No. 16-141

# In the Supreme Court of the United States

HYOSUNG D&P CO., LTD., PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

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

## BRIEF FOR THE UNITED STATES IN OPPOSITION


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## QUESTIONS PRESENTED

1. Whether *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), *Auer* v. *Robbins*, 519 U.S. 452 (1997), and other decisions approving judicial deference to an agency's interpretation of its own regulation should be overruled.

2. Whether deference may be afforded to an agency interpretation of its own regulation if that interpretation is advanced in litigation in which the government is a party.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 809 F.3d 626. The opinion of the United States Court of International Trade (Pet. App. 18a-91a) is unreported but is available at 2013 WL 5878684.

## JURISDICTION

The judgment of the court of appeals was entered on December 14, 2015. A petition for rehearing was denied on March 1, 2016 (Pet. App. 112a). On May 18, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2016. On June 15, 2016, the Chief Justice further extended the time within which to file a petition to and including July 29, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. a. The federal antidumping statute, 19 U.S.C. 1673 *et seq.*, authorizes the Department of Commerce (Commerce) to impose a tariff known as an "antidumping duty." 19 U.S.C. 1673. Such a duty "shall be imposed" when two conditions are met: (1) the Secretary of Commerce determines that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value"; and (2) the United States International Trade Commission (ITC) determines that domestic industry is, or is likely to be, materially harmed "by reason of imports of that merchandise or by reason of sales * * * of that merchandise for importation." *Ibid.*; see 19 U.S.C. 1677(1) and (2).

Commerce may initiate an "antidumping duty investigation" on its own initiative or in response to a petition filed by certain "interested part[ies]." 19 U.S.C. 1673a(a) and (b); see 19 C.F.R. 351.102(b)(30) (defining "investigation"). In carrying out an investigation, Commerce makes a "preliminary determination," and then a "final determination," of whether "the subject merchandise is being, or is likely to be," sold in this country "at less than its fair value." 19 U.S.C. 1673d(a)(1); see 19 U.S.C. 1677(34) (defining such a sale as "dumping"); see also 19 U.S.C. 1673b(b); 19 C.F.R. 351.205(a), 351.210(a).

To make those determinations, Commerce calculates the "normal" value of the imported goods and compares that price with the export price (or constructed export price)—that is, the price at which the imported goods are sold in the United States or for export to the United States. See 19 U.S.C. 1677a, 1677b(a). Commerce makes that comparison by using

the "[a]verage-to-average method"—which "involves a comparison of the weighted average of the normal values with the weighted average of the export prices * * * for comparable merchandise"—unless it determines that another method is appropriate in a particular case. 19 C.F.R. 351.414.

If Commerce makes an affirmative final determination of dumping, it issues an antidumping duty order only if the ITC—which uses an analogous set of procedures—makes a separate affirmative final determination of material injury to domestic industry. 19 U.S.C. 1673d(a)(1), (b)(1) and (c)(2); see 19 C.F.R. Pt. 207; see also 19 C.F.R. 351.211(a) (issuance of an antidumping duty order "ends the investigative phase of a proceeding"). The amount of the duty imposed in such an order is equal to "the amount by which the normal value exceeds the export price * * * for the merchandise," also known as the "dumping margin." 19 U.S.C. 1673, 1677(35).

An interested party may challenge a final determination by Commerce or the ITC in the United States Court of International Trade (Court of International Trade). See 19 U.S.C. 1516a(a)(2)(A); 28 U.S.C. 1581(c). That court's rulings are appealable to the Federal Circuit. See 28 U.S.C. 1295(a)(5). Judicial proceedings may result in affirmative final determinations from Commerce and the ITC being separated in time. That may occur if (for example) Commerce issues an affirmative final determination, the ITC issues a negative final determination, the ITC's determination is contested at the Court of International Trade, and that court's ruling causes the ITC to issue an affirmative final determination on remand.

b. In 2005, a World Trade Organization (WTO) panel found that an aspect of Commerce's method of calculating dumping margins was inconsistent with the obligations of the United States under WTO agreements. See *United States—Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R (Oct. 31, 2005); see also *United States—Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R (May 9, 2006) (upholding the panel's determination). Under the method in question, known as zeroing, "negative dumping margins (*i.e.*, margins of sales of merchandise sold at nondumped prices) are given a value of zero and only positive dumping margins (*i.e.*, margins for sales of merchandise sold at dumped prices) are aggregated." *Union Steel* v. *United States*, 713 F.3d 1101, 1104 (Fed. Cir. 2013) (citations omitted); see also, *e.g.*, *Corus Staal BV* v. *Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (sustaining use of zeroing by Commerce), cert. denied, 546 U.S. 1089 (2006); *Timken Co.* v. *United States*, 354 F.3d 1334, 1340-1345 (Fed. Cir.) (same), cert. denied, 543 U.S. 976 (2004).

