ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and NATIONAL AUTOMOBILE DEALERS ASSOCIATION,	)	
Petitioners	)	**Case No. 09-1237**
v.	)	
U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator, U.S. Environmental Protection Agency,	)	
Respondents	)	

PETITIONERS' RESPONSE TO RESPONDENTS' MOTION TO DISMISS FOR LACK OF STANDING

Petitioners Chamber of Commerce of the United States of America ("Chamber of Commerce") and National Automobile Dealers Association ("NADA") ask the Court to deny Respondents' (collectively "EPA") motion to dismiss for lack of standing. EPA's record below, together with the attached declarations, demonstrate that Petitioners' members suffer redressable injuries as a result of the decision under review and that Petitioners therefore have standing to bring this challenge.

The petition for review challenges EPA's reconsideration of its prior decision denying California's request to waive Clean Air Act (the "Act") preemption with respect to California's state-specific greenhouse gas ("GHG") emission standards for new motor vehicles. Petitioners seek review of that decision on behalf of their members, including thousands of businesses that sell new motor vehicles in California and other affected jurisdictions.

EPA's primary argument for dismissal is that Petitioners' members—including vehicle dealers in California—lack standing to challenge a decision that waives ordinary federal preemption, thereby clearing the way for California to regulate and constrain the vehicles that can be delivered for sale in that state. That argument is contrary to common sense. It also ignores uncontested evidence in the record showing that enforcement of California's state-specific GHG standards is likely to cause individual dealers in California and other affected jurisdictions substantial financial harm. Indeed, though ignored in EPA's motion, the substantial likelihood of that harm is documented and *acknowledged* by both EPA and California in the proceedings below. There is no serious dispute that those injuries are traceable to EPA's waiver decision, or that those injuries can be redressed by this Court.

BACKGROUND

The Chamber of Commerce is the world's largest federation of businesses and associations, directly representing 300,000 members and indirectly representing more than three million businesses and professional organizations of every size and in every relevant economic sector and geographical region of the country. Declaration of Rob Engstrom (Ex. 1).[1] In addition to over one thousand vehicle dealers, the Chamber of Commerce has members in other industries affected by EPA's decision to waive federal preemption, ranging from gasoline service stations and automobile repair shops to companies that purchase vehicles on a fleetwide basis. *Id.* NADA represents nearly 17,000 vehicle dealers, also located throughout the country. Declaration of David W. Regan (Ex. 2). Together, Petitioners' members include businesses from *all* of the industries that California has identified as "most affected" by its GHG standards, including those "engaged in the production, distribution, sales, service, and use of light-duty passenger vehicles as well as the refining and distribution of gasoline." CARB, Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider Adoption of Regulations to Control Greenhouse Gas Emissions from Motor Vehicles, EPA-HQ-OAR-2006-0173-0010.44 at 158 (Aug. 6, 2004) (Ex. 3).

[1] Pursuant to Fed. R. App. P. 27(a)(2)(B)(i), Petitioners attach hereto four declarations, as well as various documents from the record below in support of this Response. Relevant pages have been excerpted from lengthy documents for ease of reference.

The EPA decision under review waives preemption under the Act for California's state-specific GHG emission standards for new vehicles produced and delivered for sale in that state. The decision reverses EPA's prior determination, just one year ago, that such a waiver was unwarranted. 74 Fed. Reg. 32,744 (July 8, 2009); 73 Fed. Reg. 12,156 (Mar. 6, 2008). Without EPA's waiver, California's GHG standards would be unenforceable. *See* 42 U.S.C. § 7543(a)-(b). Because of EPA's new position, California's standards have gone into effect. As a result of EPA's waiver, other states may enforce California's standards under Section 177 of the Act. *See* 42 U.S.C. § 7507. So far, thirteen other states and the District of Columbia ("Section 177 States") have adopted California's standards. 74 Fed. Reg. at 32,754.

