

No. 21-11

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**In the Supreme Court of the United States**

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ARMAN ERITSIAN, PETITIONER

*v.*

MERRICK B. GARLAND, ATTORNEY GENERAL

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

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**SUPPLEMENTAL MEMORANDUM  
FOR THE RESPONDENT**

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ELIZABETH B. PRELOGAR  
*Solicitor General  
Counsel of Record  
Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

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Petitioner's first question presented (Pet. 9-13) seeks review of the court of appeals' decision to dismiss for lack of jurisdiction his petitions for review of the Board of Immigration Appeals' denials of his request for a waiver of inadmissibility in conjunction with adjustment of status and his subsequent motion to reopen his removal proceedings to re-adjudicate that request. In so holding, the court of appeals relied (Pet. App. 22-23, 31-32) on its decision in *Patel v. United States Attorney General*, 971 F.3d 1258 (11th Cir. 2020) (en banc), which interpreted 8 U.S.C. 1252(a)(2)(B)(i) to preclude judicial review of any aspect of the Attorney General's decision to grant or deny the listed forms of relief (including the waiver of inadmissibility at issue here), with the exception of constitutional claims and questions of law. See *Patel*, 971 F.3d at 1276; see also

8 U.S.C. 1252(a)(2)(D). In light of this Court’s grant of a petition for a writ of certiorari in *Patel* to resolve whether the Eleventh Circuit’s construction of Section 1252(a)(2)(B)(i) was correct, see *Patel v. Garland*, No. 20-979 (argued Dec. 6, 2021), the government originally recommended that the Court hold the present petition pending its decision in *Patel*. See Resp. Mem. 1-2 (filed Sept. 7, 2021).

Meanwhile, petitioner had filed a motion with the Board of Immigration Appeals to reopen his removal proceedings to re-adjudicate his requests for protection under the withholding-of-removal statute and the regulations implementing the Convention Against Torture. See Pet. 6 n.1 (noting the pending motion). On February 15, 2022, the Board granted that motion and remanded for the immigration judge to adjudicate those requests anew in light of changed conditions in the country of removal. See App., *infra*, 1a-3a.

As a result of the Board’s decision to reopen petitioner’s proceedings, a hold for *Patel* is no longer appropriate. A “final order of removal” is a statutory prerequisite to “[j]udicial review,” 8 U.S.C. 1252(a)(1); see 8 U.S.C. 1252(a)(5) and (b)(9), and the reopening of petitioner’s removal proceedings has rendered his removal order non-final. See *Nassar-Arellan v. U.S. Attorney Gen.*, 638 Fed. Appx. 892, 894-895 (11th Cir. 2016) (per curiam) (“[T]he government has reopened Victor’s removal proceedings, meaning there is no longer a final order of removal against him. We may only review an order of removal if it is a final order of removal. See 8 U.S.C. § 1252(a)(1). As there is no longer a final order of removal against Victor, we lack jurisdiction to review his appeal.”) (emphasis omitted); *Suharti v. U.S. Attorney Gen.*, 349 Fed. Appx. 443, 450

(11th Cir. 2009) (per curiam) (same); see also *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (same).

Even if this Court were, in light of its eventual decision in *Patel*, to vacate the court of appeals' determination that it lacked jurisdiction over petitioner's challenge to the denial of a waiver of inadmissibility, the court of appeals would still lack jurisdiction on remand to review the merits of petitioner's challenge. The Court should therefore deny the petition for a writ of certiorari, or grant the petition, vacate the judgment below, and remand to the court of appeals for that court to dispose of the case in light of its lack of jurisdiction.\*

Respectfully submitted.

ELIZABETH B. PRELOGAR  
*Solicitor General*

MARCH 2022

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\* The government continues to waive any further response to the petition unless this Court requests otherwise.

**APPENDIX**

**NOT FOR PUBLICATION**

U.S. Department of Justice  
Executive Office for Immigration Review  
Board of Immigration Appeals

[Filed: Feb. 15, 2022]

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MATTER OF:

Arman ERITSIAN, A078-664-545

Respondent

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ON BEHALF OF RESPONDENT: Kevin A. Gregg,  
Esquire

**IN REMOVAL PROCEEDINGS**

On Motion from a Decision of the  
Board of Immigration Appeals

Before: DE CARDONA, Temporary Appellate Immigration Judge<sup>1</sup>

DE CARDONA, Temporary Appellate Immigration Judge

This matter was before us on September 5, 2019, when we dismissed the respondent's appeal from the Immigration Judge's March 20, 2019, denial of his applications for relief and protection, and again on March 30, 2020, when we denied his prior motion to reopen. On

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<sup>1</sup> Temporary Appellate Immigration Judges sit pursuant to appointment by the Attorney General. *See generally* 8 C.F.R. § 1003.1(a)(1), (4).

May 7, 2021, the respondent, a native and citizen of Azerbaijan, filed the instant motion to reopen based on changed country conditions so he can reapply for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and for protection under the regulations implementing the Convention Against Torture (CAT). On June 14, 2021, he also filed a motion to deem his motion to reopen unopposed. The Department of Homeland Security (DHS) has not filed a response to the respondent's motions. The motion to reopen will be granted.

The respondent urges that reopening is warranted based on events that have transpired in his native Azerbaijan since the Immigration Judge's March 20, 2019, decision and our March 30, 2020 denial of his prior motion to reopen (Motion at 2-5, 7-9). Sections 240(c)(7), 240(c)(7)(C)(ii) of the Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. §§ 1003.2(c)(2), (c)(3)(ii) (providing an exception to the time limitation for motions to reopen seeking to apply or reapply for asylum or withholding based on changed conditions arising in the country of nationality or removal, if material evidence presented was unavailable and could not have been discovered or presented previously); *see also Matter of S-Y-G-*, 24 I&N Dec. 247, 252-58 (BIA 2007). Specifically, the respondent argues that due to the ongoing tension since the renewed conflict in September 2020, the conditions in Azerbaijan involving ethnic Armenians like himself have significantly worsened, which materially affect his eligibility for withholding of removal and protection under the CAT (Motion at 12-24).

Given the evidence submitted, which includes the two expert reports detailing the deteriorated conditions in

Azerbaijan and the other new, previously unavailable country conditions reports, as well as the lack of response from the DHS, we will grant the respondent's motion to reopen and remand the record to the Immigration Judge to provide him a further opportunity to pursue relief (Motion at 13-21, Tabs A-S). On remand, the Immigration Judge may take any necessary steps and allow additional evidence he deems appropriate. We express no opinion on the merits of the respondent's eligibility for relief and protection.

Accordingly, the following orders are entered.

**ORDER:** The respondent's motion to reopen is granted.

**FURTHER ORDER:** The record is remanded to the Immigration Court for further proceedings consistent with this order and for the issuance of a new decision.