

21-2081

Jusino v. Fed'n of Cath. Tchrs.

IN THE

United States Court of Appeals
For the Second Circuit

CALABRESI, *Circuit Judge*, concurring:

The majority opinion treats a series of federal issues that require some new law and some new applications of old law to the appeal in this case. But none of these issues need to be reached because all of plaintiff's claims against defendant union are time-barred. Plaintiff is *pro se*, and, as a general matter, it is advisable, when a *pro se* case can be decided in way that makes no new law, to decide it on the basis. See, e.g., *Fitzgerald v. First E. Seventh St. Tenants Corp.*, 221 F.3d 362, 364 n.2 (2d Cir. 2000) (per curiam) (declining to address a novel legal question raised by a *pro se* litigant where not necessary to adjudicate the claim).

As the majority states, the timelines questions have not been addressed by the parties and, other things being equal we prefer not to decide what has not been argued. Maj. Op. at 22. But as the majority recognizes, we are free to do so. *Id.* And we have done so when the record is sufficiently clear on the issue.

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1 As the majority also states, we do make new law in *pro se* cases, and do so
2 regularly when there is no other way of deciding a case. Maj. Op. at 23. We are
3 free to do so even when there is another way of deciding the case, but it is
4 preferable to avoid it if the “new law” is in any way problematic. The case I cite
5 above is just one of many suggesting this.

6 The question then becomes is the “new law” in this case so non-
7 problematic that it is preferable to make it, even though plaintiff is *pro se*, or does
8 it raise questions so that it is better to decide the case on a ground – timelines-
9 that is on the record but was not argued. The majority clearly believes the
10 former. I believe that, at this time, any new law touching on the intersection
11 between religious rights and freedom from discrimination – both are
12 fundamental – is best made extremely cautiously. And for that reason, I
13 respectfully concur separately.

14 I join the majority’s treatment of plaintiff’s state law claims in full.