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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The petition demonstrates that the traditional certiorari criteria weigh heavily in favor of a grant: (1) there is a circuit conflict; (2) the decision below is incorrect; (3) the question presented is important; and (4) this case is an ideal vehicle. Respondents offer only halfhearted responses to the third and fourth points. And their principal responses to the first and second points ultimately amount to the same claim: that neither this Court in *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), nor any court of appeals since has held that a "merits"-based fee award—of which the award here is supposedly an example—is collateral. That claim is wrong for many reasons, including this basic one: *Budinich* squarely held that a fee award is collateral *regardless* of whether it goes to the "merits," and courts of appeals have squarely held that a contractual fee award *of the very type here* is collateral. That is reason enough to grant review.

A. There Is A Circuit Conflict

1. As the petition explains (at 11-20), four circuits have held that stand-alone awards of contractual attorney's fees are *always* collateral, one circuit has held that they are *never* collateral, and four circuits have held that they are *sometimes* collateral. Respondents contend that there is no conflict because no circuit applies *Budinich* to fees that are "damages" for "collection" expenses, as opposed to litigation "costs" of the "prevailing party." Opp. 11, 13. The idea of lower-court uniformity, as well as the hair-splitting that underlies it, would be news to the circuits that have expressly acknowledged a conflict, including the First Circuit below.

In its decision, the First Circuit observed that the issue here "has divided our sister circuits"; that "[t]he decisions of the courts of appeals *** are in disarray"; and that, while some circuits have held that "contractual claims for attorneys' fees may fall beyond the *Budinich* line," the Second, Fifth, Seventh, and Ninth Circuits "have held that *Budinich* applies to *all claims for attorneys' fees*." Pet. App. 2a, 6a (emphasis added). Likewise, in the decision that the First Circuit followed, the Fourth Circuit noted that the Fifth and Ninth Circuits "treat contractual awards of attorneys fees as collateral, *without considering whether the contract at issue provided such awards as an element of damages or as costs to the prevailing party*." *Carolina Power & Light Co.* v. *Dynegy Mktg. & Trade*, 415 F.3d 354, 362 (4th Cir. 2005) (emphasis added); see also *id.* at 363-364 (Wilkinson, J., concurring) (Fifth, Seventh, and Ninth Circuits have held that "contractual attorneys' fees provisions are *always* collateral" (emphasis added)).

The Seventh and Ninth Circuits, despite disagreeing with the First and Fourth Circuits on the merits of the question, have also acknowledged the conflict. See *Cont'l Bank, N.A.* v. *Everett*, 964 F.2d 701, 702-703 (7th Cir. 1992); *United States ex rel. Familian Nw., Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952, 955 (9th Cir. 1994); see also *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" (emphasis added)).[1]

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[1] Any suggestion that we have somehow waived the right to assert a conflict, see Opp. 7 & n.4, 10, should be categorically rejected. Only a *claim for relief* can be waived, see *Yee* v.

2. Respondents nevertheless argue that the Second and Seventh Circuits "have yet to consider the type of contract at issue here"—one that, according to respondents, authorizes a claim "on the merits" for "damages" to compensate a party for "collection" expenses. Opp. 11, 20. That is simply untrue. Decisions of both circuits have made clear—in language that is quoted in the petition (at 17-19) but ignored in the brief in opposition—that *Budinich* applies in precisely this situation.

Thus the Second Circuit has rejected "the proposition 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." *O & G Indus., Inc.* v. *Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 168 n.11 (2d Cir. 2008) (emphasis added). That court instead has "heed[ed] the *** admonition in *Budinich*" that no "different treatment" should be accorded to "attorney's fees *deemed part of the merits recovery*." *Ibid.* (internal quotation marks omitted; emphasis added). Citing *Budinich*, the Seventh Circuit has likewise held that "[a]n open issue about legal fees, contractual or otherwise, does not affect our jurisdiction to resolve the appeal" when the contract authorized a party "to recover the attorneys' fees *incurred in the course of collection*." *Cont'l Bank,* 964 F.2d at 702 (emphasis added).

There is accordingly no question that this case would have been decided differently in the Second and Seventh Circuits.

City of Escondido, 503 U.S. 519, 534-535 (1992); and anyway the court below acknowledged the conflict, cf. *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992).

