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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

In *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), this Court held that a district court's decision on the merits that left unresolved a request for statutory attorney's fees was a "final decision" under 28 U.S.C. § 1291. The question presented in this case, on which there is an acknowledged conflict among nine circuits, is whether a district court's decision on the merits that leaves unresolved a request for *contractual* attorney's fees is a "final decision" under 28 U.S.C. § 1291.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners here, and defendants-appellees/cross-appellants below, are Ray Haluch Gravel Co.; Ray Haluch Inc., d/b/a Ray Gravel Co.; Ray Haluch, Inc., d/b/a Ray Haluch Gravel Co.; Ray Haluch Gravel Company, Inc., d/b/a Ray Haluch Gravel Co.; Raymond Haluch, individually and as an Officer of Ray Haluch, Inc. and Ray Haluch Gravel Company, Inc.; and Raymond Haluch, individually and d/b/a Ray Haluch Gravel Co.

Respondents here, and plaintiffs-appellants/cross-appellees below, are Central Pension Fund of the International Union of Operating Engineers and Participating Employers, by Michael R. Fanning, as Chief Executive Officer; International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, by Barbara Lane, as Administrative Manager; International Union of Operating Engineers Local 98 and Employers Cooperative Trust, by William Sullivan and Eugene P. Melville, Jr., as Trustees; International Union of Operating Engineers Local 98, AFL-CIO, by Eugene P. Melville, Jr., as Business Manager; and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, by Barbara Lane, as Administrative Manager.

CORPORATE DISCLOSURE STATEMENT

No petitioner has a parent corporation and no publicly held company owns 10% or more of any petitioner's stock.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 695 F.3d 1. The judgment of the court of appeals dismissing petitioners' cross-appeal (Pet. App. 19a) is unreported. The district court's memorandum and order setting forth its findings of fact and conclusions of law (*id.* at 20a-38a) is reported at 792 F. Supp. 2d 129. The district court's judgment (Pet. App. 39a-40a) is unreported. The district court's memorandum and order regarding respondents' motion for attorney's fees (*id.* at 41a-48a) is reported at 792 F. Supp. 2d 139.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2012. On December 3, 2012, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including February 8, 2013. The petition was filed on that date and was granted on June 17, 2013. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

1. 28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

2. 28 U.S.C. § 2107(a) provides, in relevant part: "[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of

appeal is filed, within thirty days after the entry of such judgment, order or decree."

3. Federal Rule of Appellate Procedure 4(a)(1)(A) provides, in relevant part: "In a civil case, * * * the notice of appeal * * * must be filed with the district clerk within 30 days after entry of the judgment or order appealed from."

STATEMENT

The district court in this case issued a decision on the merits and then awarded attorney's fees in a separate order more than a month later. Respondents filed a notice of appeal within 30 days of the latter order but not within 30 days of the former one. The same situation arose in *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), and this Court unanimously held that the notice of appeal was timely as to the decision on attorney's fees but not as to the decision on the merits, because the fee award was collateral.

Despite the fact that *Budinich* adopted a "bright-line rule," 486 U.S. at 202, the First Circuit in this case held that the notice of appeal was timely as to *both* decisions—and proceeded to vacate them. It distinguished *Budinich* on the ground that the attorney's fees in that case were based on a statute, whereas those in this case are based on a contract. It adopted a rule according to which a contractual fee award is *not* collateral when it is part of the "merits," and then determined, based on an analysis of the contract at issue and respondents' claim under it, that the fee award in *this* case was part of the "merits." The First Circuit thus concluded that there was no appealable "final decision" in the district court, 28 U.S.C. § 1291, until the fee award was made.

The First Circuit's rule depends upon a case-by-case and hard-to-apply distinction between "merits" and "nonmerits" fee awards that *Budinich* expressly rejected in favor of a clear, predictable, and uniform rule. The decision below is thus flatly inconsistent with *Budinich* and should be reversed.

A. This Court's Decision In *Budinich*

Federal courts of appeals have jurisdiction of appeals from "final decisions" of district courts. 28 U.S.C. § 1291. A notice of appeal ordinarily must be filed within 30 days after entry of the judgment or order appealed from. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). This time limit is mandatory and jurisdictional. *Bowles* v. *Russell*, 551 U.S. 205 (2007).

In *Budinich*, the district court had issued a decision on the merits on May 14, 1984 and a separate decision on attorney's fees (which were recoverable by "the winning party" under a state statute) on August 1, 1984. 486 U.S. at 197-198 (quoting Colo. Rev. Stat. § 8-4-114 (1986)). The plaintiff sought to appeal both decisions in a notice of appeal filed on August 29, 1984, which was less than 30 days after the decision on attorney's fees but more than 30 days after the decision on the merits. *Id.* at 198. This Court unanimously held that the appeal was timely as to the decision on attorney's fees, which were collateral, but not as to the decision on the merits, which was final when entered. *Id.* at 198-203.

The principal justification for the Court's decision was that, at least "[a]s a general matter," "a claim for attorney's fees is not part of the merits of the action to which the fees pertain." *Budinich*, 486 U.S. at 200. The Court rejected the view that "the

general status of attorney's fees" for Section 1291 purposes "must be altered" when, as was assertedly the case in *Budinich*, the "law authorizing them" characterizes the fees as "part of the merits judgment." *Id.* at 201.

In rejecting the proffered distinction between "merits" and "nonmerits" fee awards, the Court emphasized that "[t]he considerations that determine finality are not abstractions," but instead demand a "practical approach." *Budinich*, 486 U.S. at 201-202 (internal quotation marks omitted; brackets added by Court). What is "of importance" under this approach, the Court explained, is not "preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits,'" but rather "preservation of operational consistency and predictability in the overall application of § 1291." *Id.* at 202. This requires "a uniform rule." *Ibid.*

The Court went on to say that "no interest pertinent to § 1291 is served by according different treatment to attorney's fees deemed part of the merits recovery" and that "a significant interest is disserved"—namely, that "[t]he time of appealability, having jurisdictional consequences, should above all be clear." *Budinich*, 486 U.S. at 202. The Court thus was "not inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known." *Ibid.* Instead, the Court concluded that "[c]ourts and litigants are best served by [a] bright-line rule." *Ibid.*

B. The District Court's Decisions In This Case

1. Petitioner Ray Haluch, Inc. originally operated a sand and gravel business that performed construction work. Pet. App. 2a, 23a-24a. For the past 20 years, however, it has operated a business that sells landscaping products. *Id.* at 2a, 24a. In June 2005 petitioner Ray Haluch Gravel Company, Inc. entered into a collective bargaining agreement with respondent union. *Id.* at 2a-3a, 24a; JA 23-29. The agreement obligated the company to make certain contributions to respondent union-benefit funds. Pet. App. 3a. It also provided that "[a]ny costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting Employer." *Id.* at 9a; JA 26.

