No. 12-992

In the Supreme Court of the United States

RAY HALUCH GRAVEL CO., ET AL.,

Petitioners,

v.

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

MICHAEL K. CALLAN
JOSÉ A. AGUIAR
Doherty, Wallace, Pillsbury & Murphy, P.C.
One Monarch Place, Suite 1900
1414 Main Street
Springfield, MA 01144
(413) 733-3111

DAN HIMMELFARB
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
SCOTT M. NOVECK
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
dhimmelfarb@mayerbrown.com

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

In *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), this Court held that an award of attorney's fees was collateral, such that an earlier decision on the merits was a "final decision" under 28 U.S.C. §1291. The fees in *Budinich* were awarded under a statute. The Court granted certiorari in this case to resolve a circuit conflict on whether the same rule applies to attorney's fees awarded under a contract. Four circuits have held that a contractual fee award, like a statutory award, is *always* collateral, while four others—including the First Circuit below—have held that a contractual award is *sometimes* collateral, depending on whether it is a "merits" or "nonmerits" award. Only one circuit, the Eleventh, has held that, while a statutory fee award is always collateral, a contractual award *never* is.

The Eleventh Circuit thus disagrees with all the other circuits to have considered the question. And even that court has expressed doubt about the correctness of its rule, acknowledging that it was "sympathetic" to the view that the rule is inconsistent with *Budinich* and the "bright-line rule" this Court adopted. See Pet.Br.35-36.

Remarkably, in a case in which a First Circuit decision is under review, respondents do not defend that court's own rule, effectively conceding that it is incorrect. Respondents instead ask this Court—for the first time in the litigation, including the certiorari stage—to adopt the outlier Eleventh Circuit rule, which has been endorsed by no other court and barely has the support of the Eleventh Circuit itself. That is telling evidence that the rule we advocate is correct.

At bottom, the Eleventh Circuit's rule is wrong for the same reasons that the First Circuit's rule is wrong: it relies on a distinction between "merits" and "nonmerits" attorney's fees that *Budinich* expressly rejected; and, unlike the rule adopted in *Budinich*, it is neither a "uniform" nor a "bright-line" rule.

Respondents' principal defense of the Eleventh Circuit's position is that different rules for statutory and contractual attorney's fees are justified because all statutory fees are "nonmerits" fees and all contractual fees are "merits" fees. That is demonstrably erroneous. *Budinich* itself recognized that some statutory fees can be "merits" fees—and refused to treat them differently from "nonmerits" fees. Indeed, some statutory fee provisions look very much like the contractual provision at issue here. Conversely, many contractual fees are generally regarded as "nonmerits" fees, the most obvious being fees awarded to a "prevailing party." Respondents themselves said as much at the petition stage.

Respondents also defend the Eleventh Circuit's rule on the grounds that it avoids "piecemeal appeals" and provides more "clarity" than our rule. But this Court already rejected the former argument in *Budinich*. As to the latter, no rule could be clearer than that attorney's fee awards are collateral regardless of their source or characterization.

Finally, as an alternative basis for affirmance, respondents advocate a narrower rule: that, even if *Budinich* applies to contractual as well as statutory fees, it does not apply to either when the requested award includes "nonlitigation" fees, no matter how insignificant the amount. This fallback rule is no more consistent with *Budinich* than the First or Eleventh Circuit's rule. By substituting a "minimal-

ly nonlitigation"-"totally litigation" distinction for a "merits"-"nonmerits" distinction, it simply replaces one case-by-case, fact-intensive, and hard-to-apply rule with another.

A. The Eleventh Circuit's Rule Is Incorrect

The rule applied by the Eleventh Circuit—that statutory attorney's fees are always collateral and contractual fees never are—should be rejected because (1) it is irreconcilable with *Budinich* and (2) respondents offer no persuasive defense of it.

1. The Eleventh Circuit's rule is inconsistent with *Budinich*

a. The holding of *Budinich* rested on the need for "operational consistency and predictability" in the application of Section 1291 and the imperative that the time of appealability "should above all be clear." 486 U.S. at 202. *Budinich* thus rejected the view that there should be one rule for attorney's fees characterized as "part of the merits" by the "law authorizing them" and another rule for "nonmerits" fees. *Id.* at 201-202. Instead, it adopted a "uniform" and "bright-line" rule, *id.* at 202: that a decision leaving unresolved a request for attorney's fees is *always* final.

