No. _____

In the Supreme Court of the United States

CHRISTOPHER BARRELLA,
Petitioner,
v.
VILLAGE OF FREEPORT, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a lawyer tell the jury to render the verdict they would want if they were in the shoes of a party or another person with an interest in the case? This "golden rule" argument, when made as to the jury's determination of *damages*, is prohibited and can justify a new trial under Federal Rule of Civil Procedure 59(a) in every circuit to have considered the issue. But when a lawyer asks the jurors to determine *liability* by imagining themselves in the shoes of an interested party, the circuits are split on the propriety of this prejudicial practice.

The question presented is:

Whether a lawyer's invitation to the jury to imagine themselves in the shoes of an interested party in determining *either* liability or damages is improper, and may therefore serve as grounds for a new trial under Rule 59(a), as the U.S. Courts of Appeals for the D.C., Third, Fourth, Sixth, and Seventh Circuits have concluded, or whether such argument is improper *only* in the context of damages, as the U.S. Courts of Appeals for the Second, Fifth, Tenth and Eleventh Circuits have held.

PARTIES TO THE PROCEEDING

Petitioner Christopher Barrella was the plaintiff in the district court and appellant below.

Respondents Village of Freeport and Andrew Hardwick were defendants in the district court and appellees below.

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STATEMENT

"Do to others whatever you would like them to do to you"[1]; a good rule for life, but not the role of an American jury when it renders a verdict, whether on liability or damages. This case presents an important and acknowledged 5-4 circuit split on a basic question of federal civil procedure that implicates the right to due process: May a lawyer tell jurors to render the liability verdict they would want if they were in the shoes of a party or another interested person, even as that same tactic in the context of *damages* is condemned and can justify a new trial under Rule 59 in every circuit that has considered the question?

The prohibition on "golden rule" argument to a jury is a longstanding and universal feature of American law—at least with respect to damages.[2] The underlying rationale is as plain as it is essential to the impartial dispensation of justice by juries: Golden rule argument "is universally condemned because it encourages the jury to depart from neutrality and to decide

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[1] Matthew 7:12; *see also* Talmud Shabbat 31a ("That which is hateful to you do not do to another; that is the entire Torah, and the rest is its interpretation.") (Rabbi Hillel). A similar principle can be found in some form in many religious and ethical traditions.

[2] A classic example of a golden rule argument as to damages is to ask the jury to award the damages they would want if they were in the plaintiff's shoes. *E.g.*, *Dallas Ry. & Terminal Co.* v. *Smith*, 42 S.W.2d 794, 795 (Tex. Ct. Civ. App. 1931) ("What would compensate you if your wife went through what this lit[t]le woman has gone through? . . . Give us what you think you would want your wife to have—what you think you would be entitled to."); *Brown Cracker & Candy Co.* v. *Castle*, 26 S.W.2d 435, 440 (Tex. Ct. Civ. App. 1930) ("Put yourself in the place of Mr. Castle, how much would you feel that the Brown Cracker & Candy Company should pay you? How many thousand dollars?").

the case on the basis of personal interest and bias rather than on evidence." *Caudle* v. *District of Columbia*, 707 F.3d 354, 359 (D.C. Cir. 2013) (quotation marks omitted).

Accordingly, courts across the country have long barred golden rule argument as to damages. In a seminal 1934 case, the Fifth Circuit denounced the argument of a lawyer for a plaintiff injured by glass placed into a soda, who asked the jury, "[W]ould you swallow that glass and put yourself in that girl's position for a few paltry thousand dollars?" *F.W. Woolworth Co.* v. *Wilson*, 74 F.2d 439, 442-43 ("The appeal to the jury to put themselves in plaintiff's place was improper. One doing that would be no fairer judge of the case th[a]n would plaintiff herself."). And courts have long ordered new trials to remedy golden rule argument as to damages. *E.g.*, *Klotz* v. *Sears, Roebuck & Co.*, 267 F.2d 53, 55 (7th Cir. 1959); *Woolworth*, 74 F.2d at 442-43.

As common sense suggests, the rationale for barring golden rule argument applies just as strongly in the context of *liability*. And so some courts have concluded. *E.g.*, *Caudle*, 707 F.3d at 360 ("It is no more appropriate for a jury to decide a defendant's liability *vel non* based on an improper consideration than to use the same consideration to determine damages."). Nonetheless, a deep and puzzling circuit split on the question has emerged and become entrenched. The D.C., Third, Fourth, Sixth, and Seventh Circuits condemn golden rule argument when made either as to liability or damages and therefore permit a new trial as a remedy for the resulting prejudice. But the Second, Fifth, Tenth, and Eleventh Circuits find no fault in the practice of counsel inviting the jury to identify

with a party in determining liability, even while condemning the exact same argumentation as to damages.

The result of this split is that new civil trials are granted in some circuits because of a jury argument deemed wholly acceptable, and even salutary, in other circuits. And in addition to the distortions and unfairness the split causes across the law, it also results in the disparate application of a foundational standard woven throughout federal law: the "reasonable person" standard. Depending on the circuit, juries in cases requiring application of that standard may be asked by lawyers either to assume the vantage point of an objective reasonable person, *or* to imagine themselves in the shoes of an interested party. Such mishmash will not do.

The Court's intervention is needed to resolve this important and recurring split and reaffirm adjudicative fairness in civil trials. Unless this Court steps in, the divergence in basic federal procedure as to this unseemly and prejudicial argumentation will continue; lawyers will continue, with the blessing of four circuits, to tell juries to dispense the justice they would desire if they were in the shoes of an interested party in the case. And the opposing parties in those cases will continue to be deprived of an important procedural protection against jury verdicts tainted by emotional appeals.

This case offers an ideal opportunity to overturn the illogical and harmful carve-out for golden rule argument. In this Title VII case challenging the selection of the police chief of the Village of Freeport, the lawyer for the defendant mayor told the jurors at closing to "imagine" themselves living the life stories (recounted in the second-person) of the person selected in

the challenged employment decision, and the mayor, who made the decision. After the jurors imagined living as the selected police chief, they were told to "imagine" "the indignity you must feel" after the Title VII suit and to "imagine" "you[rself] . . . identified . . . for the world to see, for your children to see, for your friends to see." Next, the jurors were told to "imagine" themselves as the mayor making the challenged decision, and to "imagine being called a racist for this decision." App. 7a-12a.

