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

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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

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

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

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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

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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]

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

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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

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

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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,

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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,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JANUARY 19, 2021

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5362

AHMED ALI MUTHANA, INDIVIDUALLY, AND AS NEXT FRIEND OF HODA MUTHANA AND MINOR JOHN DOE,

Appellant,

v.

MICHAEL R. POMPEO, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF STATE, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia.
(No. 1:19-cv-00445).

May 15, 2020, Argued
January 19, 2021, Decided

Before: Tatel and Rao, *Circuit Judges*, and Sentelle, *Senior Circuit Judge*.

Appendix A

Opinion for the Court filed by *Circuit Judge* Rao.

Opinion concurring in the judgment filed by *Circuit Judge* Tatel.

Rao, *Circuit Judge*: Hoda Muthana grew up in the United States, but at age twenty left college to join the Islamic State of Iraq and Syria ("ISIS"). After marriage to two different ISIS fighters, Hoda now seeks to return to the United States with her son, John Doe. The State Department maintains that Hoda is not a citizen and has no right to return to the United States. Hoda's father, Ahmed Ali Muthana ("Muthana"), initiated this lawsuit on behalf of his daughter and grandson to settle their citizenship. The district court held that Hoda and her son are not U.S. citizens, because Hoda's father possessed diplomatic immunity when she was born in the United States, rendering her ineligible for citizenship by birth under the Fourteenth Amendment and her son ineligible for citizenship under 8 U.S.C. § 1401(g). We affirm the district court. A child born in the United States to a foreign diplomat is not born "subject to the jurisdiction" of the United States and thus not entitled to citizenship by birth under the Fourteenth Amendment. Hoda Muthana is not now and never was a citizen of the United States because her father enjoyed diplomatic immunity pursuant to the Vienna Convention on Diplomatic Relations when she was born, and she was never naturalized. Because Hoda is not a citizen, neither is her son, who was born abroad to two alien parents.

Muthana also sought mandamus relief to compel the United States to assist in bringing Hoda and John Doe back to the United States; however, we have no jurisdiction over such a claim and it must be dismissed. Finally, Muthana sought a declaratory judgment that if he sent money and supplies to his daughter and grandson, he would not violate the prohibition on providing material support for terrorism, 18 U.S.C. § 2339B. We agree with the district court that Muthana did not establish standing because he failed to allege a personal injury to his constitutional rights.

I.

Ahmed Ali Muthana served as the First Secretary of the Permanent Mission of Yemen to the United Nations. During this posting he lived in New Jersey with his wife and children. The United Nations notified the State Department of Muthana's appointment in October 1990, thus entitling him to diplomatic-level immunity pursuant to the U.N. Headquarters Agreement and the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 (the "Vienna Convention").[1] After several years, Yemen terminated Muthana from his diplomatic post and required him to surrender his

1. The United States accords diplomats stationed at U.N. missions the same privileges and immunities as diplomats stationed at embassies and consulates. *See* Agreement Between the U.S. and U.N. Respecting the Headquarters of the U.N., June 26, 1947, 61 Stat. 3416; Convention on Privileges and Immunities of the U.N., Feb. 13, 1946, 21 U.S.T. 1418. The State Department certified that Muthana possessed "diplomatic agent level immunity." J.A. 18.

diplomatic credentials no later than September 1, 1994. In October 1994,[2] Hoda Muthana was born in New Jersey to Muthana and his wife, neither of whom was an American citizen at the time. On February 6, 1995, the United Nations notified the State Department that Yemen had terminated Muthana from his diplomatic post. Muthana and his wife, as well as Hoda's older siblings, eventually became naturalized citizens. Hoda, however, was never naturalized as a U.S. citizen. Muthana applied for a U.S. passport on behalf of Hoda, which the State Department issued in 2005 and then renewed in 2014.

Later in 2014, Hoda dropped out of college, traveled to Syria, and joined ISIS. Hoda became a prominent spokeswoman for ISIS on social media, advocating the killing of Americans and encouraging American women to join ISIS. She also married two ISIS fighters in succession and had a child, John Doe, by way of her second husband, who was an ISIS fighter from Tunisia. In 2016, the State Department revoked Hoda's passport after determining that it had been issued in error because Hoda was not a U.S. citizen by birth and had never been naturalized. In a letter sent to Hoda's last known address, the State Department informed her of the passport revocation and explained that the passport had been issued based on an error of fact—the government's mistaken belief that at the time of Hoda's birth, Muthana no longer possessed diplomatic immunity. In fact, Muthana retained his diplomatic immunity until at least February 6, 1995,

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2. As the precise date of Hoda's birth is immaterial to the legal questions, we omit it here in order to protect her privacy.

months after Hoda's birth. As the State Department explained, a child born to a diplomat is not "subject to the jurisdiction" of the United States, and therefore does not have citizenship by birth. U.S. Const. amend. XIV, § 1. Muthana received the letter and sent a response asserting his daughter is a U.S. citizen by birth. In 2018, as the ostensible Caliphate crumbled, Hoda and her son fled and allegedly remain in a camp in Syria run by Kurdish forces.

After receiving communications from his daughter, Muthana contacted the U.S. Attorney for the Northern District of Alabama, where he resided, and expressed Hoda's "desire to return as well as her willingness to surrender to United States authorities for any contemplated charges." The U.S. Attorney responded by referring the matter to the State Department. About a month later, Secretary of State Mike Pompeo issued a public "Statement on Hoda Muthana" declaring that "Ms. Hoda Muthana is not a U.S. citizen and will not be admitted into the United States. She does not have any legal basis, no valid U.S. passport, no right to a passport, nor any visa to travel to the United States." This statement was recognized by President Donald Trump, who tweeted: "I have instructed Secretary of State Mike Pompeo, and he fully agrees, not to allow Hoda Muthana back into the Country!"

The next day, Muthana filed a nine count complaint in the U.S. District Court for the District of Columbia, alleging these statements effectively revoked his daughter's and grandson's U.S. citizenship in violation of the Fourteenth Amendment. First, proceeding as next

friend to his daughter and grandson, Muthana sought a declaratory judgment "recognizing the citizenship of his daughter and grandson." Second, again proceeding as next friend, Muthana sought "injunctive and mandamus relief obligating the United States to accept Ms. Muthana and her son back into the United States and to use all available means to do so." Third, Muthana sought a declaratory judgment that he would not violate the prohibition on providing material support for terrorism, 18 U.S.C. § 2339B, if he sent money and supplies to his daughter and grandson in Syria. The government moved to dismiss for lack of subject matter jurisdiction and failure to state a claim, or, in the alternative, for summary judgment. In support of its motion, the government attached a certification from the State Department that Muthana and his family possessed diplomatic immunity until February 6, 1995, well after Hoda's birth in October 1994.

The district court granted summary judgment to the government on the citizenship and reentry claims and dismissed the material support claim for lack of subject matter jurisdiction. The court first found Muthana could proceed as "next friend" to his daughter and grandson because he had a "significant relationship" to them and they were unavailable due to their presence in Syria. Turning to the merits, the district court converted the government's Federal Rule of Civil Procedure 12(b)(6) motion for failure to state a claim into a Rule 56 motion for summary judgment. The court held that Muthana's citizenship and reentry claims all failed for the same fundamental reason: Hoda is not, and never has been, a U.S. citizen. The court determined that the State Department

reasonably interpreted the Vienna Convention to provide for diplomatic immunity until the sending state notifies the receiving state of the diplomat's termination. The court next found that the State Department's certification was conclusive proof that Muthana continued to enjoy diplomatic immunity on the date his daughter was born. Because the child of a diplomat is not born "subject to the jurisdiction" of the United States, the court held that Hoda was not entitled to citizenship by birth and, since she was not subsequently naturalized, never became a U.S. citizen. Finally, the court dismissed for lack of jurisdiction Muthana's request for a declaration that he would not violate the statutory prohibition on providing material support for terrorism by sending aid to his daughter and grandson. The court determined that Muthana failed to allege the statute violated his constitutional rights. Muthana timely appealed.

II.

Although the government does not renew its challenge to standing on appeal, we have an independent obligation to ensure our jurisdiction. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174, 402 U.S. App. D.C. 307 (D.C. Cir. 2012). There is a serious question of whether Muthana can sustain next friend standing on behalf of his adult daughter Hoda. Next friend standing is a narrow exception to Article III standing, which requires that a party assert his own rights in alleging an injury in fact. Next friend standing has been generally limited to three historically grounded exceptions codified by Congress: a person may assert next friend standing on behalf of minors and incompetents,

or to seek a writ of habeas corpus. *See Whitmore v. Arkansas*, 495 U.S. 149, 163 n.4, 110 S. Ct. 1717, 109 L. Ed. 2d 135 & 164 (1990) ("Indeed, if there were no restriction on 'next friend' standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'"). Hoda does not fit within any of the established exceptions. At age twenty, she is not a minor, and Muthana has not asserted that she is incompetent. *See* Fed. R. Civ. P. 17(c). Nor does Muthana petition for a writ of habeas corpus on Hoda's behalf.

We need not decide whether Muthana may proceed as next friend to Hoda, however, because Muthana may proceed as next friend to his grandson.[3] Federal Rule of

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3. The district court held there was next friend standing for Hoda and John Doe by relying on *Ali Jaber v. United States*, which held that next friend standing may be invoked whenever a "plaintiff[] can sufficiently demonstrate its necessity," and therefore that next friend standing does not require statutory authorization. 155 F. Supp. 3d 70, 76 (D.D.C. 2016). We are not aware of any Supreme Court or circuit precedent that extends next friend standing beyond the exceptions codified by Congress. *Ali Jaber* misconstrues the Supreme Court's decision in *Whitmore*, which identified serious Article III concerns with expanding next friend standing and simply reserved the question of whether next friend standing could be sustained absent statutory authorization. *Whitmore*, 495 U.S. at 164. Moreover, we note that a decision of our district court "do[es] not establish the law of the circuit, nor, indeed, do[es it] even establish the law of the district." *In re Executive Office of President*, 215 F.3d 20, 24, 342 U.S. App. D.C. 20 (D.C. Cir. 2000) (cleaned up).

Civil Procedure 17 allows a next friend to sue on behalf of a minor. Next friend standing on behalf of minors is a long-recognized exception to the rule that a litigant can claim injury only to his personal interests. *See Whitmore*, 495 U.S. at 163 n.4. This exception recognizes that a minor "must be represented by a competent adult" to pursue his claims in court. *T.W. by Enk v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997); *see also Whitmore*, 495 U.S. at 165 (explaining the "ancient tradition" of next friend standing requires that "the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability"). Muthana thus may proceed on behalf of his grandson if he qualifies as his next friend. He does.

To determine whether a person may proceed as next friend to a minor, we examine the relationship between the proposed next friend and minor. *See T.W. by Enk*, 124 F.3d at 897; *cf. Whitmore*, 495 U.S. at 163-64 (explaining that, to obtain a writ of habeas corpus as a next friend, the next friend "must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate" and suggesting that a significant relationship is required). Not every person who is interested in serving as a minor's next friend qualifies for that role. There must ordinarily be a significant relationship between the proposed next friend and minor, *see T.W. by Enk*, 124 F.3d at 897, though that requirement may not rigidly apply when a minor has no significant relationships, *see Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 91 (1st Cir. 2010).

Muthana easily qualifies as next friend to his grandson. A minor's parent or close relative is a natural fit to serve as his next friend in most cases. The government argued below that, as his mother, Hoda was the appropriate next friend for John Doe. But when a minor's parent is "unable, unwilling or refuses to act" as next friend to the minor, another person may proceed as next friend. *See Ad Hoc Comm. of Concerned Teachers v. Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d 25, 30 (2d Cir. 1989). Hoda is unable to proceed as John Doe's next friend because she is inaccessible in a Kurdish camp in Syria and unable to return to the United States. Muthana is a close relative of John Doe who is able and willing to litigate his claims. Because Muthana has a significant relationship to his grandson, he may proceed as John Doe's next friend.