California's standards require that vehicles "produced and delivered for sale" by certain manufacturers into California and the Section 177 States meet specified limitations for GHG emissions on a fleet-wide basis. *See* CAL. CODE REGS. tit. 13, § 1961.1(a)(1)(A); *see also* 74 Fed. Reg. at 32,746.[2] The standards apply to vehicles for model years 2009 through 2016, and are increasingly stringent each year. Though the standards do not mandate particular mechanisms

[2] Though the California standards expressly limit GHG emissions from motor vehicles, their effect is to regulate vehicle fuel economy. EPA has observed that "the relationship between improving fuel economy and reducing [carbon dioxide] tailpipe emissions is a very direct and close one." 74 Fed. Reg. 49,454, 49,458 (Sept. 28, 2009).

for compliance, the record makes clear that California expects its standards to "force" technological changes to the vehicles "produced and delivered for sale" and, as a result, to increase the price of those vehicles. *See* Ex. 3 at 153; *see also* CARB Resolution 04-28, EPA-HQ-OAR-2006-0173-0010.107 at 12 (Sept. 23, 2004) (Ex. 4). California's standards are also expected to require "mix-shifting"—a process whereby a manufacturer modifies the "mix" of vehicles it would otherwise "produce and deliver for sale" in a state to include fewer lower fuel-economy vehicles. *See* 74 Fed. Reg. at 32,774. If a manufacturer exceeds the applicable standards in a particular year, it receives "credits" that can be used or sold in future years. *See id.* at 32,747. However, according to manufacturer comments, "mix-shifting" will be necessary for compliance in certain model years covered by the California standards, notwithstanding the availability of the "credit" option. *Id.* at 32,774. An analysis prepared by California and cited in EPA's motion concludes that, as early as 2012, "[c]ompliance with [the] GHG requirements will be a challenge." EPA Attach. 1 at 8.

ARGUMENT

Contrary to EPA's primary argument for dismissal, there is no question that Petitioners' members have standing to bring this petition in their own right. EPA's decision waived federal preemption of California's state-specific GHG emissions standards. Without that decision, California and the Section 177 States could not

enforce those standards. With EPA's waiver, those standards are now in effect. As EPA knows, the fundamental object of California's state-specific standards is to regulate and constrain the type and design of vehicles that can be sold in California and the Section 177 States. It therefore strains credulity for EPA to contend that Petitioners' members—including business that sell vehicles in those jurisdictions—show not even a "substantial probability" that they will suffer a concrete, redressable injury as a result of its waiver decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (setting forth the three elements that form the "irreducible constitutional minimum of standing"); *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (explaining that, to establish associational standing, a petitioner need only show a "substantial probability" that an agency action will cause injury to one of its members).

Common sense says, and the record below and attached declarations confirm, that when particular dealers must offer more-expensive cars or cannot stock more-desirable models, their sales will suffer because at least some customers will buy their cars from other dealers, including dealers in states where the lack of California's standards makes them more available. "[C]ourts routinely credit assertions founded on basic economic logic in upholding standing." *Shays v. FEC*, 414 F.3d 76, 90 (D.C. Cir. 2005) (internal quotation marks and citation

omitted). Such logic, reinforced by the facts below and before this Court, suffices to prove standing in this case.[3]

A. Record Evidence Conclusively Demonstrates Petitioners' Members' Standing

EPA speculates that Petitioners cannot present "specific facts to demonstrate that they have an identifiable member who has suffered a redressable injury from the waiver grant." Mot. at 7. In fact, the record below is replete with evidence demonstrating a substantial likelihood of concrete injury to Petitioners' members.