Citing an earlier precedential decision made by another panel, the Second Circuit held, as a matter of law, that all such golden rule argument is *per se* permissible because it concerns liability. Presented with the circuit split, the court "decline[d]" to "extend [its] prohibition on golden rule arguments beyond the context of damages (the only context in which they are forbidden) to any kind of liability," and determined that "his argument was not made in the context of damages, and a new trial is not warranted." App. 4a-5a. The split, therefore, is cleanly presented in this case, with no vehicle problems. The Court should grant certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not published in the Federal Reporter but is reprinted at 714 F. App'x 78 (Mem.) (2d Cir. 2018). App. 1a-5a. The district court's rulings are unreported and are not accessible via a public database. App. 6a-16a.

JURISDICTION

The Second Circuit issued its opinion on March 13, 2018. App. 1a-5a. Petitioner timely filed a petition for rehearing en banc, which the court denied on May 2,

2018. App. 17a-18a. On June 25, 2018, Justice Ginsburg granted Petitioner's application to extend the time to file until October 1, 2018. This petition is timely, and the Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Civil Procedure 59(a) provides, as relevant, "(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows: (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court."

STATEMENT OF THE CASE

A. Background & Procedural History

Petitioner Christopher Barrella brought suit in 2012 in the United States District Court for the Eastern District of New York against Respondents, the Village of Freeport and its mayor, Andrew Hardwick, challenging as unlawfully discriminatory the process of hiring the Village of Freeport's chief of police. Miguel Bermudez, who was selected for the position, was born in Cuba and identifies as Hispanic white; Barrella is of Italian descent and identifies as non-Hispanic white.

The case proceeded to trial in 2014, resulting in a jury verdict in favor of Barrella. The Village and Mr. Hardwick appealed, and the Second Circuit affirmed in part and vacated and remanded in part for a new trial, holding, *inter alia*, that the district court erred in admitting certain lay opinion testimony. *Village of Freeport* v. *Barrella*, 814 F.3d 594 (2d Cir. 2016).

At the second trial, in 2017, counsel for Mayor Hardwick engaged in a prolonged golden rule argu-

ment. At closing argument, counsel directed the jurors to "imagine" themselves as living the life story of Mr. Bermudez, which counsel set forth at length. App. 7a-9a. For example, counsel told the jurors:

> I want you to imagine, I want you to imagine that you arrived in this country at eight months of age. The only thing you know is the United States of America.
>
> Imagine you grow up in Freeport. You go to school in Freeport. Your friends are from Freeport. You live in Freeport most of your adult life. You are passionate for Freeport. You love Freeport. You are actively involved in the community of Freeport. You put your life on the line as a volunteer firefighter for Freeport.

App. 7a. After going through Mr. Bermudez's career and selection as chief of police in the second-person (*e.g.*, "You help bring crime down in Freeport. You work together with the Mayor to help the citizens of Freeport."), counsel told the jury:

> Notwithstanding all of this, you are nevertheless identified by a person who didn't get the job for the world to see, for your children to see, for your friends to see, for your fellow police officers and firefighters to see. You are labeled a woefully unqualified minority. . . . Imagine the indignity that you must feel after having all of those qualifications being called a woefully unqualified minority.

App. 8a-9a. Counsel next asked the jurors to "imagine" themselves growing up as Mayor Hardwick and making his life choices. He directed:

> Now, also imagine you were born and raised in a village. You live your entire life in a village. You served and defended your country for ten years in the military. You come back to the village that you love and you become active in the community. You put your life on the line also as a volunteer firefighter. You decide to run to be mayor, and you are elected mayor.

App. 10a. After telling the jury to imagine themselves making Mayor Hardwick's employment decision, App. 10a-11a, counsel instructed:

> Now, imagine, imagine being called a racist for this decision. Imagine being called a racist because of the fact only that the last name of the person you appointed was named Bermudez, and that the color of your skin is black.

App. 12a. Barrella's counsel requested "curative instructions" and objected to the use of golden rule argument, which Judge Wexler overruled. App. 15a-16a.

After the jury returned a verdict in favor of the Village and Mayor Hardwick on January 30, 2017, Barrella challenged on appeal to the Second Circuit, *inter alia*, the prejudice caused by opposing counsel's golden rule argument. The court affirmed the judgment. The Second Circuit held, as relevant:

> Barrella argues that Hardwick's counsel engaged in "golden rule" argumentation during closing, which asks jurors to place themselves in the position of a party. He invites us to change our precedent regarding such arguments, requesting that we extend our prohibition on golden rule

> arguments beyond the context of damages (the only context in which they are forbidden) to any kind of liability. *See Johnson* v. *Celotex Corp.*, 899 F.2d 1281 (2d Cir. 1990). We decline to do so. Regardless of whether Hardwick's counsel in fact made a "golden rule" argument during closing, his argument was not made in the context of damages, and a new trial is not warranted.

App. 4a-5a. The court denied rehearing en banc. App 17a-18a.

B. Legal Background

The prohibition against golden rule arguments has been a longstanding feature of the American legal system. A golden rule argument is a "jury argument in which a lawyer asks the jurors to reach a verdict by imagining themselves or someone they care about in the place" of an interested person, such as "the injured plaintiff or crime victim." Black's Law Dictionary 761 (9th ed. 2009). In the damages context, a golden rule argument typically "occurs when an attorney . . . asks the jury what would compensate them for a similar injury, or asks the jurors to award damages in the amount that they would want for their own pain and suffering." 75A Am. Jur. 2d Trial § 547 (2d ed. 2018) (footnotes omitted). "Because golden-rule arguments ask the jurors to become advocates for the plaintiff or victim and to ignore their obligation to exercise calm and reasonable judgment, these arguments are widely condemned and are considered improper in most states." Black's 761. As one state supreme court has explained:

> It is a fundamental tenet of our system that a man may not judge his own case, for

> experience teaches that men are usually not impartial and fair when self-interest is involved. Therefore, it is improper to permit an attorney to tell the jury to put themselves in the shoes of one of the parties or to apply the Golden Rule. Attorneys should not tell the jury, in effect, that the law authorizes it to depart from neutrality and to make its determination from the point of view of bias or personal interest.

Danner v. *Mid-State Paving Co.*, 252 Miss. 776, 786 (1965); *see* The Federalist No. 10 (Madison) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."). The prohibition on golden rule argument is a necessary consequence of this foundational precept of disinterested adjudication.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens A Conflict Among The Courts of Appeals.

