No. 23A567

IN THE SUPREME COURT OF THE UNITED STATES

TUG HILL OPERATING, LLC,

Applicant,

v.

LASTEPHEN ROGERS, individually and for others similarly situated,

Respondent.

REPLY IN SUPPORT OF APPLICATION FOR STAY PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

PHILIP M. COOPER
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654

JOHN C. O'QUINN
Counsel of Record
LUCAS H. FUNK*
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
john.oquinn@kirkland.com

Counsel for Applicant

*Admitted only in Oregon and practice is supervised by principals of the Firm.

January 8, 2024

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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Rogers's opposition relies on misdirection and ignores the bulk of Tug Hill's arguments and authorities, including this Court's controlling decisions in *Arthur Andersen*, *Henry Schein*, and *Howsam*, as well as Judge Jones's on-point dissent.[1] The key sidestep, however, is his erroneous recharacterization of the basic dispute. Rogers suggests that the issue here is whether it is a court or an arbitrator that should decide whether a valid arbitration agreement was "formed" *between him and Tug Hill* in the first place. That is not the right inquiry. The question is not "whether a valid agreement exists between the[] specific parties" *to the litigation*, but "whether there is *any agreement* to arbitrate any set of claims." *Newman*, 44 F.4th at 252-53 (Jones, J., dissenting) (emphases and citation omitted). Everyone agrees that Rogers "formed" a valid arbitration agreement containing an express delegation of arbitrability: the contract he signed with RigUp. The question, then, is "whether a court or an arbitrator must decide whether Tug Hill can *enforce* the arbitration clause in the contract between Rogers and RigUp given that the arbitration clause has a delegation provision." Ex. A at 10a (emphasis added). Or, in the words of this Court, the dispute is whether Rogers's "contract [can] be *enforced* by … nonparties" like Tug Hill—and *that* is just a matter of assessing "the *scope* of [the] agreement[]," which Rogers indisputably consented to have an arbitrator decide. *Arthur Andersen*, 556 U.S. at 630-31 (emphases added).

With that sidestep out of the way, the rest of the opposition crumbles. There is a fair prospect of reversal because Rogers has no answer to *Arthur Andersen*, *Henry Schein*, and *Howsam*, all of which show that Tug Hill's ability to invoke the arbitration agreement is just a question of determining the *scope* of the agreement—a routine matter of contract construction that

[1] *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Newman v. Plains All Am. Pipeline, L.P.*, 44 F.4th 251 (CA5 2022) (Jones, J., dissenting from denial of rehearing en banc).

falls within Rogers's express delegation of questions of arbitrability and thus cannot be decided by a court in the first instance. There is a reasonable probability that this Court will grant review, as established by Rogers's refusal to acknowledge the Fourth Circuit's *own* stated disagreement with the Sixth Circuit, much less Judge Jones's description of the split. And there is a likelihood of irreparable harm given that Rogers admittedly seeks swift disclosure of confidential information (including the names and contact information of other putative plaintiffs) with the goal of multiplying litigation against Tug Hill.

I. There Is A Fair Prospect Of Reversal.

Rogers focuses on defending the merits of the Fourth Circuit's decision, but his arguments fail at the outset because he ignores the critical cases showing that, when an agreement delegates arbitrability questions to the arbitrator, it is the arbitrator that must decide the gateway question of the agreement's application to nonsignatories. As Tug Hill previously explained, *Howsam* states that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability.'" 537 U.S. at 84. *Henry Schein* establishes that, although courts presumptively decide such questions of arbitrability, "a valid arbitration agreement … delegat[ing] the arbitrability issue" prevents the "court [from] decid[ing] the arbitrability issue." 139 S. Ct. at 529-30. And *Arthur Andersen* shows that even when the agreement to arbitrate is located in a contract signed by parties other than the parties to the litigation, a nonsignatory can still invoke the agreement under ordinary "principles of state contract law regarding the *scope* of agreements." 556 U.S. at 630 & n.4 (emphasis added).

