No. 23A___

IN THE SUPREME COURT OF THE UNITED STATES

TUG HILL OPERATING, LLC,

Applicant,

v.

LASTEPHEN ROGERS, individually and for others similarly situated,

Respondent.

APPLICATION FOR STAY PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

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December 15, 2023

PARTIES TO THE PROCEEDING

Tug Hill Operating, LLC is the petitioner in this Court and was defendant-appellee below.

Lastephen Rogers, on behalf of himself and all others similarly situated, is the respondent in this Court and was plaintiff-appellant below.

RUSCO Operating, LLC sought intervention in the district court and was defendant-intervenor-appellee below.

RULE 29.6 STATEMENT

Applicant Tug Hill Operating, LLC has no parent corporation. Its sole member is Tug Hill, Inc., and no publicly held corporation owns more than 10% of Tug Hill, Inc.'s stock.

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TO THE HONORABLE JOHN ROBERTS, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

INTRODUCTION

Pursuant to 28 U.S.C. §§1651 and 2101, and Supreme Court Rule 23, Applicant Tug Hill Operating, LLC respectfully seeks an order staying the district court proceedings by January 10, 2024, pending disposition of Tug Hill's concurrently filed petition for writ of certiorari and, if granted, this Court's issuance of its judgment to the court of appeals. The petition seeks review of the Fourth Circuit's reversal of the district court's order granting Tug Hill's motion to compel arbitration, a reversal which deepened a 5-to-3 circuit split on a critical and recurring question: When an arbitration agreement delegates gateway questions of arbitrability to the arbitrator, may a court still interpret the agreement for itself to decide whether the agreement covers nonsignatories?

The decision below presents a "familiar" scenario that has divided lower courts. *Newman v. Plains All Am. Pipeline, L.P.*, 44 F.4th 251, 254 (CA5 2022) (Jones, J., dissenting from denial of rehearing en banc). Respondent Lastephen Rogers worked for Tug Hill as an independent contractor, a position he obtained through the "matchmaking" services of an intermediary entity. Ex. A at 6a. To obtain those services, Rogers signed an agreement with the intermediary, which contemplated him working as an independent contractor for companies like Tug Hill and contained an arbitration provision granting the arbitrator "exclusive authority to resolve any dispute relating to … interpretation, applicability, or enforceability." Ex. A at 5a-6a. In other words, the agreement delegated "'gateway' questions of 'arbitrability,'" *Henry*

Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019) (citation omitted), such as "whether the arbitration contract b[inds] parties who did not sign [it]," *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). So, when Rogers later decided he was not an independent contractor and brought a putative collective action against Tug Hill under the Fair Labor Standards Act (FLSA), Tug Hill sought individual arbitration as a third-party beneficiary of Rogers's agreement. Tug Hill explained that any dispute about the interpretation of its contractual rights as a nonsignatory fell within the arbitrator's "'exclusive authority' to decide questions of arbitrability." Ex. A at 7a. The district court agreed and compelled arbitration.

The Fourth Circuit reversed. Despite recognizing that "Rogers [had] agreed to arbitrate issues—including threshold issues"—the court claimed the right to interpret the agreement "as a matter of state contract law" to decide for itself whether a nonsignatory was "authorized to enforce [it]." Ex. A at 14a-15a. The court then construed the agreement to find that Tug Hill lacked rights as a third-party beneficiary. On remand, the district court entered an expedited schedule that plans to try this putative collective action by August 2024, with conditional class certification to be fully briefed by January 10, 2024. When Tug Hill sought a stay, both the district court and Fourth Circuit denied relief.

Tug Hill now seeks a stay in this Court. There is a reasonable probability that certiorari will be granted, a fair (indeed, substantial) prospect that the decision below will be reversed, and a likelihood of irreparable harm absent a stay.

First, there is a reasonably probability of review given the entrenched 5-to-3 circuit split (which includes an 8-to-8 en banc vote in the Fifth Circuit) and the cleanness of this vehicle. The Fourth, Fifth, and Ninth Circuits "hold[] that it is for the court, not an arbitrator, to decide whether [a nonsignatory] can enforce an arbitration agreement" despite a delegation of questions of arbitrability. Ex. A at 15a (citing *Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 398-89 (CA5 2022)). But, as Judge Jones stressed in her dissent from the Fifth Circuit's evenly-divided denial of rehearing en banc, that view is "out-of-step with" the First, Second, Sixth, Eighth, and Tenth Circuits, *Newman*, 44 F.4th at 251, 254 & n.7, which recognize that a nonsignatory's "ability to invoke the arbitration agreement constitutes an issue of enforceability that 'must be considered by an arbitrator in the presence of a delegation provision,'" *Swiger v. Rosette*, 989 F.3d 501, 507 (CA6 2021). This fracture—which imperils vital national uniformity on arbitration—will not resolve on its own, as shown by the ever-widening divide, the evenly-split Fifth Circuit en banc vote, and the Fourth Circuit's own recognition of contrary authority. The decision below is an ideal vehicle because it acknowledged the existence of a valid agreement delegating questions of arbitrability and issued an outcome-determinative ruling that took the nonsignatory question away from the arbitrator.

Second, there is a strong possibility of reversal because—as Judge Jones also explained—the minority view is "out-of-step with … Supreme Court" precedent and "seriously misconstrues the law governing arbitration." *Newman*, 44 F.4th at 251. The error is simple. The question the Fourth Circuit decided for itself—"whether the

arbitration contract b[inds] parties who did not sign the agreement"—is a mine-run "question of arbitrability." *Howsam*, 537 U.S. at 84. And when "a valid arbitration agreement exists … delegat[ing] the arbitrability issue to an arbitrator, a *court may not decide the arbitrability issue*." *Henry Schein*, 139 S. Ct. at 530 (emphasis added). Here, the Fourth Circuit accepted that Rogers had executed a valid agreement delegating questions of arbitrability. Indeed, the arbitrator had "exclusive authority to resolve any dispute relating to … interpretation, applicability, or enforceability," Ex. A at 14a, which necessarily encompassed the power to decide whether the agreement could "be enforced by or against nonparties" as a routine matter "of state contract law regarding the scope of agreements," *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009). Yet the court interpreted the agreement for itself.