The circuit split on golden rule argument in the context of civil liability determinations is squarely acknowledged. As the D.C. Circuit has explained, "[w]hile all circuits that have considered the issue have held a golden rule argument improper if made with respect to damages, there appears to be . . . a circuit split regarding whether such argument is improper if made with respect to liability." *Caudle* v. *District of Columbia*, 707 F.3d 354, 360 (D.C. Cir. 2013). Indeed, as explained below, the D.C., Third, Fourth, Sixth, and Seventh Circuits bar golden rule argument whether it concerns liability or damages,

but the Second, Fifth, Tenth, and Eleventh Circuits allow golden rule argument as to liability.[3]

1. In *Caudle*, the D.C. Circuit rejected the logic in barring golden rule argument as to damages, but not as to liability:

> [W]e do not recognize a per se distinction between a golden rule argument relating to damages and the same argument regarding liability. Courts forbid golden rule arguments to prevent the jury from deciding a case based on inappropriate considerations such as emotion. It is no more appropriate for a jury to decide a defendant's liability *vel non* based on an improper consideration than to use the same consideration to determine damages.

707 F.3d at 360 (citation omitted). The *Caudle* court concluded that the golden rule argument on liability in that case necessitated a new trial. *Id.* at 361-63. In so holding, the D.C. Circuit acknowledged that it deepened an existing circuit split. *Id.* at 360.

The court in *Caudle* joined the Third Circuit, which has also rejected the propriety of golden rule argument on liability. The Third Circuit has held that it "reject[s] [the] assertion that the 'Golden Rule' argument is improper only when used in respect to the issue of damages and not when the issue is liability," as it "see[s] no rational basis for a rule that proscribes the 'Golden Rule' argument when a plaintiff argues damages, but permits it when the defendant argues liability" because the "same concerns are present in

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[3] The First, Eighth, and Ninth Circuits bar golden rule argument as to damages but appear not to have addressed whether golden rule argument is barred in the liability context. The Federal Circuit has apparently not addressed golden rule argument.

both situation[s]—the creation of undue sympathy and emotion." *Edwards* v. *City of Philadelphia*, 860 F.2d 568, 574 n.6 (3d Cir. 1988).

Three other circuits have also condemned golden rule argument across the board. The Fourth Circuit applied the bar on golden rule argument to a lawyer's "asking the jurors to consider whether any of them would like to be accused of fraud based upon the evidence which they were about to hear." *Ins. Co. of N. Am.* v. *U.S. Gypsum Co.*, 870 F.2d 148, 154 (4th Cir. 1989). In that case, the court recognized that "it is improper to ask jurors to place themselves in the position of a party" as to a matter concerning liability. *Id.*

The Sixth Circuit, too, has applied the prohibition on golden rule argument to the liability context. *Mich. First Credit Union* v. *Cumis Ins. Soc'y, Inc.*, 641 F.3d 240, 248-49 (6th Cir. 2011) (counsel invited jury to "think of your own insurance claim" and related an extended hypothetical in second-person asking the jurors to imagine themselves in plaintiff's shoes); *Johnson* v. *Howard*, 24 F. App'x 480, 487 (6th Cir. 2001) ("'I would ask each and every one of you to put yourself in [the Plaintiff's] shoes and imagine . . . the helplessness of being attacked while your hands are cuffed behind your back' . . . . [The lawyer's] 'Golden Rule' argument was clearly obvious . . . .").

Similarly, the Seventh Circuit, rejecting the assertion that "the Golden Rule argument is not objectionable when it refers only to the assessment of credibility," explained as a categorical matter that "[t]here is no reason for such a distinction because the jury's departure from its neutral role is equally inappropriate *regardless of the issue at stake*." *Joan W.* v. *City of*

Chicago, 771 F.2d 1020, 1022 (7th Cir. 1985) (emphasis added).

2. By contrast, on the basis of thin or non-existent rationales, four circuits—the Second, Fifth, Tenth, and Eleventh Circuits—permit golden rule argument as to liability but bar it in the context of damages. Those courts proceed from a correct premise—the bar on golden rule argument first emerged in cases concerning damages—and incorrectly conclude that the origin of the doctrine delineates its limitation.

Thus, in *Burrage* v. *Harrell*, a personal-injury case involving a traffic accident and apparently the earliest case to limit the bar on golden rule argument to damages, the Fifth Circuit held that an objection to such an argument regarding liability was "misplaced" because the case law "deal[s] with arguments in which the jury is exhorted to place itself in a party's shoes with respect to damages." 537 F.2d 837, 839 (5th Cir. 1976). In that case, "the argument complained of was not in any way directed to the question of damages; rather, it related only to the reasonableness of appellee's actions under emergency conditions." *Id.*

As evidenced in the opinion below, the Second Circuit also rejects out-of-hand the applicability of the bar on golden rule argument beyond the damages context. App. 4a-5a (citing *Johnson* v. *Celotex Corp.*, 899 F.2d 1281 (2d Cir. 1990)). In *Johnson* v. *Celotex*, apparently the earliest instance in which the Second Circuit limited the bar on golden rule argument to the damages context, the court adopted the limitation from the Fifth Circuit without reasoning or analysis. 899 F.2d at 1289 ("The court found that all but two of the counsel's alleged appeals to the Golden Rule argument related to liability only and not damages and

were therefore not improper.") (citing *Burrage*, 537 F.2d at 839).

Similarly, the Eleventh Circuit, quoting *Burrage*, rejected a challenge to golden rule argument regarding liability because the argument in that case—"inviting the jury to put itself in the defendants' position when considering [the plaintiff's] alleged work place misconduct and evaluating whether he was terminated because of his disability"—"'was not in any way directed to the question of damages; rather, it related only to the reasonableness of appellee's actions.'" *McNely* v. *Ocala Star-Banner Corp.*, 99 F.3d 1068, 1071 n.3 (11th Cir. 1996) (quoting *Burrage*, 537 F.2d at 839).

The Tenth Circuit, despite prohibiting the practice in the context of damages, has also approved "[u]se of the 'golden rule' argument . . . when urged on the issue of ultimate liability." *Shultz* v. *Rice*, 809 F.2d 643, 652 (10th Cir. 1986) (quotation marks omitted); *see id.* at 651-52 ("[H]er reliance on the 'golden rule' cases is misplaced: 'they deal with arguments in which the jury is exhorted to place itself in a party's shoes *with respect to damages*.'") (quoting *Burrage*, 537 F.2d at 839). More recently, the Tenth Circuit affirmatively endorsed golden rule argument in cases requiring application of a reasonableness standard, explaining that in officer-use-of-force cases the jury "must stand in [the officer's] shoes and judge the reasonableness of his actions." *Cordova* v. *City of Albuquerque*, 816 F.3d 645, 660 (10th Cir. 2016).

