To be Argued by:
ERIN S. TORCELLO
(Time Requested: 30 Minutes)

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Appellate Division–Fourth Department Docket No. CA 22-00060

Court of Appeals

of the

State of New York

VICTOR O. IBHAWA,

Petitioner-Appellant,

– against –

NEW YORK STATE DIVISION OF HUMAN RIGHTS
and DIOCESE OF BUFFALO,

Respondents-Respondents.

BRIEF FOR RESPONDENT-RESPONDENT DIOCESE OF BUFFALO

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CORPORATE DISCLOSURE STATEMENT

Respondent-Respondent Diocese of Buffalo, N.Y. is a corporation formed pursuant to a Special Act of the New York State Legislature, Chapter 568 of the Laws of 1951. The Diocese of Buffalo, N.Y. has no affiliates inasmuch as it does not control another corporation, nor is it controlled by another corporation. The Diocese of Buffalo, N.Y. is, however, the sole member of Our Lady of Victory Institutions, Inc. (a New York not-for-profit corporation) and is one of two members of Catholic Health System, Inc. (also a New York not-for-profit corporation).

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PRELIMINARY STATEMENT

This case does not involve or require the resolution of any constitutional issue. Instead, this case involves an issue that is familiar and routine to this Court: whether an administrative agency, in this case the New York State Division of Human Rights ("NYSDHR"), acted arbitrarily, capriciously, or in error of law in its decision-making. More specifically here, the only issue to be resolved is whether the NYSDHR acted arbitrarily, capriciously, or in error of law when it dismissed Petitioner-Appellant Victor O. Ibhawa's ("Appellant" or "Father Ibhawa") administrative complaint (the "Administrative Complaint") alleging employment discrimination.

To be sure, there is no dispute among the parties to this appeal that the NYSDHR's determination must be reviewed under a standard of deference. In this case, the NYSDHR determined that Appellant's Administrative Complaint was barred by the "ministerial exception,"—a penumbra of the First Amendment to the United States Constitution that bars employment discrimination claims by ministers against their religious employers. The review of that determination requires this Court to determine only if the application of the "ministerial exception" to Appellant's Administrative Complaint was arbitrary, capricious or an error of law. It does not require this Court to determine or otherwise address any

underlying constitutional question, as that question is not at the center of this appeal.

Respondent-Respondent the Diocese of Buffalo (the "Diocese") submits this brief in opposition to Appellant's appeal from the Appellate Division, Fourth Department Memorandum and Order (the "Appellate Division Order") that held the NYSDHR properly dismissed his Administrative Complaint on the grounds that as a priest claiming employment discrimination against the Diocese, the NYSDHR is barred by the ministerial exception from adjudicating Appellant's claims. For all of the reasons set forth herein, this Court does not have jurisdiction to hear this appeal, but even if it did, the Appellate Division Order should be affirmed in its entirety.

BACKGROUND LAW: THE MINISTERIAL EXCEPTION

The origin, operation, and application of the ministerial exception are not salient to the issues presented on this appeal. However, a brief discussion of the ministerial exception serves to highlight why the NYSDHR's dismissal of Appellant's Administrative Complaint was proper and why this Court does not have jurisdiction to hear this case because it does not present a constitutional question.

The ministerial exception, derived from the First Amendment to the United States Constitution, bars a civil court from infringing on the employment

relationship between a minister and his religious employer. In 2012, the Supreme Court of the United States for the first time applied the ministerial exception to employment discrimination claims. The Court began by undertaking a historical analysis of the separation between church and state, emphasizing the significance of this country's indoctrinated religious freedoms, which are codified in the Constitution. The Court observed: "The First Amendment provides, in part, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' . . . Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,* 565 U.S. 171, 185 (2012) ("*Hosanna-Tabor*").

The Court adopted the ministerial exception to employment discrimination laws, reasoning:

> The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.

Id. at 188. Thus, any challenge by a minister to their termination from employment is squarely barred by the holding in *Hosanna-Tabor*.

Following the Supreme Court's seminal decision in *Hosanna-Tabor*, the Second Circuit Court of Appeals dismissed a case brought by a school principal against a church. Relying on the holding in *Hosanna-Tabor*, the Second Circuit Court of Appeals observed: "the Supreme Court made clear that those properly characterized as 'ministers' are flatly barred from bringing employment-discrimination claims against the religious groups that employ or formerly employed them." *Fratello v. Archdiocese of New York*, 863 F.3d 190, 202–03 (2d Cir. 2017).

Against this legal backdrop, courts in New York have specifically applied the ministerial exception to claims brought pursuant to the New York State Human Rights Law, such as Appellant's. *See Martin v. SS Columba-Brigid Cath. Church*, 2022 WL 3348382, at *1 (W.D.N.Y. Aug. 12, 2022) (dismissing that plaintiff's NYSHRL claims of race discrimination, holding that the ministerial exception barred those claims just as they barred her Title VII claims); *see also Brandenburg v. Greek Orthodox Archdiocese of N. Am.*, 2021 WL 2206486, at *11 (S.D.N.Y. June 1, 2021) (dismissing NYSHRL claims alongside federal claims as barred by the ministerial exception); *Shukla v. Sharma*, 2009 WL 10690810, at *3 (E.D.N.Y. Aug. 21, 2009) (same).

While *Hosanna-Tabor* addressed the application of the ministerial exception to hiring and firing claims, it did not opine on harassment or hostile work environment claims. It remains true, as Appellant and the NYSDHR contend (*see* R.[1] 307), and the lower courts held (*see* R. 10-11), that neither the United States Supreme Court, the United States Court of Appeals for the Second Circuit, nor this Court have held that the ministerial exception bars employment discrimination claims for hostile work environment.

However, a plain reading of *Hosanna-Tabor*, including the above-referenced language, leaves room for the holding that harassment claims are similarly barred by the ministerial exception. Because investigating or adjudicating harassment claims brought by a minister against a church would require the state to entangle itself in ecclesiastical decisions and internal church governance, a finding that such claims are barred by the ministerial exception is consistent with *Hosanna-Tabor*.

Indeed, the Seventh Circuit Court of Appeals has specifically held as much. In *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 978 (7th Cir. 2021), after a rehearing *en banc*, the court held that the minister-plaintiff's harassment claims against a church were barred by the ministerial exception. That

[1] Citations to "R." are to the record on appeal before the Appellate Division, Fourth Department.

court (citing the United States Supreme Court's holding in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020)) observed:

> It would be incongruous if the independence of religious organizations mattered only at the beginning (hiring) and the end (firing) of the ministerial relationship, and not in between (work environment).

Id. at 979.

