No. 21-489

In the Supreme Court of the United States

AHMED ALI MUTHANA, PETITIONER

v.

ANTONY BLINKEN, SECRETARY OF STATE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether courts may view the Department of State's certification that a foreign official possesses diplomatic privileges and immunities as conclusive and unreviewable evidence of that official's diplomatic status.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 985 F.3d 893. The opinion of the district court (Pet. App. 38a-75a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2021. By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on June 16, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner filed suit in the United States District Court for the District of Columbia, alleging that his daughter had acquired United States citizenship upon her birth and the State Department had thus wrongfully revoked her passport in 2016. The district court granted summary judgment in relevant part to the government. Pet. App. 38a-75a. The court of appeals affirmed. *Id.* at 1a-37a.

1. a. 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; see 8 U.S.C. 1401(a). Children born in the United States to foreign diplomats possessing a certain level of immunities, however, are not born "subject to the jurisdiction" of the United States and thus do not acquire U.S. citizenship at birth. See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 693 (1898).

The Vienna Convention on Diplomatic Relations (Vienna Convention), *done* Apr. 18, 1961, T.I.A.S. No. 7502, 23 U.S.T. 3227 (entered into force with respect to the United States Dec. 13, 1972), is a multilateral treaty that codifies the rules regarding diplomatic relations among its States-Parties, including with respect to diplomatic privileges and immunities. The United States incorporated the Vienna Convention, in relevant part, into domestic law in 1978. See Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (22 U.S.C. 254a *et seq.*).

The Vienna Convention provides that "[a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State" and, with certain exceptions, "shall also enjoy immunity from its civil and admini-

strative jurisdiction." Art. 31(1), 23 U.S.T. 3240. A foreign diplomat posted to his country's permanent mission to the United Nations is "entitled in the territory of the United States to the same privileges and immunities" afforded to a diplomat posted to a foreign government's embassy in the United States. Agreement Between the United States of America and the United Nations Regarding the Headquarters of the United Nations (U.S.-U.N. Headquarters Agreement), art. V, § 15, June 26, 1947, T.I.A.S. No. 1676, 61 Stat. 3416, 3427-3428 (entered into force Nov. 21, 1947).

A diplomatic agent's privileges and immunities begin at "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." Vienna Convention art. 39(1), 23 U.S.T. 3245. After the diplomatic agent's "functions * * * 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." Art. 39(2), 23 U.S.T. 3245. A diplomatic agent's "function * * * 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," or "(*b*) on notification by the receiving State to the sending State that * * * it refuses to recognize the diplomatic agent as a member of the mission." Art. 43, 23 U.S.T. 3247.

The process of recognizing diplomatic privileges and immunities for a foreign governmental official posted at his country's permanent mission to the United Nations begins when a foreign government informs the U.N. Office of Protocol of an official's appointment to the foreign government's permanent mission and requests

that the official be afforded diplomatic-agent-level privileges and immunities. See U.S.-U.N. Headquarters Agreement art. V, § 15, 61 Stat. 3427-3428. If the U.N. Office of Protocol accepts the foreign government's accreditation, it will notify the Host Country Affairs Section of the U.S. Permanent Mission to the United Nations (a component of the State Department), which will assess whether the foreign official satisfies the criteria to receive diplomatic-agent-level privileges and immunities. See C.A. App. 102-103 (Donovan Decl. ¶¶ 4-5). If so, the Host Country Affairs Section will provide the foreign government's permanent mission with a State Department Diplomatic Identification Card bearing the official's name and a statement that he is immune from criminal and civil jurisdiction in the United States. *Ibid.* (Donovan Decl. ¶ 5).

If the United Nations notifies the State Department in advance that a diplomat will be terminated from his position, the State Department will, consistent with the Vienna Convention, continue to extend privileges and immunities to the diplomat and the family members forming part of his household for a reasonable period after the termination date, which, in the State Department's practice, is typically 30 days. C.A. App. 104 (Donovan Decl. ¶ 14); see Vienna Convention art. 39(2), 23 U.S.T. 3245 ("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.").