As our opening brief explains (at 23-31), the First Circuit's rule—according to which decisions that postpone a ruling on contractual attorney's fees are sometimes final and sometimes not, depending on the particular facts of the case—is inconsistent with *Budinich* because it (i) rests on a distinction between "merits" and "nonmerits" fees and (ii) is neither "uniform" nor "bright-line." Although respondents defended the First Circuit's rule at the petition stage, see Opp.25-29, they do not do so now, and instead

urge adoption of the Eleventh Circuit's rule. But the Eleventh Circuit's rule is inconsistent with *Budinich* for the same reasons.

As to the first, the sole difference between the Eleventh Circuit's rule and the First Circuit's is that they take a different view of what constitutes a "merits" award. Whereas the First Circuit treats only *some* contractual attorney's fees as "merits" fees, the Eleventh Circuit treats *all* contractual fees that way. But both circuits—unlike this Court in *Budinich*—rely on a distinction between "merits" and "non-merits" fees.

As to the second reason, the only difference between the Eleventh Circuit's rule and the First Circuit's is that—because of their different views of what constitutes a "merits" fee—they draw different lines between cases subject to one rule and those subject to another. Whereas the First Circuit applies one rule to all fees awarded under a statute and some fees awarded under a contract, and a different rule to other fees awarded under a contract, the Eleventh Circuit applies one rule to all fees awarded under a statute and a different rule to all fees awarded under a contract. But both circuits—unlike this Court in *Budinich*—apply one rule to one category of attorney's fees and a different rule to another. Neither circuit applies a "uniform" or "bright-line" rule.

b. Respondents insist that the line the Eleventh Circuit draws—"between contract and statute"—*is* a bright-line rule. Resp.Br.51. But the subject here is attorney's fees, not attorney's fees authorized by a particular source of law. "[T]he source of the power to award fees does not matter. The finality of a decision depends on the kinds of issues the court deter-

mines, not on the source of [its] authority ***." *Exch. Nat'l Bank* v. *Daniels*, 763 F.2d 286, 293 (7th Cir.) (Easterbrook, J.), reh'g granted in part on other grounds, 768 F.2d 140 (7th Cir. 1985). A "bright-line" rule therefore means that all attorney's fees are to be treated alike.

Budinich itself makes clear that its rule is "bright-line" in exactly the sense that it does *not* depend upon "the merits or nonmerits status" of each fee award. *Budinich*, 486 U.S. at 202. But that is just what the Eleventh Circuit's rule depends upon. Even if a contract-versus-statute rule could be thought to be a "bright-line" rule in some *other* sense, therefore, it is manifestly not "bright-line" in the sense that is relevant here.

Treating attorney's fees authorized by statute differently from those authorized by contract is no more a "bright-line" rule than treating one form of prejudgment interest differently from another. And this Court decided in *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 176 n.3 (1989), that two types of prejudgment interest—mandatory and discretionary—should *not* be treated differently for purposes of determining the finality of an earlier decision. On the contrary: quoting *Budinich*, *Osterneck* made clear that it was precisely because of the *need* for a "bright-line rule" that the two types of prejudgment interest should be treated *identically*. *Ibid.* The same is true of the two types of attorney's fees at issue here.

c. Respondents also insist that *Budinich* "did not reject" the "merits"-"nonmerits" distinction. Resp.Br.35 (internal quotation marks and brackets omitted). They interpret the decision to mean that "statutory fees are *always* on the nonmerits *** side

of the line," irrespective of "the characterization the statute uses." Resp.Br.34-35 (emphasis added). The implication seems to be that the merits fees that *Budinich* refused to distinguish from nonmerits fees were not "really" merits fees, but simply nonmerits fees inaccurately characterized by the law that authorized them. As a consequence, in respondents' view, the rule of *Budinich* does not apply when attorney's fees are "true" rather than *faux* merits fees—that is, when they are based on a contract rather than a statute.

