GRANTING THE WRIT

United States birthright citizenship, as guaranteed by the Fourteenth Amendment, stands as one of our most precious and protected traditions. It can neither be wielded as a weapon for punishment, nor taken away without highly specific and extreme circumstances which do not exist here. The holdings in this case threaten to erode these important principles, which are deeply rooted in our jurisprudence.

As discussed above, the U.S. State Department inquired into Petitioner's diplomatic status in 2004 for the express purpose of determining whether his immunity ended before his daughter's birth. Upon receipt of the Graham Letter, an official State Department certification that Petitioner's diplomatic immunity ended well prior

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respective laws. Thousands of women and children remain in Kurdish run detention camps in Syria, unsure of their paths forward. Earlier in 2021, the U.K. made the controversial decision to strip Shamima Begum, a young woman who traveled to join ISIS at 15 and has often been discussed alongside Ms. Muthana, of her British citizenship and disallow her from returning to the U.K. *See Who is Shamima Begum and how do you lose your UK citizenship?*, BBC NEWS (Mar. 2, 2021), https://www.bbc.com/news/explainers-53428191. As countries around the world make decisions about how to handle the developing situation, the United States has urged other countries to repatriate their citizens, and prosecute them as appropriate, rather than leaving them in legal limbo in detention camps indefinitely. *See* Rick Noack, *Trump urged Europe to take back its ISIS fighters. He appears less keen on taking back those from the U.S.*, WASH. POST (Feb. 21, 2019, 7:55 A.M.). https://www.washingtonpost.com/world/2019/02/21/trump-urged-europe-take-back-its-isis-fighters-he-appears-less-keen-taking-back-ones-who-came-us/.

to Ms. Muthana's birth, the State Department issued her a passport and recognized her as a U.S. citizen. The matter was settled. Ms. Muthana grew up as an American child and teenager. All of her older siblings and both of her parents became citizens. She had no need to apply for citizenship, because the U.S. government has acknowledged her birthright citizenship.

The State Department did not revisit the question of her citizenship until after she left the country and traveled to Syria. Only then did the State Department newly assert that Ms. Muthana never possessed U.S. citizenship after all because, although all agree that Petitioner was terminated from his position prior to his daughter's birth in New Jersey, the State Department now claims it did not receive notification of his termination until after her birth. Despite the obvious political implications of the timing of the State Department's actions, the lower courts wholly deferred to this new position and held that receipt of notification alone controls the end of diplomatic immunity. These holdings contradict and exacerbate the already inconsistent authority on the subject of diplomatic immunity, created in large part by repeated court deference to contradictory government positions.

The decisions in this case create a roadmap where even in the absence of any intervening change in fact or law, the State Department may alter a person's citizenship status and overrule its own previous certification by merely penning a newer certification, even in response to litigation brought to prevent this outcome. Here, this results in the statelessness of Ms. Muthana and her minor son; however, this kind of unreviewable executive authority reaches beyond just these two people.

I. The State Department's Discordant Positions on Diplomatic Immunity Have Resulted in Inconsistent Rulings

This Court holds that while "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight[,]" those interpretations are "not conclusive." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 183 (1982). With respect to the VCDR, the Executive's certification as to an individual's diplomatic status warrants judicial deference where it is based on a reasonable interpretation of the relevant treaty. *See United States v. Al-Hamdi*, 356 F.3d 564, 573 (4th Cir. 2004) ("[W]e hold that the State Department's certification, which is based upon a reasonable interpretation of the Vienna Convention, is conclusive evidence as to the diplomatic status of an individual."); *see also Iceland S.S. Co. v. U.S Dep't of the Army*, 201 F.3d 451, 458 (D.C. Cir. 2000) ("[W]here an agency has 'wide latitude in interpreting the [Treaty's memorandum of understanding], ... we will defer to its reasonable interpretation'"). Because of the expansive deference generally afforded the State Department's determinations on diplomatic status, courts typically accept the Executive's certification and rule consistent with that certification. However, where the Executive takes inconsistent litigation positions, this deference results in inconsistent law.

