NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-7038

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

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff-Appellant,

v.

AMERICAN ACTION NETWORK,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:18-cv-00945-CRC

PLAINTIFF-APPELLANT'S UNOPPOSED MOTION TO HOLD CASE IN ABEYANCE

Pursuant to Federal Rules of Appellate Procedure 26(b) and 27 and D.C. Circuit Rule 28(e), Plaintiff-Appellant Citizens for Responsibility and Ethics in Washington ("CREW") hereby respectfully moves this Court to hold in abeyance all proceedings in the above-captioned appeal pending resolution of the outstanding petition for en banc review in *CREW v. FEC*, 19-5161 (petition filed

June 23, 2021). Appellee American Action Network does not oppose the requested abeyance.

This appeal concerns the propriety of the district court's dismissal of an action brought under 52 U.S.C. § 30109(a)(8). The district court dismissed the below case solely because it found the "intervening D.C. Circuit decision" of *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*") "prohibits the Court from reviewing CREW's claim." *CREW v. AAN*, No. 18-cv-945-CRC, 2022 WL 612655, *1 (D.D.C. Mar. 2, 2022).

While the soundness of that application of *New Models* is a question in this appeal, the viability of the *New Models* decision itself remains unsettled. A petition to rehear the *New Models* decision en banc was filed on June 23, 2021 and remains pending before this Court. Given the centrality of that decision to the dismissal below and the possibility the decision will be vacated and reconsidered en banc, judicial economy favors holding this appeal in abeyance. *See In re Khadr*, 823 F.3d 92, 95 (D.C. Cir. 2021) (noting appeal was held in abeyance pending resolution of en banc petition in another matter); *United States v. Gerald*, 5 F.3d 563, 565 (D.C. Cir. 1993) (same); *Public Citizen v. Nat'l Highway Traffic Safety Admin.*, 848 F.2d 256, 259 (D.C. Cir. 1988) (same).

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of its docket with economy of

time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Here, the sole basis for the district court's decision below was the divided panel decision in *New Models*. *See CREW*, 2022 WL 612655, at *3–*8 (distinguishing other authorities but finding *New Models* alone "precludes judicial review"). As the district court noted, should "the Circuit grant en banc review in *New Models*, the en banc ruling would likely resolve the question of reviewability for both cases." *Id.* at *8. If the en banc court grants the pending petition to rehear *New Models* and vacates the decision, the district court's dismissal can likewise be vacated, and this matter can be remanded back to the district court without the need for any further appellate proceedings. If, on the other hand, the en banc court denies the pending motion to rehear *New Models*, that too will guide this appeal. Accordingly, judicial economy is best served by holding the case in abeyance pending resolution of the outstanding petition to rehear *New Models*.

While this appeal could consider the application of *New Models* to this case and the consistency of *New Models* with prior binding precedents, *cf. CREW*, 2022 WL 612655, at *8 (noting the court "could distinguish this case from *New Models*"), the more efficient course is to enable consideration of *New Models* itself in the pending en banc petition first. In *New Models*, the FEC—the agency whose reviewability is the central issue—is a party, but it is not a party here. Thus, the

panel here, or any en banc that might result, would not have the benefit of the FEC's position on the arguments, and any resulting decision would not bind the FEC as a party.

As Judge Cooper recognized below, an en banc decision addressing *New Models* may obviate the need for further appellate proceedings here. Accordingly, to preserve judicial and party resources, CREW respectfully makes this unopposed request to hold proceedings in this matter in abeyance pending resolution of the petition to rehear *New Models* en banc.

Dated: April 26, 2022.

Respectfully submitted,

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CERTIFICATE OF COUNSEL AS TO PARTIES AND AMICI CURIAE

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), Plaintiff-Appellant provides the following certificate as to parties and amici curiae. The Appellant is Citizens for Responsibility and Ethics in Washington. The Appellee is American Action Network. No amici appeared in the district court. Randy Elf has expressed an intent to appear as amicus in the appeal. Plaintiff-Appellant anticipate additional amici are likely to appear if this appeal proceeds.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Plaintiff-Appellant Citizens for Responsibility and Ethics in Washington ("CREW") submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly-held company has a ten percent or greater ownership interest in CREW.

(b) CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW files complaints with the Federal Election Commission to ensure enforcement of federal campaign finance laws and to ensure its and voters' access to information about campaign financing, including financing of independent expenditures, to which CREW and voters are legally entitled. CREW disseminates, through its website and other media, information it learns in the process of those complaints to the wider public.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify, on this 26th day of April, 2022, that:

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted under Fed. R. App. P. 32(f), this document contains 642 words.
2. This document 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 document has been prepared in proportional spaced typeface using Microsoft Word 2016 in a 14-point Times New Roman font.

/s/ Stuart McPhail
Stuart C. McPhail

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2022, 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/ Stuart McPhail
Stuart C. McPhail