

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.*

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

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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## PETITIONER'S SUPPLEMENTAL BRIEF

After considering this petition at its February 17, 2017 conference, the Court has held the case in abeyance, presumably pending the Court's disposition of *Gloucester County School Board v. G.G.*, No. 16-273. See Pet. Reply § I (urging hold).

Both *Gloucester County* and this case raised the question whether deference to an agency's interpretation of its own regulations under *Auer v. Robbins*, 519 U.S. 452 (1997), should extend to interpretations that do not carry the force of law and are advanced in an attempt to resolve pending litigation. See Pet. i (First Question Presented asking "Whether deference under *Auer v. Robbins*, 519 U.S. 452 (1997), should be afforded to the interpretation of an agency regulation offered by the agency's lawyers in a case in which the agency is itself a party"); Pet. i, *Gloucester County School Board v. G.G.*, No. 16-273 ("If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?"). This Court subsequently vacated the Fourth Circuit's decision in *Gloucester County* and remanded for further proceedings, thereby precluding the Court from resolving the *Auer* question in that case.

This case presents the Court an opportunity to resolve the *Auer* question it deemed in need of review when it granted certiorari in *Gloucester County*. See Pet. Reply § II. The question posed by petitioner is

closely related to the one the Court was unable to reach in *Gloucester County*. See *id.* 2-3.<sup>1</sup> While the Government has quibbled over whether the agency position in this case was developed by its lawyers in the course of this litigation, or instead should be seen as having been adopted by a low level functionary at the agency in a decision letter, it has never contested that the interpretation (whatever its source) lacks the force of law, giving rise to the central objection raised by petitioner in *Gloucester County* and petitioner here. See Pet. Reply 7-8, 10-12.

The briefing in the *Gloucester County* case has reinforced the need for this Court to resolve the *Auer* question now. The outpouring of amicus briefs specifically addressing the *Auer* question demonstrates the broad importance of the question and the profound disagreement over its proper disposition throughout the courts, the practicing bar, and members of the academy. See, e.g., Br. Pacific Legal Found. et al 7 (“Judges on the Second, Fifth, Sixth, and Seventh Circuit Courts of Appeals have also expressed significant concerns regarding the role and scope of *Auer* deference.”); Brief for the Cato Institute, Professors Jonathan H. Adler, James F.

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<sup>1</sup> To the extent there is a material difference between the Questions Presented in the two cases, and the Court desired to do so, the Court could rephrase the Question Presented here to match the Question granted in *Gloucester County* precisely. Cf. BIO 19 & n.8 (arguing that facts of the case present the question whether *Auer* deference is owed an agency opinion letter and acknowledging that “whether *Auer* deference may extend to an unpublished agency letter is currently pending before the Court in *Gloucester County School Board v. G.G.* (No. 16-273)”).

Blumstein, Richard A. Epstein, And Michael W. McConnell, and Cause Of Action Institute § I (urging Court to “Conform *Auer* Deference to the Rules of *Chevron* Deference”); Brief Of Professors Dean Ronald A. Cass, Christopher C. Demuth, Sr., and Christopher J. Walker § II (urging that *Auer* deference be limited to decisions authorized by clear grants of discretion); Br. Wisconsin Institute For Law & Liberty § II.A (arguing that “Applying *Auer* Deference to Informal Agency Guidance is Incompatible with the Protections States Are Supposed to Be Afforded in the Federal Political Process”).

Although the Court had good reason to forego deciding the *Auer* question in *Gloucester County* given the agencies’ intervening change in position, nothing in that development has altered the certworthiness of the *Auer* question presented in that case, and now presented here. At the same time, the more routine nature of the underlying dispute over the meaning of the agency regulation in this case makes it exceedingly unlikely that a similar development would arise in this case.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted review.

Respectfully submitted,

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