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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF IBHAWA,  
Appellant,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,  
Respondents.  
-----

20 Eagle Street  
Albany, New York  
October 17, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 Matter of Ibhawa v. the New York State Department of Human  
3 Rights.

4 MS. MILLING: Good afternoon. May it please the  
5 court. Donna Milling and co-counsel, Rosanne Johnson, for  
6 appellant, Victor Ibhawa. Appellant would like to set  
7 aside ten minutes for rebuttal.

8 CHIEF JUDGE WILSON: Are you sure you want that  
9 much for rebuttal?

10 MS. MILLING: Eight minutes?

11 CHIEF JUDGE WILSON: It's unusual, but if you  
12 would like eight, that's fine.

13 MS. MILLING: It is; I understand that, Your  
14 Honor.

15 CHIEF JUDGE WILSON: Yes.

16 MS. MILLING: But - - -

17 CHIEF JUDGE WILSON: We'll save you eight.

18 MS. MILLING: I'm going to err on the side of  
19 caution.

20 CHIEF JUDGE WILSON: Fine.

21 MS. MILLING: Thank you. On April 21st, 2020,  
22 Father Victor Ibhawa, a Catholic priest assigned to the  
23 Blessed Trinity Church in the City of Buffalo, feared for  
24 his safety as he was verbally assaulted by a coworker who  
25 yelled racial slurs and profanities, including the N word.

1 Fearing for his safety, Father Ibhawa - - -

2 JUDGE GARCIA: Counsel, we accept your factual  
3 allegations for purposes of this motion. So - - -

4 MS. MILLING: Thank you, Your Honor.

5 JUDGE GARCIA: - - - what - - - why don't you go  
6 into the issue of whether or not, given those allegations,  
7 for purposes, again, only of this - - - this stage of the  
8 proceedings, why that doesn't fall within the ministerial  
9 exception.

10 MS. MILLING: Well, both DHR and the Diocese  
11 rely on Hosanna-Tabor, Our Lady of Guadalupe, which,  
12 as I'm sure this court is familiar, has nothing to do  
13 - - - did not apply the ministerial exception to  
14 hostile work environment claims.

15 JUDGE GARCIA: And how would you square allowing  
16 a hostile work environment claim to go forward with those  
17 cases? What would be the rules around proceeding with a  
18 cause of action like that?

19 MS. MILLING: Well, I think, first of all, we're  
20 talking about - - - we're not talking about federal law;  
21 we're talking about the Human Rights Law, the New York  
22 State Human Rights Law.

23 JUDGE GARCIA: Well, we're kind of talking about  
24 federal law too and whether or not the Constitution limits  
25 what you can do. But if we were to say the cause of action

1 for hostile workplace could go forward, do you think we  
2 would have to put any guardrails around the type of proof  
3 that the court could consider in letting you prove that  
4 claim?

5 MS. MILLING: Well, I would think that, you know,  
6 obviously, an investigation would have to be conducted by  
7 DHR. You would have to look into the nature of the claim.  
8 And if you look at the Human Rights Law, which is supposed  
9 to be narrowly construed, both the Supreme Court and this  
10 law, there's no exemption for religious institutions.

11 JUDGE RIVERA: Let me ask you this. I understand  
12 your position to be the U.S. Supreme Court has left an open  
13 question as to whether or not this exception applies to  
14 hostile work environment claims. Okay. Your position is  
15 it - - - the ministerial exception shouldn't apply to  
16 hostile work environment claims.

17 So let me ask you this. Is that, sort of, all  
18 hostile work environment claims? Is there a way to carve  
19 out certain hostile work environment claims? What's - - -  
20 what's your - - - it might be closer to Judge Garcia's  
21 question about, sort of, your limiting principle.

22 MS. MILLING: I guess maybe I'm not  
23 understanding, but claims of discrimination - - -

24 JUDGE RIVERA: Well, let me try it this way.

25 MS. MILLING: Yes.



1 JUDGE RIVERA: Are there certain types of hostile  
2 work environment claims that might very well implicate what  
3 is at the heart of this ministerial exception?

4 MS. MILLING: I can tell you what doesn't, so  
5 discrimination - - -

6 JUDGE RIVERA: Okay. Well, we can start with  
7 that.

8 MS. MILLING: - - - discrimination, racial slurs  
9 - - -

10 JUDGE RIVERA: Yes, but if the discrimination - -  
11 -

12 MS. MILLING: - - - xenophobia.

13 JUDGE RIVERA: - - - the discrimination is just  
14 termination, you say that's not - - - the basis for a  
15 termination is discrimination, you say that's not covered  
16 by the exception?

17 MS. MILLING: But the ministerial exception, it  
18 has been applied under Hosanna-Tabor and Guadalupe - - -

19 JUDGE RIVERA: Okay.

20 MS. MILLING: - - - to hiring and firing.

21 JUDGE RIVERA: Right.

22 MS. MILLING: They have not applied it to a  
23 hostile work environment.

24 JUDGE HALLIGAN: Did you make a hostile work  
25 environment claim that is clearly separate from the

1 termination claim?

2 MS. MILLING: Yes, we did.

3 JUDGE HALLIGAN: Okay. And where in the record  
4 will I find that and whatever allegations there are that -  
5 - -

6 MS. MILLING: I believe if - - -

7 JUDGE HALLIGAN: - - - make that clear. I know  
8 you have allegations regarding the nature of the treatment,  
9 but - - -

10 MS. MILLING: The allegations are laid out in the  
11 record. I believe it's pages 9 to 12 - - -

12 JUDGE HALLIGAN: Right.

13 MS. MILLING: - - - and 42 to 43.

14 JUDGE HALLIGAN: But where is it - - - where is  
15 it clear that you are raising - - - I think, a hostile work  
16 environment claim, unless you're arguing constructive  
17 discharge, is different from a termination claim, right?

18 MS. MILLING: That is correct.

19 JUDGE HALLIGAN: So where do I see - - - where  
20 can I look to see that you are alleging two separate  
21 claims, one that's termination, and one that is - - - I  
22 think you - - - you checked - - -

23 MS. MILLING: It's in all - - - it's in all the  
24 pleadings, all the pleadings, Your Honor. And if you look  
25 at the lower courts - - -

1 JUDGE HALLIGAN: Okay. I think, though, you  
2 checked a box saying that there was a termination of  
3 employment claim, but I wasn't sure that you also checked  
4 it was a hostile work environment claim. So I just want to  
5 make sure what the record tells us about that, that I'm  
6 looking at the relevant pages.