The application of these cases is straightforward here: Rogers signed a valid agreement in which he consented to the arbitrator "resolv[ing] any dispute relating to the interpretation, applicability, or enforceability of th[e] binding arbitration agreement." Ex. A at 5a-6a. He thus "formed" an arbitration agreement. When Rogers sued Tug Hill, Tug Hill (in its capacity as a

putative third-party beneficiary) sought to enforce the arbitration agreement Rogers indisputably made with RigUp. When Rogers contested that his agreement encompassed his claims against Tug Hill, then a "dispute relating to the interpretation, applicability, or enforceability" arose, *id.*—namely, whether the agreement could "be enforced by [a] nonpart[y] to the contract," *Arthur Andersen*, 556 U.S. at 630-31. But rather than respect the agreement's clear statement that the arbitrator would "ha[ve] exclusive authority" to resolve that issue, the Fourth Circuit openly decided the scope issue for itself. *See* Ex. A at 5a, 14a-19a.

Rogers's refusal to engage with this analysis is per se fatal to his suggestion that affirmance is certain. That is doubly true because he also ignores Judge Jones's dissent from the Fifth Circuit's evenly-divided en banc vote, which painstakingly articulated why the minority view is "manifest error" and "out-of-step with … the Supreme Court." *Newman*, 44 F.4th at 251, 255. Given the "considered analysis" that Rogers utterly ignores, he cannot deny a "fair prospect that this Court will reverse." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

Next, instead of tackling Tug Hill's authorities, Rogers offers a series of peripheral arguments that are irrelevant, contrary to precedent, or both.

First, he suggests that this case is really about whether he "formed an agreement to arbitrate" and "consent[ed] to submit any dispute to arbitration," a dispute that only a court supposedly can resolve. Opp. 12. That is untrue. The Fourth Circuit never questioned that Rogers consented to the formation a valid agreement delegating questions of arbitrability: "[I]t is plain that Rogers agreed to arbitrate issues—including threshold issues." Ex. A at 14a. In fact, the words "form," "formed," and "formation" never appear in the decision below. All that is at issue is whether Rogers's duly-formed agreement permits a nonsignatory to "enforce" it. Ex. A at 10a. And, as *Arthur Andersen* establishes, *that* is just a question of the "scope" of Rogers's agreement,

556 U.S. at 630-32, a question that falls squarely within his express consent to have the arbitrator decide "any dispute" of "interpretation, applicability, or enforceability." Ex. A at 5a-6a.

Rogers's heavy reliance on *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287 (2010), which the Fourth Circuit never cited, only undercuts his position. That case did not involve a delegation of arbitrability at all—indeed, "[t]he parties agree[d] that it was proper for the District Court to decide whether their ratification dispute was arbitrable." *Id.* at 297. *Granite Rock* simply explained that "courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement nor (*absent a valid provision committing such disputes to an arbitrator*) its enforceability or applicability to the dispute is in issue." *Id.* at 299 (emphasis altered). Here, there is no dispute Rogers *formed* the at-issue agreement with RigUp which expressly "commit[s]" all disputes over its interpretation, application, and enforceability "to an arbitrator." *Id.*

Rogers then turns to a related sleight-of-hand: the notion that a delegation of questions of arbitrability requires a threshold judicial determination that the "parties" to the contractual delegation are the same as the "parties" to the litigation. Opp. 16 (claiming that a court must "first decid[e] whether Tug Hill and Rogers agreed to delegate disputes about arbitrability to the arbitrator"). But he cites no authority for that view, which clashes with the cases he ignores. *Arthur Andersen*, for example, shows that the "parties to the litigation" need *not* be the "parties to the contract" for the matter to be committed to arbitration. 556 U.S. at 630 & n.4. And *Howsam* and *Henry Schein* demonstrate that disputes over whether a contract covers "parties who did not sign [it]"—or even "whether the parties have agreed to arbitrate" at all—are just "gateway questions of arbitrability" that can be delegated. 537 U.S. at 84; 139 S. Ct. at 529 (citation omitted).