Additionally, the following federal courts have also held that the ministerial exception applies to harassment and hostile work environment claims:

- *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010) (rejecting plaintiff's argument that the ministerial exception does not bar her hostile work environment claims and holding: "we conclude any Title VII action brought against a church by one of its ministers will improperly interfere with the church's right to select and direct its ministers free from state interference. Thus, we hold that because Appellant is a minister for purposes of the exception, her Title VII hostile work environment claim is barred.");
- *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 2021 WL 3669050 (S.D. Ind. Aug. 11, 2021) ("In light of *Demkovich*, the ministerial exception bars [Plaintiff's] hostile work environment claim."); and

- *Preece v. Covenant Presbyterian Church*, 2015 WL 1826231 (D. Neb. Apr. 22, 2015) (observing *Hosanna-Tabor*'s limitation to hiring and firing decisions but holding that the ministerial exception applied in harassment cases).

Indeed, *Preece* highlights why hostile work environment claims should be subject to the ministerial exception. In *Preece*, the court observed: "the plaintiff's sexual harassment claim is factually entwined and related to the plaintiff's other claims, which the court may not review without excessive government entanglement with religion in violation of the First Amendment." *Id.* at *7.

This legal precedent existed, and guided, the NYSDHR in its determination as to the application of the ministerial exception to Appellant's Administrative Complaint. It is important to observe that at all times relevant to this appeal, there has been no controlling law on this issue applicable to the NYSDHR. Indeed, as recently as June 2021, the United States District Court for the Southern District of New York observed the current circuit split on this issue, and specifically recognized the effect that the (then-pending) *Demkovich* decision could have on the state of the law. *See Brandenburg v. Greek Orthodox Archdiocese of N. Am.*, 2021 WL 2206486, at *4 (S.D.N.Y. June 1, 2021) ("[N]either the Supreme Court nor the Second Circuit has decided whether the exception bars hostile work

environment claims that do not involve challenges to tangible employment actions, and the other Circuits are divided on the question.").[2]

In short, the NYSDHR's dismissal cannot be overturned because no binding legal authority existed *at the time* the NYSHDR dismissed the entirety of the Administrative Complaint on ministerial exception grounds (and there still is none). Therefore, as set forth below, the NYSDHR did not act arbitrarily, capriciously, or in error of law for adopting, in its discretion, the existing persuasive legal authority.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

The material facts giving rise to this case are undisputed. Appellant worked as a Parish Administrator for Blessed Trinity Church in Buffalo, New York. *See* R. 88-89. He self-identifies as "a black male from Nigeria." R. 27; R. 41. The parties do not dispute that Appellant's position as Parish Administrator was terminated by the Diocese in 2019.[3]

[2] A later decision from the *Brandenburg* court grappled with the potential application of the ministerial exception to hostile work environment cases, but ultimately the Southern District of New York decided that case on non-ministerial exception grounds. *See Brandenburg v. Greek Orthodox Archdiocese of N. Am., No.* 2023 WL 2185827, at *7 (S.D.N.Y. Feb. 23, 2023) ("That argument touches on an issue that has divided the lower courts: whether, and to what extent, the ministerial exception bars claims for hostile work environment and retaliation that are not based on tangible employment actions. For reasons the Court will explain, though, there is no need to wade deeply into that divide here.").

[3] The Diocese denies that it was at any point Appellant's employer. R. 96-97. However, that issue is not relevant to this appeal.

Appellant filed his Administrative Complaint with the NYSDHR alleging that he was subjected to unlawful discrimination (including wrongful termination), retaliation, and hostile work environment harassment[4] on account of his race, ethnicity, and national origin. R. 33-64. The parties submitted extensive letter briefing to the NYSDHR in connection with the administrative process that extended beyond what is typical at this stage of the NYSDHR's investigation. *See* R. 90-98 (the Diocese's initial position statement in response to the Administrative Complaint); R. 225-245 (Appellant's rebuttal in response to the Diocese's position statement); R. 113-114 (the Diocese's reply to Appellant's rebuttal); and Appellant's reply to the Diocese's surrebuttal (R. 185-190). These submissions to the NYSDHR focused on whether the ministerial exception barred Appellant's Administrative Complaint. Following investigation and consideration of the parties' arguments regarding the application of the ministerial exception (as recognized in *Hosanna-Tabor*, *supra*), the NYSDHR issued a determination dismissing Appellant's Administrative Complaint for lack of jurisdiction. *See id.* Specifically, the NYSDHR determined:

> [Appellant] a priest serving as the pastor (Parish Administrator) of a church comes under the ministerial

[4] The Diocese does not dispute for purposes of this appeal that Appellant raised certain factual assertions in the narrative of his Administrative Complaint that could theoretically form the basis of a hostile work environment harassment claim. However, the Diocese denies the ***truth*** of any such allegations of hostile work environment harassment, as well as any liability for any alleged harassing conduct. R. 33-64.

> exception (relative to the first amendment of the U.S. Constitution). The Division cannot interfere with the right of a church or other religious group, to determine who will work for them in this type of religious role.

R. 31.

Issue Presented to the Supreme Court

Following the NYSDHR's dismissal, Appellant filed a Verified Petition pursuant to New York State Executive Law § 298 (the "Petition") in Erie County Supreme Court challenging the NYSDHR's jurisdictional determination. R. 16-30. The only issue raised in the Petition for resolution by the Supreme Court was whether the NYSDHR erred in dismissing Appellant's Administrative Complaint for a lack of jurisdiction. *Id.* at ¶¶ 1-2, 6, 31-32. More specifically, Appellant asserted in the Petition that:

> Through this special proceeding pursuant to Executive Law § 298. Rev. Ibhawa seeks an order reversing the Division's dismissal of his complaint for lack of jurisdiction and requiring the Division to process his complaint.

R. 17, at ¶ 6; *see also* R. 9 ("Petitioner, Victor O. Ibhawa, moved this Court for an Order, Pursuant to Executive Law §298, reversing the Respondent New York State Division of Human Rights … March 26, 2021 Determination and Order of Dismissal of Petitioner's November 9, 2020 administrative racial discrimination complaint against the Diocese of Buffalo for Lack of Jurisdiction and remanding the matter to the NYSDHR for a proper determination of the complaint's merits.").

Appellant further asserted that the Supreme Court should apply the "error of law" standard in determining whether the NYSDHR's determination should be reversed:

> **The applicable standard of review for the administrative dismissal order is an "error of law" standard**
>
> 26. This Court has the authority to review an order of the Division Rights [sic] dismissing a complaint for lack of jurisdiction pursuant to Executive Law §298. In reviewing the Division's determination, Petitioner respectfully contends that this court should apply a "error of law" standard.

R. 23-24, at ¶ 26 (emphasis in original).

The basis for Appellant's assertion that the NYSDHR committed an error of law was twofold. First, he claimed that the religious exception set forth in § 269(11) of the New York State Executive Law ("§ 296(11)") did not apply to the instant case. R. 20, at ¶ 14; R. 22, at ¶ 20. Second, he claimed that there was no binding authority prohibiting the NYSDHR from exercising jurisdiction over Appellant's Administrative Complaint. R. 22-23, at ¶ 23 ("application of the NY State Human Rights Law to the facts of this case would not violate the First Amendment. Nor has the New York Court of Appeals ruled that NY Executive Law §298 violates the First Amendment when applied to discrimination claims of ministers.").

