ORAL ARGUMENT SCHEDULED FOR FEBRUARY 17, 2015

No. 14-5199

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, *et al.*,
Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

CROSSROADS GRASSROOTS POLICY STRATEGIES,
Proposed-Intervenor-Appellant.

On Appeal from the United States District Court
for the District of Columbia

SUPPLEMENTAL BRIEF FOR THE FEDERAL ELECTION COMMISSION

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Statutes

The Federal Election Commission ("FEC" or "Commission") submits this brief addressing how the Supreme Court's decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) ("*Lexmark*") affects the prudential standing of Crossroads Grassroots Policy Strategies ("Crossroads") to intervene in this case. (Order, January 29, 2015 (Document #1534771).)

Lexmark supports the FEC's arguments that the district court's denial of Crossroads's intervention motion should be affirmed. The Supreme Court unanimously reaffirmed "the general prohibition on a litigant's raising another person's legal rights" as well as "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." 134 S. Ct. at 1386 (internal quotation marks omitted). Both the "third-party standing" and "zone-of-interests" limitations had earlier been classified under a "'prudential' branch of standing." *Id.* at 1386-87 & n.3. *Lexmark* left that classification intact for the third-party standing limitation, but reclassified the zone-of-interests limitation as a statutory rather than "prudential" requirement. *Id.* at 1386-89.

Lexmark's reclassification of the zone-of-interests test — which both sides' briefs have analyzed, consistent with this Court's pre- and post-*Lexmark* application of the test — alters neither the necessity of applying the test here nor its fatal effect on Crossroads's appeal. Crossroads (1) lacks prudential standing because it is improperly seeking to exercise the FEC's exclusive rights, and

(2) lacks any interest that is within the zone of interests implicated in the defense of this agency-review action.

I. *LEXMARK* CONFIRMS THAT CROSSROADS MAY NOT ENFORCE THE COMMISSION'S EXCLUSIVE RIGHTS

This Court has made clear that "prudential standing notions mandate that a plaintiff's suit seek to vindicate his own legal rights or interests," not those of third parties. *Steffan v. Perry*, 41 F.3d 677, 697 (D.C. Cir. 1994) (en banc). It has further established that the ban on third-party standing applies in the context of intervention, including the context of a would-be defendant-intervenor. *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 194 (D.C. Cir. 2013) (prohibiting "Proposed [Defendant-]Intervenors [from] effectively seeking to enforce the rights of third parties (here, the FDIC)").

Lexmark expressly declined to alter the classification of third-party standing as part of the prudential standing framework. Because the case did "not present any issue of third-party standing," the Court noted that "consideration of that doctrine's proper place in the standing firmament can await another day." 134 S. Ct. at 1387 n.3. *Lexmark* thus does not affect the third-party standing aspect of prudential standing, *id.*; *see also HomeAway Inc. v. City and Cty. of San Francisco*, No. 14-4859, 2015 WL 367121, at *7 (N.D. Cal. Jan. 27, 2015) ("*Lexmark* [left] the prudential doctrine of third-party standing unaffected") (collecting cases), which this Court has held is "a jurisdictional concept," *Steffan*, 41 F.3d at 697. It

is thus consistent with *Lexmark* for the Court to find, as the Commission has urged, that Crossroads lacks prudential standing because it is seeking to exercise powers and rights that belong to the Commission. (*See* FEC Br. at 30-33.)

Specifically, Crossroads ignores that only the issue in this case is whether the *FEC's* action was reasonable, *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988), and improperly attempts to seize the FEC's "exclusive jurisdiction with respect to the civil enforcement" of the Federal Election Campaign Act ("FECA" or "Act"), 52 U.S.C. § 30106(b)(1). Crossroads's bizarre contention that the FEC should not have "exclusive license" to defend the case (Crossroads Br. at 13, 31, 36) is backwards. Congress authorized the FEC, not Crossroads, to have the exclusive authority to defend and appeal an adverse remand decision. 52 U.S.C. § 30107(a)(6) (the "Commission has the power" to defend section 30109(a)(8) suits); *compare FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 486-87 (1985) ("*NCPAC*") ("'appropriate' actions by private parties are actions that do not interfere with the FEC's responsibilities for . . . enforcing" FECA).

II. CROSSROADS FAILS THE ZONE-OF-INTERESTS TEST UNDER *LEXMARK*

A. *Lexmark* Reaffirmed and Refocused the Zone-of-Interests Test This Court Applies to Potential Defendant-Intervenors

In addition to the third-party standing limitation, this Court has faithfully enforced the zone-of-interests limitation, which exists to ensure that "a statutory

cause of action extends only to plaintiffs whose interests 'fall within the zone . . . protected by the law invoked.'" *Lexmark*, 134 S. Ct. at 1388. The Court has routinely excluded groups whose interests lay outside of the relevant statute's zone of interests,[1] and specifically held that "would-be intervenors [must] show that their interests are arguably within the zone of interests to be protected or regulated by the statute," *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 29 (D.C. Cir. 2000) (internal quotation marks omitted). Accordingly, it has applied the zone-of-interests test to evaluate would-be intervenors of every stripe, including defendant-intervenors. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 734 n.6 (D.C. Cir. 2003)[2]; *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013) (per curiam) (using zone-of-interests analysis to exclude intervenor who sought to intervene both as a petitioner and respondent); *In re Vitamins Antitrust Class Actions*, 215 F.3d at 28-31 (denying intervention request of opting-out