7 MS. MILLING: I believe that those pages that I  
8 just cited to.

9 JUDGE HALLIGAN: Okay. So 9 to 12 and - - -

10 MS. MILLING: 42 to 43.

11 JUDGE HALLIGAN: Okay. And just to pick up on  
12 Judge Rivera's question, if I can, let's suppose that you  
13 have someone who is working for a religious institution,  
14 and let's assume that it's established that this person is  
15 a minister, and let's suppose that they bring a hostile  
16 work environment claim based on gender. And the defense is  
17 that, under the religious doctrine of this religious  
18 institution, men and women are viewed differently, and  
19 we're treating you different as a woman, because that is  
20 something that is embedded in religious dogma. Could you  
21 proceed with that claim under Hosanna-Tabor and - - -

22 MS. MILLING: I don't think so, because I think  
23 they talk about things that promote the tenets of the  
24 church and the faith. Racism, xenophobia discrimination,  
25 as far as I know - - - I'm a practicing Catholic - - - do

1 not promote the tenets of the Catholic faith. And nobody  
2 has asserted that - - -

3 JUDGE RIVERA: Does misogyny - - -

4 MS. MILLING: - - - that it does.

5 JUDGE RIVERA: Does misogyny?

6 MS. MILLING: Promote the tenets - - -

7 JUDGE RIVERA: Does misogyny?

8 MS. MILLING: - - - of the Catholic faith?

9 JUDGE RIVERA: Yes.

10 MS. MILLING: No, not - - -

11 JUDGE RIVERA: Inferior status of females?

12 MS. MILLING: I'm sorry?

13 JUDGE RIVERA: The inferior status of females  
14 vis-a-vis men?

15 MS. MILLING: Well, I mean, as far as the tenets  
16 of the faith - - -

17 JUDGE RIVERA: Yes.

18 MS. MILLING: - - - we are treated differently.  
19 Yes - - -

20 JUDGE RIVERA: Yes.

21 MS. MILLING: - - - I will say that.

22 JUDGE RIVERA: Okay.

23 MS. MILLING: Yeah. So what - - - I guess what  
24 I'm trying to distinguish here is the fact that things that  
25 promote the - - - the - - - the faith, and things that are



1 involved in the organization and the hiring and firing, who  
2 to hire, who to fire, and to choose its ministers, are  
3 different from, you know, the noose over the door or the N  
4 word scrawled on the wall. So just because you're a  
5 religious minister, if this decision is allowed to stand,  
6 what you're saying to religious organizations is, have at  
7 it, to religious employees, sorry, there's nothing we can  
8 do to help you. The First Amendment says that there's  
9 nothing we can do. I know the Human Rights Law says that  
10 New York has some of the - - - I think, the strongest law,  
11 anti-discrimination laws - - -

12 JUDGE RIVERA: Well, I think their argument was  
13 there is some recourse within, sort of, the tenets of the  
14 faith, right?

15 MS. MILLING: In canon law.

16 JUDGE RIVERA: First of all, they say they don't  
17 - - - right?

18 MS. MILLING: Yes.

19 JUDGE RIVERA: I mean, the argument is, no, we -  
20 - - we don't in any way sanction what has been described in  
21 the complaint. But I thought they said you have a vehicle  
22 within the Catholic Church - - - or he did - - - I'm sorry  
23 - - -

24 MS. MILLING: Yes.

25 JUDGE RIVERA: - - - your client did.



1 MS. MILLING: But that has nothing to do with  
2 whether or not DHR has jurisdiction. And yes, let's say  
3 that there is a remedy in canon law. New York State says  
4 that you can choose to file your complaint anywhere. You  
5 don't even have to go to your employer and report the  
6 discrimination. You can go straight to DHR and file your  
7 complaint.

8 So even if there is a remedy in canon law, he  
9 tried. He made several attempts. He told them what was  
10 going on. And instead, when he met with the hierarchy at  
11 the Diocese, he was subjected to xenophobic statements.  
12 Oh, things are done differently here. Stories about  
13 priests who urinate on lawns, stories about priests from  
14 places who come to the United States and don't even know  
15 how to use a washing machine.

16 And not only that, if there is a remedy under  
17 canon law, he was never accused of anything. Nobody told  
18 him this is what you did in violation of canon law. He  
19 kept asking, what did I do? Why are you firing me? So to  
20 say now that, you know, there's a remedy in canon law - - -

21 JUDGE RIVERA: Is he - - -

22 MS. MILLING: - - - the same place - - -

23 JUDGE RIVERA: Is he - - - is he seeking to be  
24 returned to this parish?

25 MS. MILLING: I'm sorry?

1 JUDGE RIVERA: I'm sorry. Is he seeking to be  
2 returned and reinstated at this parish in the same position  
3 he held?

4 MS. MILLING: Your Honor, to be honest, we have  
5 not spoken about that remedy. We haven't looked that far.  
6 We're just dealing with what happened to him. And to now  
7 say that canon law is a remedy is - - -

8 JUDGE RIVERA: Well, you must have some sense of  
9 the remedy he's looking for.

10 MS. MILLING: Yes, he's looking for - - - we're  
11 asking that - - -

12 JUDGE RIVERA: Yes.

13 MS. MILLING: - - - this court reverse the Fourth  
14 Department's decision.

15 JUDGE RIVERA: Yes.

16 MS. MILLING: He just wants an investigation of  
17 his claim by DHR.

18 JUDGE RIVERA: Yes, in the - - -

19 MS. MILLING: - - - which is what - - -

20 JUDGE RIVERA: - - - hopes - - -

21 MS. MILLING: - - - they're mandated to do.

22 JUDGE RIVERA: Okay. But the investigation, if  
23 indeed there's probable cause to find discrimination, what  
24 - - - what remedy would he be looking for?

25 MS. MILLING: Well, if he had been an employee at

1 Walmart - - -

2 JUDGE RIVERA: Yes.

3 MS. MILLING: - - - or Xerox - - -

4 JUDGE RIVERA: Yes.

5 MS. MILLING: - - - they would have processed his  
6 claim - - -

7 JUDGE RIVERA: Yes.

8 MS. MILLING: - - - conducted an investigation -  
9 - -

10 JUDGE RIVERA: Yes.

11 MS. MILLING: - - - and based on these  
12 allegations, I would imagine sanctions would be imposed  
13 against the employer who subjected him to this type of  
14 discrimination and hostile work environment.

15 JUDGE RIVERA: So some remedy, perhaps, short of  
16 being reinstated - - -

17 MS. MILLING: Reinstated.

18 JUDGE RIVERA: - - - and reappointed - - -

19 MS. MILLING: Yeah.

20 JUDGE RIVERA: - - - at this particular parish.

21 MS. MILLING: That is correct, Your Honor.

22 JUDGE RIVERA: Um-hum.

23 JUDGE SINGAS: Counsel, do we have to defer to  
24 DHR, in your opinion, in any way, their interpretation of  
25 the ministerial exception?

1 MS. MILLING: I - - - they're - - - the cases  
2 from this court and everywhere else have said - - - other  
3 courts have said that deference is to be given. And we  
4 understand that deference is to be given. However,  
5 deference is not unlimited. And when DHR makes a decision  
6 that has no legal precedent, there's no controlling  
7 authority, then deference shouldn't be given here. For  
8 example, I was a prosecutor for - - -

9 JUDGE TROUTMAN: But do they get to make - - - we  
10 have to defer to their legal determination?

11 MS. MILLING: No, you don't. And as a matter of  
12 fact, I'm sure this court is familiar with what the Supreme  
13 Court did in the Chevron doctrine. There's no more Chevron  
14 doctrine. In Loper Bright, the Supreme Court said we're  
15 not going to defer anymore when it comes to interpretations  
16 of the law and a statute. And this court is free to do  
17 that.

18 JUDGE CANNATARO: So Counsel, do you want to  
19 revise your answer to the previous question? It sounds to  
20 me like you're saying we don't owe them any deference with  
21 respect to this determination.