Although the Vienna Convention generally requires a foreign government to notify the host country that a diplomat will be terminated from his post, see art. 10(1)(*a*), 23 U.S.T. 3234, the State Department often

receives notice of a diplomat's termination after the fact, C.A. App. 104 (Donovan Decl. ¶ 12). In those instances, the State Department continues to extend privileges and immunities to the diplomat and the family members forming part of his household until it receives official notification from the U.N. Office of Protocol that the diplomat has already been terminated from his post or until 30 days after the actual termination date, whichever is later. *Id.* at 104-105 (Donovan Decl. ¶¶ 11, 14-15). That practice is consistent with the United States' obligations under Articles 39 and 43 of the Vienna Convention, under which a sending State's termination of a diplomat from his post does not result in the receiving State's ceasing to extend privileges and immunities to him unless and until the receiving State has been notified of the termination. See Vienna Convention arts. 39(2) and 43, 23 U.S.T. 3245 and 3247. Although not relevant to this case, the Vienna Convention also allows a receiving State to terminate the privileges and immunities of a diplomatic agent if the receiving State sends notification that it "refuses to recognize the diplomatic agent as a member of the mission." Art. 43(*b*), 23 U.S.T. 3247; see art. 9(2), 23 U.S.T. 3234.

b. Petitioner was appointed as First Secretary to the Yemeni Permanent Mission to the United Nations on October 15, 1990. See Pet. App. 3a-4a; C.A. App. 102 (Donovan Decl. ¶¶ 2-3); C.A. App. 109. Consistent with the Vienna Convention and the U.S.-U.N. Headquarters Agreement, the United States then accorded petitioner and the family members forming part of his household diplomatic-agent-level privileges and immunities in the United States. Pet. App. 3a. Yemen terminated petitioner from his position as First Secretary on September 1, 1994. See *id.* at 4a; C.A. App. 105

(Donovan Decl. ¶ 18). On February 6, 1995, the United Nations notified the U.S. Permanent Mission that petitioner had been terminated from his position at the Yemeni Permanent Mission. See Pet. App. 4a, 65a-66a.

Petitioner's daughter, Hoda Muthana, was born in New Jersey in October 1994. Pet. App. 4a. In 2004, petitioner "applied for a United States passport for his daughter." *Id.* at 40a. Petitioner alleges that the State Department "initially questioned whether Ms. Muthana was eligible for a United States passport, based on its records showing [petitioner's] diplomatic status remained in effect until February 6, 1995." *Ibid.* (quoting Compl. ¶ 21) (brackets omitted). Petitioner further alleges (*ibid.*) that he responded by providing the State Department an October 18, 2004 letter from Russell F. Graham, then the Minister Counselor for Host Country Affairs at the U.S. Permanent Mission to the United Nations, stating 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." C.A. App. 12 (Graham Letter) (also available at D. Ct. Doc. 1-5, at 2 (Feb. 21, 2019)). That letter further states 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 in the territory of the United States." *Ibid.*

The State Department issued Ms. Muthana a United States passport in 2005, and renewed her passport in 2014. Pet. App. 4a. After her passport was renewed in 2014, Ms. Muthana "dropped out of college, traveled to Syria, and joined ISIS," the Islamic State in Iraq and Syria. *Ibid.* She was twice married to ISIS fighters and had a son by her second husband. *Id.* at 4a, 41a.

On January 15, 2016, the State Department sent Ms. Muthana a letter at her last known address notifying her that it had revoked her passport under 22 C.F.R. 51.62(a)(2) because the passport had been issued in error. See Pet. App. 4a, 41a. The letter explained that "[d]uring his tenure as a First Secretary at the Permanent Mission of the Republic of Yemen to the United Nations [petitioner] and family members forming a part of his household, including [Hoda Muthana], were accorded full diplomatic immunity pursuant to the U.N. Headquarters Agreement until the official notification date of his termination." C.A. App. 14 (also available at D. Ct. Doc. 1-6, at 2 (Feb. 21, 2019)). The letter acknowledged that petitioner was terminated from his position as First Secretary on September 1, 1994, but explained that "the U.S. Permanent Mission to the United Nations, Host Country Affairs Section was not officially notified of his termination from this position until February 6, 1995." *Ibid.* The State Department stated that petitioner therefore "remained in diplomatic status when [Ms. Muthana] was born" in October 1994, which meant that she was "born not subject to the jurisdiction of the United States and did not acquire U.S. citizenship at birth pursuant to the Fourteenth Amendment" or 8 U.S.C. 1401(a). C.A. App. 14-15.