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[1] *See, e.g.*, *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012); *Role Models Am., Inc. v. Geren*, 514 F.3d 1308, 1311-12 (D.C. Cir. 2008); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1286-89 (D.C. Cir. 2005); *Am. Fed'n of Gov't Emps. v. Rumsfeld*, 321 F.3d 139, 142-45 (D.C. Cir. 2003); *Mudd v. White*, 309 F.3d 819, 823-24 (D.C. Cir. 2002); *Sierra Club v. EPA*, 292 F.3d 895, 903 (D.C. Cir. 2002); *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 407-08 (D.C. Cir. 2000).

[2] Though the Court in *Fund for Animals* found that the zone-of-interests analysis was disposed by the Article III standing inquiry, it has since clarified that that conclusion was based upon the Supreme Court's earlier expansive interpretation of the Endangered Species Act, and therefore that *Fund for Animals* did not purport to preclude "considerations of [the analysis] under different statutes" like FECA. *Deutsche Bank Nat. Trust Co.*, 717 F.3d at 194-95.

parties to oppose agreed-upon class settlement provision because they were outside of the zone of interests); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074-1076 (D.C. Cir. 1998) (finding would-be intervenor within zone of interests).

Lexmark does not alter this precedent. On the contrary, it elevated the zone-of-interests analysis — which is "require[d]" in evaluating statutory causes of action like the one brought by Public Citizen in this case — and clarified that it must be performed using "traditional principles of statutory interpretation" instead of "policy judgment[s]" "dictate[d]" by judicial "prudence." 134 S. Ct. at 1387-88. Quoting Judge Silberman of this Court, the Supreme Court explained that "'"prudential standing" is a misnomer' as applied to the zone-of-interests analysis, which asks whether 'this particular class of persons ha[s] a right to sue under this substantive statute.'" *Id.* at 1387 (quoting *Ass'n of Battery Recyclers, Inc.*, 716 F.3d at 675-76 (Silberman, J., concurring)). Consistent with its focus on Congressional intent, *Lexmark* reiterated that the zone-of-interests limitation applies to "all statutorily created causes of action," that "Congress is presumed to 'legislat[e] against the background of' the zone-of-interests limitation," and, most critically, that it "*always* applies and is never negated." *Id.* at 1388.

This Court has subsequently explained that *Lexmark*'s statutory interpretive approach requires the Court to determine the "threshold matter" of the breadth of the zone of interests by focusing on the particular "'provisions of law at issue.'"

White Stallion Energy Center, LLC v. EPA, 748 F.3d 1222, 1256 (D.C. Cir. 2014) (per curiam) (quoting *Lexmark*, 134 S. Ct. at 1389), *cert. granted in part*, 83 U.S.L.W. 3089 (U.S. Nov. 25, 2014) (Nos. 14-46, 14-47, 14-49). The question is therefore "not . . . whether . . . Congress *should* have authorized . . . suit, but whether Congress in fact did so," *Lexmark*, 134 S. Ct. at 1388, and the Court is to be guided by "those . . . precedents that have interpreted [the provision], and not those applying other statutory provisions, including the APA," *White Stallion Energy Center, LLC*, 748 F.3d at 1256.

Consistent with *Lexmark*, this Court has continued to exclude parties failing the zone-of-interest analysis, regardless of "whether [the test is] characterized as prudential standing or legal capacity to state a claim." *Sierra Club v. EPA*, 755 F.3d 968, 976 (D.C. Cir. 2014); *id.* at 976-77 (using statutory interpretive zone-of-interest test to exclude party); *Nat'l Res. Def. Council v. EPA*, 755 F.3d 1010, 1018 (D.C. Cir. 2014) (same); *White Stallion Energy Center, LLC*, 748 F.3d at 1256-58 (same); *see also Permapost Products, Inc. v. McHugh*, ___ F. Supp. 2d ___, 2014 WL 3056506, at *7-11 (D.D.C. July 7, 2014) ("Nomenclature aside, the question remains the same . . . .") (excluding claims outside zone of interests).

Thus, *Lexmark* does not upset this Court's body of law taking standing and related threshold concepts originating as requirements for "plaintiffs," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (Article III standing), *Steffan*,

41 F.3d at 697 (third-party standing), *Lexmark*, 134 S. Ct. at 1386-87 (zone-of-interests), and extending them to intervenors, including defendant-intervenors. Nor should it be read to do so implicitly. This Court's application of these juridical requirements to all intervenors is reflective of its vigilance in ensuring that it is hearing from proper parties, a concern which applies with particular relevance in agency review cases such as this section 30109(a)(8) case. *See infra* pp. 7-10. As Judge Silberman has remarked in an analogous context, if the Court could "dispense with the standing requirement for a defendant-intervenor, then any organization or individual with only a philosophic identification with a defendant — or a concern with a possible unfavorable precedent — could attempt to intervene and influence the . . . litigation," an "intolerable [prospect] at the district court level." *Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 195 (Silberman, J., concurring).