Specifically, the administrative record provides substantial evidence that EPA's decision to waive federal preemption that would otherwise block enforcement of California's GHG standards will, *inter alia*: (1) require certain manufacturers to modify vehicle design, thereby increasing the cost of vehicles that Petitioners' members can sell in California and the Section 177 states[4]; (2)

[3] Contrary to EPA's assertion, nothing in Circuit Rule 15(c)(2) requires a petitioner to provide in its docketing statement a detailed explanation for each of the requirements for standing—especially where, as here, Petitioners reasonably understood their standing to be self-evident. *See Am. Library Ass'n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005). Sierra Club, 292 F.3d at 900. Indeed, in a case where associations that represent businesses *that sell new vehicles in California* challenge an agency decision that paves the way for regulation of *what vehicles can be sold in California*, it is difficult to see how standing could be anything *but* self-evident. In any event, EPA cites no case in which this Court has dismissed a petition for review for lack of standing based on allegations of a deficient docketing statement.

[4] *See, e.g.*, 74 Fed. Reg. at 32,757 ("California's greenhouse gas standards will result in an increase in new vehicle prices of approximately $1,000 per vehicle").

require certain manufacturers to "shift" the mix of vehicles that they deliver for sale in those states to meet state-specific GHG standards[5]; (3) as a result, reduce the potential for sales by dealers in the affected jurisdictions[6]; (4) constrain the ability of dealers to compete effectively in interstate commerce, given that consumers can purchase vehicles they desire from out-of-state dealers[7]; and (5) constrain the ability of dealers to compete with dealers who operate in the same state but sell vehicles for unregulated manufacturers.[8]

The $1000 estimate was provided by California. *See id.* Manufacturers provided significantly higher estimates. *Id.* at 32,775.

[5] *See, e.g.*, NADA, PATCHWORK PROVEN at 14-15, EPA-HQ-OAR-2006-0173-8957.1 (Jan. 2009) (Ex. 5); Comment of Mass. Attorney General Martha Coakley at 2, EPA-HQ-OAR-2006-0173-7176.12 (Mar. 5, 2009) ("Manufacturers typically can comply with the stricter set of standards by adjusting their marketing strategies and distribution networks.") (Ex. 6); Comment of Ed Moses, Dealer Principle, Ed Moses Dodge, EPA-HQ-OAR-HQ-2006-0173-3709 (Nov. 19, 2007) ("Chrysler and other manufacturers will be forced to withdraw some vehicles from the market, leaving me with dissatisfied customers and lower sales.") (Ex. 7). The record contains similarly-worded statements from at least 17 auto dealers.

[6] *See, e.g.*, Testimony of Damon Lester, Nat'l Ass'n. of Minority Auto. Dealers at 3, EPA-HQ-OAR-2006-0173-7176.8 (Mar. 5, 2009) (describing the likelihood of lost sales if automakers have to ration delivery of large vehicles, and the added financing costs associated with excess supply of small cars that do not sell quickly) (Ex. 8); Testimony of Eric Fedewa, CSM Worldwide at 1, EPA-HQ-OAR-2006-0173-7176.15 (Mar. 5, 2009) (describing anticipated effects of waiver including loss of sales, product mix-shifting, consumer choice hindrances, and increased compliance costs) (Ex. 9).

[7] *See, e.g.*, Testimony of NADA Chairman John McEleney at 2, EPA-HQ-OAR-2006-0173-7176.7 (Mar. 5, 2009) (Ex. 10).

[8] *See, e.g.*, Statement of Senator Carl Levin at 3, EPA-HQ-OAR-2006-0173-7176.16 (Mar. 5, 2009) (noting various manufacturers altogether exempt from

Indeed, in its Notice of Decision, EPA acknowledged that, according to California estimates, its "greenhouse gas standards will result in an increase in new vehicle prices of approximately $1,000 per vehicle." 74 Fed. Reg. at 32,757. EPA also cited a report, now relied upon in its motion, which recognizes that California's standards are likely to affect and constrain the type and design of vehicles available for sale in California, including in the initial years of enforcement. *See, e.g.*, 74 Fed. Reg. at 32,773. EPA's Notice likewise recognized the effect of the GHG standards on new vehicle sales, explaining that, based on a California "consumer choice model," new vehicle sales "would increase in the near-term . . . but see declines in fleet turnover in the longer-term, with a loss of vehicle sales of roughly 97,000 in 2020"—and that is for California alone. 74 Fed. Reg. at 32,757. Another analysis indicated that California sales would decline as a result of enforcement of the GHG standards as early as 2015. *See* Ex. 3 at 178. California, for its part, reported that:

- "The California industries and individuals affected most by the proposed climate change regulations are those engaged in the production, distribution, *sales*, service, and use of light-duty passenger vehicles as well as the refining and distribution of gasoline."
- "The California businesses affected by this regulation tend to be affiliated businesses such as gasoline service stations, *automobile dealers*, and automobile repair shops."

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regulation) (Ex. 11); Comment of William L. Kovacs, U.S. Chamber of Commerce at 4, EPA-HQ-OAR-2006-0173-8995.1 (Apr. 6, 2009) (Ex. 12).

Ex. 3 at 158, 159 (emphasis added).[9]

The total cost that California's state-specific GHG standards will impose on Petitioners' members is difficult to say with certainty. What is certain, however, is that absent enforcement of the GHG standards, manufacturers could continue to "produce and deliver" vehicles for sale, without any need to make costly design modifications or "mix-shift" to achieve compliance with state-specific standards. Conversely, the record shows that *with* the GHG standards there is more than a "substantial probability" that manufacturers *will* be forced to make such changes and that Petitioners' members will be harmed as a result. Given those circumstances, the standing of those members to challenge the EPA waiver decision is clear. *See, e.g., Am. Library Ass'n. v. FCC*, 406 F.3d 689, 697 (D.C. Cir. 2005) (finding standing where there was "a substantial probability" that an FCC order would harm petitioners' member-libraries and where, absent the order, the libraries could "continue" to operate as they had previously).

[9] In its "Initial Statement of Reasons," the California Air Resources Board employed a simplified set of assumptions to assert that profits lost by dealers as a result of lost sales would likely be offset by additional profits from higher-priced vehicles. *See* Ex. 3 at 194. Seventeen separate dealers directly disputed that conclusion in the California rulemaking. *See* CARB, Final Statement of Reasons, Regulations to Control Greenhouse Gases from Motor Vehicles, EPA-HQ-OAR-2006-0173-0010.116 at 258-59, 273 (Aug. 4, 2005) (Ex. 13).

B. The Attached Declarations Corroborate Petitioners' Standing

As in "many if not most" petitions for review, standing here "is self-evident" and "no evidence outside the administrative record is necessary for the court to be sure of it." *Sierra Club*, 292 F.3d at 899-900.[10] Nonetheless, appended to this filing are two declarations, submitted on behalf of individual NADA members, both of which demonstrate a "substantial probability" that those members will suffer redressable injury as a result of EPA's waiver of preemption for California's state-specific GHG standards. Declaration of Steve Pleau (Ex 14); Declaration of Vincent Trasatti, Jr. (Ex. 15). Those declarations describe the specific financial and competitive harms the declarants anticipate their dealerships will suffer as a result of EPA's waiver decision and make clear that those dealers have standing to challenge EPA's decision in their own right. *See Sierra Club*, 292 F.3d at 898, 900; *see also Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004) (holding that the court has jurisdiction if one petitioner has standing).

C. EPA's Arguments Against Standing Are Unavailing

Despite acknowledging below the self-evident burdens that California's GHG standards impose on Petitioners' members, EPA now attempts to downplay

[10] *See also Pub. Citizen v. FTC*, 869 F.2d 1541, 1551-52 (D.C. Cir. 1989) (noting that "the 'identity' of those injured is not the ultimate goal" but "is only a means to an end, and it should not be confused with the real purpose of the inquiry—that is, for the court to be satisfied that the requisite injury really has occurred or will occur in the future to members of the organizations").

those burdens and suggest that this Court can provide no redress in any event. Each of EPA's arguments is unfounded.