Moreover, Rogers's view that only a court can identify the parties entitled to enforce an arbitration agreement is circular and paradoxical. If, as he proposes, a delegation of questions of arbitrability is enforceable only after the court interprets the delegation to satisfy itself that the delegation applies to the dispute, then the delegation cannot accomplish its fundamental purpose of allowing the *arbitrator* to decide the "gateway dispute" of whether the "contract b[inds] parties who did not sign [it]." *Howsam*, 537 U.S. at 84. In reality, the only logical approach is that when a party (like Rogers) signs an arbitration agreement granting the arbitrator sweeping power to decide "*any* dispute relating to … interpretation, applicability, or enforceability," Ex. A at 5a-6a (emphasis added), the arbitrator alone is entitled to examine the contract's "scope" to decide whether it can "be enforced by … nonparties," *Arthur Andersen*, 556 U.S. at 630-31. Rogers's view would place nonsignatory questions into an oddball super-category of nondelegable issues which would always require the court to interpret the agreement for itself no matter how clearly the agreement delegates interpretive questions to the arbitrator.

Second, Rogers offers the red herring that courts may entertain "specific[] challenges [to] a delegation clause" to "decide whether the delegation clause was validly formed and can be enforced." Opp. 13-15 (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010)). But the Fourth Circuit did not hold that the delegation clause at issue in this case was itself nonexistent or defective. On the contrary, the court not only found "it … plain that Rogers agreed to arbitrate issues—including threshold issues," but interpreted the delegation clause in the "context of the arbitration clause *as a whole*" and recognized that Rogers was just making the sweeping objection that "he never agreed to arbitrate *anything* with Tug Hill." Ex. A at 9a, 14a (emphases added). In other words, this is not a case where a party resisting arbitration argues there is something inherently wrong with a delegation provision itself, such as that it is infected by "fraud, duress, or

unconscionability." *Rent-A-Center*, 561 U.S. at 68 (citation omitted). Rogers, of course, never denies that *RigUp* could invoke the agreement against him. Rather, he focuses on what Judge Jones identified as the wrong question: whether the parties to the *lawsuit*, rather than the parties to the *contract*, had agreed to delegation. At bottom, Rogers simply disagrees about the proper interpretation of the "scope" of the agreement he unquestionably entered with RigUp—specifically, whether it extends to Tug Hill. *Arthur Andersen*, 556 U.S. at 630-31. But *that* disagreement falls squarely within his consent to have the arbitrator "resolve any dispute relating to … interpretation, applicability, or enforceability." Ex. A at 5a-6a.

Third, Rogers briefly notes that a delegation of arbitrability requires "clear and unmistakable evidence." Opp. 15. This is a distraction because the Fourth Circuit never questioned that Rogers's agreement with RigUp contains a clear and unmistakable delegation. Nor could it have given the contract's broad language.

Fourth, Rogers makes the policy argument that a court should not "force [him] into arbitration" when it supposedly "is clear from the text of the agreement" that he did not "agree[] to arbitrate anything with [Tug Hill]." Opp. 1-2. That is a direct assault on *Henry Schein*'s holding that, no matter if the court thinks an argument for arbitration is "frivolous," a delegation of arbitrability reserves the question to the arbitrator. 139 S. Ct. at 530-31. Regardless, given that Rogers expressly consented to a broad delegation of arbitrability covering "any dispute" over "interpretation, applicability, or enforceability," Ex. A at 5a-6a—and did so in the specific context of an agreement with the very purpose of placing him with companies like Tug Hill—Rogers can hardly complain that Tug Hill is now invoking Rogers's express consent in that agreement to have the arbitrator resolve a dispute over the agreement's interpretation, application, and enforcement.

In sum, the majority of the circuits and the dissent in *Newman* are correct, and at the very least there is a fair prospect that this Court will reverse.

