ORAL ARGUMENT SCHEDULED FOR FEBRUARY 17, 2015

No. 14-5199

IN THE 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
No. 1:14-cv-00148-RJL (Hon. Richard J. Leon)

SUPPLEMENTAL BRIEF FOR APPELLANT CROSSROADS GRASSROOTS POLICY STRATEGIES

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GLOSSARY OF ABBREVIATIONS

FEC	Federal Election Commission
FECA	Federal Election Campaign Act
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ARGUMENT

In *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the Supreme Court clarified that federal courts generally cannot impose prudential limits on their own jurisdiction. Thus, as interpreted in *Lexmark*, the "zone-of-interests" test does not address jurisdictional standing; it merely asks "whether [a plaintiff] has a cause of action under the statute." *Id.* at 1387. Stripped of its jurisdictional dimension, this test does not apply to intervenor-defendants, who need only "an 'interest' in the litigation—not a 'cause of action' or 'permission to sue.'" *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1145 (D.C. Cir. 2009) (per curiam) (citation omitted). As to intervenor-defendants, the only statutory question is whether Congress negated their default rights under Rule 24, and the Federal Election Campaign Act ("FECA") did no such thing.

Nor does the zone-of-interests test apply via Rule 24 itself. Absent a "demonstrabl[e]" expression of congressional intent to the contrary, *see id.*, Rule 24(a)(2) grants a right to intervene to outsiders with an interest "relating to the property or transaction that is the subject of the action." This Court has given this text its naturally broad meaning, and there is no basis for reading in prudential-standing limits.

In any case, Crossroads GPS easily satisfies the zone-of-interests test. Private speakers like Crossroads GPS are manifestly protected and regulated by the "FECA's first-amendment-sensitive regime." *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1370 (D.C. Cir. 1988). In fact, the sole purpose of this action is to reinstate a Federal Election Commission ("FEC") enforcement matter against Crossroads GPS, depriving the organization of the "adjudicatory dismissal decision" it won before the Commission. J.A. 264. The organization's direct stake in this action could not be clearer, and it should be allowed to intervene in the district court.

A. After *Lexmark*, the zone-of-interests test does not apply to intervenor-defendants.

1. *Lexmark* clarified that the zone-of-interests test does not address the federal courts' jurisdiction.

a. Although the standing doctrine is normally "directed at those who invoke the court's jurisdiction," *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003), in this Circuit non-parties who seek to intervene of right must themselves have standing, *In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972, 976 (D.C. Cir. 2013) (citation omitted); *id.* at 980 ("It remains . . . an open question . . . whether Article III standing is required for permissive intervention."). Until *Lexmark*, this Court saw prudential standing as a "threshold, jurisdictional concept" on par with Article III standing. *Deutsche Bank Nat'l Trust*

Co. v. FDIC, 717 F.3d 189, 194 n.4 (D.C. Cir. 2013); *see generally Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674-79 (D.C. Cir. 2013) (Silberman, J., concurring). By extension, therefore, intervenors of right were required to show prudential standing as well. *See In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 29 (D.C. Cir. 2000). "In the case of statutory rights, this require[d] would-be intervenors to show that their interests are 'arguably within the zone of interests to be protected or regulated by the statute.'" *Id.* (citation omitted).

In *Lexmark*, the Supreme Court disavowed the view that federal courts should impose "prudential" limits on their power, emphasizing instead their "virtually unflagging" duty "to hear and decide cases within [their] jurisdiction." 134 S. Ct. at 1386 (internal quotation marks and citation omitted). Then clarifying its precedent, the Court announced that the zone-of-interests test is not jurisdictional; properly understood, the analysis does not ask whether the federal courts have power to hear a plaintiff's claim. *Id.* at 1387. Instead, the test asks a purely statutory question: Whether "a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.*; *see also id.* at 1387 n.4 ("[T]he absence of a valid . . . cause of action does not implicate . . . the court's statutory or constitutional power to adjudicate the case.") (citation omitted).

b. Until now, this Court required intervenors to satisfy the prudential zone-of-interests test only because it was seen as a jurisdictional standing

requirement "imposed on th[e original] parties." *See In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d at 976. Post-*Lexmark*, the test is no longer a "standing requirement[]" for the parties, *id.*, meaning that there is no jurisdictional warrant to retain it for intervenors.[1]