1. EPA begins by claiming that its decision to reverse course and waive preemption of California's state-specific standards causes no redressable injury because *proposed* federal standards now under consideration *may be* adopted, and because those standards *may* be "comparable to" the standards California has already imposed. Mot. at 7. EPA asserts that "*[i]f* the promulgated federal standards are substantially similar to those proposed standards *and* California acts to amend its regulations as anticipated by the National Fuel Efficiency Policy," *then* "compliance with the federal standards will be deemed compliance with California's standards." *Id.* (emphasis added). According to EPA, the hypothetical possibility of future regulation means that the Court cannot redress the current and imminent injuries to Petitioners' members.

EPA's certainty about the potential 2012-2016 federal regulations contrasts starkly with its view of the same proposed regulations just four months ago, when, during the waiver proceeding, EPA *refused* to consider the potential standards for purposes of assessing California's determination that its standards would be "at least as protective as applicable federal standards." *See* 74 Fed. Reg. at 32,752. EPA noted that it "would be speculative" to consider standards that were "neither proposed or final" at the time. *Id.* In fact, EPA stated that it "has consistently

found it inappropriate to engage in that speculation with respect to either EPA's or California's future standards in prior waiver decisions." *Id*. EPA's current litigation position disregards its prior consistent avoidance of speculative reliance upon future regulatory developments.

EPA's newfound willingness to speculate about potential future regulatory developments cannot defeat Petitioners' standing to challenge *this* EPA decision, which clears the way for immediate enforcement of California's GHG standards. For one thing, nothing in the record below establishes that the proposed federal standards will be "comparable"—much less identical—to the California standards. Moreover, there is no guarantee that the non-final, "comparable" federal standards will be adopted; or that, if adopted, they will survive legal challenge; or that, if they do survive, California will follow-through on its currently stated intent to "amend its regulations to allow compliance with [the] federal standards to constitute compliance with the State's standards." Mot. at 4. EPA's motion assumes that each of these contingent events is certain to transpire and that, as a result, Petitioners' members will be subject to federal standards *identical* to the standards that, because of the EPA waiver, California and the Section 177 States are now free to enforce. In fact, if nationwide application of identical federal regulations is indeed a foregone conclusion, it calls into question why EPA saw fit to grant California's waiver request in the first place.

What matters for present purposes is that Petitioners are not challenging an *anticipated* federal regulatory action, they are challenging EPA's *actual* decision to waive preemption for California's state-specific GHG standards. Given the sixty-day limitations period that governs petitions for review of such decisions, this is Petitioners' only opportunity to bring that challenge. *See* 42 U.S.C. § 7607(b)(1). The present facts establish their standing to do so. Because "standing is assessed as of the time a suit commences," *Del Monte Fresh Produce Co. v. U.S.*, 570 F.3d 316, 324 (D.C. Cir. 2009), any further inquiry into hypothetical future contingencies is inappropriate.

2. EPA next asserts that standing is lacking because "vehicle manufacturers will be able to comply" with California's standards in 2009-2011 "with little or no change to their intended model lines." Mot. at 8. Even if EPA were correct that the injury resulting from such changes will not occur in the initial years of enforcement (despite substantial record evidence to the contrary, *see* Subpart A), that does not suffice to defeat standing. Indeed, by limiting this argument to the 2009-2011 model years, EPA effectively concedes that "chang[es] to intended model lines" will, or at least are likely to, be required in the years that follow, a fact that undeniably creates a substantial risk of reduced sales and profits for Petitioners' members. The substantial likelihood that California's standards

will have their intended effect causes a concrete injury to Petitioners—at whatever point it occurs during the standards' effective period.