At no point did Appellant assert that the Supreme Court must resolve any constitutional issue, and specifically whether or to what extent the ministerial exception based in the First Amendment to the United States Constitution applied to his hostile work environment claim. *See generally*, R. 16-30. To the contrary, Appellant asserted (and as set forth below, continues to assert) that given the lack of controlling precedent on the constitutional issue, the NYSDHR incorrectly exercised its discretion in dismissing his Administrative Complaint. *See generally, id*.; *see also* R. 314 (Appellant's post-oral argument letter brief submitted to the Supreme Court where he argued "[a]bsent any controlling state or federal precedent to the contrary, it is clear that the NYS Division of Human Rights had proper jurisdiction to review [Appellant's] claim.").

The Diocese and the NYSDHR argued that the Supreme Court should deny the Petition on the grounds that the NYSDHR did not act arbitrarily, capriciously, or in error of law in determining that the NYSDHR did not have jurisdiction, by operation of the ministerial exception, to adjudicate Appellant's Administrative Complaint. *See* R. 71-98 (the NYSDHR's Verified Answer to the Petition); R. 99-114 (the Diocese's Verified Answer to the Petition); R. 296-300 (the Diocese's post-oral argument letter brief); R. 301-303 (the NYSDHR's post-oral argument letter brief).

The Supreme Court's Decision

After significant back and forth by the parties at oral argument (*see* R. 309-322), the Supreme Court ultimately dismissed the portion of Appellant's Administrative Complaint that related to his wrongful termination and retaliation claims but remanded the harassment portion of his claim back to the NYSDHR for a "proper determination of the merits of [Appellant's] complaint." R. 9. In making that determination with respect to the hostile work environment portion of the Administrative Complaint, the Supreme Court, Erie County reasoned:

> [t]he absence of controlling authority does not constitute a rational basis to determine that the ministerial exception barred review of [Appellant's] hostile work environment claim.

R. 10-11. Both the Diocese and the NYSDHR appealed.

Issue Presented to The Appellate Division

On appeal to the Appellate Division, Fourth Department, Appellant doubled down on his unfounded argument that the lack of controlling authority on the issue of application of the ministerial exception to hostile work environment harassment claims (both under New York State and federal law) required the NYSDHR to process or accept the Administrative Complaint. Appellant posed the following two questions for resolution by the Appellate Division:

> 1. Did the lower court err in holding that [Appellant's] hostile work environment claim was not barred by the ministerial exception because neither the United States Supreme Court nor any federal or state court has addressed this issue, and that the New York State Division of Human Rights' decision dismissing [Appellant's] hostile work environment claim based on a lack of jurisdiction was affected by an error of law and the absence of controlling authority?
>
> Answer: No
>
> 2. Did the lower court apply the correct legal standard when it determined that the New York State Division of Human Rights' dismissal of [Appellant's] hostile work environment claim on the ground of lack of jurisdiction was affected by an error of law and did not constitute a rational basis and did the lower court fail to afford deference to the discretion accorded the New York State Division of Human Rights in investigating [Appellant's] hostile work environment claim?
>
> Answer: Yes and No

See Appellant's Responding Brief [Appellate Division Dkt. No. 50] at 1.

The Diocese posed similar questions to the Appellate Division, asking the court to determine whether the Supreme Court applied the appropriate standard of review to the NYSDHR determination and whether it accorded the NYSDHR the required deference. *See* the Diocese's Principal Brief [Appellate Division Dkt. No. 46] at 1-2. The NYSDHR framed the issue in a substantially similar manner. *See* the NYSDHR's Principal Brief [Appellate Division Dkt. No. 47] at 1-2.

The Appellate Division's Decision

The Appellate Division observed that the only justiciable question was whether the NYSDHR's determination as to its jurisdiction was arbitrary and capricious or affected by an error of Law. *See* R. 331-332. In assessing this issue, the Appellate Division observed that "[t]he SDHR's determination is entitled to considerable deference given its expertise in evaluating discrimination claims." *Id.* Under this standard, the Appellate Division correctly concluded that the NYSDHR did not commit an error of law nor was its decision arbitrary and capricious, as "there is no controlling United States Supreme Court or New York precedent and the federal courts that have addressed the issue are divided on the extent to which the ministerial exception applies to claims of a hostile work environment…" *Id*. Indeed, the NYSDHR had in front of it the holdings and reasonings of the various other courts that had been confronted with this issue and, in its discretion, adopted the reasoning of one set over the other. *See generally*, the Diocese's Principal Brief [Appellate Division Dkt. No. 46] and the NYSDHR's Principal Brief [Appellate Division Dkt. No. 47].

Issues Presented to this Court

Appellant moved for leave to appeal to this Court and took appeal as of right pursuant to CPLR 5601(b). *See* Appellant's Notice of Motion for Leave to Appeal to the Court of Appeals dated July 25, 2023. The Court undertook an initial

jurisdictional inquiry to determine whether this Court had jurisdiction and entertained letter briefing by the parties on the question of whether "a substantial constitutional question is directly involved to support the appeal (*see* CPLR 5601 [b])." *See* Letter from this Court dated August 2, 2023. This Court denied Appellant's motion for leave to appeal as unnecessary and decided to hear this case in the normal course. *See* Order of this Court denying Appellant's Motion for Leave to Appeal as unnecessary dated January 16, 2024. However, this Court specifically stated that "[t]he termination of the jurisdictional inquiry does not preclude the Court from addressing any jurisdictional concerns in the future, even those subject to a previous jurisdictional inquiry." R. 340. As such, this Court has not yet determined whether it has jurisdiction to hear this appeal as of right pursuant to CPLR 5601(b). As set forth immediately below, it does not.

JURISDICTIONAL STATEMENT

This Court does not have jurisdiction over this appeal pursuant to CPLR 5601(b) because it does not "directly involve[]" any constitutional issue. *See* CPLR 5601(b)(1). In fact, there was never a constitutional question posed to either the Supreme Court or the Appellate Division. Instead, at all times, Appellant has only framed the issue in this case as whether the NYSDHR acted arbitrarily, capriciously, or in error of law in dismissing Appellant's Administrative Complaint. That familiar standard of review applied to administrative appeals does

not involve any constitutional issue. To be sure, the Appellate Division decided the case on those non-constitutional grounds alone, holding that it was not arbitrary, capricious, or in error of law for the NYSDHR to dismiss Appellant's Administrative Complaint where there was no controlling law either way. *See* R. 331-332. Thus, while this case touches on concepts of constitutional law, the only legal question on appeal to this Court is whether the Appellate Division, Fourth Department correctly determined that the NYSDHR did not act arbitrarily, capriciously, or in error of law.