This is an extraordinary assertion. There is no "brooding omnipresence in the sky," *S. Pac. Co.* v. *Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), that determines whether a particular attorney's fee award is "merits" or "nonmerits"; it is the positive law authorizing the award that does that. A statute that treats attorney's fees as part of the "merits" is no less conclusive as to the actual legal status of the fees than is a contract (or any other source of law) that treats them that way. And since, under *Budinich*, a fee award deemed part of the "merits" under a *statute* is treated as collateral, there is no basis for treating an award deemed part of the "merits" under a contract any differently.

The idea that statutory fees are always "nonmerits" fees is particularly hard to justify given the vast "number and variety" of statutory attorney's fee provisions, 1 Robert L. Rossi, *Attorneys' Fees* §6:19, at 6-71 (3d ed. 2013), and given also that many of them are not traditional "prevailing party" provisions but instead resemble the "costs of collection"

provision at issue here, which both the court below and respondents treat as a "merits" provision.[1]

d. In our opening brief (at 18-19, 36), we pointed out that the Eleventh Circuit's rule creates an additional problem of administrability in cases, like this, in which attorney's fees are sought under *both* a statute *and* a contract. Respondents argue that there is no problem in such cases, because, under the Eleventh Circuit's rule, "the disposition of the party's *contractual* fees claim alone will determine the time for appeal." Resp.Br.35. The reason for that, according to respondents, is that a contractual claim for fees is necessarily part of the merits, and so a decision will not be final until such a claim is resolved, whether or not there has been an award of *statutory* fees. Resp.Br.35-36.

As an initial matter, respondents' premise is incorrect, because *Budinich* makes clear that its rule applies even when a fee award is considered part of the "merits." But quite apart from that erroneous premise, *Budinich* demands a "practical approach," 486 U.S. at 202, and respondents' approach is not practical. On the contrary: in cases of this type in which fees are available under both a contract and a statute, respondents' rule would make the existence

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[1] See, *e.g.,* 16 U.S.C. §470aaa-6(b)(2) ("Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty *** shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings."); 33 U.S.C. §1319(g)(9) (same); 33 U.S.C. §1321(b)(6)(H) (same); 33 U.S.C. §3852(h) (similar); 42 U.S.C. §7413(d)(5) (similar); 42 U.S.C. §7524(c)(6) (similar); cf. JA26 (collective bargaining agreement) ("Any costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting Employer.").

of appellate jurisdiction turn on whether the request for fees mentioned the contract. If it *did*, a single notice of appeal filed after the decision on fees would suffice to bring both that decision and the earlier decision before the court of appeals. But if the request for fees mentioned only the *statute*, a court applying respondents' rule would likely conclude that the earlier decision could not be appealed unless a separate notice was filed for that decision.

The jurisdiction of federal courts of appeals should not depend on such a trivial and arbitrary distinction. And a jurisdictional rule should not require appellate courts, before proceeding to the merits, to scour the record to determine whether attorney's fees were sought under a statute, a contract, or both.[2]

2. Respondents' defense of the Eleventh Circuit's rule lacks merit

Respondents defend the Eleventh Circuit's rule on the grounds that (a) all contractual attorney's fees are "damages"; (b) the rule reduces "piecemeal appeals"; and (c) it provides greater "certainty" than the rule we advocate. Each claim is baseless.

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[2] Any assumption that litigants are always careful about such matters is belied by this very case. While the affidavit supporting respondents' motion for attorneys' fees mentioned both ERISA and the collective bargaining agreement, JA74, their "notice of motion" mentioned only ERISA, JA72. It is perhaps unsurprising, therefore, that the district court's order awarding fees mentioned only ERISA as well. See Pet.Br.19 n.4.

a. *The rule cannot be justified on the ground that all contractual attorney's fees are "damages"*

Respondents' primary defense of the Eleventh Circuit's rule is that a decision is not final until damages are awarded and that contractual attorney's fees, unlike statutory fees, are always damages. Resp.Br.19-36. That is wrong for three reasons. First, even if contractual attorney's fees *are* always damages, *Budinich* makes clear that its rule still applies. Second, contractual attorney's fees are *not* always damages. Third, the whole point of *Budinich* is to simplify the jurisdictional inquiry, including by avoiding esoteric questions about whether particular fee awards are "damages," "costs," or something else.

i. *Budinich* itself rejected the idea that attorney's fees considered "damages" are exempt from its rule. To begin with, the "damages"-"costs" distinction is just one version of the "merits"-"nonmerits" distinction, and *Budinich* categorically rejected the latter. Indeed, that "no distinction should be drawn" between merits and nonmerits fee awards is "[t]he central aspect" of the decision. 15B Charles A. Wright *et al.*, *Federal Practice & Procedure* §3915.6, at 329 (2d ed. 1992).