Petitioner Ray Haluch, who owned the business until 2006, believed that the collective bargaining agreement required that benefits be paid only on behalf of an employee named Todd Downey. Pet. App. 24a. After the funds commissioned an audit of the company, they demanded additional contributions on behalf of an employee named Martin Jagodowski and unidentified employees who had worked at the company after Jagodowski left. *Id.* at 3a, 26a-27a. The company refused to make the payments. *Id.* at 3a, 28a.

On September 25, 2009, respondents sued petitioners in the District of Massachusetts, JA 30-55, seeking to recover benefit-plan contributions under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, and the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141 *et seq.* The complaint demanded $35,863.06 in contributions on behalf of Jagodowski and

$156,988.54 on behalf of unidentified employees. Pet. App. 46a. In February 2011 the district court conducted a three-day bench trial and took the matter under advisement. *Id.* at 3a, 20a.

On April 4, 2011, respondents filed a motion for attorney's fees and costs. JA 71-198. According to a supporting affidavit, JA 74, the fees and costs were sought under "the collective bargaining agreement" and ERISA, Section 502 of which authorizes an award of "reasonable attorney's fees and costs of the action" if there is "a judgment in favor of the plan," 29 U.S.C. § 1132(g)(2)(D). The motion sought a total of $143,600.44 in attorney's fees and costs, which consisted of $126,912.30 in "attorneys' and paralegals' fees," $6,537.00 in "audit fees and costs," and $10,151.14 in "costs and disbursements." JA 69, 75, 79, 140, 194. Of the claimed attorney's fees, less than $5,000 was incurred prior to the filing of the complaint. JA 81-88; see Br. in Opp. 5.

2. The district court issued two decisions that are relevant here.

On June 17, 2011, the court issued a memorandum and order setting forth its findings of fact and conclusions of law. Pet. App. 23a-38a. The court found that respondents were entitled to recover benefit contributions for certain hours worked by Jagodowski, *id.* at 28a-33a, but not for hours worked by unidentified employees, *id.* at 35a-38a, because there was "no evidence * * * indicating that *any* other classified employee actually performed work under the [collective bargaining] [a]greement after Jagodowski left," *id.* at 37a. The court awarded respondents $10,267.11 in delinquent contributions and deductions, $8,545.31 in interest, and $8,084.99 in liquidated damages, for a total award of

$26,897.41. *Id.* at 33a-35a. The court directed the clerk to enter judgment for respondents in that amount and stated that it would rule on respondents' motion for attorney's fees "in a separate memorandum to follow." *Id.* at 38a. A judgment in the case was issued the same day. *Id.* at 39a-40a.[1]

On July 25, 2011, the district court issued its separate memorandum on attorney's fees and costs. Pet. App. 41a-48a. After calculating the fee "lodestar," *id.* at 41a-46a, the court reduced it to account for the fact that respondents had recovered less than they sought on behalf of Jagodowski and nothing at all on behalf of unidentified employees, *id.* at 46a-47a. The court ultimately awarded respondents $18,000 in attorney's fees. *Id.* at 47a. It also awarded them $16,688.15 in costs, which included the audit fees. *Id.* at 47a & n.1.

On August 15, 2011, respondents filed a notice of appeal of both the district court's order and judgment of June 17, 2011 (addressing remittances) and its order of July 25, 2011 (addressing attorney's fees). JA 199-201. Respondents' notice of appeal was filed less than 30 days after the district court's decision on attorney's fees but more than 30 days after its decision on remittances. Petitioners filed a cross-appeal a week after respondents filed their appeal. JA 202-203.

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[1] In the June 17 order the district court also denied a motion by petitioners to enforce a settlement agreement. Pet. App. 21a-23a. That ruling is no longer at issue.

C. The Court Of Appeals' Decision In This Case

1. After the notices of appeal were filed, the court of appeals issued an order expressing concern that it "may only have jurisdiction to review the memorandum and order that entered on plaintiffs' motion for attorneys' fees" and directing the parties to address "why the appeal should include an appeal from the district court's" earlier order and judgment on remittances. JA 205-206. After hearing from respondents, the court directed that a briefing schedule be set and invited the parties "to address any question of timeliness in their briefs along with the merits." JA 207.

The parties did so, with respondents taking the position that their appeal was timely as to both decisions, Resp. C.A. Br. 18-25; Resp. C.A. Reply Br. 3-9, and petitioners taking the position that it was timely only as to the later one, Pet. C.A. Br. 10-16; Pet. C.A. Reply Br. 1-2. On the merits, respondents claimed that they were entitled to additional remittances for unidentified employees and that, because they were entitled to additional remittances, the award of attorney's fees was too low. Resp. C.A. Br. 25-47. In their cross-appeal, petitioners claimed that the attorney's fees were too *high*, because the district court failed to disallow or at least reduce the amounts attributable to travel time and expenses. Pet. C.A. Br. 16-19. Petitioners did not challenge the order on remittances.

2. The court of appeals held that it had jurisdiction to review both of the district court's orders, vacated each of them, and remanded for further proceedings. Pet. App. 1a-18a.

a. The court of appeals observed that the jurisdictional question in this case is whether respondents' "notice of appeal was timely as to the first judgment," which in turn requires a determination of "whether the first judgment was a final judgment." Pet. App. 5a. The court of appeals recognized that "[t]he point of embarkation for this inquiry" is *Budinich*, which held that "[t]he judgment on the merits" in that case was "final when rendered"; that "the fees issue was wholly collateral"; and that the appeal therefore was untimely as to the judgment on the merits, because it "should have been taken within thirty days" of that decision but was not. *Id.* at 5a-6a.

The court of appeals pointed out that, on "the question of where and how" the "bright-line rule" of *Budinich* "should be drawn" in a case, like this, that involves a *contractual* fee provision, "the courts of appeals * * * are in disarray." Pet. App. 6a. While the Second, Fifth, Seventh, and Ninth Circuits "have held that *Budinich* applies to all claims for attorneys' fees," the First Circuit noted, the Fourth, Eighth, and Eleventh Circuits "have held, on various rationales, that contractual claims for attorneys' fees may fall beyond the *Budinich* line." *Id.* at 6a-7a.

The court of appeals aligned itself with the latter group, concluding that *Budinich* should not be read to apply to "all claims for attorneys' fees." Pet. App. 7a. Instead the First Circuit held that, "[w]here, as here, an entitlement to attorneys' fees derives from a contract rather than from a statute, the critical question is whether the claim for attorneys' fees is part of the merits." *Id.* at 8a.