II. The Question Presented Is Important

The question whether golden rule argument regarding liability is improper and may serve as grounds for a new trial under Rule 59(a) is important and recurring. This Court should not permit a split to

languish when the split causes new trials to be granted in some circuits for tactics deemed proper in other circuits. Beyond that important practical consideration, a split as to whether a common practice can be so prejudicial as to justify a new trial indicates a disagreement on a fundamental matter of adjudication that should trigger this Court's scrutiny.

1. Under Rule 59(a), district courts have "large" authority to "grant new trials." *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 (1996); *see* Fed. R. Civ. P. 59(a)(1)-(A) ("The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows: (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court . . . ."). Federal standards thus govern the granting of new trials. *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). And, as a settled and widely accepted exercise of their authority, federal courts have long granted new trials to remedy improper jury argument. *E.g.*, *Wash. Annapolis Hotel Co.* v. *Riddle*, 171 F.2d 732, 740 (D.C. Cir. 1948).

Accordingly, courts in the five circuits that bar golden rule argument regarding liability grant new trials to remedy resulting prejudice from the use of such argument. *E.g.*, *Caudle*, 707 F.3d at 361-63 (new trial warranted to remedy golden rule argument on liability); *Ray* v. *Allergan, Inc.*, 863 F. Supp. 2d 552, 564 (E.D. Va. 2012) (new trial warranted in light of golden rule argument asking jurors, among other things, to "imagine the horror when [plaintiff] first realized that

something was terribly wrong").[4] And courts in those circuits regularly grant pretrial motions *in limine* to preclude all golden rule argument,[5] and issue contemporaneous admonitions or instructions during trial to cure prejudice when possible. Lawyers in those circuits are, therefore, apprised not to make golden rule argument, and face admonishment if they do.

Meanwhile, on the other side of the split, courts necessarily reject requests for new trials to cure prejudice arising from golden rule argument on liability. *E.g.*, *Cordova* v. *Hoisington*, 2014 WL 11621682, at *3 (D.N.M. Apr. 22, 2014) ("As neither of these arguments was directed at the issue of damages, neither would run afoul of the prohibition against 'golden rule' arguments. Therefore, Plaintiff is not entitled to a new trial on this ground.") (footnote omitted), *aff'd sub*

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[4] *See also Moffett* v. *Sandoval*, 2012 WL 2526624, at *5 (N.D. Ill. June 28, 2012) (golden rule argument is "one of the rare exceptions to th[e] rule" that "improper comments during closing argument rarely rise to the level of reversible error").

[5] *E.g.*, *Thomas* v. *Ritz*, 2018 WL 1784473, at *4 (S.D. Ill. Apr. 13, 2018) ("Because such arguments are improper, Defendants' Motion is granted."); *Storrs* v. *Univ. of Cincinnati*, 2018 WL 684759, at *8 (S.D. Ohio Feb. 2, 2018) ("[T]o the extent UC's motion *in limine* . . . seeks to exclude 'golden rule' arguments, it is granted."); *Austin* v. *Hill*, 2014 WL 3054268, at *4-*5 (E.D. Pa. July 7, 2014) ("The risk of allowing an accumulation of improper statements to create a harm that would be insufficiently remedied by a curative instruction mitigates against allowing such statements before a jury at all. Therefore, I will grant plaintiff's motion to preclude Golden Rule comments during trial."); *Calaway ex rel. Calaway* v. *Schucker*, 2013 WL 311441, at *2 (W.D. Tenn. Jan. 25, 2013) ("Plaintiff shall not be permitted to use any 'Golden Rule' arguments at any phase of the case . . . ."); *Powell* v. *Tosh*, 2013 WL 12234610, at *4 (W.D. Ky. Oct. 21, 2013) ("Requesting or suggesting that jurors place themselves in the plaintiff's position is a prohibited 'Golden Rule' argument.").

nom. Cordova v. *City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016).[6] Those circuits do, however, grant new trials to remedy golden rule argument on *damages*. *E.g.*, *Alexander* v. *City of Jackson, MS*, 2008 WL 907658, at *5 (S.D. Miss. Mar. 31, 2008); *Moody* v. *Ford Motor Co.*, 506 F. Supp. 2d 823, 835-37, 847 (N.D. Okla. 2007); *Whitehead* v. *Food Max of Mississippi, Inc.*, 163 F.3d 265, 278 (5th Cir. 1998). And, similarly, those courts expressly limit pretrial rulings regarding golden rule argument to the issue of damages.[7] Trials in those circuits proceed, therefore, with knowledge by

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[6] *See also, e.g.*, *In re Joint E. & S. Dist. Asbestos Litig.*, 124 F.R.D. 538, 544-45 (E.D.N.Y. & S.D.N.Y. 1989) ("It applies to damages only and not to liability. . . . This distinction disposes of all but two of the statements . . . . Therefore, the motion for a new trial is denied.").

[7] *E.g.*, *Baxter* v. *Anderson*, 277 F. Supp. 3d 860, 863 (M.D. La. 2017) ("Defendants seem to suggest that the Golden Rule argument may not be used for any purpose at trial. This is incorrect. Golden Rule arguments are permissible on the ultimate question of liability.") (citation omitted); *Kimzey* v. *Diversified Servs., Inc.*, 2017 WL 131614, at *3 (D. Kan. Jan. 13, 2017) ("Motion J seeks to exclude 'golden rule' arguments . . . . The court grants defendants' Motion J as to damages, and denies it as to liability."); *Kirksey* v. *Schindler Elevator Corp.*, 2016 WL 7116223, at *11 (S.D. Ala. Dec. 6, 2016) ("[B]oth parties are barred at trial from making 'golden rule' arguments with respect to damages."); *F.H. Paschen, S.N. Nielsen & Assocs. LLC* v. *Hiscox, Inc.*, 2015 WL 13532830, at *2-*3 (E.D. La. Nov. 25, 2015) (granting "request to preclude these types of arguments" made "with respect to damages") (quotation marks omitted); *Valdes* v. *Miami-Dade Cnty.*, 2015 WL 7253045, at *12 (S.D. Fla. Nov. 17, 2015) (denying motion to exclude golden rule arguments on liability because "the prohibition against golden rule arguments applies only to damages in this Circuit"); *Stallworth* v. *Sourcecorp*, 2006 WL 2331093, at *1 (M.D. Ala. Aug. 10, 2006) ("[T]he Motion in Limine is due to be granted only to the extent that the Plaintiff is not to request the jury to place itself in her shoes with respect to damages.").

all participating lawyers that they are free to use golden rule argument as to liability and that objections to such argument will be overruled.