Third, a stay is necessary to prevent irreparable harm that goes far beyond the already-significant prejudice inherent to any denial of arbitration. The district court entered an expedited schedule, meaning Tug Hill will irretrievably lose the "benefits of arbitration (efficiency, less expense, [and] less intrusive discovery)" in rapid fashion. *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023). And the *collective* nature of this fast-moving suit adds greatly to these injuries. Not only are there the usual risks of asymmetrical discovery and settlement pressure, but the district court may grant conditional certification as early as *January 11, 2024*. At that point, Tug Hill will be forced to identify other potential class members, who will receive court-ordered notice and who will likely be recruited to perpetuate litigation *regardless* of whether Rogers must individually arbitrate. There is no undoing that.

JURISDICTION

The district court proceedings are under docket number 21-cv-199 (N.D. W.Va.), the Fourth Circuit proceedings are under docket number 22-1480, and The Chief Justice's previous order granting Tug Hill's application for an extension of time to file a petition for writ of certiorari (which Tug Hill sought *before* the district court entered its abbreviated schedule) is under docket number 23A379. The Fourth Circuit reversed the district court's order granting Tug Hill's motion to compel arbitration on August 7, 2023. Ex. A (76 F.4th 279 (2023)). The district court denied Tug Hill's motion to stay on October 26, 2023. Ex. D at 70a. The Fourth Circuit denied Tug Hill's motion to recall and stay the mandate or to stay the district court proceedings on November 29, 2023. Ex. B at 23a. This Court has jurisdiction under 28 U.S.C. §§1254(1), 1651, and 2101.

STATEMENT OF THE CASE

I. Rogers Signs An Arbitration Agreement To Find Work With Tug Hill.

Rogers claims to be an experienced foreman in the oil and gas industry. Ex. A at 4a. "[H]e sought to find work with oil and gas companies" like Tug Hill through an intermediary company called RigUp, which is "in the business of connecting skilled workers in the industry with companies looking for such workers" and had an underlying services agreement with Tug Hill. *Id.*[1] RigUp "operates an online platform … which is used by oil and gas operators and independent contractors" to

[1] RigUp, Inc, is the former name of the company that owns non-party RUSCO Operating, LLC, all of which the Fourth Circuit collectively addressed as "RigUp." Ex. A at 3a n.1.

"connect independent contractors to particular projects." Ex. C at 26a. "To engage RigUp's services, Rogers executed an agreement with RigUp in January 2019." Ex. A at 4a.

The express purpose of Rogers's agreement was to work for companies like Tug Hill. As the agreement explained to him, "RigUp has been engaged by Companies to introduce you to them for the purposes of completing projects," and Rogers could use RigUp's services "to provide freelance services to third party companies." Ex. A at 4a; Ex. E at 75a. The agreement also incorporated an arbitration provision stating "that every dispute arising in connection with these Terms will be resolved by binding arbitration." Ex. A at 5a (emphasis omitted). This included an explicit delegation of threshold questions of arbitrability to the arbitrator: "[T]he arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement." Ex. A at 5a-6a.

That same month—and "pursuant to RigUp's matchmaking"—"Rogers began work as a [foreman] at a rig site operated by Tug Hill." Ex. A at 6a. As everyone expected, Rogers performed his work as an independent contractor. *Id.*

II. Rogers Sues Tug Hill Over His Work.

A year-and-a-half later, Rogers sued Tug Hill, alleging that "he actually performed his work as an employee" and that Tug Hill had violated the FLSA "by failing to pay him any overtime." *Id.* He sought to represent himself and a class of "other similarly situated workers." *Id.*

Tug Hill moved to compel arbitration. Although Tug Hill had not signed Rogers's agreement, it sought to "enforce the arbitration agreement either 'as a third-

party beneficiary or pursuant to estoppel principles.'" Ex. A at 7a (ellipsis omitted). Tug Hill further explained that "the arbitration clause delegated to the arbitrator the 'exclusive authority' to decide questions of arbitrability." *Id.*

The district court agreed. Relevant here, it "concluded that the fact that … Tug Hill was not a signatory to the RigUp Agreement was of no moment because any question of arbitrability had to be decided by the arbitrator based on the delegation clause in the arbitration agreement." Ex. A at 8a-9a (cleaned up). "Alternatively, the court concluded that Tug Hill was a third-party beneficiary that was permitted to enforce Rogers'[s] arbitration agreement with RigUp" based on the court's own interpretation of the agreement. Ex. A at 9a (quotations omitted).

III. The Fourth Circuit Decides That It, Rather Than An Arbitrator, Should Decide The Arbitrability Question.

The Fourth Circuit reversed. Rather than allow the arbitrator to exercise the "exclusive authority" Rogers had granted it to decide whether the agreement could be interpreted to create third-party beneficiaries, the Fourth Circuit interpreted the agreement for itself and held "as a matter of state contract law" that Tug Hill was not "authorized to enforce the arbitration agreement." Ex. A at 15a.

