No. 16-141

IN THE

Supreme Court of the United States

HYOSUNG D&P CO., LTD.,

Petitioner,

v.

UNITED STATES OF AMERICA, DIAMOND SAWBLADES MANUFS. COALITION, SH TRADING, INC., AND SHINAHAN DIAMOND INDUST. CO., LTD.

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

After the petition in this case was filed, this Court granted certiorari in *Gloucester County School Board v. G.G.*, No. 16-273, to address, among other questions: "If *Auer [v. Robbins*, 519 U.S. 452 (1997)] is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?" *See* Pet. i*, Gloucester County School Board v. G.G.*, No. 16-273. Because this petition raises a closely related question, and because the Court's resolution of *Gloucester County* could shed light on the correctness of the Federal Circuit's application of *Auer* deference in this case, the Court should hold this petition pending its decision in *Gloucester County*. Depending on the Court's decision in that case, the Court should then either: (1) remand in light of its resolution of the *Auer* question; or (2) grant this petition to further clarify *Auer*'s scope and prerequisites (particularly if the Court does not reach the *Auer* question in *Gloucester County*). The Government's vehicle objections and limited defense of *Auer*'s application to this case provide no basis for a contrary disposition.

I. This Petition Should Be Held For *Gloucester County School Board*.

The Government does not address whether the petition should be held for *Gloucester County*. But in other cases, it has recommended holds where the Court's decision in another case "could affect the analysis of [the] question" presented by the petition or if "it is possible that the Court's resolution of the

question presented in [the pending case] could have a bearing on the analysis of petitioner's argument," even if the cases do "not involve precisely the same question." U.S. BIO 7, *Yang v. United States*, No. 02-136. The Government does not deny that this standard is met in this case.

Nor could it. The School Board in *Gloucester County* has argued that *Auer* deference is unavailable because the position for which deference was sought was expressed in a document that "does not carry the force of law." Pet. i, *Gloucester County School Board v. G.G.*, No. 16-273. The petition in this case likewise challenges the availability of *Auer* deference to an agency position expressed in a form that indisputably does not carry the force of law. *See* Pet. i.[1]

At the same time, the School Board's argument that deference should not be given to an interpretation issued "in an effort to affect the outcome of a specific judicial proceeding," Petr. Br. 60, *Gloucester County School Board v. G.G.*, No. 16-273, applies with special force when, as in this case, a court defers to a position offered by the Government in a case defending an agency's allegedly unlawful conduct. *See* Pet. 22-23.

Finally, even if this case were not the best vehicle for resolving the *Auer* questions it raises, that

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[1] The United States suggests the Federal Circuit should be seen as deferring to an agency decision letter in another case, rather than to its litigation position in this case. *See* BIO 18-19. That is not correct. *See infra* 7-8. But even if it were, the Government admits that this case would raise the same question presented in *Gloucester County*. *See* BIO 19 n.6.

is no reason to deny petitioner the benefit of the decision in *Gloucester County* when it comes down.

II. The Government's Vehicle Objections Are Meritless.

The Government's claim that this case is a poor vehicle for providing clarity on *Auer*'s scope is wrong in any event.

A. The Panel Correctly Concluded That The Order Is Ambiguous.

The Government spends much of its brief arguing that all three members of the Federal Circuit panel were wrong in finding the Order ambiguous. BIO 13-17. That argument is unconvincing.

First, the Government cannot plausibly claim that the panel didn't believe its own conclusion on ambiguity. *Compare* BIO 13 (insisting the *Final Modification* "unambiguously excludes the investigation at issue here"), *with* Pet. App. 3a ("Commerce spoke ambiguously on the timing issue . . . ."). The Federal Circuit is perfectly capable of foregoing reliance on *Auer* when it finds the Government's argument unambiguously correct. To be sure, in finding agency interpretation reasonable, the panel pointed to aspects of the Order that support the Government's interpretation. But that will be true in any case presenting an *Auer* question, which only arises when there are significant arguments on both sides.

Second, the panel's ambiguity holding is plainly correct. After concluding its analysis, the Order ends with a "Timetable" section providing that the "Department will apply this final modification in all

current and future antidumping investigations as of the effective date." *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722, 77,725 (Dep't Commerce Dec. 27, 2006). The Acting Solicitor General does not deny that "investigations" is a term of art, or that as used in the statute and other regulations, it encompasses the entirety of the government's investigation. *See* Pet. 26-28; BIO 15. Nor does he dispute that the "investigation," so defined, ended in this case with the issuance of the final antidumping order, which occurred after the effective date of the Final Modification. *See* Pet. 28.

Instead, the Government relies heavily on the fact that in responding to a comment in the discussion leading up to its announcement of the operative rule, Commerce referred to "investigations *pending before the Department*." BIO 13 (emphasis added) (citation omitted). But the Government cannot claim that anything in the Order signals that the quoted formulation is to be given controlling significance, particularly over the broader formulation used in the Timetable section to express the operative rule. Instead, the Government argues that both articulations should be given "equal weight" while reading the Order "as a whole." BIO 17. But giving both articulations equal weight simply means there are indications in the Order pointing in different directions – the hallmark of ambiguity.