Once a court determines that a party has standing to proceed as next friend, it must determine if the real party in interest possesses standing in his own right. Here, the alleged deprivation of American citizenship without due process of law is a judicially cognizable injury in fact. *See* U.S. Const. amend. XIV, § 1; *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) ("Citizenship ... is expressly guaranteed by the Fourteenth Amendment to the Constitution, which speaks in the most positive terms."). Accepting Muthana's allegations as true, the U.S. government denied John Doe his U.S. citizenship without due process. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (explaining that we take a plaintiff's affidavits and other factual evidence as true when determining standing at the summary judgment stage). This injury

is actual and personal to John Doe, fairly traceable to the government's conduct, and redressable through a declaratory judgment settling his citizenship. *See id.* at 560-61. Because John Doe would have standing to bring his citizenship claim, Muthana can pursue this claim as his grandson's next friend.

The district court had jurisdiction to determine John Doe's citizenship, a question that necessarily required a determination of his mother's citizenship. Under the Immigration and Nationality Act, a person born outside the United States to one citizen-parent is a citizen as long as his citizen-parent lived in the United States for five years, and was at least fourteen years old for two of those years. 8 U.S.C. § 1401(g).[4] The only alleged basis for John Doe's citizenship is the citizenship of his mother. Therefore, it is impossible to disaggregate the question of John Doe's citizenship from that of his mother's. Although Muthana cannot proceed as next friend to Hoda, the district court was required to determine Hoda's citizenship as a necessary incident of its jurisdiction to determine John Doe's citizenship.

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4. As relevant here, 8 U.S.C. § 1401 provides:

> The following shall be nationals and citizens of the United States at birth: ... (g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years[.]

We review de novo a district court's grant of summary judgment and dismissal of a claim for lack of subject matter jurisdiction. *Waggel v. George Washington Univ.*, 957 F.3d 1364, 1371, 446 U.S. App. D.C. 390 (D.C. Cir. 2020) (summary judgment); *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1156, 364 U.S. App. D.C. 416 (D.C. Cir. 2005) (lack of jurisdiction). Summary judgment should be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III.

Although Muthana's claims focus on the revocation of citizenship for Hoda and John Doe, this case requires us to first ascertain whether Hoda and John Doe were United States citizens. That question turns on whether Muthana possessed diplomatic immunity when Hoda was born. Under the Fourteenth Amendment, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1. A child born on U.S. soil to a foreign diplomat possessing diplomatic immunity is not eligible for citizenship by birth because she is not born "subject to the jurisdiction" of the United States. *See United States v. Wong Kim Ark*, 169 U.S. 649, 693, 18 S. Ct. 456, 42 L. Ed. 890 (1898); *Nikoi v. Attorney Gen. of United States*, 939 F.2d 1065, 1066, 291 U.S. App. D.C. 237 (D.C. Cir. 1991) ("The jurisdiction clause was intended to exclude from its operation children of ministers of foreign States born within the United States.") (cleaned up). We agree with the district court that because Muthana

enjoyed diplomatic immunity at the time of Hoda's birth, she did not become a citizen at birth and therefore John Doe did not acquire citizenship because he was born abroad to non-citizen parents.

The argument proceeds as follows. First, under the Vienna Convention, diplomatic immunity continues until notification of a diplomat's termination to the host country. Muthana's arguments to the contrary cannot be squared with the plain meaning of the Convention and longstanding diplomatic practice. Second, in this case the State Department certified to the district court that it was notified of Muthana's termination on February 6, 1995. Under our precedents, such certification provides conclusive evidence that Muthana enjoyed diplomatic immunity at the time of Hoda's birth in October 1994, and therefore that Hoda did not become a U.S. citizen at birth. Finally, we cannot grant Muthana equitable relief because courts have no power to confer citizenship where it otherwise does not exist under the laws of the United States.

A.

Diplomatic immunity is governed by the Vienna Convention on Diplomatic Relations. *See* 23 U.S.T. 3227. When interpreting treaties, "we are guided by principles similar to those governing statutory interpretation." *Iceland S.S. Co., Ltd.-Eimskip v. Dep't of Army*, 201 F.3d 451, 458, 340 U.S. App. D.C. 1 (D.C. Cir. 2000). Muthana argues that the Convention allows diplomatic immunity to cease on the date of his *termination* from his diplomatic

post, which was prior to Hoda's birth. Because he lost diplomatic immunity before his daughter's birth, Muthana maintains that Hoda is a birthright citizen. The government argues that the Convention requires diplomatic immunity to continue until a reasonable period after *notification of termination* to the host country. Because the State Department was not notified of Muthana's termination until after Hoda's birth, she is not a citizen by virtue of her birth in the United States. "[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Starr Int'l Co. v. United States*, 910 F.3d 527, 537, 439 U.S. App. D.C. 96 (D.C. Cir. 2018) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982)).

Here, the State Department's interpretation comports with the plain meaning of the Convention that diplomatic immunity ceases when the host country is notified of the termination. Article 43 of the Convention states in full:

> 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; (b) on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.

23 U.S.T. 3227, art. 43. Article 39 of the Convention connects the end of diplomatic functions with diplomatic

immunity, providing 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." *Id.* at art. 39. The text of the Convention plainly provides that a diplomat's functions end upon "notification" to the receiving state and that diplomatic immunities continue from the date of notification for a "reasonable period" or until the diplomat leaves the country.

This notification condition comports with longstanding principles of international law and state practice, which allowed diplomatic immunity to continue for a reasonable period after diplomatic service ended and thereby protected diplomats by giving them some breathing room to leave the country or to make other arrangements without exposure to the jurisdiction of the host country. *See, e.g.*, Emer de Vattel, The Law of Nations bk. IV, ch. IX § 125 (B. Kapossy & R. Whatmore eds., 2008) ("[W]hen he is obliged to depart on any account whatever, his functions cease: but his privileges and rights do not immediately expire. ... His safety, his independence, and his inviolability, are not less necessary to the success of the embassy in his return, than at his coming."). The notification standard ensures that decisions regarding the status of diplomats generally turns on the determinations of the sending state.[5] Luke T. Lee, Consular Law and

5. A receiving state can end the functions of a diplomat by following the requirements of Article 43(b), which requires notice to the sending state and then the provision of a "reasonable period" of continued immunity under Article 39.

Practice 95 (2d ed. 1991) (explaining that the notification standard respects state sovereignty by preventing "the receiving State [from] investigating the internal administration of the foreign consular organization in order to determine what status the [diplomatic or consular officer] holds"); *cf.* Vattel, The Law of Nations bk. IV, ch. IX § 78 (noting a sovereign's exclusive control over its diplomatic missions abroad). Thus, under the plain meaning of the Convention, reinforced by historical practice, diplomatic immunity continues at least until the host country is notified of a diplomat's termination.[6]

To support his interpretation, Muthana asserts that the term "inter alia" in Article 43 demonstrates that diplomatic immunity can cease either on the date the receiving state is notified of termination or the date of actual termination. Muthana argues that "inter alia" is a term of illustration, not of exclusion, so although notification is an example of when diplomatic immunity may cease, it is not the only standard. According to Muthana, Article

6. The parallel evolution of consular immunity also bolsters the interpretation of termination and notification as distinct standards for governing the cessation of diplomatic functions. Before 1963, an individual possessing consular immunity, as opposed to full diplomatic immunity, generally lost such immunity immediately upon termination, rather than notification. The Vienna Convention on Consular Relations, however, ended "[t]he differential treatment accorded to consuls," Lee, Consular Law and Practice 112, and replaced the termination standard with the notification standard, Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, art. 25(a). This history buttresses the conclusion that notification and termination are distinct periods for marking the end of diplomatic immunity.

43 does not foreclose an interpretation that diplomatic immunity ends as of the date of termination.[7] He reasons that, because termination is a possible standard, the State Department's decisions in 2005 and 2014 to issue a passport to Hoda were exercises of the Department's "discretion" to determine that Muthana did not have diplomatic immunity at the time of Hoda's birth.

Muthana's arguments, however, cannot be squared with the text, structure, purpose, and history of the Convention. As already discussed, the plain meaning of the Convention provides for a diplomat's functions to continue until notification of termination to the receiving state. The Convention's use of "inter alia" in Article 43 refers to other established circumstances that might end diplomatic functions, such as the death of a diplomat, the extinction of the sending or receiving state, a regime change, severance of diplomatic relations, and war. *See, e.g.*, 23 U.S.T. 3227,

7. Muthana's reliance on *Raya v. Clinton*, 703 F. Supp. 2d 569, 578 (W.D. Va. 2010), is misplaced because that case concerned a termination that occurred *after* notification. In *Raya*, Egypt notified the United States in advance that a diplomat's functions would terminate in a few days. This notification meant that the diplomat's immunity would continue until he left the country or the expiry of a reasonable period in which to do so. *Id.; see also* 23 U.S.T. 3227, arts. 39 & 43. Because notification occurred before termination, the termination date informed how long the diplomat's immunity would subsist for the "reasonable period" for him to leave the country. *See Raya*, 703 F. Supp. 2d at 578. Here Muthana was terminated before the United States was notified of his termination and the relevant legal question in this case is about the date of notification of termination, not about the length of a "reasonable period" for continued immunity after notification.

art. 39(3) (death of a diplomat), art. 45 (war and severance of diplomatic relations). Thus, "'*inter alia*', as used in the Vienna Convention indicate[s] also the existence of other conditions. All of these are now described." Lee, Consular Law and Practice 94. What "inter alia" does not include is allowing diplomatic immunity to turn on termination, a condition nowhere specified in the Convention and inconsistent with longstanding diplomatic practice.

Muthana's reading of coexisting termination and notification standards also runs afoul of one of the purposes of the Convention, namely to provide certainty and clarity in diplomatic relations. If either termination or notification of termination could govern the end of a diplomat's functions, diplomats could not be certain of the continuation of their immunity and host countries would not be certain of the status of lingering diplomats. *See id.* at 93 (explaining that international crises have arisen due to disagreement and confusion over when diplomatic immunity terminates). The Convention seeks to establish uniform standards for the diplomatic intercourse between nations in order to promote predictability and reciprocity. *See id.* (highlighting the importance of a "[c]lear statement of the condition under which the consular status of an individual terminates") (citation and quotation marks omitted); *see also* 23 U.S.T. 3227 pmbl. (explaining the Vienna Convention was created to ensure there is "an international convention on diplomatic intercourse" to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems"). As the government stresses here, the Convention "serves to protect United States diplomats

abroad, which is a critical national interest of the United States." Gov't Br. 6. An interpretation that renders the standard governing the end of diplomatic immunity uncertain would provide less protection to diplomats and the nations they represent and could undermine reciprocal treatment of American diplomats abroad.

Finally, although the State Department has some discretion over questions of diplomatic immunity even within the terms of the Convention,[8] the government does not suggest that such discretion was exercised here to deny Muthana diplomatic immunity before notification of his termination and thereby to recognize Hoda's citizenship by birth. To the contrary, the government maintains that at the time of Hoda's birth, Muthana continued to enjoy diplomatic privileges and immunities. In addition to its certification, the government presented several contemporaneous records corroborating that Muthana had diplomatic status after Hoda's birth. For example, it presented a file from the U.N. Office of Protocol reflecting that Muthana's diplomatic status continued until February 6, 1995. S.A. 109. The government maintains that the issuance of a passport to Hoda in 2005 and 2014 was in error. It would seem far afield of the judicial role to convert a government error into an exercise of executive discretion in the sensitive arena of diplomatic relations.

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8. For example, the Diplomatic Relations Act vests the President with the authority to "specify [diplomatic privileges] ... which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention," and he may do so "on the basis of reciprocity and under such terms and conditions as he may determine." 22 U.S.C. § 254c(a).

Consistent with historical practice, the Vienna Convention explicitly recognizes that diplomatic functions continue until notification of termination to the host country and that immunity is maintained for some "reasonable period" after such notification. We therefore hold that Muthana's diplomatic immunity continued at least until the United States was notified of his termination by Yemen.

B.