In deciding arbitrability for itself, the Fourth Circuit recognized that "it [was] plain that Rogers agreed to arbitrate issues—including threshold issues." Ex. A at 14a. And indeed, Rogers's agreement broadly committed to the arbitrator "*any* dispute relating to the interpretation, applicability or enforceability of this binding arbitration agreement." Ex. A at 5a-6a (emphasis added). The court also recognized that many contracts can be interpreted to allow "enforce[ment] by or against

nonparties to the contract through … 'third-party beneficiary theories.'" Ex. A at 10a (citation omitted). But it decided that the "threshold question" whether the agreement to arbitrate extended only to disputes "between [Rogers] and RigUp" was one for the court under "the Supreme Court's jurisprudence," Ex. A at 12a, 14a (emphasis omitted)—despite this Court's unanimous holding that "a court possesses no power to decide" "threshold arbitrability question[s]" when a contract allocates them to the arbitrator, *Henry Schein*, 139 S. Ct. at 529, and despite recognizing conflicting authority holding that "the question of whether a third party c[an] enforce a delegation provision in an arbitration clause [is] for the arbitrator," Ex. A at 16a (citing *Becker v. Delek US Energy, Inc.*, 39 F.4th 351, 355-56 (CA6 2022)).

The Fourth Circuit then proceeded to decide under its view of state contract law that, contrary to the district court's (fallback) interpretation, Tug Hill could not "enforce the RigUp arbitration agreement as a third-party beneficiary." *Id.* It construed the contract's "provision[s]" and "language," and ultimately disagreed with the district court that Rogers's "[a]greement demonstrates an intent to make Tug Hill a third-party beneficiary by providing specific—and significant—benefits to Tug Hill." Ex. A at 16a-17a (cleaned up). In other words, the Fourth Circuit directly ruled on the "interpretation, applicability, or enforceability of [the] … agreement"—which are what Rogers had agreed to commit to "the arbitrator['s] … exclusive authority." Ex. A at 5a-6a (brackets omitted).

IV. The District Court Fast Tracks The Case.

On remand, Tug Hill moved for a stay pending its then-forthcoming (and now-filed) petition for certiorari. The district court denied the motion without explanation,

and instead unexpectedly entered a rapid case schedule. Ex. D at 61a-62a, 70a. Under that schedule, Rogers's motion for conditional class certification is to be fully briefed by January 10, 2024. Ex. D at 61a. If that motion is granted, *Rogers will be provided with a list of putatively similarly-situated individuals who will be invited to join the litigation through a court-authorized notice.* Full merits discovery is to be completed by April 30, 2024. *Id.* Summary judgment is to be fully briefed by June 17, 2024. *Id.* And a jury trial will be held in late August 2024. Ex. D at 62a.

In light of this unforeseen development, Tug Hill asked the Fourth Circuit to recall and stay its mandate or, in the alternative, stay the district court proceedings. The Fourth Circuit denied relief on November 29, 2023. Ex. B.

This Wednesday (December 13, 2023), Rogers filed his motion to conditionally certify and notify the FLSA class. He claims to have met "his modest burden" under the "fairly lenient" standard for conditional certification, arguing that "[c]ourts routinely certify [similar] collective actions" and that there is enough for a "preliminary determination that notice should be given to potential class members." Ex. F at 85a, 87a-88a, 91a (citation omitted). He urges the court to require Tug Hill to "disclose the names, current or last known addresses, current or last known e-mail address(es) (non-company address if applicable), phone numbers, and dates of employment of all [putative class members] to be notified" within "10 days [of an] order approving notice." Ex. F at 95a (capitalization altered). And he proposes to start the first (of several) rounds of outreach to putative class members ten days after that. *Id.*

REASONS FOR GRANTING THE APPLICATION

This case satisfies all criteria for a stay pending disposition of Tug Hill's concurrently filed petition for writ of certiorari: There is "'a reasonable probability' that this Court will grant certiorari" because the petition cleanly presents a growing 5-to-3 circuit split on a critical arbitration issue. *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (citation omitted). There is "'a fair prospect' that the Court will … reverse the decision below," which violates ample precedent confirming that a nonsignatory's right to compel arbitration is simply a matter of contract interpretation that can be delegated to an arbitrator just like any other question of arbitrability. *Id.* (citation omitted). There is "a likelihood that irreparable harm [will] result from the denial of a stay" given that Tug Hill will be forced to bear the asymmetrical, heavy, and irreversible burdens of litigating a collective action on an expedited schedule, including the impending risk of the disclosure and outreach to yet-unidentified putative class members who may seek to perpetuate litigation regardless of whether Rogers must arbitrate. *Id.* (alteration in original) (citation omitted). And the "relative harms"—which are immaterial because this is not a "close case[]"—concededly weigh in favor of Tug Hill too. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

I. There Is A Reasonable Probability Of Certiorari.

There is a reasonable probability that this Court will grant Tug Hill's petition to resolve the 5-to-3 circuit split on whether a court may interpret a nonsignatory's rights under an arbitration agreement notwithstanding a delegation of questions of arbitrability to the arbitrator. The split is well-established and will not resolve

without this Court's intervention, as confirmed by ever-growing divide and the Fifth Circuit's 8-to-8 en banc vote in a parallel case. The split presents important federal issues involving not just the consistent application of the Federal Arbitration Act (FAA), but the role of arbitration in the many cases (like this one) where FLSA plaintiffs seek to avoid their arbitration agreements. And the decision below is an ideal vehicle because the Fourth Circuit identified no factual disputes about the terms of the agreement, squarely resolved the nonsignatory question for itself, recognized contrary authority, and issued a decision that deprived Tug Hill of arbitration.