2. a. Petitioner filed this suit in February 2019 individually and as putative next friend of Ms. Muthana and her minor son, seeking injunctive relief prohibiting the government from rescinding Ms. Muthana's and her minor son's asserted U.S. citizenship; a declaratory judgment stating that the purported revocation of Ms. Muthana's asserted U.S. citizenship deprived her of due process; and a writ of mandamus requiring the government to aid in the return of Ms. Muthana and her minor

son to the United States from abroad. See Compl. ¶¶ 39-116; Pet. App. 5a-6a. Petitioner also sought a declaratory judgment that, if he were to provide financial assistance to Ms. Muthana, that would not violate 18 U.S.C. 2339B (making it a crime to provide material support or resources to designated foreign terrorist organizations), see Compl. ¶¶ 117-128, but he does not raise that claim in the petition for a writ of certiorari.

In response, the State Department provided a certification from James B. Donovan, the Minister Counselor for Host Country Affairs at the U.S. Permanent Mission to the United Nations (the same position once held by Russell F. Graham), stating that, based on his review of contemporaneous State Department records, "[petitioner] and his family enjoyed diplomatic agent level immunity until February 6, 1995," the date that "the United Nations provided the U.S. Mission with official notification of [petitioner's] termination from the Yemeni Mission." C.A. App. 18 (Donovan Certification) (also available at D. Ct. Doc. 19-3, at 2 (Apr. 26, 2019)).

b. The district court granted summary judgment in relevant part to the government. Pet. App. 38a-75a. As relevant here, the court agreed that the government had reasonably interpreted the Vienna Convention as providing that "[petitioner's] diplomatic immunity extended until the date when the United States Mission was notified of his termination." *Id.* at 61a; see *id.* at 64a. The court found petitioner's contrary view—that petitioner's "diplomatic function came to an end on September 1, 1994, the date when his diplomatic position was terminated"—to "'violate[] the dictates of the Vienna Convention'" and "traditional canons of construction by rendering Article 43 of the Vienna Convention

* * * 'insignificant, if not wholly superfluous.'" *Id.* at 64a (citations omitted).

The district court further concluded that the Donovan Certification established "conclusive proof of the date of notification of [petitioner's] termination." Pet. App. 64a. The court observed that in *In re Baiz*, 135 U.S. 403 (1890), this Court "stated that because Article II of the Constitution gave the executive branch the power to send and receive ambassadors, 'the certificate of the Secretary of State is the best evidence to prove the diplomatic character of a person accredited as a minister.'" Pet. App. 65a (brackets, citation, and ellipsis omitted). The district court also stated that "in cases of more recent vintage, circuit courts have continued to find the State Department's certification conclusive." *Ibid.* (brackets and citation omitted).

The district court observed that the government "ha[d] provided additional records corroborating the State Department certification." Pet. App. 66a. The court cited the "KARDEX [r]ecord for [petitioner]" and the "TOMIS [r]ecord for [petitioner]," both of which "indicated that [petitioner's] diplomatic status was terminated on February 6, 1995." *Ibid.*; see C.A. App. 103-104 (Donovan Decl. ¶¶ 7-11) (describing the paper KARDEX and electronic TOMIS record systems). The court rejected petitioner's reliance on the Graham Letter, observing that it "speak[s] to the date of [petitioner's] termination from" his post, "not the date when the United States Mission was *notified* of [his] termination." Pet. App. 66a-67a.

3. The court of appeals affirmed. Pet. App. 1a-37a.

a. The court of appeals concluded that "the State Department's interpretation [of the Vienna Convention] comports with the plain meaning of the Convention

that diplomatic immunity ceases when the host country is notified of the termination." Pet. App. 14a; see *id.* at 13a-20a. The court explained that "[t]he text of the Convention," including Articles 39 and 43, "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." *Id.* at 15a. The court observed that "[t]his notification condition comports with longstanding principles of international law and state practice." *Ibid.*; see *id.* at 15a-16a & n.6.

The court of appeals rejected petitioner's contention that "the term 'inter alia' in Article 43 demonstrates that * * * although notification is an example of when diplomatic immunity may cease, it is not the only standard." Pet. App. 16a. The court explained that "[t]he 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," but "does not include * * * allowing diplomatic immunity to turn on termination, a condition nowhere specified in the Convention and inconsistent with longstanding diplomatic practice." *Id.* at 17a-18a. Petitioner's argument, the court concluded, "runs afoul of one of the purposes of the Convention, namely to provide certainty and clarity in diplomatic relations." *Id.* at 18a.