In 2006, Commerce responded to the WTO's finding by commencing a proceeding under Section 123 of the Uruguay Round Agreements Act, which establishes a procedure for considering a change to an agency regulation or practice to implement certain WTO reports. See 19 U.S.C. 3511, 3533.[1] On March 6, 2006,

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[1] Domestic law takes precedence over WTO agreements or a WTO decision interpreting them, see 19 U.S.C. 3512(a), but statutory methods exist for bringing U.S. law into compliance with a WTO determination. Pursuant to 19 U.S.C. 3533, a "regulation or practice may not be amended, rescinded, or otherwise modified" to implement such a determination "unless and until" a number of

Commerce proposed to stop "mak[ing] average-to-average comparisons without providing offsets for non-dumped comparisons." 71 Fed. Reg. 11,189 (Mar. 6, 2006). Commerce further proposed to apply that change "in all investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of the Department's final notice of the new weighted average dumping margin calculation methodology." *Ibid.*

On December 27, 2006, after receiving comments, Commerce issued the "final modification" to its "methodology," which announced that Commerce would "no longer" use zeroing. 71 Fed. Reg. 77,722, 77,723 (*Final Modification*).[2] Commerce also stated that, "[a]fter careful consideration" of the comments and "weighing" of the "administrative burdens," it would "apply the final modification adopted through this proceeding" not only to future investigations but also "to all investigations pending before the Department as of the effective date." *Id.* at 77,725; see *ibid.* (stating in the "Timetable" section of the *Final Modification* that "[t]he Department will apply this final

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steps have been taken, including consultation with "the appropriate congressional committees" and with "relevant private sector advisory committees"; publication of "the proposed modification and the explanation for the modification" in the *Federal Register* with an opportunity for public comment; and allowance of a period during which "the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate" may take a non-binding vote "to indicate the agreement or disagreement of the committee" with the proposed regulatory change. 19 U.S.C. 3533(g).

[2] In 2010, Commerce amended the *Final Modification* to correct "ministerial" errors not relevant to this case. 75 Fed. Reg. 14,126 (Mar. 24, 2010).

modification in all current and future antidumping investigations as of the effective date"). The *Final Modification* set an effective date of January 16, 2007, which was later extended to February 22, 2007. See *ibid.*; 72 Fed. Reg. 3783 (Jan. 26, 2007).

Commerce explained that "applying this final modification to all investigations pending before the Department w[ould] not create any undue administrative burden" because there were only "seven ongoing antidumping investigations." 71 Fed. Reg. at 77,725; see *ibid.* (discussing whether Commerce would need to "gather any new information in those investigations"). Commerce also explained that applying the new methodology to such pending investigations "w[ould] not prejudice any of the parties to those proceedings" because "[a]ll of the currently pending investigations were initiated as a result of petitions filed after the date of the Department's proposed modification" in March 2006, and the parties in those investigations therefore "had notice of the Department's intention to modify" the relevant methodology and "sufficient time to * * * comment on the application of this approach prior to the final determination in the investigation." *Ibid.*; see *ibid.* ("In those investigations in which the Department will have reached a preliminary determination prior to the effective date of this notice, the Department will provide parties with notice and an opportunity to comment on the application of this methodology on the record of the investigation.").

2. This case involves an antidumping duty investigation of diamond sawblades imported from Korea. In 2005, the Diamond Sawblades Manufacturers' Coalition (DSMC) petitioned Commerce to impose antidumping duties on certain imported diamond saw-

blades. See *Diamond Sawblades Mfrs. Coal.* v. *United States*, 626 F.3d 1374, 1376 (Fed. Cir. 2010). "Commerce and the [ITC] initiated antidumping investigations in response to the petition." *Ibid.*

a. Commerce determined that the imports in question were being sold in the United States at less than fair value. In December 2005, it published a preliminary determination of dumping. See 70 Fed. Reg. 77,135 (Dec. 29, 2005). On May 22, 2006—seven months before the *Final Modification* was issued, and nine months before the *Final Modification*'s ultimate effective date—Commerce published a final determination of dumping. See 71 Fed. Reg. 29,310. In making both of those determinations, Commerce employed the zeroing methodology of calculating dumping margins. See Pet. App. 7a.