To begin, there is no denying the split. Three circuits—most recently the Fourth Circuit—hold that a court cannot "compel arbitration without first resolving whether, as a matter of state contract law, [a nonsignatory is] authorized to enforce [an] arbitration agreement," regardless of whether the agreement delegates questions of arbitrability. Ex. A at 15a. In fact, the Fourth Circuit cited the Fifth Circuit's 2022 ruling that "deciding an arbitration agreement's enforceability between parties remains a question for courts" irrespective of a delegation of arbitrability—a ruling that barely avoided rehearing en banc by an 8-to-8 vote over a vigorous dissent. *Newman*, 23 F.4th at 398, *reh'g denied*, 44 F.4th 251. And the Ninth Circuit has long held—in a position it followed just last year—that even when a contract "expressly provide[s] that the arbitrator shall decide issues of interpretation, scope, and applicability of the arbitration provision," the court still can "decide the issue of whether a nonsignatory may compel [p]laintiffs to arbitrate."

Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1127 (2013); *see also Ngo v. BMW of N. Am., LLC*, 23 F.4th 942, 945-47 (CA9 2022).

On the other side of the split are "at least five … circuits" (and several districts) holding that a delegation of questions of arbitrability empowers the arbitrator to interpret a contract to decide the rights of nonsignatories. *Newman*, 44 F.4th at 254 & n.7 (Jones, J., dissenting). Perhaps most emphatic is the Sixth Circuit, which has repeatedly explained that a nonsignatory's "ability to invoke the arbitration agreement constitutes an issue of enforceability that 'must be considered by an arbitrator in the presence of a delegation provision.'" *Swiger*, 989 F.3d at 507; *see also* Ex. A at 15a-16a (declining to follow the Sixth Circuit's follow-on decision in *Becker*, 39 F.4th at 355-56). The First, Second, Eighth, and Tenth Circuits all have taken similar approaches. *See, e.g.*, *Casa Arena Blanca LLC v. Rainwater*, No. 21-2037, 2022 WL 839800, at *5 (CA10 Mar. 22, 2022) ("[T]he question of whether the Agreement should be enforced against [a purported] third-party beneficiary of that contract is one that should be decided by an arbitrator, not the court."); *Eckert/Wordell Architects, Inc. v. FJM Props. Of Willmar, LLC*, 756 F.3d 1098, 1100 (CA8 2014) ("Whether a particular arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is a threshold question of arbitrability" that the arbitrator must decide); *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 207, 210-11 (CA2 2005) (whether a party "was not a signatory to [an earlier] Agreement and was therefore barred from seeking its enforcement" is a "question of arbitrability" delegated to the arbitrator); *Apollo Comput., Inc. v. Berg*, 886 F.2d 469,

472-74 (CA1 1989) (whether "the right to compel arbitration … was validly assigned to the defendants and whether it can be enforced by them against [plaintiff] are issues" that "[t]he arbitrator should decide"). Many district courts concur, including in the "numerous" cases where workers asserting FLSA claims have tried to avoid their arbitration agreements. *Altenhofen v. Energy Transfer Partners, LP.*, No. 20-cv-200, 2020 WL 7336082, at *1 (W.D. Pa. Dec. 14, 2020).[2]

The split will not resolve itself, as confirmed by its growth even after this Court's emphatic 2019 holding in *Henry Schein* that "a court may not decide the arbitrability issue" in the presence of "a valid arbitration agreement." 139 S. Ct. at 530. In 2021 and 2022, the Sixth and Tenth Circuits staked out their views. *See Becker*, 39 F.4th 351; *Swiger*, 989 F.3d 501; *Casa Arena*, 2022 WL 839800. In 2022, the Fifth Circuit took the opposite approach, and then divided 8-to-8 on whether to rehear the case en banc over a dissent laying out the split. *Newman*, 23 F.4th 393, *reh'g denied*, 44 F.4th at 254-55 & n.7. The same year, the Ninth Circuit once again resolved a nonsignatory question despite a delegation of arbitrability. *See Ngo*, 23

[2] *See also, e.g.*, *Robertson v. Enbridge (U.S.) Inc.*, No. 19-cv-1080, 2020 WL 5751641, at *3-5 (W.D. Pa. July 31, 2020) ("Enbridge's ability, as a non-signatory, to enforce the Arbitration Agreements is an issue pertaining to the interpretation, applicability, or enforceability of the Arbitration Agreements between Plaintiffs and [another company]." (cleaned up)), *report and recommendation adopted*, 2020 WL 5702419 (Sept. 24, 2020); *Neal v. GMRI, Inc.*, No. 19-cv-647, 2020 WL 698270, at *4-5 (M.D. Ala. Feb. 11, 2020) ("[W]hether nonsignatory affiliates are ultimately entitled to enforce [an] arbitration clause is a matter of the agreement's continued existence, validity, and scope which must be decided by the arbitrator." (cleaned up)); *Grabowski v. PlatePass, L.L.C.*, No. 20-cv-7003, 2021 WL 1962379, at *4 (N.D. Ill. May 17, 2021) ("[W]hether a purported nonsignatory can enforce an arbitration agreement concerns a question of arbitrability and, thus, must be decided by the arbitrator.").

F.4th 942. And just a few months ago, the Fourth Circuit adopted the minority view after acknowledging contrary authority.

