No. 18-423

In The
Supreme Court of the United States

CHRISTOPHER BARRELLA,

Petitioner,

v.

VILLAGE OF FREEPORT, ET AL.,

Respondent.

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Statutes

Rules

Other Authorities

STATEMENT

The Golden Rule argument refers to the Biblical Golden Rule commonly stated as: Do to others as you would have them do to you.[1][2] The rule prohibits the use of arguments that ask the jury to consider what they would wish to receive in damages if they were the claimant. A golden rule argument suggests to jurors that they put themselves in the shoes of one of the parties with respect to damages. F.W. Woolworth Co. v. Wilson, 74 F.2d 439 (5th Cir. 1934). [3]

Judges regularly instruct juries to decide the case before them without "prejudice, sympathy, fear, favor or public opinion." Caudle v. District of Columbia, 707 F.3d 354, 363 (D.C. Cir. 2013), citing 3 Kevin F. O'Malley et al., Federal Jury Practice & Instructions: Civil § 103:01 (6th ed. 2011). An example of a prohibited Golden Rule argument is when a plaintiff's attorney in a personal injury case delivers a closing argument in which he asks the members of a jury to consider during deliberations the value of the "loss of your legs… the limitation in your enjoyment of life, pain, further medical treatment…" Granfield v. CSX Transp., Inc., 597 F.3d 474, 491 (1st Cir. 2010). All circuits to have considered the issue have found the invocation of a Golden Rule argument at a jury trial

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[1] Luke 6:31 and Matthew 7:12.

[2] See Edward J. McCaffery et. al., Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards, 81 Va. L. Rev. 134, 1, 1383 (1995).

[3] See also, Burrage v. Harrell, 537 F.2d 837, 839 (5th Cir. 1976); see, e.g., Skaggs v. J.H. Rose Truck Line, Inc. 435 F.2d 695 (5th Cir. 1970); Har-Pen Truck Lines, Inc. v. Mills, 378 F.2d 705, 714 (5th Cir. 1967); Johnson v. Howard, 24 Fed.Appx. 480, 487 (6th Cir. 2001).

with respect to damages to be improper. However, depending upon the circumstances of the case, improper use of this tactic may be remedied by the trial court's limiting instructions to the jury or it may require a new trial.[4]

However, the use of a Golden Rule argument will not necessarily be so prejudicial as to require a new trial, especially when liability in a case is otherwise clear.[5]

The Second, Fifth, Tenth and Eleventh Circuits distinguish between "golden rule" arguments when made in the context of liability and permit such arguments, holding that this type of argument does

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[4] Caudle, 707 F.3d at 359; See, e.g., Granfield, 597 F.3d at 491 (acknowledging that Golden Rule arguments are universally condemned, but finding that the "use of such language is [not] per se reversible error"); Loose v. Offshore Navigation, Inc., 670 F.2d 493, 496-97 (5th Cir. 1982) (recognizing that the use of a Golden Rule argument does not necessarily "create immutable error" when the judge appropriately instructs the jury, but reversing the jury verdict and remanding for a new trial where, among other things, the judge overruled defendant's objection to such argument because its use can "so taint a verdict as to be grounds for a new trial,"); Leathers v. General Motors Corp., 546 F.2d 1083 (4th Cir. 1977) (rejecting defendant's argument that invoking the Golden Rule, on its own, is reversible error): cf. Klotz v. Sears, Roebuck & Co., 267 F.2d 53, 55 (7th Cir. 1959) (finding that despite the district court's jury instruction, the use of the Golden Rule argument in connection with damages was so prejudicial that it warranted a new trial).