22 MS. MILLING: Well, with respect to this  
23 determination.

24 JUDGE CANNATARO: This one.

25 MS. MILLING: But in general, yes.



1 JUDGE CANNATARO: Yes.

2 MS. MILLING: We understand - - -

3 JUDGE CANNATARO: We all know that there's a rule  
4 that - - -

5 MS. MILLING: - - - that deference - - -

6 JUDGE CANNATARO: - - - we defer to  
7 administrative agencies under certain circumstances.

8 MS. MILLING: Yes.

9 JUDGE CANNATARO: But we also have rules that  
10 define - - -

11 MS. MILLING: Yes.

12 JUDGE CANNATARO: - - - when we don't have to  
13 give - - -

14 MS. MILLING: Right.

15 JUDGE CANNATARO: - - - deference.

16 MS. MILLING: And especially - - -

17 JUDGE CANNATARO: Which one is this?

18 MS. MILLING: You - - - there are - - - the  
19 general case law says that deference is to be afforded  
20 agencies because this is what they do every day. And they  
21 get a chance to - - - they're in a better position to do  
22 this.

23 But those are cases where a hearing was held. We  
24 didn't get that far. They immediately looked at this, saw  
25 that the person who was alleging this was a priest, and



1 said, oh, collar, First Amendment, we can't look at this.  
2 So we didn't even get to a hearing. So we - - -

3 JUDGE CANNATARO: So we don't owe their legal  
4 conclusion any particular deference?

5 JUDGE GARCIA: That's correct, right? I mean, I  
6 think they dismissed it for lack of jurisdiction.

7 MS. MILLING: Exactly. They conflated it. They  
8 saw the retaliatory firing and the hostile work  
9 environment. They conflated it, saw priest, and said,  
10 sorry, we can't help you. Yes.

11 CHIEF JUDGE WILSON: Thank you.

12 MS. MILLING: Thank you, Your Honor.

13 MR. WOSKOFF: If it please the court, Aaron  
14 Woskoff, for Melissa Franco, general counsel, Division of  
15 Human Rights.

16 JUDGE HALLIGAN: Counsel, I know you don't have a  
17 lot of time, but I just want to ask you a couple of  
18 questions about the - - -

19 MR. WOSKOFF: Certainly.

20 JUDGE HALLIGAN: - - - determination, if I can.  
21 The first is, do you - - - did you understand the  
22 determination to be covering a hostile work environment  
23 claim as well as a termination claim?

24 MR. WOSKOFF: Yes.

25 JUDGE HALLIGAN: Okay. And so you think that - -



1 - that there is a hostile work environment claim separately  
2 alleged. I was looking at the page of the record where  
3 there are boxes to check, and there is a box for harassment  
4 that's not checked. But you think it's adequately  
5 presented, I take it?

6 MR. WOSKOFF: It's all-encompassing.

7 JUDGE HALLIGAN: Okay. Okay. The second  
8 question I have is this. There was a statutory exemption  
9 that was included, I think, here, right? 298 - - - I think  
10 it's subsection 10 or 11; you'll, I'm sure, know which one.

11 Why is it that the agency chooses to decide what  
12 I think is an open constitutional question, which is  
13 whether or not the ministerial exception applies to  
14 harassment claims, instead of first starting with a  
15 statutory exemption, which I think is generally the order  
16 in which, you know, you proceed with legal analysis?

17 MR. WOSKOFF: I can't explain why the  
18 investigation went that way.

19 JUDGE HALLIGAN: I mean the decision, not the  
20 investigation.

21 MR. WOSKOFF: That is what the regional director  
22 decided.

23 JUDGE HALLIGAN: Does the agency generally  
24 consider - - - I looked to see how many cases there are,  
25 that I could find, applying the statutory exemption, and I



1 didn't see many of them. Does the agency generally, you  
2 know, look at - - -

3 MR. WOSKOFF: I'm not - - -

4 JUDGE HALLIGAN: - - - look at the constitutional  
5 question first?

6 MR. WOSKOFF: I'm not familiar with the agencies  
7 applying that Human Rights Law exemption.

8 JUDGE HALLIGAN: But do you think they could? It  
9 looks to me like - - -

10 MR. WOSKOFF: I think - - -

11 JUDGE HALLIGAN: - - - on the text it - - -

12 MR. WOSKOFF: - - - definitely it would have been  
13 available.

14 JUDGE HALLIGAN: Okay.

15 CHIEF JUDGE WILSON: And I'm curious why you  
16 think of this as a jurisdictional issue. Let me start this  
17 way. I would think that the ministerial exception is in  
18 the way of an affirmative defense. Does that seem  
19 reasonable?

20 MR. WOSKOFF: Yes.

21 CHIEF JUDGE WILSON: And so that the minister  
22 would have the burden to prove that as an affirmative  
23 defense. Well, sorry, you would have the burden to prove  
24 it, right, against the allegation of the plaintiff, right?

25 MR. WOSKOFF: Right. The issue was raised - - -

1 CHIEF JUDGE WILSON: The Diocese would.

2 MR. WOSKOFF: - - - by the respondent - - -

3 CHIEF JUDGE WILSON: Right.

4 MR. WOSKOFF: - - - before the Division - - -

5 CHIEF JUDGE WILSON: Right. And so the burden  
6 would rest there, right, on the person asserting the  
7 affirmative defense. And ordinarily, you wouldn't treat  
8 the - - - that as a jurisdictional issue. You'd say we  
9 have jurisdiction, and now we have to hear the affirmative  
10 defense.

11 MR. WOSKOFF: Well, it becomes a jurisdictional  
12 issue because the reading by the Division of the  
13 ministerial exception is that it precludes government  
14 interference in the rules, regulations, and policies of  
15 internal management - - -

16 JUDGE GARCIA: But I think - - -

17 MR. WOSKOFF: - - - of a religious organization -  
18 - -

19 JUDGE HALLIGAN: But I thought that --

20 JUDGE GARCIA: But to the Chief Judge's point - -  
21 - I'm sorry, here. To the Chief Judge's point on that, I  
22 think the Supreme Court has said exactly what he just  
23 paraphrased, which is this is not jurisdictional; this is  
24 an affirmative defense. So how can you dismiss it before  
25 they raise the affirmative defense, and we don't have a

1 record of what type of proof would be necessary to prove or  
2 disprove these allegations and whether or not you really  
3 would have to get into this type of inquiry?

4 MR. WOSKOFF: During the course of the  
5 investigation, it was raised by the respondent. And we're  
6 commonly looking at matters that involve religious  
7 organizations where the ministerial exception does come  
8 into play while - - -

9 JUDGE RIVERA: Let me ask. There was no fact  
10 finding; is that correct?

11 MR. WOSKOFF: The fact finding was to the extent  
12 of both parties agreeing that this individual was the  
13 pastor of this congregation.

14 JUDGE GARCIA: And then that removed this from  
15 your agency as a jurisdictional matter?

16 MR. WOSKOFF: That's our position, that we're not  
17 allowed to interfere in their internal management, that  
18 they had avenues within their organization for this to be  
19 dealt with - - -

20 JUDGE RIVERA: So that - - -

21 MR. WOSKOFF: - - - and we're not to interfere.

22 JUDGE RIVERA: That includes, of course,  
23 termination, right? But that includes this question that's  
24 been left open by the U.S. Supreme Court about hostile work  
25 environment?

1 MR. WOSKOFF: Well, we were taking a reading of  
2 Hosanna and Our Lady of Guadalupe that sort of pushes the  
3 government out of management.