Analyzing the contract at issue in this case, and respondents' claim under it, Pet. App. 8a-9a, the

court of appeals determined that the fees here "are damages"; that, as such, they "are part of the merits of [respondents'] contract claim"; and that they accordingly "fall beyond the line drawn by the *Budinich* Court." *Id.* at 9a. In reaching this conclusion, the First Circuit thought it "[p]ertinent[]" that respondents "sought recovery of both unpaid remittances and attorneys' fees" in their complaint, *id.* at 3a, and that they "consistently have asserted an entitlement" to fees "[t]hroughout the litigation," *id.* at 8a-9a. The court also found it significant that the agreement in question provided, not that "a prevailing party would be entitled to attorneys' fees," but that the employer was required to pay "'[a]ny costs, including legal fees, of collecting payments due'" the funds. *Id.* at 9a (quoting collective bargaining agreement).

The court of appeals thus found that "no final judgment entered until the district court resolved the contract-based claim for attorneys' fees" and that respondents' appeal was for that reason "timely as to all the issues raised." Pet. App. 9a.

b. Having concluded that it had jurisdiction to review both the district court's order and judgment on remittances and its order on attorney's fees, the court of appeals vacated both of them and remanded for further proceedings. Pet. App. 9a-18a. As to remittances, the First Circuit agreed with respondents that "the district court should have ordered additional payments with respect to certain unidentified employees," *id.* at 9a-10a, and remanded for a determination of "remittances owed on account of covered work" by those employees, *id.* at 17a. As to attorney's fees, the court of appeals ruled that, because the district court's fee calculation rested in part on

respondents' "lack of success in recovering remittances referable to unidentified employees," and "[b]ecause we have ruled that the plaintiffs are entitled to some level of payment for this work," the fee award "will have to be recalculated" on remand "after the appropriate amount of unpaid remittances is determined." *Id.* at 17a-18a. In light of the remand for recalculation of attorney's fees, the First Circuit dismissed petitioners' cross-appeal without prejudice. *Id.* at 18a n.7, 19a.

SUMMARY OF ARGUMENT

Budinich v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), held that a decision on the merits that leaves unresolved a request for attorney's fees is a "final decision" under 28 U.S.C. § 1291. *Budinich* involved attorney's fees awarded under a statute, but the same rule applies to fees awarded under a contract.

A. The rationale for the rule adopted in *Budinich* is that, "[a]s a general matter," a claim for attorney's fees "is not part of the merits" and that the "general status" of attorneys' fees should not be "altered" even when the law deems the fees "part of the merits" in a particular case. *Budinich*, 486 U.S. at 200-201. The general status of fees should not be altered on a case-by-case basis, the Court explained, because what matters is "operational consistency and predictability" in the application of Section 1291 and because the time of appealability "should above all be clear." *Id.* at 202. The Court found that these considerations require a "uniform" and "bright-line" rule. *Ibid.*

Budinich's broad language and reasoning compel the conclusion that its holding applies regardless of

the source of authority for the fee award. Distinguishing between statutory and contractual fees undermines the objectives of consistency, predictability, and clarity, and is neither a uniform nor a bright-line rule. Indeed, the distinction is not only impractical but unworkable, since it cannot account for a case, like this, in which a party seeks attorney's fees under *both* a statute *and* a contract. For these reasons, a separate contractual fee award, like a separate statutory award, is *always* collateral, such that an earlier decision on the merits is final when issued.

B. In the decision below, the First Circuit held that a contractual fee award is *sometimes* collateral. It adopted a rule according to which contractual fee awards are not collateral if they are part of the "merits" and collateral if they are not part of the "merits." That rule is inconsistent with *Budinich* and accordingly wrong.

To begin with, *Budinich* categorically rejected the "merits"–"nonmerits" distinction. The decision explained that "preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits'" is not "of importance" in this context. *Budinich*, 486 U.S. at 202. It went on to say that "no interest pertinent to § 1291 is served" by treating "merits" and "nonmerits" fee awards differently and that "significant interest[s]" are "disserved"—namely, the need for operational consistency, predictability, and clarity. *Ibid.*

The First Circuit believed that, although "attorneys' fees *generally* should be considered a collateral matter" under *Budinich*, "they may *sometimes* be considered as part of the merits." Pet. App. 7a-8a (emphasis added). But the whole point of *Budinich*'s "uniform" and "bright-line" rule, 486 U.S. at 202, is

that, precisely *because* attorney's fees *generally* are collateral, they *always* should be treated as collateral in determining whether a prior decision is final, *even though* attorney's fees *sometimes* are part of the merits. This Court *rejected* the argument that "the general status of attorney's fees for § 1291 purposes must be altered" when, as was assertedly the case there, the "law authorizing them" requires that they be treated as "part of the merits." *Id.* at 201.

The First Circuit's rule is inconsistent with *Budinich* for the related reason that it requires a fact-intensive analysis of both the specific contract at issue and the underlying claim in each case. *Budinich* expressly rejected a rule that would "require[] the merits or nonmerits status *of each attorney's fee provision* to be clearly established before the time to appeal can be clearly known." 486 U.S. at 202 (emphasis added).

Finally, the First Circuit's rule is inconsistent with *Budinich* because it is hard to apply. Even a proponent of the rule has recognized that contractual language "will often be ambiguous" as to whether attorney's fees are part of the "merits," and that it will sometimes suggest that fees "are a hybrid" of both "merits" and "nonmerits" relief. *Carolina Power & Light Co.* v. *Dynegy Mktg. & Trade*, 415 F.3d 354, 363 (4th Cir. 2005) (Wilkinson, J., concurring). More importantly, it is unclear just how one is supposed to go about determining whether a contractual attorney's fee award is a "merits" or a "nonmerits" award in the first place.

The court below distinguished between fees for "collecting payments due" under the contract (which supposedly are "merits" fees) and those for a "prevailing party" in the litigation (which supposedly are

not). Pet. App. 9a. But as even the like-minded Fourth Circuit has acknowledged, "a party will be able to satisfy the condition precedent to recovering legal costs" under the former type of contractual provision "in exactly the circumstances in which the claimant can also 'prevail' in a breach of contract claim," and in almost all cases, including this one, contractual attorney's fees will have been "incurred mostly in connection with th[e] litigation" itself. *Carolina Power & Light*, 415 F.3d at 360-362. The impracticability of the First Circuit's rule is confirmed by the fact that the Third Circuit has reached conflicting results in applying a similar rule in different cases, and by the fact that judges of the Eighth Circuit came to different outcomes in applying an essentially identical rule in the *same* case.

C. The Eleventh Circuit has adopted a third approach: that a contractual fee award is *never* collateral. That rule is incorrect too. To begin with, distinguishing between statutory and contractual attorney's fees is inconsistent with *Budinich*, because, as already explained, it disregards the need for "consistency," "predictability," and "cl[arity]," and is neither a "uniform" nor a "bright-line" rule. *Budinich*, 486 U.S. at 202. The Eleventh Circuit's rule also is inconsistent with *Budinich* in that, like the First Circuit's rule, it rests on a distinction between "merits" and "nonmerits" fees that *Budinich* expressly rejected—with the difference that, in the Eleventh Circuit, *all* contractual fees are "merits" fees and all statutory fees are not. Finally, while *Budinich* made clear that "conceptual consistency" is not important in this context, *ibid.*, the Eleventh Circuit's rule does not even have that to recommend it, because there is no reason to suppose that a particular contractual attorney's fee award is any more likely than a statu-

tory fee award to be a "merits" rather than a "non-merits" award.