Shortly thereafter, the ITC made a final determination that the domestic industry was not materially injured, or threatened with such injury, by importation or sales of the sawblades in question. See 71 Fed. Reg. 39,128 (July 11, 2006); see also 70 Fed. Reg. 43,903 (July 29, 2005) (preliminary ITC determination reaching opposite result). When DSMC challenged that final determination in the Court of International Trade, the court remanded to the ITC for further proceedings. See *Diamond Sawblades Mfrs. Coal.* v. *United States*, 32 C.I.T. 134 (2008). On remand, the ITC changed its determination and concluded that a material threat to the domestic industry existed. See 33 C.I.T. 48, 48 (2009). On January 13, 2009, the Court of International Trade sustained that conclusion. See *id.* at 48, 67.

When Commerce did not then immediately publish an antidumping duty order, DSMC petitioned the

Court of International Trade for a writ of mandamus. The court granted the writ and directed Commerce to publish the order. See *Diamond Sawblades Mfrs. Coal.* v. *United States*, 650 F. Supp. 2d 1331, 1334 (Ct. Int'l Trade 2009). On November 4, 2009, Commerce complied. See 74 Fed. Reg. 57,145. The order did not reassess the relevant dumping margins; it simply employed the margins that Commerce had already calculated. See *ibid.*

b. i. After the antidumping duty order was issued, petitioner filed a complaint in the Court of International Trade challenging Commerce's use of the zeroing methodology to calculate petitioner's dumping margin.[3] See Pet. C.A. Br. 9. Petitioner contended that Commerce should have recalculated the dumping margin, using the new methodology discussed in the *Final Modification*, before issuing the antidumping duty order.

The Court of International Trade rejected that contention. Relying on the reasoning of earlier decisions that had dealt with the applicability of the *Final Modification*, see *Advanced Tech. & Materials Co.* v. *United States*, 2011 WL 3624674 (Ct. Int'l Trade Aug. 18, 2011); *Advanced Tech. & Materials Co.* v. *United States*, 2011 WL 5191016 (Ct. Int'l Trade Oct. 12, 2011), the court concluded that the relevant matter—in which Commerce had rendered a final determination in May 2006—was not "pending before the Department" of Commerce at the time the *Final Modification* became effective in early 2007. See Pet. App. 84a-85a (quoting *Final Modification*); see *id.* at 86a

[3] That complaint was consolidated with a pending complaint by DSMC that challenged aspects of Commerce's 2006 final determination. See Pet. C.A. Br. 5, 9; U.S. C.A. Br. 6.

("If a party believed Commerce should have included a particular * * * investigation within the section 123 determination as one of those 'pending' before Commerce, the party had the opportunity to challenge that in a separate proceeding.").

The Court of International Trade explained that Commerce's interpretation of the *Final Modification* was consistent with the agency's regulations. The court explained that those regulations "differentiate between investigation proceedings before Commerce that lead up to the 'final * * * determination'" and "the overall investigation proceedings before both Commerce and the ITC that ultimately lead to an [anti-dumping] order." Pet. App. 87a-88a (citing 19 C.F.R. 351.211(a)).

The Court of International Trade also concluded that no issues remain "'pending' before Commerce" once the agency issues its final determination. The court observed that "nothing in the statute or regulations suggests that Commerce could continue its proceedings, accept more submissions, or change its decision after it issued its final determination in its investigation," and that "[t]he publication of an [anti-dumping] order is a purely ministerial act." Pet. App. 88a. The court further explained that the "finality" of a final determination is confirmed by the statutory provision making such a determination appealable. *Ibid.* (citing 19 U.S.C. 1516a(a)(2)(B)(i)); see *ibid.* ("[I]f the determination was still 'pending,' then it was not 'final,' and the court would have no jurisdiction to entertain a challenge to it.").

ii. The court of appeals affirmed. See Pet. App. 3a, 17a.