CPLR 5601(b) only permits an appeal as of right from "an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States." N.Y. CPLR 5601(b). This Court has interpreted appeals pursuant to CPLR 5601(b) to require both that the constitutional grounds be "directly involved" in the Appellate Division's order and that the constitutional question be substantial. *See Eltingville Lutheran Church v. Rimbo*, 34 N.Y.3d 1024 (2019); *Cangro v. Park S. Towers Assocs*., 34 N.Y.3d 1008, 1008 (2019).

It is Appellant's burden to present a record establishing that the Appellate Division Order directly involved a substantial constitutional question. *See Winters v. Lavine*, 574 F.2d 46, 61–62 (2d Cir. 1978) (interpreting CPLR 5601(b) and holding that "[i]n such circumstances the appellant has the burden of presenting to

(the Court of Appeals) a record which establishes that such construction (of the Constitution) has been not only directly but necessarily involved in the decision of the case. If the decision has or may have been based upon some other ground, the appeal will not lie.") (internal citations omitted); *see also Haydorn v. Carroll*, 225 N.Y. 84, 88 (1918) ("The appellant who relies upon this provision as an authority for his appeal assumes the burden of presenting to us a record which establishes that such construction has been not only directly but necessarily involved in the decision of the case.").

In his brief, Appellant has not attempted to meet that burden. *See generally*, Appellant's Brief ("App. Br."). Indeed, Appellant does not even address the jurisdictional question in his brief. The only reference he makes to this Court's jurisdiction to hear this appeal is:

> Pursuant to this Court's letter dated August 2, 2023 inviting comments on the issue of subject matter jurisdiction, Appellant filed a Jurisdictional statement dated August 8, 2023 (C-144). By correspondence dated August 14, 2023, the Diocese submitted comments on the issue of subject matter jurisdiction (C-148). In a letter dated January 16, 2024, this Court terminated its jurisdictional inquiry and designated that Appellant's appeal proceed in the normal course of briefing and argument (R/A 340).

App. Br. at 3. Appellant completely ignores this Court's instruction that its acceptance of this case does not preclude further inquiry into whether jurisdiction

is proper pursuant to CPLR 5601(b) (*see* R. 340) and failed to provide any basis to establish that jurisdiction is proper pursuant to CPLR 5601(b)—and it is not.

At all times prior to this current appeal, Appellant has maintained that the constitutional question need not actually be answered. Instead, he asserts that the mere existence of a constitutional question required the NYSDHR to investigate his claims. *See* Appellant's Responding Brief [Appellate Division Dkt. No. 50] at p. 32 ("With no controlling legal authority, the NYSDHR should have erred on the side of Petitioner and conducted an investigation into his hostile work environment claim, as tasked by the Executive Law. By failing to do so, the lower court was correct in holding that the decision to dismiss the hostile work environment claim based on a lack of jurisdiction was without a rational basis and was arbitrary and capricious."). Put another way, Appellant relies on the fact that the law is unsettled on the constitutional issue, but does not argue, or otherwise meet his burden to establish, that this Court must *resolve* that constitutional issue. *See* App. Br. at 9-10 ("Absent any controlling federal or state precedent to permit NYSDHR to abdicate its legislative mandate to investigate Appellant's hostile work environment claim, it's dismissal of the claim on jurisdictional grounds was both an error of law and an arbitrary and capricious abuse of discretion.").

Then, for the first time in his response to this Court's jurisdictional inquiry, Appellant took the opposite position and now seeks to invoke this Court's

jurisdiction based upon a constitutional issue. In Section 5 of his Preliminary Appeal Statement, Appellant identifies the purported constitutional basis for his appeal as follows:

> Does the First Amendment's ministerial exception permit a religious organization to subject religious ministers to a hostile work environment without fear of any legal recourse in New York State, and can the New York State Division of Human Rights abdicate its legislative mandate under New York State Executive Law Sections 290-301 to investigate a claim of hostile work environment?

R. 338.

Additionally, in Appellant's letter submitted to this Court dated August 8, 2023, he takes the position that this Court must resolve the constitutional "loophole" created by the lack of controlling authority on whether the ministerial exception applies to claims of hostile work environment that permits the NYSDHR to "renounce its responsibilities based on a lack of jurisdiction." However, as discussed above, the constitutional issue identified by Appellant is not directly involved in this case. Also as set forth above, throughout the proceedings in this case, Appellant's position has been that due to the lack of binding authority on this issue, the NYSDHR was required to assert jurisdiction over the Administrative Complaint. In other words, Appellant asserted that the lack of binding authority on the constitutional question automatically rendered the NYSDHR's determination

as one "in error of law." R. 23-24. Implying then, that no ruling as to the constitutional issue was necessary—and thus, not directly involved in this case.

Appellant, in his August 8, 2023 letter to this Court states: "This Court has read the term 'directly' involved to mean that the question must be 'necessarily' involved in the appellate division's decision." (quoting *Haydorn v. Carroll,* 225 N.Y. 84, 88 (1918)). In this case, it is clear from the parties' briefing at the Appellate Division and the Appellate Division Order that the constitutional question of whether the ministerial exception applies to claims of hostile work environment was not necessarily involved in this case. Put another way, the Appellate Division did not and was not required to answer any constitutional question in rendering its decision that the NYSDHR did not act arbitrarily, capriciously, or in error of law.[5]

For all of these reasons, Appellant does not have a right to appeal pursuant to CPLR 5601(b) because his case neither directly involves a constitutional issue nor involves the validity of a statutory provision of New York State or the United

[5] Confusingly, Appellant identifies in Section 5 of the Preliminary Appeal Statement that one of the two bases for his appeal is pursuant to CPLR 5601(b)(2). R. 334. CPLR 5601(b)(2) allows an appeal to this Court as of right: "from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States." However, to date, Appellant has not identified a statute which he believes is invalid. Appellant's passing references to § 296(11) do not and cannot constitute a challenge to the validity of that statute because Appellant has never argued that it was invalid.

States. The Diocese respectfully submits that this Court should dismiss this appeal for lack of jurisdiction. However, for the reasons set forth below, even if this Court does exercise jurisdiction over this appeal, it should affirm the Appellate Division Order because it is legally sound and based upon well-settled law (not, as Appellant argues, unsettled, constitutional law).

QUESTION PRESENTED

Question: Did the NYSDHR act arbitrarily, capriciously, or in error of law in determining that the ministerial exception applied to bar Appellant's Administrative Complaint?

Answer: The Appellate Division, Fourth Department correctly answered no.

ARGUMENT

Appellant's entire legal argument is summarized in this statement: "Absent any controlling federal or state precedent to permit NYSDHR to abdicate its legislative mandate to investigate Appellant's hostile work environment claim, it's [sic] dismissal of the claim on jurisdictional grounds was both an error of law and an arbitrary and capricious abuse of discretion." App. Br. at 9-10. *That is not the proper standard of review of the NYSDHR's determination and dismissal*. Appellant has cited no authority for the proposition that the lack of controlling authority on the ministerial exception issue mandated the NYSDHR to investigate his hostile work environment claim. His argument that the NYSDHR somehow

"abdicated" its legislative mandate dismissing Appellant's Administrative Complaint is wholly unsupported by any citation to authority.