[5] See, eg., Spray-Rite Service Corp. v Monsanto Co. (1982, CA7 Ill) 684 F2d 1226, 1982-2 CCH Trade Cases ¶64808, 11 Fed Rules Evid Serv 226, 34 Fed Rules Evid Serv 2d 698, cert gr (US) 75 L Ed 479, 103 S Ct 1249, infra.

not unfairly arouse the jury's sympathy. Burrage v. Harrell, 537 F.2d 837 (5th Cir. 1976).[6]

Petitioner asserts that at the trial of this case, counsel for Andrew Hardwick made a "golden rule" argument to the jury in the context of liability. Petitioner also asserts that because some Circuits condemn "golden rule" arguments in the context of both liability and damages a circuit split exists that must be resolved. Respondent Village respectfully asserts that Hardwick's counsel did not make impermissible "golden rule" remarks during his closing argument. Additionally, the Village submits that the question of whether to apply the condemnation of the "golden rule" argument to statements made in the context of liability is not one of such great importance that the Court must resolve in order to prevent vastly differing decisions among the courts. Respondent Village also submits that the decision made by the Second Circuit in this case to uphold its precedent is correct and should not be disrupted. Barrella v. Village of Freeport, 714 F. App'x 78 (Mem.) (2nd Cir. 2018). App. 1a-5a.

Further, the decision below should not be disrupted, as even assuming arguendo the closing argument of Hardwick's counsel can be considered an impermissible "golden rule" argument, it does not result in reversible error. Throughout the course of the trial below, the District Court provided several instructions to the jury on the law, instructed the jury on what evidence is several times and instructed the jury properly on how to assess liability and damages. It is respectfully submitted, there is no question the

[6] Johnson v. Celotex Corp., 899 F.2d 1281 (2nd Cir. 1990).

District Court provided a fair trial and there is no basis to disturb the verdict of the jury in this case. *See*: Gleason v. Noyes, 125 F.3d 855, 1997 WL 539679 (6th Cir. 1982); Diaz v. Alberts, No. 10-5939, 2013 WL 2322485 (E.D.Pa May 28, 2013)

STATEMENT OF THE CASE

A. Background & Procedural History

This case involves the appointment of a white male of Cuban descent as the Chief of Police of the Respondent, Incorporated Village of Freeport (hereinafter "Village Respondent"). The Petitioner, Christopher Barrella (hereinafter "Petitioner") himself is a white male of Italian descent who claims the black former Village Mayor, Respondent, Andrew Hardwick (hereinafter "Respondent Hardwick") discriminated against him, based upon his race, when non-party Miguel Bermudez (hereinafter "Chief Bermudez"), was appointed the Chief of Police of the Incorporated Village of Freeport Police Department.

The underlying action involves the Petitioner's employment discrimination claims for racial discrimination under 42 U.S.C. § 1981 et seq., and 41 U.S.C. § 1983 et seq., as well as Petitioner's claims for race and/or color discrimination under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e et seq., and the New York State Human Rights Law, Executive Law §§ 290 et seq.

In the Incorporated Village of Freeport, the Mayor has the sole authority to appoint a Chief of Police. The compensation for said position must be approved by the Village Board. All department heads of the

Incorporated Village of Freeport are appointed by the Village Board.

On November, 25, 2010, Chief Bermudez was appointed the Chief of Police of the Incorporated Village of Freeport. The Village Board approved the appointment of Chief Bermudez.

On January 25, 2012, the Petitioner commenced this action in the United States District Court for the Eastern District of New York.

The first trial of this matter was held on April 30, 2014 resulting in a jury verdict for the Petitioner, which was overturned and remanded for a new trial by the Second Circuit. Village of Freeport, 814 F.3d 594 (2nd Cir. 2016). On January 24, 2017, the retrial of this matter commenced before the District Court.

On January 30, 2017, the jury issued a defense verdict. The Petitioner appealed the jury verdict to the Second Circuit. The Second Circuit affirmed the judgment of the District Court. App. 1a-5a.