ARGUMENT

Twenty-five years ago, in *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), this Court unanimously held that a district court's decision on the merits that left unresolved a request for statutory attorney's fees was a "final decision" under 28 U.S.C. § 1291 even if the law regarded the fee award as part of the "merits." In this case, the First Circuit held that a district court's decision on the merits that left unresolved a request for *contractual* attorney's fees was *not* a "final decision" under Section 1291 precisely *because* the law regarded the fee award as part of the "merits."

The First Circuit's rule—that a contractual fee award is *sometimes* collateral, depending on whether it is part of the "merits"—is irreconcilable with *Budinich* and therefore wrong. So too is the Eleventh Circuit's rule, under which a contractual fee award is *never* collateral. The correct rule is that, just like a statutory fee award, a contractual fee award—whether "merits" or "nonmerits"—is *always* collateral.

A. A Contractual Fee Award Is Always Collateral

Budinich held that an attorney's fee award is always collateral for purposes of determining the time to appeal an earlier decision on the merits under 28 U.S.C. § 1291. The fee award in *Budinich* was based on a statute. But four circuits have held that the

same rule applies to a contractual fee award.[2]

Those decisions are correct. Nothing in *Budinich* suggests that the applicability of its holding depends upon the happenstance of whether the award of attorney's fees arose under a statute or a contract—or, for that matter, a rule, a regulation, judge-made law, a court's inherent authority, or any other source of law. Quite the reverse.

The basic justification for the rule adopted in *Budinich* is that, "[a]s a general matter," a claim for attorney's fees "is not part of the merits of the action to which the fees pertain," but instead is collateral to the merits, and that the "general status of attorney's fees for § 1291 purposes" should not be "altered" in a particular case even when "the statutory or decisional law authorizing them makes plain * * * that they *are* * * * part of the merits." *Budinich*, 486 U.S. at 200-201 (emphasis added). The general rule should not be altered on a case-by-case basis, the Court ex-

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[2] See, *e.g.*, *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F.2d 1197, 1200 (5th Cir. 1990) ("the 'bright-line' rule announced in *Budinich* covers all attorneys' fees, whether provided by statute or contract"); *Cont'l Bank, N.A.* v. *Everett*, 964 F.2d 701, 702 (7th Cir. 1992) (Easterbrook, J.) ("An open issue about legal fees, contractual or otherwise, does not affect our jurisdiction to resolve the appeal [of the merits]." (citing *Budinich*)); *United States ex rel. Familian Nw., Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952, 955 (9th Cir. 1994) ("attorney's fees are collateral whether they are authorized by [statute] or by [contract]" (citing *Budinich*, 486 U.S. at 201)); *O & G Indus., Inc.* v. *Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 168 n.11 (2d Cir. 2008) (rejecting the view that "the non-finality of an award of attorneys' fees sought as an element of contractual damages renders non-appealable the entire judgment in which such award is incorporated" (citing *Budinich*, 486 U.S. at 202)).

plained, because "what is of importance" in this context is "preservation of operational consistency and predictability in the overall application of § 1291" and because "[t]he time of appealability, having jurisdictional consequences, should above all be clear." *Id.* at 202.

That jurisdictional rules should be simple, clear, and certain has informed this Court's interpretation of statutes, not only in *Budinich*, but in many cases since. Indeed, this principle has been one of the most prominent features of the Court's decisions on jurisdictional issues, some of which cite *Budinich* itself.[3]

In *Budinich*, the Court concluded that the need for predictability and clarity "requires * * * a *uniform rule* that an unresolved issue of attorney's fees

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[3] See, *e.g., Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 176 n.3 (1989) ("'[w]hat is of importance here is * * * operational consistency and predictability in the overall application of the [finality requirement] of § 1291'" (quoting *Budinich*, 486 U.S. at 202; second set of brackets added by Court)); *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 99 (1994) ("'[t]he time of appealability, having jurisdictional consequences, should above all be clear'" (quoting *Budinich*, 486 U.S. at 202; brackets added by Court)); *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997) (emphasizing the need for "clarity and certainty" in "the Eleventh Amendment's jurisdictional inquiry"); *Lapides* v. *Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002) ("jurisdictional rules should be clear"); *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 582 (2004) ("[u]ncertainty regarding the question of jurisdiction is particularly undesirable"); *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) ("administrative simplicity is a major virtue in a jurisdictional statute"); *Lozman* v. *City of Riviera Beach*, 133 S. Ct. 735, 745 (2013) ("jurisdictional tests * * * should be as simple as possible" (internal quotation marks omitted)).

for the litigation in question does not prevent judgment on the merits from being final." 486 U.S. at 202 (emphasis added). It stressed that both "[c]ourts and litigants are best served by the *bright-line rule* * * * that a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *Id.* at 202-203 (emphasis added).

While *Budinich* involved attorney's fees awarded under a statute, the rule it announced did not depend upon that fact and was not limited to such fees. On the contrary, both *Budinich*'s reasoning and its "sweeping language" show that its holding "applies with equal force where attorneys' fees are sought under a *contract*." *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F.2d 1197, 1199 (5th Cir. 1990). The "broadly-worded" decision provides no basis for the "strained" distinction "between fees authorized by [statute] and those authorized by contract." *United States ex rel. Familian Nw., Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952, 954-955 (9th Cir. 1994). Treating attorney's fees differently depending on whether they happen to arise under a statute or a contract (or some other source) would contravene the requirements of "consistency," "predictability," and "cl[arity]" in this jurisdictional context, and would lead to a rule that is neither "uniform" nor "bright-line." *Budinich*, 486 U.S. at 202.

Budinich demands a "practical approach." 486 U.S. at 202. Distinguishing between statutory and contractual fees is *not* practical. Indeed, it is unworkable—a fact that is particularly evident when one considers that the distinction cannot account, at least in any logical way, for cases in which a party

seeks attorney's fees under *both* a statute *and* a contract. This is not a fanciful scenario. In fact it is precisely what happened here: respondents sought fees both for "collecting payments due" under the collective bargaining agreement and as the prevailing party under ERISA. JA 74. That is an especially compelling reason to conclude that *Budinich*'s "uniform" and "bright-line" rule, 486 U.S. at 202, is just that, and to apply it to *all* awards of attorney's fees, "irrespective of the basis of the fee claim," 10 James W. Moore *et al.*, *Moore's Federal Practice* § 54.153[1], at 54-244 (3d ed. 2013).[4]

As Judge Easterbrook summed up the matter even before *Budinich* was decided:

> [F]ees provided by statute are [not] different from fees provided by contract. * * * [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 determines, not on the source of authority for the court's decision. * * * [A] disposition of all claims on the merits is appealable, even though questions about fees remain. * * * This rule has the virtues of generality and certainty, which a good jurisdictional rule should. A rule turning on the source of the entitlement to fees would be far too uncertain.