It is undisputed between all the parties that there is no controlling authority (in New York State or the United States Supreme Court) that decides one way or the other whether the ministerial exception applies to hostile work environment claims. However, that is not dispositive to this appeal. The only question is whether the NYSDHR exercised its discretion in a manner that was not arbitrary, capricious, or in error of law in determining that the ministerial exception barred Appellant's claims.

As set forth below, the Supreme Court failed to accord the NYSDHR's determination the appropriate discretion and instead reviewed the determination *de novo*. On appeal, the Appellate Division corrected the Supreme Court's error. *See generally*, R. 331-332. For the reasons set forth below, this Court should affirm the Order of the Appellate Division Order in its entirety.

I. THE APPELLATE DIVISION CORRECTLY REVERSED THE SUPREME COURT

As set forth below, the Appellate Division correctly reversed the Supreme Court's decision on two grounds. First (as set forth below at Point I.A), the Appellate Division correctly reversed the Supreme Court's decision on the grounds that it applied the incorrect standard of review to the NYSDHR's dismissal. Second (as set forth below at Point I.B), the Appellate Division correctly reversed the

Supreme Court's decision on the grounds that the Supreme Court failed to accord the NYSDHR the proper deference in making its own agency determination as to its own jurisdiction over the Administrative Complaint. Both of these grounds for reversal were necessary to correct the erroneous decision by the Supreme Court. For the reasons outlined below, this Court should affirm the Appellate Division's reversal of the Supreme Court's decision on the same grounds.

A. The Appellate Division Correctly Determined that the Supreme Court Applied the Wrong Standard of Review to the NYSDHR's Determination

"In cases where SDHR issues an order prior to holding a hearing, dismissing a complaint for lack of jurisdiction, the standard of review is whether the determination was arbitrary or capricious . . . or affected by an error of law."[6] *Stoudymire v. N.Y.S. Div. of Hum. Rts*., 36 Misc. 3d 919, 920–21 (Sup. Ct. Cayuga Cty. 2012), aff'd sub nom. *Stoudymire v. New York State Div. of Hum. Rts.*, 109 A.D.3d 1096 (4th Dept. 2013); *see also Letray v. New York State Div. of Hum. Rts*., 181 A.D.3d 1296, 1298 (4th Dept. 2020). "An agency's action is arbitrary and capricious where it lacks a rational basis and is taken without regard to the fact." *Save Am.'s Clocks, Inc. v. City of New York*, 33 N.Y.3d 198, 220 (2019).

[6] This is the standard applied regardless of the reason for the pre-hearing NYSDHR dismissal, whether it be for lack of probable cause or jurisdictional. *See Baird v. New York State Div. of Hum. Rts.*, 100 A.D.3d 880, 881–82 (2d Dept. 2012) (applying the same standard of review for the NYSDHR's dismissal for lack of probable cause).

> [A]n error of law, its meaning is rather clear cut and most often involves an allegation that the agency improperly interpreted or applied a statute or regulation. In this regard, courts will uphold the interpretation of regulations by the agencies responsible for their administration if such an interpretation is reasonable. Thus, the arbitrary and capricious and error of law standards are very similar.

Atlas Henrietta, LLC v. Town of Henrietta Zoning Bd. of Appeals, 46 Misc. 3d 325, 332–33 (Sup. Ct. Monroe Cty. 2013), aff'd, 120 A.D.3d 1606 (4th Dept. 2014) (citing *New York City Health and Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194, 205 (1994) and *Howard v. Wyman*, 28 N.Y.2d 434, 438 (1971)).

> It is the function of the reviewing court . . . to see that an administrative determination of a body or officer was made in accordance with law *but not to review the propriety or wisdom of a legislative act by an administrative agency. An agency's interpretation and application of the law should be upheld if not irrational or unreasonable.* Thus, under the error of law standard for reviewing agency decisions . . . courts will uphold the interpretation of regulations by the agencies responsible for their administration if such an interpretation is reasonable. [7]

24 Carmody-Wait 2d § 145:77 (emphasis supplied).

[7] This commentary and the cases interpreting the error of law standard arise in the context of Article 78 proceedings, but are nevertheless instructive as the standard applied to Article 78 and Executive Law § 298 proceedings are identical. *See In re Camp*, 300 A.D.2d 481, 481 (2d Dept. 2002) (analyzing the NYSDHR's pre-hearing dismissal under both Article 78 and § 298 identically); *Steinberg-Fisher v. N. Shore Towers Apartments, Inc.*, 149 A.D.3d 848, 849 (2d Dept. 2017) (same).

In this case, the NYSDHR cannot be said to have improperly interpreted or applied any statute or regulation, or otherwise acted irrationally, in making its determination that the ministerial exception applied to bar Appellant's Administrative Complaint. That is because there was no—and Appellant identifies no—binding law for the NYSDHR to have misapplied or misinterpreted.

The Supreme Court committed reversible error by relying on the absence of such law to support a finding that the NYSDHR somehow misapplied law that does not exist. R. 9-11. In other words, the Supreme Court incorrectly applied a *de novo* standard of review, whereby it completely—and improperly—put itself in the shoes of the NYSDHR to decide anew whether it, under the NYSDHR's jurisdictional authority and operational procedures, should have investigated the merits of Appellant's Administrative Complaint.

The Supreme Court's reasoning in its decision was two-fold: (1) that the NYSDHR committed an error of law, and (2) that the NYSDHR did not have a rational basis to apply the ministerial exception. R. 10-11. More specifically, with regard to the Supreme Court's first reason, it found that:

> [I]n light of the fact that there was no controlling law from the United States Supreme Court, the Second Circuit, the Court of Appeals, or this Court, on the application of the ministerial exception to hostile work environment claims, the NYSDHR's determination and dismissal was affected by an error of law.

Id. With respect to the court's second reason, the Supreme Court determined that: the NYSDHR's determination lacked a rational basis due to the absence of controlling authority. R. 10-11.

What these different but related statements provide for is this: the NYSDHR committed an error of law where there was no binding law on the issue before it, despite the fact that its decision did not otherwise conflict with any binding law, rule, or regulation.

This created an impossibility for the NYSDHR because, applying the trial court's reasoning, had the NYSDHR adopted the alternate legal authority with respect to the application of the ministerial exception, that too would have been an error of law given the absence of any controlling precedent.

The Supreme Court (and Appellant now) provided no legal authority whatsoever for this apparent premise that the NYSDHR was not lawfully permitted to adopt the legal rulings by the federal courts that have held that the ministerial exception applied to bar everything asserted in Appellant's Administrative Complaint. At the time the NYSDHR dismissed Appellant's Administrative Complaint (and still today), there is no binding authority applicable to the NYSDHR as to the application of the ministerial exception to harassment and/or hostile work environment claims. This put the NYSDHR in the position to make its

own determination as to whether, and how, to apply the ministerial exception. That it chose, after thorough review (discussed below), to find that the ministerial exception barred all of Appellant's claims cannot be disturbed by a trial court absent a finding that the NYSDHR committed any actual *error* of law. Obviously, that there *was no law* means the NYSDHR could not have acted in error of it. In fact, even if this Court now were to decide the constitutional issue of whether the ministerial exception applies to claims of hostile work environment, that would *still* not impact the propriety of the NYSDHR's dismissal, because it made its decision based on the law in effect at the time.