The court of appeals concluded that the *Final Modification* did not support petitioner's challenge, but rather was "at best ambiguous as it applies to the present matter." Pet. App. 10a. The court observed that "aspects of the *Final Modification* strongly support Commerce's determination" that "the no-zeroing policy does not apply" to "investigations in which Commerce had already made a final determination of whether dumping was taking place" before the *Final Modification*'s effective date and in which the matter "did not thereafter return to Commerce for substantive determinations." *Id.* at 10a-11a; see *ibid.* (explaining that Commerce had "completed its non-ministerial work" in this matter well before the *Final Modification*'s effective date, at which time "[t]he matter was pending before the Court of International Trade"); *id.* at 14a (describing work done by Commerce after the final determination as "only ministerial actions"). And the court explained that "it suffices for us to uphold Commerce's answer if we conclude that the Final Modification is ambiguous * * * and Commerce's interpretation is a reasonable resolution of the ambiguity." *Id.* at 10a (citing *Auer* v. *Robbins*, 519 U.S. 452 (1997)).

The court of appeals emphasized the statement in the *Final Modification* that the change in methodology would apply to "all investigations pending before the Department as of the effective date." Pet. App. 11a. Noting that ongoing investigations sometimes are pending before the ITC rather than before Commerce, the court stated that it "makes linguistic and structural sense to view an investigation as pending before Commerce until Commerce completes *its* work,

except for any ministerial work like correcting arithmetic errors or formal entry of an order." *Id.* at 12a.

The court of appeals also found "powerful internal evidence that the *Final Modification* was not meant to apply to" the investigation in this case. Pet. App. 12a. First, the *Final Modification* stated that "[a]ll of the currently pending investigations were initiated as a result of petitions filed after" March 6, 2006 (the date when Commerce proposed to modify its prior zeroing methodology), whereas the petitions in this case were filed in 2005. *Ibid.* (alteration in original); see *id.* at 13a. Second, the *Final Modification* stated that there were "seven ongoing antidumping investigations" as of the issuance date (December 27, 2006), and all parties agreed that the investigation in this case was not one of those seven. *Id.* at 13a. Third, the *Final Modification* stated that in all of the pending investigations, the parties would have an opportunity to comment on the use of the new methodology "prior to the final determination in the investigation." *Ibid.* That statement implied "that Commerce had not made a final determination in any of the investigations to which the new policy would apply"—but here Commerce's final determination had already been made when the *Final Modification* was issued. *Ibid.*

The court of appeals further held that Commerce's later decision to apply the change in methodology "to a separate investigation" involving polyvinyl alcohol did not contradict Commerce's "decision that the no-zeroing policy of the *Final Modification* is inapplicable here." Pet. App. 14a. The court explained that the polyvinyl alcohol investigation differed from this matter because Commerce's final determination of dumping in that investigation, and "the extensive work

involved" in "calculat[ing] the * * * dumping margin," did not take place until after the *Final Modification*'s effective date. *Id.* at 15a; see *id.* at 16a; *id.* at 16a-17a (stating that "[t]he particularly strong reasons that support a finding of non-coverage of the present matter are not contradicted by the weaker case for finding coverage of" the polyvinyl alcohol investigation).

**ARGUMENT**

Petitioner urges this Court to grant review to "reconsider[] the scope and validity of deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997)." Pet. 13. Petitioner further argues that, if certiorari is granted, the Court should either overrule *Auer* altogether or "scale[] * * * back" that decision by holding it inapplicable to "cases in which the interpretation of an ambiguous regulation is offered by a government lawyer" and "the agency is a party." *Ibid.*

This case is a poor vehicle for addressing those questions. Taken as a whole, the *Final Modification* clearly indicates that Commerce did not intend to apply its new methodology to a case like this one, where Commerce had issued its own final determination with respect to dumping before the *Final Modification*'s effective date. The result in this case therefore would not be affected by a decision that *Auer* deference was inapplicable. In addition, the agency interpreted the *Final Modification* in a decision letter outside of litigation, and the relevant portion of the *Final Modification* has little or no ongoing significance. In any event, the court of appeals correctly gave deference to Commerce's interpretation of the *Final Modification*, and its decision does not conflict

with any decision of this Court or another court of appeals. Further review is not warranted.[4]