In sum, the differential treatment of golden rule argument on liability by the circuits leads to differential results—the granting of new trials in some circuits, but not others; the pretrial preclusion of golden rule argument on liability in some circuits, but not others; and jury determinations that may or may not be affected by invitations to prejudice, across civil trials, in the circuits that allow golden rule argument on liability.

2. These varying conclusions on the permissibility of golden rule argument on liability have significant implications. By way of one example, the split means that the circuits necessarily diverge in applying the reasonable-person standard embedded throughout federal law.

For example, the 2013 *Caudle* case dealt with the application of "the *Burlington Northern* standard—which forbids employer actions that would have been materially adverse to a *reasonable* employee." 707 F.3d at 360-61 (quotation marks omitted). The D.C. Circuit rejected the argument that "the [golden rule] statements are permissible because they explain the legal standard for retaliation"; the court explained that while the "*reasonable* employee" standard is "*objective*," the golden rule argument "asked the jurors to decide how each of them—not a reasonable person—would feel if he were in the appellees' situation." *Id.* at 360-61 (second emphasis added).

By contrast, the Fifth Circuit has defended the use of golden rule argument in cases assessing reasonableness as a tool to assist the jury. In *Stokes* v. *Delcambre*, the court upheld "two objected-to uses of

the Golden Rule argument" because they "requested the jury to put themselves in [plaintiff's] place to determine whether his fears and resultant failure to request help were reasonable." 710 F.2d 1120, 1128 (5th Cir. 1983).

The circuits have also differed in applying the reasonable-person standard in the same area of law. In a 2016 Tenth Circuit case applying a reasonableness standard in a challenge to an officer's use of deadly force, the court blessed the use of "Golden Rule argument" as to liability "*especially* where the issue is the objective reasonableness of the use of deadly force." *Cordova*, 816 F.3d at 660 (emphasis added). In the Tenth Circuit's view, an objective reasonableness standard *requires* the jury to "stand in [the] shoes" of the defendant. *Id.*[8]

Meanwhile, by way of example, in a use-of-force case in the Third Circuit, the District Court for the Western District for Pennsylvania held that an officer's counsel "mistakenly asked the jurors to place themselves in [the officer's] shoes," requiring the court to determine whether the "'golden rule' comment justifies a mistrial." *Sonnier* v. *Field*, 2007 WL 2713241, at *1 (W.D. Pa. Sept. 14, 2007). The court determined that the prejudice was cured in part because "defense counsel immediately recognized his mistake and took pains to reiterate the proper 'reasonable police officer' standard," and the court "issued a curative instruction to the jury" that "[i]t is not what you would have

[8] *See also Moore* v. *Peterman*, 2016 WL 7325589, at *3 n.3 (M.D. Fla. Apr. 8, 2016) (rejecting challenge to golden rule argument because "counsel's statements appear more properly directed to the determination of what was reasonable conduct for a police officer").

done . . . . It's what a reasonably prudent police officer would do under the circumstances." *Id.*

The circuits that permit golden rule argument on liability, therefore, view them as *aiding* the jury in assessing the reasonableness of conduct, while those that condemn such argument as prejudicial do so in part because golden rule argument misstates the legal standard, imposing a subjective inquiry in lieu of an objective standard.

3. This entrenched split is highly unlikely to resolve itself without the Court's intervention.

The nine circuits to have addressed the question presented have arrived at settled views and have reaffirmed their views in recent years. The courts permitting golden rule argument as to liability have hewed to their holding. *See, e.g.*, App. 1a-5a (2d Cir. 2018) (reaffirming *Celotex*, 899 F.2d at 1289); *Cordova*, 816 F.3d at 660 (10th Cir. 2016) (reaffirming *Shultz*, 809 F.2d at 651-52). Similarly, courts that denounce golden rule argument across the board have stayed their course or reaffirmed their holding in recent years. *E.g.*, *Gov't of the Virgin Islands* v. *Mills*, 821 F.3d 448, 458 (3d Cir. 2016) (reaffirming *Edwards*, 860 F.2d at 574); *Mich. First Credit Union*, 641 F.3d at 248-49 (6th Cir. 2011) (reaffirming *Johnson*, 24 F. App'x at 487). Indeed, as the Second Circuit's opinion below indicates, the courts have not been swayed to change their holdings by arguments invoking the circuit split.

Moreover, as the question presented touches on basic federal civil procedure, the longstanding nature of the split makes the Court's review all the more appropriate. *Cf., e.g.*, *DePierre* v. *United States*, 564 U.S. 70, 78 (2011) ("We granted certiorari to resolve the longstanding division in authority among the Courts

of Appeals on this question."); *Sorich* v. *United States*, 129 S. Ct. 1308 (Mem.), 1311 (Scalia, J., dissenting from denial of certiorari) (emphasizing "the longstanding confusion over the scope of the statute").

In the absence of this Court's review, the split will continue to fester, the circuits will continue to diverge in how they conduct civil trials (and when they grant new trials), and juries will continue to be asked to apply divergent standards in arriving at their determinations of liability.

III. There Are No Vehicle Problems.

The split on golden rule argument concerning liability warrants review in this case because it is squarely presented here, and there are no vehicle problems.

The Second Circuit held that all golden rule argument regarding liability is permissible and can never cause prejudice warranting a new trial (or any remedy). App. 4a-5a ("declin[ing]" to "extend our prohibition on golden rule arguments beyond the context of damages (the only context in which they are forbidden) to any kind of liability"). The court made plain, moreover, that its ruling was *not* fact-bound; rather, it explained, the dispositive point was that "his argument was not made in the context of damages." App. 5a (emphasis added).

And the court's ruling was outcome-dispositive: because Hardwick's counsel's golden rule argument concerned liability, not damages, a "new trial is not warranted." App. 5a.[9] Notably, the Second Circuit did

[9] The Second Circuit recognizes that a new trial "should . . . be granted" if "counsel's conduct created undue prejudice or passion which played upon the sympathy of the jury." *Crockett* v. *City of New York*, 720 F. App'x 85, 87 (2d Cir. 2018).

not, in the alternative, assess the prejudice in this case assuming *arguendo* that golden rule argument as to liability is improper.

Moreover, the opinions adopting the damages-only side of the split are based on strikingly thin reasoning, as discussed *supra* 12-13. Nor, in recent years, have there been opinions expanding upon this reasoning. *See* App. 1a-5a (opinion below); *Cordova*, 816 F.3d at 660. It is thus unlikely the Court's review will be enhanced in a future case by a lower court's detailed rationale for allowing golden rule argument on liability. This case is an ideal vehicle for the Court's review.