REASONS THE COURT SHOULD NOT GRANT THE PETITION

1. Counsel Did Not Make a Golden Rule Argument

The spirit of the "golden rule" prohibition is to avoid jury verdicts that are made based on juror's sympathies and personal interest. It is improper to invite the jury to evaluate the case as if they were in the position of one of the parties or victims because the thought is that people tend to want to award themselves a better result than to may be appropriate. Danner v. Mid-State Paving Co., 252

Miss. 776, 783 (Miss. 1965). "Golden rule" remarks are improper because they directly suggest that the jurors had personal stakes in the outcome of the case.[7] Remarks that implore the jury to ask themselves what kind of outcome they would want to see happen if they were one of the parties are improper.[8] The "golden rule" argument precedent applies to statements made asking the jury to place themselves in the shoes of a party, and do not apply to statements regarding nonparties to the action.[9] The Village Respondent respectfully submits that Respondent Hardwick's counsel did not engage in a "golden rule" argument by posing a hypothetical situation to the jury in which he asks the jury to imagine that they had a similar background and were similar in other respect to Chief Bermudez, a nonparty to the action.

Asking the jury to put themselves in the shoes of nonparty, Chief Bermudez does not elicit the type of bias that is intended by the prohibition of the "golden rule" argument. Asking the jury to consider if they were in the position that Chief Bermudez does not ask the jury to consider if they had a personal

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[7] United States v. Hunte, 559 Fed.Appx. 825, 833 (11th Cir. 2014);

[8] Beaumaster v. Crandall, 756 P.2d 988 (1978)(Since the argument implores the jurors to put themselves in the position of the defendants, and then asks themselves what kind of outcome they would wish under the circumstances, most courts will reverse a judgment where there has been an objection and no attempt to correct the impression created by such an argument or where such an argument has been otherwise potentially harmful.)

[9] Id. See, also, F.W. Woolworth Co. v. Wilson, 74 F.2d 439 (5th Cir. 1934); See also, Johnson v. Celotex Corp., 899 F.2d 1281 (2nd Cir. 1990); Burrage v. Harrell, 537 F.2d 837 (5th Cir. 1976).

stake in the outcome of the case. This case is distinguishable to those cited by Petitioner that found that improper "golden rule" arguments were made at trial because in this case, the only remarks that Petitioner's counsel requested a curative instruction for were those made regarding Chief Bermudez, who is not a party to this litigation.

As set forth by Petitioner's counsel at trial:

> "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."

App. 2a (p. 663 of trial transcript, January 30, 2017.)

Petitioner's counsel's request was only for a curative instruction regarding comments made, asking the jury to put themselves in Miguel Bermudez's position. The caselaw on the "golden rule" argument is clear that it is inappropriate for counsel to ask the jury to put themselves in the shoes of a party when concerning damages. F.W. Woolworth Co. v. Wilson, 74 F.2d 439 (5th Cir. 1934).[10] Counsel's comments, asking the jury to "imagine themselves" as Chief Bermudez are not impermissible "golden rule" comments even on the strictest standard as Chief Bermudez is not a party to the litigation.

The Respondent Village respectfully submits that counsel for Respondent Hardwick did not engage in

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[10] See also, Johnson v. Celotex Corp., 899 F.2d 1281 (2nd Cir. 1990); Burrage v. Harrell, 537 F.2d 837 (5th Cir. 1976).

an impermissible "golden rule" argument during his closing argument at trial.

All circuits that have considered the issue of the permissibility of a "golden rule" argument have ruled that it is impermissible with respect to damages. F.W. Woolworth Co. v. Wilson, 74 F.2d 439 (5th Cir. 1934). In the case at bar, it is undisputed, as acknowledged by the Petitioner in his petition, and is held by the Second Circuit, counsel did not make "golden rule" statements in the context of damages.

2. The Second Circuit's Decision Was Correct

The Second Circuit held that the District Court did not abuse its discretion in denying a curative instruction regarding the "Golden Rule."

The Second Circuit held, in pertinent part:

> 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 (2nd 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.

Petitioner's App. 4a.

