ORAL ARGUMENT NOT YET SCHEDULED

No. 09-1237

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.
Respondents.

On Petition for Review from a Decision of the
United States Environmental Protection Agency
74 Fed. Reg. 32,744 (July 8, 2009)

BRIEF OF *AMICI CURIAE* CAR DEALERS ADAM D. LEE AND CHARLES E. FRANK IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES RULINGS AND RELATED CASES

A. Parties and Amici

All of the parties, intervenors, and *amici curiae* appearing before this Court are listed in Respondent's Opening Brief.

B. Rulings Under Review

A statement of the rulings under review appears in Respondents' Opening Brief.

C. Related Cases

A statement of related cases appears in Respondent's Opening Brief.

DATED: September 15, 2010

Respectfully submitted,

STEPHEN F. HINCHMAN
MATTHEW F. PAWA

By /s/ Stephen F. Hinchman
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Counsel for *Amici Curiae* Adam D. Lee and Charles E. Frank

RULE 26.1 CORPORATE DISCLOSURE STATEMENT OF ADAM D. LEE, PRESIDENT OF LEE AUTO MALLS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Adam D. Lee, President of Lee Auto Malls, states that no parent or publicly held corporation owns 10 percent or more of Lee Auto Mall stock.

DATED: September 15, 2010

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Regulations

State Regulations

GLOSSARY

California standards	California's greenhouse gas emission standards for new motor vehicles, 13 Cal. Code Regs § 1961.1 *et seq*.
Chrysler	Companies of the Chrysler Group, LLC, including Dodge, Jeep, Chrysler and Ram.
CO2	Carbon Dioxide
EPA	United States Environmental Protection Agency
Floor planning	A loan that is secured by merchandise and paid off as the goods are sold, usually given by manufacturers to a retailer or dealership.
Frank	Charles E. Frank and the Z. Frank Chevrolet Dealership
GHG	Greenhouse Gas or Greenhouse Gasses
GM	General Motors
Lee	Adam D. Lee and the Lee Auto Mall family of Dealerships
MPG	Miles Per Gallon
MY	Model Year
NADA	National Automobile Dealers Association
National Program	EPA and NHTSA's combined national GHG emissions and fuel economy standards for new motor vehicles, 49 C.F.R. Parts 531, 533, 536, 537 and 538.
NHTSA	National Highway Transportation Safety Administration
Section 177 States	States that have adopted California emission standards for new motor vehicles pursuant to Section 177 of the Clean Air Act, 42 U.S.C. § 7507.

Pursuant to this Court's scheduling order, Adam D. Lee and Charles E. Frank respectfully submit this *amici curiae* brief in support of respondent U.S. Environmental Protection Agency ("EPA").

IDENTITY AND INTERESTS OF THE AMICI

Adam D. Lee is President of Lee Auto Malls, a third-generation family run business, founded in 1936, that owns car dealerships throughout Maine. Lee Auto Malls ("Lee") includes two Chrysler-Dodge-Jeep-Ram ("Chrysler") dealerships, a General Motors ("GM") dealership, Honda, Nissan, and Toyota dealerships, and six used car dealerships. Lee is the state's largest Jeep dealer and, overall, sells approximately 7,000 new and used cars a year, making it one of the top-selling vehicle dealerships in the state.

Charles E. Frank ("Frank") is the former owner of Z Frank Chevrolet in Chicago, Illinois. Over the course of Frank's thirty-three year career, Frank sold well over one million Chevrolet vehicles – often ranking among the top-selling Chevrolet dealers in the nation – and his businesses have included two Chevrolet dealerships and Oldsmobile, Volkswagen, Mazda, Kia and Hyundai dealerships. At the time of its sale in July 2008, Z Frank Chevrolet sold an average of 16,000 new cars a year in the retail and fleet markets.