Whether Hoda and John Doe are citizens depends on whether Muthana enjoyed diplomatic immunity at the time of Hoda's birth. Under the Vienna Convention, the question turns on one dispositive fact: when was the United States notified that Muthana was no longer a diplomat? The State Department certified to the district court that the United States received notice of Muthana's termination on February 6, 1995. The district court accepted this certification as conclusive proof that Muthana had diplomatic immunity when his daughter was born in October 1994. Muthana attempts to rebut this conclusion by relying on a document obtained when applying for Hoda's passport. That letter states Muthana was "notified to the United States Mission" as a diplomat from October 15, 1990, to September 1, 1994. In light of more than a century of binding precedent that places the State Department's formal certification of diplomatic status beyond judicial scrutiny, we conclude the certification is conclusive and dispositive evidence as to the timing of Muthana's diplomatic immunity. With no dispute of material fact, summary judgment for the government was appropriate.

The Constitution vests the President with the sole power to "receive Ambassadors and other public Ministers." U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."), § 3 ("[H]e shall receive Ambassadors and other public Ministers."). The Reception Clause recognizes the President's authority to determine the status of diplomats, a fact long confirmed by all three branches. *See, e.g.*, Crimes Act of 1790 ch. IX § 25, 1 Stat. 112, 117-18; Presidential Power to Expel Diplomatic Personnel from the United States, 4A Op. O.L.C. 207, 208-09 (Apr. 4, 1980); *In re Baiz*, 135 U.S. 403, 432, 10 S. Ct. 854, 34 L. Ed. 222 (1890). Just as the President is vested with the "exclusive" power to recognize foreign governments, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 17, 135 S. Ct. 2076, 192 L. Ed. 2d 83 (2015), his "action in ... receiving ... diplomatic representatives is conclusive on all domestic courts," *Guar. Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 138, 58 S. Ct. 785, 82 L. Ed. 1224 (1938).

Recognizing the vesting of these diplomatic powers with the President, courts have afforded conclusive weight to the Executive's determination of an individual's diplomatic status. *See In re Baiz*, 135 U.S. at 432 (Courts may not "sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister."). Justice Bushrod Washington, riding circuit, explained why the Constitution compels this rule:

> The constitution of the United States having vested in the president the power to receive ambassadors and other public ministers, has necessarily bestowed upon that branch of the government, not only the right, but the exclusive right, to judge of the credentials of the ministers so received; and so long as they continue to be recognized and treated by the president as ministers, the other branches of the government are bound to consider them as such.

United States v. Ortega, 27 F. Cas. 359, 361, F. Cas. No. 15971 (C.C.E.D. Pa. 1825) (Washington, J.). This understanding has survived to the present day. *See Carrera v. Carrera*, 174 F.2d 496, 497-98, 84 U.S. App. D.C. 333 (D.C. Cir. 1949); *Zdravkovich v. Consul Gen. of Yugoslavia*, 1998 U.S. App. LEXIS 15466, 1998 WL 389086, at *1 (D.C. Cir. June 23, 1998) ("The courts are required to accept the State Department's determination that a foreign official possesses diplomatic immunity from suit.").[9]

In litigation implicating the status of diplomats, the courts and the Executive have developed a practice in

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9. This view is also uniformly maintained by our sister circuits. *See, e.g., United States v. Al-Hamdi*, 356 F.3d 564, 568, 573 (4th Cir. 2004); *Abdulaziz v. Met. Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984); *United States v. Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984) ("[R]ecognition by the executive branch—not to be second-guessed by the judiciary—is essential to establishing diplomatic status.").

which the Executive submits a certification of a diplomat's status to the court. For example, in *Carrera*, we 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: "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." 174 F.2d at 497. We noted that this was the process that was "approved by the Supreme Court in *In re Baiz*." *Id.; see also United States v. Al-Hamdi*, 356 F.3d 564, 569 (4th Cir. 2004); *Abdulaziz v. Met. Dade County*, 741 F.2d 1328, 1330-31 (11th Cir. 1984); 4A Op. O.L.C. at 208-09. In this case, the State Department has submitted under this longstanding process a formal certification that the United States was notified of Muthana's termination from his diplomatic position on February 6, 1995.

In response, Muthana argues that the certification is not conclusive as to the dates of immunity because the district court was required to weigh the additional evidence he submitted, which he claims at least creates a dispute of material fact sufficient to prevent summary judgment. Specifically, Muthana attached a 2004 letter from Russell Graham (the "Graham Letter"), in which the United States Mission to the United Nations informed the Bureau of Citizenship and Immigration Services that Muthana was "notified to the United States Mission" as a diplomat from October 15, 1990, to September 1, 1994. Muthana argues that the district court should have given more weight to the Graham Letter than the State

Department's certification, which was produced twenty years after Hoda's birth and after this lawsuit was filed. Because the Graham Letter was dated from before Hoda received her passport, Muthana suggests the Letter demonstrates that the State Department understood he was not in a diplomatic role when Hoda was born.

Even on its own terms, however, the Graham Letter creates no dispute over the relevant legal fact of when the United States was *notified* of Muthana's termination. The Graham Letter notes only two dates: Muthana's date of appointment as a diplomat, October 15, 1990, and his date of termination, September 1, 1994. The Graham Letter merely addresses the duration of Muthana's diplomatic position and when it was terminated. The Graham Letter says nothing about when the United States was notified of Muthana's termination and therefore when his diplomatic immunity ended.

In any event, we must accept the State Department's formal certification to the Judiciary as conclusive proof of the dates of diplomatic immunity. *See, e.g., Carrera*, 174 F.2d at 497. The Executive's determination cannot be attacked by "argumentative or collateral proof." *See In re Baiz*, 135 U.S. at 432. When a diplomat has been recognized by the Executive, "the evidence of those facts is not only sufficient, but in our opinion, conclusive upon the subject of his privileges as a minister." *Ortega*, 27 F. Cas. at 362. *See also Carrera*, 174 F.2d at 498 ("[T]he Secretary having certified Carrera's name as included in the list, judicial inquiry into the propriety of its listing was not appropriate."); *Al-Hamdi*, 356 F.3d at 573

(explaining that the State Department's certification "is conclusive evidence as to [] diplomatic status"). The State Department made a formal certification in this case, and it cannot be undermined by collateral evidence such as the Graham Letter, a document of unknown provenance that Muthana attached to his complaint.

By accepting the certification as conclusive, we decline to second-guess the Executive's recognition of diplomatic status. If courts could rely upon extrinsic evidence submitted by private parties to impeach the credibility of the Executive's formal certification, the certification would not be conclusive, and the courts rather than the Executive would have the final say with respect to recognizing a diplomat's immunity.[10] *See United States v. Pink*, 315 U.S. 203, 230, 62 S. Ct. 552, 86 L. Ed. 796 (1942) ("We would usurp the executive function if we held that that [the recognition] decision was not final and conclusive in the courts."). The district court properly held that the State Department's certification is conclusive proof of the dates of Muthana's immunity and declined Muthana's request to look behind the certification or to order discovery.

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10. Contrary to the concurring opinion, the State Department argued that its certification was "conclusive" and "dispositive." Gov't Br. 30-31. When discussing the effect of the Graham Letter at oral argument, the State Department argued that, "under *Baiz*," its certification "ha[s] a special status here." Oral Arg. Tr. 25:3-4; *see also* Oral Arg. Tr. 17:1-3. Indeed, the Department advanced in its brief the argument the court adopts today: "Under established law that has been consistent for over a century, when the Department of State certifies the diplomatic status of an individual, the courts are bound to accept that determination." Gov't Br. 25 (citation and quotation marks omitted).

Under the Vienna Convention, immunity continues at least until notification of termination, and the State Department here certified to the district court that notification of Muthana's termination occurred on February 6, 1995. Thus, Muthana possessed diplomatic immunity when his daughter was born in October 1994. As a consequence, Hoda Muthana was not born "subject to the jurisdiction" of the United States and is not a citizen by birth under the Fourteenth Amendment. *See Nikoi*, 939 F.2d at 1066. This also means that John Doe did not acquire citizenship based on parentage under 8 U.S.C. § 1401(g), since neither of his parents was a U.S. citizen when he was born.

C.

Muthana also seeks equitable relief. He maintains that the government should be equitably estopped from "stripping" Hoda of her U.S. citizenship. He contends the State Department previously determined that Muthana's diplomatic post terminated prior to Hoda's birth when it issued her a passport in 2005, recognizing her right to citizenship by birth.[11] Muthana also highlights the

11. Muthana sensibly does not rest his argument solely on the State Department's issuance and subsequent revocation of Hoda's passport. As Muthana acknowledges, a passport "does not confer citizenship upon its recipient." *Hizam v. Kerry*, 747 F.3d 102, 109 (2d Cir. 2014). The Secretary of State is authorized to "cancel any United States passport ... if it appears that such document was ... erroneously obtained from ... the Secretary," 8 U.S.C. § 1504(a), and the State Department cancelled Hoda's passport in 2016. Thus, the State Department's issuance, renewal, and revocation of Hoda's passport cannot settle her claim to citizenship.

unfairness created by the State Department's issuance and subsequent revocation of Hoda's passport. He explains that, had he known Hoda was not born a U.S. citizen, he would have pursued the naturalization process for her, as he did for himself, his wife, and their other children.

Although Muthana may have had a good faith understanding that his daughter acquired citizenship at birth, an error initially shared by the State Department, the law affords Muthana no relief. As we have explained, Hoda has never been a U.S. citizen and therefore the State Department revoked her passport, but could not strip her of a citizenship she never lawfully enjoyed. Even if the State Department previously recognized Hoda as a citizen as Muthana contends, the Executive can only recognize lawful citizenship, and Hoda did not acquire citizenship at birth because her parents had diplomatic immunity. We cannot now order the State Department to recognize Hoda's citizenship, because she is not a citizen under the Constitution or laws of the United States. The Executive has no authority to confer citizenship on Hoda outside of the naturalization rules created by Congress.[12]

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12. The Constitution vests the exclusive power "[t]o establish an uniform Rule of Naturalization" in Congress. U.S. CONST. art. I, § 8; *Chirac v. Chirac's Lessee*, 15 U.S. 259, 269, 4 L. Ed. 234 (1817) (Marshall, C.J.) ("[T]he power of naturalization is exclusively in congress."). The Executive cannot unilaterally confer citizenship. Congress may, however, grant citizenship through private bills, which are generally reserved for "cases that are of such an extraordinary nature that an exception to the law is needed." H.R. COMM. ON THE JUDICIARY, SUBCOMM. ON IMMIGR. & CITIZENSHIP, 116TH CONG., RULES OF PROC. & STATEMENT OF POL'Y FOR PRIV. IMMIGR. BILLS, at 3 (2019).

Nor do the courts have an equitable power to grant citizenship. "Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these limitations." *INS v. Pangilinan*, 486 U.S. 875, 885, 108 S. Ct. 2210, 100 L. Ed. 2d 882 (1988); *Fedorenko v. United States*, 449 U.S. 490, 506, 101 S. Ct. 737, 66 L. Ed. 2d 686 (1981) ("Congress alone has the constitutional authority to prescribe rules for naturalization.") (citing U.S. Const. art. I, § 8). Having held that Hoda is not a citizen under the Fourteenth Amendment and her son is not a citizen under 8 U.S.C. § 1401(g), we cannot confer citizenship through equity.

* * *

For the foregoing reasons, we affirm the district court's conclusion that Hoda Muthana and her son are not, and never have been, citizens of the United States.

IV.

Having held that Hoda and her son are not citizens, the district court properly denied Muthana's mandamus petition. Rather than grant the government summary judgment on this count, however, the district court should have dismissed Muthana's mandamus claims for lack of subject matter jurisdiction. Under 28 U.S.C. § 1361, "[a] court may grant mandamus relief only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Baptist Mem'l Hosp. v. Sebelius*,

603 F.3d 57, 62, 390 U.S. App. D.C. 251 (D.C. Cir. 2010) (cleaned up). "These three threshold requirements are jurisdictional; unless all are met, a court must dismiss the case for lack of jurisdiction." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189, 421 U.S. App. D.C. 123 (D.C. Cir. 2016). Thus, "mandamus jurisdiction under § 1361 merges with the merits." *Lovitky v. Trump*, 949 F.3d 753, 759, 445 U.S. App. D.C. 186 (D.C. Cir. 2020) (citation and quotation marks omitted).