To illustrate the illogical effect of the Supreme Court's order, the Supreme Court's reasoning makes it impossible for the NYSDHR to have made *any* lawful determination. If the NYSDHR had adopted the rulings by the federal courts that have held the ministerial exception does not apply to hostile work environment claims and had allowed the case to proceed to a hearing, the Supreme Court's reasoning would require that such a determination also be an error of law, given the lack of binding authority to provide for the same. That reasoning, and holding, cannot stand because it creates an impossible-to-meet burden for the NYSDHR to make any determination in any area of unsettled law.

The Supreme Court here was only permitted to determine whether the NYSDHR's dismissal was in error of (existing) law or otherwise arbitrary, or

capricious. The Supreme Court's error was that it *"review[ed] the propriety or wisdom*" of the NYSDHR determination and dismissal anew. *See* 24 Carmody-Wait 2d § 145:77, *supra*. Therefore, the Appellate Division correctly determined that the Supreme Court applied the wrong standard of review. R. 331-332. ("Respondents contend that the court applied an incorrect standard of review and failed to give the requisite deference to SDHR's determination. We agree.").

B. The Appellate Division Correctly Determined that the Supreme Court Failed to Afford the NYSDHR's Determination the Requisite Deference

In addition to applying the incorrect standard of review, the Appellate Division also correctly determined that the Supreme Court failed to give any deference to the NYSDHR in its determination and dismissal of Appellant's Administrative Complaint as it was required to do, and reversed the Supreme Court's error. R. 331-332 ("Respondents contend that the court applied an incorrect standard of review and failed to give the requisite deference to SDHR's determination. We agree.").

The NYSDHR is specifically vested with authority under Section 295(6)(a) and (b) of the Executive Law: "to receive, investigate and pass upon complaints alleging violations of this article." The "[NYSDHR] has broad discretion to determine the method to be employed in investigating complaints . . . *and its determinations are entitled to considerable deference* due to its expertise in

evaluating discrimination claims." *Napierala v. New York State Div. of Hum. Rts*., 140 A.D.3d 1746, 1747 (4th Dept. 2016) (emphasis supplied). As noted by the Court of Appeals in *Gonzalez v. Annucci*, 82 N.Y.3d 461 (2018):

> Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute.

Id. at 471 (*citing Kurcsics v. Merchants Mutual Insurance Co*., 49 N.Y.2d 451, 459 (1980)).

In this case, the NYSDHR processed Appellant's Administrative Complaint and engaged in its investigative process. *See* R. 88-89 (the NYSDHR Final Investigation Report and Basis of Determination). Specifically, that investigative process involved a review of: (1) the initial Administrative Complaint (R. 33-64); (2) the Diocese's position statement responding to the allegations asserted against it (R. 90-98); (3) Appellant's reply in response to the Diocese's position statement (R. 225-245); (4) the Diocese's rebuttal in response to Appellant's reply (R. 276-282); and (5) Appellant's "Surrebuttal" in response to the Diocese's rebuttal (R. 185-190). Indeed, the NYSDHR deviated from its typical review process and went above and beyond what it normally requires when evaluating administrative complaints. It "specifically requested that [Appellant] file a response to the Surrebuttal" and reviewed Appellant's Surrebuttal. R. 23 (Petition at ¶ 25). The

Final Investigation Report and Basis of Determination reveals that it considered and gave credence to all the above-referenced submissions and gave serious consideration to the bounds of its jurisdictional authority to adjudicate the Administrative Complaint.[8] *See* R. 88-89.

The Supreme Court failed to give ***any*** deference to the NYSDHR. The Supreme Court held, without analysis: "the absence of controlling authority does not constitute a rational basis to determine that the ministerial exception barred review of Petitioner's hostile work environment claim." R. 10-11. In so holding, the Supreme Court failed to consider that the NYSDHR had reviewed extensive briefing by both parties on the issue of jurisdiction and determined, in its discretion and in accordance with its operating procedures, that the ministerial exception applied. *See* R. 89-89.

[8] Appellant also argues (in cursory fashion) that the NYSDHR failed to consider the jurisdictional issue specifically with respect to whether it could adjudicate the hostile work environment portion of Appellant's Administrative Complaint. *See* App. Br. at 10 (arguing that the NYSDHR "erroneously conflated" his termination claim with his hostile work environment claim). However, this argument is entirely contradicted by the fact that Appellant, in his "Surrebuttal," specifically argued: "despite federal precedent barring discrimination claims relating to hiring, firing and promotion decisions, unrelated matters such as workplace harassment are not automatically precluded by the Supreme Court's holding in *Hosanna-Tabor*, supra." R. 188-189. The NYSDHR's Final Investigation Report and Basis of Determination reveals that it considered the Administrative Complaint as a whole and determined that given Appellant's status as a minister, no portion of his complaint—including his allegations of a hostile work environment—could proceed. *See* R. 89. In short, there is simply no argument Appellant can advance that will negate that the NYSDHR reviewed the entirety of the Administrative Complaint and, based on reasoned consideration of its jurisdictional bounds, dismissed it after thorough evaluation.

Appellate Division courts have, on numerous occasions, observed the NYSDHR's entitlement to deference by a reviewing court in making an administrative determination to dismiss a case without holding a hearing. In *McDonald v. New York State Div. of Hum. Rts*., the Appellate Division, Fourth Department reversed the trial court and reinstated the NYSDHR's determination and pre-hearing dismissal of a complaint, holding:

> Courts give deference to SDHR due to its experience and expertise in evaluating allegations of discrimination . . . and such deference extends to [NYSDHR's] decision whether to conduct a hearing . . . SDHR has the discretion to determine the method to be used in investigating a claim, and a hearing is not required in all cases.

147 A.D.3d 1482, 1482 (4th Dept. 2017) (internal quotations omitted). In that case, the court further observed that:

> "the parties made extensive submissions to [NYSDHR], 'petitioner was given an opportunity to present [her] case, and the record shows that the submissions were in fact considered, the determination cannot be arbitrary and capricious merely because no hearing was held.'"

Id. (*quoting Smith v. New York State Div. of Hum. Rts*., 142 A.D.3d 1362, 1363 (4th Dept. 2016) (*quoting Gleason v. W.C. Dean Sr. Trucking, Inc*., 228 A.D.2d 678, 679 (2d Dept. 1996))).

Indeed, the Appellate Division, Fourth Department had the occasion to recently opine on this exact issue and asserted as follows:

> Courts give deference to SDHR due to its experience and expertise in evaluating allegations of discrimination ..., and such deference extends to [SDHR's] decision whether to conduct a hearing ... [SDHR] has the discretion to determine the method to be used in investigating a claim, and a hearing is not required in all cases.