The court of appeals further concluded that "[i]n light of more than a century of binding precedent that places the State Department's formal certification of diplomatic status beyond judicial scrutiny," the Donovan Certification "is conclusive and dispositive evidence as to the timing of [Petitioner's] diplomatic immunity." Pet. App. 20a; see *id.* at 20a-26a. The court explained that in light of the Constitution's vesting of

diplomatic authority in the Executive, "[i]n litigation implicating the status of diplomats, the courts and the Executive have developed a practice in which the Executive submits a certification of a diplomat's status to the court," and that "this was the process that was 'approved by the Supreme Court in *In re Baiz*.'" *Id.* at 22a-23a (citation omitted). The court of appeals rejected petitioner's reliance on the Graham Letter, explaining that "the Graham Letter creates no dispute over the relevant legal fact of when the United States was *notified* of Muthana's termination." *Id.* at 24a. The court observed that "[t]he Graham Letter notes only two dates: [petitioner's] date of appointment as a diplomat, October 15, 1990, and his date of termination, September 1, 1994," but that the letter "says nothing about when the United States was notified of [petitioner's] termination and therefore when his diplomatic immunity ended." *Ibid.*

The court of appeals stated that "[i]n any event, [it] must accept the State Department's formal certification to the Judiciary as conclusive proof of the dates of diplomatic immunity." Pet. App. 24a. "If courts could rely upon extrinsic evidence submitted by private parties to impeach the credibility of the Executive's formal certification," the court explained, "the courts rather than the Executive would have the final say with respect to recognizing a diplomat's immunity," which "'would usurp the executive function.'" *Id.* at 25a (citation omitted).

Finally, the court of appeals rejected petitioner's contention that the government "should be equitably estopped from 'stripping' [Ms. Muthana] of her U.S. citizenship" given that the State Department issued her a passport in 2005. Pet. App. 26a; see *id.* at 26a-28a. The

court explained that "the law affords [petitioner] no relief" because "[t]he Executive has no authority to confer citizenship on [Ms. Muthana] outside of the naturalization rules created by Congress." *Id.* at 27a. The court further explained that the courts have no "equitable power to grant citizenship." *Id.* at 28a (citing *INS* v. *Pangilinan*, 486 U.S. 875, 885 (1988), and *Fedorenko* v. *United States*, 449 U.S. 490, 506 (1981)).

b. Judge Tatel concurred in the judgment. Pet. App. 32a-37a. He observed that "[b]oth parties agree that this dispute turns on when the United States Mission received 'notification' of [petitioner's] termination from his role as a diplomat." *Id.* at 32a. He further observed that "nothing in the Graham letter contradicts the Donovan letter's statement that the United States received notification of [petitioner's] termination on February 6, 1995." *Ibid.* In Judge Tatel's view, therefore, the court "could have easily resolved this case on the ground that there is no genuine issue of material fact as to the date of notification." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 13-27) that the State Department's official certification of his diplomatic status, the Donovan Certification, is not "reasonably considered conclusive and unreviewable evidence" of his diplomatic status because it purportedly "conflicts with the Department's own prior certification." Pet. i. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Furthermore, this case would be a poor vehicle in which to address the question presented because the Graham Letter on which petitioner relies does not conflict with the Donovan Certification's establishment of the date on

which the United States received notice of petitioner's termination as a diplomat. No further review is warranted.

1. a. The court of appeals correctly determined that the Donovan Certification is conclusive and unreviewable evidence of petitioner's diplomatic status at the time of Ms. Muthana's birth. The Constitution vests the President with "[t]he executive Power," including the sole power to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, §§ 1, 3. Just as "the President since the founding has exercised [the] unilateral power to recognize new states," *Zivotofsky* v. *Kerry*, 576 U.S. 1, 15 (2015), the Executive's "action * * * in receiving [a foreign government's] diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination," *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 138 (1938).

Recognizing that the Constitution vests diplomatic powers in the Executive, this Court has long held that courts may "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." *In re Baiz*, 135 U.S. 403, 432 (1890). The "certificate of the Secretary of State" has therefore been seen as "the best evidence to prove the diplomatic character of a person accredited as a minister by the government of the United States." *Id.* at 421 (summarizing a holding from *United States* v. *Liddle*, 26 F. Cas. 936 (Washington, Circuit Justice, C.C.D. Pa. 1808) (No. 15,598)). Courts "have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof." *Id.* at 432; see *id.* at 421-

422 (describing cases where courts deemed a "certificate" of the State Department as "proper to establish whether a person is a public minister within the meaning of the Constitution and the laws," and explaining that "the inquiry" into a person's diplomatic character "may be answered by such evidence, if adduced"). Consistent with this Court's decision in *Baiz*, the lower courts in this case permissibly viewed the Donovan Certification as conclusive evidence that the State Department accorded petitioner diplomatic privileges and immunities in the United States until February 6, 1995, when the United Nations notified the U.S. Mission to the United Nations that petitioner had been previously terminated from his diplomatic post.