This intractable split is the exact type of question this Court often resolves—both as a matter of general practice, *see* S. Ct. R. 10(a), and especially in the arbitration context. Earlier this year, for example, this Court granted certiorari on a different delegation-of-arbitrability issue in *Coinbase, Inc. v. Suski*, No. 23-3, 2023 WL 7266998 (Nov. 3, 2023), which will address the consequences of a delegation of arbitrability in a dispute involving multiple contracts with differing language.[3] Indeed, the asserted split in *Suski* involved four federal circuits (plus some state courts), as opposed to the eight federal circuits here. And in recent years, this Court has often granted certiorari in arbitration cases, including on related issues such as whether the New York Convention displaces the rule that "nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel" (it does not), *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020), or whether a supposedly "frivolous"

[3] Although the grant in *Suski* confirms the importance of arbitrability-related questions, it does not eliminate the need for review here. *Suski* asks, "Where parties enter into an arbitration agreement with a delegation clause, should an arbitrator or a court decide whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation?" Pet. For Writ of Cert. at i, *Suski*, No. 23-3. That framing presumes that the parties to the litigation include signatories to the relevant agreement(s), and thus does not cover the gateway question here of who (arbitrator or court) should decide whether the relevant agreement applies to a nonsignatory in the first place. And even if *Suski* reconfirms that a delegation of arbitrability broadly empowers an arbitrator to decide threshold issues, that holding is unlikely to move the Fourth Circuit, which already brushed off decisions like *Henry Schein* saying the same thing.

arbitrability issue can be decided by the court despite a delegation of arbitrability (it cannot), *Henry Schein*, 139 S. Ct. at 531.[4] These frequent grants are unsurprising because the FAA sets out a "national policy" of "great importance." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012) (per curiam).

National uniformity is especially important in the context of the question presented here. The nonsignatory issue is a "*gateway*" question of arbitrability, meaning that everything else that happens in a dispute may follow from the answer. *Howsam*, 537 U.S. at 84 (emphasis added). In other words, the resolution of "who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). There is no reason to tolerate uncertainty and inconsistency on a threshold issue.

The question presented also frequently implicates yet another busy realm of federal law—the FLSA—in a trend several judges have noted. In the words of Judge Jones, there is a "familiar" pattern of workers "su[ing] … non-signatory defendant[s] for FLSA violations," *Newman*, 44 F.4th at 254-55, akin to the circumstances the Sixth Circuit confronted in *Becker*, 39 F.4th at 354, and the facts the Fourth Circuit confronted here, *see, e.g.*, Ex. A at 14a-17a. Sure enough, "a bevy of lawsuits like

[4] *See also, e.g.*, *Bielski*, 599 U.S. at 740 ("To resolve th[e] disagreement among the Courts of Appeals [about stays pending appeals from denials of arbitration], we granted certiorari."); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1620-21 (2018) ("We granted certiorari to clear the confusion" about whether the National Labor Relations Act conflicts with individual-arbitration agreements); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412-13 (2019) (addressing an alleged "conflict among the Courts of Appeals" regarding "classwide" arbitration).

[these] have become common in the energy industry," with plaintiffs suing nonsignatories in an effort to evade arbitration agreements signed by the intermediaries that connected the plaintiffs with the defendants. *Newman*, 44 F.4th at 252 (Jones, J., dissenting). Or, in the words of another federal judge canvasing "numerous, materially similar lawsuits[] in this and other Districts," such disputes are "neither counsels' nor the [c]ourt's 'first rodeo.'" *Altenhofen*, 2020 WL 7336082, at *1.

The decision below is an ideal vehicle to resolve the split. The Fourth Circuit cleanly held that a court must "first resolv[e] … as a matter of state contract law" the nonsignatory question before it can "compel arbitration," and the opinion rejected the contrary view "that the question of whether a third party c[an] enforce a delegation provision in an arbitration clause [is] for the arbitrator, not the court." Ex. A at 15a-16a (citing *Becker*, 39 F.4th at 355-56). The Fourth Circuit accepted that Rogers was bound by his arbitration agreement. The Fourth Circuit accepted that Rogers's agreement plainly delegated questions of arbitrability by giving "the arbitrator … exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement." Ex. A at 5a-6a (brackets omitted). And the Fourth Circuit's decision to keep the arbitrability question for itself was dispositive because the arbitrator never had the chance to decide the threshold question about Tug Hill's rights under Rogers's agreement (or to decide *any* question at all).

II. There Is A Fair Prospect Of Reversal.

As Judge Jones explained in a parallel case, the Fourth Circuit's approach was not just dubious, but committed "manifest error" in its refusal "to follow the Supreme Court." *Newman*, 44 F.4th at 251, 255. The recently-entrenched minority side of the split contradicts decades of precedent and is little more than an end-run of this Court's recent admonition that, when an agreement commits threshold questions of arbitrability to the arbitrator, the "court may not decide the arbitrability issue" even if it thinks an issue is "frivolous." *Henry Schein*, 139 S. Ct. at 530-31.

Start with the decades of precedent confirming that disputes over nonsignatory rights fall within a delegation of arbitrability. The question "whether [an] arbitration contract b[inds] parties who did not sign the agreement" is just a routine "question of arbitrability"—*i.e.*, a "gateway dispute about whether the parties are bound by a given arbitration clause" in the first place. *Howsam*, 537 U.S. at 84. In a generic case, that dispute might be "for a court to decide," consistent with the general presumption that courts will decide threshold issues. *Id.* But this Court has said that an arbitration clause can reverse that presumption by "delegat[ing] the arbitrability issue to an arbitrator." *Henry Schein*, 139 S. Ct. at 530. In such cases, the court may only "determine[] whether a valid arbitration agreement exists," and upon finding one the "*court may not decide the arbitrability issue*." *Id.* (emphasis added).

Here, the Fourth Circuit recognized that Rogers had executed a valid agreement to arbitrate. And the court recognized that Rogers's agreement contained an undeniable delegation of questions of arbitrability; indeed, "it [was] plain that

Rogers agreed to arbitrate issues—including threshold issues." Ex. A at 14a. Nor could the court have said otherwise given the explicit language giving "the arbitrator … exclusive authority to resolve *any dispute* relating to the interpretation, applicability, or enforceability of th[e] … arbitration agreement." Ex. A at 5a-6a (emphasis added and brackets omitted).