The "golden rule" argument is prohibited only where it is used to inflame the jury and encourage and increase a damages award. Johnson v. Celotex Corp., 899 F.2d 1281 (2nd Cir. 1990).[11] The fear is that jurors will consider what they would want if they were the victim or the plaintiff and inflate damages in a self-interested way. Johnson v. Celotex Corp., 899 F.2d 1281 (2nd Cir. 1990); Burrage v. Harrell, 537 F.2d 837 (5th Cir. 1976).

The circuits agree that "the rationale for prohibiting a "golden rule" argument is that the jury's sympathy will be unfairly aroused, resulting in a disproportionate award of damages." Burrage v. Harrell, 537 F.2d 837 (5th Cir. 1976). Further, the

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[11] See also, Burrage v. Harrell, 537 F.2d 837 (5th Cir. 1976)(finding that arguments related to the reasonableness of the defendants actions under emergency conditions was not an impermissible "Golden Rule" argument;
Hymel v. UNC, Inc., 68 F.3d 467, 1995 WL 581622 at 5 (5th Cir. 1995)(unpublished)(finding no error in the trial court allowing the plaintiff to use the Golden Rule argument regarding the merits of defendant's defense of a factual error and stating "Our case law forbids the Golden Rule argument only in relation to damages");
Stokes v. Delcambre, 710 F.2d 1120, 1128 (5th Cir. 1983)("The use of the Golden Rule argument is improper only in relation to damages. It is not improper when urged on the issue of ultimate liability;"

Second, Fifth, Tenth, and Eleventh Circuits find that such a result is not found when the "golden rule" is used in situations that relate to liability. Johnson v. Celotex Corp., 899 F.2d 1281 (2nd Cir. 1990) (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…the remaining two instances were determined to be of a nature that would not unduly affect the jury in light of the judge's charge); Burrage v. Harrell, 537 F.2d 837 (5th Cir. 1976) (The rationale for prohibiting [golden rule] arguments is that the jury's sympathy will be unfairly aroused, resulting in a disproportionate award of damages); Shultz v. Rice, 809 F.2d 643 (10th Cir. 1986) (Finding that the "golden rule" cases deal with arguments in which the jury is exhorted to place itself in a party's shoes with respect to damages); McNealy v. Oceala Star-Banner Corp., 99 F.3d 1068 (11th Cir. 1996) (An impermissible golden rule argument is an argument in which the jury is exhorted to place itself in a party's shoes with respect to damages).

In fact, in cases involving qualified immunity and excessive force, the jury is actually required to place themselves in the shoes of a reasonable officer on the scene and to evaluate the situation with only the information then-available to the officer. Valdes v. Miami-Dade County, 2015 WL 7253045 (S.D. Fl. 2015).

The Second Circuit's declination to change its "golden rule" precedent is correct, as the use of "golden rule" arguments should be permitted when

made in the context of liability. The Second Circuit's precedent correctly identifies the distinction between "golden rule" arguments made in the context of damages as opposed to liability. Johnson v. Celotex Corp., 899 F.2d. 1281 (2nd Cir. 1990).

Despite the Petitioner's assertions that the distinction between liability and damages recognized by the Second, Fifth, Tenth, and Eleventh Circuits is unsupported, this distinction is regularly identified and upheld in all four circuits. A jury being asked to put themselves in the place of a party when determining any kind of liability, including issues related to a witness's credibility, does not disable the jury from sympathizing with a party in the way that it does in the context of damages. Thus, the reasoning of the Second Circuit in upholding its precedent regarding the "golden rule" argument is supported and the jury award should not be disturbed in this case.

3. The Circuit Split Does Not Need To Be Resolved

Petitioner argues that the circuit split results in discrepancies effecting how the reasonable person standard is applied. This argument is incorrect, as precedent holds that with proper instruction of the law, the existence of improper "golden rule" arguments alone do not warrant a new trial. See, Gleason v. Noyes, 125 F.3d 855, 1997 WL 539679, at 2 (6th Cir. Aug. 29, 1997) (unpublished table opinion) (noting that improper statements made during closing statement did not warrant reversal in

part because a jury instruction provided that statements of counsel are not evidence).[12]

The Village Respondent respectfully submits that the "golden rule" argument and the question of whether to condemn these arguments in the context of liability is not a question of such importance that the Court must resolve.