IV. The Decision Below Was Incorrect.

The Second Circuit erred by ruling that golden rule arguments as to liability can never, as a matter of law, introduce prejudice into the adjudicative process. Federal district courts, rather, should be permitted to assess prejudice caused by golden rule argument as to liability on a case-by-case basis.[10] Neither law nor logic support the Second Circuit's categorical approval of all golden rule argument as to liability.

In light of the universal recognition that golden rule argument is always improper when made in the context of damages, there is no reasonable basis for the polar opposite conclusion—golden rule argument is *always proper*—when the same jury argument is made in the context of liability. Indeed: "Give us the liability verdict you would want if you were in plaintiff's shoes" is no more consistent with the evenhanded

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[10] *See Blunt* v. *Little*, 3 F. Cas. 760, 761-62 (C.C. Mass. 1822 (Story, J.) ("[I]f it should clearly appear that the jury . . . have acted from improper motives . . . it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.").

dispensation of justice than "Give us the damages you would want if you were in plaintiff's shoes."

Golden rule argument is necessarily intended to "encourage[] the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Mills*, 821 F.3d at 458 (quotation marks omitted). For that reason, courts also bar golden rule argument in the criminal context, so that prosecutors are forbidden from "urg[ing] jurors to identify individually with the victims with comments like 'it could have been you' the defendant killed or 'it could have been your children.'" *Id.* (quoting *Bedford* v. *Collins*, 567 F.3d 225, 234 (6th Cir. 2009)).[11]

This is not a matter of imposing semantic, formalistic restrictions on lawyer argument. Under our system, juries are asked to reach their decisions as neutral actors; just as persons interested in the case should not serve as jurors, so should those who do serve on a jury be free from lawyers' appeals to decide cases as though they were in the shoes of an interested party. Nor does reversal of the Second Circuit's categorical rule require deeming every golden rule argument on liability a reversible error. Rather, trial courts should have the leeway to assess the full range of golden rule arguments; some may be innocuous and easily cured by an admonition or jury instructions, while others may be repeated, egregious, or evidently intended to inflame the jurors. *Compare, e.g.*, *Gypsum*, 870 F.2d at 154 ("Here, where the remark was

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[11] *See also Johnson* v. *Bell*, 525 F.3d 466, 484 (6th Cir. 2008) ("'It could have been my little girl that was in that store, a witness eliminated. It could have been you. It could have been your children.' . . . Closing arguments that encourage juror identification with crime victims are improper.").

made during an opening statement in a three-week trial in a contest between two large corporations, the absence of any prejudice flowing from it is self-evident."), *with Caudle*, 707 F.3d at 361-62 ("The appellees' counsel's improper argument was not harmless. First, this was a close case. . . . Second, the appellees' counsel's comments went to central issues in the case."). Entrusting courts to evaluate prejudice on a case-by-case basis would harmonize the treatment of golden rule argument across the circuits as to both damages and liability, and accord with district courts' traditionally broad discretion to administer trials.

In this case, the prejudice caused by Respondent's golden rule argument warrants a new trial. Counsel repeatedly engaged in golden rule argument, asking the jurors to identify with the defendant and an interested person (the person selected in the challenged employment decision). And the golden rule argument in this case amounted to a series of striking emotional appeals: the jurors were asked to imagine themselves "being called a racist for this decision" because of "the color of your skin" and to imagine themselves "identified" "for the world to see, for your children to see, for your friends to see." App. 9a, 12a; *cf. Moody*, 506 F. Supp. 2d at 836 ("plaintiffs' counsel clearly refers to the jury as 'you,' and it appears that he is telling the jurors that they might personally be involved"; "Plaintiffs' counsel's arguments in this case are classic Golden Rule arguments").[12]

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[12] *Cf., e.g.*, *Beaumaster* v. *Crandall*, 576 P.2d 988, 994 (Ala. 1978) ("Since the argument implores the jurors to put themselves in the position of the defendants, and then to ask themselves what kind of outcome they would wish under the circumstances, most courts will reverse a judgment where there has been an objection

It is understandable, indeed, that jurors may have been affected by such powerful appeals to their emotions. The problem with such jury argument is that it is not evidence or a summary of evidence, it misstates the law, and, by asking for jurors to reach a verdict by identifying themselves with persons interested in the outcome of the case, it is inconsistent with the core procedural protections of federal trials.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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Counsel for Petitioner

October 1, 2018

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and no attempt to correct the impression created by such an argument or where such an argument has been otherwise potentially harmful.") (citing federal and state cases).

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 13, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

17-446-cv

CHRISTOPHER BARRELLA,

Plaintiff-Appellant,

v.

VILLAGE OF FREEPORT
AND ANDREW HARDWICK,

Defendants-Appellees.[*]

March 13, 2018, Decided

Appeal from an order of the United States District Court for the Eastern District of New York (Leonard D. Wexler, Judge).

PRESENT: José A. Cabranes, Reena Raggi, *Circuit Judges*, Lawrence J. Vilardo, *District Judge.*[*]

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* Judge Lawrence J. Vilardo, of the United States District Court for the Western District of New York, sitting by designation.

* The Clerk of Court is ordered to amend the caption of this case as shown herein.

Appendix A

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of March, two thousand eighteen.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is **AFFIRMED**.

Plaintiff-Appellant Christopher Barrella ("Barrella") appeals from a final judgment of the District Court, following a trial in which the jury found for Defendants-Appellees Village of Freeport ("the Village") and Andrew Hardwick ("Hardwick"). Barrella seeks reversal and remand to the District Court for a new trial. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.[1]

1. For a recitation of the background in this case, see *Village of Freeport v. Barrella*, 814 F.3d 594 (2d Cir. 2016).

Appendix A

Barrella, a Lieutenant in the Freeport Police Department, alleges that he was passed over by the village's mayor at the time, Andrew Hardwick, for the position of police chief. He brought a civil rights action against the Village and Hardwick, alleging violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and § 1981, 42 U.S.C. § 1981. The first trial of this matter resulted in a verdict for Barrella. *Barrella v. Village of Freeport*, 43 F.Supp. 3d 136 (2014). We affirmed in part and vacated and remanded in part. *Village of Freeport v. Barrella*, 814 F.3d 594 (2d Cir. 2016). On January 30, 2017, following a new trial, the jury found for Freeport and Hardwick.