That should have been the end of the court's inquiry. Having found that "a valid agreement exists" and that "the agreement delegates the arbitrability issue to an arbitrator," *Henry Schein*, 139 S. Ct. at 530, disputes about *who* the "contract bound" were "question[s] of arbitrability" for the arbitrator, *Howsam*, 537 U.S. at 84. It makes no difference that the court thought the better reading of the agreement was that Rogers had agreed just to arbitrate disputes "arising *between him and RigUp*." Ex. A at 14a. The only way the court reached that conclusion was by engaging in contract interpretation—for example, by "read[ing]" "the delegation provision … in the context of the arbitration clause as a whole." *Id.* That was error under the settled rule that, "if a valid agreement exists … delegat[ing] the arbitrability issue to an arbitrator," interpretive questions "such as whether the parties have agreed to arbitrate" fall to the arbitrator regardless of whether the court thinks a contrary view is "frivolous." *Henry Schein*, 139 S. Ct. at 529-31 (citation omitted).

That is not all; other binding precedent demonstrates the inescapable logic that only the arbitrator can decide the nonsignatory question when an agreement gives the arbitrator exclusive power to interpret and apply the agreement. *Arthur Anderson* explained that "the scope of agreements *(including the question of who is*

bound by them)" is an ordinary matter "of state contract law" which often "allow[s] a contract to be enforced by or against nonparties … through [doctrines including] 'third-party beneficiary theories.'" 556 U.S. at 630-31 (emphasis added and citation omitted). That is, *someone* needs to interpret the agreement to decide what it says and to whom it applies. So when—as here—an agreement expressly commits to the arbitrator "any dispute relating to … interpretation, applicability, or enforceability," Ex. A at 5a-6a, the question whether the agreement applies to nonsignatories is just another matter of contract interpretation for the arbitrator alone.

The Fourth Circuit's own circular reasoning illustrates this point that the court could not have decided the nonsignatory question without intruding on Rogers's express delegation to the arbitrator of "any" matter concerning "interpretation, applicability, or enforceability." *Id.* That is because the court's opinion repeatedly required the panel to interpret the agreement for itself. The court bypassed the agreement's delegation of arbitrability by saying that Rogers "did not enter into any agreement that allows an arbitrator to decide whether a third party like Tug Hill has rights under the arbitration agreement"—but the *only way* the court reached that conclusion was by first interpreting and applying the agreement; in particular, by "read[ing]" "the delegation provision … in the context of the arbitration clause as a whole" to find it "plain that Rogers agreed to arbitrate issues … arising between him and RigUp." Ex. A at 14a (emphasis omitted). Indeed, the Fourth Circuit twice-over recognized that it was engaging in contract interpretation to decide issues of applicability and enforceability: First, when the court acknowledged that "a nonparty

[like Tug Hill] may nonetheless be entitled to enforce [an agreement] under standard contract principles." Ex. A at 12a. And second, when the court—having taken the question away from the arbitrator—reapplied state law to reaffirm its own conclusion (contrary to the district court's alternative ruling) that "Tug Hill may [not] enforce the RigUp arbitration agreement as a third-party beneficiary" based on the agreement's "language," "provisions," and "purpose." Ex. A at 16a-18a.

In addition to this self-defeating logic which facially usurped the arbitrator's exclusive right to interpret the agreement, by its own terms the decision below repeatedly clashed with this Court's precedent in at least five respects.

First, the Fourth Circuit's interpretation of the agreement—that "it is *plain* that Rogers agreed to arbitrate issues … [b]ut he did not enter into any agreement that allows an arbitrator to decide whether a third party like Tug Hill has rights under the arbitration agreement," Ex. A at 14a (emphasis added)—is just a revival of the defunct rule that a court can ignore a delegation of questions of arbitrability if the court believes that an arbitrability dispute is "wholly groundless." *Henry Schein*, 139 S. Ct. at 528. It may have been "plain" to the three judges on the panel how the agreement should be interpreted, but they had "no power to decide the arbitrability issue." *Id.* at 529. The court also should not have been so sure of its conclusion. As *Henry Schein* stressed, "[i]t is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way." *Id.* at 531. In fact, the district court *here* "[a]lternatively … concluded that Tug Hill was a third-party beneficiary that was permitted to enforce

Rogers'[s] arbitration agreement with RigUp," Ex. A at 9a (quotations omitted), and the "arbitrator might hold [the same] view"—should the arbitrator be given the opportunity to form one, *Henry Schein*, 139 S. Ct. at 531. Regardless of whether a single panel of judges thought that Tug Hill's construction of the agreement was erroneous, the whole point of a delegation of arbitrability is to give the arbitrator the first crack at the question.

Second, the Fourth Circuit inverted *Arthur Anderson*, which it paraphrased to claim "that it is *a court*, not an arbitrator, that must initially decide whether a nonparty to an arbitration agreement is entitled to enforce it." Ex. A at 10a. But *Arthur Andersen* held no such thing—because it did not address a delegation of arbitrability—and its logic actually compels the opposite conclusion. As explained, *Arthur Andersen* held that nonsignatories often have the right to compel arbitration and that the existence of this right is a matter of ordinary "state contract law regarding the scope of agreements (including the question of who is bound by them)." 556 U.S. at 630-31 & n.4. In other words, whether a nonsignatory has rights is just another question of contract interpretation and application. Other precedent that actually addresses delegations of arbitrability leaves little doubt that an agreement may "delegate" such questions "to an arbitrator." *Henry Schein*, 139 S. Ct. at 530.