Petitioner mistakenly contends (Pet. 23) that *Baiz* is inapposite because the facts of that case "do not square" with the facts of this case, insofar as the petitioner in *Baiz* "was unable to present *any* credible State Department certification at all." But the *Baiz* Court did "not care[] to dispose of" the case "upon the mere absence of technical evidence." 135 U.S. at 431-432. The Court relied instead on correspondence from the Secretary of State, which demonstrated that the State Department never recognized the petitioner as a diplomat. See *id.* at 429 (explaining that the Secretary's "correspondence disposes of the question before us"). So too here. The lower courts properly viewed the Donovan Certification and the accompanying declaration and exhibits as dispositive proof that petitioner enjoyed diplomatic privileges and immunities until February 6, 1995.

Petitioner contends (Pet. 24) that the Donovan Certification should not be controlling because there are "not one, but two separate and contradictory State Department certifications" here, "both produced for the

identical purpose of establishing [petitioner's] diplomatic status." Petitioner thus concludes (Pet. 25) that courts should "afford at least the same deference to the Graham Letter" as to the Donovan Certification. That contention and conclusion are incorrect and inapposite. As the court of appeals observed (Pet. App. 24a), the Donovan Certification, not the Graham Letter, is "the State Department's formal certification to the Judiciary" regarding "the dates of diplomatic immunity." And this Court made clear in *Baiz* that courts "have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof." 135 U.S. at 432.

Moreover, as the district court, the court of appeals, and Judge Tatel's concurrence recognized, "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." Pet. App. 32a; see *id.* at 24a, 67a. The Graham Letter states only that petitioner was a "diplomatic member of the Permanent Mission of Yemen to the United Nations from October 15, 1990 to September 1, 1994," and 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." C.A. App. 12 (emphasis added). The Graham Letter does not make any representations about petitioner's diplomatic immunity (or lack thereof) during *other* periods of time. The Donovan Certification, by contrast, makes clear that because the State Department did not receive notification of petitioner's termination until February 6, 1995, petitioner continued to be recognized by the State Department as entitled to immunity until

that date. Nothing in the Graham Letter contradicts that certification.

Petitioner's reliance (Pet. 25-26) on another letter from Mr. Graham in *Baoanan* v. *Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009), which petitioner contends uses language similar to that in the Graham Letter here, is misplaced. *Baoanan* addressed the distinct question of *residual immunity*, which is immunity that "shall continue to subsist" even after the diplomat's functions have ended "with respect to *acts performed* by such a person in the exercise of his functions *as a member of the mission*." Vienna Convention art. 39(2), 23 U.S.T. 3245 (emphases added). The only purpose of the letter in *Baoanan* was to establish that the allegedly unlawful acts occurred during the defendant's tenure as a member of the mission, thereby making him potentially "eligible for the residual immunity afforded by Article 39(2)" as long as the acts were "'official acts.'" 627 F. Supp. 2d at 162. The *Baoanan* court had no need to (and thus did not) consider—and the letter in that case (like the Graham Letter here) did not address—the separate question of how long the defendant continued to enjoy general diplomatic privileges and immunities following his termination from the mission.

Finally, petitioner asserts (Pet. 28) that the court of appeals' decision gives the Executive "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." That assertion is unsound. Congress has expressly authorized the Secretary of State "to cancel any United States passport * * * if it appears that such document was * * * erroneously obtained." 8 U.S.C. 1504(a); see 22 C.F.R. 51.62(a)(2). Here, the

State Department concluded, based on a thorough review of all available information and documentation, that Ms. Muthana erroneously obtained her passport because petitioner and family members in his household enjoyed diplomatic immunity at the time of her birth, and she therefore did not acquire birthright citizenship. See C.A. App. 105-106 (Donovan Decl. ¶¶ 17-19); see also *id.* at 111 (TOMIS record indicating that petitioner's "Termination Received Date" was "02/06/1995"). Petitioner's suggestion (Pet. 24) that the State Department was precluded from cancelling or revoking Ms. Muthana's passport because it "had all of the same evidence and information before it in 2004 as it does today" cannot be squared with Congress's recognition that passports are sometimes obtained in error, which is precisely why it has granted the Secretary of State the authority to cancel or revoke a passport whenever such an error "appears." 8 U.S.C. 1504(a).