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[4] In its order awarding respondents attorney's fees, the district court mentioned only ERISA as the basis for the award. Pet. App. 41a-42a. The First Circuit, in contrast, viewed respondents' entitlement to fees as "deriv[ing] from a contract rather than from a statute." *Id.* at 8a. That courts may be unable to agree even on what the basis of a particular fee award *was* is further confirmation that the statute-contract distinction is unworkable.

Exch. Nat'l Bank v. *Daniels*, 763 F.2d 286, 292-293 (7th Cir.), reh'g granted in part on other grounds, 768 F.2d 140 (7th Cir. 1985).

B. The Rule Adopted By The First Circuit Below—That A Contractual Fee Award Is *Sometimes* Collateral—Is Incorrect

In the decision below, the court of appeals adopted a rule that is based on an even *more* complicated distinction than that between statutes and contracts. The court determined that, while *all* awards of attorney's fees under a *statute* are collateral, *some* awards of fees under a *contract* are collateral and some are not. In particular, the First Circuit held that contractual fee awards are not collateral if they are part of the "merits" but collateral if they are not part of the "merits." The distinction between "merits" and "nonmerits" contractual fee awards is no more reconcilable with *Budinich* than the more general one between statutory and contractual awards. Nor is there any other justification for the First Circuit's rule.

1. The First Circuit held that a contractual fee award is sometimes collateral

In the decision below, the First Circuit joined the Third, Fourth, and Eighth Circuits in holding that "contractual claims for attorneys' fees may fall beyond the *Budinich* line." Pet. App. 6a. The First Circuit's version of that rule is that *Budinich* does not control when contractual fees are "an element of damages" and therefore "part of the merits of the[] contract claim." *Id.* at 8a-9a. Applying that rule here, the court of appeals analyzed the contract at issue, as well as respondents' claim under it, *ibid.*, and determined that, in this case, the attorney's fees are

damages and thus "beyond the line drawn by the *Budinich* Court," *id.* at 9a.

While the First Circuit believed that the Third Circuit "has put a foot in each camp," Pet. App. 7a, the better reading of that court's decisions is that it has adopted a rule that is similar (though not identical) to the First Circuit's. In the Third Circuit, an unresolved claim for attorney's fees is not collateral, and therefore prevents an otherwise final judgment from being final, if the requested fees are based on a contract and "an integral part of the contractual relief sought." *Gleason* v. *Norwest Mortg., Inc.*, 243 F.3d 130, 138 (3d Cir. 2001). That court has characterized this rule as an "exception" to *Budinich*. *Local Union No. 1992 of Int'l Bhd. of Elec. Workers* v. *Okonite Co.*, 358 F.3d 278, 287 n.13 (3d Cir. 2004). It is true, however, that the Third Circuit has reached different results in applying the rule to the facts of particular cases.[5]

In the decision below, Pet. App. 8a, the First Circuit followed the Fourth Circuit's decision in *Carolina Power & Light Co.* v. *Dynegy Marketing & Trade*, 415 F.3d 354 (4th Cir. 2005), which held that an unresolved issue of contractual attorney's fees prevents an "order from being a final judgment" when the fees "would be awarded as part of the damages for [the] breach of contract claim." *Id.* at 360. Like the First Circuit, the Fourth Circuit analyzed "the contract be-

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[5] See, *e.g.*, *Vargas* v. *Hudson Cnty. Bd. of Elections*, 949 F.2d 665, 669-670 (3d Cir. 1991) (integral part); *Ragan* v. *Tri-County Excavating, Inc.*, 62 F.3d 501, 505 (3d Cir. 1995) (integral part); *Gleason*, 243 F.3d at 138 (not an integral part); *Am. Soc'y for Testing & Materials* v. *Corrpro Cos.*, 478 F.3d 557, 570 (3d Cir. 2007) (not an integral part).

tween the parties" and determined that, "[i]n the case before us," the attorney's fees were an element of damages and therefore not collateral. *Id.* at 359.

A concurring opinion in *Carolina Power & Light* articulated a narrower rule. The concurrence would treat a contractual fee award as collateral, not only when it is clearly and solely an award of "costs" to the prevailing party, but also when (1) the contract is "ambiguous" as to whether fees "are remedial, i.e., an element of damages, or, instead, are to be awarded to a prevailing party as costs of the underlying action" or (2) the contract suggests that "the attorneys' fees are a hybrid of both damages and costs." *Carolina Power & Light*, 415 F.3d at 363 (Wilkinson, J., concurring). Based on its own analysis of the contractual language, the concurrence determined that, "[i]n this case, the contract is perfectly clear that the attorneys' fees are a part of damages" alone and therefore not collateral. *Id.* at 362.

The Eighth Circuit has also held that contractual attorney's fees are not collateral, and fall outside *Budinich*'s "bright-line rule," if they "are substantively part of a plaintiff's compensatory damage" and thus "go to the merits of the claim." *Justine Realty Co.* v. *Am. Nat'l Can Co.*, 945 F.2d 1044, 1047-1048 (8th Cir. 1991). The panel was divided, however, on whether the fees at issue in that case were of this type. Whereas the majority determined that the fees went to "the merits of [the] claim of breach of the contract," *id.* at 1048, the dissent, based on a different reading of the same record, believed that the fees related to "the contractual dispute that was tried in the District Court and with respect to which that court entered judgment," *id.* at 1049 (Bowman, J., dissenting).

2. The First Circuit's rule is inconsistent with *Budinich*

The rule adopted by the First Circuit below, and the identical or similar rules adopted by the Third, Fourth, and Eighth Circuits, are fundamentally at odds with *Budinich* and therefore wrong. As explained below, the rules are inconsistent with *Budinich* in two basic ways. First, they depend upon a distinction between "merits" and "nomerits" attorney's fees that *Budinich* categorically rejected. Second, they are difficult to apply and lead to different results in different cases, and thus are the very opposite of the uniform and bright-line rule that *Budinich* found necessary to ensure predictability and clarity in the application of 28 U.S.C. § 1291.

a. Budinich *rejects the distinction between "merits" and "nonmerits" attorney's fees*

According to the First Circuit, the "critical question" in deciding whether *Budinich* applies to contractual attorney's fees in a particular case is whether the claim for fees "is part of the merits." Pet. App. 8a. The circuits whose decisions the First Circuit followed said much the same thing.[6]

But *Budinich* squarely rejected the distinction between attorney's fees that are part of the "merits" and those that are not. 486 U.S. at 201. It explained

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[6] See *Gleason*, 243 F.3d at 137 (a claim for fees is not collateral when it is "part of the contractual damages at issue on the merits"); *Carolina Power & Light*, 415 F.3d at 362 (a claim for fees is not collateral when it "goes directly to the merits of the case"); *Justine Realty*, 945 F.2d at 1048 (a claim for fees is not collateral when it is "inherent in the merits of [the] claim").

that "preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits'" is not "of importance" under the "practical approach" that must be employed when considering issues of finality and appealability. *Id.* at 202. What *is* important, the Court made clear, is that "no interest pertinent to § 1291 is served," and that "significant interest[s]" are "disserved," by treating "merits" and "nonmerits" fee awards differently. *Ibid.* That "no distinction should be drawn" between such fee awards, moreover, was not some minor or inconsequential feature of *Budinich*; it was "[t]he central aspect" of the decision. 15B Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3915.6, at 329 (2d ed. 1992).