II. There Is A Reasonable Probability Of Certiorari.

Rogers also fails to engage with Tug Hill's arguments showing a reasonable probability of certiorari. He again says nothing about Judge Jones's dissent that identified the growing split. He ignores that the Fourth Circuit itself recognized that it was parting ways from the Sixth Circuit. *See* Ex. A at 15a-16a. And he has no response to the lower-court opinions identifying the nonsignatory issue as a recurring FLSA problem, in which plaintiffs like Rogers seek to circumvent their duly-signed arbitration agreements. *See* Application 15-16 (collecting cases). That alone is reason to reject Rogers's arguments, which essentially demand that this Court credit his self-serving pronouncements over the statements of multiple federal judges.

Rogers's objections also fail on their own terms. He does not deny that the Sixth Circuit has repeatedly rejected the Fourth Circuit's approach, nor does he mention what the Sixth Circuit has openly stated: that a "delegation clause encompasses [a plaintiff's] argument that [a defendant], who did not sign [plaintiff's] agreement with [a third party], lack[s] ability to invoke the arbitration agreement." *E.g.*, *Swiger v. Rosette*, 989 F.3d 501, 506 (2021). Instead, Rogers reprises an earlier sidestep, urging that the Sixth Circuit cases are distinguishable because "the party opposing arbitration [did not] specifically challenge the delegation clause." Opp. 24. But as explained above, the Fourth Circuit's decision did not rest on a finding that Rogers's delegation clause itself was specifically "[in]valid," *id.*, and indeed no one disputes that the agreement would be perfectly enforceable in a suit between Rogers and RigUp. *See supra* 5-6. This case just presents the *interpretive* issue of whether Tug Hill can invoke the concededly valid agreement as a nonsignatory. The Sixth Circuit understood that distinction (and got it right).

Because Rogers cannot deny the fresh, acknowledged, and intractable split involving at least the Fourth, Fifth, Sixth, and Ninth Circuits (plus the district courts he ignores), his potshots at other cases agreeing with the Sixth Circuit are irrelevant. They also are meritless. Rogers does not dispute, for example, that the Eighth Circuit has held that "[w]hether a particular arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is a threshold question of arbitrability" to be decided by the arbitrator. *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1100 (2014). He simply claims that the underlying district court decision there employed a different analysis (which the Eighth Circuit did not mention), and that later Eighth Circuit cases have refused to enforce delegations of arbitrability in the absence of "clear[] and unmistakabl[e]" language (which is irrelevant because the Fourth Circuit never doubted the clarity of the delegation here). Opp. 24 (citation omitted); *see supra* 6.

Nor can Rogers deny that the First Circuit has required the arbitrator to decide who can enforce an agreement. *See Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 472-74 (1989). He points out that *Apollo* predates *Granite Rock*, *see* Opp. 22, but that is irrelevant for the reasons above—including that *Granite Rock* did not involve a delegation of arbitrability, *see supra* 4—and ignores that courts on the majority side of the split have continued to cite *Apollo*. *See Swiger*, 989 F.3d at 508. And though Rogers claims the delegation clause in *Apollo* "required only a '*prima facie* showing of the existence of such an agreement to arbitrate,'" Opp. 22 (brackets omitted), that is immaterial because Rogers's agreement here contains an *unambiguous and express agreement* to arbitrate, meaning that it necessarily satisfies *Apollo*'s supposedly lower standard.

Rogers next admits that the Second Circuit has held that the question whether a party "was not a signatory to [an earlier] Agreement and was therefore barred from seeking its enforcement" is a "question of arbitrability" for the arbitrator. *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205,

207, 210-11 (2005). He sidesteps by noting that the Second Circuit appended the additional inquiry of whether "a sufficient relationship existed between the parties," Opp. 22, but that extra inquiry (to the extent it even survives *Henry Schein*) is facially irrelevant here. The Fourth Circuit did not rest its decision on the supposed lack of a "sufficient relationship"—nor could it have given that Rogers worked for Tug Hill for more than a year in a position he obtained "pursuant to RigUp's matchmaking," which was the whole point of Rogers entering an agreement with RigUp in the first place. Ex. A at 6a.