Muthana sought a writ of mandamus obligating the United States to use all available means to return his daughter and grandson to the United States. To do so, he asked the court to "order the government to affect her return to the United States, including but not limited to the use of military or other government aircraft." Pl.'s Mem. in Support 21, *Muthana v. Pompeo*, No. 1:19-cv-00445-RBW (D.D.C. Mar. 1, 2019), ECF No. 15. Not even citizens have a clear right to assistance from the U.S. government in coming to U.S. territory, so aliens certainly have none. Accordingly, Hoda and her son lack any right to this relief. We therefore remand this claim and direct the district court to dismiss Muthana's mandamus petition for lack of subject matter jurisdiction.

V.

Finally, the district court correctly dismissed for lack of standing Muthana's claim for a declaratory judgment that he would not violate the prohibition on providing material support for terrorism if he sent money and supplies to his daughter and grandson. *See* 18 U.S.C.

§ 2339B. In pursuing this claim, Muthana proceeded in his personal capacity rather than as next friend to his daughter and grandson. The district court held that he lacked standing because he failed to identify a personal constitutional right that would be affected by the enforcement of the statutory prohibition on providing material support for terrorism. We agree.

To establish standing for a pre-enforcement challenge, a plaintiff must demonstrate first "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" and, second, that "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (citation and quotation marks omitted). Muthana's claim fails under the first requirement because he did not allege that the material support statute was unconstitutional as applied to his intended conduct. Instead, he argued that he would not violate the statute by sending support to Hoda because she was no longer engaged in terrorist activity.

Preenforcement review is not a vehicle to settle questions of statutory interpretation unconnected with matters of constitutional right. Instead, pre-enforcement review is limited and appropriate only to relieve a plaintiff from the necessity of "first expos[ing] himself to actual arrest or prosecution" before he can "challenge [the] statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974). The district court properly rejected Muthana's standing to seek review of the applicability of the material support statute absent

a claim of constitutional right.[13] Accordingly, we affirm the dismissal of this count for lack of subject matter jurisdiction.

* * *

Muthana focuses his lawsuit on the hardship resulting from the revocation of his daughter's passport and the State Department "stripping away" her citizenship. Yet Hoda was not born a United States citizen because her father possessed diplomatic immunity when she was born and therefore she was not born subject to the jurisdiction of the United States. *See* U.S. Const. amend. XIV, § 1. Hoda's son, who was born abroad to two non-citizen parents, could not have acquired citizenship. *See* 8 U.S.C. § 1401(g). Therefore, we affirm in part the grant of summary judgment to the government because neither Hoda Muthana nor John Doe have ever been citizens of the United States. We also affirm the district court's dismissal for lack of jurisdiction of Muthana's claim for pre-enforcement review of the material support for terrorism statute. Because the district court lacked jurisdiction over Muthana's petition for a writ of mandamus, it must be dismissed on remand.

So ordered.

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13. For the first time on appeal, Muthana argues that the material support statute unconstitutionally burdens his right to free association. Because it is "not the province of an appellate court to hypothesize or speculate about the existence of an injury Plaintiff did not assert to the district court," we decline to consider this new theory of standing on appeal. *Huron v. Cobert*, 809 F.3d 1274, 1280, 420 U.S. App. D.C. 455 (D.C. Cir. 2016) (cleaned up).

Tatel, *Circuit Judge*, concurring in the judgment: Although this case touches on a critical provision of the Fourteenth Amendment—the "Jurisdiction Clause"—it could have been resolved on the most routine of grounds. Both parties agree that this dispute turns on when the United States Mission received "notification" of Ahmed Ali Muthana's termination from his role as a diplomat with the Yemeni Mission to the United Nations. If the United States Mission received that notification before Muthana's daughter's birth in October 1994, she is a citizen of the United States; otherwise, she is not.

The record contains two documents purporting to speak to Muthana's diplomatic tenure: a 2004 letter from Russell Graham stating that Muthana was "notified to the United States Mission" as a diplomat from October 15, 1990, to September 1, 1994, and a 2019 letter from James Donovan stating that Muthana and his family possessed diplomatic immunity until February 6, 1995. But as even this court agrees, Majority Op. at 21-22, nothing in the Graham letter contradicts the Donovan letter's statement that the United States received notification of Muthana's termination on February 6, 1995. We therefore could have easily resolved this case on the ground that there is no genuine issue of material fact as to the date of notification, just as the government argued in the district court, just as Judge Walton concluded, and just as the government urges here. Indeed, we could have done so by judgment.

Yet the court reaches out to affirm on the basis of an argument not raised by the government and not surfaced by the court at oral argument: that we must ignore the Graham letter entirely and look to the contents of the

Donovan letter alone because that is the document the executive branch "formally" transmitted to the court in the course of litigation. Such a holding is not only unnecessary, but wrong.

The court begins its analysis with "a century of binding precedent that places the State Department's formal certification of diplomatic status beyond judicial scrutiny." Majority Op. at 19. So far so good. Over a century ago, the Supreme Court announced in *In re Baiz*, 135 U.S. 403, 10 S. Ct. 854, 34 L. Ed. 222 (1890), that because "we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister," "the certificate of the Secretary of State . . . *is the best evidence* to prove the diplomatic character of a person." *Id.* at 432, 421 (emphasis added). Were the Donovan letter the only State Department certification in the record, that uncontroversial statement of law would make this an even easier case.

The problem, of course, is that the record contains not one but two documents purporting to be certifications. Both the Graham and Donovan documents appear on the letterhead of the United States Mission, carry the United States seal, and bear the signature of the Minister Counselor for Host Country Affairs. Both, moreover, contain the same opening words: "This is to *certify that* . . . ." Joint Appendix 12, 18 (emphasis added). Based on only the four corners of the two documents, both would appear to qualify as the "best evidence to prove the diplomatic character of a person."

The court sidesteps the problem of dueling certifications by describing the Donovan document as a "formal certification to the Judiciary" submitted to the court pursuant to a "longstanding process." Majority Op. at 21-22. But the court never explains why the Donovan document, and not the Graham document, is "formal" despite both bearing the same indicia of institutional legitimacy. Nor does the court point to any evidence, record or otherwise, that a longstanding formal procedure for communicating the Executive's view of diplomatic status to the court exists. Instead, it simply *assumes* that the way such information reached the court in a handful of prior cases reflects a longstanding formal procedure. But those decisions describe only the facts before the court in each, not any formal procedure.

Without saying so outright, the court appears to adopt a novel rule: that the term "certification" somehow refers only to a "formal certification to the Judiciary" submitted by the Executive in connection with litigation. Majority Op. at 22. That rule suffers from two major flaws.

First, the government nowhere advances the court's theory—not in its brief and not at oral argument. *See Carducci v. Regan*, 714 F.2d 171, 177, 230 U.S. App. D.C. 80 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."). To be sure, as my colleagues observe, Majority Op. at 22 n.10, the government does contend that the Donovan letter was "conclusive" and "dispositive."

Appellees' Br. 30-31. But the government does not contend that the Donovan letter was the sole "certification," and thus "dispositive," *by virtue of* the Executive submitting it to the court during this case. The court nonetheless claims to divine such an argument from the government's statement that "when the Department of State certifies the diplomatic status of an individual, the courts are bound to accept that determination." Majority Op. at 22 n.10. That statement, however, says nothing about what makes one document and not another a "certification"—the critical question here—and certainly says nothing to suggest that submission during the course of litigation is dispositive. The government simply declares that the Donovan letter "ends the factual inquiry into Plaintiff's diplomatic status at the time of [his daughter's] birth," Appellees' Br. 25-26, before going on to argue that the Graham letter "failed to . . . refute th[e] date" contained in the Donovan document, *id.* at 31. I think it especially unwise to adopt a rule that turns on government submission of a document when the government itself advances no such rule.

Second, no case supports the court's new rule. Although the court seeks to house its theory in *In re Baiz*, 135 U.S. 403, 10 S. Ct. 854, 34 L. Ed. 222 (1890), and *Carrera v. Carrera*, 174 F.2d 496, 84 U.S. App. D.C. 333 (D.C. Cir. 1949), neither case speaks to how a court differentiates between two seemingly authentic State Department documents. To be sure, the Court held in *In re Baiz* that "the certificate of the Secretary of State . . . *is the best evidence* to prove the diplomatic character of a person." 135 U.S. at 421 (emphasis added). But in that case, the Court rejected the petitioner's claim to immunity

because there was no certification at all, so the question of submission was not before the Court. And in *Carrera*, the plaintiff challenged the only purported certification on the ground that it was submitted *ex parte* and therefore "not properly presented to the District Court." 174 F.2d at 497. Rejecting that argument, our court held that "the process by which the claim of immunity . . . was communicated to the court" was proper. *Id. Carrera*, in other words, suggests that a court can consider a State Department certification (which, per *In re Baiz*, is the "best evidence" of diplomatic status) no matter how that certification makes its way to the district court. Nothing in either opinion suggests that submission by the government during litigation somehow elevates one authentic State Department document over another; the issue was just not before either court.

Nor do decisions citing *In re Baiz* and *Carrera* address the issue of dueling documents. In *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328 (11th Cir. 1984), for example, the Eleventh Circuit relied on a State Department certification and rejected the argument that it should conduct an independent inquiry into whether the individual fell outside the protections of the Vienna Convention, or "was apparently eligible for, but had not been granted diplomatic status at the time he initiated [suit]." *Id.* at 1331. In *United States v. Al-Hamdi*, 356 F.3d 564 (4th Cir. 2004), the Fourth Circuit likewise concluded that, having been presented with a "State Department[] certification . . . based on a reasonable interpretation of the Vienna Convention," the court would "not review the State Department's factual determination that, at the

time of his arrest, Al-Hamdi fell outside of the immunities of the Vienna Convention." *Id.* at 571, 573. Neither case addressed the question we face here: what to do when there are two state department documents purporting to address diplomatic status.

Of course, our review is limited in this sensitive arena. Article II of the Constitution gives the President the power to "receive Ambassadors and other public Ministers," which is precisely why the Supreme Court crafted the "best evidence" rule in *In re Baiz*: to prevent the judiciary from "sit[ting] in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister." 135 U.S. at 432. Nothing in the Constitution or case law, however, requires that we credit the Executive's litigating position to the exclusion of all other Executive evidence, no matter how authoritative.

Under the court's new rule, had Muthana produced a document identical to Donovan's letter in every way except for stating "this is to certify that the United States Mission received notification not in February 1995, but in July 1994," it would have been improper to even *consider* that evidence. The case law does not require such a result, the government does not seek it, and we can straightforwardly resolve this case on the same ground Judge Walton did—that "the Graham certification . . . speak[s] to the date of [Muthana's] termination . . . , not the date when the United States Mission was *notified* of [his] termination." *Muthana v. Pompeo*, No. 19-cv-00445, 2019 U.S. Dist. LEXIS 218098, at *31 (D.D.C. Dec. 17, 2019).

APPENDIX B — REDACTED OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED DECEMBER 17, 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 19-445 (RBW)

AHMED ALI MUTHANA, INDIVIDUALLY, AND AS NEXT FRIEND OF HODA MUTHANA AND MINOR JOHN DOE,

Plaintiff,

v.

MICHAEL POMPEO, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF STATE, *et al*.,

Defendants.

December 9, 2019, Decided
December 17, 2019, Filed

UNDER SEAL

MEMORANDUM OPINION

The plaintiff, Ahmed Ali Muthana, brings this civil action individually and as the next friend of his daughter, Hoda Muthana, and minor grandson, John Doe, against

the defendants, Michael Pompeo, in his official capacity as the Secretary of the United States Department of State ("the "State Department"); Donald J. Trump, in his official capacity as the President of the United States; and William Barr, in his official capacity as the Attorney General of the United States (collectively, the "defendants"), seeking expedited declaratory, injunctive, and mandamus relief, *see* Expedited Complaint for Declaratory Judgment, Injunctive Relief and Petition for Writ of Mandamus ("Compl." or the "Complaint") ¶ 1, in his attempt to have the Court order that his daughter and grandson be permitted to enter the United States and that he be permitted to provide financial support to them while they are in Syria.