The lower courts in this case uniformly accepted and affirmed the State Department's position that diplomatic immunity ceases solely and exclusively upon receipt of

notification from the sending State to the receiving State.[28] This narrowed interpretation of the VCDR directly conflicts with the plain language of its relevant provisions, the government's varied previous positions as accepted and implemented by federal courts throughout the country, the State Department's own publicized guidance on the end of diplomatic immunity, and the government's prior certification as to Petitioner specifically.

As to matters of diplomacy, the "State Department's views are instructive, since it is the agency most intimately involved with procedures under the Vienna Convention[;]" however, "it is the court's function to interpret the law[,]" not the agency. *Vulcan Iron Works, Inc. v. Polish Am. Mach. Corp.*, 479 F. Supp. 1060, 1065 (S.D.N.Y. 1979). The lower courts' rulings here deepen the already ambiguous law relating to the issue of when diplomatic immunity prevents application of the Fourteenth Amendment, one of great importance to individuals, law enforcement and the government itself. This ambiguity merits clarification and uniformity. Ms. Muthana's case presents a compelling set of circumstances through which this Court can provide it.

A. Under the VCDR, there are multiple reasonable interpretations of when diplomatic immunity ends

The protections of diplomatic immunity are coextensive with the time period during which an individual is performing diplomatic functions. Article 43 of the VCDR states that "the function of a diplomatic agent comes to an end, inter alia: (a) on notification by the sending State

28. Pet. App. at 20a, 62a-64a.

to the receiving State that the function of the diplomatic agent has come to an end."[29] In interpreting the text of a treaty, courts look to the plain language of the document and construe it "so that no words are treated as being meaningless, redundant, or mere surplusage." *Pielage v. McConnell*, 516 F.3d 1282, 1288 (11th Cir. 2008); *see also New York v. EPA*, 443 F.3d 880, 885 (2006) (explaining that when interpreting legislation, courts are directed to "give effect to each word"). The term "inter alia" means "among other things." *Inter-Alia, Black's Law Dictionary* (11th ed. 2019). By its very definition it is "a term of inclusion and not a term of limitation ... it connotes an illustrative example rather than an exhaustive list." *United States v. Kayser-Roth Corp.*, 103 F. Supp. 2d 74, 85 (D.R.I. 2000); *see also Chevron Chem. Co. v. United States*, 59 F. Supp. 2d 1361, 1367 (1999) (finding that "by itself, the term 'inter alia' demonstrates" that a list was not intended to be exhaustive); *see also Gordon Cos. v. Fed. Express Corp.*, No. 14-CV-00868-RJA-JJM, 2016 U.S. Dist. LEXIS 120205, at *3-4 (W.D.N.Y. Sept. 2, 2016) (finding that where an agreement included the phrase "inter alia," meaning "among other things", the parties' allegation was "not limited to the specific examples listed"). The D.C. District and Circuit courts in this matter, however, both adhered to a narrow rule that the language of Article 43 can *only* mean "that diplomatic functions continue until notification of termination to the host country."[30] The plain language of the provision and the prior conduct of the

29. 23 U.S.T. 3227, art 43.

30. Pet. App. at 20a. The VCDR in its entirety is riddled with qualifying language like "normally", "reasonably" and "inter alia", that counter the idea that the treaty was meant to be read rigidly or narrowly 23 U.S.T. 3227, arts. 39(2); (3).

State Department demonstrate that there are actually multiple reasonable interpretations of when diplomatic immunity ends under the VCDR.

Decisions out of the Second, Seventh and D.C. Circuits accept and implement the government's position that termination of duties, rather than receipt of notification, serves as the determinative trigger point for the end of diplomatic immunity. In *United States v. Guinand*, the D.C. District Court explained that the U.S. government has "consistently interpreted Article 39 of the VCDR" to allow U.S. jurisdiction over individuals once their "status as members of the diplomatic mission has been terminated." 688 F. Supp. 774, 775 (D.D.C. 1988). The government in *Guinand* also pointed the court to "an official State Department publication intended to provide guidelines to law enforcement authorities on ... privileges and immunities ... [that] states, in pertinent part, as follows: criminal immunity expires upon the termination of the diplomatic or consular tour of the individual enjoying such immunity, including a reasonable period of time for such person to depart the U.S. Territory." *Id; see also United States v. Sharaf,* 183 F. Supp. 3d 45, 50 (D.D.C. 2016) (accepting the State Department's submission of a letter certifying that, based on Article 39 of the VCDR, the Defendant did not possess diplomatic immunity at the time of the criminal act, because her "duties terminated effective December 9, 2014" and "[u]pon termination of duties, it is the practice of the United States government to accord 30 days as the reasonable period for a member of the mission to depart the United States"). The conflict of law deepened by the D.C. Circuit's newly crafted rule in this case conflicts with holdings from within its own Circuit, the home circuit of the U.S. government.