Although long-time members of the National Automobile Dealers Association ("NADA"), Lee and Frank[1] do not support NADA's Petition for Review of EPA's grant of a Clean Air Act § 209(b) waiver for California's greenhouse gas ("GHG") emission standards for new motor vehicles ("the California standards"). Based on an analysis of their businesses, Lee and Frank have concluded that GM and Chrysler's loss of market share at their dealerships and nationwide – much of which occurred during a period of record car sales – was and continues to be due to consumer demand for cleaner and more efficient vehicles. Lee and Frank have testified in various hearings before Congress, the EPA, and the National Highway Traffic and Safety Administration ("NHTSA") that new standards are needed to reduce GHG emissions *and* to improve automobile sales and profits at their current and former dealerships.

STATUTES AND REGULATIONS

Applicable statutes and regulations are contained in Petitioners' Opening Brief, except for Section 177 of the Clean Air Act, 42 U.S.C. § 7507, which is in Attachment 1.

[1] Frank's NADA membership ceased with the sale of his dealerships.

SUMMARY OF ARGUMENT

The California GHG standards have benefited, not harmed the U.S. automotive industry. By requiring development and production of cleaner and more efficient vehicles, the California standards have resulted in increased vehicle sales, and thus profits, during what has otherwise been the greatest period of crisis in the history of the industry.

To the extent that Petitioners' members have suffered harms, those injuries are not traceable to the California standards. Nor would vacating the California standards redress Petitioners alleged injuries. The third-party automakers, both domestic and international, that are the object of the California standards are now well into production of an entirely new generation of low-polluting and highly-efficient vehicles demanded by the marketplace and by similar federal standards that begin in model year ("MY") 2012. Given the costs and lead time required to take new vehicles to market, no decision by this Court regarding the California standards would alter this welcome and long overdue trend.

ARGUMENT

Petitioners' members – new vehicle dealers and associated auto industry businesses – lack all three essential elements of standing to bring this case. They are benefited, not injured by the California standards; any harms they may have

suffered are traceable to the economic crisis facing the auto industry not to the California standards; and, given the fundamental and comprehensive realignment of the industry in just two short years, no decision by this Court will provide Petitioners redress.

Petitioners assert standing based upon three distinct injuries allegedly caused by the California standards: (1) injuries that may occur prior to implementation of EPA and NHTSA's combined national GHG emissions and fuel economy standards (the "National Program") in 2012; (2) injuries that may occur between 2009 and 2016 in six states that have not yet updated their regulations to adopt California's 2010 amendments to the California standards; and (3) the potential that prospective future amendments to the California standards will not be subject to a "full waiver analysis" by EPA. *See* Petitioners' Opening Brief, at 22-27.

None of these assertions meets the standing test, but the last two are facially deficient as a matter of law. Regarding the last claim, standing requires an injury in fact which is actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A claim that a *potential future* amendment to the California standards *may* not be subject to a full § 209(b) waiver analysis fails this test twice over and cannot be evaluated by this Court.

The second assertion, that the EPA waiver authorizes enforcement of a patchwork of disparate emission standards in six states through 2016, is also

legally unsupportable. Section 177 of the Clean Air Act exempts states from federal preemption only if they adopt and enforce emission standards that are "identical" to the California standards for each model year. 42 U.S.C. § 7507. California has amended its standards to (a) accept compliance with the National Program for MY 2012 to 2016 as compliance with the California standards, and (b) to allow automakers the option of achieving compliance in MY 2009 to 2011 based on the pooled average for fleets sold in California and the Section 177 states. *See* 13 Cal. Code Regs. §§ 1961.1(a)(1)(A)(i)-(ii) (2010). It is well established that states opting-in to the California standards must update their standards to reflect changes in California's standards for each model year. *See Ass'n of Int'l Auto. Mfrs., Inc., v. Mass. Dep't of Envtl. Prot.*, 208 F.3d 1, 8 (1st Cir. 2000) (states cannot enforce non-identical standards); *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 200-01 (2d Cir. 1998) (same). Since the EPA waiver does not authorize enforcement of non-identical standards and since Petitioners do not claim to be injured by EPA's grant of a waiver to enforce the California standards in MY 2012 through 2016 in California or in states that have adopted identical standards as California, Petitioners can claim no injury for MY 2012 or beyond.