Budinich also rejected respondents' particular version of the distinction. In holding that "merits" and "nonmerits" fees should be treated the same, this Court expressly disagreed with a lower court decision, *Holmes* v. *J. Ray McDermott & Co.*, 682 F.2d 1143 (5th Cir. 1982), that had concluded otherwise. See *Budinich*, 486 U.S. at 198, 201. *Holmes* held that the initial decision in that case, which had not resolved a request for attorney's fees, was not final because "the award of attorney's fees to [the plaintiff]

was an element of *damages* for [the defendant's] willful and arbitrary denial of maintenance and cure," 682 F.2d at 1147 (emphasis added), a right that is contractual in nature, see Pet.Br.25-26. That holding, which *Budinich* rejected, is respondents' position here.

In fact, the *Holmes* decision that this Court rejected in *Budinich* is one of the foundational precedents for the Eleventh Circuit rule that respondents urge this Court to adopt in this case. *Holmes* was followed in *Ierna* v. *Arthur Murray International, Inc.*, 833 F.2d 1472, 1475 (11th Cir. 1987), which in turn was followed in *Brandon, Jones, Sandall, Zeide, Koh, Chalal & Musso, P.A.* v. *MedPartners, Inc.*, 312 F.3d 1349, 1355 (11th Cir. 2002) (per curiam), which is the post-*Budinich* Eleventh Circuit decision on which respondents rely here, see Resp.Br.20—and also the decision that was criticized by the Eleventh Circuit itself in a subsequent case, *Adeduntan* v. *Hospital Authority of Clarke County*, 249 F. App'x 151, 153-155 (11th Cir. 2007) (per curiam), as inconsistent with *Budinich*.

Respondents ignore *Holmes*, even though we discussed it in our opening brief (at 25-26). They do, however, cite *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962), for the proposition that "nonstatutory attorney's fees are damages, not 'costs.'" Resp.Br.29. *Vaughan* held that, while attorney's fees generally are not recoverable in federal court as part of the prevailing party's statutory "costs," they are recoverable as contractual "damages" in an action for maintenance and cure. 369 U.S. at 530. But *Vaughan* had nothing to do with appealability under 28 U.S.C. §1291, and it hardly supports the view that *Budinich*'s holding does not apply to contractual fee

awards. Quite the contrary: *Holmes* relied heavily on *Vaughan* in support of its holding that a decision leaving unresolved a request for nonstatutory attorney's fees is not final, *Holmes*, 682 F.2d at 1147 & n.7, and this Court rejected that holding in *Budinich*.

ii. Respondents' main defense of the Eleventh Circuit's rule is flawed for a second reason: not all contractual attorney's fees are in fact "damages." Before we explain why, it bears emphasis that respondents' submission necessarily depends on the idea that *all* contractual attorney's fees are "damages." Respondents do not contend, for example, that some contractual fees are "damages" and some "costs," and that their treatment for appealability purposes should vary depending on which they are. That is the position of the First Circuit, and respondents no longer defend it. Nor do respondents contend that some contractual fees are "damages" and some "costs," but that for appealability purposes they should all be treated as "damages." That would be the opposite of the position adopted by this Court in *Budinich*—which found that statutory fees may or may not be part of the "merits" but should all be treated as if they are not—and thus would be indefensible. So a necessary (though not sufficient) component of respondents' position is that all contractual fees are "damages." We now explain why they are not.

While it is possible to characterize *some* contractual attorney's fees as "damages" (as opposed to "costs"), it is not possible to characterize *all* of them that way. Even the First Circuit below, and the circuits with which it aligned itself, acknowledge that fact. Indeed, that is the very premise of the appealability rule they have adopted. Those courts recog-

nize, in particular, that an award of attorney's fees to the "prevailing party" under a contract is no more an award of "damages" than an award to the "prevailing party" under a statute.[3]

In defending the First Circuit's rule at the petition stage, respondents themselves endorsed this view. That contractual attorney's fees awarded as "damages" differ from those awarded to the "prevailing party," in fact, is one of the central themes of the brief in opposition. See, *e.g.*, Opp.10-15, 25-29.