4 JUDGE RIVERA: I have to say I was a bit  
5 surprised by the Division's approach. One would think such  
6 an open question that has divided other courts, with no  
7 decision from us, that there would be perhaps some actual  
8 extensive analysis provided by the Division in support of  
9 its determination. I mean, were - - - did I miss it? Was  
10 there some analysis in this record?

11 MR. WOSKOFF: Well, basically, once the parties  
12 were in agreement that it was - - -

13 JUDGE RIVERA: Yes.

14 MR. WOSKOFF: - - - a pastor, and they both were  
15 in - - -

16 JUDGE RIVERA: Yes.

17 MR. WOSKOFF: - - - agreement of that - - -

18 JUDGE RIVERA: Yes.

19 MR. WOSKOFF: - - - we saw no factual issue to be  
20 determined.

21 JUDGE HALLIGAN: But there's an open legal  
22 question, right? I mean, the circuit courts have split on  
23 the question of whether or not, even once you determine  
24 that the individual is a minister, it applies to a claim  
25 like this, which is harassment, not termination. And as



1 Judge Rivera says, I don't see any exploration of that  
2 question in the decision.

3 MR. WOSKOFF: Because the Division halted when  
4 both parties agreed that it's a pastor. And we're not  
5 getting - - -

6 JUDGE HALLIGAN: But that doesn't answer - - -  
7 even if the person is - - - well, even if the person is a  
8 minister, I think that still leaves open the question of  
9 whether the exception applies to this kind of claim. Isn't  
10 that what's - - - what's - - -

11 MR. WOSKOFF: Their - - -

12 JUDGE HALLIGAN: - - - circuit - - -

13 MR. WOSKOFF: Yeah, that's why we're here.

14 JUDGE RIVERA: Yes, but that's the point. One  
15 would have thought, again, because there is no controlling  
16 authority in New York on this issue, and the U.S. Supreme  
17 Court has left it open, that the Division would have given  
18 its opinion in some kind of writing, even if it was in some  
19 conclusory fashion, that one could clearly understand how  
20 you had reached this conclusion - - - how you had reached  
21 this particular determination. It might have been, shall I  
22 say, at least helpful for our analysis here.

23 MR. WOSKOFF: Understood. But the determination  
24 does make clear that we are of a position that we are not  
25 to interfere with internal management of a religious

1 organization.

2 JUDGE RIVERA: So then we should - - - just to be  
3 clear on your representation, it should be our  
4 understanding that this decision is the Division's  
5 conclusion that the ministerial exception applies to  
6 hostile work environment claims. That's what we should  
7 take from this decision?

8 MR. WOSKOFF: I would say we don't even get to  
9 that because this is an action under Human Rights Law 298  
10 and - - - for judicial review. And under judicial review,  
11 if there is a rational basis for the determination where  
12 we're following the ministerial exception - - -

13 JUDGE RIVERA: But I'm just trying to confirm the  
14 basis for the determination.

15 MR. WOSKOFF: The basis for the determination is  
16 that the ministerial exception under Demkovich - - -

17 JUDGE RIVERA: Yes.

18 MR. WOSKOFF: - - - Hosanna-Tabor - - -

19 JUDGE RIVERA: Yes.

20 MR. WOSKOFF: - - - Our Lady of Guadalupe leads  
21 us to - - -

22 JUDGE RIVERA: Applies to this claim.

23 MR. WOSKOFF: Yes. In that we shouldn't  
24 interfere with internal management of a religious  
25 organization.



1 JUDGE GARCIA: But the decision - - -

2 JUDGE TROUTMAN: And just so I'm clear, including  
3 hostile work environment; it applies to hostile work  
4 environment?

5 MR. WOSKOFF: Yes.

6 JUDGE GARCIA: But your - - - the decision also  
7 has to be made without an error of law, right? An error of  
8 law, at the administrative level, will lead to a reversal.  
9 And if you're saying it was jurisdictional, and the Supreme  
10 Court says it's not jurisdictional, why isn't that an error  
11 of law?

12 MR. WOSKOFF: The Supreme Court has not said - -  
13 -

14 JUDGE GARCIA: They did.

15 JUDGE HALLIGAN: I think if you look at footnote  
16 4 of Hosanna-Tabor, it does say it's an affirmative  
17 defense. And so if we were to conclude that that is an  
18 error of law, it seems to me we would need to send it back.

19 MR. WOSKOFF: The issue was raised by the  
20 respondent before the Division.

21 CHIEF JUDGE WILSON: Thank you.

22 MR. WOSKOFF: Okay. Thank you.

23 MS. MCGRAW: Good afternoon, Your Honors.

24 Kathleen McGraw, Bond, Schoeneck & King. I'm here with my  
25 co-counsel, Erin Torcello, on behalf of respondent, Diocese

1 of Buffalo.

2 I'm going to jump right in on this topic we were  
3 just discussing of the affirmative defense issue. I think  
4 it's important to recognize the differences between an  
5 administrative investigation and complaint and, like, if  
6 you were to sue a case in state supreme court.  
7 Everything's determined kind of all at once. And the  
8 record is very clear in this matter that there was  
9 significant briefing back and forth by respondent, the  
10 Diocese, and Father Ibhawa on these issues.

11 And I do really think it's important to note  
12 that, at the Division level, a determination that it lacks  
13 jurisdiction is the same effect as if it had said we lack  
14 probable cause. There's two options under the regulations.  
15 You can say there's no probable cause to investigate this,  
16 or you can say we don't have jurisdiction. The effect is  
17 the same.

18 So I agree with Your Honors. And footnote 4 in  
19 Hosanna-Tabor certainly does say that the ministerial  
20 exception is an affirmative defense. But I do think that  
21 that's talking about in the Title 7 con - - -

22 JUDGE RIVERA: Well, so just to be clear, it's -  
23 - - it lacks probable cause. It's effectively the same  
24 when they say lacks jurisdiction, because of the pure legal  
25 question as to whether or not the ministerial exception



1 applies to a hostile work environment, or because you were  
2 persuaded that there was no hostile work environment here?

3 MS. MCGRAW: My statement - - -

4 JUDGE RIVERA: Not you - - - I'm sorry - - - the  
5 Division.

6 MS. MCGRAW: My statement that it's effectively  
7 the same is a matter of how it turns out practically.  
8 Practically, you get a letter that says your claim is  
9 dismissed. And - - -

10 JUDGE RIVERA: Sure. Yes, of course, but that's  
11 not helping me.

12 MS. MCGRAW: And then I'm sorry, what was your -  
13 - - I just - - -

14 JUDGE RIVERA: Well - - -

15 MS. MCGRAW: I don't understand your question.

16 JUDGE RIVERA: Probable cause determinations  
17 could be based on the law; you're not wrong about that. It  
18 doesn't deprive them of jurisdiction. But it could be as a  
19 legal matter. Otherwise there's not a claim there. But  
20 they may very well be based on a factual determination.

21 MS. MCGRAW: Yeah, that's correct.

22 JUDGE RIVERA: Is there any way for us to  
23 determine, based on what the Division did here, which of  
24 those categories this falls into?

25 MS. MCGRAW: Well, it says that it's a

1 jurisdictional dismissal, so I think - - -

2 JUDGE RIVERA: No, no, no, I know that. Whether  
3 or not it's purely about the law or there's any factual  
4 aspect to this analysis.

