

No. 21-489

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IN THE  
**Supreme Court of the United States**

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AHMED ALI MUTHANA,

*Petitioner,*

*v.*

ANTONY J. BLINKEN, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DC CIRCUIT

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**REPLY BRIEF FOR PETITIONER**

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## TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES .....	ii
REPLY BRIEF FOR PETITIONER .....	1
I. Respondents’ Merits Argument Does Not Negate Petitioner’s Stated Reasons to Grant Review .....	1
A. The Graham Letter constitutes an authoritative State Department certification .....	2
B. The lower courts’ rulings improperly altered Ms. Muthana’s citizenship status without due process.....	5
II. Conflict of Law Need Not Exist to Warrant Review .....	7
A. The importance of the question presented necessitates review.....	7
B. Although not necessary for review, conflicting State Department positions result in inconsistent law .....	8
III. This Case Presents an Ideal Vehicle for Review .....	9
CONCLUSION .....	11

# TABLE OF CITED AUTHORITIES

	<i>Page</i>
<b>CASES</b>	
<i>Adarand Constructors v. Pena</i> , 515 U.S. 200 (1995).....	11
<i>Baoanan v. Baja</i> , 627 F. Supp. 2d 155 (S.D.N.Y 2009) .....	4
<i>Carrera v. Carrera</i> , 174 F.2d 496 (D.C. Cir. 1949).....	8
<i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006).....	7
<i>In re Baiz</i> , 135 U.S. 403 (1890).....	2, 8
<i>Kolovrat v. Oregon</i> , 366 U.S. 187 (1961).....	7
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007).....	7
<i>Montana v. Kennedy</i> , 366 U.S. 308 (1961).....	6
<i>Rasul v. Bush</i> , 542 U.S. 466 (2004).....	7
<i>Sumitomo Shoji Am. v. Avagliano</i> , 457 U.S. 176 (1982).....	8

*Cited Authorities*

*Page*

**STATUTES**

23 U.S.T. 2337, art. 39(2).....4

8 U.S.C. § 1503.....6

**OTHER AUTHORITIES**

*The United States Has Repatriated 27 Americans from Syria and Iraq Including Ten Charged with Terrorism-Related Offenses for Their Support to ISIS*, DEP'T OF J., OFF. OF PUB. AFFS. (Oct. 1, 2020), <https://www.justice.gov/opa/pr/united-states-has-repatriated-27-americans-syria-and-iraq-including-ten-charged-terrorism>. . . . .1

## REPLY BRIEF FOR PETITIONER

The U.S. State Department enjoys broad deference to certify diplomatic status and confer the rights and privileges that accompany it. Both parties recognize this. Respondents, however, simplify the issue presented in this Petition, and remove from it the operative question: what happens when the Executive changes its mind without any accompanying change in fact or law? And how should courts respond when that change results in the deprivation of our most urgently protected right, without due process of law? Petitioner comes now before this Court seeking resolution of this key legal question. Although Respondents suggest denial on three grounds, none withstands scrutiny.<sup>1</sup>

### I. Respondents' Merits Argument Does Not Negate Petitioner's Stated Reasons to Grant Review

Respondents' argument that the Donovan Letter<sup>2</sup> is the only State Department certification worthy of

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1. In the wake of the fall of the Islamic State, the world has watched as governments grapple with the question of what to do with those left behind. The United States has unequivocally answered, urging other nations to follow as it “continues to lead by example” and “take responsibility for their citizens.” *The United States Has Repatriated 27 Americans from Syria and Iraq Including Ten Charged with Terrorism-Related Offenses for Their Support to ISIS*, DEP'T OF J., OFF. OF PUB. AFFS. (Oct. 1, 2020), <https://www.justice.gov/opa/pr/united-states-has-repatriated-27-americans-syria-and-iraq-including-ten-charged-terrorism>.

2. Petitioner refers to the 2019 document authored by Mr. Donovan as the “Donovan Letter” and the letter authored by Mr. Graham in 2004 as the “Graham Letter” throughout. *See* Pet. 6, 11.

deference speaks to the merits of the question presented, and is not a basis to deny review. It is also wrong, ignoring key components of Petitioner’s case and misapplying distinguishable precedent.