After denying the plaintiff's first request for expedited consideration of the relief requested by the plaintiff on March 11, 2019, *see* Order at 4 (Mar. 11, 2019), ECF No. 18, on November 14, 2019, the Court granted the Plaintiff's Renewed Motion for Expedited Ruling ("Pl.'s Mot." or the "renewed motion for expedited consideration") and granted in part and denied in part the defendants' Motion to Dismiss or, in the Alternative, for Partial Summary Judgment ("Defs.' Mot." or the "motion to dismiss"),[1] *see* Order at 1-2 (Nov. 15, 2019), ECF No.

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1. In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) the Declaration of James B. Donovan ("Donovan Decl."); (2) the Brief of Amicus Curiae Center for Immigration Studies in Support of Defendants/Respondents ("CIS Brief"); (3) the Brief of Amicus Curiae Immigration Reform Law Institute in Support of Defendants ("IRLI Brief"); (4) the Plaintiff's Memorandum

30. This Memorandum Opinion provides the legal basis for the Court's November 15, 2019 Order.

I. BACKGROUND

According to the plaintiff, "[p]rior to his daughter's birth, [the plaintiff] worked as a diplomat for the United Nations." Compl. ¶ 18. However, "[o]n June 2, 1994, the Yemeni Ambassador Al-Aashtal required [the plaintiff] to surrender his diplomatic identity card." *Id.* Thereafter, his daughter, Hoda Muthana, was born in New Jersey on [redacted] 1994. *See id.* ¶ 20. The plaintiff initially applied for a United States passport for his daughter in 2004. *See id.* ¶ 21. The State Department "initially questioned whether Ms. Muthana was eligible for a [United States] passport, based on [its] records showing her father's diplomatic status remained in effect until February 6, 1995," but after the plaintiff provided the State Department with a letter "confirm[ing] that the diplomatic status he had due to his employment at the [United Nations] was terminated prior to the time of Ms. Muthana's birth," Ms. Muthana's passport application was granted. *Id.*

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of Law in Opposition to Defendants' Motion to Dismiss or in the Alternative Motion for Partial Summary Judgment ("Pl.'s Opp'n"); (5) the first Declaration of Ahmed Ali Muthana (May 10, 2019) ("1st Muthana Decl."); (6) the Reply in Support of Defendants' Motion to Dismiss or, in the Alternative, for Partial Summary Judgment ("Defs.' Reply"); (7) the Plaintiff's Renewed Motion for Expedited Ruling ("Pl.'s Mot."); and (8) the second Declaration of Ahmed Ali Muthana (Oct. 31, 2019) ("2d Muthana Decl.").

In November 2014, Ms. Muthana withdrew from the university she was attending in Alabama and traveled to Syria. *See id.* ¶ 22. "After arriving in Syria, Ms. Muthana made her way into [Islamic State in Iraq and Syria ('ISIS')]-controlled territory." *Id.* ¶ 23. She married twice and had a son, John Doe, by her second husband. *Id.* ¶¶ 23-24. "On January 15, 2016, the United States issued a letter addressed to Ms. Muthana at her parents' residence, purporting to revoke her passport under 22 C.F.R. [§] 51.7 and 51.66[,]"

> assert[ing] for the first time that because the [United States] Permanent Mission to the United Nations [the ("United States Mission")], Host Country Affairs Section, had not been officially notified of [the plaintiff's] termination until February 6, 1995, [Ms. Muthana] was not "within the jurisdiction of the United States" at the time of her birth, and therefore [is] not a United States citizen pursuant to the Fourteenth Amendment to the Constitution.

Id. ¶ 25.

In December 2018, "Ms. Muthana fled ISIS-controlled territory," *id.* ¶ 30, and "subsequently surrendered to Kurdish forces, who transferred her to Camp al-Hawl in northeast Syria," *id.* ¶ 31. On January 15, 2019, the plaintiff's counsel wrote a letter to the United States Attorney for the Northern District of Alabama, "communicating [Ms. Muthana's] desire to return [to the United States] as well as her willingness to surrender to

United States authorities for any contemplated charges." *Id.* ¶ 33.

> On February 20, 2019, the . . . State Department declared on its website that "Ms. Hoda Muthana is not a [United States] citizen and will not be admitted into the United States. She 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."

Id. ¶ 35. That same day, President Trump "tweeted that 'I have instructed Secretary of State Mike Pompeo, and he fully agrees, not to allow Hoda Muthana back into the Country!'" *Id.* ¶ 36. Ms. Muthana and her son are "currently detained in Syria by Kurdish forces at Camp Roj, after being transferred from Camp al-Hol (also spelled al-Hawl)." Pl.'s Mot. at 2.

On February 21, 2019, the plaintiff instituted this civil action against the defendants, seeking expedited consideration "because of the precarious position of [the] [p]laintiff['s] [ ] daughter and grandson at Camp al-Hawl in Syria, under the authority of Kurdish forces" and the President's "intent to withdraw [United States] forces from the Syrian conflict." Compl. ¶ 15. On March 4, 2019, the Court denied the plaintiff's first request for expedited relief. *See* Order at 4 (Mar. 11, 2019), ECF No. 18. Thereafter, on April 26, 2019, the defendants filed their motion to dismiss. *See* Defs.' Mot. at 1. On November 1, 2019, the plaintiff filed his renewed motion for expedited consideration, "re-urg[ing] the need for expedited relief

in this matter, based on updated circumstances and newly discovered facts[,]" Pl.'s Mot. at 1, and the Court subsequently scheduled a hearing on the defendants' motion to dismiss, *see* Min. Order (Nov. 5, 2019). At the hearing on November 14, 2019, the Court granted the plaintiff's renewed motion for expedited consideration and granted in part and denied in part the defendants' motion to dismiss. *See* Order at 1 (Nov. 15, 2019), ECF No. 30. These motions are the subject of this Memorandum Opinion.

II. STANDARDS OF REVIEW

A. Motion for Expedited Consideration

Temporary restraining orders and preliminary injunctions[2] are "extraordinary remed[ies] that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Chaplaincy of Full Gospel Churches v. Eng.*, 454 F.3d 290, 297, 372 U.S. App. D.C. 94 (D.C. Cir. 2006) (quoting *Cobell v. Norton*, 391 F.3d 251, 258, 364 U.S. App. D.C. 2 (D.C. Cir. 2004)). In determining whether to issue a temporary restraining order or preliminary injunction, *see Hall v. Johnson*, 599 F. Supp. 2d 1, 3 n.2 (D.D.C. 2009) (noting that the

2. As the Court previously explained, although the plaintiff does not fashion his renewed request for expedited consideration of this case in the form of a motion for a temporary restraining order or preliminary injunction, the Court finds it appropriate to apply the same framework used to evaluate those types of motions to requests for expedited consideration. *See* Order at 3 (Mar. 11, 2019), ECF No. 18.

same standard applies to both), a plaintiff must establish "[(1)] that he is likely to succeed on the merits, [(2)] that he is likely to suffer irreparable harm in the absence of preliminary relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is in the public interest,[,]" *Sherley v. Sebelius*, 644 F.3d 388, 392, 396 U.S. App. D.C. 1 (D.C. Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)).

B. Rule 12(b)(1) Motion to Dismiss

"Federal [district] courts are courts of limited jurisdiction[,]" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994), and "[a] motion for dismissal under [Federal Rule of Civil Procedure] 12(b)(1) 'presents a threshold challenge to the [C]ourt's jurisdiction[,]'" *Morrow v. United States*, 723 F. Supp. 2d 71, 75 (D.D.C. 2010) (Walton, J.) (quoting *Haase v. Sessions*, 835 F.2d 902, 906, 266 U.S. App. D.C. 325 (D.C. Cir. 1987)). Thus, the Court is obligated to dismiss a claim if it "lack[s] [ ] subject-matter jurisdiction[.]" Fed. R. Civ. P. 12(b)(1). Because "[i]t is to be presumed that a cause lies outside [the Court's] limited jurisdiction," *Kokkonen*, 511 U.S. at 377, the plaintiff bears the burden of establishing by a preponderance of the evidence that the Court has subject-matter jurisdiction, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

In deciding a motion to dismiss for lack of subject-matter jurisdiction, the Court "need not limit itself to

the allegations of the complaint." *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 14 (D.D.C. 2001). Rather, the "[C]ourt may consider such materials outside the pleadings as it deems appropriate to resolve the question [of] whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000); *see Jerome Stevens Pharms., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253, 365 U.S. App. D.C. 270 (D.C. Cir. 2005). Additionally, the Court must "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting [the] plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Am. Nat'l Ins. C o. v. Fed. Deposit Ins. Corp.*, 642 F.3d 1137, 1139, 395 U.S. App. D.C. 316 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972, 364 U.S. App. D.C. 326 (D.C. Cir. 2005)). However, "the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge*, 185 F. Supp. 2d at 13-14 (alterations in original) (internal quotation marks omitted).

C. Rule 12(b)(6) Motion to Dismiss

A complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Thus, to survive a motion to dismiss under Rule 12(b)(6) for "failure to state a claim upon which relief may be granted[,]" Fed. R. Civ. P. 12(b)(6), the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

face[,]'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the [C]ourt to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556); *see Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276, 305 U.S. App. D.C. 60 (D.C. Cir. 1994) (noting that the plaintiff is entitled to "the benefit of all inferences that can be derived from the facts alleged"). Although the Court must accept the facts pleaded as true, legal allegations devoid of factual support are not entitled to this presumption. *See Kowal*, 16 F.3d at 1276. Along with the allegations made within the four corners of the complaint, the Court may also consider "any documents either attached to or incorporated in the complaint and matters of which [it] may take judicial notice." *Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997).

D. Rule 56 Motion for Summary Judgment

The Court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When ruling on a Rule 56 motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. *See Holcomb v. Powell*, 433 F.3d 889, 895, 369 U.S. App. D.C. 122 (D.C. Cir. 2006) (citing *Reeves v.*

Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)). The Court must therefore draw "all justifiable inferences" in the non-moving party's favor and accept the non-moving party's evidence as true. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The non-moving party, however, cannot rely on "mere allegations or denials[.]" *Burke v. Gould*, 286 F.3d 513, 517, 351 U.S. App. D.C. 1 (D.C. Cir. 2002) (quoting *Anderson*, 477 U.S. at 248). Thus, "[c]onclusory allegations unsupported by factual data will not create a triable issue of fact." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 185 F.3d 898, 908, 337 U.S. App. D.C. 343 (D.C Cir. 1999) (Garland, J., concurring) (alteration in original) (quoting *Exxon Corp. v. Fed. Trade Comm'n* , 663 F.2d 120, 126-27, 213 U.S. App. D.C. 356 (D.C. Cir. 1980)). If the Court concludes that "the non[-]moving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof[,]" then the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

III. ANALYSIS

The Court will first address the plaintiff's motion for expedited consideration and will then address the defendants' motion to dismiss or, in the alternative, for summary judgment.

A. The Plaintiff's Renewed Motion for Expedited Consideration

The plaintiff seeks "expedited relief in this matter, based on updated circumstances and newly discovered facts[.]" Pl.'s Mot. at 1. Specifically, the plaintiff alleges that "[t]he President of the United States most recently announced the withdrawal of [United States] troops from the area" where Ms. Muthana and her son are currently detained, *id.* ¶ 5, and argues that "the failure of the United States to urgently facilitate the return of Ms. Muthana and her son will cause immediate and irreparable harm by jeopardizing their ability in the future to return to the United States[,]" *id.* ¶ 6. The plaintiff further argues that "Ms. Muthana and Minor John Doe are in immediate danger of both physical violence and the already fragile health of Minor John Doe further declining." *Id.* ¶ 26.