5 MS. MCGRAW: I don't think it's plainly clear on  
6 the face of the determination. But I do think that,  
7 looking into the record and the briefing back and forth by  
8 the parties, there was really not a dispute of fact here.  
9 We - - - you know, the Diocese certainly reserved its  
10 rights with respect to some of the allegations, but this  
11 was all about the law. It was all about this unsettled  
12 constitutional law. And that's why the determination by  
13 the Division - - - that's why I'm saying it would have - -  
14 -

15 CHIEF JUDGE WILSON: Except that that doesn't  
16 exactly square with what we just heard from counsel for the  
17 Department, which is that, as soon as they heard a priest  
18 was involved, they stopped. That was dispositive. So all  
19 of this rest of the briefing back and forth, about  
20 whatever, seems like it was irrelevant to the Department's  
21 decision.

22 MS. MCGRAW: I would - - - respectfully, you  
23 know, I'm not the Division. I don't know. And I think I  
24 would disagree, because I think this case went beyond the  
25 typical briefing that you would see back and forth by the

1 parties. And I don't think that it was just priest, you  
2 know, hang up the phone, we're out of - - - you know,  
3 they're out of luck there.

4 We talked a lot about - - - and this is where the  
5 allegations of hostile work environment really came out.  
6 And you know, the box was not checked, that is correct.  
7 But we treated this as if it was a hostile work environment  
8 claim as well as a termination claim and briefed both legal  
9 issues.

10 JUDGE HALLIGAN: But none of that is reflected in  
11 the determination from the agency, right? It's one  
12 sentence.

13 MS. MCGRAW: That - - - it is one sentence.  
14 There is also in the record - - - and I apologize; I don't  
15 have the exact pages, but the internal - - - there's  
16 another internal determination that I think is in the  
17 formal - - -

18 JUDGE HALLIGAN: There's a couple of pages, I  
19 think.

20 MS. MCGRAW: Correct.

21 JUDGE HALLIGAN: But I don't think it dives into  
22 the substance of the open constitutional question.

23 Let me ask you another question, if I can. Do  
24 you agree that the statutory exemption could be applied  
25 here?

1 MS. MCGRAW: I think it could be applied. I  
2 don't think that it needed to be. And I will note that,  
3 based on my research, 296 - - - and its sub 11 - - - has  
4 not been applied to an employment claim since Hosanna-  
5 Tabor. I do think that it pre - - - it certainly pre-dates  
6 it on the books, and I don't think that it's - - -

7 JUDGE HALLIGAN: But do you think that Hosanna-  
8 Tabor means that for some reason it couldn't be or simply  
9 that it hasn't been?

10 MS. MCGRAW: No, I don't think that it means it  
11 couldn't be. I do think it has to be - - - 296(11) would  
12 have to be applied consistent with Hosanna-Tabor and Our  
13 Lady of Guadalupe.

14 JUDGE CANNATARO: What's your view on the idea of  
15 a remittal to resolve a nonconstitutional basis for this  
16 determination before getting to the constitutional one?

17 MS. MCGRAW: I'm sorry; I don't understand the  
18 question.

19 JUDGE CANNATARO: Should it be remitted for a  
20 determination of whether an exemption applies before we  
21 even tackle this constitutional issue?

22 MS. MCGRAW: I don't think so, because I think  
23 that the determination by the Division that it didn't have  
24 jurisdiction, based on the ministerial exception, has to be  
25 accorded significant deference and is not arbitrary and

1 capricious. I mean, the standard here is very high.

2 JUDGE TROUTMAN: So we could address it on the  
3 merits?

4 MS. MCGRAW: I'm sorry?

5 JUDGE TROUTMAN: We could review on the merits,  
6 make a determination on the merits here?

7 MS. MCGRAW: I do not think that this court even  
8 has jurisdiction to review - - - to review the merits of  
9 the Division's dismissal. We are - - -

10 JUDGE HALLIGAN: Wait, you mean that - - -

11 CHIEF JUDGE WILSON: Now I really don't  
12 understand, because if your view is that the jurisdictional  
13 decision we've got says no - - - there's no jurisdiction is  
14 based on the Division's interpretation of constitutional  
15 law from the Supreme Court setting out the ministerial  
16 exception, why we can't review that?

17 MS. MCGRAW: This got to the trial court on an  
18 administrative appeal. So the standard on the initial  
19 trial court decision was did the Division act arbitrarily,  
20 capriciously, or an error of law. That determination by  
21 the trial court - - -

22 CHIEF JUDGE WILSON: And if it misinterpreted the  
23 United States Supreme Court law as to the scope of the  
24 ministerial exception, that seems like that would be an  
25 error of law.

1 MS. MCGRAW: And I don't think there's any - - -  
2 there - - -

3 CHIEF JUDGE WILSON: The question isn't whether  
4 we should reverse. The question is whether we can review.

5 MS. MCGRAW: And our position is still that - - -  
6 that there is not a constitutional question here. That was  
7 never - - -

8 CHIEF JUDGE WILSON: Even though the  
9 constitutional question is the basis for the no-  
10 jurisdiction decision?

11 MS. MCGRAW: Yes. But again, it's in the  
12 administrative appeal context. So you're coming at it  
13 without - - -

14 JUDGE HALLIGAN: Counsel, I'm having a hard time  
15 understanding that, because it seems to me that - - - and I  
16 think that - - - that counsel for - - - for the agency's  
17 comments confirmed this. There are some number of cases  
18 that come before the agency which involve someone who is  
19 perhaps a minister and could invoke the exception. And  
20 this is a question that's divided the federal courts,  
21 right? And so I think if your position is correct, that  
22 means that no court can review the agency's determination  
23 on an open question of constitutional law. How could that  
24 be?

25 JUDGE GARCIA: What if they went the other way

1 from you? What if they decided it the other way?

2 MS. MCGRAW: So - - -

3 JUDGE GARCIA: You'd be in the same position?

4 MS. MCGRAW: I actually don't think so. So I  
5 think the question here is, if it had to - - -

6 JUDGE GARCIA: If you lost, we could review.

7 MS. MCGRAW: Well, so let me say, so if it was  
8 decided the other way, if it was decided that they were  
9 going to investigate, because they determined that the  
10 ministerial exception did not apply to harassment claims,  
11 we, the Diocese, would have made the same administrative  
12 appeal. And in that circumstance, the posture would have  
13 been we believe our constitutional rights under the First  
14 Amendment are violated, because now we believe that the  
15 State is entangling and impeding our free

16 JUDGE HALLIGAN: So only - - -

17 MS. MCGRAW: - - - exercise.

18 JUDGE HALLIGAN: So only someone claiming an  
19 establishment clause claim can vindicate the rights that  
20 are set forth under Hosanna-Tabor and Our Lady of  
21 Guadalupe? I don't understand how only the religious  
22 institution, and not a plaintiff, could vindicate those  
23 rights in a court of law as opposed to the agency.

24 MS. MCGRAW: So certainly Father Ibhawa could  
25 have brought this case in trial court. He could have sued

1 this case in Supreme Court.

2 JUDGE HALLIGAN: I understand, but what I think  
3 you're saying is that, if you go to the agency first, that  
4 only the religious institution can go to court to get  
5 review of the constitutional question, and not the  
6 plaintiff. But maybe I'm misunderstanding you.

