No. 23-268

IN THE
Supreme Court of the United States

CAROLYN FROST KEENAN,
Petitioner,
v.
RIVER OAKS PROPERTY OWNERS, INC.,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals
for the First District of Texas

PETITION FOR REHEARING

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PETITION FOR REHEARING

Carolyn Frost Keenan (Keenan) respectfully petitions for rehearing of this Court's October 16, 2023 order denying her petition for a writ of certiorari.

REASONS FOR GRANTING REHEARING

Rule 44.2 authorizes a petition for rehearing based on "other substantial grounds not previously presented." Such a substantial ground exists here.

As framed by the question presented in Keenan's petition for a writ of certiorari and as argued in the body of that petition, Texas's First Court of Appeals joined the Sixth Circuit in concluding that an FHAA reasonable-accommodation disability claim under 42 U.S.C. § 3604(f)(3) is barred if the defendant does not know or could not have reasonably known of the disability "at the time" that the reasonable accommodation was requested and rejected. Compare *Keenan* v. *River Oaks Prop. Owners, Inc.*, No. 01-20-00493-CV, 2022 WL 802989, 2022 Tex. App. LEXIS 1800 (Tex. App.—Houston [1st Dist.] Mar. 17, 2022, pet. denied); App. 60-61a (stating "the evidence establishes that ROPO did not know, and could not have reasonably been expected to know, of a disability *at the time* that it denied Keenan's requested accommodation"); with *Hollis* v. *Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 541 (6th Cir. 2014) (stating that the "Appropriate Legal Standard" for an "FHA reasonable-accommodation plaintiff" includes "that the defendant knew or should have known of the disability at the time of the refusal").

Keenan explained that those opinions conflicted with the knowledge element adopted by the First, Third, Eighth, Ninth, and Eleventh Circuits, which

did not include the temporal-knowledge requirement that was dispositive for Keenan's FHAA counterclaim. And Keenan noted that in light of those conflicts and considering the population of the First District's 10-county jurisdiction, litigants might be inclined to forum shop, a compelling reason to grant certiorari. See *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984); see also *Yee* v. *City of Escondido*, 503 U.S. 519, 537-38 (1992).

Keenan, however, did not reference an opinion from the Fifth Circuit that outlined the required elements of an FHAA reasonable-accommodation disability claim under 42 U.S.C. § 3604(f)(3), but the First District is included in that circuit's geographic jurisdiction. Where the Fifth Circuit sides in that conflict, therefore, is of critical importance to this Court's consideration of the question presented. To be sure, in *DIRECTV, Inc.* v. *Imburgia*, it was the conflict between the Ninth Circuit and the California Court of Appeal regarding the FAA that compelled this Court to grant certiorari and resolve the conflict regarding "the same interpretive question decided" oppositely by those two courts. 577 U.S. 47, 53 (2015).

In a recent case, the Fifth Circuit outlined the similar elements found in both the ADA and the FHAA. *Providence Behavioral Health* v. *Grant Rd. Pub. Util. Dist.*, 902 F.3d 448, 457, 459 (5th Cir. 2018). Specifically, the Fifth Court acknowledged that "[t]he ADA, FHA, and [Texas Fair Housing Act] all prohibit governmental entities from discriminating against individuals with disabilities." *Id.* at 451, 457.

As to reasonable accommodation claims under the ADA, the Fifth Circuit stated that a plaintiff must show by a preponderance of the evidence (1) that the plaintiff is a qualified individual with a disability, (2) that "*the disability* and its consequential limitations were *known* by" the defendant, and (3) that the defendant "failed to make reasonable accommodations for such known limitations." *Id.* at 457 (emphasis added).

As to the FHA, the court stated that a defendant "engages in a discriminatory practice if it refuses to make a 'reasonable accommodation' to 'rules, policies, practices or services when such accommodation may be necessary to afford [a disabled person] equal opportunity to use and enjoy a dwelling.'" *Id.* at 459 (quoting 42 U.S.C. § 3604(f)(3)(B)). And finally, the Fifth Circuit explained that "[r]easonable accommodation claims under the FHA and ADA both require that a reasonable accommodation be provided to the plaintiffs if necessary to allow the plaintiffs to have usage and enjoyment in a facility equivalent to individuals who are not disabled." *Ibid.*

From the above summary of elements, the Fifth Circuit follows the First, Third, Eighth, Ninth, and Eleventh Circuits in concluding that although a defendant must have knowledge of the plaintiff's disability for a valid claim to exist, there is *no* requirement that the defendant's knowledge of the disability must be proved to exist "at the time" of the denial of the reasonable accommodation or otherwise the claim is

forever barred, despite subsequently acquiring that knowledge.

To resolve the conflicts among the circuits and to prevent forum-shopping abuse, this petition for rehearing should be granted. See *Southland Corp.*, 465 U.S. at 15; *Yee*, 503 U.S. at 537-38; *Imburgia*, 577 U.S. at 53. And ultimately, the Court should reverse the First District's erroneous decision.

Before doing so, however, this Court should request that ROPO file a response to this petition for rehearing under Rule 44.3. In its response, ROPO should presumably be able explain why the First District's and Sixth Circuit's "at the time" temporal knowledge requirement is rooted in the text of 42 U.S.C. § 3604(f) and why the First, Third, Fifth, Eighth, Ninth, and Eleventh Circuits are wrong to not include that one-time temporal knowledge requirement.

Keenan submits that the correct test under 42 U.S.C. § 3604(f), in light of the causal language "because of a handicap," makes it "unlawful" to "discriminate" when a defendant refuses to permit reasonable accommodations to premises or to rules, such as deed restrictions, when necessary to afford such handicapped persons full enjoyment of the premises or equal opportunity to use and enjoy a dwelling—even if the defendant does not know or could not have known of the disability when such an accommodation was first requested and denied. 42 U.S.C. § 3604(f)(2)-(3)(A)-(B).

In other words, if the defendant later learns that the disability or handicap was the basis for the request

previously denied, the defendant is not forever absolved of its obligation under the FHAA to permit a reasonable accommodation based on its prior purported ignorance. To be sure, once knowledge of the disability has been sufficiently shown, the defendant's continued refusal to permit a reasonable accommodation would establish a prima-facie claim of discrimination that was "because of a handicap." See, e.g., *Bostock* v. *Clayton Cty.*, 140 S. Ct. 1731, 1747 (2020) (stating "[a]s enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them").

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the Court should grant rehearing, grant the petition for a writ of certiorari, and reverse the judgment of Texas's First Court of Appeals District and remand to the state district court for further proceedings.

Respectfully submitted,

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NOVEMBER 9, 2023

CERTIFICATION OF PARTY

Carolyn Frost Keenan, by and through undersigned counsel, hereby certifies that this petition for rehearing is restricted to the grounds specified in Sup.Ct.R. 44.2 and has been presented in good faith and not for delay.

Respectfully submitted,

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