Rogers also has no answer to the Tenth Circuit's holding that "the 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." *Casa Arena Blanca LLC v. Rainwater*, No. 21-2037, 2022 WL 839800, at *5 (Mar. 22, 2022). He reprises his detour into the "formation" of arbitration agreements, arguing that the Tenth Circuit has recognized that "challenges to the formation of a delegation clause are for the court." Opp. 21. Yet again, Rogers does not contest that he formed a valid agreement containing an express delegation clause, but merely disputes whether his agreement extends to Tug Hill. This case thus fits comfortably with *Casa Arena*'s rule that, when "*an* agreement was formed" and there is no "dispute that the agreement contains a delegation provision," any disagreement about "third-party beneficiary" enforcement should be resolved by the arbitrator. 2022 WL 839800, at *5 (emphasis added).

Finally, Rogers's other arguments against certiorari fall flat. He revisits the faulty view that this case is about a "specific challenge[] to the formation of a delegation clause," Opp. 25, whereas this case is actually about the interpretation and scope of a duly-formed agreement with RigUp, in which there is a valid (indeed, unchallenged) delegation clause. He contests the merits of whether his agreement confers third-party rights on Tug Hill, but that is not the question

presented; the question is the threshold dispute over *who* (court or arbitrator) should decide Tug Hill's third-party rights. *See* Opp. 26. And he claims that certiorari is unnecessary because "parties [who] wish to arbitrate disputes … with nonsignatories" simply "need to … clearly say so in their contracts," Opp. 27, which is unresponsive because the whole point of a delegation of arbitrability (which Rogers's agreement clearly includes) is for the *arbitrator* to decide whether the agreement is one that allows nonsignatories to compel arbitration. This theory also overlooks *Arthur Andersen*'s recognition of the broad array of nonsignatory-enforcement doctrines that do not require specific mention in the contract. 556 U.S. at 631 (referencing "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel" (citation omitted)). And this theory ignores the legion of current FLSA cases where workers like Rogers have tried to end-run their arbitration agreements.

The split is real, deep, and growing, all of which demonstrates a reasonable likelihood that this Court will grant certiorari.

III. Tug Hill Is Likely To Suffer Irreparable Harm Absent A Stay.

Rogers also bypasses Tug Hill's main argument on irreparable harm: the imminent prospect of disclosing still-confidential information. Tellingly, Rogers never denies that this disclosure is irreversible and damaging to Tug Hill. Nor could he. It is common sense that revelation of confidential information is irreparable harm, especially where Rogers *admits* that the point of the disclosure is to recruit additional plaintiffs. *See* Opp. 35-36; *see, e.g.*, *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1308-09 (1989) (Marshall, J., in chambers); *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) (noting "irreparable harm" when trade secrets might "become public knowledge"). His own recent motion in the district court demands a broad array of data including the names and contact information of putative plaintiffs,

with the express goal of contacting them "through U.S. Mail, [e]mail, text message, and posting at Tug Hill's jobsites." Ex. F at 95a-96a. The irreparable-harm inquiry can and should end there.

Rogers's deflections cannot overcome that simple analysis. He claims that "Tug Hill must show that a favorable decision from this Court will *inevitably* lead … to arbitration of the merits of [his] claims, because if the arbitrator agrees with Rogers that Tug Hill has no right to arbitrate, the parties will be back to district court" eventually. Opp. 29 (emphasis added). That is not the standard, but rather an improper attempt to smuggle a merits question into the irreparable-harm analysis—and *not* even the merits of the issue this Court would decide if it grants certiorari, but rather the *ultimate* merits of what an arbitrator should be deciding (the very thing Tug Hill is arguing is not for a court at all). Rather, Tug Hill just needs to show a "likelihood" of irreparable harm if its stay request is denied—not that the asserted harm will *never* come to pass absent a stay. *King*, 567 U.S. at 1302. Indeed, Rogers's approach makes no sense. Under his view, a stay would be proper only if this Court hypothesized every single downstream turn a lawsuit might take, which would force the parties to brief the full case on the merits of the issue before this Court (and beyond) at the application stage. That sort of "time-consuming sideshow" would be especially inappropriate in the arbitration context, where the whole point of a delegation of arbitrability is that the court should "*not* decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 530-31 (emphasis added).