On that issue at least, those four circuits (and respondents' prior position in this Court) are clearly correct. According to respondents, contractual damages "compensate[] the nonbreaching party for the injury suffered as a result of the breach." Resp.Br.26; see also Resp.Br.20. An attorney's fee award under a "prevailing party" provision—whether statutory or contractual—most certainly does *not* do that. As this Court explained in *Budinich* itself, "[s]uch an award does not remedy the injury giving

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[3] See *Carolina Power & Light Co.* v. *Dynegy Mktg. & Trade*, 415 F.3d 354, 362 (4th Cir. 2005) ("a contract [can] provide[] for an award of attorneys fees *** as costs to the prevailing party[] [or] as an element of damages"); *id.* at 363 (Wilkinson, J., concurring) ("contractual *** attorneys' fees [can be] remedial, i.e., an element of damages, or, *** awarded to a prevailing party as costs of the underlying action"); *Gleason* v. *Norwest Mortg., Inc.*, 243 F.3d 130, 138 (3d Cir. 2001) (finding "no difference *** between payment of attorneys' fees to a prevailing party under statute and payment of attorneys' fees under the contract to a 'prevailing party'"); *Ragan* v. *Tri-County Excavating, Inc.*, 62 F.3d 501, 505 (3d Cir. 1995) (contractual attorney's fees can be "sought as part of damages" or "as prevailing party"); see also Pet. App. 9a (decision below); *Justine Realty Co.* v. *Am. Nat'l Can Co.*, 945 F.2d 1044, 1047-1049 (8th Cir. 1991).

rise to the action, and indeed is often available to the party defending against the action." 486 U.S. at 200. That a *defendant* in a breach-of-contract action may be able to recover fees under a contractual "prevailing party" provision removes any possible doubt about whether such fees can be considered "damages," since a defendant will be able to recover in that circumstance only if there has *been* no breach.

In support of their new position at the merits stage, respondents rely principally, if not exclusively, on the idea that all contractual attorney's fee awards are "liquidated damages." Resp.Br.20-23. That is a curious theory, inasmuch as "liquidated damages" are "an amount of money fixed as damages" in the contract "that are to be payable in the event of breach." Restatement (Second) of Contracts §356 cmts. a & b (1981). An award of attorney's fees under a contract could therefore be considered "liquidated" only if "the parties specif[ied] the amount of such fees." *Id.* cmt. d. And even in that event, the fees could not be considered liquidated *damages* if they were made under a "prevailing party" provision, particularly if they were paid to a prevailing defendant.

No authority cited by respondents supports the view that *all* awards of contractual attorney's fees are "damages." And at least one authority supports the opposite view. Respondents quote (at 29-30) Professor Dobbs' treatise on remedies as follows: "When recovery of a fee award is permitted because the adversary has breached a duty to protect against [litigation] costs, the fee award is *damages*, not *costs*. One implication of this statement is that statutes and rules affecting *costs* thus have no bearing on such cases." Dan B. Dobbs, *Law of Remedies: Dam-*

ages-Equity-Restitution §3.10(3), at 286 (2d ed. 1993). But in the very next sentence, which respondents do *not* quote, Professor Dobbs says that "[a] second implication is that only one who is in the role of a plaintiff can recover attorney fees" under this principle and that "it is not enough to be a prevailing defendant to recover the fees discussed here." *Ibid.* When defendants recover contractual attorney's fees as the "prevailing party," in other words, the fees cannot be considered "damages."

Consistent with the decisions cited above (and with respondents' own position at the petition stage), Professor Dobbs' treatise thus supports the proposition that *some*, but not *all*, contractual attorney's fees are "damages." In fact, there is no reason to think that even a *majority* of contractual attorney's fee awards are "damages" (as opposed to "costs"), since bilateral "prevailing party" provisions are routinely included in commercial contracts.[4]

Treating contractual and statutory "prevailing party" awards differently is particularly unjustifiable because, while *Budinich* involved a *statutory* "prevailing party" provision, the underlying claim was *contractual*. 486 U.S. at 197. If respondents' position were correct, parties in contract actions would be subject to different rules depending on whether the "prevailing party" provision appeared in the con-