1. For several reasons, this case is a poor vehicle for addressing the questions presented.

a. The *Final Modification* defines the class of investigations to which its change in methodology applies in a way that unambiguously excludes the investigation at issue here. In the *Final Modification*, Commerce stated that the new methodology would apply to future investigations and "to all investigations pending before the Department as of the effective date." 71 Fed. Reg. at 77,725. In this case, the agency made its final determination seven months before the *Final Modification* was issued, and nine months before the *Final Modification*'s ultimate effective date. Indeed, although the Federal Circuit found deference to be a sufficient ground to decide the case, the court stated, with respect to petitioner's challenge, that the *Final Modification* is "at best ambiguous," and that "aspects of the *Final Modifica-*

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[4] On a number of recent occasions, this Court has declined to consider whether to overrule *Auer* and other decisions affording deference to an agency's interpretation of its own regulation. See, *e.g.*, Pet. i, *Gloucester County School Bd.* v. *G.G.* (No. 16-273) (asking in question 1 whether "th[e] Court [should] retain the *Auer* doctrine"); Oct. 28, 2016 Order, *Gloucester County School Bd.*, *supra* (granting review of questions 2 and 3 but not of question 1); *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607 (2016) (No. 15-861); *Swecker* v. *Midland Power Co-op.*, 136 S. Ct. 990 (2016) (No. 15-748); *Brown* v. *Columbia Gas Transmission, LLC*, 135 S. Ct. 2051 (2015) (No. 14-913); *Stewart & Jasper Orchards* v. *Jewell*, 135 S. Ct. 948 (2015) (No. 14-377); *Michigan Dep't of Community Health* v. *Sebelius*, 133 S. Ct. 1581 (2013) (No. 12-589). Several other petitions pressing similar arguments are currently pending before the Court. See, *e.g.*, *Noble Energy, Inc.* v. *Jewell* (No. 16-368); *Flytenow, Inc.* v. *FAA* (No. 16-14).

*tion* strongly support Commerce's determination." Pet. App. 10a. The court also identified "powerful internal evidence that the *Final Modification* was not meant to apply to the [present] investigation." *Id.* at 12a. Accordingly, a refusal to apply *Auer* deference would not change the result in this case.

As the court of appeals explained, it "makes linguistic and structural sense to view [an] investigation as pending before Commerce until Commerce completes *its* work" (other than "ministerial" actions). Pet. App. 12a. Deciding whether an antidumping duty order should issue requires proceedings at and final determinations from both Commerce and the ITC (and often from the Court of International Trade and the Federal Circuit as well). Commerce sensibly decided that a change in the methodology used to arrive at a final determination of whether dumping has taken place should not apply in cases in which that final determination had already been made and the matter—while perhaps pending elsewhere—was no longer "pending before the Department."

Other language in the *Final Modification*, moreover, clearly shows that the prescribed change in methodology was not intended to apply to this case. The *Final Modification* stated that all of the "pending" investigations affected by the change had been initiated as a result of petitions filed after March 6, 2006; that only seven such investigations existed; and that the parties in all of the pending investigations would have a chance to comment on the use of the new methodology "prior to the final determination in the investigation." 71 Fed. Reg. at 77,725; see Pet. App. 12a-13a. None of those statements would have been accurate if the *Final Modification* applied to the investi-

gation at issue in this case. That investigation was initiated in 2005; petitioner has conceded that it is not one of the seven investigations referenced; and Commerce's final determination in the investigation had already been made seven months before the *Final Modification* was issued, making it impossible to provide an opportunity for comment "prior to the final determination." See Pet. App. 12a-13a; see also Pet. 31.

Petitioner's contrary arguments do not establish any ambiguity in the *Final Modification*. Petitioner relies heavily (*e.g.*, Pet. 27) on the regulatory definition of "investigation," which states that an investigation terminates with the issuance of an antidumping order (or in various other circumstances not relevant here). See 19 C.F.R. 351.102(b)(30). But the *Final Modification* did not apply its change in methodology to all investigations that were pending in some manner as of the effective date; it applied the change only to existing investigations that were "pending before the Department" of Commerce. 71 Fed. Reg. at 77,725. As the Court of International Trade recognized, there is a meaningful distinction between "the pendency of the * * * investigation before Commerce" and the "pendency of the investigation as a whole." Pet. App. 87a.