Petitioner, in his petition, asserts that courts in the circuits that bar golden rule arguments regarding liability grant new trials. However, that is a mischaracterization, as the majority of the cases in circuits that find "golden rule" arguments improper in both liability and damages contexts, have declined to grant new trials for this reason. In fact, the only case cited by Petitioner in his petition where a Circuit Court granted a new trial based on a finding that counsel made a "golden rule" argument at trial in the context of liability was the D.C. Circuit case, Caudle v. District of Columbia. [13]

In Insurance Co. of North America, Inc. v. U.S. Gypsum Co., Inc., despite finding that it was "improper to ask jurors to place themselves in the position of a party," the Fourth Circuit held that such a statement does not constitute reversible error and declined to grant a new trial on that basis.

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[12] See also, United States v. Smith, 918 F.2d 1551, 1562 (11th Cir.1990)(Because statements and arguments of counsel are not evidence, improper statements can be rectified by the district court's instruction to the jury that only the evidence in the case be considered).

[13] Caudle v. District of Columbia, 707 F.3d 354 (D.C. 2013).

Ins. Co. of North America, Inc. v. U.S. Gypsum Co., Inc., 870 F.2d 148 (4th Cir. 1989). Similarly, in Joan W. v. City of Chicago, the Seventh Circuit opined that no distinction should be made between liability and damages and that "golden rule" arguments are impermissible in the context of both. However, the Seventh Circuit held that the impermissible statements made by counsel asking the jury, "how would you feel," asking the jury to put themselves in the shoes of the victim in the case, did not result in reversible error. Joan W. v. City of Chicago, 771 F.2d 1020, 1022 (7th Cir. 1985) (Although the judge did overrule the City's objection to the Golden Rule argument and did not give a limiting instruction, we have noted that any prejudice can often be cured simply by a general instruction that properly informs the jury on the law of damages, citing Spray-Rite Services Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982), aff'd, 465 U.S. 752, 104 S. Ct. 1464, 79 L.Ed2d 775 (1984).

In Michigan First Credit Union v. Cumis Ins. Soc., Inc., the Sixth Circuit found it improper for counsel to invite jurors to "think of your own insurance claim" during counsel's closing argument. Despite holding that the argument was inappropriate, the Sixth Circuit declined to grant a new trial. Michigan First Credit Union v. Cumis Ins. Soc., Inc., 641 F.3d 240 (6th Cir. 2011).

In Edwards v. Philadelphia, 860 F.2d 568 (3rd Cir. 1988), the Third Circuit declined to disturb the jury verdict rendered in the District Court, despite opining that counsel engaged in an impermissible golden rule

argument. Edwards v. Philadelphia, 860 F.2d 568 (1988) (Despite declining to give an immediate curative instruction to the jury regarding impermissible "golden rule" arguments, the District Court did not commit reversible error and a new trial was not warranted.)

The differing approaches by the Circuits regarding the "golden rule" argument is not an issue of such importance that is directly leading to vastly differing results, as proclaimed by the Petitioner. The decision that some Circuits have made to extend the prohibition of "golden rule" arguments to statements made in the context of liability is not a determining factor in whether a new trial is granted. Much more weight is given to the trial court's instructions to remedy any inappropriate comments made by attorneys in closing arguments.

Even if the purported "circuit split" is one that the Court determines should be resolved, this is not the case to resolve it, as the remarks at the closing arguments of this trial were not "golden rule" arguments because the remarks did not apply to a party or a victim.