3. As for the Fifth and Ninth Circuits, respondents claim that decisions of those courts actually support *their* position. That would not disprove the existence of a circuit conflict even if it were true, because decisions of the Second and Seventh Circuits support *our* position. And it is not true.

Respondents rely (Opp. 17) on *Deus* v. *Allstate Insurance Co.*, 15 F.3d 506 (5th Cir. 1994), in which a law firm sought to collect fees owed by its client under a retainer agreement. The Fifth Circuit held that *Budinich* did not apply because the claim for damages was "'the only game in town'" and just "happen[ed] to be for fees earned." *Id.* at 521. The rule applied in *Deus* thus was that, "[w]here an attorney *** seeks judgment against his client, it should be considered a claim for substantive relief on the merits, not a collateral issue of attorneys' fees." *Id.* at 521-522. That rule has no applicability to contractual attorney's fees of the kind awarded here.

One case involving such an award is the Fifth Circuit's *First Nationwide Bank* decision discussed in the petition (at 18), which respondents erroneously claim "did not involve" the circumstances present here. Opp. 17-18. In *First Nationwide Bank*, as in this case, the plaintiff "brought [an] action" against the defendants "to recover [a] deficiency and attorneys' fees" under a contract. 902 F.2d at 1198. And the court applied *Budinich*. *Id.* at 1199-1200.

Respondents also rely (Opp. 18-19 & n.6) on *Hacienda La Puente Unified School District* v. *Honig*, 976 F.2d 487 (9th Cir. 1992), and *McSomebodies* v. *Burlingame Elementary School District*, 897 F.2d 974 (9th Cir. 1989). Both cases involved an award of *statutory* fees, and so did not address the question

presented here. We can hardly be faulted, therefore, for "fail[ing] to cite" them. Opp. 19.

Nor is there merit to respondents' assertion that the Ninth Circuit decision we did cite (Pet. 19-20)—*Familian*—would not "control" on the facts of this case. Opp. 19. *Familian* expressly rejected the view advocated by respondents and adopted by the First Circuit—namely, that *Budinich* does not apply when "some of the *** attorney's fees arose prior to the litigation." 21 F.3d at 955.[2]

4. Respondents' fallback argument is that, even if there *were* a circuit conflict, this Court's review would be "premature." Opp. 23. That is so, according to respondents, because the four circuits that have adopted our position (a) might "harmonize any conflict on their own" through en banc review, (b) might "reconsider their positions" in light of 1993 Rules Amendments, or (c) might "eliminate" the conflict by coming out differently in cases with different "equities." Opp. 23-25.

This argument for postponing certiorari is—to put it politely—far-fetched. In fact, respondents' suggestion that a deep and longstanding conflict among nine circuits could be resolved without this

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[2] Respondents also dispute our contention (Pet. 20 n.2) that the Tenth Circuit has not addressed the question presented, citing (Opp. 16-17) *North American Specialty Insurance Co.* v. *Correctional Medical Services, Inc.*, 527 F.3d 1033 (10th Cir. 2008). But *Budinich* did not apply in that case because the attorney's fees there were "the result of a previous independent litigation." *McKissick* v. *Yuen*, 618 F.3d 1177, 1197 (10th Cir. 2010). Even if respondents were correct, that would mean only that the circuit conflict is even broader than the petition indicates.

Court's intervention—because four of those circuits (a) might grant rehearing en banc and overrule their precedents, (b) have not had sufficient opportunity to consider Rules Amendments enacted 20 years ago, or (c) might decide the same issue of statutory interpretation differently based on the "equities" of a case—is so transparently implausible that it is tantamount to a concession that this Court's intervention is needed now.

B. The Decision Below Is Incorrect

1. As the petition explains (at 20-28), the First Circuit's decision is inconsistent with *Budinich* in numerous ways and therefore erroneous. In arguing otherwise, respondents take the position that *Budinich*'s holding depended upon the "characteristics" of the "fees at issue"—namely, that they did not "remedy the injury giving rise to the action" but instead were awarded to the "prevailing party." Opp. 26 (internal quotation marks omitted). Because those characteristics are not present in this case, respondents argue, the claim for fees here is "a claim on the merits" rather than "a collateral claim." Opp. 29.

The plaintiff in *Budinich* made the same argument: that "the general status of attorney's fees for § 1291 purposes"—*i.e.*, their collateral status—"must be altered when," as was assertedly the case there, "they are *** part of the merits judgment" under "the *** law authorizing them." *Budinich*, 486 U.S. at 201. And this Court expressly *rejected* that argument, holding that "consistency and predictability" is more important than whether a particular award is properly characterized as "'merits' or 'nonmerits.'" *Id.* at 202.