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[4] See, *e.g.*, *Buckhorn Inc.* v. *ORBIS Corp.*, ___ F. App'x ___, ___, 2013 WL 5273119, at *3 (Fed. Cir. 2013); *DocMagic, Inc.* v. *Mortg. P'ship of Am., L.L.C.*, 729 F.3d 808, 809 (8th Cir. 2013); *Dolphin LLC* v. *WCI Cmtys., Inc.*, 715 F.3d 1243, 1246 n.4 (11th Cir. 2013) (per curiam); *S. Walk at Broadlands Homeowner's Ass'n* v. *Open Band at Broadlands, LLC*, 713 F.3d 175, 186 (4th Cir. 2013); 1 *Attorneys' Fees* §9:25, at 9-64 n.4.

tract itself or in a statute that governed contract disputes. There is no sense in that.

The truth, in short, is that contractual attorney's fees are no different from statutory fees: the law sometimes treats them as distinct from the "merits" and sometimes as part of the "merits." Once this is understood, the foundation of respondents' position crumbles. If there is no difference between statutory and contractual fees in this respect, then there is no possible basis for applying *Budinich*'s rule to statutory but not contractual fees.

iii. There is a third reason to reject respondents' elaborate attempt to establish that all contractual (but not all statutory) attorney's fees are "damages": the enterprise itself is an illegitimate one. The whole point of *Budinich*'s emphasis upon "operational" over "conceptual" consistency, 486 U.S. at 202, is to avoid precisely this kind of theoretical hair-splitting about what is a "merits" (or "damages") fee award, as opposed to a "nonmerits" (or "costs") award.

The "distinction between fees that are 'compensation for injury' and those that are not" is "altogether too metaphysical." *Exch. Nat'l Bank*, 763 F.2d at 293. *All* fee awards, whether based on a statute, a contract, or some other source of law, "make the prevailing party better off." *Ibid.* Whether a particular award "is 'really' a way to compensate for the underlying hurt or instead a way to reduce the cost of litigation" is "a question of semantics rather than substance." *Ibid.* It is thus a question that is irrelevant under *Budinich*.

b. *The rule cannot be justified on the ground that it reduces "piecemeal appeals"*

Respondents also defend the Eleventh Circuit's rule on the ground that it avoids "piecemeal appeals." Resp.Br.16-18, 39-42. That is also wrong for three reasons: the same argument was rejected in *Budinich*; an immediate appeal limited to the merits can be *more* efficient than a later appeal of the merits and fees together; and the Federal Rules of Civil Procedure provide a mechanism for avoiding "piecemeal appeals" when it is not.

i. If avoidance of "piecemeal appeals" were a reason to treat attorney's fee awards as non-collateral, *Budinich* would have been decided differently. That consideration is no more weighty for contractual fee awards than for statutory awards. Yet *Budinich* determined that, because attorney's fees are ordinarily separate from the merits, the earlier decision is subject to appeal upon entry, and that the need for consistency and predictability requires that the same rule be applied to fees that are *not* separate from the merits. *Budinich* necessarily concluded, therefore, that these considerations outweigh whatever benefits there might be in avoiding "piecemeal appeals."

But *Budinich* did not merely reject respondents' argument by implication; it rejected it expressly. The Court explained that "an appeal of merits-without-attorney's-fees when *** the attorney's fees [are deemed] part of the merits is no more harmful *** than an appeal of merits-without-attorney's-fees when [they are not]"—and, in particular, that the former is not "in any way (except nominally) a more piecemeal enterprise" than the latter. *Budinich*, 486 U.S. at 202. The point is that, if avoiding "piecemeal

appeals" is not a reason to treat "nonmerits" attorney's fees as non-collateral, then it is not a reason to treat "merits" fees that way either.

In fact, *Budinich* makes clear that avoidance of "piecemeal appeals" is not a reason to treat even "merits" fees awarded under a *contract* as non-collateral. As we have mentioned, *Budinich* expressly disagreed with the Fifth Circuit's decision in *Holmes*. In holding that contractual attorney's fees are non-collateral for appealability purposes, *Holmes* relied not only on the idea that such fees are "damages," but also on "[t]he policies against piecemeal appeals." *Holmes*, 682 F.2d at 1148. This Court thus explicitly rejected a decision that relied on two of the same theories that respondents advance here.

ii. Respondents' argument in any event rests on a mistaken premise: that a single appeal is always superior from the point of view of "efficient judicial administration." Resp.Br.41 (internal quotation marks omitted). It is not.