3. EPA also attempts to defeat standing by asserting that the California regulations "directly regulate only vehicle manufacturers." Mot. at 6. But standing is not foreclosed simply because a regulation does not operate directly against those bringing the challenge. *See Lujan*, 504 U.S. at 562. Rather, to "have standing, there must be a substantial probability that [the challenged] action created a demonstrable risk, or caused a demonstrable increase in an existing risk, of injury to the particularized interests of" Petitioners' members. *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895 (D.C. Cir. 2006) (internal quotation marks and citations omitted). EPA's waiver has undeniably created such a risk by requiring manufacturers to meet state-specific GHG standards that will—and in fact *are intended to*—"force" a change in the cost, type, and design of vehicles Petitioners' members can sell.

EPA resists this conclusion by insisting that manufacturers who "produce and deliver [vehicles] for sale" in California and the Section 177 States "have a range of options for complying with" California's standards, and that, therefore, "any alleged injury to dealers or other third parties . . . is entirely speculative because it is based on the *voluntary actions* of third parties." Mot. at 9 (emphasis added). However, as with any performance-based mandate, manufacturers may

have leeway in *how* to comply, but they do not have a choice about *whether* to comply at all (unless they are willing to face severe penalties). Here, aside from the possible exception of credits, which may (or may not) be sufficient to assist with compliance for certain regulated manufacturers in the early years of enforcement, *see* Mot. at 8-9, *any and all* of the manufacturers' "options for compl[iance]" create a "risk of injury" to Petitioners' members by increasing the cost, and changing the type, design, and performance of, the vehicles they can sell. *See Bennett v. Spear*, 520 U.S. 154, 169 (1997) (standing may be present where an injury is "produced by determinative or coercive effect upon the action of someone else").[11]

Also unfounded is EPA's assertion that the injury to Petitioners' members is not redressable since "manufacturers *could* choose to manufacture fleets compliant with the California standards regardless of what the Court holds regarding the waiver decision." Mot. at 9 (emphasis added). Again, such speculation does not

[11] EPA's citation of *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), *see* Mot. at 9, is inapposite. There, plaintiffs claimed that an IRS revenue ruling allowing 501(c)(3) status for hospitals which did not provide unlimited free access to indigents "had 'encouraged' hospitals to deny" such services. 426 U.S. at 42. The Court found this supposed "encouragement" insufficient to confer standing. Here, the California standards do not "encourage" production of more expensive or less powerful cars—they mandate it. And while *Simon* involved associations challenging someone else's *tax liability*, this case involves an economic injury *to Petitioners' members themselves*. The extreme attenuation fatal to standing in *Simon* is not remotely present here.

suffice to defeat standing. As described above, there is nothing "voluntary" about California's GHG standards. Their whole point is to coerce compliance. Unless this Court acts, what the manufacturers *cannot* do, voluntarily or otherwise, is continue to provide a fleet mix unconstrained by California's state-specific GHG standards. What is speculative is *EPA's* guess that the manufacturers would choose to comply with California's standards absent any compulsion by the state to do so.

4. Finally, EPA invokes a decision of the U.S. District Court for the District of Vermont to argue that Petitioners lack standing to bring the instant challenge. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 392 (D. Vt. 2007) (concluding that Plaintiffs failed to show that Vermont's decision to adopt California's standards "create[d] economic hardship for the automobile industry"), *cited in* Mot. at 10. But neither the body of evidence in *Green Mountain*, nor the statutory scheme to which that evidence was applied, are the same as in this case. *Green Mountain* followed *a trial on the merits*, and the conclusion EPA cites related to the court's conclusion that Vermont's regulation was not preempted by the federal Energy Policy and Conservation Act ("EPCA"). *Id.* at 343-92. That conclusion had nothing to do with, and in no way suggested, that the Vermont plaintiffs lacked standing to bring that suit. And it

certainly has no relevance to whether the members Petitioners represent have standing to bring a challenge here.[12]