Petitioners' sole remaining assertion of injury is that enforcement of the California standards for MY 2009 through 2011 will force manufacturers to alter the mix of vehicles delivered to dealers or increase the cost manufacturers charge

dealers for vehicles that are delivered, thereby affecting the dealers' inventories, sales, prices and/or profits.

Petitioners must not only verify that the above alleged harms are actual or imminent, but also that they are traceable to the challenged standards and redressable by a favorable decision from this Court. *Lujan*, 504 U.S. at 560-61. Because the California standards regulate third-party automakers and not Petitioners' dealer members,[2]

> [t]he existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.

Id. at 562 (internal citations omitted).

Petitioners have failed to meet this burden.

A. The California Standards Have Benefited New Vehicle Dealers.

First, Petitioners' have failed to even allege that their members face actual or imminent injury. *Lujan*, 504 U.S. at 560. Allegations that the California standards will cause injury-in-fact "*if*" the standards force a manufacturer to alter the mix of

[2] *See* 13 Cal. Code Regs § 1961.1(a)(1) (2010) (compliance the California standards are based on manufacturer compliance with fleet average requirements).

vehicles it delivers to dealers, or that the standards "*may*" limit dealers' ability to stock certain vehicles,[3] are mere conjecture and are particularly unavailing here since Petitioners failed to aver that such an impact actually occurred during MY 2009 – which is complete – or that it is likely or imminent in MY 2010 or 2011. Lee and Frank agree with Respondent that, based on historic changes in consumer demand and market conditions, sales of compliant vehicles have substantially increased since 2008, providing manufacturers with excess credits and enabling them to comply with the California standards through MY 2011 without altering their product lines, if they so chose. *See* Respondent's Opening Brief, at 20-21.

Second, Petitioners' attempt to show harm based on studies and forecasts produced early in the administrative record, *see* Petitioners' Opening Brief at 23, wholly ignores that the automotive industry has since entered into the worst economic crisis in its history.[4] Chrysler is in bankruptcy; GM has survived only due to a federal bailout; and Ford has lost billions of dollars in reserves. Corporate leadership has been replaced, whole brands – Oldsmobile, Hummer, Saturn, Plymouth, Pontiac, and Mercury – have been eliminated, vehicle and engine lines

[3] *See* Petitioners Opening Brief at 24.

[4] While Petitioners argue standing can only be evaluated based on the circumstances as of their petition to this court on Sept. 8, 2009, that was a year into the collapse of the auto industry. Thus, Petitioners have failed to show injury, traceability or redressability as of any date. Regardless, a case can also become moot if standing disappears as the case progresses. *See Arizonians for Official English v. Arizona*, 540 U.S. 43, 68 n.22 (1997).

changed, factories closed, inventory liquidated, and dealerships unilaterally eliminated by their parent manufacturers. The implosion of the industry has nothing to do with the California standards but rather is due to wholly separate and independent factors ranging from health care costs, to pensions, union contracts, rising fuel prices, changes in consumer demand, collapse of the credit market, and the onset of a severe national recession.

If anything, the evidence – whether based on sales at the Lee and Frank dealerships, national sales, or published studies – shows that by requiring development of cleaner and more efficient cars and trucks, the California standards have resulted in more popular vehicles and increased sales, thereby mitigating the economic losses that new car dealers, including Petitioners' members, would otherwise have suffered.[5]

For example, a recent EPA study shows that beginning in 2005, higher fuel prices began to reverse the two-decade-long trend of rising national fleet average GHG emissions and fuel consumption.[6] National sales data confirm Lee and Frank's first-hand observations, *infra* at 2, that during this period sales of low-mpg domestic brands (Ford, GM, and Chrysler) steadily dropped while sales of high

[5] *See, e.g.* Respondent's Opening Brief at 19.