2. The zone-of-interests test does not apply to Crossroads GPS as a statutory matter.

For most party-plaintiffs, *Lexmark*'s re-categorization of the zone-of-interests analysis has little practical significance; if they cannot state "a valid . . . cause of action," their suit still fails. 134 S. Ct. at 1387 n.4; *see also Sierra Club v. EPA*, 755 F.3d 968, 976 (D.C. Cir. 2014). But the same cannot be said for prospective intervenors, particularly intervenor-defendants. Framed as a cause-of-action inquiry, the zone-of-interests test simply does not translate. For "[u]nder Federal Rule of Civil Procedure 24(a)(2), 'the question is not whether the applicable law assigns the prospective intervenor a cause of action[, but] [r]ather . . . whether the individual may intervene in an already pending cause of

[1] *Lexmark* did not decide whether prudential restrictions on litigating rights belonging to others are jurisdictional in nature. 134 S. Ct. at 1387 n.3. But that question is not presented here, because Crossroads GPS seeks to defend its own interests arising under the FECA and the "adjudicatory dismissal decision" it won before the FEC. J.A. 264; Opening Br. 21-22. (By analogy, Public Citizen's suit is akin to a mandamus petition, which was historically brought against the decision maker but typically litigated between the real parties in interest. *See* Fed. R. App. P. 21 advisory committee's note (1996).) In any event, whatever prudential considerations may remain after *Lexmark*, Congress negated them across-the-board in the context of Section 30109 suits. *See infra* 7-8; Opening Br. 23-24.

action.'" *Philip Morris USA, Inc.*, 566 F.3d at 1145 (alterations in original; citation omitted). "As the Rule's plain text indicates, intervenors of right need only an 'interest' in the litigation—not a 'cause of action' or 'permission to sue.'" *Jones v. Prince George's Cnty., Md.*, 348 F.3d 1014, 1018 (D.C. Cir. 2003); *see also Philip Morris USA, Inc.*, 566 F.3d at 1145 (indicating that intervenor-plaintiffs might be required to show a cause of action if they assert unique claims).

Instead of asking whether Congress authorizes qualified intervenors to appear, the correct statutory question is whether their right to intervene has been negated. With limited exceptions, the Federal Rules "govern the procedure in all civil actions and proceedings in the United States district courts." Fed. R. Civ. P. 1 (emphasis added). To override that benchmark, the onus is on Congress to "demonstrably" express its intent. *Philip Morris USA, Inc.*, 566 F.3d at 1145. Congress knows precisely how to expand and contract Rule 24 when it so desires, *e.g.*, 31 U.S.C. § 3730(b)(5) (False Claims Act); 42 U.S.C. § 9613(i) (Comprehensive Environmental Response, Compensation, and Liability Act), and nothing in the FECA signals an intent to repudiate the intervention rights of interested non-parties like Crossroads GPS. *See* Reply Br. 10-11.

3. Rule 24(a) does not incorporate the zone-of-interests test.

a. Without jurisdictional or statutory basis, there is no license for the courts to hold prospective intervenors to the zone-of-interests test. Rather, a

prospective intervenor "must" be allowed to intervene upon meeting the elements set forth in Rule 24(a); as relevant here, the outsider must simply "claim[] an interest relating to the property or transaction that is the subject of the action" and risk a "practical" impairment of that interest.

These elements do not connote a zone-of-interests analysis. To the contrary, as a leading case from this Circuit reasoned, "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967); *see also* Fed. R. Civ. P. 24 advisory committee's note (1966) ("[I]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene . . . ."); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1310 (1976) ("[T]he tendency, supported by both the language and the rationale of the Federal Rules of Civil Procedure, is to regard anyone whose interests may be significantly affected by the litigation to be presumptively entitled to participate in the suit on demand."). For the reasons discussed in its filed briefs, Crossroads GPS claims an obvious interest in this case, and it meets the other elements of Rule 24(a) as well.

b. *Deutsche Bank National Trust Co.* does not counsel differently. In that pre-*Lexmark* decision, a panel of this Court suggested that Rule 24 could be

read to house "prudential standing requirements." 717 F.3d at 194. But this self-styled dictum (*id.* at 195) does not square with the plain text of Rule 24(a) or with the broad, practical reading this Court has given the Rule's interest element. Again, the Rule contemplates intervention of right without identifying any added "prudential" limits, and the courts are not empowered to create those limits by inference. Like all the Federal Rules, Rule 24 is "as binding as any statute duly enacted by Congress," meaning that the "federal courts have no more discretion to disregard [a] Rule's mandate than they do to disregard constitutional or statutory provisions." *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988); *see also Jones v. Bock*, 549 U.S. 199, 213 (2007) (deviations from procedural practice "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation") (citation omitted). Tellingly, the panel in *Deutsche Bank* allowed that "[o]ther courts do not seem to have specifically identified th[e] rule as going to third-party prudential standing." 717 F.3d at 194 n.5.[2]