**A. The Graham Letter constitutes an authoritative State Department certification**

Courts grant deference to the State Department on matters of diplomacy because it is the agency best positioned to accurately determine a person’s status. Justification for this deference is frustrated here, because the State Department has twice expressed positions with contrary outcomes despite no intervening change in fact or law. Respondents’ counterargument that no change in the government’s position occurred because only the Donovan Letter counts as “the State Department’s formal certification to the Judiciary” regarding “the dates of diplomatic immunity” finds no basis in established law. Opp’n 15 (quoting Pet. App. 24a). Respondents highlight *In re Baiz* for the proposition that the “certificate of the Secretary of State” is “the best evidence to prove the diplomatic character of a person.” Opp’n 13 (quoting 135 U.S. 403, 432 (1890)). This is not in dispute. Nothing in *Baiz*, however, detracts from the status of the Graham Letter as an official State Department determination also deserving of this best evidence weight. Respondents disagree, asserting that the litigation-created Donovan Letter represents the only relevant piece of evidence. Opp’n at 13. As Judge Tatel correctly explained in his concurrence at the D.C. Circuit, “no case supports the [majority’s] new rule” that a State Department certification only merits deference where it is a “formal certification to the judiciary submitted in connection with litigation.” Pet. App. 34-35a.

Both the Graham Letter and the Donovan Letter are credible State Department documents that speak to the duration of Petitioner's immunity; both are authored by individuals holding the same position; and both were created to answer the question of when Petitioner's immunity ended. One, however, was created during litigation, and specifically tailored to fit Respondents' litigation position. Respondents attempt to reconcile the contradiction created by the two Letters with the argument that they do not address the same time frame, because the Graham Letter only speaks to the duration of Petitioner's tenure with the Mission and does not make any representations about unspecified "other periods of time" or when notification specifically occurred. Opp'n 15. This revisionist interpretation of the events of this case ignores important context and language. In relevant part, the Graham Letter articulates that Petitioner was "notified to the United States Mission ... from October 15, 1990 to September 1, 1994[,] and that "during this period of time [he] was ... entitled to full diplomatic privileges and immunities". The Graham Letter was indisputably provided to the State Department for the exclusive purpose of satisfying the Department's inquiry into whether Ms. Muthana was born subject to the jurisdiction of the United States. It also references Petitioner's notification to the post and specifies that Mr. Graham reviewed the State Department's contemporaneous "records" and the information officially provided by the UN Office of Protocol. These records are the same ones that Mr. Donovan assessed; the agency provides no explanation for why Mr. Graham's Letter, relying on that same information, came to the contrary conclusion—a conclusion which was repeatedly implemented by the government. The agency further fails to explain what prompted Mr. Donovan's late review of the same information.

Petitioner put before this Court another “Graham Letter” submitted in litigation as a State Department certification, in *Baoanan v. Baja*, utilizing identical language as in the Graham Letter relevant here. Pet. 25-26 (citing 627 F. Supp. 2d 155 (S.D.N.Y 2009)). Pet. 25-26. Respondents counter that *Baoanan* is distinguishable because it “addressed the distinct question of *residual immunity*, which is immunity that ‘shall continue to subsist’ even after the diplomat’s functions have ended ‘with respect to *acts performed* by such a person in the exercise of his functions *as a member of the mission*.’” Opp’n 16 (emphasis in original). Respondents imply that for residual immunity purposes, the analysis of when general immunity ends is distinct from a context like Petitioner’s, with no residual immunity issue. That argument fails.

Residual immunity derives from Article 39(2) of the VCDR, the same provision that defines the parameters of general immunity.<sup>3</sup> 23 U.S.T. 2337, art. 39(2). No differing end date applies for residual immunity, and Respondents do not set forth any reason why there would be a difference. Courts evaluate whether general privileges remained in effect, and if not whether the acts were taken as a part of that person’s diplomatic function. The *Baoanan* court recognized that identical language used in that Graham

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3. In full, Article 39 states as follows: “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. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.” 23 U.S.T. 2337, art. 39(2).



Letter constituted official State Department certification of the time of that plaintiff's general immunity; factual differences between that case and this one do not lessen the Letter's significance. And again, this argument speaks to the merits of this case and not the certworthiness of the question presented.