[6] *See* EPA, *Light-Duty Automotive Technology, Carbon Dioxide Emissions, and Fuel Economy Trends: 1975 Through 2009*, EPA420-R-09-014, at 5, 23 (Nov. 2009) (Attachment 2).

efficiency vehicles from the "new domestics" (Toyota, Honda, Nissan, Hyundai-Kia) increased.[7] In response, Ford, GM and Chrysler have changed their business models to regain market share by improving the efficiency of their larger vehicles and engines, and by introducing more high efficiency cars and hybrids – the very vehicle fleets required by the California standards.[8]

Recent studies modeling the economic impact of higher emissions and fuel economy standards confirm both that Detroit's product portfolio became "misaligned" with the market with regard to emissions and efficiency over the last decade;

> The business model [the Detroit 3] have followed since the 1970's is clearly broken. Reliance on gas-guzzling SUVs and large cars for domestic profit was risky in several ways. Cutting prices to offset gradually rising gasoline prices from 2000 through 2006 while spending billions to engineer the next generation of these vehicles left GM and Chrysler with no margin for error. There never was a high volume international market for SUVs and the large cars the Detroit 3 automakers became dependent upon, so when the price of gasoline soared in 2008 and the domestic market for them collapsed, the Detroit 3 automakers could not avoid the worst of the downside.[9]

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[7] *See, e.g.,* Wall St. J., *Auto Sales Market Data Center; U.S. Market* (Aug. 2010) (Attachment 3).

[8] *See, e.g.,* C. Thompson, *GM crafts lineups for next spike at the pump*, Automotive News (Aug. 9, 2010); J. LaReau, *Ford goes green, small, high-tech*, Automotive News (Aug. 2, 2010); B. Wernle, *Chrysler Product Plan: Tweaks, then tidal wave*, Automotive News (July 26, 2010) (Attachment 4).

[9] W. McManus, R. Kleinbaum, *Fixing Detroit: How Far, How Fast, How Fuel Efficient*, U. of Mich. Transp. Research Inst. 2009-26, at 30 (June 2009) (Attachment 5).

and that higher efficiency and emissions standards (such as the California standards) would benefit, not harm the industry:

> . . . Because Detroit 3 automakers have long underestimated the consumer value of fuel economy, raising fuel economy standards would not cost more than consumers would be willing to pay. We found that an industrywide mandated increase in fuel economy of 30% to 50% would increase Detroit's gross profits by roughly $3 billion per year, and [] increase sales by the equivalent of two large assembly plants.[10]

In sum, Petitioners are benefited, not injured by the California standards.

B. Petitioners Have Failed To Show That Their Alleged Injuries Are Caused By The California Standards.

As noted above, the collapse of the auto industry has forced manufacturers to fundamentally change their business models for reasons wholly independent of the California standards. Today, virtually all manufacturers are working diligently to produce new high efficiency vehicles and engines, to alter their product mix to include more smaller vehicles, and to incorporate new fuels and technologies. As part of this change, manufacturers have also eliminated or sold brands, dramatically reduced inventory, closed dealerships, and revised credit terms, etc.

[10] *Id*. *See also id*. at 6 (other automakers also benefit from higher standards, but to a lesser degree because their fleets start with a higher baseline); *Citigroup Global Market Reports*, Oct. 13, 2009, Respondent's Opening Brief at Attachment 1 (automakers will benefit by building vehicles to higher standards).

Petitioners have not and cannot meet their burden to show that manufacturers have made these changes due to the California standards and not for independent reasons based on other business factors. *See Bennett v. Spear*, 520 U.S. 154, 169 (1997) (injury not traceable to defendant if it "the result of the independent action of some third party not before the court").