7 MS. MCGRAW: I'm not saying that. I'm saying  
8 that he went to the agency, so then he is - - - the  
9 agency's determination must be afforded deference one way  
10 or the other.

11 JUDGE HALLIGAN: So.

12 MS. MCGRAW: And I'm not saying we would be - - -  
13 I'm sorry. Go ahead.

14 JUDGE HALLIGAN: So maybe I misunderstood you. I  
15 thought what you said is that, if someone goes to the  
16 agency, that if the agency invokes the ministerial  
17 exception, that that plaintiff cannot appeal that up  
18 through the courts, cannot appeal the determination on the  
19 constitutional question up through the courts. But that if  
20 it were an adverse decision against you, you could appeal  
21 that. Is that right?

22 MS. MCGRAW: What I'm saying is that - - -

23 JUDGE HALLIGAN: I'm sorry. I'm just looking.

24 Is that - - - do I - - -

25 MS. MCGRAW: The answer - - -





1 JUDGE HALLIGAN: Do I understand you?

2 MS. MCGRAW: Yes. Yes. But what I'm saying is,  
3 because Father Ibhawa's position and the Diocese's position  
4 are different, he is not claiming that, by the dismissal,  
5 that his constitutional rights are infringed. He's  
6 claiming that you didn't investigate my employment  
7 discrimination claim.

8 We're saying that - - - what I was trying to  
9 explain was that, if the Diocese was in the reverse  
10 posture, our argument wouldn't be that the Division didn't  
11 do its job; it's that our constitutional rights are  
12 infringed.

13 And just to be very clear, what I was arguing on  
14 the jurisdiction of - - -

15 JUDGE RIVERA: But if the reason they don't do  
16 the investigation - - -

17 MS. MCGRAW: I'm sorry?

18 JUDGE RIVERA: If the reason is they don't do the  
19 investigation because they believe you have particular  
20 constitutional rights that would be infringed upon by such  
21 an investigation, you can't challenge that, and that  
22 wouldn't raise a constitutional issue?

23 MS. MCGRAW: You can challenge it under the  
24 arbitrary and capricious standard. I don't think that it  
25 raises the constitutional issue.

1 I do think it's really important to note here,  
2 this isn't a question of - - - there isn't United States  
3 Supreme Court or any controlling law saying that the  
4 ministerial exception does not apply to harassment claims.  
5 The Division cited one way of the circuit split over the  
6 other. I do not think that that is possibly any error of  
7 law.

8 JUDGE RIVERA: How do we know they did that?

9 MS. MCGRAW: I'm sorry?

10 JUDGE RIVERA: How do we know they did that?

11 MS. MCGRAW: Well, because they decided that they  
12 dismissed the entire claim, which included the hostile work  
13 environment claim, thus aligning - - -

14 JUDGE RIVERA: Is it possible they thought this  
15 particular claim had no basis in that hostile environment  
16 work jurisprudence, or that he didn't make it out? Is any  
17 of that possible or no, not at all?

18 MS. MCGRAW: It's possible. I wasn't the agency,  
19 so I didn't make that determination. I don't know.

20 CHIEF JUDGE WILSON: Thank you.

21 MS. MCGRAW: Thank you, Your Honors.

22 MS. TORCELLO: Good afternoon, Your Honors. Erin  
23 Torcello, of Bond, Schoeneck & King. I want to thank you  
24 for allowing both of us to present today.

25 CHIEF JUDGE WILSON: On behalf of the court, I



1 just wanted to say it's an unusual request. We don't  
2 usually let parties split time, but we would like to  
3 encourage the practice that you have asked for which is to  
4 allow a younger attorney to have an experience of arguing  
5 here.

6 MS. TORCELLO: Thank you. And I'm obviously the  
7 younger attorney, correct? All right.

8 CHIEF JUDGE WILSON: You got me.

9 JUDGE RIVERA: It's certainly a hard call.

10 MS. TORCELLO: Thank you. One of the topics that  
11 Your Honors have touched upon is whether or not there is a  
12 way, when analyzing these hostile work environment claims,  
13 whether or not you can do so without infringing upon the  
14 church's right to free exercise and avoid infringement  
15 within the internal governance of the church matters. And  
16 it is our position, following Demkovich, along with  
17 Hosanna-Tabor, and Lady Guadalupe, that that is not  
18 possible.

19 My counterpart raises her - - - talks about the  
20 allegations within the underlying facts in terms of the  
21 racial slurs that were stated. It's important to mention  
22 that it's not just an employee, but there were also  
23 allegations about a parishioner also making xenophobic - -  
24 -

25 JUDGE HALLIGAN: Do you want to address, Counsel,

1           why - - - why you think that the Seventh Circuit has the  
2           better of the view as over the Ninth Circuit?

3                   MS. TORCELLO: Yes. Because the role of a - - -  
4           in this case a priest or a minister, their role as an  
5           employer - - - or employee, I'm sorry, is intertwined with  
6           their role as a minister.

7                   JUDGE HALLIGAN: Is that - - - would that be true  
8           then only for someone who is a priest? I mean, the - - - I  
9           think the Seventh and the Ninth Circuits articulate  
10          different frameworks for dealing with harassment claims.  
11          So why should we - - - I take it you support the Seventh  
12          Circuit's view.

13                   MS. TORCELLO: Yeah, I do support the Seventh  
14          Circuit.

15                   JUDGE HALLIGAN: And why?

16                   MS. TORCELLO: Because the - - - so the Ninth  
17          Circuit created a test that talked about tangible versus  
18          intangible employment actions. And you could only - - -  
19          the ministerial exception applies only to the tangible  
20          employment actions, not intangible employment actions,  
21          meaning your interaction within the workplace. The Seventh  
22          Circuit's decision is instructive. First of all, it's post  
23          Hosanna-Tabor. So it's taking into account the reasoning  
24          of Hosanna-Tabor that says - - - as well as Our Lady  
25          Guadalupe - - -

1 JUDGE HALLIGAN: Do you think the Ninth Circuit's  
2 decision can't survive Hosanna-Tabor?

3 MS. TORCELLO: Correct.

4 JUDGE HALLIGAN: And why is that exactly? What  
5 in Hosanna-Tabor bears or precludes the Ninth Circuit's  
6 ruling?

7 MS. TORCELLO: Sure. So Hosanna-Tabor in the - -  
8 - the court reasoned that the religious clauses of the  
9 First Amendment ensures a church of a - - - church or a  
10 religious employer has the autonomy to select and control  
11 its ministers in order to minister to its faithfuls.

12 Similarly, in *Our Lady Guadalupe*, the court  
13 observed that it was important for the church's  
14 independence, on matters of faith and doctrine, that the  
15 church have the authority to select, supervise, and remove,  
16 if necessary, a minister.

17 Those two reasonings, within those two decisions,  
18 absolutely support the contention that hostile work  
19 environment claims, because it's dealing with supervision  
20 and control during the time of employment - - -

21 JUDGE RIVERA: But if the reason for the  
22 different treatment is one that is abhorrent to the faith,  
23 how does it then fit under the Supreme Court's underlying  
24 analysis, which is I know what you're arguing.

25 MS. TORCELLO: Sure, I understand. So the issue

1 is because, in a hostile work environment claim, there's  
2 two segments to that analysis. The first is whether or not  
3 the conduct was harassing. And there's a standard for  
4 that. Let's leave that aside for right now.