In any event, the Government's attempt to deny that the Timetable section contains the operative rule, *see* BIO 17, is unconvincing. The "Summary" at

the start of the Federal Register entry states that "[t]he schedule for implementing this change is set forth in the 'Timetable' section, below." 71 Fed. Reg. at 77,722. And in subsequent orders delaying the effective date of the new rule, Commerce used the formulation set forth in the Timetable section, omitting any reference to "pending before the Department." *See Antidumping Proceedings: Calculations of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 1,704, 1,704 (Dep't Commerce Jan. 16, 2007) ("The Department also will apply the final modification in all current and future antidumping investigations as of the effective date."); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3,783, 3,783 (Dep't Commerce Jan. 26, 2007) (same).

Third, as the petition observed, the Order said the agency was following past precedents in which Commerce had applied a rule change to "*all segments* pending as of the date of the change." Pet. 29 (quoting 71 Fed. Reg. at 77,725). And we explained that the word "segments" is also a term of art that encompasses the entire investigation, not just the part conducted by Commerce. Pet. 29-30. The Government offers not a word in response.

Fourth, the Government acknowledges that the Order also speaks of following the retroactivity model applied in litigation. BIO 15-16. And it does not deny that following that model would lead to applying the Final Modification to this case. *See* Pet. 29; BIO 15-16. Instead, the Government says that

reference to legal tradition should not "supersede the specific language" of the Order's operative provisions. BIO 16. But, as discussed, that language – at best – points in two different directions. The reference to litigation practices plainly reinforces that conclusion.

Fifth, the Government points to the Order's reference to seven then-pending cases, which number excluded this case. BIO 14-15. But as we've explained, it is unsurprising that the agency did not attempt to count cases that were final but might yet be revived on appeal. And when Commerce confronted a similar case involving Polyvinyl Alcohol from Taiwan (not included in the seven cases count because dismissed at the time of the Order, but later revived on appeal), Commerce viewed the reference to the seven then-pending cases as no bar to applying the Order to that case. *See* Pet. 31. As is the Government's wont, having no real answer, it buries its response in an entirely unconvincing footnote. *See* BIO 17 n.5. It says that the Federal Circuit explained away the apparent inconsistency, but that is not correct. The court concluded that Commerce could have thought the two cases were substantively distinguishable, such that the difference in treatment was not arbitrary under the APA. Pet. App. 14a-16a. But the Federal Circuit offered no answer to the point that the Polyvinyl Alcohol case proves that the "seven cases" argument is makeweight. *See id*.

Finally, the Government says that the Order's references to administrability eliminate any ambiguity. BIO 16. But the Government notably does not claim that our interpretation materially expands the universe of pending cases subject to the new rule, even though the Government has access to

that information and every reason to share it with the Court if the data actually substantiated its point.

B. The First Question Presented Is Squarely Presented.

The Government says this case presents a poor vehicle for deciding whether deference is owed to "the litigating position of an agency attorney" because the position advanced in this litigation is consistent with a paragraph in an agency decision letter issued in another matter. BIO 18. Not so, for several reasons.

First, to be clear, there is no claim that the agency decision in this case was applying the interpretation set forth in the decision letter the Government now cites, as that decision letter was issued *after* Commerce finally disposed of this case. *See Advanced Tech. & Materials Co. v. United States*, 2011 WL 3624674, at *7 (Ct. Int'l Trade 2011) (decision letter issued Dec. 14, 2009); Pet. App. 9a (Order in this case issued Nov. 4, 2009).

Second, the Government's suggestion that the Federal Circuit was deferring to the decision letter rather than the agency's litigating position is wrong. The court of appeals never mentions the letter, for the understandable reason that the Government never claimed deference to it, or even cited it in the course of litigation at the lower court or the Federal Circuit. The Government's only nod in the direction of the letter was its citation to a Court of International Trade decision arising from the other matter. *See* U.S. C.A. Br. 9-10, 15-16. But the Government cited that decision only as precedent agreeing with its litigating position, not as evidence of some underlying agency interpretation entitled to

Auer deference. *See id*. Accordingly, there is no reason why this Court could not take this case on the same understanding as the Federal Circuit – *i.e.*, that the interpretation for which *Auer* deference was sought was the position asserted in the agency's briefs.

Third, although the problems associated with deferring to agency litigating positions are particularly acute when the litigation position was developed by counsel rather than the agency, the first Question Presented does not presume that scenario. *See* Pet. i (asking only whether deference is due a position "*offered* by the agency's lawyers in a case in which the agency is itself a party" (emphasis added)); Pet. 21-23 (explaining why deferring to an agency position in a case in which the agency is a party, defending its own actions, is problematic on its own).