To take just one example, since the car sales crash of 2008, virtually all automakers have abandoned their decades-old practice of overproducing cars and relying upon incentives to move inventory. This newfound discipline avoids overcapacity costs, increases profit per vehicle, and allows manufacturers to focus limited resources on high-demand vehicles. It is this new business model, combined with significantly reduced credit terms for dealer floor planning – and not the California standards – that has limited dealers' ability to stock vehicles in highest demand and that is increasing the price of those vehicles.[11]

In sum, Petitioners have failed to show that their alleged injuries are fairly traceable to the California standards and not the result of independent actions by manufacturers.

[11] *See, e.g.,* T. Keith, *Dealers Beg for Cars as Automakers' New Discipline Curbs Sales*, Bloomberg (Aug. 11, 2010); S. Ryst, *Car dealers make most of less on their lots*, Washington Post (Aug. 12, 2010) (Attachment 6).

C. Petitioners Have Failed To Show That Their Alleged Injuries Are Redressable by a Favorable Judicial Ruling.

Since the California standards have not caused Petitioners injury, a favorable judicial ruling, by definition, could not provide relief. Moreover, the ongoing transformation of the industry is so broad and deep as to be virtually impervious to any ruling by this Court regarding the California standards.

For example, in EPA's and NHTSA's Detroit hearings regarding the National Program, Sue Cischke, Group Environmental and Safety Engineering for Ford Motor Co., testified that Ford has begun executing a long-term sustainability plan to match the fundamental change occurring in the marketplace, including

> converting three truck and SUV plants to build small cars, re-tooling our powertrain facilities to manufacture EcoBoost engines and more advanced six-speed transmissions, leveraging our global platforms, increasing our hybrid offerings and moving forward with an aggressive electrification strategy. While there are significant costs in making this transformation, it is the right thing to do for our customers, and you will continue to see us offer more great products with advanced, innovative technologies to improve the fuel efficiency of our vehicles and to deliver outstanding quality and features that our customers desire.[12]

[12] *EPA/NHTSA Joint Public Hearing Transcript, Detroit MI*, EPA-HQ-OAR-2009-0472-6185, at 13-14 (Oct. 21, 2009) (hereinafter as "Detroit Hearings") (Attachment 7).

Given the costs and lead times required to get new products from the drawing board to the production line to market,[13] as well as the early credit option in the National Program, *see* 40 C.F.R. § 86.1867–12 (providing CO2 credits for sales of compliant 2009-2011 model year vehicles), there is no realistic chance that an order from the Court vacating the EPA waiver would change manufacturers' current product plans. To the contrary, industry wide manufacturers have testified that they are committed to full and immediate transformation of their fleets.[14]

In sum, Petitioners have not met their burden to adduce facts showing that that automakers will respond to a favorable judicial ruling in a manner that would provide Petitioners' relief. *Lujan*, 504 U.S. at 562.

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[13] *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295, 368-69 (D. Vt. 2007)(4 years lead time needed to manufacture new vehicle; 8-12 years to roll out new technologies to an entire fleet).

[14] *See e.g., Detroit Hearings* at 10-12 (GM); *id*. at 13-14 (Ford); *id*. at 46-48 (Chrysler); *id*. at 52-54 (Toyota); *id*. at 79-81 (Hyundai); *id*. at 83-84 (Alliance of Automobile Manufacturers).

CONCLUSION

For the foregoing reasons, Petitioners have no standing and their petition for review should be dismissed.

DATED: September 15, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. Civ. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typface using Microsoft Office Word Mac 2008 in 14-point Times font.

DATED: September 15, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2010, I filed and served the foregoing *Amici Curiae* Brief of Adam D. Lee and Charles E. Frank by electronic service through the CM/ECF system to the following counsel, who are registered CM/ECF users:

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In addition, pursuant to D.C. Circuit Rule 31(b), I have caused five paper copies of this brief to be mailed to the Court on September 16, 2010.

DATED: September 15, 2010

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