Regardless, Rogers is wrong to presume that the arbitrator will return this dispute to the courts. He ignores that the district court in this very case alternatively held that Tug Hill could invoke the arbitration agreement as a third-party beneficiary. Ex. C at 50a, 56a-58a ("This agreement not only services [sic] as the condition precedent to [Rogers's] work with customers, like defendant Tug Hill, [but] … also defines all of the parties' respective commitments, rights,

and obligations related to the performance of that work."). His selective quotations overlook that the agreement was clearly intended to confer benefits on Tug Hill (which had an underlying contract with RigUp); indeed, the whole point of the agreement was "to introduce [Rogers] to [companies like Tug Hill] for the purposes of completing projects," and the agreement even contemplated litigation about whether Rogers was "an employee of RigUp *or a Company*" with which Rogers was placed (like Tug Hill). Ex. E at 75a (emphasis added). Rogers's assumption that he will avoid arbitration is not just irrelevant, but baseless.

Rogers also argues that a stay is unwarranted because Tug Hill delayed in seeking one. That misunderstands the facts of the case and the core reason a stay is needed from this Court now—namely, the district court's entry of a schedule that threatens to compel the disclosure of confidential information in January. Rogers does not explain how Tug Hill could have sought relief from that *particular* harm meaningfully sooner (especially in light of the obligation to seek relief from the lower courts first under Supreme Court Rule 23.3), much less articulate where Tug Hill went wrong in first seeking relief from the lower courts, culminating in Tug Hill seeking a stay in this Court nearly a full month before the potential disclosure date.

A brief review of the facts proves as much. Tug Hill did not hide the ball: Just eight days after the Fourth Circuit issued its mandate, Tug Hill advised the district court and Rogers that it was considering seeking review from this Court and that, if it elected to do so, it would likely seek a stay.[2] The district court, in turn, did not enter the at-issue scheduling order until October 26, 2023. Ex. D at 61a. And it only did so *after* Tug Hill in fact requested a stay that would have given this Court time to review a certiorari petition. *See* Ex. D at 70a. Had the district court

[2] *See* Meeting Report and Proposed Disc. Plan at 1-2, *Rogers v. Tug Hill Operating, LLC*, No. 21-cv-199 (N.D. W.Va. Sept. 6, 2023), ECF No. 44.

entered a different schedule that did not threaten to compel disclosure of confidential information or impose serious burdens before this Court could even consider certiorari, Tug Hill might not have needed a stay from this Court. In any event, the district court, for its part, did not suggest any improper delay by Tug Hill. *See id.* at 61a. Once the schedule was entered and the district court denied a stay, Tug Hill sought relief in the Fourth Circuit, which denied a stay on November 29, 2023 (again without suggesting undue delay). *See* Ex. B at 23a. Tug Hill then sought a stay in this Court on December 15, 2023—just two days after Rogers filed his conditional-certification motion demanding broad disclosure of confidential information. *See* Ex. F at 79a, 95a.