D. Prudential Standing Is Also Clear In This Case

EPA does not suggest (nor could it) that there are prudential reasons for the Court to find a lack of standing here. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) ("*ADAPSO*") (prudential standing is present if a petitioner's interests are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.") Denial of standing for prudential reasons is permissible "only if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 458 (D.C. Cir. 1998) (citation and internal quotation marks omitted; *see ADAPSO*, 397 U.S. at 153). Here, the interests of Petitioner's members—protecting their ability to obtain and sell the vehicles consumers want and can afford to buy—are plainly related to "the

[12] EPA's conflation of *Green Mountain*'s final-merits decision with *this* Court's standing inquiry "falls into the familiar trap of confusing the merits of a case with the threshold requirement of standing to present a challenge." *Pub. Citizen*, 869 F.2d at 1549. It is notable, however, that *Green Mountain* assumed EPA would not waive preemption of California's GHG standards if they imposed undue burdens on the vehicle industry under EPCA. *See* 508 F. Supp. 2d at 349. That assumption no longer applies since EPA's waiver decision expressly refused to address any compliance burdens cognizable by the Department of Transportation when administering EPCA. *See* 74 Fed. Reg. at 32,783.

purposes implicit" in the Act. Indeed, EPA specifically recognized in the proceedings below that it could not grant a waiver for California's standards without first considering the "cost of compliance," because Congress specifically intended through the Act to "avoid undue economic disruption in the automotive manufacturing industry and also sought to avoid doubling or tripling the cost of motor vehicles to purchasers." 74 Fed. Reg. at 32,774 (quoting *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979)). And while California's GHG standards do not operate against Petitioners' members directly, those members are nonetheless the intended targets of the standards, which undeniably constrain—and indeed were *intended to constrain*—the type and design of the vehicles Petitioner's members can sell. *See, e.g.*, *S. Coast*, 472 F.3d at 895 (rejecting EPA's challenge to industry petitioner's standing when industry was the ultimate object of regulations even though only states were "directly" regulated). Moreover, while manufacturers remain free to distribute vehicles for sale anywhere in the country, and consumers are free to purchase them anywhere, dealers must sell within (and under the requirements of) the state in which they are located. For that reason, dealers are uniquely affected by EPA's decision to waive federal preemption of the California standards and are therefore uniquely positioned to bring this challenge. There is certainly no doubt that Petitioners "in practice can be

expected to police the interests that the statute protects." *Amgen, Inc. v. Smith*, 357 F.3d 103, 110 (D.C. Cir. 2004) (internal quotation marks and citation omitted).

II. PETITIONERS HAVE ASSOCIATIONAL STANDING

While EPA contests whether any of Petitioners' individual members would have standing to challenge EPA's waiver decision in their own right, it does not dispute that Petitioners are capable of satisfying the remaining requirements for associational standing. *See Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 815 (D.C. Cir. 2006). That is unsurprising. The interests Petitioners seek to protect through this Petition are clearly germane to their organizational purposes. (Ex. 2; Ex. 1). Moreover, this is not a case in which Petitioners are asking for a remedy requiring evaluation of different members' interests. Rather, Petitioners seek invalidation of the waiver on purely legal grounds. Accordingly, member participation is unnecessary. *See, e.g., Int'l Union, United Auto., Aerospace, & Agric. Workers of Am. v. Brock*, 477 U.S. 274, 287-88 (1986).

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask the Court to deny EPA's motion to dismiss. In the alternative, Petitioners request that the Court refer the motion to the merits panel to which the Petition is assigned and allow the parties an opportunity for full briefing and argument on the standing issue.

Dated: November 9, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petitioners' Response to Respondents' Motion to Dismiss for Lack of Standing has been filed with the Clerk of the Court this 9th day of November 2009 by using the CM/ECF System.

In addition, I hereby certify that the foregoing Petitioners' Response to Respondents' Motion to Dismiss for Lack of Standing has been served by United States first-class mail this 9th day of November 2009 upon each of the following participants or proposed intervenors in the case who are not registered CM/ECF users:

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