Petitioner also infers (Pet. 29-30) from the *Final Modification*'s citations, and from its reasons for applying the change in methodology to some pending cases, that this particular case should be subject to that change. Those arguments do not aid petitioner's cause. The fact that the agency referred to other contexts in which a legal change was given a broad retroactive sweep says nothing about the exact scope

of the agency's order in this case. In particular, those references do not supersede the specific language that the agency used to explain which pending investigations the *Final Modification* would cover. And the reasons the agency gave for covering investigations "pending before the Department" cut against petitioner's position. For instance, the agency emphasized that its choice to cover such investigations would not "create any undue administrative burden" because there were only "seven ongoing antidumping investigations." 71 Fed. Reg. at 77,725. But if Commerce had thought that more than seven investigations would be covered (which would necessarily have been true if this case were subject to the *Final Modification*), it might have deemed the burden too great and declined to apply the *Final Modification* to pending investigations at all.

b. The *Final Modification* language on which the court of appeals principally relied—*i.e.*, the statement that "the Department has determined to apply the final modification adopted through this proceeding to all investigations *pending before the Department* as of the effective date," 71 Fed. Reg. at 77,725 (emphasis added)—appeared in a subsection entitled "Whether Implementation Should Apply to On-Going Investigations," in a section entitled "Analysis of Public Comments." See *id.* at 77,722, 77,724 (italics omitted). In its concluding "Timetable" section, the *Final Modification* stated that "[t]he Department will apply this final modification in all current and future antidumping investigations as of the effective date." *Id.* at 77,725. Petitioner characterizes the court of appeals' decision as relying on "'an explanatory statement in response to public comments' prefacing the announce-

ment of the actual rule." Pet. 32-33 (quoting Pet. App. 11a). Petitioner further describes the court below as holding that the reference to "investigations pending before the Department" in the earlier section of the *Final Modification* "could reasonably be read to serve as a gloss on the broader language of the operative provision that referred to '*all* current and future antidumping investigations.'" Pet. 33 (quoting Pet. App. 11a) (in turn quoting 71 Fed. Reg. at 77,725) (emphasis added by petitioner).

Petitioner's description implies that the *Final Modification*'s "Timetable" section, which petitioner characterizes as the "actual rule" and the "operative provision," has a greater legal status than the earlier "pending before the Department" language, which petitioner characterizes as "an explanatory statement" and "a gloss." Nothing in the text or structure of the *Final Modification* supports that understanding. The "Timetable" section is on its face simply one section of the larger document, not a discrete rule that the rest of the *Final Modification* interprets or explains. The *Final Modification* therefore should be read as a whole, giving equal weight to all its constituent parts. Under that approach, there is no reason to believe that the outcome of this case would have been different if the court of appeals had eschewed reliance on principles of *Auer* deference.[5]

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[5] Petitioner also suggests in passing (*e.g.*, Pet. 31, 32 n.30) that Commerce's treatment of the polyvinyl alcohol investigation was inconsistent with the result in this case. As the court of appeals explained, no such inconsistency exists. See Pet. App. 14a-16a. In any event, any tension between the two agency decisions would not be a sound reason for overturning the decision in *this* case, which is strongly supported by the *Final Modification*'s description of

c. For three additional reasons, this case is a poor vehicle for review of the questions presented.

First, petitioner is incorrect in asserting (Pet. 15) that this case involves deference solely to "the litigating position of an agency attorney." Rather, the position taken by the agency in this case, and accepted by the Federal Circuit in 2015, is the same position that the agency took in a December 2009 administrative decision letter that was issued in a parallel investigation of diamond sawblades imported from China.

In that matter, Commerce made its final determination of dumping in May 2006 (before the *Final Modification* was issued), but an antidumping duty order did not issue until November 2009 (after the *Final Modification* became effective) because of judicial proceedings involving the ITC's domestic-injury determination. In December 2009, Commerce declined the foreign producer's request to apply the new non-zeroing methodology. Commerce explained:

> The Department was clear that the * * * change in methodology * * * would apply to 'all investigations pending before the Department as of the effective date' [of the *Final Modification*]. The Department completed its final determination in the investigation of diamond sawblades from [China] in 2006, prior to the effective date of the change in methodology * * * . Because the investigation * * * was not 'pending before the department' as

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the class of investigations that would be covered. See *id.* at 16a-17a (explaining that "the particularly strong reasons that support a finding of non-coverage of the present matter are not contradicted by the weaker case for finding coverage" of the polyvinyl alcohol investigation).