This sequence of events is nothing like the cases Rogers cites. His lead case involved a party who sat on his hands for "almost a year" until seeking a stay just "hours before his scheduled execution." *Price v. Dunn*, 139 S. Ct. 1533, 1536-38 (2019) (Thomas, J., concurring in the denial of certiorari). And the remaining cases are completely irrelevant, as they involve parties who did not seek relief until *after* the challenged order was already in place—thus undercutting their claims of irreparable harm—which is the opposite of Tug Hill asking this Court for relief nearly a month *before* the district court will rule on the disclosure. *See West Virginia v. B. P. J.*, 143 S. Ct. 889 (2023) (Alito, J., dissenting from denial of application to vacate injunction) (applicant "allowed the … injunction to go unchallenged for nearly 18 months"); *Beame v. Friends of the Earth*, 434 U.S. 1310 (1977) (Marshall, J., in chambers) (applicants delayed in seeking review of order directing them "to begin implementation of four pollution control strategies"); *Ruckelshaus*, 463 U.S. at 1316 (applicant delayed despite already being subject to an injunction); *Foster v. Gilliam*, 515 U.S. 1301, 1302-03 (1995) (Rehnquist, C.J., in chambers) ("the State sought no relief" until "several weeks" after the order enjoining a trial, which this Court "c[ould not] undo"); *Morland v.*

Sprecher, 443 U.S. 709, 710 (1979) (per curiam) (petitioners sought relief from a "preliminary injunction" that was entered several months earlier).

Finally, Rogers says that "the balance of the equities and the public interest do not favor a stay," but his arguments are doubly wrong. Opp. 34. Balancing the equities is proper "[i]n close cases," *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam), but this case is not close given the undeniable prejudice of disclosing confidential information. And even if balancing were proper, this Court would just "weigh the *relative* harms to the *applicant and to the respondent*," *id.* (emphases added), meaning that Rogers can assert only harm to himself—not to strangers to this litigation.

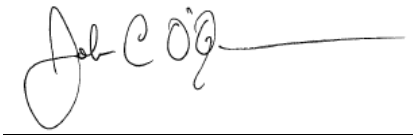
The only harm he invokes for himself is a "delay in reaching the merits" of his claim for monetary compensation, Opp. 34, but a desire to resolve litigation "immediately" does not count. *John Doe*, 488 U.S. at 1309; *accord Ruckelshaus*, 463 U.S. at 1317. And if Rogers ultimately is correct in his prediction that this Court will deny certiorari, a stay pending resolution of Tug Hill's petition on the current schedule would likely last only until late February—a very brief pause in the district court litigation. Rogers identifies no harm to himself from such a short stay. By contrast, the harm to Tug Hill of being forced to (among other things) disclose confidential information during that time is obvious—and cannot be undone. Rogers's further complaint about how long his case has already been pending also rings hollow because the vast bulk of the supposed delay is due to *Rogers's* decision to fight arbitration in the district court and on appeal. Had Rogers accepted his obligation to arbitrate, his FLSA claim likely would have been resolved by now. Indeed, a substantial portion of this litigation was consumed by *his* appeal to the Fourth Circuit. What was unforeseeable was that the district court would try to "rocket," Opp. 11, this case from remand to conditional certification in less than five months.

And even if Rogers could invoke the interests of non-parties to this litigation, that would get him nowhere. Nothing is stopping potential plaintiffs with viable claims from asserting them; a stay of this action in which Rogers is currently the sole plaintiff does not prevent others from suing. The purported harm here thus is not to Rogers (who retains his claim for financial compensation) or to other potential plaintiffs (who can bring their own suits). It is to Tug Hill, in being forced to disclose confidential information that might be used by others to round up more plaintiffs against Tug Hill.

* * *

Rogers's evasion on each stay factor confirms that this is a straightforward case for relief. There is a fair prospect of reversal, as underscored by Rogers's refusal to engage with this Court's precedents and Judge Jones's *Newman* dissent. There is a reasonable probability of review, as underscored by Rogers's choice to ignore the opinions describing the split and its importance. And there is a likelihood of irreparable harm, as underscored by Rogers's concession that his attorneys will use confidential information to identify new plaintiffs. Tug Hill respectfully seeks a stay.

Respectfully submitted,



PHILIP M. COOPER
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654

JOHN C. O'QUINN
Counsel of Record
LUCAS H. FUNK*
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
john.oquinn@kirkland.com

Counsel for Applicant

*Admitted only in Oregon and practice is supervised by principals of the Firm.

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