5 The second part of the analysis is whether or not  
6 there's liability to the employer. That is the problem.  
7 That part of the analysis is the problem because - - -  
8 we're under the Human Rights Law, so I'll stick with that  
9 standard, which has changed. So I'll make it easy to say  
10 the New York State Human Rights Law, in order to create  
11 liability on the part of the employer, there has to be a  
12 burden of proof to show that the employer condoned or  
13 acquiesced in the conduct.

14 So taking the situation with Father Ibhawa,  
15 counselor Milling was addressing the fact that he went to  
16 the Diocese, and the Diocese responded and said - - - and  
17 this is in their papers - - - the Diocese did not take any  
18 action and told him, in part, there are different ways in  
19 ministry and serving people. So the question is, will  
20 liability attach there, because the church - - - the  
21 Diocese is telling this priest you should not have handled  
22 it the way you handled it.

23 JUDGE CANNATARO: I don't quite understand how  
24 liability intersects with their established right to hire,  
25 appoint, supervise, if the liability is viewed simply as a

1 consequence of what they - - - what a plaintiff, like the  
2 minister here, dealt with when they arrived in the  
3 workplace.

4 MS. TORCELLO: But an employer is not  
5 automatically liable just where there was - - - even where  
6 there was conduct that was - - -

7 JUDGE CANNATARO: I understand that it has to be  
8 condoned in some way - - -

9 MS. TORCELLO: Yes.

10 JUDGE CANNATARO: - - - or - - - or not  
11 addressed.

12 MS. TORCELLO: Yeah.

13 JUDGE CANNATARO: At the very least.

14 MS. TORCELLO: Right. So - - -

15 JUDGE CANNATARO: But that still doesn't  
16 implicate the rights to appoint or hire, does it?

17 MS. TORCELLO: Well, because the Division or a  
18 court would have to say, well, the Diocese's response to  
19 say you did not minister in the correct way in dealing - -  
20 -

21 JUDGE RIVERA: But those are all factual issues.  
22 I wasn't even asking you about the factual. They didn't do  
23 an investigation. I - - -

24 MS. TORCELLO: But - - -

25 JUDGE RIVERA: It may very well be, if there had

1           been an investigation, the Division makes the exact  
2           findings that you're advocating for. But I can't see that  
3           in this decision that they've made. So I was asking what I  
4           thought was a pure legal question. Perhaps it cannot be  
5           answered as a pure legal question.

6                       I'm trying to understand how if the conduct that  
7           creates the alleged hostile work environment is conduct  
8           that is contrary to the dogma, the tenets, the principles,  
9           is abhorrent to the Catholic Church, how, nevertheless,  
10          that somehow is protected by the ministerial exception, as  
11          a large theoretical question, not - - - not as whether or  
12          not he could make his case.

13                      MS. TORCELLO: Sure. But the issue - - - and my  
14          light is on. So I want to respect the court's time.

15                      CHIEF JUDGE WILSON: Please go ahead and answer.  
16          Thank you.

17                      MS. TORCELLO: So but the factual issues are so  
18          intertwined with his role as a priest, it cannot be  
19          answered on a legal basis alone, because the facts - - -  
20          the - - -

21                      JUDGE HALLIGAN: Can I ask you one - - - I know  
22          your light's on too. I appreciate you noting that. But  
23          one last question if I can. Do you - - - is it your view  
24          that, if we were to decide there was an error of law  
25          because this was treated as a jurisdictional matter and not



1 an affirmative defense, that you could, upon return to the  
2 agency, invoke 296(11), which I think you did.

3 MS. TORCELLO: That's a good question. I - - -

4 JUDGE HALLIGAN: Well, you did rely on it, I  
5 believe.

6 MS. TORCELLO: Yes.

7 JUDGE HALLIGAN: Is that right?

8 MS. TORCELLO: Yeah.

9 JUDGE HALLIGAN: So is there a reason - - - I  
10 thought that you raised it as a defense, but I - - -

11 MS. TORCELLO: Right. Because we can - - - we  
12 can choose who our minister - - - yes, that's correct.

13 JUDGE HALLIGAN: And so is there a reason that  
14 you couldn't pursue that defense on a remand, if that's  
15 where we ended up?

16 MS. TORCELLO: We could pursue that on a remand.  
17 I think we could also pursue the same issue on a remand, if  
18 it's the court's position that they did not consider - - -  
19 fully consider or give a rational basis for its dismissal  
20 on jurisdictional grounds, but it will be the same  
21 argument. We made the same arguments. We made the  
22 affirmative defense - - -

23 JUDGE HALLIGAN: Well - - -

24 MS. TORCELLO: - - - arguments at the - - -

25 JUDGE HALLIGAN: I understand, although - - -



1           although, generally, I think a statutory question is  
2           different than a constitutional question, but in any event.

3                   CHIEF JUDGE WILSON: Thank you.

4                   MS. TORCELLO: Thank you.

5                   MS. MILLING: Your Honor, I would just like to  
6           briefly respond to - - - Judge Rivera had asked whether or  
7           not - - - who would set the parameters for discrimination  
8           as far as hostile work environment. It's our contention  
9           that the parameters are already set in Executive Law  
10          296(h), the anti-discrimination law. It sets forth all the  
11          unlawful acts. And we believe that that would fit under a  
12          hostile work environment.

13                   As far as checking the box, I believe we checked  
14          the box. If we did not, that is also not a problem. It's  
15          up to DHR to determine what claims may lie. This is a form  
16          that's filled out by regular Joe Smith without the - - -  
17          the help of a lawyer. And so the form is created that way.

18                   As far the affirmative defense, I believe it was  
19          Judge Halligan who pointed out that Chief Justice Roberts,  
20          in his decision, where he said that Hosanna-Tabor - - -  
21          they're not deciding whether or not Hosanna-Tabor - - - the  
22          ministerial exception applies to anything other than hiring  
23          and firing. And then he goes on to say, in any event, it's  
24          an affirmative defense and not a jurisdictional - - - it's  
25          not - - - it's an affirmative defense, not a jurisdictional

1 bar.

2 And DHR, Mr. Woskoff has said that the  
3 affirmative defense was raised by the Diocese. And that is  
4 correct. They did raise it. But just because they said it  
5 doesn't make it so. I was a prosecutor. And if the  
6 defendant murdered somebody, and he said I'm asserting  
7 justification, but I'm not testifying and I'm not putting  
8 any proof on, well, just trust me, I was justified before I  
9 killed the person, that would be the same analogy. As far  
10 as - - -

11 JUDGE RIVERA: But I'm sorry, is this point that  
12 the Division did, in fact, consider the affirmative defense  
13 and rendered a decision reject - - - accepting it - - -  
14 well, here, accepting it. Is that your position?

15 MS. MILLING: No. We don't know what they did  
16 other than saying that he's a priest, First Amendment,  
17 sorry, we can't help you.

18 As far as the Seventh and Ninth Circuit  
19 decisions, while they might be instructive, obviously  
20 they're not controlling on this court. And I guess I can't  
21 emphasize enough that this is a New York State agency.  
22 This is the agency that is mandated by the legislature.