Third, the Fourth Circuit justified seizing the arbitrability question from the arbitrator by citing the FAA's requirement of "*a written agreement* for arbitration" and by emphasizing clipped statements from *Henry Schein* that "*the court* determines whether a valid arbitration agreement exists" "*before* referring a dispute to an

arbitrator." Ex. A at 11a. But here, the court acknowledged that a written, valid arbitration agreement "exists" and that Rogers's "agreement" includes an express delegation of questions of arbitrability. *Henry Schein*, 139 S. Ct. at 530. The only dispute is over interpretive questions about *who* and *what* the agreement covers—which are classic "question[s] of arbitrability" about "parties who did not sign the agreement," *Howsam*, 537 U.S. at 84, and "whether the parties have agreed to arbitrate" at all, *Henry Schein*, 139 S. Ct. at 529 (citation omitted).

Fourth, the Fourth Circuit cited one of its prior decisions for the supposed "general" rule that "the relevant threshold question that a court must address when being asked to compel arbitration is whether 'an arbitration agreement exists *between the parties*.'" Ex. A at 12a (quoting *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (CA4 2001)). But the emphasized dicta of the Fourth Circuit's own creation cannot be squared with precedent or logic, all of which show that a dispute over whether an agreement covers "the parties" does not and cannot belong to some sort of super-category of nondelegable issues. Again, *Henry Schein* makes clear that, once "a valid agreement exists" delegating arbitrability issues to the arbitrator, the court's job is over and it cannot decide arbitrability questions, 139 S. Ct. at 530—one of which is "whether the arbitration contract b[inds] parties who did not sign [it]," *Howsam*, 537 U.S. at 84. Again, *Arthur Andersen* makes clear that "who is bound" is just an ordinary interpretive matter of "state contract law regarding the scope of agreements." 556 U.S. at 630. And again, *this* agreement makes clear that the

arbitrator has "exclusive authority to resolve *any* dispute relating to … interpretation, applicability, or enforceability." Ex. A at 5a-6a (emphasis added).

Sure enough, the Fourth Circuit's own circular analysis once more dispels the notion that the interpretive question of which "parties" possess a right to invoke Rogers's agreement can somehow be disentangled from Rogers's delegation of questions of "interpretation, applicability, or enforceability." Ex. A at 6a, 12a. The court's conclusions about the contents of the agreement and Tug Hill's rights thereunder depended on the court's *own* interpretation of what the agreement supposedly made "plain" about the scope of "Rogers['s] agree[ment]" given the "context of the arbitration clause as a whole." Ex. A at 14a. Thus, when the Fourth Circuit construed the arbitration agreement—which concededly *could* be interpreted in a way "in which a nonparty [like Tug Hill] may nonetheless [have been] entitled to enforce it," Ex. A at 12a—the court admitted it was resolving "gateway questions of arbitrability," *Henry Schein*, 139 S. Ct. at 529 (quotations omitted).

Fifth, the Fourth Circuit wrongly invoked the supposed pragmatic concern that it would be "counterintuitive" for "a party with no contractual right to compel arbitration [to] be permitted to do just that." Ex. A at 12a. That logic puts the cart before the horse; specifically, by assuming its own premise that Tug Hill has "no contractual right to compel arbitration." *Id.* In reality, whether Tug Hill has such a right as a third-party beneficiary depends on the interpretation of the agreement—once again confirmed by the Fourth Circuit's recurring acknowledgment that familiar "'principles' of state law" frequently "allow a contract to be enforced by or against

nonparties." Ex. A at 10a-19a (citation omitted); *accord Arthur Andersen*, 556 U.S. at 631.

This concern is also legally and logically groundless. Legally, it flouts *Henry Schein*'s explanation that "policy argument[s]" about litigants overstating their alleged arbitration rights cannot displace the arbitrator's prerogative to decide questions of arbitrability in the face of a contractual delegation. 139 S. Ct. at 528, 531. Logically, it ignores that litigants have good reason to eschew "frivolous motions to compel arbitration" because arbitrators have the power to "efficiently dispose of frivolous cases" and often to "impos[e] fee-shifting and cost-shifting sanctions." *Id.* at 531. Indeed—and in sharp contrast to *Henry Schein*'s observation "that frivolous motions to compel arbitration have [not] caused a substantial problem," *id.*—the real and increasingly "familiar" problem here is that a minority of circuits have allowed litigants to end-run delegations of arbitrability by having courts decide arbitrability issues. *Newman*, 44 F.4th at 254 (Jones, J., dissenting). And, given that at least one adjudicator (the district court) has already agreed with Tug Hill's interpretation, there is no concern whatsoever of a frivolous motion in this action.

* * *

To be clear, granting a stay does not require deciding that the Fourth Circuit actually erred; all that is necessary is "a fair prospect" of reversal by this Court as a whole. *King*, 567 U.S. at 1302 (citation omitted). That prospect is undeniable given that multiple circuits, a vigorous Fifth Circuit dissent, and several district judges—including the very district judge in this case—have seen things quite differently than

the Fourth Circuit. In light of "the considered analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision below." *Id.* at 1303; *accord John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309-10 (1989) (Marshall, J., in chambers) (similar).

III. Tug Hill Will Suffer Irreparable Harm Absent A Stay (And Any Balance Of Equities Overwhelmingly Weighs In Tug Hill's Favor).

Without a stay, Tug Hill will suffer the "irreparable harm" not just of litigating in expedited fashion a putative collective action that is properly subject to individual arbitration, but in imminently disclosing still-confidential information that creates additional litigation risks regardless of whether this Court ultimately grants certiorari and reverses. *Hollingsworth*, 558 U.S. at 190. And, to the extent this is a "close case" requiring "balanc[ing] the equities and weigh[ing] the relative harms to the applicant and to the respondent," the ledger overwhelmingly favors Tug Hill. *Id.*

There is no doubt about the irreparable harm of forcing Tug Hill to litigate instead of arbitrate. This Court has recognized that arbitration confers numerous "benefits": "efficiency, less expense, less intrusive discovery, and the like." *Bielski*, 599 U.S. at 743. But these benefits are "irretrievably lost" when a party must litigate, "*even if* the [reviewing court] later conclude[s] that the case actually had belonged in arbitration all along." *Id.* (emphasis added). Moreover, a denial of arbitration can effectively resolve a case irrespective of the merits because, "[a]bsent a stay, parties also could be forced to settle to avoid the district court proceedings"—especially "in class actions" *Id.* "[C]ontinuation of proceedings in the district court 'largely defeats the point of the appeal'" from a denial of arbitration. *Id.* (citation omitted).