B. Crossroads is Not Within the Zone of Interests Implicated in the Defense of this Suit

Crossroads's interests do not nearly fall within the interests encompassed in defending against the FECA cause of action in this case: 52 U.S.C. § 30109(a)(8). (*See* FEC Br. at 28-31.)

Applying "traditional tools of statutory interpretation," *Lexmark*, 134 S. Ct. at 1387, to evaluate section 30109(a)(8) confirms that Crossroads's place is outside of the zone of interests in defense of this FECA lawsuit. On its face, section

30109(a)(8) authorizes only a "party aggrieved by an order of the Commission dismissing a complaint filed by [that] party" to file a petition for judicial review of the agency's decision. 52 U.S.C. § 30109(a)(8)(A); *Common Cause v. FEC*, 108 F.3d 413, 418-19 (D.C. Cir. 1997) (same). Section 30109(a)(8) is equally clear that the only defendant permitted to be sued in the first instance in such an action is the FEC itself. Because the *sole remedy* available in such suit is a declaration that *the FEC* acted "contrary to law" and a "direct[ive]" to "*the Commission*" to "conform with such declaration," 52 U.S.C. § 30109(a)(8)(C) (emphasis added), the statute cannot be interpreted to contemplate any other defendant. Thus, as the Supreme Court itself has recognized, the district court cannot order any relief against a *respondent* in a section 30109(a)(8) review action like this one. *NCPAC*, 470 U.S. at 488 (administrative respondent may be sued "[i]f, and *only* if," a court has entered a contrary-to-law finding with which the FEC has failed to conform (emphasis added)). Congress's decision not to "authorize[] suit" by Public Citizen against Crossroads, *Lexmark*, 134 S. Ct. at 1388, "indicates it is foreclosed," *In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972, 977 (D.C. Cir. 2013); *see Am. Fed'n of Gov't Emps. v. Rumsfeld*, 321 F.3d 139, 144 (D.C. Cir. 2003) (private action against federal agency employer is precluded by OSHA's enforcement scheme).

Crossroads's interests similarly fall outside of the broader interests FECA protects. In *Buckley v. Valeo*, the Supreme Court recognized that FECA's "primary purpose [is] to limit the actuality and appearance of corruption resulting from large individual financial contributions." 424 U.S. 1, 26 (1976) (per curiam). In *FEC v. Akins*, the Court performed the zone-of-interests analysis (under the rubric of "prudential standing") and concluded that FEC *complainants* may proceed in a section 30109(a)(8) case because "their failure to obtain relevant information . . . is injury of a kind that FECA seeks to address." 524 U.S. 11, 20 (1998). Here, Crossroads has not contended — and could not plausibly contend — that its interests fall within the anticorruption and informational interests FECA protects. *Accord Lexmark*, 134 S. Ct. at 1389 (examining Lanham Act's purposes).

Crossroads initially asserted a "property" interest and argued that it is within FECA's zone of interests because the Act "regulates the precise type of activity that Public Citizen imputes to" it. (Crossroads Br. at 16, 24.) But FECA does not protect Crossroads's economic interests and Crossroads's regulatory argument is contrary to both what the Commission determined here and what Crossroads itself seeks to advocate. (*See* FEC Br. at 29.) Crossroads later argued that it is within FECA's zone of interests because the Act permits respondents to participate during the *administrative* enforcement process. (Reply Br. at 10.) But Congress's decision to permit administrative respondents to make submissions to the FEC in

an administrative enforcement matter does not negate the exclusion of such parties from subsequent *litigation against the FEC* authorized in section 30109(a)(8)(A). And Crossroads's question-begging notion (*id.* at 11) that Rule 24 by itself bootstraps a proposed intervenor inside a statute's zone of interests would, if accepted, negate the zone-of-interests analysis for intervenors. *Contra Lexmark*, 134 S. Ct. at 1388 (zone-of-interest analysis "is never negated").

Finally, because Crossroads's interests lie outside of the zone of interests FECA protects (and for the same reasons it has failed to show Article III causation (*see* FEC Br. at 34-38)), it necessarily follows that it also fails the proximate cause analysis applied in *Lexmark*. 134 S. Ct. at 1390-91.

CONCLUSION

For the foregoing reasons, and because Crossroads lacks Article III standing and fails the requirements of Rule 24 as set forth in the FEC's merits brief, the Court should affirm the district court's denial of Crossroads's motion to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February 2015, I electronically filed the foregoing Supplemental Brief for the Federal Election Commission with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. Service was made on the following through CM/ECF:

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