Fourth, even on the Government's premise that deference was afforded a low-level Commerce official's letter, this case squarely presents the fundamental conflict between *Auer* and the Administrative Procedure Act that arises when a court gives authoritative weight to an agency interpretation that lacks of the force of law. *See* Pet. 14-20; Petr. Br. 54-61, *Gloucester County School Board v. G.G.*, No. 16-273. Particularly if this Court does not resolve that conflict in *Gloucester County*, the Court should grant certiorari in this case to address it.

C. The Government's Remaining Vehicle Objections Are Meritless.

1. The Government asserts that the proper construction of the underlying Order is of "little if

any ongoing significance." BIO 19. But the Court would grant certiorari in this case to resolve the *Auer* question, which is an issue of indisputable and recurring importance. *See* Pet. 23-24.

Indeed, the question may be of increased significance now that a new administration is set to take charge of scores of federal agencies. New agency heads may be impatient to impose new policies (or repeal old ones) and tempted to short-circuit the APA process under the guise of issuing new interpretations of existing regulations.

2. Finally, the Government faults petitioner (BIO 20-21) for failing to ask the Federal Circuit to overrule *Auer* and this Court's cases applying *Auer* to agency litigating positions, *see, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994). The Government acknowledges that the Federal Circuit lacks the power to entertain such requests, but says that raising the issue anyway "might have afforded this Court the benefit of the court of appeals' views on the matter." BIO 21.

The Government does not say how this Court would benefit from the Federal Circuit explaining it lacked the power to overrule a Supreme Court decision, which is by far the most likely outcome of any such argument. But in any event, an issue is preserved for this Court's review so long as the court of appeals passed on it. *See* Pet. 25 & n.25. And as the petition noted, *Citizens United v. FEC*, 558 U.S. 310, 330 (2010), makes clear that by applying *Auer* in this case, the Federal Circuit necessarily passed on its continued validity. Pet. 25 & n.25. The Government does not even attempt to square its

assertion to the contrary with that precedent. BIO 21.

III. The Government's Limited Arguments On The Merits Reinforce The Need For Review.

The Government offers little response to the petitioner's arguments on the merits, and none of it provides a reason to deny review.

The Government offers almost no response to our showing that giving *Auer* deference to agency interpretations that lack the force of law is inconsistent with the design of the APA and this Court's *Chevron* jurisprudence. *See* Pet. 14-20; BIO 24-25. Instead, the Acting Solicitor General assures the Court that the inconsistency is nothing to worry about because there is "no reason to believe that agencies have attempted to side-step the APA's notice-and-comment requirements." BIO 24. This Court has not been so sanguine about the risk of abuse. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012). But more importantly, the problem *Auer* creates is not limited to encouraging vague regulations and intentional evasion of the APA. Even when acting in good faith, agencies' invocation of *Auer* still avoids the deliberative process the Congress intended the APA to ensure for agency actions that have the force of law.

The Government's vehicle objection illustrates the problem. The Final Modification was promulgated after extensive notice-and-comment proceedings that included consultation with members of Congress, affected industries, and other agencies concerned with the rule's impact on our international

obligations. *See* BIO 4-5, 4 n.1. That process led Commerce to change its mind on the important question of whether the rule change should apply to pending cases, or only to investigations initiated after the Order's effective date. *Id*. 5-6.

According to the Government, however, the decision whether the rule change applied to cases revived on appeal after the effective date of the rule change was conclusively resolved by a program manager in Office 9 of the Import Administration. That official made his decision without notice or comment from anyone other than the parties to that one particular case. Indeed, agency rules permit only parties directly interested in the particular dispute to participate in the administrative proceeding. *See* 19 C.F.R. § 351.309(c) (permitting only "interested part[ies]" to file briefs in an antidumping proceeding); *id*. § 351.102(b)(29) (defining "interested party" to include those involved in the manufacture, production, export, or import of the subject merchandise). For that reason, the letter's two-sentence analysis of the question does not address (much less reasonably reject) most of the arguments petitioner has made in support of its interpretation in this case. Nonetheless, the Government insists that this cursory decision by a low level functionary has the same legal force as a notice-and-comment rulemaking.

In a footnote, the Government asserts that all of this is fine because "*Auer* deference has justifications that do not apply to *Chevron* deference," *i.e.*, that an agency "is in a better position than other entities to reconstruct the purpose of the regulations it promulgated." BIO 25 n.7 (citation and internal

quotation marks omitted). It is doubtful that a program manager in Office 9 has any special insight into the intended meaning of this Order. But more importantly, there is no exception in the APA for when an agency revises regulations to clarify their original intended meaning. That is because Congress believed it important for agencies to act intelligently and deliberatively *whenever* they enact interpretations having the force of law, whether they are creating new rules or clarifying old interpretations. *Auer* conflicts fundamentally with that legislative decision by allowing agencies to bypass the notice-and-comment procedures Congress believed necessary to ensure such careful deliberation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held for *Gloucester County School Board v. G.G.*, No. 16-273, or granted plenary review.

Respectfully submitted,

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