When a fee request raises complex issues that could be materially affected—if not entirely mooted—by the resolution of the appeal of the merits, it may be more efficient for the appeal of the merits to go forward alone. See Fed. R. Civ. P. 58 advisory committee's notes (1993). Indeed, in this very case, the parties briefed fee issues in the court of appeals, only to have the First Circuit direct the district court to recalculate the fee award in light of its reversal on the merits. See Pet.App.18a (declining to issue "advisory" opinion on fees).

iii. It is particularly unnecessary to adopt the Eleventh Circuit's rule to afford "the opportunity to hear the appeal of the entire case in a single proceed-

ing," Resp.Br.41, because the Federal Rules of Civil Procedure already afford that opportunity. Five years after this Court decided *Budinich*, Rule 58 was amended to provide that, when judgment is entered and a motion for attorney's fees remains pending, the district court "may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." Fed. R. Civ. P. 58(e). Federal Rule of Appellate Procedure 4(a)(4), in turn, provides that the time to file a notice of appeal does not begin to run until the district court has disposed of a Rule 59 motion.

Thus, in cases in which it is "more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case," the amendment enables district courts "to delay the finality of the judgment for appellate purposes *** until the fee dispute is decided." Fed. R. Civ. P. 58 advisory committee's notes (1993). There is no need to adopt the Eleventh Circuit's flawed rule for that purpose. Oddly, respondents make no mention of Rule 58 in their brief on the merits, even though they relied heavily on it in their brief in opposition in making a different argument (which, like their defense of the First Circuit's rule, they have since abandoned). See Opp.30-35.

c. *The rule cannot be justified on the ground that it provides "clarity"*

Respondents also defend the Eleventh Circuit's rule on the ground that it provides more "clarity" than our rule. Resp.Br.36-38. They argue, in particular, that litigants will have to "guess" whether our

rule covers "non-attorney professional fees," and they use this case as an example of the supposed problem, pointing out that the district court's initial decision "left both attorney's fees *and* auditor's fees unresolved." Resp.Br.36.

This is a peculiar argument. The unresolved request for auditor's fees here was encompassed within a motion that respondents themselves characterized, repeatedly, as one for "attorneys' fees and costs," JA72, 74, 79, and the requested "audit fees and costs" ($6,537.00) were barely one twentieth of the requested "attorneys' and paralegals' fees" ($126,912.30)—indeed, they were less even than the requested "costs and disbursements" ($10,151.14), JA75, 79. The idea that a request for a modest amount of auditor's fees in a motion for attorney's fees and costs could by itself render inapplicable *Budinich*'s "uniform" and "bright-line" rule is a rather extravagant one. Still more extravagant is the idea that this is a reason to exempt *all* contractual attorney's fee awards from *Budinich*'s rule.

Respondents insist that applying *Budinich* in this situation creates "substantial uncertainty," Resp.Br.38, but there is nothing *at all* uncertain about the rule we advocate. The rule is this: when a district court decides a case but leaves unresolved a motion for attorney's fees, the decision is subject to immediate appeal under *Budinich*, whether the motion is made under a statute or a contract (or, as here, both), and whether or not the motion also includes a request for "professional fees" that arguably are not "attorney's fees."

Although respondents rely on the facts of *this* case in support of their argument, they seem at least as concerned that our rule leaves the status of *stand-*

alone motions for "non-legal" professional fees "up in the air." Resp.Br.37-38. But they provide no real-world example of any case involving such a motion. All we would say about such a case, if it ever arose, is that, whether or not *Budinich* applied in that situation (and it likely would), the rule should be the same for "merits" and "nonmerits" awards, and for statutory and contractual awards. That *Budinich* might *not* govern when a decision leaves unresolved a *stand-alone* request for "non-attorney professional fees," however, provides no basis for concluding that it should not govern here.