One of the circuits with which the First Circuit aligned itself has taken the position that treating contractual attorney's fees as collateral when they are "part of * * * the merits" would "frustrate [a] purpose[] of section 1291"—namely, "avoiding piecemeal appeals." *Justine Realty*, 945 F.3d at 1049; see also *Carolina Power & Light*, 415 F.3d at 362 ("whatever gains in predictability such a rule would bring would come only at the cost of an increased number of piecemeal appeals"). *Budinich* rejected that idea too. "[A]n appeal of merits-without-attorney's-fees when *** the attorney's fees [are deemed] part of the merits," the Court explained, "is no more harmful *** than an appeal of merits-without-attorney's-fees when [they are not]." *Budinich*, 486 U.S. at 202. The former is not "more disruptive of ongoing proceedings, more likely to eliminate a trial judge's opportunity for reconsideration, more susceptible to being mooted by settlement, or in any way (except nominally) a more piecemeal enterprise." *Ibid.*

At bottom, the First Circuit's decision reflects a fundamental misunderstanding of *Budinich*. The court of appeals believed that, although "attorney's fees *generally* should be considered a collateral matter" under *Budinich*, "they may *sometimes* be considered as part of the merits." Pet. App. 7a-8a (emphasis added). In fact that is the very *opposite* of what *Budinich* held. The whole point of *Budinich*'s "bright-line rule," 486 U.S. at 202, is that, precisely *because* attorney's fees *generally* are collateral, they *always* should be treated as collateral in determining whether a prior decision is final, *even though* attorney's fees *sometimes* are part of the merits. This Court *rejected* the argument that "the general status of attorney's fees for § 1291 purposes must be altered" when, as was assertedly the case in *Budinich*, the "law authorizing them" requires that they be treated as "part of the merits." *Id.* at 201. Yet that is the very premise on which the First Circuit's decision rests.

Indeed, in distinguishing between "merits" and nonmerits" attorney's fees, the decision below employed the very same reasoning as a court of appeals decision—*Holmes* v. *J. Ray McDermott & Co.*, 682 F.2d 1143 (5th Cir. 1982)—with which this Court expressed disagreement in *Budinich*, see 486 U.S. at 198, 201. Just as the First Circuit believed that the district court's initial decision was not final in this case because "the attorneys' fees must be considered an element of the plaintiffs' contractual damages," Pet. App. 8a, the Fifth Circuit in *Holmes* thought that the initial decision in that case 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," *Holmes*, 682 F.2d at 1147, a right under the mari-

time law that is contractual in nature, see *Atl. Sounding Co.* v. *Townsend*, 557 U.S. 404, 422 n.9 (2009). Thus, *Budinich* not only rejected the "merits"–"nonmerits" distinction; it rejected a decision that drew that distinction, in a nonstatutory case, in precisely the way the First Circuit did here.

b. **Budinich *requires a clear and predictable rule***

i. To determine whether attorney's fees are part of the "merits" or not, the First Circuit's rule demands a fact-intensive analysis of both the specific contract at issue and the underlying claim in each individual case. See Pet. App. 8a-9a. The same is true of the identical or similar rules applied by the Third, Fourth, and Eighth Circuits. See *Gleason*, 243 F.3d at 137-138; *Carolina Power & Light*, 415 F.3d at 359; *Justine Realty*, 945 F.2d at 1048.

But *Budinich* made clear that the finality of a decision should *not* have to be assessed on a case-by-case basis. It expressly *rejected* a rule that would "require[] the merits or nonmerits status *of each attorney's fee provision* to be clearly established before the time to appeal can be clearly known." *Budinich*, 486 U.S. at 202 (emphasis added). What was necessary instead, the Court said, was a "uniform" and "bright-line" rule, *ibid.*, of which the First Circuit's case-by-case approach is the antithesis.

ii. The First Circuit's rule is also difficult to apply. As one of the judges who joined the Fourth Circuit decision candidly acknowledged, contractual language "will often be ambiguous" as to whether attorney's fees are part of the "merits" or not, and it will sometimes suggest that fees "are a hybrid" of both "merits" and "nonmerits" relief. *Carolina Power*

& Light, 415 F.3d at 363 (Wilkinson, J., concurring).[7] More fundamentally, it is not at all apparent what the standard is for determining whether an award of contractual fees is a "merits" or "nonmerits" award in the first place.

In the decision below, the First Circuit found it "[p]ertinent[]" that respondents "sought recovery of both unpaid remittances and attorneys' fees" in their complaint, Pet. App. 3a, and that they "consistently have asserted an entitlement" to fees "[t]hroughout the litigation," *id.* at 8a-9a. The court did not explain, however, why the same request for fees could be a "nonmerits" request if made later in a litigation but a "merits" request if made earlier. It is hardly unusual, after all, for a plaintiff to allege an entitlement to *statutory* attorney's fees in a complaint, yet statutory fees indisputably are collateral under *Budinich*. Indeed, *Budinich* itself made clear that attorney's fees are collateral even when the plaintiff "specifically requested [them] as part of the prayer in his complaint." *Budinich*, 486 U.S. at 201.

The First Circuit also distinguished between fees for "collecting payments due" under the contract (which it deemed "merits" fees) and those for a "prevailing party" in the litigation (which it deemed "nonmerits" fees). Pet. App. 9a (quoting collective bargaining agreement). But the court did not say

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[7] Ironically, this judge's proposed solution to the problem was not to reject the rule adopted by the Fourth Circuit in favor of that of the Second, Fifth, Seventh, and Ninth, but rather to propose an even more complicated rule, according to which contractual fees must also be treated as collateral in "ambiguous or hybrid cases." *Carolina Power & Light*, 415 F.3d at 363 (Wilkinson, J., concurring).

whether that is a test for distinguishing "merits" from "nonmerits" fees or merely an example of the distinction. In any event, the distinction provides scant justification for departing from the "practical approach" of *Budinich*. 486 U.S. at 202.