Barrella argues on appeal: that the District Court committed reversible error when it (1) allowed the Village and Hardwick to question Barrella about a 1994 class action race discrimination lawsuit he joined; (2) it excluded evidence of Hardwick's statements; (3) it excluded evidence related to Hardwick's treatment of other Caucasian employees of the Village; (4) it did not give a curative instruction after Hardwick's counsel allegedly made a "golden rule" argument in closing; and (5) it did not give curative instructions based on what Barrella claims were misstatements of law in closing argument by the Village and Hardwick as to "motivating factor."

Taking these claims *seriatim*, Barrella argues that the District Court prejudiced the jury by admitting evidence that he joined a 1994 class action lawsuit alleging race discrimination in Nassau County's administration of a police hiring examination. According to Barrella, *Outley*

v. City of New York, 837 F.2d 587 (2d Cir. 1988)—which held that improper questioning about a plaintiff's past litigation in violation of Fed. R. Evid. 404(b), combined with reference to that questioning in summation, require a new trial—entitles him to a reversal of the jury verdict. We review a district court's evidentiary rulings for abuse of discretion. *Freeport*, 814 F.3d at 610. If there was an abuse of discretion, we are required to determine whether the errors "were clearly prejudicial to the outcome of the trial, where prejudice is measured by assessing the error in light of the record as a whole." *Id.* (internal citation omitted). Upon a review of the record, we conclude that *Outley* does not require us to reverse the jury verdict, and that the District Court's admission of this evidence was not clearly erroneous.

Barrella contends that the District Court erred when it excluded evidence of Hardwick's statements allegedly demonstrating his discriminatory intent with respect to Barrella and with respect to other Village employees. Reviewing these evidentiary claims for abuse of discretion, we conclude that the District Court's decision to exclude the evidence at issue was not clearly erroneous.

Barrella argues that Hardwick's counsel engaged in "golden rule" argumentation during closing, which asks jurors to place themselves in the position of a party. He invites us to change our precedent regarding such arguments, requesting that we extend our prohibition on golden rule arguments beyond the context of damages (the only context in which they are forbidden) to any kind of liability. *See Johnson v. Celotex Corp.*, 899 F.2d 1281

(2d Cir. 1990). We decline to do so. Regardless of whether Hardwick's counsel in fact made a "golden rule" argument during closing, his argument was not made in the context of damages, and a new trial is not warranted.

Last, Barrella claims that Hardwick's counsel misstated the law during closing as to whether race was a "motivating factor" in Hardwick's decision to promote someone above Barrella for police chief. We review whether counsel's conduct caused prejudice for abuse of discretion. *Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534, 540 (2d Cir. 1992). In doing so, "we recognize the trial court's superior vantage point when evaluating the possible impact of the alleged prejudicial conduct." *Id.* Upon review of the record, we conclude that the District Court's decision not to issue curative instructions regarding Hardwick's discussion of "motivating factor" was not clearly erroneous.

CONCLUSION

We have reviewed all the arguments raised by Barrella on appeal and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/

APPENDIX B — EXCERPTS OF THE TRANSCRIPT OF THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED JANUARY 30, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

12-CV-0348 (LDW)

CHRISTOPHER BARRELLA,

Plaintiff,

-against-

VILLAGE OF FREEPORT AND ANDREW HARDWICK, AS BOTH MAYOR AND IN HIS INDIVIDUAL CAPACITY,

Defendants.

United States Courthouse
Central Islip, New York

January 30, 2017
9:30 a.m.

Appendix B

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE LEONARD D. WEXLER, UNITED STATES DISTRICT JUDGE, AND A JURY

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[636](The following is the closing statement by Mr. Novikoff.)

MR. NOVIKOFF: Ladies and gentlemen of the jury, thank you for your service.

I want you to imagine, I want you to imagine that you arrived in this country at eight months of age. The only thing you know is the United States of America.

Imagine you grow up in Freeport. You go to school in Freeport. Your friends are from Freeport. You live in Freeport most of your adult life. You are passionate for Freeport. You love Freeport. You are actively involved in the community of Freeport. You put your life on the line as a volunteer firefighter for Freeport. You have been recognized by civic organizations for your commitment to Freeport. You rise to the rank of Captain of the Fire Department. You are in a leadership position on the Fire Council for the Fire Department.

You decide to devote your professional life to [637] Freeport. You become a police officer. You perform your job with excellence. You rise up the ranks first as

a sergeant, then as a lieutenant. You are recognized for your leadership ability by Chief Woodward, who makes you an Administrative Sergeant. Then when there's no one essentially running the police department, Chief Woodward, Chief Woodward makes you the Administrative Lieutenant to run the department.

You are appointed unanimously by the Board of Trustees of Freeport. You get a standing ovation from a packed house of Whites, Blacks, Hispanics, Asians, men, women, young and old, in support of your appointment of Deputy Chief of Police.

You represent the police department at these Board meetings. You do a great job for the nine months that you are the Acting Chief. You do a great job. You implement policy that help Freeport. You help bring crime down in Freeport.

You work together with the Mayor to help the citizens of Freeport.

You take the Civil Service test to be chief of police. You satisfy all of the criteria that New York State and Nassau County Civil Service require you to satisfy to be considered to be chief of police.

You happen to be friends with the Mayor. You [638] happen to be friends with the Mayor and know the Mayor for three decades. You served as a fire captain with the Mayor. You served on the leadership of the Fire Council with the Mayor. You have the trust of the Mayor. The Mayor knows that you are loyal to him.

Appendix B

You have the support of the PBA.

You have the support of the Board of Trustees.

You have the support of the religious, business, and community organizations and leaders in Freeport.

You have the support of the Freeport residents. You have the support of the retiring Chief of Police.

You are appointed Chief of Police by the mayor. Notwithstanding all of this, you are nevertheless identified by a person who didn't get the job for the world to see, for your children to see, for your friends to see, for your fellow police officers and firefighters to see. You are labeled a woefully unqualified minority. You heard that from him. I showed you the Complaint. Imagine the indignity that you must feel after having all of those qualifications being called a woefully unqualified minority.

Miguel Bermudez does not have to imagine that he has had to live with that for five years. That man's lawsuit was started with this lie, woefully unqualified minority. And if there could be anything more disgusting than the racist lie that he put in a public document against [839]Mr. Barrella, it was that he knew it was a lie when he said it.

I told you in my opening statement I'll get him on the stand and I would have him admit that it was a lie, and he admitted it. He admitted that Mr. Bermudez was qualified. And you want to know the truth? Don't believe me, don't believe Mr. Corbett. Mr. Bermudez was more

qualified than Mr. Barrella. How do we know? Because Chief Woodward told us so.

This is what Chief Woodward said about him, "I felt he needed more experience in a command position to interact more with the public, before he could have a position that would engage in regular public conduct."