23 JUDGE GARCIA: But Counsel, the agency is subject  
24 to the U.S. Constitution, right?

25 MS. MILLING: It is.

1 JUDGE GARCIA: So what do you say to the Seventh  
2 Circuit's general position that investigating a loan  
3 violates the First Amendment prohibitions? Because in  
4 investigating, they would have to come in and justify, and  
5 get into the reasons why they were doing this and not doing  
6 certain things, or stopping or not stopping certain things.  
7 And that would get into areas that should not be explored.

8 MS. MILLING: Well, at least they have to try.  
9 And I mean, this is not a hiring and firing. If somebody  
10 is alleging that I was called the N word or, you know, I'm  
11 being discriminated against in my workplace, I don't know  
12 how much delving you have to go into internal church  
13 management. And I would imagine that no church or  
14 religious organization is going to say we condone  
15 discrimination and so therefore - - -

16 JUDGE HALLIGAN: We need a - - -

17 MS. MILLING: - - - we're not answering your  
18 questions.

19 JUDGE HALLIGAN: I think we need a rule that  
20 would apply more broadly, right? And isn't the concern  
21 that many hostile work environment claims require you to  
22 get enmeshed in the management of a religious institution  
23 in a way that really treads on what the Constitution, you  
24 know, walls off?

25 MS. MILLING: I don't know about many. I don't

1 see it in this instance. I'm sure, obviously, there are  
2 instances where that would - - - would occur. So maybe  
3 this would be a case-by-case basis.

4 CHIEF JUDGE WILSON: So you know, to - - - I  
5 mean, to take the example you were - - - sorry; over here.  
6 To take the example - - -

7 MS. MILLING: Oh, I'm sorry.

8 CHIEF JUDGE WILSON: - - - you were giving, you  
9 know, I - - - I can't imagine the Diocese would say we  
10 condone our parishioners calling people the N word. But  
11 they might say we want to be the ones to figure out how  
12 best in our - - - consistent with our faith, to deal with  
13 that problem. That is, we may want to tell the priest, in  
14 this circumstance, that he needs to turn the other cheek.  
15 We may want to have him counsel or have somebody else  
16 counsel the parishioner. And it's not that they would say  
17 we want - - - we condone this behavior. They may say this  
18 is abhorrent, but we want to be the ones to police it and  
19 the First Amendment gives us that right.

20 MS. MILLING: And we'll ignore New York's - - -  
21 the Human Rights Law.

22 CHIEF JUDGE WILSON: Well, it's not - - -

23 MS. MILLING: We understand that New York State  
24 provides you protections, but we're not going to - - -

25 CHIEF JUDGE WILSON: Well, the question is

1           whether enforcing those protections, in this circumstance,  
2           intrudes on their First Amendment rights.

3                   MS. MILLING: On the First Amendment rights. And  
4           our position obviously is no, it doesn't. The church, even  
5           - - - even the Supreme Court has said that the church is  
6           not immune from secular laws. They said it in Guadalupe.  
7           They said it in Hosanna-Tabor. We can't have separate  
8           rules just because you're a religious employee. It can't  
9           be a free for all.

10                   JUDGE GARCIA: But clearly, if they - - - if they  
11           fire - - -

12                   MS. MILLING: Yes.

13                   JUDGE GARCIA: - - - a minister. But why isn't  
14           that the same argument? Well, that's the Human Rights Law.  
15           You can't do that under the Human Rights Law. How can you  
16           condone that? It's the State Human Rights Law. And now  
17           you're saying somebody could get fired for improper reasons  
18           and you can't even look at it?

19                   MS. MILLING: Because I think, as you said, or I  
20           think Judge Rowan said, that it - - - Judge Wilson said,  
21           it's just - - - it's part of the - - - the internal  
22           governance and management of church doctrine. It's - - -  
23           discrimination is different. It doesn't promote the faith.

24                   JUDGE GARCIA: I discriminated against this  
25           minister and I fired him. That's not reviewable, right?

1 MS. MILLING: Well, it depends on the reason why  
2 you fired him.

3 JUDGE GARCIA: No, I don't think it does.

4 JUDGE HALLIGAN: I mean, it seems like a  
5 termination is - - - whether we think it's inappropriate,  
6 even abhorrent, a termination is shielded from judicial  
7 review, isn't it?

8 MS. MILLING: Under the ministerial exception.

9 JUDGE HALLIGAN: Right. Right.

10 MS. MILLING: Um-hum.

11 JUDGE HALLIGAN: And so there are - - - to Judge  
12 Garcia's point, there are some employment actions - - -

13 MS. MILLING: Yes.

14 JUDGE HALLIGAN: - - - that are taken where we  
15 don't, because the Constitution prohibits us, let, you  
16 know, a state agency take a look at. And so the question  
17 is just why is the work environment and a harassment claim  
18 different in kind than termination, because termination is  
19 off bounds?

20 MS. MILLING: But I think the courts have talked  
21 about tangible employment actions. And it all goes back to  
22 advancing the tenets of the faith and the church.

23 JUDGE CANNATARO: But that brings me back to  
24 Chief Judge Wilson's hypothetical. What if they viewed  
25 their response to this hostile work environment situation

1 as a doctrinal issue? We want to minister to the people  
2 who are doing this. We want to teach our clergy member  
3 that he needs to be more forgiving - - -

4 MS. MILLING: Yes.

5 JUDGE CANNATARO: - - - the way Jesus was.

6 MS. MILLING: Do what Jesus did, yes. Um-hum.

7 JUDGE CANNATARO: So you know, how do you  
8 separate - - - how do you pull out what's ministerial and  
9 what's not?

10 MS. MILLING: Well, I guess they're going to have  
11 to decide that - - - what you're saying then is that the  
12 church is going to be saying, listen, you're a religious  
13 employee, you have no civil rights, okay? You're going to  
14 do what Jesus did, and you're going to turn the cheek. You  
15 turn your cheek, and no matter what is done to you, look to  
16 the Bible.

17 JUDGE RIVERA: Well, it may not - - -

18 MS. MILLING: And look to Jesus.

19 JUDGE RIVERA: It may not be - - - maybe it's  
20 turning the other cheek. Maybe.

21 MS. MILLING: Yeah.

22 JUDGE RIVERA: But maybe it's some other way of  
23 dealing with the situation. And so let me go one step  
24 further with these questions. What if you had been  
25 successful, and the Division orders a sanction, a



1 particular type of sanction that the church finds offensive  
2 to its tenets, might indeed put a wedge between the  
3 ministers, the church, the parish, and the flock. How is  
4 that not about government telling them how to handle and  
5 manage the issues that arise within their ministry?

6 MS. MILLING: Because I think a line has to be  
7 drawn, and then I guess it will be up to the legislature in  
8 New York State to say there's an exemption for racial  
9 discrimination, harassment when it comes to religious  
10 organizations - - -

11 JUDGE RIVERA: Well, in this case, it's really  
12 about the - - -

13 MS. MILLING: - - - and religious employees.

14 JUDGE RIVERA: - - - U.S. Supreme Court and the  
15 Constitution - - - the federal constitution, right? I mean  
16 - - -

17 MS. MILLING: Yeah.

18 JUDGE RIVERA: Okay.

19 CHIEF JUDGE WILSON: Thank you.

20 MS. MILLING: Thank you, Your Honor.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals in the Matter of Ibhawa v. New York State Division of Human Rights, No. 100, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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