Courts in the Second and Seventh Circuits have similarly looked to the termination of duties date for guidance. In *Swarna v. Al-Awadi*, the court described how "diplomats lose much of their immunity following the termination of their diplomatic status." 622 F.3d 123, 133-44 (2d Cir. 2010); *see also Swarna v. Al-Awadi*, 607 F. Supp. 509, 517 (S.D.N.Y. 2009) (stating that "the purpose of immunizing a diplomatic agent's private acts is to ensure the efficient functioning of a diplomatic mission, not to benefit the private individual, and this purpose terminates *when the individual ceases to be a diplomatic agent*") (emphasis added); *see also Baoanan v. Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009) (wherein the U.S. government filed a Statement of Interest on the scope of Article 39(2) and the "Government direct[ed] the Court to the government's Declaration ... submitted to the court in [*Guinand*], for the proposition that 'the United States Government has consistently interpreted Article 39 of the VCDR to permit the exercise of U.S. jurisdiction over persons whose status as members of the diplomatic mission has been terminated for acts they committed during this period in which they enjoyed privileges and immunities'"). As discussed in greater detail *infra*, in *Baoanan*, the government submitted and the Court accepted another "Graham Letter" which uses identical language to describe the dates during which the individual held diplomatic immunity as exists in Ms. Muthana's 2004 Graham Letter.[31] In *United States v. Wen*, the court accepted the government's argument in its motion to dismiss that, based on Article 39 of the VCDR, "[i]n

31. Exhibit 2 to Defs.' Reply to Pl.'s Mem. of Law in Supp. of Diplomatic Immunity (Corrected Copy), *Baoanan v. Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009) (No. 08-cv-5692), ECF No. 25-2.

the instant case, Wen's consular status was terminated on March 4, 1992. After that time, his criminal immunity ceased to exist." No. 04-CR-241, 2005 U.S. Dist. LEXIS 19545, at *4 (E.D. Wis. Aug. 24, 2005). In so holding, the court relied upon the government's certification that "the motion to dismiss should be denied on the merits because any protection of diplomatic immunity that applied to Wen necessarily terminated on March 16, 1992, the date that Wen's term as a Consular ended ... this position is based on the premise that ... Wen could not have acted in official capacity while no longer a Consular." *Id.*

The lower courts' holdings that receipt of notification is the sole determining factor also conflict with the State Department's own existing published guidance on the subject, as provided for the benefit of law enforcement and judicial authorities. In the State Department's publication on "Diplomatic and Consular Immunity," the government explains under the heading "termination of immunity" that immunity "expires upon termination of the diplomatic or consular tour of the individual enjoying immunity[,]" making no mention of any need for receipt of notification by the host state.[32]

B. The Executive took inconsistent positions with respect to Petitioner's diplomatic status, despite no new evidence

Finally, the interpretation of the VCDR now urged by the State Department and accepted by the courts below

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32. *Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities,* U.S. DEP'T. OF STATE, OFFICE OF FOREIGN MISSIONS (Aug. 2018) https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf.

does not comport with the Executive's earlier treatment of Petitioner. As noted above, no new evidence or intervening change in law came to light that calls into question the veracity of Petitioner's termination date, the date of Ms. Muthana's birth, or the authenticity or purpose of the Graham Letter. In 2004, the State Department applied the exact same VCDR provision that it does today, to the exact same set of facts, and the official in the exact same position certified that Petitioner's diplomatic immunity ended before his daughter's birth. In 2016, the Department abruptly reversed course.

The State Department's certification of a person's diplomatic status enjoys significant deference for a reason: based on the information available to it, the Department is in the superior position to make the most accurate determination. Surely then, the State Department's contemporaneous certification in 2004 is entitled to as much, if not more, deference as the government asks be given to its post hoc reversal of that earlier position. The politicized nature of Ms. Muthana's actions cannot enter into this legal calculus.