These are not just generic concerns. On the particular facts of *this* case, Tug Hill faces serious and irreparable prejudice for at least two reasons.

First, the district court's recent and unexpected entry of a rapid scheduling order means that Tug Hill will be forced to litigate much (if not all) of this case before this Court resolves Tug Hill's petition, let alone issues a merits decision should this Court grant certiorari. Rogers's motion for conditional certification will be fully briefed by January 10, 2024, and discovery will be finished by April 30, 2024. Ex. D at 61a. Not long after that, summary judgment briefing will close in mid-June and trial will start near the end of August. Ex. D at 61a-62a. Under that schedule, Tug Hill will not just partially lose "many of the asserted benefits of arbitration"—it will need to run the gamut of the decreased "efficiency," extra "expense[s]," and "intrusive discovery" that accompany litigation. *Bielski*, 599 U.S. at 743. Those harms will not dissipate even if this case ultimately is arbitrated: The time, effort, and expenses will already have been incurred, and "the parties will not be able to unring any bell rung by discovery." *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 265 (CA4 2011).

Second, Rogers's desire to bring a *collective* FLSA lawsuit despite having agreed to individual arbitration both multiplies the prejudice and adds new injuries. This Court has repeatedly recognized that "the individualized nature of" arbitration is "one of arbitration's fundamental attributes," *Epic Sys.*, 138 S. Ct. at 1622, and that the loss of "individual" proceedings "sacrifices the principal advantage of arbitration and greatly increases risks to defendants," *Lamps Plus*, 139 S. Ct. at 1414 (cleaned up). Collective proceedings also raise a special "potential for coerc[ing]"

settlements because "the possibility of colossal liability can lead to what Judge Friendly called 'blackmail settlements.'" *Bielski*, 599 U.S. at 743. And such proceedings impose disproportionate burdens on defendants.

This particular collective proceeding poses an especially grave risk of collateral consequences under the speedy schedule. The recently-filed motion to conditionally certify and authorize notice to the class will be fully briefed by *January 10*—and likely decided shortly afterward given the district court's stated desire to try this case by August 2024. Ex. D at 61a-62a. According to Rogers, the standard for granting this motion "is fairly lenient," "low," and "light," with the district court not even "consider[ing] the merits of Rogers's claims or Tug Hill's exemption defenses." Ex. F at 87a-90a, 93a-94a. In his view, all he needs are bare "pleadings and affidavits" for the "modest factual showing sufficient to demonstrate that [he] and potential plaintiffs together were victims of a common policy or plan that violated the law." Ex. F at 88a (citation omitted). And courts supposedly "routinely certify [similar] collective actions." Ex. F at 91a.

If the motion is granted, Rogers demands within "10 [d]ays" an array of still-confidential information, including "the names, current or last known addresses, current or last known e-mail address(es) (non-company address if applicable), phone numbers, and dates of employment of all [putative members] to be notified." Ex. F at 95a. And ten days after that, he plans to send the first round of "[c]ourt approved Notice" to potential members, followed by future communications by "mail, email, and text," or even "phone." Ex. F at 95a-97a. These plaintiffs may be recruited to

perpetuate litigation against Tug Hill *even if Rogers's case is sent to individual arbitration*. There is no way "to unring any bell rung by discovery" regardless of whether this Court ultimately grants certiorari and reverses. *Levin*, 634 F.3d at 265.

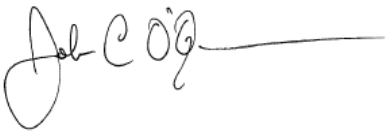
Rogers cannot dispute the irreparable harm to Tug Hill; indeed, he did not contest the point when Tug Hill sought relief from the Fourth Circuit. That is because requiring Tug Hill to disclose confidential information, to face new claimants, and to participate in expedited, collective litigation instead of routine, individual arbitration is inherently and irrevocably prejudicial.

Finally, although this is not a "close case[]," any balancing here overwhelmingly favors Tug Hill. *Hollingsworth*, 558 U.S. at 190. Rogers's opposition below did not address this point either, much less identify any irreparable injury to him. That is because none exists: Rogers's statute of limitations has been tolled and Tug Hill's discovery obligations have attached. At most, Rogers might complain about a delay in adjudicating a claim for compensation based on a purported FLSA violation that has already occurred, but a brief pause while this Court evaluates Tug Hill's petition is insufficient to show "irreparable harm" no matter Rogers's "interest in receiving [compensation] immediately." *John Doe*, 488 U.S. at 1309. "[T]he worst possible outcome for parties and the courts[] [is] litigating a dispute in the district court only for [a higher court] to reverse and order the dispute arbitrated." *Bielski*, 599 U.S. at 743 (cleaned up). A stay while this Court considers whether to grant certiorari (and considers the merits of the case should the Court decide to resolve the circuit split) will conserve everyone's resources.

CONCLUSION

For the foregoing reasons, Tug Hill respectfully requests that this Court by January 10, 2024, stay the district court proceedings pending the disposition of the petition for writ of certiorari and, if granted, this Court's issuance of its judgment to the court of appeals.

Respectfully submitted,



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