No. ________

IN THE

Supreme Court of the United States

CAROLYN FROST KEENAN,

Applicant,

v.

RIVER OAKS PROPERTY OWNERS, INC.,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

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August 3, 2023

APPLICATION

To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicant Carolyn Frost Keenan respectfully requests a 32-day extension of time, to and including September 18, 2023, within which to file a petition for a writ of certiorari to review the judgment of the Court of Appeals for the First District of Texas in this case.

1. The Court of Appeals for the First District of Texas (the First Court) entered judgment on March 17, 2022. *See Keenan v. River Oaks Property 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). (Exhibit 1). Keenan timely filed a petition for review in the Supreme Court of Texas, which that court denied, and then filed a motion for rehearing in that court, which that court denied on May 19, 2023. (Exhibits 2-3). On June 20, 2023, the Court of Appeals for the First District of Texas entered an Order staying the issuance of the mandate from that court to allow Keenan to file a petition for writ of certiorari in this Court. (Exhibit 4). Thus, unless extended, the time to file a petition for certiorari will expire on August 17, 2023. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257(a). *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 52-53 (2015).

2. Keenan is the owner of a home in the well-known residential subdivision in Houston, Texas called River Oaks. The Respondent, River Oaks Property Owners, Inc. (ROPO), purports to be a statutory property owners' association under the Texas Property Code with the power to enforce deed restrictions, among other powers. After her mother-in-law became wheelchair bound due to an age-related disability, Keenan requested that ROPO provide a reasonable accommodation to exceed an impermeable-cover deed restriction with a larger driveway for a wheel-chair-accessible van and ramp into the home. ROPO refused Keenan's initial request for an accommodation and then later refused her attorney's formal written request for the accommodation, which specifically cited to the Fair Housing Amendment Act (FHAA).

3. After Keenan proceeded to build the larger driveway despite ROPO's repeated refusals to allow the accommodation, ROPO filed suit to enforce the deed restriction and to recover attorney's fees for the alleged violation. Keenan later counterclaimed for a violation of the FHAA based on ROPO's refusal to provide a reasonable accommodation notwithstanding the pre-suit request made by Keenan's attorney. After years of litigation, including Keenan's petition for writ of mandamus granted by the Supreme Court of Texas in *In re Keenan*, 501 S.W.3d 74 (Tex. 2016) (per curiam), the trial court granted a final summary judgment in favor of ROPO on a breach-of-deed-restriction claim requiring Keenan to remove 1,260 square feet from her driveway and other structures from her property and pay ROPO over

$665,000.00 in attorneys' fees. (Exhibit 5). Critically here, the judgment also disposed of Keenan's FHAA claim, among others. (Exhibit 5).

4. In upholding the trial court's judgment on Keenan's FHAA counterclaim, the First Court concluded 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." *See Keenan*, 2022 Tex. App. LEXIS 1800, at *57 (emphasis in original) (quoting *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000)). In reaching the conclusion that ROPO had to know of the claimed disability when Keenan initially requested an accommodation, the First Court misconstrued *Groome*, which held that "under the Fair Housing Act, a violation occurs when the disabled resident is first denied a reasonable accommodation, irrespective of the remedies granted in subsequent proceedings." 234 F.3d at 199. But *Groome* does not require an FHAA plaintiff to inform the defendant about the disability at the time that the request for accommodation is first made or otherwise the FHAA claim is forever barred. But that is precisely what the First Court held.

5. Although the First Court misconstrued *Groome* to announce its erroneous rule regarding when a defendant must know of the claimed disability for FHAA liability to be established, the First Court's "at the time" rule has been adopted by the Sixth Circuit. *See Hollis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 541 (6th Cir. 2014) (stating "[i]n addition to proving reasonableness and necessity, an FHA reasonable-accommodation or reasonable-modification, plaintiff

also must prove that she suffers from a disability, that she requested an accommodation or modification, that the defendant housing provider refused to make the accommodation or to permit the modification, and that the defendant knew or should have known of the disability at the time of the refusal"). But that erroneous rule, reinforced by the First Court's opinion below, has created a circuit split among other federal circuits that do not include the "at the time" element. *See Summers v. City of Fitchburg*, 940 F.3d 133, 139 (1st Cir. 2019) (stating that "[t]o prevail on such a reasonable accommodation claim, a plaintiff must show a qualifying handicap, the defendant's actual or constructive knowledge of that handicap, a request for a specific accommodation that is both reasonable and necessary to allow the handicapped individual an equal opportunity to use and enjoy the particular housing, and the defendant's refusal to make the requested accommodation"); *accord Olsen v. Stark Homes, Inc.*, 759 F.3d 140, 156 (2d Cir. 2014) (same); *Salisbury v. City of Santa Monica*, 998 F.3d 852, 857-58 (9th Cir. 2021) (same). And the First Court's adoption of the Sixth Circuit rule has only widened that split with its ten-county Texas jurisdiction—a jurisdiction with a population that would constitute the seventeenth largest state.

6. In short, this case raises a fundamental question under FHAA jurisprudence: "Does an FHAA plaintiff have to inform the defendant that the need for a reasonable accommodation was because of a disability when the request is first made or only at some point before the FHAA claim is asserted in a lawsuit?" This case raises a question that this Court needs to address and a question that only *this* Court can decide.

7. Dylan B. Russell of Hoover Slovacek LLP, Houston, Texas, was retained on behalf of Applicant Carolyn Frost Keenan to file a petition for writ of certiorari. Over the past two months, counsel has been occupied with briefing deadlines for a variety of matters, and he will be occupied with additional briefing deadlines over the next several weeks, as follows: (1) motions for rehearing and motions to dismiss for lack of jurisdiction in the Texas Supreme Court arising from *Mosaic Baybrook One, LP, et al. v. Paul Simien*, Nos. 19-0612 and 21-0159, filed July 7; (2) a motion to dismiss for lack of jurisdiction in the Texas Supreme Court arising from *IMT Pavilion III LP et al. v. Victor Mendez*, No. 21-0157, filed July 11; (3) an opening brief in the Fourteenth Court of Appeals, Houston, Texas, arising from *Binnacle Texas City Twenty Two, LLC v. Principal Services, Ltd.*, No. 14-23-00161-CV, due August 4; (4) a motion for rehearing in the Texas Supreme Court arising from *In re Willow Creek Golf Club, Inc.*, No. 22-1144, due August 9; (5) a motion for rehearing in the First Court of Appeals, Houston, Texas, arising from *David Herbig, Trustee of the Welch Family Trust C v. Jeanne Manry Welch, Trustee of the Welch Manry Family Trust*, No. 01-22-00080-CV, due August 11; (6) a reply on a petition for review in the Texas Supreme Court arising from *Nationwide Coin & Bullion Reserve, Inc. v. William Ciarlone*, No. 22-1049, due August 14; and (7) a brief on the merits in the Texas Supreme Court arising from *River Plantation Community Improvement Association v. River Plantation Properties LLC et al.*, No. 22-0733, due August 16. The Applicant requests this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised

by the proceedings below.

8. For these reasons, the Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including September 18, 2023.

Respectfully submitted,

By: */s/ Dylan B. Russell*
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