For one thing, respondents would not have been entitled to recover the costs of "collecting payments due" under the collective bargaining agreement via this lawsuit, JA 26, if they had not prevailed in the litigation, because in that event the payments would not have been "due." Respondents thus were "able to satisfy the condition precedent to recovering legal costs—that is, that [petitioners] failed * * * to deliver [payments]—in exactly the circumstances in which [respondents] 'prevail[ed]' [on their] claim." *Carolina Power & Light*, 415 F.3d at 361-362. That means that, in a case of this type, there is at most a *conceptual* difference between "merits" and "nonmerits" contractual attorney's fees, not a practical one, and *Budinich* makes clear that "conceptual consistency" is not "of importance." 486 U.S. at 202.

Even before *Budinich*, Judge Easterbrook "reject[ed] as altogether too metaphysical the distinction between fees that are 'compensation for the injury' and those that are not." *Exch. Nat'l Bank*, 763 F.2d at 293. As he went on to explain: "All awards of fees make the prevailing party better off. Whether this benefit 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.*

Moreover, in almost all cases, including this one, see JA 88-139; Br. in Opp. 5, the attorney's fees sought were "incurred mostly in connection with th[e] litigation," *Carolina Power & Light*, 415 F.3d at

360, and the "pre-litigation fees" were "minimal," *Justine Realty*, 945 F.3d at 1049. It is not practical—indeed, it is not *reasonable*—to treat one fee award differently from another for jurisdictional purposes, as the First Circuit apparently would, see Pet. App. 9a & n.4, simply because a small portion of the fees in one award but not the other was for work done before the complaint was actually filed.

In this connection, it bears mention that the Eighth Circuit believed that its position—and by extension that of the First Circuit—was consistent with *Budinich* because of this Court's "references to 'attorney's fees for the litigation,' 'attorney's fees for the litigation at hand,' 'attorney's fees for the litigation in question,' and 'attorney's fees attributable to the case.'" *Justine Realty*, 945 F.2d at 1048 (quoting *Budinich*, 486 U.S. at 199, 201-203). That is a curious basis for finding *Budinich* inapplicable, inasmuch as the great bulk of the fees in that case, as in this one, indisputably were "for the litigation." See *id.* at 1049; JA 88-139. Even the small amount of fees "for legal work performed before any formal litigation was commenced," Pet. App. 9a n.4, could be viewed as "for the litigation" in a case of this type, at least in certain circumstances, and at least in part, because "some of the services performed before a lawsuit is formally commenced by the filing of a complaint are performed 'on the litigation.'" *Webb* v. *Dyer Cnty. Bd. of Ed.*, 471 U.S. 234, 243 (1985); see, *e.g.*, *EEOC* v. *AutoZone, Inc.*, ___ F. Supp. 2d ___, 2013 WL 1277873, at *6 (D. Mass. Mar. 29, 2013) ("An attorney's zealous and robust representation of her client's interests in the early stages of a dispute may preempt the need to bring suit at all, an outcome that would inure to the benefit of all parties involved. Although litigation was not avoided here, it

would be imprudent to withhold from counsel an award of attorneys' fees for what can be rightly deemed services rendered to the benefit of the litigation.").[8]

The impracticability of the First Circuit's rule is proved by the fact that the Third Circuit has reached conflicting results in applying its even murkier "integral part of the contractual relief sought" test in different cases, and by the fact that judges of the Eighth Circuit came to different outcomes in the *same* case. See *supra* Point B.1. Because it is hard to apply, the First Circuit's rule—like the equally- or even-more-hard-to-apply rules of other circuits—severely undermines the core interests on which *Budinich* rests: "preservation of operational consistency and predictability in the overall application of § 1291," and the need for "[t]he time of appealability," which has "jurisdictional consequences," to "above all be clear." 486 U.S. at 202.

This Court reaffirmed the importance of clear jurisdictional rules just recently, and at considerable length, in *Hertz Corp.* v. *Friend*, 559 U.S. 77 (2010). There the Court said that "administrative simplicity is a major virtue in a jurisdictional statute"; that "[c]omplex jurisdictional tests complicate a case, eating up [the parties'] time and money"; that "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear

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[8] *Budinich* likely would *not* apply, however, to "attorney's fees from a *prior* litigation," *Familian*, 21 F.3d at 955 n.2 (emphasis added)—for example, when an attorney brings an action "against his client" for "fees earned" in an earlier matter, *Deus* v. *Allstate Ins. Co.*, 15 F.3d 506, 521 (5th Cir. 1994).

a case"; and that "[s]imple jurisdictional rules also promote greater predictability" for plaintiffs and defendants alike. *Id.* at 94. Each and every one of these considerations weighs heavily against the rule adopted by the First Circuit here.

3. Respondents' defense of the First Circuit's rule lacks merit

In defending the First Circuit's rule at the petition stage, respondents argued that the rule is consistent with *Budinich*, Br. in Opp. 25-29, and also relied on (a) this Court's decision in *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989), and (b) Rules 54 and 58 of the Federal Rules of Civil Procedure as amended in 1993, Br. in Opp. 29-35. We have already explained why the First Circuit's rule is *in*consistent with *Budinich*. As discussed below, the rule finds no support in *Osterneck* or the Rules of Civil Procedure either.

a. Osterneck *provides no support for the First Circuit's rule*

Osterneck held that a motion for discretionary prejudgment interest is a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), such that the judgment itself is not subject to appeal until the motion is acted upon. The decision distinguished *Budinich* on the ground that, unlike attorney's fees, which "as a general matter" are "not part of the merits" because they "are not part of the compensation for the plaintiff's injury," discretionary prejudgment interest "traditionally" has been "considered part of the compensation due plaintiff" and therefore part of the merits. *Osterneck*, 489 U.S. at 175. The rules adopted in the two cases thus were different because the general nature of attorney's

fees and prejudgment interest are different. *Osterneck* does not support the theory that either rule should give way if the traditional understanding of the relief does not apply in a particular case.

In fact *Osterneck* supports *our* position, not respondents', because the decision makes clear that the same rule for prejudgment interest—that it is not collateral—applies whether it is discretionary or available as a matter of right, even though as-of-right prejudgment interest is arguably collateral rather than part of the merits. *Osterneck*, 489 U.S. at 176 n.3. In explaining why the same rule applies, the Court quoted *Budinich*'s observations that "operational consistency" and "predictability" in the application of Section 1291 are more important than "conceptual consistency" in the status of a particular type of motion as "'merits' or 'nonmerits'" and that "[c]ourts and litigations are best served by the bright-line rule." *Ibid.* (quoting *Budinich*, 486 U.S. at 202). *Osterneck* thus makes precisely the same point as *Budinich*: that, whatever the rule for a specific type of relief (collateral or non-collateral), the rule should be the same whether the relief is deemed "merits" or "nonmerits" in a particular case.

b. Federal Rules of Civil Procedure 54 and 58 provide no support for the First Circuit's rule

Respondents have also advanced a complicated defense of the First Circuit's rule that the court of appeals itself did not employ. The theory relies upon two Federal Rules of Civil Procedure: Rule 54(d)(2)(A), which provides that "[a] claim for attorney's fees * * * must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages," and Rule 58(e),

which provides that, "if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may * * * order that the motion have the same effect * * * as a timely motion under Rule 59"—*i.e.*, that it delay the time for filing a notice of appeal until the motion is disposed of, see Fed. R. App. P. 4(a)(4)(A). These rules give district courts discretion, in an appropriate case, "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." Fed. R. Civ. P. 58 advisory committee's note (1993).