The Court denied the plaintiff's previous request for expedited consideration in this matter on the ground that "the plaintiff ha[d] not submitted any competent evidence into the record (i.e., affidavits, exhibits) that would permit the Court to assess whether [his daughter] [and grandson], in fact, face[] irreparable harm[.]" Order at 4 (Mar. 11, 2019), ECF No. 18 (first alteration in original) (internal quotation marks omitted). In contrast, the plaintiff has now submitted evidence into the record demonstrating that Ms. Muthana and her son face ongoing threats to their health and safety, including a declaration by the plaintiff detailing communications with his daughter, *see* 2d Muthana Decl. ¶¶ 11, 14 (indicating that

); *id.* ¶ 16 ("My daughter has also communicated to me that because she made statements on video since she has been detained in Syria, which make it clear that she denounces ISIS,), and , *see* Pl.'s Mot., Ex. B ( ) at1( ). Based on the evidence now before the Court, and considering the perilous conditions that Ms. Muthana and her son are experiencing, the Court is now satisfied that irreparable harm does exist.[3] *See Vo Van Chu v. U.S. Dep't State* , 891

3. As to the remaining factors of the expedited consideration inquiry, the Court finds that expedited consideration of this matter would not prejudice the defendants in this case or harm the public at large, and therefore the third and fourth factors, the balance of the equities and the public interest, weigh in favor of expedited consideration. As to the first factor, the likelihood of success on the merits, although the Court ultimately finds that the plaintiff cannot prevail on the merits in this case, *see* Part III.B, *infra*, it nevertheless concludes that expedited consideration of this matter is appropriate, considering the demonstrated potential for

F. Supp. 650, 656 (D.D.C. 1995) ("The cumulative effect of these potential injuries—the ongoing threat to [the plaintiff's wife's] health and safety, the ongoing threat of repatriation, and the strong possibility that, should [the plaintiff's] be repatriated, she could not secure an exit visa—is enough the satisfy this Court that irreparable harm would exist here."). Accordingly, the Court grants the plaintiff's renewed motion for expedited consideration.

B. The Defendants' Motion to Dismiss

In analyzing the defendants' motion to dismiss, the Court will first address Counts One to Eight of the Complaint, which are brought by the plaintiff in his next

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irreparable injury to Ms. Muthana and her son. *See Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 317 F. Supp. 3d 555, 560-61 (D.D.C. 2018) ("[T]he Court may grant [the] [p]laintiffs' motion and issue an injunction if a 'serious legal question is presented, . . little if any harm will befall other interest persons or the public, and . . . denial of the order would inflict irreparable injury on [the] [plaintiffs].'" (fourth and fifth alterations in original) (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844, 182 U.S. App. D.C. 220 (D.C. Cir. 1977))); *see id.* at 563 (concluding that low likelihood of success on the merits was not fatal to the plaintiffs' motion for an injunction "[b]ecause [the] [p]laintiffs' appeal present[ed] serious legal questions on the merits, and because the likelihood of irreparable harm, the balance of the equities, and the public interest strongly favor[ed] interim relief" (internal quotation marks omitted)); *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 14 (D.D.C. 2014) ("find[ing] that [the plaintiff's] low likelihood of success on the merits [was] not fatal to its motion for a stay and injunction" where "the other factors weigh[ed] heavily in favor of [the plaintiff]").

friend capacity and relate to Ms. Muthana's and her son's claims to citizenship, and will then address Count Nine, which is brought by the plaintiff in his individual capacity and relates to the plaintiff's request for a declaratory judgment authorizing him to send money to Ms. Muthana to facilitate her return to the United States with her son without incurring liability pursuant to 18 U.S.C. § 2339B (2018).[4]

1. Counts One to Eight

The defendants seek to dismiss Counts One to Eight of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that "[t]he Court lacks jurisdiction over [the] [p]laintiff's next-friend claims" because the plaintiff has provided "no valid reason why [Ms.] Muthana has not herself brought this action or signed on to the allegations in the [C]omplaint." Defs.' Mot. at 2. The defendants also seek dismissal of Counts One to Eight pursuant to Federal Rule of Civil Procedure 12(b)(6), or alternatively, entry of summary judgment for the defendants on Counts One to Eight pursuant to Federal Rule of Civil Procedure 56, arguing that Counts One to Eight "rest on a fundamental and dispositive error—the assertion that [Ms.] Muthana is a [United States] citizen." Defs.' Mot. at 16. The Court will first address whether the Court has jurisdiction over these claims.

4. Section 2339B makes it unlawful to "provide[] material support or resources to a foreign terrorist organization[.]" 18 U.S.C. § 2339B(a).

a. Whether the Court Lacks Jurisdiction over the Plaintiff's Next Friend Claims

The defendants argue that dismissal of Counts One to Eight is appropriate pursuant to Rule 12(b)(1) because the "[p]laintiff does not satisfy either of *Whitmore*[*v. Arkansas*]'s requirements" for next friend status. Defs.' Mot. at 13 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)). The plaintiff responds that he "demonstrates appropriate grounds for next friend status in this case." Pl.'s Opp'n at 10 (capitalization removed). The Court agrees with the plaintiff that he has standing to bring claims as Ms. Muthana's next friend.

> The traditional prerequisites for next friend standing were laid out by the Supreme Court in *Whitmore v. Arkansas*: "First, a 'next friend' must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on h[er] own behalf to prosecute the action. Second, the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest. The burden is on the 'next friend' clearly to establish the propriety of his status and thereby justify the jurisdiction of the court." Although it is true that *Whitmore* focused largely on the habeas context, . . . it recognized that courts have

> applied it in other settings . . . . As such, the most natural reading of *Whitmore* is that next friend standing is *not* limited to habeas cases, but instead may be invoked if plaintiffs can sufficiently demonstrate its necessity.

Ali Jaber v. United States, 155 F. Supp. 3d 70, 75-76 (D.D.C. 2016) (citation omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 163-64, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)), *aff'd sub nom . Jaber v. United States*, 861 F.3d 241, 430 U.S. App. D.C. 82 (D.C. Cir. 2017).

As to the first prong of the *Whitmore* test, the defendants argue that the "[p]laintiff rests his assertion that he should be entitled to sue as his daughter's next friend on the claim that [Ms.] Muthana has had difficulty communicating with counsel[,]" Defs.' Mot. at 13 (internal quotation marks omitted), but the "[p]laintiff acknowledges that both he and his counsel have received communications from [Ms.] Muthana, and further acknowledges that [Ms.] Muthana has repeatedly [been interviewed] by Western news media," *id.* (third alteration in original) (citation and internal quotation marks omitted). The plaintiff responds that

> Ms. Muthana is being held by Kurdish forces and has little to no control over her ability to communicate with the outside world. She is not able to text or call home freely, and both [the] [p]laintiff and counsel for [the] [p]laintiff have no ability to initiate contact with her.

Pl.'s Opp'n at 10 (citation omitted). Additionally, in his first declaration submitted to this Court, the plaintiff states that "[w]henever [he] do[es] hear from [his] daughter, it is almost always from a new phone number, and she identifies that she is borrowing a phone from someone, or using the camp Administration phone[,]" 1st Muthana Decl. ¶ 39, and that he "ha[s] tried to reach her subsequently at each number from which [he] ha[s] received a message from her, but it has not been successful[,]" *id.* ¶ 40. Based on the plaintiff's representations, the Court concludes that Ms. Muthana is "sufficiently inaccessible to invoke next friend standing, at least at this stage of the proceedings." *Ali Jaber*, 155 F. Supp. 3d at 76 (concluding that, "on a motion to dismiss, [the] defendants' speculation [that the plaintiffs might be able to participate in court proceedings, even though they could not leave Yemen,] c[ould] [not] defeat [the] plaintiffs' sworn statement that[] . . . telephone contact was sporadic and difficult from Khashamir, and that [t]eleconferencing, internet[,] and other forms of communication were nearly impossible" (eighth alteration in original) (internal quotation marks omitted)).

As to the second prong of the *Whitmore* test, the defendants argue that the "[p]laintiff has not made an adequate showing that he is acting in accord with [Ms.] Muthana's interests." Defs.' Mot. at 14. Specifically, they argue that the "[p]laintiff alleges that [Ms.] Muthana wishes to return to the United States and is ready to face the consequences of her actions[,] . . . [b]ut [Ms.] Muthana's own past statements raise questions regarding whether [Ms.] Muthana and [the] [p]laintiff are aligned on this point." *Id.* The plaintiff responds that the "[d]efendants

rely on statements made by Ms. Muthana in 2015, nearly four years ago[,]" and that "[i]n all communications since leaving ISIS-controlled territory, Ms. Muthana has been clear and consistent that she regrets her actions and wishes to return to the United States [to] face justice." Pl.'s Opp'n at 12. Additionally, in his first declaration, the plaintiff states that his "daughter began communicating with [him] in late 2018 that she wishes to surrender to United States authorities, and is willing to be subject to any legal consequences under the United States judicial system" and "also communicated to [him] at that time that she wants to return to the United States[] with her son[,]" and that he "want[s] her to return to the United States with her son ([his] grandson) as well." 1st Muthana Decl. ¶¶ 31-33.

> Although [t]he existence of a significant relationship enhances the probability that a putative next friend knows and is dedicated to the [absent party's] individual best interests, courts have refused to infer—simply on the basis of a close familial tie—that a putative next friend actually represents the absent party's best interests. In other words, where a party's own views as to his best interests appear to conflict with those of a putative next friend, a court cannot substitute the views of the would-be next friend for those of the absent party, even where the purported next friend is a loving parent who only wants what he rationally believes to be in the best interests of his adult child.

Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 22 (D.D.C. 2010) (alterations in original) (citations and internal quotation marks omitted).

Here, however, not only has the plaintiff demonstrated that he has a significant relationship with Ms. Muthana, but he has also demonstrated that, since at least late 2018, their interests have been aligned. *See* 1st Muthana Decl. ¶¶ 31-33 (representing that Ms. Muthana has expressed a desire to return to the United States); *see also* Pl.'s Mot., Ex. B (Muthana Ltr.) at 4 (letter signed by Ms. Muthana stating that "[c]oming to Syria was a mistake" and making "a plea[] to be rescued"); *cf. Al-Aulaqi*, 727 F. Supp. 2d at 22-23 (concluding that the plaintiff lacked standing to bring claims as his son's next friend where his son was "mentally competent, and . . . ha[d] access to the courts within the meaning of *Whitmore*[,] [a]nd yet, during the past ten months that his name ha[d] allegedly appeared on 'kill lists,' [his son] ha[d] neither filed suit on his own behalf nor expressed any desire to do so"). Accordingly, based on the record in this case, the Court finds that the plaintiff, as Ms. Muthana's father, has a significant relationship with Ms. Muthana and that he is also representing Ms. Muthana's best interests.

Because the plaintiff has satisfied the two prongs of the test for next friend standing articulated in *Whitmore*, the Court concludes that the plaintiff has standing to bring Counts One to Eight as the next friend of Ms. Muthana and her son and therefore denies the defendants' motion to dismiss Counts One to Eight pursuant to Rule 12(b)(1).

b. Whether Ms. Muthana was Subject to the Jurisdiction of the United States at the Time of Her Birth

The defendants argue that dismissal of Counts One to Eight of the Complaint pursuant to Rule 12(b)(6), or alternatively, entry of summary judgment for the defendants on Counts One to Eight pursuant to Rule 56, is appropriate because Counts One to Eight "all rest on a fundamental and dispositive error—the assertion that [Ms.] Muthana is a [United States] citizen." Defs.' Mot. at 16. Specifically, they argue that the

> [p]laintiff alleges that he was terminated from his diplomatic position with the Yemeni Mission to the United States no later than September 1, 1994. It is undisputed that [(the "United States Mission")] was not formally notified of his termination, however, until February 6, 1995. Thus, under the plain terms of the Vienna Convention, and consistent with the practice of the United States regarding individuals accredited to permanent missions to the United Nations, [the] [p]laintiff's diplomatic status ceased on February 6, 1995—the date the receiving State (the United States, through [the United States Mission]), received notice of his termination. In the meantime, [Ms.] Muthana was born in New Jersey on [redacted] 1994.

Defs.' Mot. at 19-20 (citations and internal quotation marks omitted). The plaintiff disputes the defendants' interpretation of the Vienna Convention, arguing that "[i]mmunity for a diplomat and family members lasts only as long as the diplomatic position itself." Compl. ¶ 41; *see* Pl.'s Opp'n at 2 n.2 ("[The] [p]laintiff does not believe the date of official notice to be relevant to the end of his duties and therefore his entitlement to immunity[.]"). The plaintiff alternatively argues that, even if Ms. Muthana did not become a citizen at birth, "[t]he [United States] government should be equitably estopped from disputing Ms. Muthana's previously recognized citizenship based on its earlier determination." Pl.'s Opp'n at 33.