Floriano-Keetch v. New York State Div. of Hum. Rts., 175 A.D.3d 960, 961 (4th Dept. 2019) (alteration in original).

In this case, the Supreme Court committed an unquestionable error as it supplanted its wisdom for the wisdom of the NYSDHR, and failed to give any deference to NYSDHR's determination and dismissal. For this separate and independent reason, the Supreme Court erred in disturbing the dismissal of Appellant's Administrative Complaint, and the Appellate Division, Fourth Department was correct to reverse that error.

For both of these reasons, as well as those addressed below, the Appellate Division, Fourth Department was correct to reverse the Supreme Court. This Court should thus affirm the Appellate Division Order in its entirety.

II. APPELLANT'S REMAINING CONTENTIONS ARE UNSUPPORTED AND WITHOUT MERIT

As set forth above, Appellant's primary argument is that the lack of controlling authority mandated the NYSDHR to investigate his Administrative Complaint, and that argument fails. Appellant's brief, which despite lacking

subheadings or being organized according to any specific arguments, also appears to assert the following ancillary contentions that are either unsupported or plainly wrong: (1) that this case does not arise "from any employment dispute" (App. Br. at 6); and (2) that § 296(11) and *Matter of Diocese of Rochester, New York v. New York State Division of Human Rights* (and <u>not</u> the United States Constitution or the ministerial exception applicable to all state and federal employment discrimination laws) control the present dispute. Each of these arguments is addressed below in turn.

A. <u>This Case is an Employment Dispute</u>

For the first time on this appeal (and somewhat inexplicably), Appellant argues that his harassment claim does not arise "from any employment dispute" and that "Appellant Ibhawa's claim of a hostile work environment, arose from being subjected to disparaging racial and xenophobic epithets, in violation of New York State Executive Law §§ 296(1)(h); 296 (1)(a)…." App. Br. at 6. That argument is non-sensical and otherwise a non-starter.

First, § 296(1)(a), which Appellant invoked in the Petition (*see generally*, R. 16-30 and specifically R. 20-21) and invokes now, bars discrimination or harassment by <u>*employers against employees*</u>. *See* N.Y. Exec. Law § 296(a)(1). And, Appellant's allegations that he was subjected to "xenophobic epithets" <u>*in his workplace*</u> purportedly support his hostile <u>*work*</u> environment claim. App. Br. at 6.

Now, trying to refashion his claim into something else, he tries to argue that his claim is not one made in the context of an employment dispute but instead one simply as a "New Yorker." He writes:

> By automatically refusing to take jurisdiction over any complaint of discrimination by a religious organization, the Division would deny New Yorkers access to a vital administrative mechanism for vindicating their rights under the Human Rights Law. Appellant Ibhawa is just such a New Yorker.

Id. at 10.

This attempt to morph his claim beyond the employment context is not only confusing and illogical, but is in no way supported by the record—which clearly establishes that this is an employment dispute.[9] As such, there simply is no argument that Appellant's claim is not one arising from an employment dispute and any conclusions Appellant draws from that incorrect premise must be rejected.

[9] *See, e.g.*, R.i (Appellant's statement pursuant to CPLR 5531 stating: "The nature and object of the action is an administrative appeal from the New York State Division of Human Rights challenging its dismissal of an ***employment discrimination complaint*** based on a lack of jurisdiction"); R. 25 at ¶ 8 (Appellant stating: "In that complaint he alleged unlawful discriminatory conduct ***relating to employment*** by the Diocese of Buffalo because of race/color, national origin, and retaliation"); R. 33 (cover letter from Appellant to NYSDHR enclosing the "notarized ***Employment Discrimination*** Complaint Form filed on behalf of … Rev. Victor Ibhawa."); R. 31 (NYSDHR's Determination and Dismissal, stating "Victor O. Ibhawa filed a verified complaint with the New York State Division of Human Rights ('Division') charging the above-named respondent with an ***unlawful discriminatory practice relating to employment***….") (emphasis supplied in all).

B. Appellant's Reliance on *Matter of Diocese of Rochester* and New York Executive Law § 296(11) is Misplaced in Light of *Hosanna-Tabor* and its Progeny

Appellant asks this Court to outright ignore the impact of the *Hosanna-Tabor* case on employment discrimination complaints brought under state law by ministers. Instead, Appellant asks this Court to apply only § 296(11) to his claims. Specifically, Appellant argues that § 296(11) must be "construed narrowly in order to maximize deterrence of discriminatory conduct" and that this Court should apply it in a way that mandates the NYSDHR to investigate his Administrative Complaint because "there is no protected-choice rationale at issue." App. Br. at 14.[10]

Appellant's argument that the NYSDHR should have ignored the constitutional limitations of the ministerial exception recognized by the United States Supreme Court and instead relied solely on the religious exemption found in § 296(11) is completely contrary to the Supremacy Clause of the United States Constitution. The ministerial exception—a penumbra of the First Amendment to the United States Constitution—applies with the same force to NYSHRL claims as it does to federal employment discrimination claims. *See Martin v. SS Columba-*

[10] Appellant's brief is confusing on this point. Indeed, on page 14 of his brief, Appellant argues that § 296(11) is New York State's statutory codification of the ministerial exception. However, on the very next page, Appellant argues "the ministerial exception is not compelled by statute." Appellant's argument is not only internally inconsistent and hard to follow, but (as set forth in this point) is also just plainly wrong in light of *Hosanna-Tabor*.

Brigid Cath. Church, 2022 WL 3348382, at *1 (W.D.N.Y. Aug. 12, 2022) and *Brandenburg v. Greek Orthodox Archdiocese of N. Am.*, 2021 WL 2206486, at *11 (S.D.N.Y. June 1, 2021).

For example, in *Martin v. SS Columba-Brigid Cath. Church*, the court held:

> that the ministerial exception also bars Ms. Martin's NYSHRL race discrimination claims. *See Shukla v. Sharma*, No. 07 CV 2972 (CBA), 2009 WL 10690810, at *3 (E.D.N.Y. Aug. 21, 2009) ("Given that the ministerial exception is grounded in the First Amendment, it may be applied 'to any federal or state cause of action that would otherwise impinge on the Church's prerogative to choose its ministers.'" (*quoting Werft v. Desert SW Annual Conf. of United Methodist Church*, 311 F.3d 1099, 1100 n.1 (9th Cir. 2004))), *report and recommendation adopted*, 2009 WL 3151109 (E.D.N.Y. Sept. 29, 2009).

Martin, 2022 WL 3348382, at *8. Notably, Appellant does not address either *Martin* or *Brandenburg* in his brief, despite addressing them to the Appellate Division below. *See* Appellant's Responding Brief [Appellate Division Dkt. No. 50] at 13, 14, 30, and 31.