Respondents also contend that treating contractual attorney's fees as "collateral" when the claim for fees was "stated in the complaint and sought as damages" would "increase the frequency of piecemeal appeals, thereby frustrating rather than promoting the purposes of § 1291." Opp. 35. *Budinich* rejected that argument 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.*

Respondents are not helped by *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989), which held that a motion for prejudgment interest is a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). See Opp. 29. *Osterneck* distinguished *Budinich* on the ground that, unlike attorney's fees, which "as a general matter" are "not part of the compensation for the plaintiff's injury," prejudgment interest "traditionally has been considered part of the compensation due plaintiff." 489 U.S. at 175. The rules adopted in the 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.

Finally, respondents' repeated insistence (Opp. 11, 13, 18-21, 25) that *Budinich*'s rule is limited to

fees "for the litigation at hand," *Budinich*, 486 U.S. at 201, is curious, inasmuch as the bulk of the fees *here* indisputably were for the litigation at hand. See Pet. 23.

2. Respondents also advance a complicated theory that the First Circuit itself did not adopt. 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). The 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. 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.'" 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. If they are not, 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. Tellingly, respondents did just that, "fil[ing] a motion for attorneys' fees" post-trial. Pet. App. 3a; see Dist. Ct. Dkt. 69. There was thus nothing to prevent the district court from extending the time to appeal *in this very case*.

C. The Question Presented Is Important

As the petition explains (at 25-28), the question presented is a recurring and important one because tens of thousands of contract cases are filed in federal court each year, a substantial proportion of contracts include attorney's fees provisions, and the

finality issue can arise in a variety of procedural settings. Respondents do not dispute any of this. Instead they claim that (1) there is no need for "nationwide uniformity," because "there is no prospect of forum shopping," and (2) if there is a need for uniformity, "this Court should achieve it not in its adjudicative capacity by granting certiorari, but in its rulemaking capacity *** by amending the Federal Rules." Opp. 36. These points would have been equally applicable in *Budinich*, and yet the Court granted certiorari to decide a similar question there. In any event, neither argument provides a basis for denying certiorari here.

As to the first, the main problem is not forum shopping but the lack of certainty within forums. *Budinich* itself makes clear that "what is of importance" is "predictability" in applying Section 1291 and that the time for appeal be "clear." 486 U.S. at 202. In circuits, like the First, in which contractual fee awards may or may not be deemed collateral, it is difficult to know in advance how the circuit's rule will be applied in a particular case—or even what the rule *is*. See Pet. 22-24. It is manifestly incorrect, therefore, that "[o]nce a circuit lays down its rule, litigants within that circuit can predict the finality and appealability of attorney's fee awards." Opp. 35-36.

The Court should also reject respondents' invitation to resolve the conflict through rulemaking. Although it is true that this Court has "recognized *** that the possibility of amending rules may obviate the need for a grant of certiorari," it is also true, as respondents concede, that that recognition arose "in a different context"—that of the Sentencing Guidelines. Opp. 36. In that unique context, there was evidence that "Congress intended [the] Sentencing

Commission to play [the] primary role in resolving conflicts over interpretation of Guidelines." *Buford* v. *United States*, 532 U.S. 59, 66 (2001). With respect to "eliminat[ing] a conflict concerning a statutory provision" like 28 U.S.C. § 1291, in contrast, the task is "[o]rdinarily" and "primarily" this Court's, through the exercise of its "certiorari jurisdiction." *Braxton* v. *United States*, 500 U.S. 344, 347-348 (1991). Certiorari is particularly appropriate in a case, like this, involving the proper interpretation of one of this Court's precedents.

D. This Case Is An Ideal Vehicle

As the petition explains (at 28-30), this case is an especially good vehicle for deciding the question presented because the answer will be outcome-determinative on *all* the issues in respondents' appeal. Respondents do not contend otherwise. Instead they repeat their argument that there is no circuit conflict on whether the type of fee award at issue here is collateral. Opp. 38. We have already explained why that is wrong. Respondents' appeal of the district court's merits decision would have been dismissed as untimely in four other circuits, and this Court should grant certiorari to decide whether the rule applied in those circuits is correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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