> of [the effective date], the department's change in methodology does not apply to the investigation.

Mem. from Alex Villanueva, Import Admin., Dep't of Commerce, to Gang Yan Grp. re: Request for Changed Circumstances Review (Dec. 14, 2009) (footnotes omitted) (quoted in *Advanced Tech. & Materials Co.* v. *United States*, 2011 WL 3624674, at *7 (Ct. Int'l Trade Aug. 18, 2011)). That reasoning applies equally here.

The Federal Circuit briefing in the present case discussed the 2009 decision letter. See, *e.g.*, Pet. C.A. Br. 41-46; see also U.S. C.A. Br. 9-10, 15-16 (citing *Advanced Tech.*); Pet. 17 n.21. Petitioner's first question presented (Pet. i) appears to reflect the premise that the interpretation at issue was first offered by government counsel during the litigation, rather than articulated by the agency itself. Because the 2009 decision letter shows that premise to be incorrect, this case is a poor vehicle for answering the question that petitioner identifies. See generally *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 588 (2000) (discussing *Auer* deference to "opinion letters").[6]

Second, the agency interpretation at issue here has little if any ongoing significance beyond the present case. Pursuant to the *Final Modification*, Commerce ended its use of zeroing in antidumping duty investigations nearly ten years ago. See pp. 5-6, *supra*; see also 77 Fed. Reg. 8101 (Feb. 14, 2012) (ending use of zeroing in making certain comparisons in the course of periodic reviews of antidumping orders). It is there-

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[6] The question 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).

fore unlikely that any other antidumping duty order would be affected by a decision of this Court holding that the *Final Modification*'s change in methodology should have been applied to investigations in which Commerce had already made a final determination as of February 2007.

Third, the challenges petitioner seeks to raise are not properly before this Court because petitioner did not press them below and the court of appeals did not pass on either of them. With respect to whether *Auer* deference should be unavailable when an agency interpretation is offered in litigation against the government, petitioner's court of appeals brief was silent. Petitioner argued that deference was not warranted in this case because the *Final Modification* is unambiguous. See Pet. C.A. Br. 11. Petitioner also argued that the agency's interpretation of the *Final Modification* "does not represent the agency's fair and considered judgment" because Commerce "has offered disparate, and conflicting, reasons for failing to apply the *Final Modification* in the diamond sawblades investigations," including reasons that petitioner characterized as "post hoc." *Id.* at 12, 46; see also *id.* at 46-47 (discussing polyvinyl alcohol investigation); *id.* at 47 (characterizing agency interpretation as a "convenient litigating position") (citing *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012)). But petitioner did not contend that an agency interpretation advanced in a case in which the government is a party is categorically unworthy of deference. By extensively discussing the 2009 decision letter, moreover, petitioner tacitly acknowledged that this case involves an interpretation of the *Final Modi-*

*fication* that the agency arrived at outside the context of litigation. See *id.* at 41-46.

Petitioner's Federal Circuit briefs also did not address the broader question whether *Auer* should be overruled. Rather, petitioner effectively "concede[d] * * * the correctness of that precedent." *United States* v. *Williams*, 504 U.S. 36, 44-45 (1992); see Pet. 25 & n.25; see also Gov't C.A. Br. 13 (citing and relying on *Auer*). Although the Federal Circuit is bound by this Court's decisions, petitioner could have noted and preserved the question, which might have afforded this Court the benefit of the court of appeals' views on the matter. Cf. *Williams*, 504 U.S. at 44-45 ("It is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case" that the precedent was correctly decided); see generally *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

2. Consistent with *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer*, the court of appeals correctly held that Commerce's reasonable interpretation is entitled to deference. See Pet. App. 10a-12a; pp. 13-17, *supra* (discussing interpretation of the *Final Modification*). That decision does not conflict with any decision of this Court or another court of appeals. Petitioner does not assert that a circuit conflict exists, but it urges this Court to overrule its longstanding precedents and to withhold deference from agencies' interpretations of their own regulations,

either entirely or with respect to interpretations first advanced in litigation to which the government is a party. Review of those issues is not warranted.