B. Respondents' Fallback Position Is Also Incorrect

As a fallback, respondents urge the Court to affirm on the basis of a narrower rule: that, even if *Budinich* applies to contractual as well as statutory fees, it does not apply to either type when the requested award includes "nonlitigation" fees, no matter how insubstantial the amount. Resp.Br.42-52. Respondents' alternative argument goes as follows: *Budinich*'s holding—that a decision on the merits leaving unresolved a request for attorney's fees is final when entered—is limited to attorney's fees "for the litigation," *Budinich*, 486 U.S. at 199, 201; some of the fees requested here—the auditor's and attorney's fees incurred before the complaint was filed—were not "for the litigation"; accordingly, the initial decision in this case was *not* final when entered. Respondents make this argument despite the fact that the so-called "nonlitigation fees" amounted to less than $9,000 of the total requested award of more than $143,000. See Resp.Br.7, 43.

This rule is every bit as flawed as the Eleventh Circuit's broader rule. Indeed, it shares many char-

acteristics with the First Circuit rule that respondents no longer defend.

As an initial matter, the references to attorney's fees "for the litigation" in *Budinich* simply mean that its rule does not apply to attorney's fees for a *prior* case—the relief sought, for example, when an attorney sues a former client for unpaid fees. See Pet.Br.30 n.8. That obviously is not the situation here. Both the "litigation" and the "nonlitigation" fees are "attributable to *th[is]* case," *Budinich*, 486 U.S. at 203 (emphasis added)—*i.e.*, the dispute over contributions to union-benefit funds.

But respondents' fallback theory would be meritless even if *Budinich* meant something different. With unintended irony, respondents claim that their narrower theory provides both "operational consistency and predictability" and a "bright-line rule." Resp.Br.49, 51 (internal quotation marks omitted). In truth it provides neither. A rule requiring courts and litigants to distinguish between "minimally nonlitigation" and "totally litigation" fees is every bit as inimical to the policies underlying *Budinich* as one requiring them to distinguish between "merits" and "nonmerits" fees. Respondents would just substitute one case-specific, record-intensive, and complicated rule for another.

To determine whether requested attorney's fees are part of the "merits," and not subject to *Budinich* for that reason, the First Circuit's rule requires an analysis of both the particular contract and the underlying claim in each case. See Pet.Br.26. Similarly, to determine whether requested attorney's fees include "nonlitigation" fees (no matter how small), and are not subject to *Budinich* for *that* reason, respondents' fallback rule would require an analysis of

the entire fee submission in each case. The one here, for a relatively straightforward dispute, runs to 135 pages in the joint appendix. JA64-198.

Any standard for distinguishing "merits" from "nonmerits" fees is also uncertain and difficult to apply. See Pet.Br.26-31. The same is true of the standard—whatever it may be—for distinguishing "nonlitigation" from "litigation" fees, and thus for determining whether a particular fee request includes *any* "nonlitigation" fees. Respondents say that the line should be drawn at the point where the complaint was filed. Resp.Br.42-49. But there is no question that at least *some* work antedating the complaint can be "for the litigation," however that term is understood. See Pet.Br.29-30. As respondents elsewhere concede, their fallback rule would therefore require courts to determine in each case whether any fees incurred before the complaint was filed are "sufficiently remote from the litigation" to constitute "nonlitigation" fees. Resp.Br.38 n.15.

Respondents insist that the very small size of the "nonlitigation" fees here should be "of no relevance" to the inquiry. Resp.Br.50. But it is quite relevant. If respondents could demonstrate that what they call "nonlitigation" fees commonly make up a substantial proportion of the amount requested in a motion for attorney's fees and costs, there could conceivably be a legitimate question whether *Budinich* should apply in that situation—despite the problems, in both principle and practice, that such an exemption would create. In fact, however, respondents cannot cite even *one* real-world example of an attorney's fees motion in which "nonlitigation" fees were anything more than a small fraction of the overall request. Logic and experience suggest, moreover, that they

rarely if ever will be. See Pet.Br.28-29. This shows that the justifications for respondents' fallback rule are especially uncompelling.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MICHAEL K. CALLAN
JOSÉ A. AGUIAR
Doherty, Wallace, Pillsbury & Murphy, P.C.
One Monarch Place, Suite 1900
1414 Main Street
Springfield, MA 01144
(413) 733-3111

DAN HIMMELFARB
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
SCOTT M. NOVECK
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
dhimmelfarb@mayerbrown.com

Counsel for Petitioners

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