4. Even If Counsel Made An Impermissible Golden Rule Argument, It Did Not Result in Reversible Error

Assuming arguendo a "golden rule" argument is made in a case, and that it is improper, that does not, alone, serve as a basis for a new trial. The court must ascertain if the trial court committed reversible error.

The law is clear that although it is improper to ask jurors to place themselves in the position of a party, such a "golden rule" argument does not constitute reversible error if no prejudice arises from counsel's comment. See, Arnold v. Eastern Airlines, Inc., 681 F.2d 186, 199–200 (4th Cir.1982), cert. denied, 460 U.S. 1102, 103 S.Ct. 1801, 76 L.Ed.2d 366 on rehearing, Arnold v. Eastern Airlines, Inc., 712 F.2d 899 (4th Cir.1983), cert. denied 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984).

The relevant inquiry is not whether arguments made were improper but whether the District Court's response or lack of response, to the remarks was a prejudicial abuse of discretion. Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 197 (4th Cir.1982), cert. denied, 460 U.S. 1102, 103 S.Ct. 1801, 76 L.Ed.2d 366 (1983); accord Shroyer v. Kaufmann, 426 F.2d 1032, 1034 (7th Cir.1970). "Naturally, in reviewing questions concerning remarks alleged to have misled the jury, we give great weight to the district judge's judgment." Joseph v. Brierton, 739 F.2d 1244, 1248 (7th Cir.1984).

The circuits also agree that a factor to consider when determining if a "golden rule" argument serves as a basis for a new trial is whether the trial court instructed the jury properly on the law, how to analyze liability and damages, what evidence is, and what the reasonable person standard is, should that apply.[14]

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[14] Joan W. v. City of Chicago, 771 F.2d 1020, 1022 (7th Cir. 1985) (Although the judge did overrule the City's objection to the Golden Rule argument and did not give a limiting instruction,

An analysis of the District Court's discretion to refuse to give a curative instruction when an attorney engages in a golden rule argument establishes that the District Court instructed the jury properly. Judge Wexler's instructions to the jury were clear on what constitutes as evidence and how the jury should assess liability and damages. Judge Wexler's instructions on the law of discrimination were also clear.

The Trial Court gave the following instructions, in pertinent part, before the closing arguments from both sides were heard:

> As I said a number of times, what lawyers say is not evidence. The evidence is documents received in evidence and what

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we have noted that any prejudice can often be cured simply by a general instruction that properly informs the jury on the law of damages, citing Spray-Rite Services Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982), aff'd, 465 U.S. 752, 104 S. Ct. 1464, 79 L.Ed2d 775 (1984). See also, United States v. Smith, 918 F.2d 1551, 1562 (11th Cir.1990)(Because statements and arguments of counsel are not evidence, improper statements can be rectified by the district court's instruction to the jury that only the evidence in the case be considered); See also, Gleason v. Noyes, 125 F.3d 855, 1997 WL 539679, at 2 (6th Cir. Aug. 29, 1997) (unpublished table opinion) (noting that improper statements made during closing statement did not warrant reversal in part because a jury instruction provided that statements of counsel are not evidence); See also, Diaz v. Alberts, No. 10-5939, 2013 WL 2322485 at 10-11 (E.D.Pa May 28, 2013)(The Court of Appeals unambiguously held that, in cases where such advocacy is employed a clear and complete jury instruction on the elements of the claim asserted and on the allocation of the burdens of proof, whenever given, is sufficient to cure harm caused by a Golden Rule argument).

> witnesses have said, whether on direct or cross. Now, there's always objections made concerning what a lawyer is saying. I never even consider them and deny them, because I keep saying what lawyers say is not evidence. So they can tell you whatever they want, I don't care. That is not evidence. So you know what the evidence is.

App. 2a. (Page 611 of trial transcript, January 30, 2017.)