**B. The lower courts' rulings improperly altered Ms. Muthana's citizenship status without due process**

Respondents describe Petitioner's assertion that the court of appeals' "decision gives the Executive 'unrestrained authority to reverse its own prior positions and thereby alter an individual's status'" without due process of law as "unsound[,]" because the Secretary of State has the authority to cancel an erroneously granted passport. Opp'n 16 (quoting Pet. 28). Respondents miss the point. Petitioner never argues that Ms. Muthana's citizenship came as a by-product of her receipt of a passport; Petitioner identifies that the State Department twice granted her passports because it had already recognized her citizenship status. Birthright citizens do not receive naturalization papers; they have inherent status, created by the Constitution, and later recognized through the issuance of documents evidencing their rights and privileges. Petitioner's concern over unrestrained authority for the Executive to change its mind has nothing to do with its ability to revoke a document. Instead, if the lower courts' decision stands, the State Department may at any time create a secondary "certification" to support the Executive's change in position, even when in direct conflict with other authoritative evidence and when the change results in the deprivation of a critically important right. That consequence happened here.

Respondents all but concede that the lower courts erred in going as far as they did when they declared a change to Ms. Muthana's previously held status. They clarify that "here the government has revoked Ms. Muthana's passport as having been erroneously obtained; it has not formally altered her citizenship status." Opp'n 17 (emphasis added). Respondents' use of the word "formally" is telling here, indicating recognition of the practical effect of their actions. No matter how Respondents choose to characterize it, an individual born in the U.S. who lived all of her life as a U.S. citizen now no longer holds that citizenship status. Even if Respondents had no intention to unilaterally change her status, the unequivocal holding of two federal courts did just that. The disparity between the import of the citizenship right at issue here, and the informal administrative process used to constructively rescind that right, is striking. And the result is severe. The current holdings effectively exile Ms. Muthana from the country that repeatedly called her its own for nearly two decades, leaving her and her young son stateless. This imbalance alone supports granting certiorari. *See Montana v. Kennedy*, 366 U.S. 308, 309 (1961) (granting review "in view of the apparent harshness of the result entailed" where the Petitioner, who continuously resided in the United States since he was a child and believed himself to be a citizen by virtue of his parent's citizenship, was later stripped of citizenship based on a statutory technicality).<sup>4</sup>

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4. Respondents suggest that "to the extent Ms. Muthana wishes to establish her citizenship status, Congress has provided procedures for her to use in pursuing that from the Executive" through 8 U.S.C. § 1503. Opp'n 18. That suggestion is disingenuous. Respondents well know that Ms. Muthana remains detained in Syria; she cannot merely leave to present herself at an Embassy.

## II. Conflict of Law Need Not Exist to Warrant Review

Respondents' disagreement about whether a conflict of law exists misunderstands the relevance of the authorities cited by Petitioner; regardless, the existence of a conflict is not essential to review of the question presented.

### A. The importance of the question presented necessitates review

A conflict of law is not essential to grant review of this matter, where the parties do not dispute the importance of the question presented. Pet. 27-31. This Court routinely grants review in the absence of a clear conflict of law where an issue of unusual importance arises. *See Massachusetts v. EPA*, 549 U.S. 497, 504-05 (2007) (granting the petition “in spite of the serious character of [Respondents'] jurisdictional argument and the absence of any conflicting decisions” because of “the unusual importance of the underlying issue”); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (granting certiorari because the issue presented raised “important questions about the balance of powers in our constitutional structure”). An already important issue takes on additional urgency when it may affect issues of international importance or impact foreign policy. *Rasul v. Bush*, 542 U.S. 466, 470 (2004). The same is true when the question presented involves rights that turn upon a correct interpretation of a treaty. *See Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (explaining

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And, two U.S. courts, the former President and the former Secretary of State have all made clear their positions that she no longer has citizenship status. Therefore, an administrative endeavor to the Agency already denying her would personify futility.

that review was appropriate “because the cases involve important rights asserted in reliance upon federal treaty obligations”); *see also Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 177 (1982) (granting certiorari to determine whether a treaty with Japan provided a defense to a federal employment discrimination suit).