II. The D.C. Circuit's Decision is Wrong

The lower courts disposed of Petitioner's claims based on two key findings: 1) receipt of notification constitutes the exclusive date upon which diplomatic immunity ends; and 2) the Donovan Letter, procured during litigation in 2019, served as "conclusive evidence" of Petitioner's diplomatic status, foreclosing any further judicial inquiry. The lower courts then ruled that Ms. Muthana is not now and never was a U.S. citizen, despite the years during which the U.S. government afforded her that status. The law cited in the Circuit Court's Opinion does not support

those conclusions. The Circuit Court inappropriately failed to properly consider the extraordinary relevance of the Graham Letter. This error is particularly significant here because it results in the statelessness of both Ms. Muthana and her minor son.

This Court has held that "the certificate of the Secretary of State ... is the *best evidence* to prove the diplomatic character of a person." *In re Baiz,* 135 U.S. 403, 421 (1890) (emphasis added); *see also Abdulaziz v. Metro. Dade Cnty.,* 741 F.2d 1328, 1329 (11th Cir. 1984) (noting that "courts have *generally* accepted as conclusive the views of the State Department as to the fact of diplomatic status") (emphasis added). As noted in Weinstein's Federal Evidence, "the best evidence rule is one of preferences, not absolute exclusion." Jack Weinstein & Margaret Berger, WEINSTEIN'S FEDERAL EVIDENCE § 1004.02[1] (2d ed. 2006). However, the Circuit Court did not afford the 2019 Donovan Letter mere substantial weight or "best evidence" status; it revered the Donovan Letter as "dispositive and conclusive evidence" which was "beyond judicial scrutiny[,]" therefore requiring deference to the exclusion of all other evidence, no matter how authoritative.[33] The law neither requires nor supports this result.

Relying on *In re Baiz,* the Circuit Court opined that "courts have afforded conclusive weight to the Executive's determination of an individual's diplomatic status."[34] 135 U.S. at 432 (noting that courts may not "sit in judgment upon the decision of the executive in reference to the public

33. Pet. App. at 20a.

34. *Id.* at 21a.

character of a person claiming to be a foreign minister"). The Circuit Court similarly relied upon *Carrera v. Carrera* for the proposition that the D.C. Circuit has "explained that the Executive's certification of immunity is entitled to conclusive weight when it is 'transmitted to the district judge' by the State Department.'"[35] 174 F.2d 496, 497 (D.C. Cir. 1949). The Circuit Court concluded that the 2019 Donovan Letter served as conclusive proof of Petitioner's status at the time of Ms. Muthana's birth, and that it was therefore foreclosed from examining any other evidence.

The facts of the cases discussed above, however, do not square with those presented by Petitioner. This Court in *In re Baiz* rejected that petitioner's claim of immunity on the grounds that he was unable to present *any* credible State Department certification at all. In so holding, this Court merely explained that the Executive, rather than the judiciary, sits in the best position to determine diplomatic status. The D.C. Circuit reinforced this holding in *Carrera* in the context of a request that the State Department certify an individual's status, finding that "it is enough that an ambassador has requested immunity, that the State Department has recognized that the person for whom it was requested is entitled to it, and that the Department's recognition has been communicated to the Court." *Carrera,* 174 F.2d at 497. *Carrera, In re Baiz* and cases following these holdings certainly stand for the generally well-established proposition that the State Department's certification regarding diplomatic status, and therefore diplomatic immunity, is entitled to a great deal of deference. Neither case, however, presented a

35. *Id.* at 23a.

circumstance where a court was asked to examine not one, but two separate and contradictory State Department certifications, both produced for the identical purpose of establishing a petitioner's diplomatic status, and both bearing all indicia of authenticity. Nothing in the factual or legal analysis of any case cited by the government or the lower courts addresses two internally contradictory certifications and mandates deference to the most recent document.