The Trial Court gave the following instructions, in pertinent part, after closing arguments were heard from all sides:

> Now, the evidence on which you are to decide the facts comes in several forms, sworn testimony of witnesses, both on direct and on cross-examination and regardless of who called them; exhibits that the Court received in evidence; and facts to which the lawyers agreed or stipulated. And again, evidence, what lawyers have said is not evidence, whether its in the opening, during trial or even the closing. You do not get evidence from lawyers. You get it through evidence that's received and the documents that are received. Certain things are not evidence. I've just gone through them. Statements or arguments of lawyers are not evidence, objections to questions are not evidence….

App. 2a. (p. 650 of trial transcript, January 30, 2017.)

The Trial Court gave the following instructions to the jury after the attorney's closing arguments, as to how they should evaluate and assess liability and damages:

> In determining whether plaintiff's race was a motivating factor for the failure to appoint him, you must consider any evidence of intent submitted by all sides.
> A motivating factor is a determining factor that moved defendants towards the employment decision that was made… Plaintiff bears the ultimate burden of proving to you by a preponderance of the evidence that his race was a motivating factor in defendants' failure to appoint him Chief of Police.
> Damages means the amount of money that will reasonably and fairly compensate plaintiff for harm proximately caused by defendants… Damages are not based on speculation or sympathy.

App. 3a. (p. 654 of trial transcript, January 30, 2017.)

Trial courts are given wide discretion and deference, because the proper curative measure for a "Golden Rule" argument depends upon the nature of the case, the emphasis upon the alleged impermissible argument, the reference in relation to the entire argument, and the likely impact or effect upon the jury. Edwards v. City of Philadelphia, 860 F.2d 568, 574 (3rd. Cir. 1988). The trial court is necessarily better situated to evaluate all of the

factors and the statements in the context of the whole trial. Ins. Co. of North America, Inc. v. U.S. Gypsum Co., Inc., 870 F.2d 148 (4th Cir. 1989).

Accordingly, as the District Court has the superior vantage point in assessing the context and effect of the alleged "golden rule" arguments made and gave the appropriate instructions to the jury on what evidence is and how to evaluate liability and damages, the District Court did not abuse its discretion in denying Petitioner's counsel's request for a curative instruction. Therefore, a new trial is not warranted.

CONCLUSION

The Petitioner's petition for a writ of certiorari should be denied.

Dated: January 14, 2019

Respectfully submitted,
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APPENDIX- 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 STATE 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 CAPCITY,
Defendants.

United States Courthouse
Central Islip, New York

January 30, 2017
9:30 a.m.

TRANSCRIPT OF TRIAL

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

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[611] THE COURT: Be seated. We are now going to have the summation by the lawyers. As I said a number of times, what lawyers say is not evidence. The evidence is documents received in evidence and what witnesses have said, whether on direct or cross.

Now, there's always objections made concerning what the lawyer is saying. I never even consider them and deny them, because I keep saying what lawyers say is not evidence. So they can tell you whatever they want, I don't care. That's not evidence. So you know what the evidence is…

[663] 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.

[650] …Now, the evidence on which you are to decide the facts comes in several forms, sworn testimony of witnesses, both on direct and on cross-examination and regardless of who called them; exhibits that the Court received in evidence; and facts to which the lawyers agreed or stipulated. And again, evidence, what lawyers have said is not evidence, whether its in the opening, during trial or even the closing.

You do not get evidence from lawyers. [651] You get it through evidence that's received and the documents that are received.

Certain things are not evidence. I've just gone through them. Statements or arguments of lawyers are not evidence, objections to questions are not evidence….

[654] …In determining whether plaintiff's race was a motivating factor for the failure to appoint him, you must consider any evidence of intent submitted by all sides….

[655] …A motivating factor is a determining factor that moved defendants towards the employment decision that was made…

…Plaintiff bears the ultimate burden of proving to you by a preponderance of the evidence that his race was a motivating factor in defendants' failure to appoint him Chief of Police…

[657] …Damages means the amount of money that will reasonably and fairly compensate plaintiff for harm proximately caused by defendants… Damages are not based on speculation or sympathy…