As a preliminary matter, the Court addresses whether the defendants' motion should be treated as a motion to dismiss Counts One to Eight pursuant to Rule 12(b)(6), or as one for summary judgment pursuant to Rule 56. As support for their Rule 12(b)(6) motion to dismiss, the defendants submitted the declaration of James B. Donovan, the current Minister for Host Country Affairs at the United States Mission; supporting exhibits to Mr. Donovan's declaration; and a State Department certification executed by Mr. Donovan. *See generally* Donovan Decl.; Defs.' Mot., Exhibit ("Ex.") B (certification by James B. Donovan (Mar. 1, 2019) ("Donovan Cert." or the "State Department certification")). Rule 12(d) instructs that, "[i]f, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the [C]ourt, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all

the material that is pertinent to the motion." Fed. R. Civ. P. 12(d); *see 3M Co. v. Boulter*, 842 F. Supp. 2d 85, 100 (D.D.C. 2012) ("The . . . Circuit agrees that Federal Rules 12 and 56 are properly construed to require that a speaking motion to dismiss must be treated as a motion for summary judgment."); *see also id.* at 97 (defining a "speaking motion" as a "motion[] attacking the merits of a pleader's claim by relying on matters outside the pleadings, such as affidavits or other factual material"). "A motion may be treated as one for summary judgment even if the parties have not been provided with notice or an opportunity for discovery if they have had a reasonable opportunity to contest the matters outside of the pleadings such that they are not taken by surprise." *Beach TV Props., Inc. v. Solomon*, 324 F. Supp. 3d 115, 123 (D.D.C. 2018) (quoting *Bowe-Connor v. Shinseki*, 845 F. Supp. 2d 77, 85 (D.D.C. 2012)). Because it is impossible for the Court to evaluate the merits of the defendants' Rule 12(b)(6) motion to dismiss without considering the materials submitted by the defendants, and because the plaintiff was not "taken by surprise[,]" *id.*, by the defendants' intention to convert their Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment, *see* Defs.' Mot. at 3 ("[T]he Court should dismiss the [C]omplaint in its entirety under Rule 12. In the alternative, the Court should grant summary judgment to [the][d]efendants on Counts [One] t[o] [Eight]."), the Court finds it appropriate to convert the defendants' Rule 12(b)(6) motion to dismiss Counts One to Eight into a Rule 56 motion for summary judgment on those counts of the Complaint.

The Court next addresses whether the plaintiff enjoyed diplomatic immunity at the time of Ms. Muthana's birth, and whether Ms. Muthana was therefore subject to the jurisdiction of the United States at the time of her birth. The Fourteenth Amendment to the United States Constitution provides that "[a]ll persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States[.]" U.S. Const. amend. XIV; *see also* 8 U.S.C. § 1401(a) (2018). "The jurisdiction clause 'was intended to exclude from its operation children of ministers . . . of foreign States born within the United States.'" *Nikoi v. Attorney Gen. of United States*, 939 F.2d 1065, 1066, 291 U.S. App. D.C. 237 (D.C. Cir. 1991) (alteration in original) (first quoting *Slaughter-House Cases*, 83 U.S. 36, 73, 21 L. Ed. 394 (1873); then citing *United States v. Wong Kim Ark.*, 169 U.S. 649, 693, 18 S. Ct. 456, 42 L. Ed. 890 (1898)). Thus, children born in the United States to a parent with diplomatic immunity at the time of their birth are not "subject to the jurisdiction" of the United States at the time of their birth. *See id.* ("Because one parent was a foreign official with diplomatic immunity when each child was born, the births did not confer United States citizenship."); *see also Raya v. Clinton*, 703 F. Supp. 2d 569, 576 (W.D. Va. 2010) ("[I]f the plaintiff's father was entitled to diplomatic privileges and immunities in this country on the date the plaintiff was born, the plaintiff is not a United States citizen."). "Pursuant to the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e, the governing law in the United States on the issue of diplomatic privileges and immunities is the Vienna Convention on Diplomatic Relations" (the "Vienna Convention"). *Raya*, 703 F. Supp. 2d at 576.

> The determination of whether a person has diplomatic immunity is a mixed question of law and fact. [The Court] review[s] such questions under a hybrid standard, applying to the factual portion of each inquiry the same standard applied to questions of pure fact and examining de novo the legal conclusions derived from those facts. Interpretation of an international treaty is an issue of law subject to de novo review.

United States v. Al-Hamdi, 356 F.3d 564, 569 (4th Cir. 2004) (citations and internal quotation marks omitted).

In determining whether the plaintiff enjoyed diplomatic immunity at the time of Ms. Muthana's birth, the Court must first determine whether the defendants' interpretation of the Vienna Convention, i.e., that the plaintiff's diplomatic immunity extended until the date when the United States Mission was notified of his termination, is reasonable. *See id.* at 570 ("[The Court] first must ensure that the State Department's certification was not based on an impermissible interpretation of the Vienna Convention. Then, [the Court] will examine the evidentiary effect of the State Department's certification made pursuant to that interpretation."). The Vienna Convention provides that "[t]he Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of: [ ] the appointment of members of the mission, their arrival and their final departure or the *termination of their functions* with the mission[.]" Vienna Convention, art. 10(1)(a), Apr. 18, 1961, 23 U.S.T. 3227 (emphasis added). It further provides that

> [w]hen 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.

Id. art. 39(2) (emphasis added). Article 43 of the Vienna Convention provides that

> [t]he 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;
>
> (b) on *notification* by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.

Id. art. 43 (emphasis added); *see Raya*, 703 F. Supp. 2d at 576.

> When interpreting a treaty or memorandum of understanding, [the Court] [is] guided by principles similar to those governing statutory interpretation. [The Court] must, of course, begin with the language of the [t]reaty itself. At this level, [t]he clear import of treaty language

> controls unless application of the words of the of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories. To the extent that the meaning of treaty terms are not plain, [the Court] give[s] great weight to the meaning attributed to treaty provisions by the [g]overnment agencies charged with their negotiation and enforcement . . . . *[W]here an agency has wide latitude in interpreting the [treaty], . . . [the Court] will defer to its reasonable interpretation.*

Iceland S.S. Co. Ltd.-Eimskip v. U.S. Dep't of Army, 201 F.3d 451, 458, 340 U.S. App. D.C. 1 (D.C. Cir. 2000) (fifth and twelfth alterations in original) (emphasis added) (citations and internal quotation marks omitted).

Here, the Court must "give 'substantial deference' to the State Department's interpretation of [the Vienna Convention], and in the context of diplomatic immunity, the receiving state always has had 'broad discretion to classify diplomats.'" *Al-Hamdi*, 356 F.3d at 571 (quoting *Abdulaziz v. Metro. Dade Cty.*, 741 F.2d 1328, 1331 (11th Cir. 1984)). Moreover, the plaintiff in this case "has failed to show how the [defendants'] interpretation violates the dictates of the Vienna Convention or infringes on the [Vienna] Convention's purpose of ensur[ing] the efficient performance of the functions of diplomatic missions as representing States." *Id.* (third alteration in original) (internal quotation marks omitted). Indeed, it is the plaintiff's—not the defendants'—interpretation of the

Vienna Convention that "violates the dictates of the Vienna Convention." *Id.* The plaintiff's interpretation of the Vienna Convention, i.e., that the plaintiff's diplomatic function came to an end on September 1, 1994, the date when his diplomatic position was terminated, violates traditional canons of construction by rendering Article 43 of the Vienna Convention, which states that "[t]he function of a diplomatic agent comes to an end[] . . . on *notification* by the sending State to the receiving State that the function of the diplomatic agent has come to an end[,]" Vienna Convention art. 43(a) (emphasis added), "insignificant, if not wholly superfluous[,]" *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) (stating that it is the Court's "duty to give effect, if possible, to every clause and word of a statute" (internal quotation marks omitted)); *see Pielage v. McConnell*, 516 F.3d 1282, 1288 (11th Cir. 2008) ("[T]reaties, like statutes, should be construed so that no words are treated as being meaningless, redundant, or mere surplusage."). Accordingly, the Court concludes that the defendants' interpretation of the Vienna Convention is reasonable.

Having concluded that the defendants' interpretation of the Vienna Convention is reasonable, the Court next turns to whether the defendants have provided conclusive proof of the date of notification of the plaintiff's termination, or whether further discovery is required. The defendants argue that "the Court should consider the [State] Department['s] . . . certification as conclusive proof of the dates [the] [p]laintiff enjoyed diplomatic immunity." Defs.' Reply at 12. The plaintiff responds that "[t]his Court, and [the] [p]laintiff, are not obligated

to accept the determination made by [the] [d]efendants regarding [the plaintiff's] diplomatic status, particularly when the [State] Department . . . documents contradict themselves and the [State] Department['s] . . . own prior determination." Pl.'s Opp'n at 32. The Supreme Court has "stated that because Article II of the Constitution gave the executive branch the power to send and receive ambassadors, 'the certificate of the [S]ecretary of [S]tate . . . is the best evidence to prove the diplomatic character of a person accredited as a minister.'" *Al-Hamdi*, 356 F.3d at 571 (quoting *In re Baiz*, 135 U.S. 403, 421, 10 S. Ct. 854, 34 L. Ed. 222 (1890)). Additionally, "[i]n cases of more recent vintage, circuit courts have continued to find the State Department's certification conclusive." *Id.* at 572 (collecting cases); *see id.* at 573 ("hold[ing] that the State Department's certification, which [was] based upon a reasonable interpretation of the Vienna Convention, [was] conclusive evidence as to the diplomatic status of an individual").

As support of their alternative motion for summary judgment in this case, the defendants submitted the State Department certification, executed by Mr. Donovan, which states that "[o]n February 6, 1995, the United Nations provided the [United States] Mission with official notification of [the plaintiff's] termination from the Yemeni Mission . . . . [The plaintiff] and his family enjoyed diplomatic agent level immunity until February 6, 1995." Defs.' Mot., Ex. B (Donovan Cert.); *see* Pl.'s Opp'n at 2-3 n.2. This certification, which, as the Court has already concluded, "is based upon a reasonable interpretation of the Vienna Convention, is conclusive evidence as to the

diplomatic status" of the plaintiff. *Al-Hamdi*, 356 F.3d at 573. Moreover, the defendants have provided additional records corroborating the State Department certification. *See* Donovan Decl., Ex. 1 (KARDEX Record for Ahmed Ali Muthana) (indicating that the plaintiff's diplomatic status was terminated on February 6, 1995); *id.*, Ex. 2 (TOMIS Record for Ahmed Ali Muthana) (same). Despite this documentation, the plaintiff responds that "the documents provided by [the] [d]efendants do not conclusively reveal the date on which the United States first learned of the end of [the plaintiff's] duties." Pl.'s Opp'n at 2 n.2. To counter the State Department certification, the plaintiff relies on a certification executed by Russell F. Graham, who previously served as the Minister Counsel of Host Country Affairs at the United States Mission, the position currently occupied by Mr. Donovan, "certify[ing] that . . . [the plaintiff] was notified to the United States Mission as a diplomatic member to the Permanent Mission of Yemen to the United Nations from October 15, 1990 to September 1, 1994." Pl.'s Opp'n at 2 n.2; *see* Compl., Ex. C (certification by Russell F. Graham (Oct. 18, 2004)) (the "Graham certification")). Additionally, the plaintiff argues that one of the exhibits submitted with Mr. Donovan's declaration raises a question as to the date when the United States Mission received official notification of the plaintiff's termination because it indicates that the plaintiff "left the [United States] Mission in September 1994[.]" Donovan Decl., Ex. 3 (termination list sent from United Nations Office of Protocol to United States Mission) (the "termination list")). However, both the Graham certification and the termination list speak to the date of the plaintiff's termination from the United

States Mission, not the date when the United States Mission was *notified* of the plaintiff's termination from the United States Mission. As discussed *supra*, it is the date of notification of the plaintiff's termination—not the date of the termination itself—that governs the diplomatic immunity inquiry, and thus the Graham certification and the termination list do not undermine the determination in the State Department certification that the United States Mission did not receive notice of the plaintiff's termination until February 6, 1995. Therefore, because the defendants have offered "conclusive evidence as to the diplomatic status" of the plaintiff at the time of Ms. Muthana's birth, *Al-Hamdi*, 356 F.3d at 573, which the plaintiff has failed to rebut, "th[e] Court may not go behind the State Department's determination that the plaintiff's father enjoyed diplomatic privileges and immunities . . . through [February 6, 1995], or permit the plaintiff to engage in further discovery on this issue." *Raya*, 703 F. Supp. 2d at 578. And, "[b]ecause the certification from the State Department conclusively establishes that the plaintiff[] [ ] enjoyed diplomatic privileges and immunities in the United States on the date that [Ms. Muthana] was born, [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,[5] *id.*, and John Doe is not a United

5. In Count Two, the plaintiff argues that Ms. Muthana became a citizen at birth based on "her *mother's* pending legal residency and prior legal entry into the United States." Compl. at 13 (emphasis added). However, this claim has no merit because, at the time of Ms. Muthana's birth, Ms. Muthana's mother was not a United States citizen and therefore, as the plaintiff's wife, she too enjoyed diplomatic immunity at the time of Ms. Muthana's

States citizen by virtue of being Ms. Muthana's child.[6]

Relying on *Magnuson v. Baker*, a Ninth Circuit case,

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birth. *See* Vienna Convention art. 37(1) ("The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36."); *see also Nikoi*, 939 F.2d at 1066 ("Because *one parent* was a foreign official with diplomatic immunity when each child was born, the births did not confer United States citizenship." (emphasis added)).