There are two State Department certifications here. Both speak to Petitioner's diplomatic status at the time of his daughter's birth. The first, the Graham Letter, was produced in 2004 in the context of Petitioner's passport application on behalf of Ms. Muthana. The second, the Donovan Letter, was produced in 2019 during litigation and tailored as purported support for the State Department's change in position on her citizenship. Both letters were signed and certified by individuals in identical positions. Throughout the duration of this litigation, the government has not attempted to produce a single piece of new evidence supporting its reversal; instead, there is no apparent dispute that the State Department had all of the same evidence and information before it in 2004 as it does today.

As noted *supra*, the State Department enjoys significant deference with respect to matters of diplomacy precisely because it is in the best position to make accurate determinations. The reasons justifying this high level of deference therefore crumble when used to discredit the accuracy of the Executive's own prior position as represented by the Graham Letter, in favor of its secondary conclusion, with no intervening addition

of evidence. If the State Department's certification is dispositive evidence, then courts are surely obligated to afford at least the same deference to the Graham Letter, created prior to any political conversations involving Ms. Muthana, as they did to the litigation-responsive Donovan Letter. Neither lower court did so. The Circuit Court dismissed the Graham Letter as inconclusive on the grounds that it "notes only two dates: [Petitioner's] date of appointment as a diplomat ... and his date of termination[;] [t]he Graham Letter says nothing about when the United States was notified of [Petitioner's] termination and therefore when his diplomatic immunity ended." The Graham Letter, however, explicitly provides the duration during which Petitioner had diplomatic immunity:

> [t]his is to certify that ... our records indicate that [Petitioner] was notified to the United States Mission as a diplomatic member of the Permanent Mission of Yemen to the United Nations from October 15, 1990 to September 1, 1994[;][**d]uring this period of time, [Petitioner] ... was entitled to full diplomatic privileges and immunities** in the territory of the U.S.[36]

There is no other plausible explanation, nor has one been offered, for why the Graham Letter would include the dates that it did, and why the State Department accepted those dates in 2004, except that they were reliable indicia of Petitioner's diplomatic status. Another "Graham letter," written by the same Mr. Graham during his tenure, certified an individual's diplomatic status in

36. Doc. 1-5 (emphasis added).

Baoanan v. Baja, 627 F. Supp. 2d 155 (S.D.N.Y. 2009).[37] The Graham Letter in *Baoanan* used identical language to describe the parameters of the individual's immunity as the Graham Letter in this case. The court in *Baoanan* accepted that language. Assuming that the Graham Letters involved here and in *Baoanan* are surely not the only two in existence written by Mr. Graham, the Court can reasonably conclude that the State Department has previously accepted on countless occasions the language that it now contests as insufficient. The Donovan Letter, by contrast, speaks in explicit terms relating to notification simply because it was created to fill a litigation need. This made-to-order nature of the Donovan Letter does not negate the non-litigation nature of the Graham Letter, nor should it be reason to give the Graham Letter any less credence.[38] Not a single case cited by the Circuit Court supports, let alone requires, its conclusion to the contrary.

The lower courts accepted the Donovan Letter as the only evidence that mattered, noting "we must accept the State Department's formal certification to the Judiciary as conclusive proof of the dates of diplomatic immunity."[39] The Circuit Court then ruled outright that Ms. Muthana is not and never was a citizen, despite competing Executive evidence previously recognizing her to be one. "Without

37. Exhibit 2 to Defs.' Reply to Pl.'s Mem. of Law in Supp. of Diplomatic Immunity (Corrected Copy), *Baoanan v. Baja,* 627 F. Supp. 2d 155 (S.D.N.Y. 2009), (No. 08-cv-5692), ECF No. 25-2.

38. The Circuit Court described the Graham Letter as "a document of unknown provenance"; however, the government has never argued or implied that the origin or authenticity of the Graham Letter is in question. Pet. App. 25a.

39. *Id.* at 24a.

saying so outright, the court appears to adopt a novel rule," one that the government itself did not even argue for, that a State Department certification worthy of deference "somehow only refers to a 'formal certification to the judiciary' submitted in connection with litigation."[40] As further explained by Judge Tatel's concurrence, this legally flawed new rule would require the court to "credit the Executive's litigating position to the exclusion of all other Executive evidence, no matter how authoritative."[41] No rule of this nature is supported by this Court's precedent or the Constitution, and this kind of weighing of evidence is wholly inappropriate for early dismissal of any case.