Furthermore, to the extent petitioner contends (Pet. 28) that the cancellation of an erroneously obtained passport "alter[s] an individual's status" without "the protections of due process," that contention is incorrect. For one thing, Ms. Muthana had the opportunity to request a hearing to challenge the basis and evidence upon which the passport was revoked. 22 C.F.R. 51.71(h); see 22 C.F.R. 51.70-51.74 (2015); see also C.A. App. 15 (revocation letter informing Ms. Muthana of her right to a hearing). More importantly, Congress has made clear that the cancellation of a passport "shall affect only the document and not the citizenship status of the person in whose name the document was issued." 8 U.S.C. 1504(a). Here, the government has revoked Ms. Muthana's passport as having been erroneously obtained; it has not formally altered her citizenship status.

Cf. 8 U.S.C. 1451(a). And to the extent Ms. Muthana wishes to establish her citizenship status, Congress has provided procedures for her to use in pursuing that from the Executive. See 8 U.S.C. 1503.

b. Alternatively, petitioner contends (Pet. 15-21) that under the Vienna Convention, his diplomatic immunity expired upon his termination from the mission in September 1994, irrespective of when the State Department received notification of his termination. That contention is incorrect. Interpretation of a treaty "must, of course, begin with the language of the Treaty itself," and the "clear import of treaty language controls" as a general matter. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982); see *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699-700 (1988). "Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji*, 457 U.S. at 184-185; see *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1512 (2017) ("The Court also gives 'great weight' to 'the Executive Branch's interpretation of a treaty.'") (citation omitted). Accordingly, "because the State Department is charged with the responsibility of enforcing the Vienna Convention," courts should "give 'substantial deference' to the State Department's interpretation of that treaty's provisions." *United States* v. *Al-Hamdi*, 356 F.3d 564, 570 (4th Cir. 2004) (brackets and citation omitted); see *United States* v. *Li*, 206 F.3d 56, 63 (1st Cir.) (en banc), cert. denied, 531 U.S. 956 (2000).

Here, the Vienna Convention's text clearly supports the State Department's interpretation even without any deference. Article 39 provides that "[w]hen the func-

tions 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." Vienna Convention art. 39(2), 23 U.S.T. 3245. That text makes clear that a diplomat enjoys immunity *at least* until his "functions * * * have come to an end." *Ibid.* Article 43, in turn, explains in relevant part 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." 23 U.S.T. 3247. Under the plain text of Articles 39 and 43, therefore, a diplomat enjoys immunity at least until the receiving State has received notification of his termination or has taken action to terminate his status. Indeed, as the court of appeals observed, the Vienna Convention on Consular Relations, *done* Apr. 24, 1963, T.I.A.S. No. 6820, 21 U.S.T. 77 (entered into force with respect to the United States Dec. 24, 1969), deliberately "replaced the termination standard with the notification standard" for determining the duration of *consular* immunity, which "buttresses the conclusion that notification and termination are distinct periods for marking the end of diplomatic immunity." Pet. App. 16a n.6.

That interpretation is consistent with the purposes of the Vienna Convention on Diplomatic Relations and longstanding principles and practices of international law. See *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (adopting the interpretation that "is most faithful to the Convention's text, purpose, and overall structure"). The preamble to the Vienna Convention expressly states that "the purpose of [diplomatic] privileges and immunities is not to benefit

individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States," and that "an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations." Vienna Convention, preamble, 23 U.S.T. 3230; see *Abdulaziz* v. *Metropolitan Dade County*, 741 F.2d 1328, 1330 (11th Cir. 1984). The United States' practice of "not terminat[ing] a diplomat's privileges and immunities without official notice" furthers those purposes "because anything short of [official notification], such as reliance on hearsay about the status of a diplomat, could erroneously expose an accredited diplomat to the jurisdiction of the United States, when in fact, under applicable international law, he or she would enjoy immunities." C.A. App. 104-105 (Donovan Decl. ¶ 14).