"He can be the abrasive."

"He's not a diplomat."

And with regard to being Chief of Police, Chief Woodward said, he wasn't ready for that. Chief Woodward told that to Trustee White. He told that to Trustee Kennedy. Howard Colton said the same thing to Mayor Hardwick. Howard Colton testified Mr. Barrella was his friend. He said the same thing to Mayor Hardwick.

Now, also imagine you were born and raised in a village. You live your entire life in a village. You served and defended your country for ten years in the military. You come back to the village that you love and [840]you become active in the community. You put your life on the line also as a volunteer firefighter. You decide to run to be mayor, and you are elected mayor.

You are told that your first choice is a white Irish man who is a police officer from Nassau County that can't be your chief of police. You try to make him the Police Commissioner. You are told by the Village attorney you can't do that.

So, you are now left with one of three choices to become the Chief of Police. One of those candidates you have known for many decades. There is one candidate that you have been friends with for many decades. There's one candidate with whom you have served in the Fire Department. One candidate that you served in a leadership position on the Fire Council. There's one candidate that you know of and witnessed personally his love and commitment for that Village. There's one candidate that you trust. There's one candidate that you know would be loyal to you. There's one candidate that served as Acting Chief for eight months. There's one candidate that in your opinion had the overwhelming support of the residents, the Board of Trustees, the religious, business and community leaders in Freeport, of the Police Benevolent Association, of everybody. There is one candidate that you knew that the residents would like because he lived in that Village.

[641]In contrast, imagine that as mayor you have another candidate who you couldn't pick out of a lineup, notwithstanding the fact that he worked in the Village for 25 years and you lived in the village your entire life, you didn't know him from Adam. You had no with relationship with him. You had no trust with him. There was no support from the retiring Chief of Police. There was no support from the residents. There was no support from anyone for that other candidate.

This candidate lived 31 miles way, and this candidate didn't even apply for the position of Chief of Police until he found out that the other guy was selected for the job.

Now, imagine, imagine being called a racist for this decision. Imagine being called a racist because of the fact only that the last name of the person you appointed was named Bermudez, and that the color of your skin is black. That's what this man is accusing Mayor Hardwick of, of being a racist.

But Mayor Hardwick didn't have to imagine that, because that's what is being charged against him without a shred of evidence, other than his skin color and the last name of Mr. Bermudez.

[642]MR. NOVIKOFF: (Continuing.)

This lawsuit started with a lie, woefully unqualified minority, it didn't stop there. There were numerous falsehoods from plaintiff's counsel in opening statement. There are too many to go through. I'm going to read you some. Plaintiff's counsel said that she would show evidence that Mayor Hardwick instituted legislation and started a lawsuit specifically to get Mr. Bermudez the position. Where was that evidence? She said that Mayor Hardwick tried to promote a completely unqualified African-American to the position of assistant chief. Where was that evidence? It's not there.

Plaintiff's counsel said all over the village the mayor hired and promoted minority candidates at the expense of Caucasians, who were forced out. Where was the evidence of that?

Plaintiff's counsel also said the mayor demoted, terminated and otherwise force out Caucasians in the vast majority of department head posts in the village and hired and promoted minorities to replace them. Where was the evidence of that? There is no evidence.

All she did, and co-counsel did was parade a list of witnesses who it was shown had axes to grind against the mayor.

THE COURT: You have five minutes.

[643]MR. NOVIKOFF: Thank you, your Honor.

And all you need to look at is john Maguire's testimony. He was shown to be a liar, an absolute liar. On cross-examination he testified inconsistently, materially inconsistent. But what did he tell the truth about? That the racist, Mayor Hardwick, according to Mr. Barre11a, wanted to appoint a white Irish cop. That he had to admit.

Also, look at him, he's white and Irish. Nevertheless the racist Mayor Hardwick appointed him with the board of trustee approval to be the chief of staff. White. Howard Colton, white Jewish man, village attorney. Doesn't seem to be something that a racist would do, that the two most important people that he's going to rely on day to day were white, nonHispanic.

Doesn't seem to be a racist to me, in the first choice you wanted was a white Irish man. The judge, Judge Wexler will instruct you on the law. You are going to be told that

the plaintiff must by a preponderance of the evidence show that race was a motivating factor. Not factor, but a motivating factor. Now, as Mr. Corbett says, what is a motivating factor? Judge Wexler will define that for you. It's going to be quote "a motivating factor is a determining factor that moved, that moved defendants towards the employment decision that was made. [644]Determining means exactly what it sounds like, to determine, to decide, causing something to occur or be done in a particular way, serving to decide something, to be the cause or the reason for.

Judge Wexler will also tell you that the reasons that Mayor Hardwick gave were legitimate and nondiscriminatory, and that in order for you to find that it was intentional discrimination, you should look to see if those reasons were lies. And if the real reason was race. There is no evidence to support that. There is zero evidence to support that.

There is no evidence that these were lies. There is no evidence that race blade any factor. And there is certainly no evidence that the race of Mr. Bermudez or the last name of Mr. Bermudez played a determining role or a deciding role or caused or was the reason for his selection to be Chief of Police.

Mr. Corbett is right. We would not be here if Mayor Hardwick was white.

Put an end once and for all to plaintiff's lies. Remember, he failed the test and he cried racism. This

is what he does. He doesn't get something that he likes professionally, he cries racism. Put an end to it. Give Bermudez back his dignity, let him walk away with his head held high, knowing that he deserved that position, and [645]tell Freeport that their former mayor was not racist. Thank you for your time.

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[647](Whereupon, the jury retired from the courtroom.)

MR. ROONEY: We believe you're going to need some curative instructions based upon some things that were said.

[648]THE COURT: Denied.

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[663]THE COURT: I'm sure at the end of each segment plaintiff has some things that he wants to put on the record.

Okay, counsel, what do you want to put on the record now?

MR. ROONEY: Your Honor, they repeatedly in their closing said that we had to show that it was a determining factor, they said it three times, and we thought jury should get a curative instruction on that subject.

Second --

THE COURT: Denied.

Go ahead.

MR. ROONEY: Most of Mr. Novikoff's argument was a golden rule argument asking the jury to put themselves in his the place of Miguel Bermudez, and we didn't think that was appropriate either.

THE COURT: Denied.

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APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MAY 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 17-446

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of May two thousand eighteen.

CHRISTOPHER BARRELLA,

Plaintiff-Appellant,

v.

VILLAGE OF FREEPORT
AND ANDREW HARDWICK,

Defendants-Appellees.

ORDER

Appellant, Christopher Barrella, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix C

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/_____