6. The following would be the legal basis for Ms. Muthana's son acquiring United States citizenship at birth:

> A person born abroad in wedlock to a [United States] citizen and an alien acquires [United States] citizenship at birth if the [United States] citizen parent has been physically present in the United States or one of its outlying possessions prior to the person's birth for the period required by the statute in effect when the person was born ([Immigration and Nationality Act] [§] 301(g), formerly [Immigration and Nationality Act] [§] 301(a)(7)[]). For birth on or after November 14, 1986, the [United States] citizen parent must have been physically present in the United States or one of its outlying possession for five years prior to the person's birth, at least two of which were after the age of fourteen.

Acquisition of U.S. Citizenship by a Child Born Abroad, U.S. Dep't of State — Bureau of Consular Affairs, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Acquisition-US-Citizenship-Child-Born-Abroad.html (last visited Dec. 9, 2019). However, this means of acquiring United States citizenship at birth does not apply here since Ms. Muthana is not a United States citizen.

see Pl.'s Opp'n at 35-36 (citing *Magnuson v. Baker*, 911 F.2d 330 (9th Cir. 1989)), the plaintiff argues that even if Ms. Muthana did not become a United States citizen at the time of her birth, the defendants "should be equitably estopped from disputing Ms. Muthana's previously recognized citizenship based on [the State Department's] earlier determination" that Ms. Muthana was a United States citizen. *Id.* at 33. Specifically, he alleges that "the United States, in recognition of Ms. Muthana's birthright citizenship, granted Ms. Muthana a United States passport in January 2005, and later renewed that passport in 2014." *Id.* at 34. He argues that the "defendants are prevented by estoppel from now disputing Ms. Muthana's citizenship[,]" *id.* at 33 (capitalization removed), because "[the plaintiff] and his daughter relied on this representation, and as a result did not take further action to procure or clarify her status in the United States, as they would have otherwise, and as [the plaintiff] did for [his] older children[,]" *id.* at 34. Additionally, he contends that "[t]here is no evidence to suggest that [the plaintiff] or his daughter (who was a minor at the time) acted in bad faith or presented anything but accurate information to the United States." *Id.* at 34. The defendants respond that "courts cannot grant citizenship through use of equitable powers[,]" Defs.' Reply at 18, and the "[p]laintiff's allegations establish that the [State] Department . . . did exactly what it was statutorily authorized to do: revoke an erroneous grant of a passport in a routine exercise of the Secretary of State's authority[,]" *id.* at 19.

At the outset, the Court notes that the plaintiff's reliance on *Magnuson* is misplaced. Although the Ninth

Circuit in *Magnuson* concluded that the Secretary of State could not revoke a previously-issued United States passport with a pre-revocation hearing "solely on the basis of 'second thoughts[,]'" *Magnuson*, 911 F.2d at 336,

> the legal landscape regarding cancellation of passports has changed substantially since *Magnuson* was decided in 1990. In 1994, Congress added a section to the Immigration and Nationality Act authorizing the Secretary of State to cancel passports and reports of birth if it appeared that they were obtained illegally, fraudulently, or erroneously.

Atem v. Ashcroft, 312 F. Supp. 2d 792, 799 (E.D. Va. 2004). Section 1504 of Title 8 of the United States Code provides that "[t]he Secretary of State is authorized to cancel any United States passport or Consular Report of Birth, or certified copy thereof, if it appears that such document was illegally, fraudulently, or erroneously obtained from, or was created through illegality or fraud practiced upon, the Secretary." 8 U.S.C. § 1504(a). "In light of Congress'[s] enactment of § 1504, the Ninth Circuit's conclusion [in *Magnuson*] . . . is no longer persuasive. This is so because Congress has now expressly authorized the Secretary of State to revoke passports in certain instances[.]" *Atem*, 312 F. Supp. 2d at 799.

Moreover, equitable relief is not otherwise available to Ms. Muthana in this instance. "Courts cannot grant citizenship through their equitable powers." *Hizam v. Kerry*, 747 F.3d 102, 110 (2d Cir. 2014) (citing *Immigration*

& Nationality Serv. v. Pangilinan, 486 U.S. 875, 885, 108 S. Ct. 2210, 100 L. Ed. 2d 882 (1988)); *see also Pangilinan*, 486 U.S. at 885 ("Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these limitations."). "When the State Department issues a [passport] it does not grant citizenship—it simply certifies that a person was a citizen at birth. Issuing or revoking a [passport] does not change the underlying circumstances of an individual's birth and does not affect an individual's citizenship status." *Hizam*, 747 F.3d at 107 (citing 8 U.S.C. § 1504(a)); *see Chacoty v. Tillerson*, 285 F. Supp. 3d 293, 298 (D.D.C. 2018) ("The issuance or rescission of a [passport] [ ], 'affect[s] only the document and not the citizenship status of the person.' That is because . . . passports[] do not confer citizenship; rather, they merely provide proof of one's status of as a citizen." (quoting 8 U.S.C. § 1504(a)). Therefore, the State Department's "[r]evo[cation] [of] [Ms. Muthana's] [passport] did not change h[er] citizenship status. Instead, it withdrew the proof of a status [that] [s]he did not possess." *Hizam*, 747 F.3d at 108. Thus,

> [b]ecause the [passport] does not confer citizenship, and because [Ms. Muthana] is plainly not a citizen, . . . [an] order [by this Court] that the State Department re-issue the [passport] [would] allow[] [Ms. Muthana] to maintain proof of citizenship without actually being a citizen . . . . Such an incongruous result cannot stand.

Id. at 110; *see Pangilinan*, 486 U.S. at 884 ("Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship." (quoting *Fedorenko v. United States*, 449 U.S. 490, 517, 101 S. Ct. 737, 66 L. Ed. 2d 686 (1988))). The Court must therefore deny the plaintiff's request for equitable relief.

Accordingly, because the defendants have offered conclusive evidence that the plaintiff enjoyed diplomatic immunity at the time of Ms. Muthana's birth and therefore Ms. Muthana did not acquire citizenship by birth and her son did not acquire citizenship as a child born abroad to a United States citizen, and equitable relief is not available to Ms. Muthana, the Court must grant summary judgment to the defendants on Counts One to Eight of the Complaint pursuant to Rule 56.

2. Count Nine

The defendants argue that Count Nine should be dismissed pursuant to Rule 12(b)(1) because the "[p]laintiff has not established standing" on Count Nine and "improperly seeks an advisory opinion." Defs.' Mot. at 40. Specifically, the defendants argue that the "[p]laintiff has not alleged that he has a constitutional right to provide support to [Ms.] Muthana, which is necessity to establishing standing under the rule of *Babbitt v. [United] Farm Workers*." Defs.' Reply at 24 (citing *Babbitt v. United Farm Workers*, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)). The plaintiff counters that "he wishes to provide assistance to his daughter and

grandson to assist with his daughter's exercise of her constitutional right to return to the United States[,] [ ] [which] fits within the framework contemplated in *Holder v. Humanitarian Law Project*[.]" Pl.'s Opp'n at 38 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)). However, the Court agrees with the defendants that the plaintiff does not have standing to bring Count Nine in his individual capacity.

> Where a plaintiff has yet to face prosecution under a statute he seeks to challenge, the Supreme Court, in *Babbitt v. United Farm Workers*, requires that he establish Article III standing by (1) "alleg[ing] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and (2) demonstrating that "there exists a credible threat of prosecution thereunder."

Ord v. District of Columbia, 587 F.3d 1136, 1140, 388 U.S. App. D.C. 378 (D.C. Cir. 2009) (alteration in original) (quoting *Babbitt*, 442 U.S. at 299).

The plaintiff's reliance on *Holder* is misplaced. As the defendants correctly note, unlike the plaintiffs in *Holder*, who "brought a pre-enforcement *constitutional challenge* alleging that 18 U.S.C. § 2339B violated their constitutional rights," Defs.' Reply at 25; *see Holder*, 561 U.S. at 10-11 ("claim[ing] that the material-support statute was unconstitutional . . . [because] it violated their freedom of speech and freedom of association under the

First Amendment" and "was unconstitutionally vague"), the plaintiff in this case does not challenge the legality of the statute; he merely seeks a declaratory judgment "that he may send money to ensure the survival of his daughter and grandson . . . without incurring liability under § 2339B[,]" Compl. at 27. Moreover, even assuming that the plaintiff is challenging the legality of the statute, he has not identified any personal constitutional right of his that would be affected. As the defendants correctly argue, the "[p]laintiff does not allege a constitutional right to transfer money abroad to an adult child." Defs.' Mot. at 41. And, because the plaintiff brings Count Nine individually, not in a next friend capacity, he cannot claim a violation of Ms. Muthana's purported constitutional rights to establish his own standing on this claim. Thus, the plaintiff fails to satisfy the first prong of the *Babbitt* pre-enforcement standing test. The Court therefore grants the defendants' motion to dismiss Count Nine of the Complaint pursuant to Rule 12(b)(1).

IV. CONCLUSION

Every judge at some point in his or her career will have to decide a case he or she wishes had not been assigned to him or her. This is one of those cases.

As the father of a daughter, the undersigned can appreciate the anguish the plaintiff is experiencing resulting from his daughter's conduct. Unfortunately, children all too often make bad decisions, and sometimes those decisions can be life-altering, which is the consequence in this case. And, as the father of a daughter,

the undersigned, if sympathy could rule the day, would have been tempted to provide at least some of the relief requested. However, emotions cannot play a role in the judicial decision-making process. Rather, adherence to law must control. That command—not the thousands of written, electronic, and telephonic communications directed to the undersigned, some of which can reasonably be construed as threats if the Court ruled in the plaintiff's favor, nor compassion for the plaintiff, his daughter, or his grandson—caused the Court to rule as it has. While these rulings provide no sense of gratification to the undersigned, the analysis of the current state of the law precludes reaching any other conclusions on the issues raised in this case.

Accordingly, for the foregoing reasons, the Court grants the plaintiff's renewed motion for expedited relief. The Court also grants in part and denies in part the defendants' motion to dismiss. Specifically, the Court grants the defendants' motion to dismiss to the extent that it seeks (1) entry of summary judgment for the defendants on Counts One to Eight for the Complaint pursuant to Rule 56 and (2) dismissal of Count Nine of the Complaint pursuant to Rule 12(b)(1), and denies the motion in all other respects.

SO ORDERED this 9th day of December, 2019.

/s/ Reggie B. Walton
REGGIE B. WALTON
United States District Judge