Petitioner's reliance (Pet. 17-18) on the phrase "inter alia" in Article 43 is misplaced. As the court of appeals explained, the Convention's use of that phrase "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." Pet. App. 17a; see Vienna Convention art. 39(3) (death of diplomat) and art. 45 (war and severance of diplomatic relations), 23 U.S.T. 3245 and 3248; see also arts. 9(2) and 43(*b*), 23 U.S.T. 3234 and 3247 (declaring a diplomat *persona non grata*). Those established circumstances are well-known in international law or set forth in the Convention itself. See Pet. App. 17a-18a. Petitioner's reading of "inter alia" as requiring a host country to end a diplomat's privileges and immunities without official notification of his termination contravenes

not only the Convention's plain text, which does not provide for a date-of-termination rule, but also its purpose to "contribute to the development of friendly relations among nations." Vienna Convention, preamble, 23 U.S.T. 3230; cf. Luke T. Lee & John Quigley, *Consular Law and Practice* 85 (3d ed. 2008) (explaining in the consular-immunity context that under a termination rule, "the receiving State would be investigating the internal administration of the foreign consular organisation to determine a consul's status," which "would be neither feasible nor in accord with the prohibition against interference in the internal affairs of another State").

2. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. As explained above, the lower court's decision to give the State Department's certification conclusive weight as to petitioner's diplomatic status at the time of Ms. Muthana's birth followed this Court's decision in *Baiz*. And petitioner does not contest that every court of appeals to address the issue has adopted the same rule. See *Al-Hamdi*, 356 F.3d at 573 ("[W]e hold that the State Department's certification * * * is conclusive evidence as to the diplomatic status of an individual."); *Abdulaziz*, 741 F.2d at 1331 ("The courts have the right to accept the certificate of the State Department as to diplomatic status."); *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."); *Carrera* v. *Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949) ("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.").

Petitioner suggests (Pet. 18) that "[d]ecisions out of the Second, Seventh and D.C. Circuits accept and implement the * * * position that termination of duties, rather than receipt of notification, serves as the determinative trigger point for the end of diplomatic immunity." That suggestion is incorrect because it once again conflates residual immunity with the duration of general privileges and immunities following termination of diplomatic functions. Each case that petitioner identifies (Pet. 18-20) addressed the scope of a former diplomat's residual immunity, and therefore focused on whether the allegedly unlawful acts occurred during the defendant's tenure as a diplomat. See *Swarna* v. *Al-Awadi*, 622 F.3d 123, 134 (2d Cir. 2010); *United States* v. *Al Sharaf*, 183 F. Supp. 3d 45, 51 (D.D.C. 2016); *Baoanan*, 627 F. Supp. 2d at 162 (S.D.N.Y. 2009); *United States* v. *Wen*, No. 04-cr-241, 2005 WL 2076724, at *1 (E.D. Wis. Aug. 24, 2005); *United States* v. *Guinand*, 688 F. Supp. 774, 775 (D.D.C. 1988). None of those cases involved the distinct question of when the "function of [the] diplomatic agent comes to an end" for purposes of the general diplomatic privileges and immunities that affect the ability to acquire birthright citizenship. Vienna Convention art. 43, 23 U.S.T. 3247; see art. 39(2), 23 U.S.T. 3245.

3. In any event, this case would be a poor vehicle in which to resolve the question presented. Even if the Donovan Certification were not to be treated as conclusive proof of petitioner's diplomatic status at the time Ms. Muthana was born, nothing in the Graham Letter (or in the record in this case) contradicts the Certification's conclusion that the State Department did not

receive notification of petitioner's termination as a diplomat until February 1995. See p. 15, *supra*. And as the district court observed, Mr. Donovan's conclusion in the Certification, which was reiterated in his declaration, was based on the contemporaneously created KARDEX record, TOMIS record, and U.N. termination list, all of which unambiguously establish that the State Department was not notified of petitioner's termination as a diplomat until February 1995. See C.A. App. 105-106 (Donovan Decl. ¶¶ 17-19); see also *id.* at 109, 111-112, 114. As a result, the only reasonable conclusions to be drawn from the evidence in the record are that petitioner enjoyed diplomatic privileges and immunities until February 1995, that Ms. Muthana therefore did not acquire United States citizenship at birth, and that the State Department's revocation of her passport as having been erroneously obtained was justified. Accordingly, petitioner would not be entitled to relief even if the question presented were resolved in his favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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