Instead, Appellant relies on pre-*Hosanna-Tabor* authority (ignoring, *e.g.*, *Martin* and *Brandenburg, infra*) in advancing his argument that the NYSDHR was wrong in its determination and dismissal. Specifically, he relies on *Matter of Diocese of Rochester v. New York State Division of Human Rights*, 305 A.D.2d 1000 (4th Dept. 2003) (and cases cited therein) to support his position that the

NYSDHR was required to investigate his Administrative Complaint. App. Br. at 18-20. However, this case was decided well before the United States Supreme Court recognized the ministerial exception as a penumbra of the First Amendment in *Hosanna-Tabor.* Thus, *the Matter of Diocese of Rochester* dealt solely with the NYSDHR's interpretation of § 296(11) and not the now-existing constitutional limitations. The procedural posture within which that case fell was made patently clear by the 2001 NYSDHR Inter-Office Legal Memorandum related to that case, which presented the following question:

> Does the Division lack subject matter jurisdiction over the Complaint, pursuant to Human Rights Law § 296.11, because the Complainant's employment involves performing ministerial duties for a religious employer?

R. 143.

The Legal Memorandum concludes:

> … [T]he New York courts do not recognize a "ministerial exception". Under New York law, cases which involve constitutional issues of freedom of religion are decided by the application of "neutral principles of law", a doctrine well-established in New York case law. The religious organization exemption contained in § 296.11 should be interpreted in accordance with New York law, rather than federal law.

Id. at 143-144. Eleven years later, the Supreme Court decided *Hosanna-Tabor* and recognized the ministerial exception as a constitutional mandate, rendering the

Matter of Diocese of Rochester case and the NYSDHR's analysis or application of § 296(11) related to the facts of that case outdated and bad law.

Specifically, *Hosanna-Tabor* rejected the plaintiff's argument (the same one advanced by Appellant here) that the case could be decided on neutral principles of law. The Supreme Court held: "The present case . . . concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 171. However, Appellant ignores that fact entirely, and in so doing, ignores the supremacy of the United States Constitution. In short, following *Hosanna-Tabor*, and particularly after *Martin* and *Brandenburg* (*supra*), it is indisputable that the ministerial exception applies to NYSHRL claims. It is also telling that Appellant has not cited a single case post-*Hosanna-Tabor* that analyzed or invoked § 296(11) in a ministerial employment context.[11]

Notwithstanding the clear legal precedent, Appellant spends nearly his entire brief making sweeping policy-based arguments, asserting that the NYSDHR was statutorily mandated to investigate his Administrative Complaint and that "public policy and fundamental fairness mandate that the State not blindly apply the ministerial exception to Appellant's hostile work environment claim absent an

[11] After conducting thorough research, the undersigned counsel was unable to locate any New York State case that has opined on § 296(11)'s application since 2012 (*i.e.* since *Hosanna-Tabor*).

investigation and a determination…." App. Br. at 15. But, the NYSDHR did not "blindly" apply the ministerial exception to Appellant's claims—it did so after extensive briefing and consideration of its own jurisdictional limitations consistent with United States Supreme Court precedent. *See* R. 33-64; R. 90-98; R. 225-245; R. 276-282; and R. 185-190.

III. APPELLANT IS NOT LEFT WITHOUT A REMEDY

The Diocese does not condone discrimination or harassment. If what Appellant alleges happened to him did occur, there is no question that such acts are abhorrent and there is no place for them in a civilized society. Appellant has a right to grieve his alleged unlawful discrimination and harassment and to be heard and for justice to be done—but the place for him to grieve that injustice is not the New York State Division of Human Rights. It is within the Church.

All aspects of the Roman Catholic Church are internally governed by the Code of Canon Law. The Code of Canon law is a set of ecclesiastical ordinances laid down by papal pronouncements. Book VI of the Code of Canon Law[12] provides for a penal system within the Church to provide canonical justice to those who have been wronged. It is thus the Code of Canon Law, not New York civil law, where Appellant has a remedy.

[12] Available at https://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic_lib6-cann1311-1363_en.html#BOOK_VI. (last visited April 25, 2024)

The United States Supreme Court established "the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its minister." *Hosanna-Tabor,* 565 U.S. at 188. When Father Ibhawa chose to enter the ministry, he committed himself to the Church and surrendered his rights to certain civil remedies for issues stemming from the employment relationship between himself and the Church. The dispute which gave rise to this case is one that by Father Ibhawa's own definition of it, invokes internal church governance issues. Father Ibhawa writes:

> According to the complaint, after Appellant reported the discrimination to the Diocese, members of the chancery criticized Appellant for firing the employee who yelled "n****r" at him, stating that "these things can be very delicate in America" and advised Appellant that "in America" there are "different ways in ministry and serving people."

App. Br. at 7. This dispute, involving Father Ibhawa (after reporting it up the Church's chain of command) allegedly being told by Church superiors about different ways of ministry and how to handle disputes with parishioners is exactly the type of employment dispute barred by the ministerial exception. *See Hosanna-Tabor*, 565 U.S. at 188 ("Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will

personify its beliefs."). As the United States Court of Appeals for the Seventh Circuit recognized in *Demkovich v. St. Andrew the Apostle Par*, *supra*:

> The First Amendment ministerial exception protects a religious organization's employment relationship with its ministers, from hiring to firing and the supervising in between. Adjudicating a minister's hostile work environment claims based on interaction between ministers would undermine this constitutionally protected relationship. It would also result in civil intrusion upon, and excessive entanglement with, the religious realm, departing from the teachings of *Hosanna-Tabor* and *Our Lady of Guadalupe*.

3 F.4th at 985.

This Court cannot constitutionally punish the Diocese for directing its priest, Father Ibhawa, in how to provide ministry to the Church's congregation. Consistent with the First Amendment principles dictated by the United States Supreme Court in *Hosanna-Tabor* (and its progeny) the Diocese must be free to manage internal Church governance issues under Canon Law and not civil law. Therefore, while Father Ibhawa is without a remedy under civil law, he is not without a remedy under Canon Law.

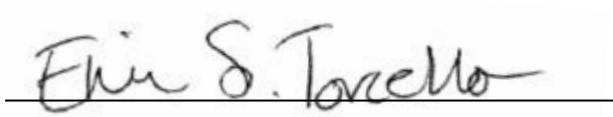
CONCLUSION

This Court does not have jurisdiction to hear the merits of this appeal pursuant to CPLR 5601(b) because there is no constitutional question that was decided by the Appellate Division. However, even if this Court were to consider

the merits of the appeal, it should affirm the Appellate Division Order in its entirety because it is legally sound and Appellant has presented no compelling reason why it should be reversed.

Dated: Buffalo, New York
May 1, 2024

BOND, SCHOENECK & KING, PLLC



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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.13 that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: Buffalo, New York
May 1, 2024

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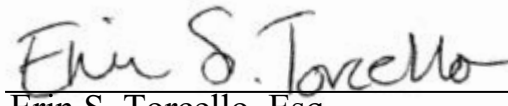

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