III. This Case Raises Exceptionally Important Questions

Diplomatic immunity, birthright citizenship, and Executive authority each separately constitute issues of exceptional national importance. These issues intersect in the facts of this case. The duration of diplomatic immunity is a recurrent question that will continue to arise in U.S. courts in perpetuity, in both civil and criminal contexts. Diplomatic immunity impacts law enforcement decisions;

40. *Id.* at 34a (Tatel, J., concurring).

41. *Id.* at 37a. This is in stark contrast to prior holdings in other courts. *See, e.g., Magnuson v. Baker*, 911 F.2d 330, 333 (9th Cir. 1990), *superseded by statute*, 8 U.S.C. § 1504 (holding that "[t]here is no power given to the [relevant government official] to revoke [citizenship] merely because he or she has 'second thoughts' about the initial issuance ... This limitation reflects the high value of citizenship") (negated on other grounds after the passage of legislation allowing for revocation of passport documents by the Secretary of State under certain circumstances).

the State Department, and the diplomats themselves. The D.C. Circuit's Opinion announces a dangerous new rule that receipt of notification is the sole relevant date to consider, and the most recent certification wins—even if created in response to litigation. This holding conflicts with other State Department guidance, the plain language of the VCDR, the government's positions in other cases, and the government's prior determination about Petitioner himself. The government has a vested interest in clarity on the question of what triggers the end of diplomatic immunity, and to what extent the State Department may exercise its own discretion in making this determination.

Although this case began with a dispute over Petitioner's diplomatic status, that issue does not stand alone here. This case asks important questions regarding the extent of the Executive's unrestrained authority to reverse its own prior positions and thereby alter an individual's status, and simultaneously shield that reversal from both judicial review and the protections of due process. These questions arise against the backdrop of one of our most paramount and protected rights: United States citizenship. *Klaprott v. United States,* 335 U.S. 601, 616 (1949) (Rutledge, J., concurring) (finding that "to take away a man's citizenship deprives him of a right no less precious than life or liberty").

This Court has repeatedly affirmed the sacred value of citizenship and the tradition that, in this country, we do not use citizenship status as a weapon to punish bad behavior. *Trop v. Dulles*, 356 U.S. 86, 103 (1958) ("The deprivation of citizenship is not a weapon that the government may use to express its displeasure at a citizen's conduct, however

reprehensible that conduct may be").[42] Nowhere is this more true than with respect to birthright citizenship. When an individual is born in the United States and entitled to rights of citizenship, "neither the Congress, nor the Executive, nor the Judiciary, nor all three in concert" are capable of stripping away that right. *Mitsugi Nishikawa v. Dulles*, 356 U.S. 129, 138 (1958).

Generally, individuals born in the United States are able to assume their citizenship, with formal acknowledgement of that citizenship occurring later, when they apply for a passport, register to vote, or claim some other right reserved for U.S. nationals. However, when proffered proof of citizenship like a passport is later claimed to lack credibility, it can be difficult for individuals to prove their status as birthright citizens precisely because of the automatic nature of that citizenship. This leaves birthright citizenship status particularly open to political vulnerability. Here, the lower courts' holdings create a pathway by which the Executive can leverage the deference afforded to it in matters of diplomacy to alter an individual's status under the guise of merely revoking (or "rescinding") a purportedly erroneously granted document, thereby sidestepping or eroding the due process protections afforded citizenship altogether.[43]

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42. The Supreme Court once expressed its view that citizenship is so paramount to our democracy that it was preferable to have many immigrants "improperly admitted" to the U.S. than it is to have even one proper citizen "permanently excluded from his country." *Kwok Jan Fat v. White*, 253 U.S. 454, 464 (1920).

43. Regardless of whether the courts emphasize the word "revoke" or "rescind", the simple fact remains that Ms. Muthana had citizenship status and now she does not, though she received no due process protections when it disappeared.