B. If the zone-of-interests test still governed intervenor-defendants, Crossroads GPS would satisfy it.

Even if *Lexmark* had not eliminated the zone-of-interests test for intervenor-defendants, the test would not bar Crossroads GPS here. First, the Supreme Court

[2] Nor would the outcome have been different in *Deutsche Bank* without the Court's comments on prudential standing and Rule 24. As the Court's primary holding made clear, the prospective intervenor could not claim a cognizable interest even under Article III. 717 F.3d at 193-94.

has indicated that the FECA "protect[s] a more-than-usually 'expan[sive]' range of interests." *See Lexmark*, 134 S. Ct. at 1388; *FEC v. Akins*, 524 U.S. 11, 19 (1998). Never "especially demanding," the zone-of-interests test is even less of an obstacle to parties litigating under the FECA—if it raises the bar at all. *Lexmark*, 134 S. Ct. at 1389. And because the plaintiffs themselves do not appear to be subject to the zone-of-interests test in this action, there is no good reason to apply that test to intervenors under Rule 24. Opening Br. 23-24. At the very least, the interest requirement should not be higher for intervenors than it is for the original litigants.

Second, to the extent the zone-of-interests test does apply, Crossroads GPS's interests are more than "arguably within the zone of interests to be protected or regulated by the statute." *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256 (D.C. Cir. 2014) (per curiam) (citation omitted), *cert. granted in part*, 134 S. Ct. 702 (2014). The "FECA's first-amendment-sensitive regime" has been deliberately tailored by Congress and the courts to honor the rights of organizations like Crossroads GPS—private speakers engaged in public discourse. *Galliano*, 836 F.2d at 1370; *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264-65 (1986); *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) (per curiam). This Court, in fact, has stressed that the FECA and the FEC are "[u]nique" in that their "sole purpose [is] the regulation of core constitutionally protected activity." *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003). "The subject matter which the

FEC oversees . . . relates to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981). Thus—to borrow *Deutsche Bank*'s term—there is an intuitive "nexus" between Crossroads GPS's direct interest in sustaining the challenged dismissal order and its defense of that order as consistent with the FECA. 717 F.3d at 195.

The provision of the Act authorizing this suit underscores the point. Section 30109 was "purposely designed to ensure fairness . . . to respondents," like Crossroads GPS. *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam); *Galliano*, 836 F.2d at 1370 (highlighting "the first-amendment-prompted arrangements Congress devised for FECA enforcement actions"). At each stage of the enforcement process, Congress guaranteed respondents the opportunity to defend themselves. Hence, the Commission may not take any action, other than dismissing the complaint, until the respondent has "the opportunity to demonstrate . . . that no action should be taken." 52 U.S.C. § 30109(a)(1). Nor may the FEC even proceed to discovery unless a bipartisan majority of Commissioners finds "reason to believe" a violation has occurred. *Id.* § 30109(a)(2).

Throughout, the FECA reflects "wise and prudent safeguards . . . to protect the privacy and other interests of respondents." *Rose v. FEC*, 608 F. Supp. 1, 7

(D.D.C.), *rev'd*, Nos. 84-5701, 84-5719, 1984 WL 148396 (D.C. Cir. Oct. 24, 1984) (per curiam). In other words, the dismissal Public Citizen seeks to invalidate arose from FECA procedures established precisely to protect the interests of speakers like Crossroads GPS. That a private speaker caught up in an FEC enforcement matter is "within the zone of interests to be protected or regulated by" this regime can hardly be clearer. To argue otherwise—as the FEC does (Br. 29)—is to ignore both the burdens visited on the targets of federal agencies and the "constitutional significance" of the FEC's organic statute. *Machinists Non-Partisan Political League*, 655 F.2d at 387.

CONCLUSION

This Court should reverse the order of the district court and direct that Crossroads GPS be allowed to intervene.

Respectfully submitted,

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February 10, 2015

CERTIFICATE OF COMPLIANCE

I certify that this supplemental brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font. I also certify that this brief complies with this Court's order limiting supplemental briefs to 10 pages.

/s/ Thomas W. Kirby
Thomas W. Kirby

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2015, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Thomas W. Kirby
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