The premise of respondents' theory seems to be that, because Rule 58 refers to a "motion for attorney's fees * * * under Rule 54(d)(2)," and because Rule 54(d)(2) does not require a motion when the fees are an "element of damages," Rule 58 does not grant discretion to extend the time for an appeal when there is a pending request for fees that are an element of damages. Br. in Opp. 34 From that premise, respondents draw two conclusions: that there was "no need to address" such fees in Rule 58 because *Budinich* does not apply to them; and that, if *Budinich* did apply to them, they would be in "a procedural no-man's-land"—covered by "*Budinich*'s finality rule" but not by Rule 58's solution to "the problem of piecemeal appeals." *Ibid.* Respondents' premise is erroneous, and thus so too are their conclusions.

It is simply not true that, by virtue of its reference to Rule 54(d)(2), Rule 58 "does not address fees that constitute 'an element of damages.'" Br. in Opp. 34. Respondents apparently read Rule 54(d)(2) to say that fees that are an element of damages may not be sought by motion. But it does not say that. It

says only that they do not *have to be* sought by motion—presumably because fees that are truly an "element of damages" to be "proved at trial" will often if not ordinarily be awarded at the same time as other damages, particularly if the case is tried to a jury. See 10 *Moore's Federal Practice* § 54.151[2][d], at 54-240 (if fees are an element of damages, the motion requirement of Rule 54(d)(2) "is inapplicable" and fees "may not be sought *solely* by motion after judgment" (emphasis added)). If fees are not awarded at that time, however, nothing in the Rules prevents a party from filing a motion (together with a request for an order, if desired, that delays the time for appeal).

Far from being prohibited, a motion will often be necessary, because even fees that are supposedly part of the "merits" may consist mainly of fees for litigating the case (as they did here), thus requiring the party seeking fees to provide the district court with new information after the trial. Tellingly, respondents did just that, "fil[ing] a motion for attorneys' fees" post-trial. Pet. App. 3a; see JA 71-198; see also *Justine Realty*, 945 F.2d at 1045-1046 (same). There was thus nothing to prevent the district court from extending the time to appeal *in this very case*.

Had the 1993 amendments to the Federal Rules of Civil Procedure really been meant to modify *Budinich*'s "bright-line rule," 486 U.S. at 202, they would have done so directly and forthrightly, not in the roundabout way that respondents suggest. They would not have "hid[den] [an] elephant[] in [a] mousehole[]." *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). That is one problem with respondents' theory. The other, as we have explained, is that it fails even on its own terms.

C. The Rule Adopted By The Eleventh Circuit—That A Contractual Fee Award Is *Never* Collateral—Is Also Incorrect

Like the First, Third, Fourth, and Eighth Circuits, the Eleventh Circuit has held that the rule of *Budinich*—that attorney's fees awards are collateral—does not apply to fees that are authorized by contract. Unlike those circuits, however, the Eleventh Circuit has held that contractual fee awards are *never* collateral.

In *Brandon, Jones, Sandall, Zeide, Koh, Chalal & Musso, P.A.* v. *MedPartners, Inc.*, 312 F.3d 1349 (11th Cir. 2002) (per curiam), the Eleventh Circuit articulated its rule as follows: "In this Circuit, a request for attorneys' fees pursuant to a contractual clause is considered a substantive issue; and an order that leaves a substantive fees issue pending cannot be 'final.'" *Id.* at 1355. This rule applies to *all* contractual fee awards, even those that might be deemed collateral under the decisions of the First, Third, Fourth, and Eighth Circuits. *Adeduntan* v. *Hospital Authority of Clarke County*, 249 F. App'x 151 (11th Cir. 2007) (per curiam), for example, involved a contractual "prevailing party" provision, see *id.* at 153, yet the Eleventh Circuit concluded that the district court's decision on the merits was not final because the amount of fees had not been determined, *id.* at 152-155. Cf. *Gleason*, 243 F.3d at 137-138 (Third Circuit decision finding an award under a contract's "prevailing party" provision collateral).

In *Adeduntan*, the Eleventh Circuit said that it was "sympathetic" to the argument that its longstanding rule had been "undermined" by the "sweeping language" in *Budinich*, including this Court's adoption of a "bright-line rule," but felt

bound by its prior decision in *MedPartners*, which postdated *Budinich*. 249 F. App'x at 154 (quoting *Budinich*, 486 U.S. at 202). "For better or for worse," the Eleventh Circuit said, and "whether wrong or right," *MedPartners* "is binding panel precedent that we must follow," at least until "the Supreme Court[] decides otherwise." *Id.* at 154-155.

This Court should decide otherwise and make clear that *MedPartners* is wrong. For multiple reasons, the Eleventh Circuit's rule is at least as misguided as the First Circuit's.[9]

To begin with, the Eleventh Circuit's rule is inconsistent with *Budinich*. As we have explained, distinguishing between statutory and contractual attorney's fees undermines the need for "consistency and predictability" and the imperative that the time of appealability "above all be clear," and a rule that draws such a distinction is neither "uniform" nor "bright-line." *Budinich*, 486 U.S. at 202. The Eleventh Circuit's rule also cannot account for cases in which fees are sought under *both* a contract *and* a statute.

There is a further respect in which the Eleventh Circuit's rule is at odds with *Budinich*. Like the First Circuit's rule, it rests on a distinction between "merits" and "nonmerits" fees that *Budinich* expressly rejected—with the difference that *all* contractual fees are "merits" fees and all statutory fees (per *Budinich*) are not. See *Adeduntan*, 249 F. App'x at 153 ("the attorney's fees * * * are * * * part of the

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[9] Respondents have never advocated the Eleventh Circuit's rule, see Resp. C.A. Br. 18-25; Resp. C.A. Reply Br. 3-9; Br. in Opp. 25-35, and of course the court below did not adopt it. Nor has any other court.

merits of this case because they were awarded * * * based on a contract").

Finally, while *Budinich* made clear that "conceptual consistency" is not "of importance" in this context, 486 U.S. at 202, the Eleventh Circuit's rule cannot even claim that. On the contrary, the rule is completely arbitrary, because there is no reason to think—and the Eleventh Circuit has provided no evidence—that a particular contractual fee award is any more likely than a statutory fee award to be a "merits" rather than a "nonmerits" award (however that distinction might be drawn).

The Eleventh Circuit's rule is accordingly untenable, as that court itself all but acknowledged in *Adeduntan*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2013