Under this Court's decisions, courts should ordinarily accord "substantial deference to an agency's interpretation of its own regulations," giving that interpretation "controlling weight" unless an "alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (citations omitted); see *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1214 n.2 (2015) (Thomas, J., dissenting) ("Occasionally, Members of this Court have argued in separate writings that the Court failed appropriately to apply *Seminole Rock* deference, but in none of those cases did the majority opinions of the Court expressly refuse to do so."). Those decisions likewise establish that an interpretation of a regulation that an agency advances in litigation is ordinarily entitled to the same degree of deference. See, *e.g.*, *Auer*, 519 U.S. at 462 (deferring to interpretation in amicus brief); *Chase Bank USA, N.A.* v. *McCoy*, 562 U.S. 195, 209 (2011) (same); *Christopher*, 132 S. Ct. at 2166.

This Court has also made clear, however, that deference to an agency's interpretation of its regulations may be unwarranted in certain circumstances. For instance, a significant change in an agency's interpretation of its own regulation may affect the deference that courts will give the agency's views. Cf., *e.g.*, *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337-1338 (2013) (concluding that agency's "consistent" interpretation, with "no indication that [the

agency's] current view is a change from prior practice," was "another reason" to accord *Auer* deference); *Thomas Jefferson Univ.*, 512 U.S. at 515. And in discussing deference to agency interpretations advanced in litigation, this Court has stated that deference may be withheld if there is "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question," as where the agency's position is nothing more than "a post hoc rationalization * * * seeking to defend past agency action against attack." *Auer*, 519 U.S. at 462 (citation and internal quotation marks omitted); see, *e.g.*, *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (declining to defer to interpretation that "appears to be nothing more than an agency's convenient litigating position").

Petitioner offers no sound reason to disturb that established legal framework, which has roots stretching back to before the enactment of the Administrative Procedure Act (APA), see *Seminole Rock*, 325 U.S. at 414, and which underpins a vast swath of precedent in this Court and in the courts of appeals. See generally *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986) (explaining that stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact"); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (requiring "special justification, not just an argument that the precedent was wrongly decided," to "overturn[] long-settled precedent") (citation and internal quotation marks omitted). Petitioner contends (Pet. 20) that "[a]ffording control-

ling weight to an agency's interpretation of its own regulation * * * raises serious" separation-of-powers and due process "concerns." But a court's decision to construe a regulation by deferring to the agency's reading does not mean that the reading itself has the "force of law" (Pet. 21). "*Auer* deference is not an inexorable command in all cases," and "it is the court that ultimately decides whether a given regulation means what the agency says." *Perez*, 135 S. Ct. at 1208 n.4. That inquiry imposes a meaningful "judicial check" (Pet. 22), see *Perez*, 135 S. Ct. at 1208 n.4; see also *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991), including in cases where the government is a party rather than a friend of the court.

Contrary to petitioner's contention (Pet. 14-19), deference to an agency's interpretation of a regulation is consistent with "the design of the APA." Petitioner offers (Pet. 15) no reason to believe that agencies have attempted to side-step the APA's notice-and-comment requirements by promulgating nebulous, open-ended legislative rules—which are at risk of being deemed arbitrary and capricious—and then attempting to give them content through later interpretation. Cf. *Perez*, 135 S. Ct. at 1209; see generally *Motor Vehicles Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983); see also Cass R. Sunstein & Adrian Vermuele, *The Unbearable Rightness of* Auer, at 13 (forthcoming U. Chi. L. Rev. 2016). And while petitioner raises the specter of situations in which an agency position advanced in litigation does not reflect the "agency's considered views," as regulations under the APA must do (Pet. 16), existing doctrine already accounts for that possibility by asking whether the

agency's position is only a "post hoc" justification that "does not reflect the agency's fair and considered judgment." *Auer*, 519 U.S. at 462. Although parties will sometimes disagree about whether that limit on deference principles applies in a particular case (see Pet. 19), such case-specific disputes provide no sound reason to jettison *Auer* and *Seminole Rock* altogether.[7]

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Petitioner also briefly suggests (Pet. 18-19) that *Auer* deference is questionable because its principles are not identical to the principles that govern *Chevron* deference. Because *Auer* deference has justifications that do not apply to *Chevron* deference, however, those doctrines need not operate in lockstep. See, *e.g.*, *Martin*, 499 U.S. at 152 (explaining that an agency "is in a better position" than other entities "to reconstruct the purpose of the regulations" it promulgated); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).