Petitioner recognizes that the unique circumstances of this case do not lend themselves to a circuit split, and the Petition does not allege one. The reason for this is clear: there are no other cases asking courts to weigh two equally authoritative State Department certifications of a person’s diplomatic status, the second of which rendered a previously recognized U.S. citizen stateless.<sup>5</sup> The lower courts permitted Respondents’ litigation-tailored second certification to replace the first. The possible application of this holding to a world of other factual circumstances is disquieting. And, the facts of this case, set against the backdrop of important recurring principles of law, provide a reason to grant review, not deny it. This is particularly so where the circumstances and timing surrounding Ms. Muthana’s loss of status were so openly political.

**B. Although not necessary for review, conflicting State Department positions result in inconsistent law**

Although not necessary to granting review, conflicting law does exist here, where the State Department has

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5. As explained in the Petition, the lower courts’ reliance on *In re Baiz* and *Carrera v. Carrera*, 174 F.2d 496 (D.C. Cir. 1949) is misplaced; neither case, nor any case cited by Respondents or the lower courts, has addressed a circumstance with two dueling certifications.

taken inconsistent positions, and courts have accepted and implemented them. Respondents' method of distinguishing the cases cited by Petitioner on the question of notification vs. termination does not change that. Respondents do not dispute that the courts in the cited cases looked to termination rather than notification. Instead, Respondents argue these cases are distinguishable because they "addressed the scope of a former diplomat's residual immunity, and therefore focused on whether the allegedly unlawful acts occurred during the defendant's tenure as a diplomat." Opp'n 22. This argument misdirects the relevant analysis. As discussed *supra*, residual immunity analyzes the remaining immunity for actions performed in the exercise of a person's function as a member of the Mission, which requires a court to first determine the duration of those functions. Each case cited by Petitioner therefore first required that those courts accept the date upon which general immunity ceased; each case looked to termination, not notification, to do that. *See* Pet. 18-20 (discussing and listing cases where the government looked to termination).

### **III. This Case Presents an Ideal Vehicle for Review**

Respondents raise a number of flawed factual and merits-based reasons why this matter serves as a poor vehicle for review. Petitioner's case, however, cleanly presents the legal questions warranting review. Opp'n 22-23. The Donovan Letter does not constitute conclusive proof of Petitioner's diplomatic status at the time of his daughter's birth, and its contents do conflict with the conclusion drawn from the previously accepted Graham Letter. The fact of this matter evinces that conflict: one letter affirmed Ms. Muthana's status as a natural born

citizen eligible for a U.S. passport, the other denied it. This case represents an ideal vehicle to determine when and how much deference to the State Department is appropriate.

Respondents' second argument underestimates this Court's ability to craft an appropriate remedy. They contend that even if the question presented were resolved in Petitioner's favor, he would still not receive relief because other "contemporaneously created" records establish Petitioner's diplomatic status at the time of his daughter's birth. Opp'n 13. The question presented here, however, is not whether Petitioner ultimately succeeds in establishing his daughter's citizenship; the question is whether a State Department certification constitutes conclusive and unreviewable evidence when it conflicts with the Department's own prior certification. The D.C. Circuit's determination that the Donovan Letter is conclusive formed the basis of its ruling, placing that ruling squarely within the parameters of resolution created by Petitioner's question presented. Furthermore, as pointed out in Petitioner's briefing to the lower courts, factual disputes remain as to inconsistencies in the referenced "contemporaneous" records. These inconsistencies include unattributed and undated handwritten notations. The date of receipt of notice remains unclear as well, as Respondents rely on the publication date of the Blue List and provide no date that they first received the information contained therein. As this Court well knows, it does not function to sit in judgment of disputed facts appropriate for discovery proceedings before a district court. Resolution of the important question presented here does not require this Court to do that. Should this Court deem it appropriate, it may remand to the lower courts to

assess any lingering factual disputes, or otherwise craft an appropriate remedy. *See Adarand Constructors v. Pena*, 515 U.S. 200, 238 (1995) (after deciding the case on the merits, reversing and remanding for consideration of several unresolved factual questions). This Court should grant certiorari because this case presents an opportune vehicle to answer a question of pressing importance; where a right as important as citizenship is implicated, courts should apply the highest level of scrutiny before taking it away.

### CONCLUSION

For the foregoing reasons, Petitioner Ahmed Ali Muthana, as next friend of Hoda Muthana and Minor John Doe, respectfully requests that this Court grant certiorari and order briefing and oral argument, or in the alternative remand to the district court for further proceedings on all remaining unresolved issues.

Respectfully submitted,

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