As discussed *supra,* the Circuit Court held that the most recent certification constitutes "conclusive evidence" to the exclusion of the Executive's own prior certification, even in the absence of any questions about the credibility or authenticity of the first document. Permitting this approach exposes Executive determinations, particularly those relating to citizenship, to the dangers of arbitrary or erroneous reversal at the whim of each next administration.[44] The government could pen a new certification as it has done here, and in so doing "take away on one day what it was required to give the day before." *Maslenjak v. United States,* 137 S. Ct. 1918, 1921 (2017). With no more than a single administrative letter, the State Department effectively erased the prior years-long recognition of Ms. Muthana as a citizen, with all accompanying rights and privileges. Our liberties are only as strong as the procedures that safeguard them, and by "so unmooring the revocation of citizenship from its award, the Government opens the door to a world of disquieting consequences." *Id.; see also* Stephen M. Shapiro et al., SUPREME COURT PRACTICE § 4-51 (11th ed. 2019) (noting that the Supreme Court may "be motivated by a feeling that the decision represents a gross miscarriage of justice or a subtle erosion of a statutory or legal principle or that the

44. Although the facts of Ms. Muthana's case may be unique, the framework is not. Denaturalization and the revocation of citizenship documents that are later claimed to be issued in error have increased substantially in recent years. In the summer of 2018, USCIS announced its intent to create an office specifically to investigate the files of naturalized citizens for denaturalization potential. *AILA Doc. No. 18072705, Featured Issue: Denaturalization Efforts by USCIS*, AM. IMMIGR. LAWYERS ASS'N (Sept. 04, 2020), https://www.aila.org/advo-media/issues/all/featured-issue-denaturalization-efforts-by-uscis.

result reached below is unduly harsh in its impact"). This cannot have been Congress's intent. The justice system is well-equipped to determine what, if any, punishment may reasonably apply to Ms. Muthana's actions; statelessness cannot be among them.

IV. This Case Presents an Ideal Vehicle to Resolve the Question Presented

Petitioner's case presents an ideal vehicle for review of the question presented here. The Circuit Court's holding creates dangerously broad rules of law capable and deserving immediate review. Although the question presented involves complex issues relating to diplomatic immunity, deference to the Executive and U.S. citizenship, the issue presented is capable of full resolution by an Order from this Court.

Both parties agree on nearly all lingering questions of pure fact. Petitioner's diplomatic duties and position ended prior to Ms. Muthana's birth; the Graham Letter exists to address the duration of Petitioner's term of immunity; official acknowledgement of Ms. Muthana's status as a citizen previously occurred; and no new facts came to light which would support the State Department's change of position between the drafting of the Graham Letter and the Donovan Letter. Although the facts of this case are unique, the issues are not; no factual disputes remain which could erode the force and effect of a potential ruling from this Court.

The lower courts' opinions are on all fours with one another and unambiguous in their holdings, providing this Court with a clear blueprint for review. No interlocutory

determinations remain unresolved, nor are there any issues pending on remand. *Cf. Abbott v. Veasey,* 138 S. Ct. 612, 613 (2017) (denying review where the case was interlocutory, remedial issues remained, and there was an overlapping unresolved claim). Both lower courts strictly adhered to the idea that under the VCDR, the sole trigger for the end of diplomatic immunity is receipt of notification by the host state. The lower courts further subjected the dueling Graham and Donovan certifications to inequal treatment, giving the Donovan Letter conclusive weight while failing to afford the Graham letter any legally significance weight. Both courts disposed of all issues in their entirety.

CONCLUSION

Hard facts can make bad law. But "facts are stubborn things."[45] This Court serves in the function as guardian to prevent bad rulings made in reaction to difficult facts, like the ones present here. Petitioner turns to this Court to rule not with emotion or motive, but based on supported and just principles of law and policy.

For the foregoing reasons, Petitioner Ahmed Ali Muthana, as next friend of Hoda Muthana and Minor John Doe, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit, which affirmed the holding of the District Court for the District of Columbia.

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45. Ronald Reagan, 1988 Republican National Convention, quoting John Adams, *Argument in Defense of the British Soldiers in the Boston Massacre Trials,* Dec. 4, 1770 ("Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence").

Respectfully submitted,

CHRISTINA A. JUMP*
ALYSSA F. MORRISON
CONSTITUTIONAL LAW CENTER
FOR MUSLIMS IN AMERICA
100 North Central Expressway,
Suite 1010
Richardson, TX 75080
(972) 914-2507
cjump@clcma.org
Counsel for Petitioner

* *Counsel of Record*